WINTER 2017

atissue

A STONE | DEAN PUBLICATION

Connecting you to trending and relevant legal developments in California

inside this issue:

A Few Words from Stone | Dean

As 2017 starts ramping up, Greg and I would like to pause for a minute and thank you, our loyal readers and valued clients, for our successful 2016. We expanded our practices by adding our Transportation and Trucking Practice Group, and welcomed two new attorneys to our firm, Gregg Garfinkel and Angie Jones. We thank our fantastic clients and our exceptional staff for making this possible. Our Core Values at Stone | Dean help us focus on what's important: We strive to make a real difference for our clients!

We hope you enjoy this edition of *At Issue*. You will learn a little more about Angie and our new Transportation Practice Group, will be educated on some of the new laws enacted in 2017 and will get some useful tips from a legal perspective on moving your home. We also present the second part of a serious and important issue regarding "End of Life" decisions. Lastly, we will challenge your view of privacy, and the reality of technology that requires a new view of that expectation.

Last but not least, we wish all of our readers and special loved ones a very successful 2017.

– Kristi and Greg

Q&A with Angela Jones, Esq.

To our Readers: Learn a little more about our newest attorney at Stone | Dean!

Congratulations on becoming our newest attorney! What has been the most surprising thing about actively practicing law? How small the legal community really is. They tell you that in law school, but I don't think anyone really appreciates the sincerity of that statement until they start practicing. You realize your reputation really is everything when you see the same names come across your desk and the same faces in court.

What is the main difference between law school and law practice? During law school, it's all about you: how you study, how you test, and how well you do. In practice, there are so many moving parts and additional considerations. For example, you have a case to manage, a client to advocate for, and an opposing counsel to maintain a rapport with.

How do you like to decompress after a long day? As much as I hate to admit this, I enjoy immersing myself in bad reality television after a long day (queue all the "Real Housewives" installments). I also enjoy cooking and sharing a glass of wine with my husband.

What is your favorite part of practicing law? I enjoy working with clients to prepare an effective defense. Each case is different and I love arranging the pieces of each one into a strong defense strategy that puts clients in the best position to achieve the best possible case result.

Which area of law intrigues you the most? Criminal law and procedure. The laws are fascinating (as are the cases, typically). Other areas of law usually involve money or property; however, criminal law involves people's freedoms. We are a society of checks and balances and it's so important to have lawyers on both sides who understand they are responsible for ensuring constitutional due process.

What do you enjoy most about working for Stone | Dean? Hands down, our culture. The higher-ups are consistently reinforcing that we need to keep learning and evolving. Also, you are allowed to be your own attorney (within limits, of course). But you're encouraged to develop into the practitioner you feel comfortable being.

What inspired you to become an attorney? I cannot attribute my desire to become an attorney to one point or thing in my life (I know, so anticlimactic!). I remember telling my mom and uncle that I was going to be an attorney when I was young. I've never wanted to be anything else. When you know, you just know.

When you started at Stone | Dean you were a receptionist. Did you have any idea that four years later you would be an associate attorney? I knew that one day I would be an attorney; I was not sure what job prospects would be available to me when I graduated. I am very fortunate to have started with a firm that is and was so willing to work with me while I attended school and took the time to invest in me so I would be able to hit the ground running after graduation.

If you could argue any case in history, which one would it be, and why? I have three - all for different reasons. For its excitement and publicity: The People v. OJ Simpson! Talk about the case of a lifetime for a young prosecutor.

For its immeasurable impact on the rights of arrestees: Miranda v. Arizona. In that decision, the U.S. Supreme Court held that arrestees must be advised of their rights before being questioned by police.

For its effect on civil liberties: Brown v. Board of Education, where the U.S. Supreme Court decided that "separate" was not equal and took steps to end segregation.

What helps you prepare for trial? Bouncing arguments, lines of questions, and statements off my husband and my family.

What advice would you give to someone interested in going to law school? To make sure you are doing it for the right reasons and that it is really something you want to do. It's taxing, expensive, and, at times, a big sacrifice.

Learn more about Angela on our website at:
http://stonedeanlaw.com/our-people/attorneys/angela-jones/

Case in Focus:

Gregory Miller, Esq. gets case thrown out by way of motion for summary judgment using the “trivial defect” defense, then defends and wins appeal!

