May 2015 • Vol. XXVIII • Number 5

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PROFESSIONAL LIABILITY UNDERWRITING SOCIETY
Journal
YOUR SOURCE FOR PROFESSIONAL LIABILITY EDUCATION AND NETWORKING

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Is A Penny Saved A Penny Earned When Attorney-Litigants Represent Themselves?

By Kendra L. Basner

Every attorney has heard the old adage attributed to famous lawyer and 16th U.S. President Abraham Lincoln, "a lawyer who represents himself has a fool for a client." Do you know why?

The U.S. Supreme Court used this quote to set the backdrop for its 1991 opinion in *Kay v. Ehrler* (1991) 499 U.S. 432, 437-438, 111 S.Ct. 1435, denying a self-represented attorney-litigant a statutory attorney fee award in his successful civil rights action pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C.A. §1988. The court stated:

> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. In any event, he is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

Though the cautionary saying is familiar, and the complications are acknowledged, many lawyers and law firms find compelling reasons to justify self-representation. Some may do it out of necessity because they do not have professional liability insurance coverage. Others may resort to it because certain claims are not covered under their policy or they have a high self-insured retention. Of course, there are also those who may honestly believe they are the best attorneys for the job. Yet, when it comes down to it, there are many who base their decision solely on the Benjamins.

Benjamin Franklin, whose face graces the hundred dollar bill and who, incidentally, was not a lawyer, is given credit for another familiar maxim, "a penny saved is a penny earned." But, is it true when lawyers represent themselves?

Sure you may be able to keep a penny in your pocket rather than giving it to someone else, but if you think a win will eventually reimburse you for your precious time and efforts, think again. Lawyers may be more wise to heed the inadvertent advice of one of their own.

American Rule

There are two basic attorney fee schemes: the English rule ("loser pays") and the American rule ("every man for himself"). Many states generally follow the "American rule," which provides that absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney's fees and may not recover those fees from an adversary.

However, even if a statutory exception or contractual attorney fee provision

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Do Choice-of-Law Provisions Insulate Insurance Carriers from Tort and Punitive Damage Liability under California Law?

By Kathryn C. Ashton

It's no secret that California permits policyholders to assert either contract or tort remedies for an insurer's breach of the implied covenant of good faith and fair dealing. The difference between the two remedies, available at the policyholder's election, is significant; "[i]f the insured elects to proceed in tort, recovery is possible for not only all unpaid policy benefits and other contract damages, but also extra-contractual damages such as those for emotional distress, punitive damages and attorney fees."[1] The ability to seek punitive damages, in addition to other potential tort recovery, makes California an attractive forum for policyholders seeking maximum damages for an insurer's unreasonable or unjustified denial of policy benefits.[2]

New York, on the other hand, does not permit tort recovery for bad faith, thereby also precluding an insured from recovering punitive damages.[3] Because California potentially allows a broad spectrum of damages for an insurer's bad faith and New York allows much less, it is not surprising that many policyholders elect to pursue their bad faith actions in California while many insurers seek to confine any action on the policy to New York by including a choice-of-law provision in their policy. But are such provisions enforceable with respect to claims for breach of the implied covenant of good faith and fair dealing asserted under California law?

Recently, a federal district court in California held a choice-of-law provision in an insurance policy was not enforceable with respect to a policyholder's claim for breach of the implied covenant of good faith and fair dealing. *See Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 2015 U.S. Dist. Lexis 23441 (Feb. 5, 2015). Although federal decisions are not binding on California courts with respect to issues of state law,[4] *Tri-Union* raises the issue of whether California will enforce a valid choice-of-law provision where doing so would deprive a policyholder of potential tort and punitive damages for the insurer's bad faith. In other words, do California policyholders have a public policy right to recover tort and punitive damages against an insurer for its bad faith? The *Tri-Union* court answered this question in the affirmative, but would a California court do the same?

