

# atissue

A **STONE | DEAN** PUBLICATION

*Connecting you to trending and relevant  
legal developments in California*



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## Q&A with Gregory S. Miller

**Gregory S. Miller, Esq. is a skilled attorney with a variety of interests. In this Q&A article, Gregory shares details about his hobbies and his path to a legal career.**

### So far, what has been the most rewarding experience/part of being an attorney for you?

There's nothing like the vindication that comes from a jury seeing the case your way, and knowing that your assessment and evaluation were correct.

### Why did you decide to go to law school?

There were two main factors in my decision to pursue law as a career. From as early as I can remember I recall having a strong sense of what was right and what was wrong and feeling obligated to

get involved when I observed someone being taken advantage of. The second influence was a coach, family friend and mentor, who I looked up to and admired for his integrity, involvement and practice of helping others.

### What do you consider to be the most rewarding aspect of working for Stone | Dean?

Stone | Dean is a truly unique environment that cultivates, supports and rewards professionalism and integrity on all levels.

### What sort of pastimes do you like to engage in?

I am an outdoorsman. You will find me exploring and enjoying nature whenever I have time: hiking, traveling, fishing, skiing, canoeing, surfing, cycling, golfing, and tennis.

### If you chose not to go to law school, where do you think you would be now?

MMA fighting. I like the idea of a straight forward contest with few rules.

### Are there any pre-trial rituals you like to engage in to bring yourself luck?

I am not superstitious. I prepare thoroughly and avoid distractions before a trial.

### Did you consider practicing a different area of law before choosing litigation?

Briefly, I practiced entertainment law and family law before finding a home in civil litigation.

### What was the first job you ever had? Did you enjoy the experience?

Wow, this is going way back. Mowing lawns, washing cars, bussing tables. I

always had a strong work ethic. My father was born a farmer and had a strong work ethic, up early and worked long hours. My mother worked too. We were not an idle family.

### How would you describe your approach to litigation?

Thorough. I approach every case with a healthy distrust and suspicion, and I investigate and dig.

### Describe yourself in three words.

Professional, passionate, balanced.

### What did you enjoy most about law school?

Although it was a significant time for personal growth and I enjoyed it immensely, I was not extremely disciplined as an undergraduate student at UCLA. When I entered law school there was a new and different sense of focus and seriousness that I enjoyed, along with the discovery that the law was something that I enjoyed and could do professionally.

### Do you consider social media pages such as LinkedIn to be a valuable marketing tool as an attorney?

Social media pages are additional tools to make and continue contacts, but I am a firm believer in personal contacts as the best basis for lasting relationships.

### What advice would you give to someone considering a career in law?

Find a niche that you have a passion for so that you will be motivated. Then network with people that have qualities that you respect, so that you develop those traits.

## A Message from the Partners

Happy New Year to our valued clients and treasured friends! As we all recover from the busy holiday season and settle in for an exciting new year, Stone | Dean's Winter 2015 edition of At-Issue includes a myriad of information about changes and developments in the law and interesting information about our staff and activities. We hope you enjoy our articles and on behalf of all of us at Stone | Dean, we wish you and yours a healthy, happy and prosperous New Year!

- Greg, Kristi and Robyn





They are now expressly protected under FEHA. The law also extends the existing religious belief accommodation requirements to unpaid interns and volunteer workers.

- California finally conformed its requirements for eligibility waiting periods to the federal standard adopted in the Affordable Care Act (ACA). Effective January 1, 2015, an individual who is otherwise eligible to participate in a group health plan must be enrolled no later than the 90th day following the date of hire. (SB 1034.)
- Employers who use temp agencies are now liable for any unpaid wages and the failure to secure workers' compensation insurance. (AB 1897) The law applies to employers with 25 or more employees who hire more than five temps from agencies at a time. Employers should perform due diligence on a staffing agency to determine whether the agency complies with all relevant employment laws. Also, while the statute cannot be waived by agreement, employers may contract with a staffing agency for indemnification for the agency's failure to pay required wages or secure valid workers' compensation coverage.
- California law permits an employee to pursue a civil action to recover unpaid wages or compensation, and to also recover liquidated damages equal to the unpaid wages plus interest. AB 2074 provides a longer statute of limitations for recovering liquidated damages for unpaid wages. Employees previously had a three-year statute of limitations to seek recovery of unpaid wages but just a year to seek liquidated damages. Now, the statute of limitations is three years for both, which increases employers' exposure for wage and hour violations.
- AB 2751 expands the definition of an unfair immigration-related practice to include threatening to file or filing a false report or complaint with any state or federal agency. Current law extended the protection only to reports filed with the police. It also clarifies

## New Employment Laws for 2015

By Robyn M. McKibbin, Esq.