Facts

Greg Miller successfully represented a Stone | Dean supermarket client in a personal injury case involving a woman who alleged she tripped and fell on a buckled linoleum tile at the store’s entrance. The defect in the floor measured 3 inches in diameter and less than 1/8 inch at its highest point. The incident was not disputed and was captured on the store’s security camera.

As a result of the fall plaintiff alleged severe injuries requiring an excess of $280,000 in medical bills as well as pain and suffering damages. All efforts to resolve the case before trial failed.

Legal Standard - The Trivial Defect Defense

The trivial defect defense holds that walkways, whether public or private, are not required to be maintained in perfect condition. The duty of care imposed upon a property owner [even one with actual notice of a defect] does not require the owner to repair "trivial" or "minor" defects. (*Whiting v. City of National City* (1937) 9 Cal.2d 163, 166 [applied to a public property owner]; *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 398–399 [applied to a private property owner].)

The policy behind the trivial defect defense is a recognition that: 1) it is impossible to maintain heavily traveled surfaces in perfect condition; slight imperfections and minor defects inevitably occur in construction and maintenance, and their existence is not unreasonable, and 2) other imperfections will naturally arise out of the passage of time due to natural wear and tear.

The issue here was whether the trivial defect defense could be applied to the interior of a grocery store. Traditionally the defense has been asserted by municipalities in the context of defending against slight differentials between two sidewalk slabs.

Case law developed over time holding that where the height variance between adjacent sidewalk panels was 3/4 of an inch or less, the court had discretion to deem the defect trivial and dismiss the case. Later cases modified this analysis to hold that there was no bright line “height test,” and that the court had to consider not only the height of the defect but also the surrounding circumstances that may make the defect more dangerous. Some of the factors include whether there were jagged edges or a deep hole; whether the defect was concealed from view; lighting conditions; and whether other persons were injured by it.

The Summary Judgment Motion

Greg moved the court to dismiss this case at the trial court level by way of motion for summary judgment because there were really no material facts in dispute for a jury to decide. The basis for the motion was on the grounds the defect was merely “trivial.” The motion assumes all of the facts in a light most favorable to the plaintiff, basically giving the plaintiff all of the benefit of doubt.

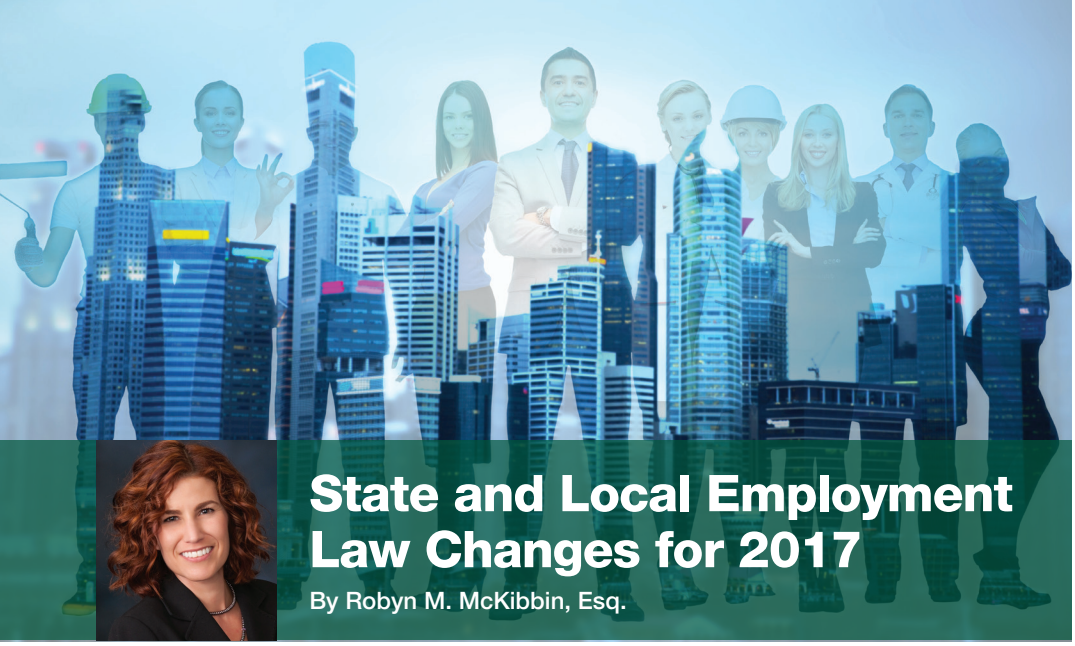
In opposing the motion for summary judgment, plaintiff relied heavily on a paid expert witness declaration stating that the defect was, in that expert’s opinion, more than trivial and in fact dangerous; was a violation of the building code and was unsafe because it was in a high customer traffic area.