In California, insurance policies are contracts, subject to the same construction principles as other contracts.[5] Provisions in insurance policies are given effect and are not rewritten or omitted to advance some perceived public policy.[6] California courts acknowledge the parties' freedom to contract,[7] while recognizing the potential for disparate bargaining power between policyholders and insurers. California courts enforce contracts as written—including policies—unless doing so violates public policy.[8]

With respect to choice-of-law provisions specifically, California has a strong policy of enforcing such provisions that satisfy the principles set forth in section 187(2) of the Restatement Second of Conflict of Laws ("Restatement").[9]

The Restatement sets forth a multi-part test; under the first part, the court determines whether the state in the choice-of-law provision has a substantial relationship to the parties, their transaction or whether there is any other reasonable basis for the law chosen by the parties. The first part may be satisfied if one of the parties resides in the chosen state or has its principal place of business there.[10] If the first part is met, the court then determines if the law chosen by the parties is contrary to a fundamental policy of California.[11] If there is no contradiction, the court will enforce the choice-of-law-provision. But if the court finds a conflict between the law of the chosen state and a fundamental policy of California, it will analyze if California has a "'materially greater interest than the chosen state'" in resolving the specific controversy.[12]

In *Tri-Union*, the policyholder argued a choice-of-law provision, which stated "[t]he construction, validity, and performance of this Policy will be governed by the laws of the State of New York …", was unenforceable because it violated a fundamental policy of California.[13] That fundamental policy, the insured argued, was its right to sue an insurer *in tort* for breach of the implied covenant, a remedy not recognized under New York law.

Notwithstanding the California Supreme Court's conclusion that "a valid choice-of-law clause … encompasses *all causes of action arising from or related to that agreement*, regardless of how they are characterized, including *tortious* breaches of the duties emanating from the agreement …,"[14] the insured in *Tri-Union* successfully argued *Nedlloyd* did not apply to insurance contracts. This argument was bolstered by reference to Comment (g) of Section 187 of the Restatement, which provides: "A fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power. Statutes involving the rights of an individual insured as against an insurance company are an example of this sort." Relying on Comment (g) and various California cases explaining the rationale for affording tort liability in the insurance context, the *Tri-Union* court concluded "a tort remedy for the [*sic*] an insurer's breach of the implied

covenant of good faith and fair dealing implicates *a substantial and thus fundamental public policy in California*."[15] And after finding California had a materially greater interest than New York, the court refused to enforce the choice-of-law provision in the policy.

In proclaiming a policyholder has a fundamental right to seek and obtain tort and even punitive damages against an insurer for bad faith, the *Tri-Union* court appeared to ignore several key California decisions. For example, California courts generally express great reticence in proclaiming what is and what is not public policy.[16] But in choosing to nullify the insurer's choice-of-law provision, the *Tri-Union* court appeared to express no such hesitancy.

The *Tri-Union* court also appeared to pay little heed to California's long tradition of enforcing policy provisions as written, confirming the parties' right to contract as they please.[17] In finding an insurance policy "exception" to choice-of-law analysis, the *Tri-Union* court held that while other business entities may rely upon choice-of-law provisions, insurance companies may not.[18]

More importantly, the Tri-Union court appeared to ignore the California Supreme Court's decision in Boghos v. Certain Underwriters at Lloyd's of London, 36 Cal.4th 495 (2005), where the court rejected the notion that an insured has a fundamental public policy right to seek tort remedies for bad faith.

In Boghos, an insured brought claims for breach of contract and bad faith against a disability insurer. The insurer moved to compel arbitration under a provision in the policy that stated the parties agreed to waive the right to a jury trial and to submit to binding arbitration.[19] The trial court and the appellate court refused to enforce the arbitration provision and the California Supreme Court granted review.

