Jones, Skelton & Hochuli

Reporter

SPRING 2018 ISSUE

CELEBRATING

35 YEARS

1983-2018

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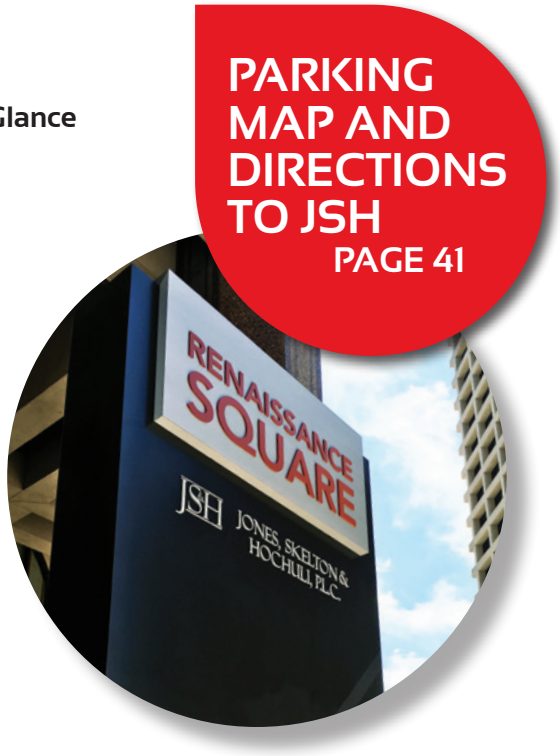

MESSAGE FROM THE EDITOR

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Welcome to the Spring 2018 edition of The JSH Reporter.

As always, we are pleased to share several resources with you, including important case summaries, case law updates, attorney-authored articles, and firm news and events.

Since our last issue of The JSH Reporter in Fall 2017, we announced the launch of our completely redesigned website. We have also welcomed six new attorneys and promoted two associates to partnership. Of the six new attorneys, four are recent law school graduates who worked as law clerks for JSH last summer. You can read more about them on pages 26 and 29.

We are also pleased to announce that 2018 marks the firm's 35th Anniversary. In this issue, we look at the past 35 years. In 1983, our firm had just 12 attorneys, 3 paralegals, 14 secretaries, 1 administrator and 2 office staff. Those were the days when, like others, lawyers practiced without modern technology, such as computers, the Internet and cell phones. Secretaries used message pads instead of emails, lawyers used books for research instead of online research tools like Westlaw, and typewriters rather than PCs were the norm. In this issue celebrating JSH's past, we reflect on the beginning of our firm and recognize the many exceptional lawyers and employees who have dedicated their careers to JSH. That dedication helped lay the foundation for the successful law firm JSH has become. Read more about our firm's history and some of its outstanding founding attorneys on pages 20 through 25.

In our next issue, we will advance to the present and focus on all of the growth JSH has experienced over the years, which has brought our firm to where it is today. Although we continue to celebrate our past 35 years, we continuously look to the future and reimagine new ways of providing the most exceptional legal services we can to our clients, who we look forward to serving for another 35 years. In our next issue, we will also highlight our talented group of Women Lawyers, our philanthropic efforts in the community, and our growing practice areas such as Intellectual Property, Tribal Law and Environmental Law.
We hope you enjoy this issue of The JSH Reporter. We publish the Reporter as an educational and informational resource, and we want to hear from you! Share your thoughts and ideas at lvoepel@jshfirm.com or marketing@jshfirm.com.

Lori Voepel
Partner and *JSH Reporter* Editor

During Lori's 25 years of practice, she has handled approximately 300 state and federal appeals in virtually every area of law. She also provides appellate guidance to trial attorneys in all stages of litigation, from the pleading through post-trial stages. Contact Lori at 602.263.7312 or lvoepel@jshfirm.com.

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APPELLATE HIGHLIGHTS

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We hope you find the following appellate case highlights valuable. For additional information on the cases summarized below, please visit the publications section on our website at jshfirm.com/news/law-alerts/ or contact one of the lawyers in our Appellate Department.

July 11, 2017

Yahweh v. City of Phoenix

(Arizona Court of Appeals, Division One)

Affirming dismissal of claims against the City because Yahweh's notice of claim did not include a sum-certain settlement offer as required by A.R.S. § 12-821.01.

August 22, 2017

Swenson v. County of Pinal

(Arizona Court of Appeals, Division Two)

Affirming dismissal because County did not waive the notice-of-claim requirement and statute of limitations by obtaining liability insurance and contractual indemnification.

August 29, 2017

Sign Here Petitions, LLC v. Chavez

(Arizona Court of Appeals, Division One)

In a defamation case, the court must act as gatekeeper in protecting free speech, determine whether a statement is capable of a defamatory meaning, and evaluate the surrounding circumstances from a reasonable person's point of view.

August 31, 2017

Twin City Fire Insurance Co. v. Leija

(Arizona Court of Appeals, Division One, review granted)

When a worker settles a claim against a third party for less than the limits of the third party's insurance, the worker may obtain a subsequent judicial determination of whether the carrier's lien should be reduced to account for the employer's alleged comparative fault.

September 19, 2017

Sharp v. Orange County

(Ninth Circuit Court of Appeals)

Upholding qualified immunity in a case involving execution of an arrest warrant and mistaken identity where there was no clearly established federal law setting a precedent that the particular conduct is unconstitutional.

September 22, 2017

Flynn v. Campbell

(Arizona Supreme Court)

An amended complaint naming a new defendant relates back to the original complaint under Rule 15(c) if the newly added defendant knew or should have known the plaintiff mistakenly failed to name him or her as a party in the original complaint.

October 16, 2017

Morales v. Sonya Fry

(Ninth Circuit Court of Appeals)

Holding that the second prong of a qualified immunity determination, i.e., whether a constitutional right is clearly established, is a question of law that only a judge can decide.

October 18, 2017

Rasor v. Northwest Hospital

(Arizona Supreme Court)

In medical malpractice cases: (1) defendants may move for summary judgment based on a proposed expert's lack of qualifications without first challenging the sufficiency of the expert affidavit; and (2) an expert is unqualified to testify on standard of care if she did not engage in active clinical practice or teaching during the year immediately preceding the injury.

November 16, 2017

Fappani v. Bratton

(Arizona Court of Appeals, Division One)

Affirming dismissal of abuse-of-process claim arising out of Bratton's excessive-noise complaints about Fappani's property, because Fappani failed to allege facts showing that Bratton used or misused a judicial process for an improper purpose.

December 14, 2017

Richardson v. All Services Unlimited, Inc.

(Arizona Court of Appeals, Division One)

Reversing summary judgment based on statute of limitations because a plaintiff's unawareness that a party may have been responsible for the plaintiff's injury is a Rule 15(c) mistake for purposes of "relation back."

December 26, 2017

Muscat v. Creative Innervisions LLC

(Arizona Court of Appeals, Division One)

Affirming dismissal of negligence claim because Muscat's alleged harms arose solely from the consequences of his own criminal conduct and thus do not constitute legally cognizable injuries.

January 3, 2018

State of Arizona v. Jean

(Arizona Supreme Court)

Warrantless GPS tracking violated Jean's Fourth Amendment rights, but the evidence obtained need not be suppressed because the good-faith exception to the exclusionary rule applies.

January 22, 2018

District of Columbia v. Wesby

(United States Supreme Court)

Officers had probable cause to arrest 21 partygoers for unlawful entry, where owner of the house (who was not present) confirmed that he had not given anyone permission to be there.

January 25, 2018

Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.

(Arizona Court of Appeals, Division One)

Affirming dismissal of quantum meruit claim because an attorney may not recover the quantum meruit value of his services under an unwritten contingent fee agreement, which is void as against public policy.

February 8, 2018

KnightBrook Insurance Co. v. Payless Car Rental System Inc.

(Arizona Supreme Court)

Arizona's equitable indemnity law does not incorporate the Restatement (First) of Restitution § 78, which requires a lower "justifiable belief" indemnification standard.

ABOUT THE AUTHOR **JONATHAN BARNES**

Jon Barnes concentrates his practice on federal and state appeals in all types of civil litigation, including medical malpractice, governmental liability, employment, family law and torts. He also assists trial counsel in preserving the record for appeal, preparing dispositive and post-trial motions, and crafting proposed final judgments.

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CASES OF NOTE: TRIAL COURT DECISIONS

Cristy Chait and Cory Tyszka Obtain Defense Verdict in *Kazzazi v. Das*

October 4, 2017
Maricopa County Superior Court


Partner Cristy Chait and Associate Cory Tyszka obtained a defense verdict in a medical malpractice case. This case involved allegations of medical malpractice arising from an endoscopic procedure. Plaintiffs alleged the procedure was not indicated and Defendant was negligent in performing it while Plaintiff remained on Plavix, causing Plaintiff to suffer internal hemorrhaging and complications. Defendant maintained he met the standard of care in ordering the procedure and continuing Plaintiff's Plavix. Defendant further claimed that Plaintiff's alleged ongoing damages were caused by preexisting conditions. Plaintiff claimed approximately $1,000,000 in damages due to pain and suffering, loss of consortium, loss of enjoyment, medical care, and expenses. The case was tried in Maricopa County Superior Court before the Honorable David Talamante. Following a seven-day trial, the jury returned a defense verdict.

John Masterson and Jeremy Johnson Obtain Defense Verdict in Wrongful Death Case in *Gomez v. JRB Attachments, et al.*

October 23, 2017
Maricopa County Superior Court


Partners John Masterson and Jeremy Johnson obtained a defense verdict after a 15-day wrongful death trial based on an alleged product defect. The case stemmed from a fatal accident at a construction site in which Mr. Gomez was killed when a 1,500-pound digger bucket fell from a large excavator operated by his co-worker. Defendant JRB designed, manufactured, and sold the coupler that connected the bucket to the excavator. The JRB coupler was powered by the excavator's hydraulic system, which allowed it to be controlled by an operator from the cab of the excavator. Plaintiffs (the decedent's wife and children) alleged that the JRB coupler was defective in its design and operating instructions. Defendant JRB maintained that its coupler was not defective and was instead misused by the excavator operator. Plaintiffs also sued the general contractor and the sellers of the excavator and coupler. Plaintiffs settled with the general contractor during the first week of trial and dismissed seller defendants at the close of their case-in-chief. The jury was out for approximately four hours before returning a defense verdict.

Sandy Gerber and Josh Snell Obtain Unanimous Defense Verdict in *Newton v. GEICO*

January 17, 2018
Maricopa County Superior Court


Plaintiffs Tyler Newton and Kalynn Palimsano insured their 2007 Chrysler Pacifica with an auto insurance policy issued by our client, GEICO Automobile Insurance. On January 6, 2014, Plaintiff Kalynn Palmisano was driving the Pacifica when the engine seized. The Pacifica was found to contain only one quart of oil, which meant around 4 and ½ quarts of oil were gone.

Plaintiff Tyler Newton alleged that he and his son had checked the oil level a few days earlier, and found the level full and the color of oil good. Plaintiffs suspected that the oil had been drained out of the Pacifica by Kalynn Palmisano's ex-husband, an allegedly vengeful auto mechanic. Plaintiffs' claims were based on their own prior accusations involving the ex-husband for vandalizing their vehicles, and his threats to vandalize their Pacifica. The Pacifica showed no signs of leaking or burning oil, and Plaintiffs allegedly discovered an oil stain on their driveway. As a result, Plaintiffs filed a vandalism claim with GEICO.

On behalf of GEICO, Partners Sandy Gerber and Josh Snell investigated the claim and discovered that the Pacifica had been driven 8,582 miles since its last oil change. They ultimately determined that there was no coverage due to a failure by Plaintiffs to properly maintain the vehicle. After a six-day trial, the jury was out less than 30 minutes before returning a unanimous defense verdict.

Michele Molinario and Justin Ackerman Obtain Summary Judgment on Roadway Design Case in *Tourtillot v. City of Yuma*

November 9, 2017
Maricopa County Superior Court


On April 22, 2013, a traffic accident occurred at a rural intersection in Yuma County, Arizona. The intersection was equipped with STOP signs and flashing warning signs that controlled eastbound and westbound traffic along the intersection. On the day of the accident, Decedent was driving eastbound with two other passengers. Decedent allegedly stopped at the STOP sign at the intersection and then proceeded forward. As she entered the intersection, Decedent's vehicle was struck by a truck. Decedent and her two other passengers subsequently died from injuries sustained as a result of the accident.