Instead of retaining a rebuttal expert at considerable expense, Greg countered the expert opinion by arguing plaintiff’s expert’s opinions were merely conclusory and lacking foundation. The trial court agreed and held that the trivial defect defense was applicable to the defendant grocery store, and granted a summary judgment dismissing the case.

The Appeal

Plaintiff immediately filed an appeal. Greg handled the appellate briefing and oral argument. The issue on appeal was whether the trial court properly applied the trivial defect analysis to the facts of this case and whether plaintiff’s expert witness had supplied sufficient evidence to overcome the trivial defect defense.

The court unanimously sided with Greg’s position — upholding the trial court’s granting of the motion for summary judgment — and awarded costs to Stone | Dean’s client.



State and Local Employment Law Changes for 2017

By Robyn M. McKibbin, Esq.

As business owners, our readers need to be kept up to speed on the newest laws that affect many businesses. Here are the highlights of some of these new laws, most of which go into effect on January 1, 2017.

Wage & Hour

On January 1, 2017, companies with 26 or more employees must pay a minimum wage of $10.50/hour under state law. Smaller businesses with 25 or fewer employees are not required to begin the scheduled increase until 2018. However, the minimum wage for employees working in Los Angeles City increased on July 1, 2016, to $10.50/hour for companies with 26 or more employees. Where a conflict exists between a California statute and a local ordinance, employers should follow the law that is more generous to employees.

Under the L.A. ordinance, an "employee" is any individual who performs at least two hours of work within the geographic boundaries of the City. The size of an employer will be determined by the average number of "employees" employed during the previous calendar year. For a new business that did not operate during the previous calendar year, its size as an employer will be determined by the number of employees it employed during its first pay period.

In 2014, the California Domestic Worker Bill of Rights went into effect providing new overtime rules for domestic workers. It was set to expire in 2017, however, Governor Brown signed a bill removing the expiration date, which means the overtime laws remain in effect.

Discrimination and Retaliation Protections

When companies verify that workers have the necessary documentation to work in the United States they may not: (1) request more documents or different documents than are required under federal law, (2) refuse to honor documents tendered that on their face reasonably appear to be genuine, (3) refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work, or (4) attempt to reinvestigate or re-verify an incumbent employee's authorization to work using an unfair immigration-related practice (SB 1001). Any person who is deemed in violation of this new law is subject to a penalty imposed by the Labor Commissioner of up to $10,000, among other relief available.

Beginning March 1, 2017, any business establishment that has single-user toilet facilities must mark them as "all gender" toilet facilities.

Leave Protections

By July 1, 2017, employers with 25 or more employees must provide specific information in writing to new employees upon hire and to other employees upon request of their rights to take leave under *Labor Code* Section 230.1, relating to victims of domestic violence, sexual assault, or stalking. The Labor Commissioner will develop a form that employers may elect to use to comply with these provisions and to post it on the Labor Commissioner's website. Employers are not required to comply with the notice of rights requirement until the Labor Commissioner posts such form.

Arbitration Agreements

New *Labor Code* Section 925 prohibits employers from requiring that an employee who lives and works in California agree, as a condition of employment, to a provision that would: (1) require the employee to litigate or arbitrate outside of California claims that arise in California; or (2) deprive the employee of the protection of California law with respect to a controversy arising in California. A contract that violates these restrictions is voidable at the employee's request, and the matter would be adjudicated in California under California law. The law applies to contracts entered into, modified, or extended on or after January 1, 2017. An employee who successfully sues to void such offending provisions can recover reasonable attorney's fees. However, it does not apply where the employee is individually represented by legal counsel in negotiating the terms of an agreement with respect to choice of law or forum.