In determining whether the arbitration provision was enforceable, the court construed the policy language "based on the same state law standards that apply to contracts generally."[20] After finding the arbitration provision unambiguous, the court determined whether the insured's breach of contract and bad faith claims were protected by public policy and concluded they were not.[21]

Specifically, after explaining that fundamental public policies are unwaivable rights "tethered" to statutes or constitutional provisions, the court found the insured's "claims for nonpayment of benefits and breach of the covenant of good faith and fair dealing cannot properly be so described."[22] A failure to pay benefits under the policy "is a claim for breach of contract, pure and simple" and a claim as such was in bad faith and "may properly be described either as a tort claim … or as a special type of contract claim for which we allow tort damages …."[23] In reaching its

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You Are What You Tweet: Social Media and the Litigation Privilege

By Kenneth A. McLellan

Recent stories in the media have shown the impact of social media on all walks of life. Former Senior Banker at RBS, Rory Cullinan, left his post shortly after his 18-year-old daughter Bridget posted "selfie" photographs her father had sent her noting that he was at another "boring Board meeting." Mr. Cullinan's daughter posted them online on Instagram. While it is not clear that Mr. Cullinan left his job because of the photos, the incident surely caused embarrassment.[1] In another story, former Red Sox pitcher Curt Schilling made headlines. Some ill-mannered young men made lewd comments about his daughter, Gabby Schilling. Mr. Schilling had congratulated his daughter on making her college's softball team, and a series of extremely vulgar tweets ensued. Mr. Schilling identified two of the worst offenders in an online post, leading to their suspensions from college and a job termination. In another instance, the New York Post reported that a group of wine salesmen posted a photo of themselves pouring out the expensive champagne of a client who had just dismissed their company for another marketing agency. The pouring out of the champagne wasn't so bad in and of itself, but what caused offense was the pouring of it while being groped by a stripper at the Hustler Club.[2] As a result of the lewd pictures, the salesmen were suspended. The overarching theme is that comments or photographs posted online, even if posted in jest, have very real, real-world implications.

The impact of social media has affected all areas of life, and litigation is no exception. The impact of social media coupled with electronic filing requirements in court, along with the ability of parties to instantly, widely disseminate information has had a definite effect on litigation. A recent New York Times article discussed the manner in which the details of sexual harassment lawsuits are finding wide audiences in online forums.[3] In that article, the author explains that:

> More and more, the first court filings in gender-related suits, often allegations that inspire indignation, are winning wide readerships online before anyone steps foot in a courtroom.
>
> As a result, plaintiffs are finding themselves with unexpected support—and greater-than-ever power to ruin reputations. Panicky defendants are left trying to clear their names from accusations that sometimes are unsubstantiated. Judges and law professors, watching the explosion of documents online, fear such broad exposure is throwing court proceedings off track and changing the nature of how civil suits are meant to unfold.

In this article, we seek to explore the specific issue of how the application of the litigation privilege applies in an environment where the details of litigation can easily be disseminated to the media, and to the public at large through social media outlets. This issue is of importance when dealing with opposing counsel who seek to use media exposure or online publicity for a strategic advantage in an era where, as Ms. Jodi Kantor of The New York Times insightfully observes, litigation papers no longer "[remain] stuffed inside folders and filing cabinets at courthouses." It is also potentially important from an underwriting perspective. Insurers may wish to apprise themselves of whether their prospective insureds have written media communication policies and social media policies in connection with analyzing the risk of issuing lawyers' professional liability policies to potential insureds. Statements to the media or in online forums can generate claims from opposing counsel or litigants for intentional torts, such as defamation, but conceivably, also claims designed to potentially trigger coverage, such as negligent misrepresentation. Finally, beyond tort liability, for attorneys there are important ethical implications to posting information about pending litigation online.

The challenge of how to apply the law in order to balance protecting parties' privacy and reputation with First Amendment rights has become increasingly complex with the advent of the internet and the emergence of electronic filing and social media. Judges, legislators, and lawyers are still struggling to navigate this new, perplexing landscape. Unfortunately, this situation won't be resolved any time soon; the law changes at a glacial pace while the internet evolves daily. As Supreme Court Justice Stephen Breyer admitted in a speech at Vanderbilt University in 2010, "If I'm applying the First Amendment, I have to apply it to a world where there's an Internet, and there's Facebook, and there are movies like … *The Social Network*, which I couldn't even understand."[4] Although some judges may not grasp the Facebook phenomenon—and we gather that Justice Breyer's comment was self-deprecating humor— most are well aware that social media has afforded almost anyone with a computer or smartphone the ability to publish on the web. This type of publishing, different from any type seen before, allows an individual to publish something permanently, instantaneously, and globally. While this lends great power

and freedom to the individual, it also can potentially create novel legal issues.