Governor Brown signed a host of new employment laws for 2015. Some of the laws which will impose new obligations and potential liabilities are discussed below.

- AB 1660 amends the Fair Employment and Housing Act (FEHA) to forbid discrimination on the basis of national origin against holders of a special driver's license issued to undocumented residents. Last year the California Department of Motor Vehicles was authorized to issue driver's licenses to people who cannot provide documentation that they are legal residents of the United States. The new law also prohibits an employer from requiring an applicant to present a driver's license as a condition of employment, unless a driver's license is required for the job.
- Employers subject to California's mandatory AB 1825 sexual harassment training requirement for supervisors will need to revise their programs to include prevention of "abusive conduct." The law was enacted in

response to the growing prevalence workplace bullying. AB 2053 amends FEHA and defines "abusive conduct" as "[c]onduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." The law does not specify how much of the AB 1825 training must address workplace bullying, nor does it provide specific guidance on what must be included in the training.

- AB 1443 responds to several court rulings in other jurisdictions suggesting unpaid interns or volunteers are not "employees" for purposes of harassment and discrimination laws.

**CONTINUED ON PAGE 5**



## Truth is All a Matter of Perspective

By Leslie A. Blozan, Esq.

As a society, we like to think we seek the truth. Truth is a cherished virtue. Parents want their children to tell the truth. Investigators search for the truth. Witnesses solemnly swear to tell the truth. The truth shall set us free. However, social scientists are discovering that truth is a lot less objective than we would like to believe.

In the realm of litigation, truth seeking and truth finding is a perilous task. To successfully resolve a case, a litigating party must persuade the opponent, mediator, judge or jury of truthfulness, trustworthiness and ultimately, justice. Persuasion requires more than simple truth telling, since truth itself is an amorphous concept.

What is truth? The dictionary tells us that "truth" is "that which is true or in accordance with fact or reality." The definition necessarily leads us to question both truth and reality, as studies confirm both are subjective.

When relationships break down and litigation follows, trust between the parties has been destroyed. Each side identifies with their own truth and justifies their own actions as necessary and proper. The other side, with a different perception, sees the opponent as a liar, untrustworthy and deceptive.

truth

genuine or factual 2  
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For a witness, telling the truth requires describing a memory of a past event. That seems simple enough; something happened, someone saw it, the person describes what they saw. The problem is that memory is subject to all of the personal biases, knowledge, fears and stressors each person carries within themselves.

A classic example is a crime victim, confronted with a gun. The fearful witness is often distracted by fear of the gun, preventing them from noticing details about the assailant. The failure to notice details, in turn, can lead to the well-meaning but unreliable attempt to fill in blanks of memory. Those efforts reflect the "truth" as the witness remembers, but often bear little relation to the objective truth. People are wrongly convicted based on unreliable eyewitness testimony the witness believes is truthful.

The opportunities for selective perception of truth are endless. Children growing up in the same family, experiencing the same event often have surprisingly different memories of what happened. Ask any couple how they met or became engaged and they will often tell different stories. Multiple witnesses to accidents or traumatic events have widely varying recollections.

The gap between perception and conflicting truths can be bridged. In negotiations and mediations, trust can be rebuilt. A lawyer's job is to create empathy for a client and the client's position. It is our job to take objective facts and witness perceptions and weave them into a sympathetic, simple story. The story must be credible and emotional, allowing the listener to develop empathy for the presenter. Trust is built from credibility, likeability and identification. When a lawyer and witness are trusted, they are believed. When they are believed, they are persuasive, and persuasion equals success.