Reminders:

In addition to L.A.'s minimum wage increase, all employers must provide 48 hours of paid sick leave in each year of employment, calendar year, or 12-month period on July 1, 2017. The L.A. ordinance also requires that unused paid sick leave rolls over from year to year, which is not required under state law.

The Department of Labor's planned increase of the minimum salary threshold needed to qualify for executive, administrative, and professional exemption suffered a temporary injunction November 22 before the update to the Fair Labor Standards Act (FLSA) could be rolled-out on December 1st, 2016. The potential federal regulations would have increased the threshold for exempt-status to $47,476 and directly impact California employers employing exempt employees who may earn enough to be exempt under state law (at least $41,600, twice the state's current minimum wage of $10/hour), but not federal law. California employers may have been granted a reprieve in enacting these changes, but should still keep in mind that it may be temporary: some version of the rule may still become law in 2017. Self-audits of employments practices and employee classifications are still recommended; employers should watch changes to the FLSA as they arise.

For help navigating these changes, please contact Stone | Dean's Employment Law Practice Group.

http://stonedeanlaw.com/practice-areas/employment-law/

Who Will Help Me at The End?

By Leslie Blozan, Esq.

The New California End-of-Life Option Act and What It Means – Part II of III

Since June, competent, terminally ill Californians have the right to end their lives with the assistance of doctors. In Part I of this article, available in our previous issue online, we described the law and the requirements to exercise these new options.

Now that the right for medically-assisted end-of-life choice exists, the next question becomes: *How does it work?* Participation in the process is strictly voluntary. A doctor can elect to not participate for any reason or no reason. Many hospitals do not participate due to ethics or legal reasons.

Groups of doctors unsuccessfully sued to block implementation of the law. Individual hospitals have faced internal battles regarding whether or not to participate in the law. The law remains in force, but prospective patients have little guidance in how to proceed.

There is no central clearinghouse of information for those who seek to terminate their lives under the new law. Each patient must conduct the research necessary to find help. The search can seem like an overwhelming process, but there are resources available.

The first challenge for a patient is finding a doctor to guide the process. Family doctors are often reluctant to do so, but may be willing to make a referral. Some doctors are morally and ethically opposed to the new law and will not cooperate on any level. Some doctors do not know specialists who will accept referrals for end-of-life care. Fortunately, there is already a network of medical care providers ready to help.

California Death with Dignity, a project of the *Death with Dignity National Center*, has a website with information, referrals and resources. The website, www.californiadeathwithdignity.org, posts the text of the California statute and also provides useful legal documents, such as medical care advance directives, medical power of attorney and definitions of commonly used terms, but does not provide doctor referrals.

Compassion & Choices is another organization offering assistance in finding the resources necessary to make and effectuate an end-of-life decision. Their website, at www.compassionandchoices.org, lists useful resources and offers consultations to prospective patients and their families. Those consultations can lead to referrals for medical care.

In San Francisco, Dr. Lonny Shavelson operates *Bay Area End of Life Options*. Dr. Shavelson is an expert in end-of-life issues and an author on the subject. His organization is dedicated to assisting patients considering ending their lives. He offers free consultations and also assists in coordinating the necessary steps to meet all legal requirements. His website, www.bayareaendoflifeoptions.com, provides guidance through the process, as well as explanations of the law, legal forms and referrals. Out-of-area referrals are available through his organization.

Other resources include local hospices and palliative care providers in local communities. They often have lists of doctors and hospitals for referrals. Estate and elder law attorneys often have contacts for doctor referrals. This office can assist in the referral process, for no charge.

Once the process is initiated, there are legal and financial consequences. Our next article in this series addresses these issues, including health and life insurance considerations for the person seeking to end their life due to illness.

We Use Technology to Track Ourselves: But is Our Technology Tracking Us?