By way of example, in a recent case involving celebrity chef and cooking show host Paula Deen, her lawyers sought to sanction opposing counsel because of tweets he sent concerning the case while litigation was still ongoing.[5] In 2013 a harassment and hostile work environment suit was brought against Paula Deen and her brother, Bubba Hiers, in connection with their Savannah restaurant, Uncle Bubba's Seafood and Oyster House. Owing to the fame of Ms. Deen, the proceedings received much public attention and scrutiny, eventually leading to the publishing of racial slurs and comments made by Ms. Deen discussed in her deposition. As a result, she lost millions of dollars in endorsement deals and had to close down the restaurant in 2014, after a confidential settlement was reached.[6] While it is not quite clear why the restaurant shut down, the negative publicity could not have helped. Ms. Deen's case is not an isolated incident. Many other celebrities and businesses have been or will be put into the limelight because of litigation in the press or via the so-called "blogosphere" or "Twitter-verse." Considering the possible irreparable harm that can be done, and the possibility that litigation can go even further in the age of the internet, is there anything that a defendant and defense counsel can do? This situation brings together one of those novel legal issues of the internet age, reconciling the use of social media with a legal principle called the *litigation privilege*.

The litigation privilege, in its original form, provided for absolute immunity from civil liability for defamatory statements made during the litigation process. However, should this age-old legal principle protect the attorney from civil liability for what he or she tweets? This article seeks an answer to that question. This article will examine how courts have decided to apply the litigation privilege in the age of the internet, specifically to defamation through social media, like Facebook, Twitter, and blogs. First, we will discuss litigation privilege, its history, and its importance to our system of law. Second, we will analyze the effectiveness of different strategies for overcoming a litigation privilege defense when the privilege is exploited disingenuously to shield improper conduct, including suits for defamation or malicious prosecution, motions for sanctions and lodging a complaint with an attorney grievance committee. Third, we will discuss best practices for trying (or not trying) a case in the court of public opinion, and how to address the situation where comments are made in the media about pending legal proceedings if you are a litigant or counsel who is the target of such comments. Fourth, we will discuss ethical concerns. Lastly, we will examine potential insurance underwriting concerns.

Litigation Privilege – A Brief History

Litigation privilege is a centuries old concept that was brought to American shores with the first English settlers. One of the first documented cases of litigation privilege comes from seventeenth century England, with the case of *Brook v Montague*. In this case, it was ruled that

> a counsellor-in-law hath a privilege to enforce any thing which is informed him by his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false but; it is at the peril of him who informs it…[.][7]

Current case law more plainly explains the modern view of the litigation privilege as "absolute immunity regarding any act in the course of a judicial proceeding, regardless of whether the act involved a defamatory statement or other tortious behavior, so long as the act had some relation to the proceeding."[8] American law has kept and expanded the old precedent, because it has become indispensable to the adversarial system of law. The adversarial system relies on zealous representation to (hopefully) reveal the truth. Zealous advocacy, in turn, requires a protection for lawyers and witnesses from defamation suits. Without the litigation privilege, lawyers may have reason to fear suit merely for loyalty to their client, which could have a profoundly negative, chilling effect on the attorney-client relationship. Besides zealous advocacy, California also specifically cites "the promotion of full and truthful testimony… free access to the courts, and the finality of judgments," as other important policy goals achieved by the litigation privilege.[9]

Does The Litigation Privilege Always Attach?

Understandably, the litigation privilege is important to our civil justice system, but when do its protections begin (and end), whom does it cover, what claims does it bar, and, what statements, in what forums, does it protect? Although a relative wealth of case law on the litigation privilege exists, we have tried to focus on only the most recent developments dealing with the convergence of social media and litigation privilege.

At what point does the litigation privilege attach, and when does it cease to apply?