Prior to the accident, the County had conducted a routine review of the intersection, which included traffic studies and accident report reviews. In 2002, the County decided to implement flashing beacons with oversized stop signs on the east and westbound approaches instead of installing a four-way stop.

Following the accident, the successors of Decedent and her passengers sued Yuma County, alleging it negligently maintained the intersection by failing to install a four-way stop. Yuma County moved for summary judgment on Plaintiffs' claims, arguing it was statutorily immune pursuant to A.R.S. § 12-820.01 and entitled to the affirmative defense contained in A.R.S. § 12-820.03.

Specifically, the County argued that because it made an affirmative decision in 2002 to select, fund and install one form of traffic countermeasure over others at the intersection, the County has immunity for this decision under § 12-820.01. In addition, the County's decision not to install additional traffic countermeasures after its 2002 decision to implement flashing STOP signs, amounts to a determination of fundamental governmental policy that is also entitled to immunity under § 12-820.01(B). Thus, the County argued it was entitled to absolute immunity against Plaintiffs' claims under both provisions of § 12-820.01.

Following oral argument by attorneys Michele Molinario and Justin Ackerman, the trial court agreed with the County and granted summary judgment in its favor, dismissing the case in its entirety.

Donn Alexander and Cory Tyszka Obtain Unanimous Defense Verdict in Home Heathcare Case

January 30, 2018
Maricopa County Superior Court


Partner Donn Alexander and Associate Cory Tyszka obtained a unanimous defense verdict in a home healthcare matter. This case involved allegations of abuse, neglect, and negligence relating to the care of an elderly woman with dementia. Plaintiff alleged that Defendants' caregiver employee was negligent in failing to respond to the elderly woman's calls for help, causing the woman to fall and break her hip after she got up from her bed without assistance. Plaintiff further alleged that Defendants were negligent in failing to properly train and supervise the caregiver. Plaintiff sought compensatory and punitive damages. The Defense maintained that the caregiver's actions were reasonable, that Defendants exceeded the standard of care in training and supervising the caregiver, and that the woman's fall was not caused by Defendants' or the caregiver's conduct. Plaintiffs claimed $877,874.64 in damages due to pain and suffering, medical bills and expenses, and loss of enjoyment of life. The case was tried in Maricopa County Superior Court before the Honorable Rosa Mroz. After a six-day trial, the jury returned a unanimous defense verdict on January 30, 2018.

Jay Rosenthal and John Lierman Conquer Four-Day Jury Trial in *Sulkowski v. Skanon Investments, Inc.*

February 8, 2018
Maricopa County Superior Court

Partner Jay Rosenthal and Associate John Lierman recently obtained a favorable verdict after a four-day jury trial in Maricopa County Superior Court. The client, a supplier of concrete and construction materials, had been sued after a hydraulic hose on one of its cement mixer trucks failed, spraying the plaintiff's BMW convertible with hydraulic fluid. At the time, the top of the convertible was down and it was alleged that fluid landed on the plaintiff and injured his eyes, resulting in dry-eye syndrome. The plaintiff had about $3,600 in proven medical expenses for the initial injury to his eyes, and claimed about $129,000 in anticipated care for the rest of his life, plus pain and suffering. The defendant concrete company admitted fault for the accident and liability for cleaning the defendant's car, as well as treatment expenses for the initial personal injury, but challenged whether it violated any trucking regulations and disputed the severity and permanency of the claimed injuries.

The defense was based on the general rule that damages are limited to those proximately caused by the Defendant's negligence. The defense argued that the plaintiff had pre-existing and unrelated eye problems, and failed to act reasonably after the incident to mitigate his damages. Evidence showed that after the accident, the plaintiff rushed his vehicle to the BMW dealership to have it cleaned, but did not wash himself off until several hours later. He consulted an optometrist later that day, but after the initial injury healed, the plaintiff refused standard treatments for dry-eye syndrome—including tear duct plugs routinely used in such cases—and failed to follow doctor recommendations for using eye drops. Expert testimony on dry-eye syndrome related it to various factors, including age and climate, and cast doubt on any link to the accident.

After the parties presented their cases, the plaintiff asked for an award of $684,000; the defense recommended the jury award the plaintiff $35,000 to $40,000. After deliberating for two hours, the jury awarded the plaintiff $35,000.

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CONGRATULATIONS TO **OUR NEW PARTNERS**

CHRIS PIERCE & ERIK STONE

R. Christopher Pierce focuses his practice in the areas of construction defect litigation and general civil liability defense including products liability, premises liability and personal injury litigation. He is committed to providing clients with prompt and thorough case evaluations, delivering effective litigation defense strategies, and posturing cases for early resolution opportunities. Chris is past president of the Young Lawyers Division of the Arizona Association of Defense Counsel and past board member of the Young Lawyers Division of the Arizona State Bar Association.

Chris joined JSH after earning his J.D. from University of Arizona, James E. Rogers College of Law. He received his B.S. in aerospace engineering from University of Arizona. Chris decided to move from engineering to law school in part because of the challenge. "It seemed like an interesting way to apply critical analysis and problem solving to another discipline," said Chris.

During Chris' free time, he travels and engages with the outdoors. Traveling to new distant places and becoming immersed in unique cultures is a rewarding experience for Chris.

"Even though JSH is a large firm it feels small and collegial. As associates, I think we are surrounded by success and encouraged to achieve our own success; joining the partnership in such an environment is very meaningful," said Chris.

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Erik Stone is experienced in handling a variety of general civil litigation matters, including commercial litigation, intellectual property, professional liability, wrongful death and personal injury claims, employment and discrimination, and construction defect.

Erik is a member of the Arizona Association of Defense Counsel, Young Lawyers Division, where he serves on the Softball Committee. He is a past member of the State Bar of Arizona, Young Lawyers Division, where he served as president in 2014 - 2015. Since 2014, Erik has been recognized by Southwest Super Lawyers as a Rising Star. As a four-year associate, Erik was acknowledged in the October 2014 Issue of Arizona Attorney Magazine for obtaining one of the top ten defense verdicts in Arizona.

Erik joined JSH after earning his J.D. from Boston University School of Law. He earned his B.A. from Arizona State University graduating cum laude.

Outside the firm, Erik enjoys spending time with family and friends, playing recreational sports, and taking weekend trips to Canyon Lake with his dog, Max.

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2018 CHANGES IN THE CIVIL PROCEDURE RULES: PRACTICAL EFFECTS OF THE CHANGES

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The Arizona Supreme Court adopted revisions to the Arizona Rules of Civil Procedure, effective July 1, 2018, to streamline the judicial process and hopefully provide better access to justice. The touchstone of the new rules is the "proportionality" standard, which limits the discovery parties can undertake to that which is proportional to the size and value of the case. Here is a summary of some of the more dramatic changes, and how they might affect the way litigation is conducted, the costs of litigation, and the ability to settle cases.

The Tier System

One of the biggest changes is that from the beginning of the lawsuit, cases will be grouped into "Tiers" based on the size of the case/value of the damages at issue. The Tier level dictates the amount of discovery the parties are permitted to conduct: the higher the Tier, the more discovery allowed.

Tier 1 is for simple cases that can be tried in 1 to 2 days, such as "auto tort, intentional tort, premises liability, and insurance coverage claims." This Tier includes cases that require minimal documentary evidence and few witnesses, and claim up to $50,000 in damages. A Tier 1 case gets five total hours of fact witness depositions; five interrogatories, five requests to produce, ten requests for admissions, and 120 days within which to complete discovery.

Tier 2 cases are those of intermediate complexity that have more than minimal documentary evidence, more than a few witnesses, and might include expert witnesses. These cases will likely involve multiple theories of liability, counterclaims, or cross claims, and will involve claimed damages from $50,001 to $300,000. Most cases will fall into this category. A Tier 2 case gets 15 total hours of fact witness depositions; ten interrogatories, ten requests to produce, ten requests for admissions, and 180 days within which to complete discovery. The limit in the time allowed to prosecute these cases will require both parties to act more quickly to get the case litigated, and might result in the parties entering into more stipulations.

Tier 3 is for logistically or legally complex cases, class actions, antitrust, multi-party commercial or construction cases, securities, environmental torts, construction defect, medical malpractice, product liability, and mass torts. Commercial court cases and medical malpractice cases will be automatically assigned to Tier 3, unless the court decides otherwise after a scheduling conference. Tier 3 cases will likely require voluminous documentary evidence, numerous pretrial motions raising difficult or novel legal issues, or a large number of witnesses, and will involve claimed damages exceeding $300,000. A Tier 3 case gets 30 total hours of fact witness depositions, 20 interrogatories, ten requests to produce, 20 requests for admission, and 240 days within which to complete discovery.

There is a process by which parties can ask for more discovery than their Tier allows, including by stipulation or motion. New Rule 26(f) prohibits any party from seeking discovery from anyone – even non-parties – before that party has served its initial disclosure statement.

Question: How can one determine the amount of damages at issue when the rules prohibit a plaintiff from specifying a dollar amount in the complaint (if he or she is not seeking a sum certain)? **Answer**: The plaintiff must plead that his or her damages "are such as to qualify for" one of the three Tiers. Additionally, the parties must meet and confer at the earliest practical time about the anticipated course of the case, including the Tier to which the case should belong, whether they can streamline and limit claims/defenses, the discovery to be taken and the motions to be filed. These requirements apply to all civil actions, except the most minor cases, which are outlined in Rule 16(C)(8)(b). Even parties to a compulsory arbitration case must meet and confer.

Practical Effects of the Tier System & Key Takeaways

The Tier system will impact parties on both sides of the table. For the defense, the Tier system significantly reduces the amount of time attorneys will have to prepare the case, in many cases by half. On the other hand, Plaintiffs' attorneys who file many cases per month, will have the added pressure to meet and confer with all defense counsel on their matters to agree on a Tier.

However, the net effect of this Tier system probably benefits plaintiffs more than the defense. The time limits will not affect plaintiffs as much because they are able to accomplish much of what they need to do pre-suit. The defense will be behind a good plaintiff's lawyer from the outset. And while this is true now, the added time limitations of the new rules will exacerbate things for the defense. Shorter discovery schedules will also require the defense to front-load costs associated with disclosures and the retention of experts. In addition, by agreeing on a Tier, both parties are essentially agreeing to a settlement range. This, combined with time limits on discovery and other evidence-gathering actions, lends a distinct advantage to the plaintiff. Before agreeing to the designation of Tier 1 or 2 in particular, clients/carriers will need to be informed of and accept the limits within which the defense will need to work with respect to expert witnesses and discovery.

On a positive note, one of the most important changes in the rules is that pre-litigation discussions are encouraged and, in some instances required, promoting greater communication and, perhaps, opportunities to resolve claims earlier in the process.

Expedited Procedure for Resolving Discovery & Disclosure Disputes

Another welcome change in the rules is the new expedited procedure for resolving discovery and disclosure disputes, instead of the usual motion to compel or motion for protective order. The parties must file a joint motion, no longer than 3 pages, outlining the dispute, and attach a good faith consultation certificate. There is no briefing unless the court orders so. The parties jointly contact the court by phone to request a hearing. And the court resolves the dispute by minute entry.

Electronically Stored Information – ESI

New Rule 26.1 addresses ESI, how and when it is preserved, requested, and discovered. When the existence of ESI is discovered or disclosed, the parties must confer and attempt to agree on its disclosure and production. At their conference, each party must have a representative familiar with the systems containing ESI, and any disputes must be resolved through the expedited procedure. Rule 26(b)(2) states that a party is not entitled to obtain ESI for purposes unrelated to the case; to inspect an opponent's data sources or storage devices; or to discover ESI that would require restoration of data through forensic means unless the information is (a) relevant to a claim of fraud or intentional misconduct; or (b) restoration is reasonably required to address prejudice from spoliation or the opponent's failure to preserve evidence; or (c) other good cause. Rule 37(g) will require a party to take steps to prevent the application of a document retention policy from destroying ESI.