By Alex Knaub

Wearable technology takes many forms. “Smartwatches” like Apple Watch, activity trackers such as Fitbit, and GoPro wearable cameras are all the rage. We live in the future where a small device on your wrist can track your daily activity, sleep patterns, heart rate, steps taken, GPS location, calories burned, and more. Ask yourself these questions:

Should we be concerned that our daily information is being collected? Who has access to this information? Who owns it? What can they do with the information?

Lawyers are asking these questions, and frankly, the answers are not readily apparent, nor are they comforting. No one knows the extent to which this technology will be adopted and used in litigation.

First, can wearable device information be used? The short answer is “yes.” The more probative question is *how will the information be used?*

A plaintiff could use the information themselves to bolster their claims of injury, showing their activity levels pre- and post-accident. A law firm in Calgary has started using this exact type of information to support its clients’ injury claims, arguing that using the wearable device data to track the injured person’s activities on a daily basis can show the effects of an injury to a jury more effectively than simply telling them. A jury can see the difference between 10,000 steps per day pre-accident and 1,000 steps per day post-accident.

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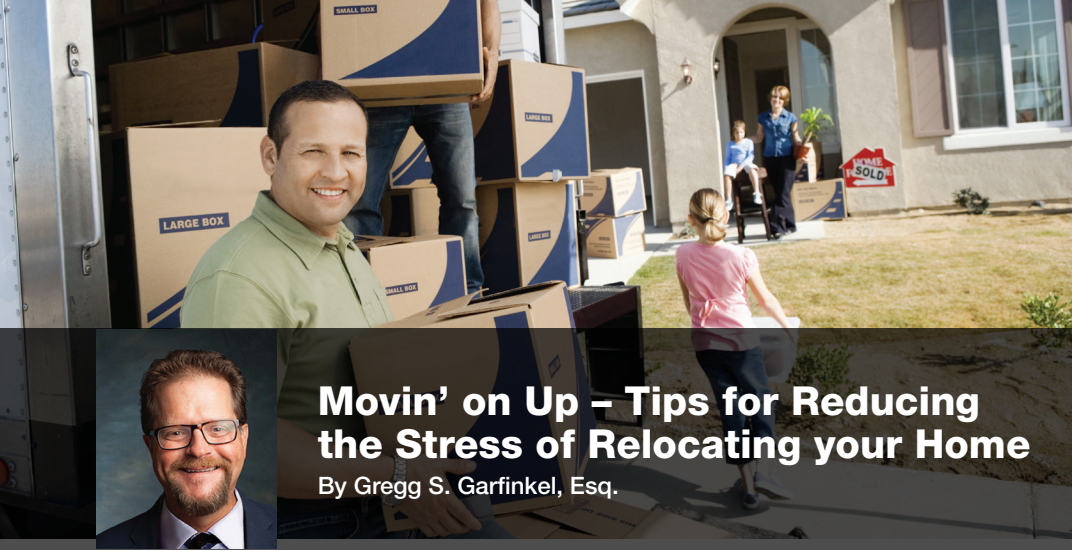

Movin' on Up – Tips for Reducing the Stress of Relocating your Home

By Gregg S. Garfinkel, Esq.

Whether you are following through on a pre-election promise to "move to Canada" or simply relocating to another state to start a new beginning, moving is difficult. Picking up and moving everything you own to another state/country is a trying ordeal even under the best of circumstances. Here are some tips for reducing the inevitable stress of moving.

Know Your Rights

There is no shortage of helpful websites available to inform you of your rights when moving your household goods. For interstate moves (moves crossing state lines), the prudent mover should review www.fmcsa.dot.gov/protect-your-move. For intrastate movers (moves that do not cross state lines), www.thecmsa.org. Both of these sites provide helpful preparation and packing tips as well as search functions to select a licensed and insured mover.

The selection of a competent mover is the single most important part of the preparation process. A trustworthy mover can simplify the moving process and eliminate many sources of stress. An unscrupulous mover can turn the process into a nightmare. It is important that you research the credentials of your prospective mover. Friends (or transportation lawyers you may know) are an excellent source of referrals.