The litigation privilege sometimes begins pre-suit. In a copyright suit between sellers of virtual animals in a game called Second Life, a California judge ruled that "Digital Millennium Copyright Act ('DMCA') [takedown] Notices [served pre-suit] … are protected by the litigation privilege and are non-actionable in and of themselves."[10] Pre-suit materials published online were covered by the litigation privilege because they were considered an initial part of the suit. Similarly, the litigation privilege may

apply post-settlement, provided that there is no confidentiality provision in a settlement agreement. This very issue arose in a suit brought by Carrie Prejean, a former Miss California. Ms. Prejean touched off a firestorm of controversy back in 2009. At the Miss USA Pageant, she indicated that she was not a supporter of same-sex marriage. She was subject to personal attacks and terminated from her reign as Miss California. A lawsuit ensued, and during a mediation, Ms. Prejean was shown a compromising video of herself which led to a confidential settlement of the matter. Details of the settlement were soon posted on TMZ.com, prompting further litigation against opposing counsel who apparently released information about explicit recordings and photographs to the media. The court stated that the "litigation privilege does not bar a breach of contract claim arising from violations of confidentiality provisions contained in a settlement agreement."[11] In the case involving the woes of Ms. Prejean, *Limandri v. Wildman, et al.,* the litigation privilege did not preclude a breach of contract claim because a defense attorney in the case had promised confidentiality. However, the court also noted that statements made during settlement negotiations are absolutely privileged. In another case involving a claimed violation of a confidentiality provision —although the opinion does not indicate that the litigation privilege was invoked as a defense—a former private school headmaster lost an $80,000 settlement when his daughter posted a crude remark taunting the defendant and referencing the settlement on Facebook.[12] Finally, in the case of *Cole v Patricia A. Meyers & Associates, APC*, Mr. Cole was dismissed from an underlying case but opposing counsel maintained a version of the complaint on their website. The court stated the "defendants have not shown that the complaint was published on the Internet … in connection with an issue under consideration by a judicial body."[13] In essence, absolute litigation privilege may be invoked before, during, and even after a suit, but there are important restrictions, for example, when there is a confidentiality provision in a settlement agreement or if a pleading is published online (not in front of a judicial body) after the case is concluded.

To whom does the litigation privilege apply?

In California, a Court ruled that "the privilege has been held to extend to judges and other official officers … attorney … parties … witnesses and prospective witnesses … and jurors"[14] In New York, "[the] absolute privilege has also been applied to statements by non-attorneys, such as accountants and the parties themselves."[15] In 2013, an Illinois Appellate Court ruled that the persons to which litigation privilege applies is limited: "Illinois courts … have never extended the privilege to other persons having no connection to the lawsuit."[16] However, the litigation privilege only exists within a judicial or quasi-judicial proceeding and to statements that have some semblance of relevance to the proceeding.[17]

What types of claims are immunized by the application of the litigation privilege?

Although the litigation privilege was originally developed to bar claims solely for defamation, many jurisdictions have extended it to cover a variety of torts.[18] In California "only malicious prosecution actions are exempt" from litigation privilege.[19] On the other hand, Texas has adhered more closely to a traditional view of the litigation privilege. In a 2001 ruling from the Texas Court of Appeals, the court held that Texas does not simply "grant absolute immunity from civil liability for all acts by any party, witness or other person so long as the acts have some relation to a judicial proceeding." Instead, the litigation privilege is judged on a case by case basis, pursuant to the facts of each case.[20] Importantly, as stated in a 2007 Florida Supreme Court ruling, "adequate remedies still exist for misconduct in a judicial proceeding, most notably the trial court's contempt power, as well as the disciplinary measures of the state court system and bar association."[21]

What statements does the litigation privilege cover?

Courts are very liberal in extending the litigation privilege to almost any statement. In a New York case where Ukrainian Olympic figure skater Oksana Baiul sued a producer of figure skating television for defamation, the court held that "[the] absolute privilege embraces anything that may possibly or plausibly be relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability."[22] Florida grants a litigation privilege "so long as the act has some relation to the proceeding."[23] Texas and California agree, while Illinois holds that statements "must not only bear some relation to the judicial proceeding but must also be 'in furtherance of that representation.'"[24]

In what forum does the litigation privilege apply?