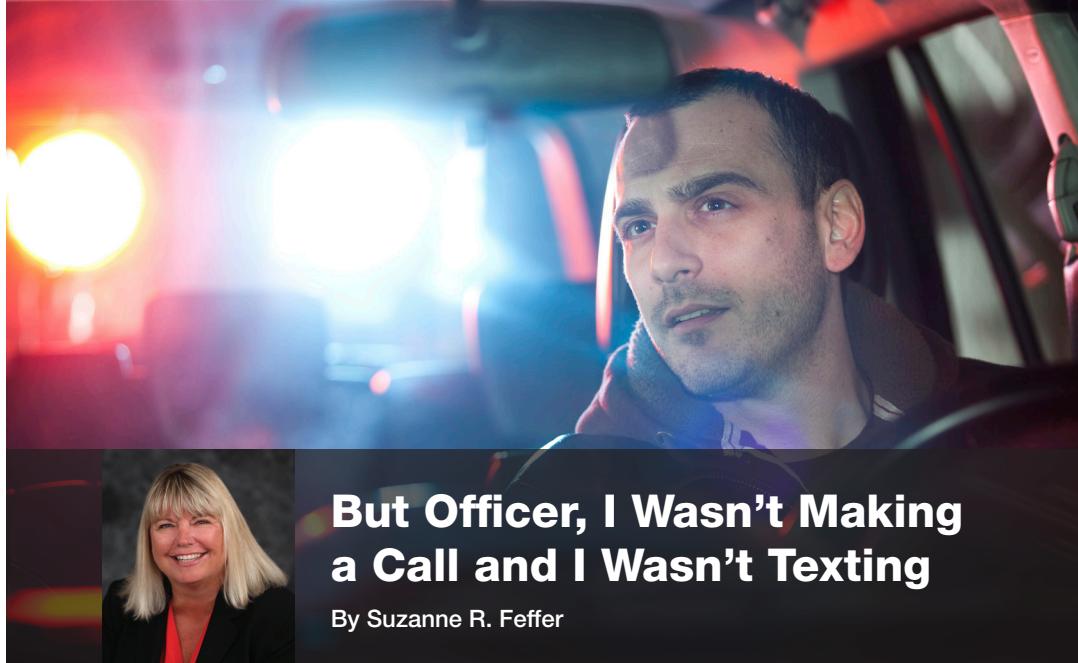
**If you want to test your powers of observation and memory, there is a simple test you can take. Go to the website [www.theinvisiblegorilla.com](http://theinvisiblegorilla.com) and take the Selective Attention test devised by Dr. Christopher Chabris and Dr. Daniel Simons.**

that an employer cannot discriminate or retaliate against an employee who updates his/her personal information "based on a lawful change of name, social security number, or federal employment authorization document". The law complicated terminations of employees who come forward with a new social security number or identity. While federal immigration law does not prohibit terminations for an employee's prior dishonesty, California's law calls into question the practice of terminating employees who falsified their information at the time of hire, and later come forward to correct their personal information with their employer. Employers may take action against employees who update other types of information, such as educational qualifications or criminal history, because of previous misrepresentations. This law also clarifies that an employer's compliance with this law may not serve as the basis of a discrimination claim, including any disparate treatment claim.

- AB 1723 expands the Labor Commissioner's power to issue citations for the under payment of wage to include waiting time penalties. Labor Code section 1197.1 enumerates various statutory penalties against employers who fail to pay minimum wage. It authorizes employees to recover a civil penalty, restitution of wages, and liquidated damages through a "Berman Hearing" before the Labor Commissioner, a civil action, or a Labor Commissioner citation. Waiting time penalties were authorized only for the first two mechanisms. This law amends section 1197.1 to harmonize these three recovery mechanisms and authorize waiting time penalties in all three scenarios.

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**To review a full listing of the new laws, go to [www.stonedeanolaw.com/whitepapers/](http://www.stonedeanolaw.com/whitepapers/)**



## But Officer, I Wasn't Making a Call and I Wasn't Texting

By Suzanne R. Feffer

I hear many explanations for use of a cell phone while driving. They span from claims that the driver was not actually making a call because he was were just picking up voicemail messages to a defense based on the fact that the driver held the phone up to her mouth (on speaker) and not up to her ear. My personal favorite is a driver who explained that he was not using his cell phone – he just has a habit of driving while holding the phone to his ear.