Spot the Red Flags

Unscrupulous (sometimes referred to as "rogue") movers usually work like this: Without the benefit of visiting your home or surveying the goods to be shipped, they provide a lowball estimate over the telephone or Internet. However, once the doors of the trailer are shut, they demand substantially more money for their services. This devolves into a hostage goods situation (i.e., pay the additional money or you won't see your goods again). Your best defense is to recognize a rogue mover before they have your goods. Here are some red flags to watch for:

- The mover does not offer or agree to an onsite inspection of your household goods and gives a lowball estimate over the telephone or online
- The moving company demands cash or a large deposit before the move
- The mover asks you to sign blank or incomplete documents
- The mover does not provide a written estimate (can be binding or non-binding)
- The mover does not provide you with a copy of the *Your Rights and Responsibilities When You Move* booklet. This booklet is mandated by state and federal law
- The company's website has no local address and no information about their registration or insurance
- The mover claims all goods are covered by their insurance
- When you call the mover, the telephone is answered with a generic "Movers" or "Moving Company," rather than the company's name
- Offices and warehouse are in poor condition or nonexistent
- The mover says they will determine the charges after loading
- The company rents its equipment (i.e., no company name on the rental truck)

If possible, a good idea is to drive by the physical location of the company that you are entrusting with your goods. There are plenty of reputable moving companies out there: if something doesn't feel right, go with another company.

Selecting a Reputable Mover

Before selecting your mover, you should research all prospective movers and their complaint history to ensure that they are properly licensed and insured. The websites identified above will provide you with a pretty good overview of their complaint history—a Yelp search will also work wonders.

Then, you should obtain written estimates from several movers and compare them. Without exception, the estimate should be based on an actual in-person inspection of your household goods. Remember, if you hire a mover based solely on the lowest price, you may be sacrificing other things that are actually more important, like getting your possessions moved safely and delivered on time.

Be Active in the Process

Moving day is probably the most stressful part of the whole process. Thus, it is important that you review all estimates and documents provided *before* the movers show up so that you are empowered with knowledge. Review and re-review your Estimate, your Order for Service, and the "Your Rights and Responsibilities" booklet that was required to be provided before moving day. Be involved in the process. Do not sign any blank documents. Make sure that inventory sheets are fully and accurately prepared.

Most importantly, understand the concept of valuation protection. A moving company's liability is limited to $.60 per pound unless you agree to pay the mover an increased amount for a corresponding higher level of valuation protection. If you want any damage to your goods to be reimbursed at a rate higher than $.60 per pound, you will need to pay extra for that protection. Also, it is imperative that you check with your homeowner's insurer to see if your goods are covered while they are being transported.

While moving to Canada, or La Cañada, can be a stressful endeavor, there are many steps you can take to reduce the angst attendant with relocating your family. Should you have any questions, please contact Stone | Dean's Transportation and Trucking Practice Group.

http://stonedeanlaw.com/practice-areas/transportation-and-logistics/

Are You Listening?

By Suzanne Feffer, Esq.

Do you remember a time when you saw someone put a glass up to a wall to try and learn what was happening on the other side? Or were they pretending to be busy while really struggling to listen in on a conversation that did not involve them? The issue of eavesdropping is now more complicated when those conversations involve some electronic component. Both criminal and civil penalties may be in store for a nosey neighbor or busybody coworkers.

The California Invasion of Privacy Act (CIPA) (*California Penal Code* §§ 630-637.5) establishes everything from criminal time and fines to civil penalties for eavesdropping and recording some communications. Penal fines may run as high as $10,000, with civil penalties imposed at $5,000 per violation. Criminal penalties span from misdemeanors to felonies (the proverbial wobbler), depending upon whether it is a first offense.

Not all conversations are protected – just those that a party reasonably expects to be confidential. Chatting it up at the water cooler would not give rise to a reasonable expectation that the conversation was confidential, though a conversation behind a closed door may. Mindful that employers may openly monitor various acts and conversations of employees, it should be noted that where one should have known that a conversation would be overheard or recorded, it is not confidential for the purpose of protection under the law.

Sometimes a party to case may seek to secure damaging evidence against an opponent by secretly recording conversations. This does not end well for the party holding the recorder. In *Coulter v. Bank of America* (1994) 28 Cal. App. 4th 923, a bank employee covertly recorded conversations with co-workers in an effort to establish evidence of sexual harassment. That employee was ultimately fined $132,000 for 44 instances of electronic eavesdropping.