Courts have also extended that privilege outside of courts. In *Amaretto Ranch*, notice of litigation papers published on a blog were shielded by the litigation privilege.[25] However, in the case of *GetFugu*, the court refused to apply the litigation privilege to a press release published online by Patton Boggs attorneys. Although California has allowed re-publication to non-parties with a legitimate interest in the proceeding, the court determined that publication on the internet went beyond a specialized group. "The press release and Tweet were posted on the Internet and thus were released worldwide. Dissemination of these publications to a segment of the population as large as the 'investment community' is essentially the same as disclosure to the general public."[26] In a 2014 Massachusetts case, the court ruled that Facebook posts made by a man's ex-girlfriend after hacking onto his page were not shielded by the litigation privilege.[27]

What are the ethical considerations for attorneys?

It would appear that applicable ethical rules are a check on opposing counsel who is bent on inappropriately pursuing a claim through the media. By way of example, in New York, attorneys are obligated not to engage in frivolous conduct, which includes knowingly asserting material factual statements that are false. (Prohibited by Rule 3.1 (b) (3)).[28] Further, in New York, a lawyer must not knowingly make a false statement of fact or law to a third person. (Rule 4.1). Additionally, a lawyer must not use means that have no substantial purpose other than to embarrass or harm a third person to obtain evidence. (Rule 4.4). Finally, New York has a rather elaborate rule governing Trial Publicity. (Rule 3.6(a)). A lawyer participating in a trial must not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. But note, under Rule 3.6(c)(2), a lawyer may state what is in the public record without

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elaboration, and may under Rule 3.6(c)(4) advise of the result of any step in litigation.

Strategies for Overcoming Litigation Privilege Defenses

If the litigation privilege affords immunity for certain claims such as defamation, then what remedy is available for harm caused by defamatory statements made under the cloak of the litigation privilege? There are several checks on the excesses of attorneys under this principle: whether the statements fit reasonably within the definition of litigation privilege (in other words, are they relevant to proceedings and made in the appropriate forum); whether the other party is subject to a malicious prosecution suit; sanctions or contempt of court and exposure to a grievance based on an ethical violation. Because of the broad nature of the protections that litigation privilege encompasses, it is often difficult to directly overcome it in court. As discussed above, people involved in litigation are covered, before, during, and after, for any civil claims, even if the statement has no relevance and is not made in court. However, in certain circumstances, the litigation privilege is weaker than in others, particularly based upon the forum in which it was made in and to whom the statement was published. *GetFugu* shows that weakness most apparently. Statements published on the Internet are a hard sell to judges, because many see the internet as publishing to a worldwide, not a specific, audience and to be almost completely divorced from any relevance to litigation. In *GetFugu*, quoting *Rothman*, the court held:

> the litigation privilege should not be extended to 'litigating in the press.' Such an extension would not serve the purposes of the privilege; indeed, it would serve no purpose but to provide immunity to those who would inflict upon our system of justice the damage which litigating in the press generally causes: poisoning of jury pools and bringing disrepute upon both the judiciary and the bar.[29]

One civil charge that is not contemplated under litigation privilege is malicious prosecution. Therefore, regardless of whether the litigation privilege would apply to certain statements, a party can still claim malicious prosecution against the other.

One effective option may be to ask the court for sanctions for frivolous conduct. As evidenced in *Rothman*, courts are particularly sensitive to parties litigating in the press and "bringing disrepute upon both the judiciary and the bar."[30] In the Paula Deen case, Deen's attorneys asked the court to disqualify opposing counsel, Matthew C. Billips, for his offending tweets about the case and Deen. Although the judge refused to disqualify Billips, the judge was open to sanctions.[31] However, a call for sanctions can only go so far. A New Jersey lawyer attempted to sue opposing counsel for distress to his client because of "barbaric questioning," where the defense attorney in a medical malpractice case inquired as to whether a baby's death may have been caused by child abuse, i.e., shaken-baby syndrome. The New Jersey court found that litigation privilege protected the defense attorney from this suit and opted to impose a $2,500 sanction on the suing lawyer as well as attorney's fees and court costs of over $11,000.[32]

What Should You Do?