In a case of first impression, the court has held that reading a map on your cell phone does not violate the law. In *People v. Spriggs* (2013) 224 Cal.App.4th 150, while stopped in traffic, the defendant driver pulled out his cell phone to check his mobile map app to find a way around the congestion. He was cited for violating Vehicle Code section 23123(a). The Code prohibits drivers from "using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving." (Vehicle Code section 23123.5 prohibits use of a wireless device to "write, send or read" a text while driving.) The driver argued that the Code prohibited only listening to and talking on the telephone in the driver's hand while driving. There was no similar prohibition against looking at a hands free device.

With only one other case interpreting section 23123 (holding that use of a cell

phone while stopped at a red light was still use while driving within the meaning of the Code), the court was left to examine whether the statute encompassed the use of a mobile app while driving. The court reviewed the Legislative history, noting that the "Legislature was concerned about hand-held use of wireless telephones [and] this concern was addressed by prohibiting drivers from engaging in conversations while holding the telephone in one's hand rather than prohibiting all hand-held uses of the telephone." Id at 157. Admittedly, when the statute was proposed in 2006, most cells phones did not have functions beyond making telephone calls. While the Legislative history did make mention of general concerns regarding distracted driving, there is no indication that the Code was intended to embrace conduct beyond telephone calls. Thus, the court concluded that the Code did not prohibit all uses of hand-held devices and use of the defendant driver's mobile map app did not violate the Code. Id at 165.

While use of mobile apps may not currently be a violation of the Vehicle Code, it may well be considered distracted driving and, therefore negligent, if one is involved in an accident. Moreover, explaining to the officer that you were really just looking at an app and not reading a text may prove to be rather difficult, landing you in traffic court all the same.



# Paid Sick Leave

By Robyn M. McKibbin, Esq.

With the passage of the "Healthy Workplaces, Healthy Families Act of 2014," California became the second state to require that employers provide paid sick leave. Unlike several other leave laws, there is no exemption for small employers. The new law applies to exempt and non-exempt employees who work in California 30 days or more in a year. This includes temporary, part-time, and seasonal employees. Effective July 1, 2015, employees must accrue no less than one hour of paid sick time for every 30 hours worked. This equates to approximately 1.3 hours/week, or 5.3 hours/ month, for employees who work 40 hours a week.

Employees are entitled to use accrued paid sick days beginning on the 90th day of employment and can be used in increments as small as two hours.

Unused accrued paid sick days carry over from year to year. If the employer elects to implement a carry-over policy, it may limit an employee's use of paid sick leave to 24 hours or three days each year. Employers are not required to compensate employees for unused sick days upon termination of employment, but they must reinstate the previously unused balance if they rehire the employee within one year. The rehired employee is entitled to use the previously accrued and unused paid sick days and to accrue additional paid sick days upon rehire.

If the need for paid sick leave is foreseeable, the employee must provide "reasonable advance notification." If the need is unforeseeable, the employee must provide notice "as soon as practicable."

Employers can avoid the accrual and carry-over requirements if they currently

have a paid leave policy that provides no less than three days of sick leave and provide the full amount of sick leave for each year of employment, calendar year or 12-month basis, i.e., three days of sick leave are given to all employees on January 1 or on the anniversary of their hire date.

Employers cannot require employees to locate a replacement worker to cover days on which an employee uses paid sick days. Moreover, employers must be careful about the timing of any disciplinary action. Employers cannot fire, demote, suspend or otherwise "discriminate" against an employee within 30 days of him/her taking a sick day or a rebuttable presumption arises that it was an act of retaliation, which could trigger a wrongful termination claim.

Sick leave is paid at the employee's regular rate. If the employee is paid by commission or piece rate, or otherwise has a variable hourly wage, or is a non-exempt, salaried employee, then the rate of pay is calculated by dividing the employee's total wages (not including overtime) by the employee's total hours worked in the full pay periods in the prior 90 days of employment.

Employees are entitled to use paid sick time for preventive care for themselves or a family member, as well as for the diagnosis, care, or treatment of their or their family member's existing health condition. "Family member" is broadly defined and includes in-laws, grandparents and grandchildren, among others. Paid sick leave may also be used by victims of domestic violence, sexual assault, or stalking.

Employers must notify employees of the amount of paid sick leave available on the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages.

The new law does not apply to home health care workers, employees covered by a collective bargaining agreement that expressly provides for the wages, hours of work, and working conditions of employees, as well as for paid sick days (and other conditions), individuals employed in the airline industry, and employees covered by the federal Railway Labor Act if they receive compensated time-off at least equal to the new law.