Whether a conversation is to be deemed confidential for the purpose of CIPA is a question of fact. Customer service calls are far less likely to be considered confidential than calls to a broker involving sensitive financial information. That said, there are no hard and fast rules on the subject. Courts have been less than clear as to whether the content of the communication is relevant in determining whether it could reasonably be considered confidential. At a minimum, the content of the conversation, however seemingly private and personal, will not alone determine whether it was confidential for the purpose of determining the application of the law. The easiest way for a business to avoid violating CIPA is to announce at the beginning of the conversation that it may be recorded. When the other party then elects to continue with the conversation, consent to record is implied (mindful that all participants must so consent). In the clearest way possible, the expectation of confidentiality then evaporates.

So what about that glass to the wall and hanging out in the hall? That conduct, however unsavory, is unaffected by CIPA. The Act comes into play only when the conversation involves some electronic connection or transmission. As more of our communications are electronic in nature (via telephone, voice mail, voice over internet, etc.), the application of CIPA grows.

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The advantage here is apparent in cases where seemingly small accidents lead to catastrophic injury. The type of injury that requires lifetime care can and does happen from a slip-and-fall injury. When serious injuries occur, having data is extremely helpful to overcome the natural skepticism concerning a three-million dollar slip-and-fall.

Unfortunately, attorneys that know all about wearable devices and their utility in the courtroom might also lack scruples. In this instance, an attorney might tell their client what their activity levels *should be* post-accident, so the comparison of activity pre- and post-accident is dramatic.

If this "reliable" data can be easily manipulated, does it have any value? Well, all data can be manipulated. That doesn't mean it doesn't have value.

Wearables have not become the standard, yet. This is fortunate, as most of us don't consider how wearable-data can and will be used. Perhaps this data will reduce frivolous lawsuits by disproving exaggerated damages. Perhaps the data will help prove-up damages in seemingly innocuous cases. Perhaps employers will use the technology to track their employees using wearables.

For now, remember you have a device on your arm that tracks your every movement, you have a device in your purse that logs all of your communications, and you don't have a reasonable expectation of privacy in either one.

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NEWS & ANNOUNCEMENTS

➔ In October, Stone | Dean was a Tournament Sponsor at the IBA-BGP's Annual Golf Classic, attended by a fantastic group of LA-area insurance agents and brokers. In January, Kristi Dean and Robyn McKibbin also presented a seminar on "Major Claims" before the members of the California Insurance Wholesalers Association at the Annual Conference in La Jolla. Kristi is a CDI-approved provider of continuing education courses.

➔ Greg Stone, acting as a private mediator, successfully settled a bodily injury case pre-litigation after the parties were unsuccessful in getting it resolved. "The parties appeared with an open mind and it was very rewarding to see both sides finally come together, shake hands and resolve their dispute before any court intervention," Greg said.

➔ Robyn McKibbin successfully moved to dismiss a defamation lawsuit against a former employee client based on the doctrine of collateral estoppel. The same issue was already adjudicated in the client's favor in an underlying arbitration. Congratulations also to Robyn for negotiating a pre-litigation settlement on behalf of a whistleblower client who was terminated shortly after raising accounting practices concerns.

➔ In early December, Leslie Blozan traveled to New York City for the 16th annual DRI Insurance Coverage Practice Symposium. As panel counsel for some insurance carriers, Leslie had an opportunity to meet with those carriers as well as obtain valuable continuing education on issues of coverage and bad faith.

➔ In mid-January, Gregg Garfinkel spoke at the *Conference of Freight Counsel (CFC)*'s Winter Meeting. The CFC is comprised of the most accomplished Transportation Law attorneys in the Nation. In May, Gregg will be speaking at the *California Moving & Storage Association's* Annual Convention regarding recent developments in California Transportation & Warehousing Law.

➔ Leslie Blozan was successful in obtaining summary judgment for a market client. Through evidence, she was able to prove the store conducted reasonable inspections, and lacked notice of a floor hazard that caused plaintiff to fall. The court agreed there was no triable issue of material fact on lack of notice, eliminating the market's liability as a matter of law.

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