Rule 45, which addresses subpoenas, has also been changed in an attempt to lessen the burden and expense associated with ESI discovery. Section (c)(2)(D) allows a party to not provide ESI if doing so would be unduly burdensome or expensive. In a similar vein, Section (c)(6)(C) now requires parties to confer with each other before bringing any motion to compel, to quash, or for a protective order regarding compliance with a subpoena. A good faith consultation certificate must accompany any of these motions. These changes, which affect all three Tiers, reinforce

> "CLIENTS SHOULD CONSIDER RETAINING COUNSEL **BEFORE** A COMPLAINT IS FILED TO ENSURE COMPLIANCE WITH THESE NEW RULES, REGARDLESS OF THE TIER TO WHICH THEIR MATTER MAY BE ASSIGNED."

the court's expectation that parties will try to resolve any subpoena or production issues before involving the court.

Rule 45.2 outlines the procedures for resolving disputes over preservation requests. A party or non-party receiving a preservation request may object on two bases: (1) no duty to preserve ESI; or (2) preservation would impose an undue burden or expense. Although a failure to object in writing does not waive the objection, the dispute resolution procedures in this rule only apply if a written objection is served on the requestor. A positive change for the defense is that Rule 45.2 and the Tiered system significantly limit the amount of preservation required, which historically was over broad and unduly burdensome to the defendant. ESI rules also prevent forensic examination of computer systems, absent extreme situations – such as where the claim directly involves the company's systems. The plaintiff bears the burden to show that information was destroyed, thereby disallowing any fishing expeditions by the plaintiff.

The rule contains two separate procedures for resolving disputes involving ESI preservation requests. The first pertains to preservation requests in a pending action. In such cases, parties can seek a resolution from the court and must follow the procedures outlined in Rule 26(d). A non-party may seek a protective order under Rule 26(c) with an accompanying good faith consultation certificate. The second procedure applies when there is no pending action. A person receiving a preservation request may petition the court to determine whether the non-party has a duty to preserve ESI. The petition must be served on the requestor as a summons and pleading would be served. The requesting party may file a response to the petitioner; the petitioner may then file a reply.

Rule 45 also limits a defendant from independently acquiring medical records produced by plaintiff, which opens up the possibility that the plaintiff could omit anything related to pre-existing conditions. In practice, an explicit demand for medical records would need to be included in the subpoena.

This rule also states that any party or non-party who complies with a court's preservation order is considered to have taken reasonable steps to preserve within the meaning of Rule 37. However, a party who does not use the dispute resolution procedures in Rule 45.2 will be deemed to have failed to take reasonable steps within the meaning of Rule 37.

Rule 37(g) defines the duty to preserve and codifies existing law, placing on litigating parties the duty to preserve sooner rather than later. This provides a new mechanism for discussion with the plaintiff's attorney.

Disclosure of Expert Testimony

Beginning July 1, 2018, in Tier 3 cases, each party must provide an expert report for any expert witness. The court also may order a party to provide an expert report in other cases to help it determine if the expert's testimony meets the requirements for admissibility. If a report is required, Rule 26.1(d)(4) sets forth the required contents of such report. If no report is required, a party must disclose the expert's information, qualifications, substance of his or her testimony, the grounds for each opinion, the amount the expert is to be paid, and all other cases in which the witness testified in the last four years.

The report requirement for Tier 3 cases is similar to the federal rules regarding expert reports. The benefit of this rule is that expert reports confine an expert to his or her report and written opinions. The expert's reports often eliminate the need to depose an expert and, thus, avoid providing the expert an opportunity to remedy deficiencies in the report and his or her opinions.

Medical Malpractice Cases

The new rules require a medical malpractice plaintiff, within 5 days of the service of an answer, to serve on the answering defendant a medical records authorization and copies of all his or her medical records relevant to the condition described in the complaint. After that, defendant has 10 days to serve copies of the plaintiff's available medical records on all other parties. If a defendant obtains records from a medical records authorization, it must serve copies of non-duplicative records on all other parties at its sole expense. The parties may agree to limit the records produced. Though the parties might dispute which records are relevant to the condition described in the complaint, the requirement that plaintiff must provide a medical record authorization at the outset will hopefully expedite the process of obtaining medical records.

Under the new rules, medical malpractice parties also must simultaneously disclose the identities and opinions of their standard of care and causation experts, unless the parties agree or the court orders otherwise for good cause. Simultaneous disclosures will make it more difficult to fully rebut the opinions contained in the report of the plaintiff's expert. But plaintiffs must still comply with A.R.S. §12-2603, which requires a plaintiff to provide a preliminary expert opinion affidavit with the initial disclosure statement.

Discovery Sanctions

Currently, Rule 37(c) provides that if a party fails to timely disclose information, the party cannot use that information at trial, unless such failure is harmless. The new rule substitutes the words "unless the court specifically finds that such failure caused no prejudice" instead of the word "harmless." The difference in language is supposed to prevent the courts from letting discovery slackers get away with violations by prohibiting the information's use at trial unless there is a specific finding of no prejudice. Whether the new language works this way or not is yet to be seen. But the new rule does authorize sanctions previously reserved for failures to preserve ESI. These sanctions include: presuming the information was unfavorable to the party, instructing the jury it must or may presume the information was unfavorable to the party, or dismissing the action or entering a default upon finding prejudice to the other party. Again, the inclusion of more sanction options is intended to encourage the courts to actually impose sanctions when parties violate the disclosure rules. Indeed, the comment to new Rule 26.2 states that the new rules are designed to keep discovery proportional on the understanding that "proportional discovery follows up on robust initial disclosure. "The 2018 amendments seek to make initial disclosure robust through a clearer mandate to impose sanctions under Rule 37 for failures to disclose relevant material and for abuses of discovery." In other words, the Supreme Court wants the trial judges to actually impose sanctions so parties will more willingly disclose at the outset, which will hopefully make the new Tiered discovery limits work. The comment to new Rule 37 is in accord. It says these rules "increase the power of the court to promote full compliance with discovery and disclosure rules, and thus to help the parties and the court fulfill the important goals in Rule 1." The comment concludes that the new rules "work together to strengthen mandatory initial disclosure of relevant material as the bedrock of Arizona civil litigation."

The overall result of the Tiered system is to demand robust disclosure at the onset, front-load expenses, and require full and complete initial disclosure and early evaluation. Judges will likely become more interactive, allowing the defense an opportunity to discuss expanding discovery limitations. If judges strictly enforce the limitations of the Tiered system, extensions will be far more limited.

Making Litigation More Efficient

The new rules are designed to make litigating more efficient and less costly. For example, for cases filed on or after July 1, 2018, Rule 38.1 reduces the number of days between the filing of the complaint and placement of the case on the dismissal calendar from 270 to 210. The amendment omits the previous medical malpractice provisions, so the 210-day rule will apply to medical malpractice cases as well.

Rule 45 prohibits a party from subpoenaing materials that have already been produced or that are already available to the parties, unless there is good cause. A party who issues a subpoena seeking documents, ESI, tangible items, or an inspection of premises must pay the reasonable expenses that the subpoenaed person incurs. If a party, attorney, or person violates these rules, the court must impose an appropriate sanction, which can include lost earnings and reasonable attorney's fees.

Final Thoughts

Hopefully the new rules will cause parties to be more forthcoming with their disclosure material, and superior court judges to start imposing appropriate sanctions for discovery abuses, all of which will reduce the cost of litigation. Clients should consider retaining counsel before a complaint is filed to ensure compliance with these new rules, regardless of the Tier to which their matter may be assigned.

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KEEP IT SIMPLE STUPID: REMEMBERING THE BASICS IN A CONSTRUCTION DEFECT INDEMNITY CASE TO MINIMIZE SURPRISES DOWN THE ROAD

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There is an old saying: familiarity breeds contempt. Admittedly, residential construction defect cases can be repetitive. They usually involve the same Plaintiffs' attorneys, the same alleged defects, and resolve in the same fashion for the same per-home amount. As a result, there is a dangerous tendency to view new construction defect ("CD") lawsuits as homogenous. So what happens when the courts in which we practice throw us a curveball? It turns out, as illustrated by recent developments in the authors' home jurisdiction of Arizona, a curveball can be a blessing in disguise by providing defense counsel a chance to get back to basics.

The *Amberwood* Case

Arizona CD law was thrown for a loop recently when the Arizona Court of Appeals — the state intermediate appellate court — decided a case interpreting an indemnity provision in a construction contract between a builder and a subcontractor. In an unpublished opinion, the court decided that a subcontractor can be forced to indemnify a contractor for mere defect allegations, even those alleged defects which are neither attributable to any subpar workmanship on the part of the subcontractor nor otherwise actually caused by the subcontractor, unless the contract specifically required a finding of fault by the subcontractor. *Amberwood Dev., Inc. v. Swann's Grading, Inc.*, 2017 Ariz.App. LEXIS 207, 2017WL 712269 (Ariz. App. 2017)(unpublished opinion), *review denied* 2017 Ariz. LEXIS 242 (2017). While this may not be a major development in several states, it was the first time that an Arizona court addressed the issue. And defense counsel should consider whether such a development has arisen or may arise in your jurisdiction(s).

Amberwood Development, a general contractor, arbitrated a construction defect complaint brought by numerous homeowners that alleged, among other things, defects attributable to soils movement. The rough and finish grader, Swann's Grading, provided a defense in the arbitration, but did not otherwise participate in the arbitration. Ultimately, Swann's Grading did not agree to indemnify Amberwood for any part of the $1.75 million award to the plaintiff homeowners or the additional $723,000 paid in settlement to another group of homeowners. *Id*. Amberwood, therefore, brought an action for indemnity against Swann's Grading, relying on the parties' subcontract. The indemnity provisions of this contract required Swann's Grading to defend and indemnify Amberwood "from claims, demands, costs, or attorney fees, causes of action and liabilities of every kind whatsoever arising out of or in connection with Subcontractor's work performed for Contractor...." Id. At *2.

At a bench trial, Amberwood presented expert testimony establishing that 70.6% of the litigation settlement and 72.7% of the arbitration award were attributable, at least in part, to issues that "arose out of" Swann's Grading's work. Swann's Grading's expert denied causation for the alleged defects, but apparently did not rebut the arguments that the alleged defects themselves arose out of Swann's Grading's work. Id. This makes a measure of sense analytically: How can a defective condition arise from or relate to a subcontractor's work if the defective condition was not caused by a defect in the subcontractor's work? This has been the common position of subcontractors in litigation for years, and most contractors would likely tell you that they never thought they would have to pay for defect claims unless it was proven that their work was bad. Worse still, defense counsel for Swann's Grading was not provided the expert's report and allocation until the day of oral argument, was not granted a stay to analyze or respond to the newly disclosed report, and the report was admitted into evidence over defense counsel's objection. The trial court ultimately rejected the subcontractor's position, and the Court of Appeals affirmed the lower court's decision finding Swann's Grading responsible for $1.3 million (which included the allotted portion of arbitration award and settlement costs, plus a portion of Amberwood's attorney's fees and costs). *Id*.

The Court of Appeals' decision in *Amberwood* is something of a departure from the approach undertaken by the CD defense community. The last Arizona case that had addressed the issue directly provided implicit support for Swann's Grading's position. In *MT Builders, LLC v. Fisher Roofing, Inc.*, 219 Ariz. 297, 197 P.3d 758 (App. 2008), the same Court that decided *Amberwood* was faced with a similar argument: a builder who argued that fault was not a necessary prerequisite to recover indemnity from a subcontractor. The *MT Builders* case, however, involved a contract that limited the subcontractor's indemnity to the contractor for claims "arising out of or resulting from the performance or non-performance [sic] of the Subcontractor's Work under this Subcontract **... to the extent caused in whole or in part by any negligent act or omission of the Subcontractor...**." *MT Builders*, 219 Ariz. at 303, 197 P.3d at 764 (emphasis added). Under the plain language of the contract, the Court decided that a finding of fault was required for the general contractor to receive indemnity. In addition to citing to outside authority (a treatise and cases from nine other jurisdictions across the country), the *MT Builders* Court made reference to the well-settled rule of contract construction that an ambiguous provision be construed against the drafter. *Id*. The overall tone of the *MT Builders* opinion and ultimate result left the "subcontractor bar" feeling emboldened, believing that the same line of argument and reasoning would be applied to other subcontracts as well.