While the paid sick leave does not begin until July 1, employers must inform employees of the new law by January 1, 2015. A poster explaining the new law must be displayed in a conspicuous place at all worksites. The California Labor Commissioner created a poster for this purpose which can be downloaded at [http://www.dir.ca.gov/DLSE/Publications/Paid\\_Sick\\_Days\\_Poster\\_Template\\_%2811\\_2014%29.pdf](http://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_%2811_2014%29.pdf). The Labor Commissioner also updated its Wage Theft Prevention Act/Labor Code Section 2810.5 Notice to reference employee rights under the new sick leave law. Employers should use the new Notice beginning on January 1. The revised Notice can be downloaded at [http://www.dir.ca.gov/DLSE/Publications/LC\\_2810.5\\_Note\\_%28Revised-11\\_2014%29.pdf](http://www.dir.ca.gov/DLSE/Publications/LC_2810.5_Note_%28Revised-11_2014%29.pdf).

Practically, the new law undermines paid time off (PTO) policies. Some employers elect to combine vacation, sick leave, holidays, personal days and/or floating holidays into one pool. PTO policies simplify accrual rates and relieve employers from policing how employees use their personal time off. Unused PTO time is considered a vested right and must be paid out upon separation. If an employer elects to continue its PTO policy, it must segregate a portion as its sick leave. This could complicate the accrual rates and create two pools of paid leave subject to two different sets of rules: the new law and the employer's current PTO rules.

Alternatively, if an employer elects to continue its PTO policy, it must treat all of the paid leave as sick leave. This alternative still complicates the accrual rate and exposes the employer to employees taking paid leave with little to no notice without repercussion.

The easiest alternative is to eliminate PTO and return to offering separate vacation and sick leave.



# Latest Legalities

By Kristi W. Dean, Esq. and Angie Jones

## Here are some interesting end-of-year stories to amuse, entertain and provoke your grey matter.

**The “Man” Can Take You, but Not Your Cell Phone!** During the era of mobile technology, and the holiday season where cheer is often accompanied by a modicum of overindulgence and resulting rabble rousing, it's good to know that you may be arrested without a warrant, but your phone cannot. In the June 2014 ruling in *Riley v. California*, the United States Supreme Court overturned prior law and ruled that police cannot, without a warrant, search cellular phones seized from an individual who has been arrested.

Prior to *Riley*, police could search any item immediately associated with an arrestee's person under an exception to the warrant requirement called “search incident to lawful arrest” meaning, if you were lawfully arrested, your phone was usually fair game. However, now police must obtain a warrant or consent before searching an individual's cell phone, even incident to arrest. The Court noted that warrantless searches of cell phones might be permitted in emergencies, provided the government's interests are compelling enough to override the privacy interests at stake.

*[Riley v. California (2014) 134 S.Ct. 2473]*

**Jail...Let's Not Do That Again** Speaking of warrants, one silently issued arrest warrant landed self-proclaimed, “King of Instagram” in jail earlier this month. Dan Bilzerian, who won \$50 million playing poker (or so he claims), was arrested at Los Angeles International Airport on suspicion of possessing or manufacturing illegal explosive devices, according to the Los Angeles Police Department.

A far cry from his usual scantily-clad entourage of well-endowed women, Bilzerian was held overnight and without

bail at a Los Angeles County jail before being released. It is unclear whether the charges have been dropped.

Bilzerian, who has over 5 million Instagram followers, did not miss a social media beat. Upon being released from jail, the millionaire promptly tweeted a photo of himself and two women on an airplane and captioned it, “Jail...Let's not do that again.” A sentiment undoubtedly held by most who exit jail after an overnight stay.

The warrant for Bilzerian came out of Clark County, Nevada. Need we say more?

*[Source: Businessinsider.com, December 11, 2014]*

### Woman Sues Disney For \$250M, Alleges *Frozen* Is Based On Her Life.

Isabella Tanikumi is claiming that Disney's blockbuster film, *Frozen*, infringed on the copyright of her books, *My Living Truth* and *Yearning of the Heart*, both of which are based on her life story. Her suit delineates eighteen similarities between her work and *Frozen*, including details of the village, the sisters, the younger sister's memory loss, and even the two male characters in the film, Hans and Kristoff (which are named Hans and Christoff in her work).