While there is ample room for disagreement with and criticism of the *Amberwood* Court's decision, its immediate impact was drastic. The arbitration decision, though only a memorandum, was the first case to address this broader indemnity provision. Its persuasive value was likely high at the outset, and it has now been upheld by a respected trial court judge. A subcontractor's potential exposure in a CD case has dramatically increased. The pendulum swung drastically in the developers' direction, and developers immediately took advantage of the shift by taking aggressive positions in settlement negotiations and litigation.

Faced with this drastic swing, the Arizona CD defense bar was forced to re-evaluate its usual strategy for litigating a CD case. But, upon further review, it appears not much has really changed in terms of how CD cases involving indemnification issues should be handled, as long as practitioners remember to stick to the "basics." So it is helpful to look back at some of the "basic" concepts that are far too often ignored, even by very good CD attorneys.

Ascertain Whether An Indemnity Provision Falls Into A Legal Gap

The *Amberwood* case surprised Arizona CD counsel because, before *Amberwood*, there had not been any case that defined the breadth of the type of indemnity provision in question. Absent case law directly on point, defense counsel chose to take for granted that the inevitable interpretation of a broader indemnity provision would be favorable to their clients. That was a mistake.

Most indemnity provisions have been sharpened over time to require little or no showing of fault on the part of the indemnitor to allow recovery. As the *Amberwood* case illustrated, broad indemnification provisions can be used to recover virtually all of the fees and costs incurred by a general contractor or indemnitee in defending claims made by a third party. *See also Continental Heller Corp. v. Amtech Mechanical Services, Inc.*, 61 Cal.Rptr.2d 668 (Cal.Ct.App. 1997). Express indemnity is the strongest cause of action in almost every case between a general contractor and subcontractor, and therefore, this should be the very first thing counsel analyzes.

Most states we surveyed take a hands-off view of contract interpretation. Thus, where the contract terms are clear and unambiguous, the express terms of the contract will govern the extent of the indemnity obligation. *See, e.g., Koppers Co. v. Missouri Pac. R. Co., Inc.*, 34 Ark. App. 273, 809 S.W.2d 830 (1991); *Hagerman Constr. Corp. v. Long Elec. Co.*, 741 N.E.2d 390 (Ind. Ct. App. 2000); *Mautz v. J.P. Patti Co.*, 298 N.J.Super. 13, 688 A.2d 1088 (App. Div. 1997). All analysis should start with application of the general principles of contract construction, especially if there is no dispute between the parties about the contract terms. It is important to discern immediately what effect an indemnitee's own negligence has on the indemnity obligation. Most states we looked at have anti-indemnity statutes or rules that either forbid an indemnitee from recovering for damages resulting from its own negligence or otherwise limit the indemnitee's recovery. *See, e.g.*, New York CLS Gen. Oblig. § 5-322.1 (making agreements for indemnification of one's own negligence void and unenforceable); Fla. Stat.Ann. § 725.06 (requiring a monetary limitation on the extent of indemnification that is commercially reasonable and specifically incorporated into project specifications and/or bid documents to be enforceable). Likewise, some jurisdictions, like Arizona, require that a contract specifically address the impact of the indemnitee's own

"THE *AMBERWOOD* CASE SURPRISED ARIZONA CD COUNSEL BECAUSE, BEFORE *AMBERWOOD*, THERE HAD NOT BEEN ANY CASE THAT DEFINED THE BREADTH OF THE TYPE OF INDEMNITY PROVISION IN QUESTION."

negligence on the recovery to be enforceable. These defenses arise from the mere language of the contract.

The larger question is how to proceed when the indemnity language is not crystal clear or is otherwise open to multiple interpretations — a legal gap if you will. Rare is the case where the parties simply agree that indemnity is owed. Knowing how courts have interpreted the same or similar language when presented with disagreements is therefore crucial. Most often, the issue we face as litigators is whether the language in the indemnity provision requires a finding that the subcontractor was at fault for or otherwise the cause of the claimed defect. Because contractual interpretation is usually an issue of law to be determined by the Court, it is important to be aware of how the Court will likely interpret your indemnification provisions.

This is often easier said than done. Courts have interpreted the same or similar indemnification provisions and reached different results, sometimes even within the same jurisdiction. *Compare Continental Heller Corp. v. Amtech Mechanical Services, Inc., supra*, with *Heppler v. J.M. Peters Co.*, 87 Cal.Rptr.2d 497 (Cal. Ct. App. 1999) to better understand just how important it is to know your jurisdiction's indemnity cases. In *Continental Heller*, the California Court of Appeals found that no finding of fault or causation was required for a general contractor to recover indemnity where the subcontractor agreed to indemnify the general contractor for any claim that "arises out of or is in any way connected with the performance of work under this Subcontract" and "shall apply to any acts or omissions ... on the part of the Subcontractor." Continental Heller, 61 Cal. Rptr.2d at 670. The *Heppler* court, however, reached the exact opposite result when looking at a nearly identical indemnity provision ("arising out of or in connection with Subcontractor's ... performance of the work...") and held that a finding of fault on the part of the subcontractor was a prerequisite to trigger the indemnity obligation. The Heppler court expressly distinguished the facts at bar from those presented in the *Continental Heller* case. Specifically, the court noted the following differences in the two cases:

1. *Continental Heller* involved only one subcontractor positioned to control its work, whereas Heppler involved multiple subcontractors whose work was only a component part and who had no control over the other subcontractors involved in the project.

2. The cases involved different commercial contexts — a large, sophisticated subcontractor in *Continental Heller* and a smaller, less sophisticated subcontractor in *Heppler* who could be financially ruined by the potential indemnity obligation without a fault/causation requirement.

3. *Continental Heller* involved a slightly broader indemnity provision that applied to "*any*" acts or omissions of the subcontractor.

Since the vast majority of CD cases settle, the practitioner is in the tough position of determining whether he/she wants to obtain a definitive ruling on the breadth of a specific indemnity provision. A motion for summary judgment may clarify the issue, but it also may result in making bad (or good) law for the instant or future cases. In other words, sometimes the devil you don't know is better than the one you do.

Propound and Conduct Meaningful Discovery

Bad habits can result in parties sending out routine discovery requests which result in routine, less-than-helpful responses by the opposition. Sussing out problematic indemnity issues requires thoughtful strategy. Propounding written discovery asking the general contractor to identify any and all construction defects and/or damages relating to a client's work telegraphs defense counsel's intention and usually results in a laundry list of damages that have no conceivable connection to the client's work. For instance, recently a general contractor stated in discovery responses that a perimeter fence subcontractor's work caused or contributed to problems with stucco, concrete, drywall, and roofing issues. The issue may be better saved for an expert deposition where the expert may not be prepared for the question or is less likely to strain credulity, especially when the expert knows he/she is likely to be deposed on the same or similar issues by the same attorneys in the next case.

However it is done, a practitioner should take the steps necessary to avoid what happened to Swann's Grading the *Amberwood* case-a last minute disclosure of substantially more claims alleged to be "connected to" its work than previously imagined. Because the Arizona Supreme Court denied review of the appellate court's decision in *Amberwood*, the risk of last minute disclosure like that allowed in *Amberwood* remains a nightmare scenario for all defense counsel. Thoughtful discovery requests or strategic expert deposition questions can help minimize the risk of having a drastic increase in potential liability heaped upon a client at the last minute.

Manage Client Expectations

No one likes being sued, and it is natural for contractors to take complaints and lawsuits about their workmanship personally. Contractors worry about the impact that lawsuits will have on their ability to attract future business and/or buy insurance. For these reasons and others, clients are very invested in the outcome of their litigation. A good place to start in any case is advising subcontractor clients about the impact and possible interpretation of applicable indemnity language. *Amberwood* and other indemnity cases also provide a good teaching opportunity to educate clients on the importance and possible effect of indemnity provisions and to encourage clients to be proactive in attempting to draft and/or revise contractual indemnity provisions for their own benefit. Providing exemplars of ideal indemnity provisions is always well received.

While most developers are savvy enough to know the impact of their indemnity provisions, some misinterpret the strength of an indemnity provision in their jurisdictions. The surest way for a general contractor to hold up a potential settlement is by making a demand that does not reflect and is not supported by the indemnity language provisions of the applicable contract. A general contractor who settled with homeowners early should not expect a full and complete (100%) recovery from the

subcontractors when the subcontract's indemnification language requires a finding of fault. Similarly, general contractors should likewise temper their expectations where they cannot locate a subcontract or, in the rare case, are not indemnified parties under the contract agreement. There is no better way to blow up a mediation or insure protracted litigation than to have a client who is not ready to accept the realities of his/her own case.

This should sound, and is on many levels, elementary. Even so, the importance of remembering the basics cannot be overstated. Many good lawyers, under the demands of a changing and busy profession, can take the likely results of a case for granted. But surprises can and do happen. In order to minimize the likelihood or impact of these surprises, defense counsel must insure that all of the "basic" items discussed above are considered.

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SOME TRUCKERS SAY THE DARNDEST THINGS

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In a time where companies are getting better at documenting and keeping track of incidents, we are faced with a dilemma in the trucking field with these incident reports pinning the driver, and ultimately the company, to often incorrect facts and words that are fueled by emotions.

Picture this: It's 3:00 in the morning. You are the Safety Director of a medium sized trucking company. You get a call from dispatch reporting that a driver was involved in a serious accident involving a fatality. Depending on the company's policies and procedures, you most likely call an independent adjuster to head to the scene and/or head to the scene yourself. After the police release your driver from the scene and you have them undergo the required DOT post-accident drug screen, you ask your driver to complete an incident report. Your company's policy, like many others in the industry, is to have its drivers fill out an incident report after they are involved in an accident with injuries while on the job. By now, it is close to 9:00 in the morning and your driver has been awake for over twenty hours. The last six hours were spent talking to police officers and watching emergency responders use the jaws of life to pry open what remains of the other cars involved in the accident. Your driver fills out a statement that reads as follows: "I was driving about 73 mph on the highway when traffic stopped in front of me-I tried to stop as fast as I could-I slammed on my brakes and skidded-but I could not stop in time and hit the vehicle in front of me. I can't believe I killed them. I am tired and do not feel like writing this right now."

A year and 364 days may pass without incident, but as we see all too often, on the final day before the statute of limitations runs, a lawsuit is filed against the driver and the company.

Unfortunately, this is often when outside counsel is first hired. As we begin to review the file, all may look great until we come across the incident report taken the early morning of the accident. We read the driver's words and we cringe inside.

We cringe because many states require that written and recorded statements provided by witnesses to an accident be disclosed during discovery. That means that we are stuck with the driver's words on the incident report. They are memorialized in the handwriting of our driver. There is no way around them. No amount of deposition preparation will take away the sting of those words. Unfortunately, the driver's words may lead the jury to assume that the driver was the cause of the accident and that his actions led to any injuries or death. Additionally, they might lead the jury to believe that the tractor or trailer's brakes weren't properly maintained because it was unable to stop in time despite heavy braking efforts by the driver. There is also an implication that the driver may have been tired or fatigued at the time of the crash.

Of course, what the driver was unaware of at the time that the incident report was written, is that he had slowed to 65 mph a few miles earlier when the speed limit changed and that the

> "ALLOWING TIME TO PASS PRIOR TO A DRIVER HAVING TO GIVE A STATEMENT ABOUT AN ACCIDENT, ALLOWS THE DRIVER'S EMOTIONS TO SETTLE AND MAY ALLOW FOR A MORE ACCURATE RECOLLECTION OF THE ACCIDENT AND THE EVENTS THAT LED UP TO IT."

reason traffic ahead of him came to such an abrupt stop was because a car had drifted across the center median and caused a head-on collision ahead of him. Unfortunately, the driver's written incident report turns what would have been a highly defensible case into a defense attorney's nightmare based on a speeding driver that was inattentive. A good Plaintiff's attorney will spend the deposition of the driver laboring over the words used in the handwritten statement. This is where the Plaintiff's attorney makes their case against the driver and company. They will twist and turn the drivers' written words into either an admission on the part of the driver or, at the very least, something that undermines the driver's credibility (based on changing the story from the written account) in the eyes of the jury.

By requiring the driver to write a statement, particularly right after the accident, the company is essentially forcing the driver to give testimony without the advice of counsel and without any additional information about the nature of the accident (or the benefit of the data regarding the driver's speed or braking that is likely contained in the ECM unit). Doing so can have can have a disastrous impact on the company's defense position and can call the driver's credibility into question long before suit has been filed. Of course, we aren't implying that having defense counsel would somehow alter the truth of the statement or the driver's memories or recollection; however, the presence of defense counsel may lead to a better choice of descriptive words and a far less hazardous account of what happened from the driver. Additionally, allowing time to pass prior to a driver having to give a statement about an accident, allows the driver's emotions to settle and may allow for a more accurate recollection of the accident and the events that led up to it. We have all gotten into trouble at some point in our lives by blurting out words that were based on emotion. Demanding that truck drivers prepare incident reports shortly after the accident, particularly while emotions are running high, can lead to troublesome results for both the driver and the company and can be a heavy anchor that sinks our defense.

Many companies have written policies and procedures that require the driver to complete a written report after the accident – that seems to be a norm in the industry. We aren't suggesting you violate company policy. That leads to an entirely different set of problems. Rather, we recommend you continue to comply with the company's rules, but if the policies and procedures do not call for your driver to complete an incident report, requiring one should be avoided. Additionally, if the current policies and procedures require the driver complete an incident report, we suggest that you allow time, and if warranted by the nature of the accident, possible attorney involvement and driver preparation, before the driver puts pen to paper. Finally, companies should give serious consideration to ultimately changing their policies and procedures regarding incident reports to, at a minimum, allow the driver time to settle down and better understand the accident before requiring a full written account. The written statements do nothing to help defend an eventual lawsuit, but they can cause serious damage to the driver's credibility and, ultimately, a less favorable outcome for the company.

A smart alternative would be to have an attorney with experience handling rapid response investigations lead the accident investigation and interview the driver. The attorney can then provide a summary of the driver's recollection to the company. This affords attorney-client privilege to the investigation and will prevent discovery of a potentially hazardous written account from the driver. This also rings true for recorded statements, which many times can be even more damaging than written statements. The moral of the story is to think twice before requiring your driver to solidify their account of the accident while under great stress, likely while very tired, without the benefit of ECM information pertaining to speed and braking, and without any input from an attorney. Doing so may just provide the Plaintiff with Exhibit A for their next trial against your company.

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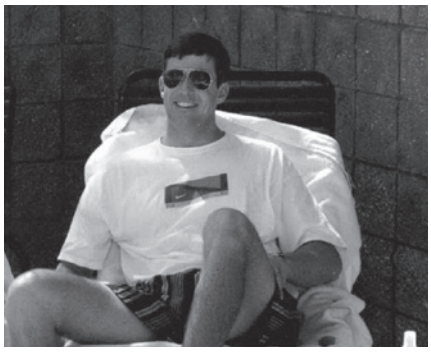

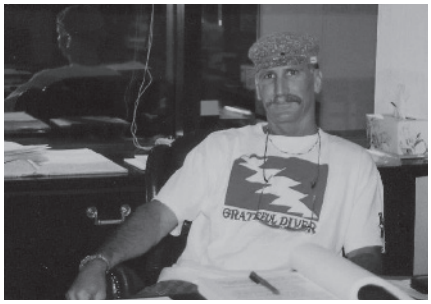
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2017

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2018

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2018

A BLAST FROM THE PAST: 1983

USA & WORLD

- 40th President: Ronald Reagan
- 43rd Vice President: George H. W. Bush
- New York Mercantile Exchange (NYMEX) begins trading in crude oil futures
- Dow Jones Industrial Average breaks 1,200 for first time
- Sally Ride becomes the first American woman in space
- Vanessa Williams is crowned Miss America
- Average cost of new home is $82,600
- Average annual income is $21,070
- Average monthly rent is $335
- Dodge RAM 50 truck costs $5,665
- First Class Stamp costs .20 cents
- Gas is $1.24 per gallon
- Cost of a Superbowl ad is $400,000
- Chrysler brings first minivan to the market
- World population estimated at 4.72 billion people
- Margaret Thatcher re-elected by landslide majority
- Tokyo Disneyland opens
- Seatbelt use becomes mandatory in U.K.
- Jenga introduced at London Toy Fair

TECHNOLOGY

- Cryptographic Communications System & Method (RSA) patented
- Last hand-cranked telephones in U.S. taken out of service
- Phillips & Sony introduces Compact Discs
- Apple Inc. releases the Apple Lisa personal computer
- Lotus 1-2-3 is released for IBM-PC compatible computers
- Motorola introduces the first mobile phones to public
- Microsoft Word is first released

MUSIC

- Michael Jackson's "Thriller" album is #1 for 37 weeks
- 1983 Billboard #1 Songs:
  - Every Breath You Take - The Police (Billboard song of the year)
  - Maneater - Hall & Oates
  - Down Under - Men at Work
  - Africa - Toto
  - Come On Eileen - Dexys Midnight Runners
  - Let's Dance - David Bowie
  - Flashdance... What A Feeling - Irene Cara
  - Sweet Dreams (Are Made of This) - Eurythmics
  - Maniac - Michael Sembello
  - Tell Her About It - Billy Joel
  - Total Eclipse of the Heart - Bonnie Tyler
  - Islands In the Stream - Kenny Rogers with Dolly Parton
  - All Night Long (All Night) - Lionel Richie
  - Say Say Say - Paul McCartney, featuring Michael Jackson

ARIZONA

- Arizona Governor: Bruce Babbit
- Phoenix Mayor: Margaret T. Hance
- Population of Arizona: 2.969 million people
- La Paz County becomes Arizona's 15th and last County founded, with Parker as the County Seat
- Phoenix experiences 154 consecutive days of 90+ degree temperatures
- Valley investors form America West Airlines

BOOKS

- NYTimes Best Selling Books include: Pet Sematary by Stephen King; Poland by James Michener; Space by James Michener; The Little Drummer Girl by John le Carre
- Roald Dahl publishes The Witches
- Jackie Collins publishes Hollywood Wives

BROADWAY

- Andrew Lloyd Webber's "Cats" wins seven Tony Awards
- With 3,389 performances, "A Chorus Line" becomes the longest running Broadway show
- "Annie" closes at Alvin Theater in NYC after 2,377 performances

TELEVISION & FILM

- Laverne & Shirley last airs on ABC
- Jim Henson's Fraggle Rock debuts on HBO
- Final episode of M*A*S*H airs on CBS
- Terms of Endearment wins Academy Award
- Return of the Jedi becomes highest grossing film of the year
- Popular movies include: Trading Places, National Lampoon's Vacation, Risky Business, The Right Stuff, Twilight Zone, The Big Chill, Never Say Never Again, and Sudden Impact

SPORTS

- Inaugural season kicks off for Arizona's first professional football team, the Arizona Wranglers (USFL)
- John Elway is first pick by Baltimore Colts in NFL Draft
- Last NFL game played at Shea Stadium; Pittsburgh Steelers beat New York Jets 34-7
- Wayne Gretzky sets NHL all-star record of 4 goals in 1 period
- Prize stallion and Derby winner Shergar kidnapped in Ireland; Lloyds of London pays $10.6 million insurance
- Scott Hamilton wins U.S. Figure Skating Championship

Four JSH Law Clerks Become Associates

Jon Brinkman, Chris Heo, Lisa Papsin and Brian Ripple worked worked at the firm as 2017 Summer Law Clerks, during which they had the opportunity to observe trials, depositions, mediations, settlement conferences and arbitrations. All four associates are graduates of Arizona State University, Sandra Day O'Connor College of Law. We are pleased they have choosen to continue their legal careers as new associates with our firm.

Jon Brinkman is an associate in the firm's Transportation, Auto, Products and General Liability Trial Group, focusing his practice in general civil litigation and insurance defense. He represents clients in cases involving trucking, premises liability, contract disputes, personal injury and wrongful death. While pursuing his J.D. and M.B.A. at Arizona State University, Jon received the CALI Award for the Highest Grade in Legal Writing and was a Pedrick Scholar. He earned his B.S. in Finance and B.A. in Legal Studies from Arizona State University, W.P. Carey School of Business.

Christopher Heo works in the firm's Transportation, Auto, Products and General Liability Trial Group, focusing his practice in general civil litigation and insurance defense. He represents clients in cases involving trucking, premises liability, contract disputes, personal injury and wrongful death. Between his first and second year of law school, Chris worked as a legal extern in the Maricopa County Attorney's Office. He earned his B.S. in Marketing from Arizona State University. Chris is fluent in the Korean language.

Lisa Papsin belongs to two of the firm's Trial Groups. In the Professional Liability, Bad Faith and Complex Litigation Trial Group, she represents clients in cases involving contract, tort and insurance coverage disputes. In the Governmental Liability and Employment Trial Group, Lisa defends public entities in civil litigation and employment-related matters including premises liability, discrimination, wrongful termination and transgender protections. During law school, Lisa served as President of the Executive Moot Court Board and earned the CALI Award in Negotiation. She was selected by her peers to be the student speaker at her law school graduation ceremony. She earned her M.F.A. in English and Creative Writing, and B.S. in Sociology and English from Northern Arizona University.

Brian Ripple works in the firm's General Liability and Auto Trial Group, focusing in the areas of general civil litigation and insurance defense. During law school, Brian worked as a legal intern for The Arizona Justice Project and served as the Associate Editor of *Jurimetrics, The Journal of Law, Science and Technology*. While pursuing his undergraduate degree, Brian was active in his fraternity, Sigma Chi, and served as the President his senior year and as Public Relations Chair his junior year. He was also active in ASU's Student Bar Association, serving as the Vice President of Social Affairs during his second year of law school. He earned his B.S. in Economics and Political Science from Santa Clara University.

TAKING AN ERASER TO THE BLACKBOARD:

NEW STRATEGIES FOR COMBATTING THE EVER-INCREASING COST OF MEDICAL CARE IN LITIGATION ACCESSIBILITY CLAIMS

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It is a common fact pattern in personal injury litigation: Plaintiff is injured and the Defendant is clearly at fault. The medical care received seems reasonable, and it appears to be a straightforward claim, but then the demand arrives. It is no secret that the cost of post-accident medical care is increasing. Contributing to that increase is a dramatic cost increase in chiropractic and pain management care, including injections, radiofrequency ablations, and nerve blocks. Together, it has become common to see six-figure medical specials stemming from even minor, low speed automobile accidents. These outrageous totals are then black boarded for the jury, leaving Defendants struggling to justify an award for less than the medical bills.

The 2017 Manual of Model Civil Jury Instructions for the Ninth Circuit explains that when determining the measure of damages, the jury should consider "[t]he reasonable value of necessary medical care, treatment, and services received to the present time." Traditionally, Defendants rely on their own medical experts to opine as to the reasonableness of treatment and expenses. But as medical offices grow, fewer and fewer medical experts are able or willing to testify as to their own billing practices, let alone commenting or critiquing the charges of another provider's bill.

When Plaintiffs allege subjective pain complaints and transient, soft-tissue injuries, Defendants risk looking callous when explaining to a jury how the Plaintiff did not need the treatment that various doctors, chiropractors, and pain management specialists tell them they needed or would be helpful. And what if all of the care was reasonable? It has become common practice for many medical providers, especially those that cater to post-accident care, to "bill" for amounts far in excess of what they ultimately accept or expect to receive.

One weapon that Defendants can use to combat these rising charges is the use of medical billing experts. Experienced billing experts provide two levels of important testimony. First, he or she will analyze the coding of the bills, including International Statistical Classification of Diseases and Related Health Problems "ICD" and Current Procedural Terminology "CPT" codes, and will identify improper, inappropriate, or repetitive billing codes that are often hidden within these medical bills to drive up the total amounts. For example, it is not uncommon for a chiropractor to bill twice for "manual therapy" to the cervical and lumbar spine in the same visit. A medical billing expert, however, can explain to a jury how the code for "manual therapy" should be billed by time, not by body part, and will eliminate one of those redundant charges. Similarly, standard surgical charges such as "operative use of microscope" and "surgical assistants," are often overused, and should not usually be billed in conjunction with certain procedures. Billing experts can assist in pointing out these inaccuracies to a jury as well.

The second step that a billing expert will take is to determine the reasonable value of the medical services as compared to other providers within the same geographic region. To do so, the experts will use proprietary software and databases in order to determine what other providers in the same zip code (or nearby zip codes) are charging for the same CPT coded-services.