The suit, filed on September 21, demands a jury trial and also seeks an order requiring Disney to, “cease and desist from any and all sales.”

The lawsuit leaves many people wondering: Is there something to Tanikumi's claim or should she just, “let it go”?

*[Source: Foxnews.com/latino, September 29, 2014]*

### On The Hook: Re-Living the Horror.

The families of nine victims in the Sandy Hook shooting have filed a wrongful death lawsuit against Bushmaster, the company out of North Carolina that manufactured the semiautomatic rifle Adam Lanza used the day of the incident. The rifle distributor and the gun store that sold the rifle to Nancy Lanza, the shooter's mother, have also been named as defendants.

Despite the fact that these businesses

did not break any laws, the plaintiffs claim each company is guilty of “negligent entrustment” because they made and/or sold a weapon with no appropriate civilian uses to the general public.

At the time of the shooting, the gun used by Lanza (a Bushmaster XM15-E2s rifle) was legally compliant and was not considered an “assault rifle.” It was only after the shooting that the Connecticut state legislature changed the law to ban the particular model used by Lanza.

If the lawsuit appears to be a stretch, it may be. It not only challenges the actions of arguably law-abiding companies but it proposes an exception to the Protection of Lawful Commerce in Arms Act (PLCAA) enacted in 2005 and designed to prevent exactly this type of litigation. The PLCAA is a federal statute that provides protection to gun manufacturers and dealers and prohibits “qualified civil liability actions,” which “result from the criminal or lawful misuse” of firearms or ammunition. Civil plaintiffs may not sue gun manufacturers or distributors for the crimes other people commit with the companies' weapons or ammunition (barring some misconduct on the part of the companies themselves). One of the six exceptions to the civil immunity provided by the statute is “negligent entrustment or negligence per se” – a claim which involves holding one party liable for entrusting a product to another party who then causes harm to a third party.

Plaintiffs will argue that the assault weapon design was contracted specifically and exclusively for wartime use and thereafter manufactured for police use; further, the initial design was never intended for mainstream commerce or civilian use. The assault rifles were designed to fire rapidly and not necessarily accurately; and initially manufactured to kill the enemy in mass. Therefore, the plaintiffs will argue, the manufacturers should have known the guns would be used for nefarious mass killing, and by criminals and the mentally unstable.

The debate will undoubtedly be heated and passionate.

*[Source: Businessweek.com, December 16, 2014]*



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## NEWS & ANNOUNCEMENTS

→ Gregory Stone and Kristi Dean have been named as 2015 “Super Lawyers”, a rating service by Thomson Reuters. The process begins with a diverse list of the top attorneys nominated by their own peers. The nominations are then validated with third-party research across 12 key categories. The final nominees are then reviewed by a highly credentialed panel of attorneys. Both Greg and Kristi have been consistently nominated as Super Lawyers since 2006.

→ In December, Kristi Dean and Leslie Blozan attended the Defense Research Institute Annual Conference in San Francisco where they networked with defense counsel throughout the nation and listened to educational lectures on cutting edge issues of law.

→ In November, Kristi Dean attended the 2014 Annual Company Appreciation Night by the Insurance Brokers and Agents of the San Fernando Valley at the Woodland Hills Country Club. Stone | Dean supported the event as an entertainment sponsor.

→ In November and January, Kristi Dean spoke at the CPCU El Camino Chapter monthly meetings where she spoke about

“major” claims and fraud prevention. Kristi is an approved continuing education provider for the California Department of Insurance.

→ Robyn McKibbin successfully settled a wage and hour lawsuit on behalf of a family-owned electrical company for a fraction of the plaintiff’s purported damages.

→ In December, Leslie Blozan attended career day at the Lycee Francais de Los Angeles. She had the opportunity to introduce French-speaking students to the civil litigation system in California, fostering a new generation of litigators.

→ In February, Robyn McKibbin spoke at the Business Fundamentals Boot Camp on “Employment Issues That Arise as Companies Grow”. The presentation educated business professionals on employment law from a litigator’s perspective.

→ In January, Kristi Dean, Leslie Blozan and Robyn McKibbin hosted and presented an educational Mock Trial for the California Insurance Wholesalers’ Association’s Annual Conference in La Jolla. Members of CIWA played the roles of attorneys, judge, witnesses and jurors. Participants and spectators received three hours of CE credit for the program.

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