These methodologies, taken together, can significantly reduce the total bills presented to a jury. In one recent case, for example, a billing expert determined that the reasonable value of the $650,000 in black boarded medical bills was actually only $126,000 after removing the improper charges and inflated prices. In situations when the reasonableness of care is undisputed or uncertain, a billing expert's testimony can provide the jury with a commonsense and rational basis to award a Plaintiff a sum less than the black boarded medical specials, even if liability is conceded.

In addition to combatting the reasonable value of the Plaintiffs' or claimants' billed care, a growing number of state courts are allowing Defendants to present evidence of the amounts actually paid on medical bills. While at first glance this seems to implicate the collateral source rule, courts are starting to understand that amounts paid on the bills may actually provide the best evidence as to the reasonable value of the treatment. So far, courts in Iowa, Ohio, Indiana, Kansas, Pennsylvania, Idaho, California, New York, Florida, Minnesota and Maryland have reached this conclusions. In *Howell v. Hamilton Meats*, the California Supreme Court explained that when the amount billed substantially exceeds the amount accepted as payment in full, the Plaintiff is not actually incurring liability for the difference, thus the collateral source rule is not implicated at all. Some of these jurisdictions have taken this proposition a step further, finding that Plaintiff's medical bills were not even admissible to prove past medical expenses.

This same principal should also be considered when evaluating future medical expenses. Plaintiffs typically blackboard ridiculously large sums for future care needs that are based on rack rates that can be three or four times as much as that provider typically accepts as payment for similar services. A billing expert can analyze the life care plans and provide the foundation for more reasonable costs for the future treatment based on the use of proper codes and typically accepted amounts for similar services in the region. Utilizing an expert in this area can significantly reduce the reasonable cost of future medical care and offer the jury a second (and generally much smaller) number from which to base a reasonable award for medical treatment.

As medical expenses continue to spiral out of control, it is more important than ever to be proactive in countering the "amount billed" approach that is generally used by Plaintiff's counsel. Through the use of billing experts (and motion practice when necessary) Defendants can persuasively educate the judge and jury as to why the amounts billed by the medical providers are often mistaken, unreasonable, and not an accurate picture of what the reasonable costs of medical treatment are and, instead, offer an alternative number that is based on accurate billing at amounts that are commonly accepted for similar services in that area. With these strategies, Defendants can provide the jury with a reasonable and evidence-based justification for damages awards that fairly compensate an injured Plaintiff, regardless of the black boarded past and future medical specials.

> "AS MEDICAL EXPENSES CONTINUE TO SPIRAL OUT OF CONTROL, IT IS MORE IMPORTANT THAN EVER TO BE PROACTIVE IN COUNTERING THE "AMOUNT BILLED" APPROACH THAT IS GENERALLY USED BY PLAINTIFF'S COUNSEL."

Published in the Fall/Winter 2017 issue of *USLAW Magazine.*

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Jeremy Johnson concentrates his practice on the defense of clients in the areas of trucking and transportation, wrongful death and personal injury, product liability, and premises liability. He also Co-Chairs the firm's Transportation, Auto, Products and General Liability Trial Group.

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Erica Spurlock focuses her practice in the areas of automobile and commercial trucking defense, employment defense, and other personal injury, wrongful death and general liability defense.

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JSH FIRM **ANNOUNCEMENTS**

JSH Welcomes Two New Attorneys

Taryn Campbell focuses her practice in the areas of auto liability defense, general civil litigation, and insurance defense. Prior to joining JSH, Taryn worked as in-house counsel for a major insurance company where she handled bodily injury, property damage, auto, and fire casualty claims. She also worked in private practice handling contested foreclosure actions for clients. While in law school, Taryn worked as a certified legal extern at the State of Connecticut Prosecutor's Office, served as an assistant clerk at the Quinnipiac Sappern Fellowship Judicial District Court of New Haven, and worked as a certified legal extern at the State of Connecticut Office of the Victim Advocate. She is a graduate of the National Institute for Trial Advocacy and Advanced Trial Skills Program. She obtained her J.D. from Quinnipiac University School of Law and her B.A. in Sociology from University of Arizona.

David Amundsen focuses his practice in the areas of automobile liability defense, general civil litigation, and insurance defense. He is experienced representing clients in arbitration and trial. Prior to joining JSH, David worked in-house at a national insurance company where he focused on property damage and personal injury defense. Before working in-house, David served as Deputy County Attorney for the Graham County Attorney's Office. While there, he handled all types of criminal prosecutions including misdemeanor and felony cases. He received both his B.A. and J.D. from Arizona State University. He graduated from the Arizona College of Trial Advocacy, National Institute for Trial Advocacy.

Daniel Nageotte Selected as Diversity Legal Writing Program Scholar

Daniel was selected as the firm's 2018 Diversity Legal Writing Program Scholar. During the Spring semester, Daniel attended weekly training sessions at the firm designed to enhance his legal writing skills, teach him about the firm environment, and explore practical tips for the practice of law. Daniel clerked for 12 hours each week, where he completed projects assigned by his mentor attorney, JSH Partner Ashley Villaverde Halvorson. Ashley provided Daniel with feedback regarding each of his projects in an effort to improve his legal writing skills.

The MCBA Diversity Legal Writing Program provides second-year law students at Arizona State University with practical clerking experience in private law firms within Maricopa County. In addition to helping Daniel obtain valuable clerking experience, the firm has also provided him with a $5,000 scholarship.

Josh Snell Inducted into the Federation of Defense & Corporate Counsel

Partner Josh Snell has been inducted into the Federation of Defense & Corporate Counsel (FDCC). The FDCC is an invitation-only organization comprising the top defense attorneys, corporate counsel and insurance industry executives who have achieved professional distinction during their careers. Josh is the third JSH attorney to join the FDCC.

FDCC
DEFENSE LAWYERS. DEFENSE LEADERS.

THE EXPERT WITNESS: A SELDOM USED BUT POWERFUL RESOURCE TO IMPROVE YOUR MEDIATION SUCCESS

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In my experience, it is the rare mediation where a party invites its expert witness to participate in mediation. Is it something I would recommend in every case? Clearly, no. Can it be a game changer in the right case? From this mediator's perspective, definitely yes. This article will address the important considerations in determining whether to involve your expert witness in mediation.

Considerations Before Bringing an Expert Witness to Your Mediation

Even before deciding whether to bring your expert witness to mediation, it is always a good idea to involve him or her in the pre-mediation process. In order to effectively advocate your position in mediation, you need to have an excellent grasp on all of the technical and scientific issues that will be discussed during mediation. Involving your expert witness in your pre-mediation preparation ensures you will be fully prepared for mediation.

An experienced expert witness can also bring value by helping you to select the right mediator for your case. In order to assure the best possible mediation outcome, selecting the right mediator with appropriate knowledge and experience of the technical or scientific issues that will be discussed during mediation is critical. Often, your expert witness will have had prior experience with potential mediators and can provide you with valuable insight in selecting the right mediator for your case.

Another very important consideration before bringing your expert witness to mediation is the potential for waiver of confidentiality or work product by prematurely disclosing the expert witness's or your work product to the opposition if the case does not settle at mediation. You need to be mindful of this potential pitfall. Make certain you evaluate what information to provide your expert witness to review if you intend to bring your him or her to mediation. It is strongly recommended that you label all information provided to your expert witness prior to mediation "for settlement purposes only" or similar limiting language. An expert witness who has been provided access to the parties' mediation statements should also understand that information contained in these memoranda may not later be used by the expert witness in future reports or testimony.

While most states have statutes protecting communications occurring during mediation, it is still a good idea to discuss these issues with opposing counsel and the mediator prior to mediation. This ensures there is clear understanding and agreement on how communications will be protected going forward. This is particularly important when involving third-parties in mediation, such as expert witnesses. Apprehension about bringing your expert witness to mediation usually centers around the concern that if the case does not settle, you will have prematurely disclosed your case to the opposition. However, with today's mandatory disclosure rules, this concern is largely a non-factor. Also, consider this: if you brought your expert witness to mediation and the case did not settle, it may be because your expert witness was not as effective as you thought he or she might be. Better to learn this in mediation than trial.

Apprehension about exposing your expert witness to the opposition in mediation also ignores the reality that the vast majority of your cases will settle before ever getting to trial. Further, if you have confidence in your expert witness you should not fear exposing him or her in mediation; rather, you should relish the opportunity to demonstrate the strength of your case, not only to the opposition but also to the mediator. Having your expert witness participate in mediation can enhance your credibility and send a strong message to the opposition and mediator that you have confidence in your case. It also demonstrates that you are clearly invested and prepared for the mediation.

So, when should you consider bringing your expert witness to mediation? There is no hard and fast rule for making this decision. Rather, each case should be evaluated on its individual

> A WELL-PREPARED EXPERT WITNESS CAN SAVE YOU TIME AND EXPENSE BY CLEARLY IDENTIFYING THE KEY FACTS AND ISSUES IN DISPUTE, SEPARATE ADVOCACY AND EMOTION THAT LAWYERS AND CLIENTS TYPICALLY FOCUS ON IN MEDIATION, AND PROVIDE A MORE OBJECTIVE ANALYSIS OF THE CASE.

facts. Certainly, if your case involves technical or scientific issues, there can be substantial benefit to bringing your expert witness to mediation. While you may feel you have a good understanding of the technical or scientific issues that will be discussed during mediation, the same may not be true of your opposition or your mediator. Bringing your expert witness to mediation can ensure both parties and the mediator have a better understanding of your case. This is also likely to lead to a better resolution.

Involving your expert witness in mediation is particularly beneficial when cases are mediated pre-suit, or very early in the litigation process. A well-prepared expert witness can save you time and expense by clearly identifying the key facts and issues in dispute, separate advocacy and emotion that lawyers and clients typically focus on in mediation, and provide a more objective analysis of the case. A well-prepared expert witness can also provide valuable assistance in educating the opposition of the weaknesses in their case or by providing damage models, repair protocols, or other recommendations to facilitate case resolution. Finally, your expert witness can assist counsel and the mediator in diffusing unreasonable client or opposition expectations, and focus the parties on a realistic resolution of the case.

Still on the fence about involving your expert witness in mediation? Consider this: How many times have you had a mediation break down because a technical or scientific issue was raised that you could not adequately explain, did not anticipate, or did not have an answer to? How many times have you felt frustration that your mediator, or the opposition, did not fully understand the strength of your case or the weakness in the opposition's case? Having your expert witness participate in mediation can eliminate these pitfalls from derailing the mediation or maximizing your settlement.

So how do you know when to consider bringing your expert witness to mediation? There are a number of practical considerations to evaluate before answering this question. Will it be cost effective? Are the issues your expert witness has opined on so technical or scientific that your mediator and the opposition would benefit from further explanation and analysis? Are you completely confident in how your expert witness will present, and in his or her opinion, to expose your expert witness to the opposition scrutiny during mediation?

Having made the decision to bring your expert witness to mediation, now what?

It is recommended that you broach the subject of bringing an expert witness in advance of the mediation, first with opposing counsel, then with the mediator. It is important that both parties and the mediator agree on whether expert witnesses will participate in mediation and, if so, what role they will play. This allows the mediator to better control the mediation by limiting the expert witness and counsel to the expert witness's intended role. It may also prevent your mediation from ending prematurely, because the other side did not know or anticipate that you would bring your expert witness to mediation, resulting in the opposition feeling unprepared, a sense of being blind-sided, or unfairly attacked.

Assuming you cross the hurdle about bringing your expert witness to mediation and the mediator and opposing counsel agree to allow your expert witness to participate, the question then becomes, how to effectively use your expert witness in mediation. The most common way is to have your expert witness make a presentation in an opening joint session with the mediator and the opposition. If done right, this can have a powerful impact. It allows you to set the tone for the mediation and it demonstrates your preparation and your belief in the strength of your case. In cases involving highly technical or scientific issues, it can ensure the mediator and opposition have a clearer understanding of your case from the outset, saving valuable time to focus on resolution of the case.

It is also important to prepare your expert for mediation just as you would your client. Never assume your expert witness will be familiar with the mediation process. Your expert witness can sabotage your best intentions if he or she does not understand the role you want him or her to play during mediation. It is critical that you educate your expert witness on your expectations for their participation in mediation. Will they simply observe and listen, and be available to educate you and answer your questions during private caucus sessions? Is it your intention to have your expert witness make a presentation in a joint session? If so, have you carefully prepared your expert witness for the presentation? Are you confident enough in your expert witness to allow him or her to engage in face-to-face discussion with opposing counsel, any opposing expert, if one is present, or with the mediator? You should also educate your expert witness about your mediator's experience, mediation style and subject matter knowledge. Similarly, it is important to educate your expert witness about opposing counsel and client. Preparation is the key to success.

What if you bring your expert witness to mediation and the case does not settle?

Was the decision to involve your expert witness at mediation a poor one? Not necessarily. There are still benefits to be derived from bringing your expert witness to mediation. In all likelihood, with the assistance of a well-prepared expert witness, the issues that remain in dispute after mediation will likely be substantially narrowed, resulting in more focused discovery and considerable savings in time and expense before the case is finally resolved.

> "IT IS ALSO IMPORTANT TO PREPARE YOUR EXPERT FOR MEDIATION JUST AS YOU WOULD YOUR CLIENT."

Another benefit to having your expert witness participate in mediation is that you have the opportunity to test your expert witness's opinions before they are finalized for trial. Particularly if the technical or scientific issues are novel or unsettled, bringing your expert witness to mediation can provide you with valuable feedback on the merits of your case. It can also be an effective strategy for learning the strengths and weaknesses of your opponent's case and allow you time to modify your case strategy for trial.

Final Thoughts

In the proper case and with the appropriate preparation, bringing your expert witness to mediation can be a powerful weapon in your mediation arsenal. The next time you sit down to prepare for mediation, consider inviting your expert witness to the party. It may just make the difference in whether your mediation is a success.

Published in the March 2018 issue of *Arizona Attorney Magazine.*

ABOUT THE AUTHOR **MARK ZUKOWSKI**

Mark Zukowksi has served as an arbitrator and mediator for more than 20 years. He received extensive training through the American Arbitration Association (AAA) and the Straus Institute for Dispute Resolution at Pepperdine University. Mark regularly serves as an arbitrator and mediator in a variety of personal injury and commercial cases. He is a construction and commercial arbitrator and mediator for AAA. In 2011, he was accepted into the prestigious National Academy of Distinguished Neutrals. Mark serves as a settlement conference Judge Pro Tem for the Maricopa County Superior Court and previously served as a Judge Pro Tem for the Arizona Court of Appeals.

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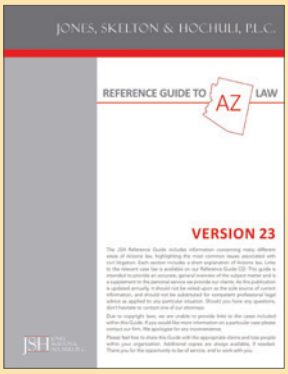
JSH **RESOURCE ALERT!**

Law Alerts

JSH Law Alerts are periodic publications that provide summaries and reviews of recent court decisions. In order to provide these Alerts to our clients in a more timely manner, we publish Law Alerts within 48 hours of the case's original publication date. These Alerts are sent to our clients via email, posted to our website, and distributed via social media. To be added to our email distribution list, please send your request to marketing@jshfirm.com. Archives of past Law Alerts are available at jshfirm.com/news.

Reference Guide to Arizona Law

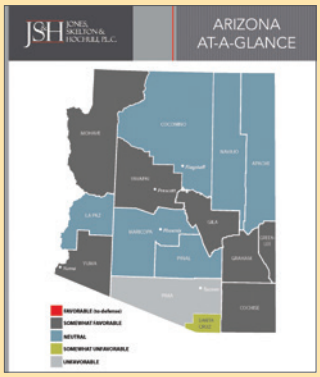
The firm's Reference Guide to Arizona Law is distributed to clients via print and electronic media. JSH attorneys update the Reference Guide as needed to reflect changes in case law and statutes. The Reference Guide includes a detailed table of contents and case law, and covers most of the major issues that arise in personal injury cases, as well as a short explanation of Arizona law on each point. To receive a copy of the latest version of our Reference Guide, email marketing@jshfirm.com.



National Compendium of Law

JSH Partners Phillip Stanfield and David Stout served as contributing authors for the Arizona chapter of USLAW NETWORK's National Compendium of Law, with research support provided by JSH summer associates. The Compendium is a multi-state resource that provides easy access to state common and statutory law regarding a variety of litigation-oriented issues. In addition to chapters devoted to 44 states and their respective jurisdictions, general sections in the Compendium include: pre-suit and initial considerations; negligence; discovery; evidence, proofs and trial issues; and damages. To download the USLAW National Compendium, visit jshfirm.com/news.

In addition to the National Compendium, USLAW regularly produces new and updates existing Compendiums, which are easily sourced on a state-by-state basis and are developed by the member firms of USLAW. Current Compendiums include: Retail, Spoliation of Evidence, Transportation, Construction Law, Workers' Compensation, Surveillance, Offer of Judgment, Employee Rights on Initial Medical Treatment, and many more. To download copies of these resources, visit USLAW.org and search Compendium.



Arizona At-a-Glance: Defense Favorability by County

The firm's At-a-Glance provides analysis of verdict results in each county, and outlines 15 points on the most common questions and issues in personal injury claims. To download a copy of this resource, visit jshfirm.com/Arizona-at-a-glance.

NEW STANDARDS FOR WORKPLACE RULES: THE NLRB'S DECISION IN *BOEING COMPANY*

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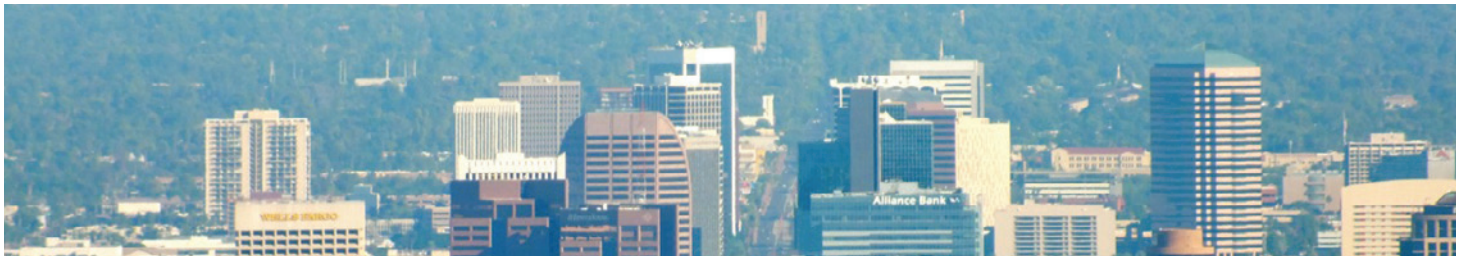
Under the National Labor Relations Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their rights to collectively work with other employees to improve their working conditions, both inside and outside of the union context. 29 U.S.C. § 158. As a result, the National Labor Relations Board – which is charged with preventing and remedying unfair labor practices – routinely investigates and issues complaints against employers who maintain workplace rules that prohibit employees from engaging in those protected concerted activities. For example, a rule preventing employees from discussing their wages is an unfair labor practice, and the NLRB would find such a rule unlawful and require the employer to repeal it. *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 537 (6th Cir. 2000) ("A rule prohibiting employees from communicating with one another regarding wages, a key objective of organizational activity, undoubtedly tends to interfere with the employees' right to engage in protected concerted activity.")

Until recently, the NLRB's standard for evaluating whether a workplace rule violated the National Labor Relations Act was extremely broad and ambiguous. Under the prior standard, any workplace rule that "employees would reasonably construe the language to prohibit Section 7 activity" was an unfair labor practice. *Lutheran Heritage,* 343 NLRB 646 (2004). Painting with that broad brush, the NLRB has found rules prohibiting the following types of workplace behavior to be unlawful:

- loud, abusive or foul language (*Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999));
- "inability or unwillingness to work harmoniously with other employees" (*2 Sisters Food Group*, 357 NLRB 1816 (2011));
- "negative energy or attitudes" (*The Roomstore*, 357 NLRB 1690 (2011)); and
- "negative conversations about associates and/or managers" (*Claremont Resort & Spa*, 344 NLRB 832 (2005)).

These rules are plainly not intended to interfere with workers' rights to organize or otherwise seek to improve their employment, and all have legitimate justifications. However, the National Labor Relations Board's prior standard refused to take into consideration the reasons employers might have these rules in place. For example, under the prior standard, the Board occasionally even struck down workplace rules by healthcare providers requiring confidentiality. *Rocky Mountain Eye Center*, P.C., 363 NLRB No. 34, slip op. at 8 (2015) (striking down a confidentiality provision because "[t]he laundry list of items deemed to be 'confidential information' . . . broadens the rule beyond the scope of HIPAA under any reasonable reading.").

This presented significant problems for employers. Suppose an employee is terminated after which he or she brings a charge under the National Labor Relations Act, alleging the termination



> **UNTIL RECENTLY, THE NLRB'S STANDARD FOR EVALUATING WHETHER A WORKPLACE RULE VIOLATED THE NATIONAL LABOR RELATIONS ACT WAS EXTREMELY BROAD AND AMBIGUOUS.**

was based on the employee engaging in activity protected by the Act. The employer would then be required to provide the NLRB with, at a minimum, a position statement responding to the allegation, the employee's file, and the employee handbook. At that point, even if the NLRB concluded the termination was legitimate and justified, it could still determine that the workplace rules violated the Act, forcing the employer to either change its rule or spend even more time and money defending its position. As a result, an employer could be forced to waste time and money defending an allegation that violated the Act, but was an otherwise necessary workplace rule.

Thankfully, that isn't the case anymore. In a recent decision (*The Boeing Company*, 365 NLRB No. 154 (2017)), the NLRB overruled the "reasonably construe" standard, recognizing that this prior standard "prevents the Board from giving meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules and handbook provisions."

To determine whether a workplace rule is unlawful, under the NLRB's new standard, the Board will evaluate: "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." *Id*. at 3 This still means that certain rules will be unlawful because they prohibit or limit NLRA-protected rights, like a rule prohibiting employees from discussing wages or benefits with one another. But other rules, like those requiring employees to abide by basic standards of civility, will no longer be unlawful.

This does not mean employers are completely protected in their enforcement of such workplace rules. For example, if an employee who engages in protected activity is disciplined for violating an otherwise lawful workplace rule, the discipline itself could still be found to violate the NLRA. Moreover, because this standard has yet to actually be applied, there are some categories of workplace rules (like those regarding solicitation or confidentiality) that may be more closely scrutinized by the NLRB because of the potential impact on employee rights under the Act. Still, employers can now rest a little easier knowing that common and justified workplace rules will no longer be targeted by the National Labor Relations Board.

ABOUT THE AUTHOR **DAVID POTTS**

Dave Potts focuses his practice on employment law, general civil litigation, commercial and business litigation, and wrongful death and personal injury defense.

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JS&H WOMEN LAWYERS WOMEN LEADERS

This issue of The JSH Reporter highlights our firm's "past," including the women lawyers who helped to lay our firm's foundation. In recognition of National Women's History month in March, we reflect on and want to thank our women partners for their achievements and for serving as role models for those who have since joined JSH. The next issue of The JSH Reporter – our "present" issue, being published Fall 2018 – will focus on how much our firm has grown, including the increased number of women attorneys who have joined JSH's ranks over the years. We celebrate our many women lawyers and their accomplishments at JSH, as well as in the legal profession and community at large.


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Kathleen Elder


Eileen Gilbride


Ashley Villaverde Halvorson


Michele Molinario


Georgia Staton


Lori Voepel


Jennifer Anderson


Taryn Campbell


Diana Elston


Sarah Epperson


Liz Gilbert


Chelsey Golightly


Courtney Moran


Lisa Papsin


Clarice Spicker


Erica Spurlock


Linda Tivorsak


Cory Tyszka


Laura Van Buren

JSH UNVEILS **NEW WEBSITE**

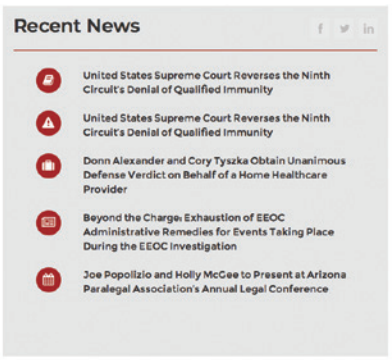
jshfirm.com

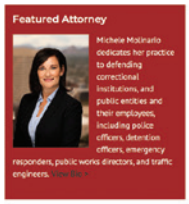
This past December, we announced the launch of our completely redesigned website. The new website reflects the firm's long-standing brand and reputation as the largest and most experienced law firm of trial lawyers in Arizona. Our website has a modern and responsive design that makes information about our firm more readily accessible to visitors. The website also features original photos taken by JSH Partner Bill Schrank.

"In 2018, Jones, Skelton & Hochuli celebrates its 35th anniversary. As we reflect on the past and look to the future, we are proud to offer our clients and visitors an educational and intuitive website," said JSH Managing Partner Bill Holm.

The new site features a mobile-optimized design and user-friendly navigation with up-to-date information about the firm's attorneys, practice and industry areas, updates on JSH's career opportunities, professional and community involvement, and representative experience.

In our Fall 2018 issue of The JSH Reporter, we will further explore the layout of the website.





JSH Sponsors ASU's Annual Jenckes Closing Argument Moot Court Competition

In October 2017, JSH sponsored the annual competition at Arizona State University, Sandra Day O'Connor College of Law, in which 34 students prepared a closing argument and competed in front of local attorney judges in teams of two. On November 3, 2017, the winning team, comprised of students Angelika Doebler and John Thorpe, advanced to compete against the University of Arizona's James E. Rogers College of Law team for the coveted Jenckes Cup. Assisting ASU in reversing its long-time losing streak, JSH attorneys Lisa Papsin and Alex LaCroix coached the ASU team to victory, and the ASU team regained the Cup and glory as this year's winners. The competition was hosted in the Great Hall of the Beus Center for Law and Society, and was judged by fellows from the American College of Trial Lawyers.

JSH FIRM **ANNOUNCEMENTS**

JSH Receives Metropolitan Tier One Law Firm Ranking in 2018 Edition of "Best Law Firms"

We are proud to announce our inclusion in the 2018 "Best Law Firms" rankings by U.S. News and Best Lawyers®. The "Best Law Firms" rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. To be eligible for a ranking in a particular practice area and metro region, a law firm must have at least one lawyer included in the 23rd Edition of The Best Lawyers in America in that particular practice area and metro. This year, 20 JSH attorneys were included, and Partner Don Myles was named "Lawyer of the Year" for Insurance Law in Phoenix, AZ.

- Metropolitan Tier One in Education Law; Employment Law – Management; Insurance Law; Medical Malpractice Law – Defendants; Personal Injury Litigation – Defendants; Product Liability Litigation – Defendants; and Workers' Compensation Law – Employers.
- Metropolitan Tier Two in Appellate Practice; Construction Law.
- Metropolitan Tier Three in Criminal Defense: General Practice; and Litigation – Labor & Employment.

Don Myles Joins Lawyers for Civil Justice Board of Directors

Partner Don Myles has been welcomed as a Member of the Board of Directors of Lawyers for Civil Justice (LCJ). LCJ is a non-profit organization dedicated to promoting the corporate and defense perspective on proposed changes to the Federal Rules of Civil Procedure. The organization works proactively to achieve specific rule reforms by galvanizing corporate and defense practitioners and legal scholars to offer consensus proposals to Congress as well as the Federal Civil Rules Advisory Board.

LCJ
LAWYERS FOR CIVIL JUSTICE

Ashley Villaverde Halvorson Named President of Los Abogados

Partner Ashley Villaverde Halvorson has been elected as the 2018–2019 President of the Board of Directors of Los Abogados. Since starting out as a member in 2010, Ashley has served one term as vice president, three terms as secretary, and served as Chair of the Gala and Mentorship Committees. Los Abogados is Arizona's Hispanic Bar Association, whose primary purpose is to enhance the quality of legal services provided to the community.

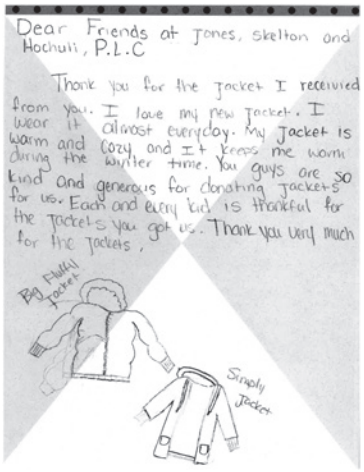
LOS ABOGADOS™
Hispanic Bar Association

JSH GIVES BACK

Annual JSH Silent Auction Benefits 600 Elementary School Students

During the holidays, JSH spreads the cheer by supporting a local elementary school through fundraising efforts. This year, we were able to support two elementary schools, Desert View Elementary School and Mitchell Elementary School, as well as adopt a family in need. Every student at Desert View Elementary was gifted with a winter jacket, and every student at Mitchell Elementary received a wrapped toy and visit from Santa (played by Associate Gianni Pattas). We feel honored to be able to provide these elementary students with some well-deserved holiday cheer.

Our "adopted" family of five was in need of basic household necessities, including new mattresses and bedding, a kitchen faucet and garbage disposal, a water heater, and washer and dryer, as well as home improvements to repair broken doors, plumbing, and holes in the ceiling and walls. JSH was able to purchase, install and repair everything the family needed. This included providing the family with space heaters and blankets, and gift cards for cold-weather clothing and holiday food.



We would not be able to provide these donations without the help of our gracious vendors and our employees. Every year, our kind-hearted vendors donate items for the Charity Committee's internal silent auction where attorneys and staff bid on items including gift baskets, gift cards, certificates for entertainment and experiences, hand-crafted items, baked goods, and electronic devices.

During our December 2017 silent auction, the firm's Charity Committee raised $4,434. All proceeds from the auction went toward providing donations to the elementary school kids and our adopted family.

JSH Sponsors Annual CLLSA Fajita Cook-Off

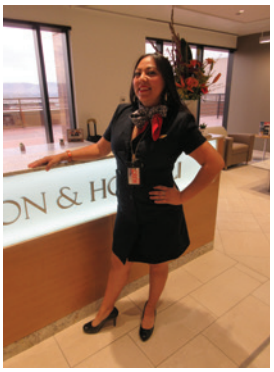
JSH sponsored the Sandra Day O'Connor College of Law, Arizona State University Chicano/Latino Law Students Association (CLLSA) 32nd Annual Fajita Cook-Off. Teams of students competed to make the best fajitas for attendees to vote on and enjoy. Proceeds from the Fajita Cook-off go toward funding Book Scholarships for CLLSA members and to enable members to participate in Moot Court.

IN-HOUSE **EVENTS**

Annual Halloween Costume Contest

1st Place – Raquel Auriemma (Legal Secretary), who dressed as a gumball machine
2nd Place – Krisha Stevens (Paralegal), who dressed as a wrecking ball

Honorable mentions to:
Lina Lujan (Legal Support Coordinator), our very own Rosie the Riveter;
Leslie Castaneda (Receptionist), an airline pilot;
Shelley Coffey (Legal Secretary), dressed as a cheerleader; and
Our Copy Center Team who dressed as "The Spice of Life!"



Valentine Dessert Contest

JSH employees got creative with their delicious Valentine treats! Our lucky attorney judges were Josh Snell, Jon Brinkman, Alexix Terríquez and Laura Van Buren. Homemade treats included pink sugar cookies, red velvet brownies, angel food cake, cupcakes and walnut cake.

JSH Wraps Up Annual In-House Trial College Program

Every year, experienced JSH partners host an 11-week Trial College to provide practical, hands-on training for associates. The Program is designed to significantly develop and refine the skills necessary for excellence in trial practice, which includes evaluation from senior trial partners. This year's associate participants included Sam Arrowsmith, Taryn Campbell, John Gregory, Joel Habberstad, John Lierman, Ravi Patel, Gianni Pattas, Dave Potts, Jonah Rappazzo and Clarice Spicker. Managing Partner Bill Holm and Senior Partner Georgia Staton acted as Judges during the mock trial.

The first half of the 11-week program includes weekly 1-hour lectures on fundamental trial techniques. The second half of the program focuses on a 3-day mock trial, with other JSH attorneys acting as jurors and judges. The program concludes with deliberations and a verdict reached by the jurors.

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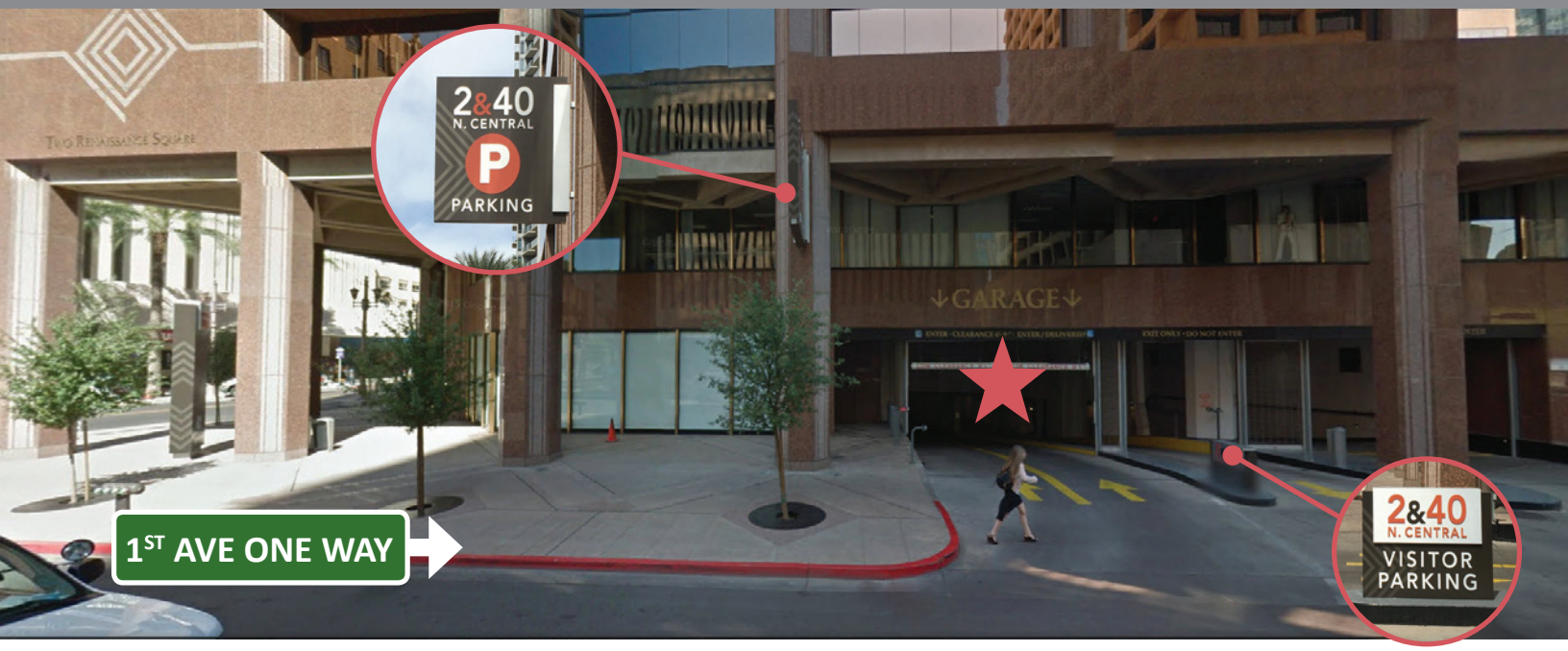

DIRECTIONS TO JSH

The firm is located on the 27th floor of Two Renaissance Square Tower, on the south east corner of 1st Avenue and Adams Street. The entrance to our underground parking garage is on the east side of 1st Avenue, immediately south of Adams Street. Traveling south on 1st Avenue (one way street), cross Adams Street and take an immediate left into our underground parking garage (see red star above). Using one of the first three lanes to dispense a parking ticket, visitors may park on any level and in any space not marked Reserved. Upon parking, take the elevator from the garage to the building lobby (L). Remember to bring your parking ticket to our receptionist on the 27th floor for parking validation. If you have an oversized vehicle that will not fit in the underground parking garage (maximum clearance is 6'9"), you will need to use the metered parking spaces on Adams Street. Visit www.phoenix.gov/streets/parking-meters/map for details and locations.

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CELEBRATING 35 YEARS 1983-2018

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