Although litigation privilege can be a powerful protection in court, most jurisdictions draw the line once statements jump to the general public. In *Rothman*, statements made by an attorney during a statement to the media were not protected. In *GetFugu*, a press release issued by Patton Boggs alleging the FBI was investigating RICO claims at GetFugu was not protected under litigation privilege. In *Baiul*, however, the litigation privilege was invoked when one of the defendants spoke with the New York Post, calling the suit "weird" and saying figure skater Oksana Baiul was "flaky." Similarly, in *Amaretto Breedables* pre-trial documents were protected by litigation privilege because they were deemed as part of the litigation.

With these differing rulings, what should you do? The best course of action is to refuse your client if they ask to try their claims in the court of public opinion. It is also advisable to use great care when speaking with the press or commenting online. A certain degree of theatrics, puffery, hyperbole or rhetoric may be acceptable at a trial in a courtroom, in a pleading at mediation or in motion papers, and it appears even a potentially defamatory statement would be shielded by the litigation privilege in those scenarios. However, the same may not be true if those statements are widely disseminated to the public view through traditional media outlets or through social media. Issuing statements to news outlets treads a fine line between defamation and merely restating the facts of a complaint. Publishing yourself could lead to larger issues. Even if a statement is protected by the litigation privilege, counter-claims and motions can slow down proceedings as well as escalate a settleable case into a contentious trial.

On the other side, if you and your client feel as if you've been wronged, a defamation suit may not be the best option. Claims of defamation are protected by the litigation privilege. A motion for sanctions or a suit for malicious prosecution, which may not be protected under the litigation privilege, may be better options, although they are not entirely foolproof either. Another option, if the story was published by a third-party, is to ask that party to take the story down. Finally, as the post-settlement cases mentioned previously attest to, enforcing confidentiality agreements is important, and may sometimes serve as a waiver of the litigation privilege on breach of contract claims. Indeed, the best and most expedient option to address another party's inappropriate use of media may be to request sanctions for frivolous conduct and/or file a complaint with a grievance committee.

The Underwriting Perspective

Insurers issuing lawyers' professional liability policies may wish to include questions on their applications inquiring as to whether prospective insured law firms have written policies on communication with the media and written social media policies, to ensure that firm management has control over what is said in the media—in the broad sense of the term—including social media. Furthermore, insurers may wish to take extra care writing policies for law firms that engage in practice areas where there is sensationalism and media involvement, e.g., any firms which represent celebrities, entertainers or professional athletes. Another potential area of concern may be law firms that represent plaintiffs in employment practices claims, such as claims of sexual harassment. Those prospective insureds may carry additional risk of generating claims of negligent misrepresentation to the media, or may draw claims by opportunists who may file frivolous but costly-to-defend claims.

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Conclusion

In short, while the litigation privilege generally protects an attorney from a defamation lawsuit for statements made in a judicial proceeding, it does not allow him or her to check his or her ethical obligations at the door of the courthouse, or when he or she is communicating about the case through traditional media or online/social media outlets. Attorneys are generally protected by the litigation privilege for what they say and write in the midst of a court proceeding, when what they are talking or writing about is relevant to the proceeding.[33] However, it appears that courts do not favor litigating in the press. Once an attorney communicates with the press about a matter, or through social media outlets, there is potential exposure to claims or sanctions.

In many ways, social media is the frontier and the new Wild West. Statements made through social media can have far-reaching, unintended consequences, and reach unintended audiences. Counsel must use great care when publishing statements about litigation in online forums and social media. While litigation is public, that does not necessarily mean it can be publicized, particularly online. It will be interesting to watch and see how the law will apply to the new contours of the litigation privilege unfolding in the age of social media.

We gratefully acknowledge the assistance of Andrew D'Aversa, Univ. of Penn. Law School, 2017, with the research and writing of this article.

Endnotes

To view the full article endnotes, please see the online version of the article at http://plusweb.org/Journal.aspx

PLUS FOUNDATION

The PLUS Foundation reflects the generosity of the professional liability community through philanthropy and the advancement of diversity and education.

PHILANTHROPY

Conference Cause

Reflecting the generosity of the professional liability industry each year at the PLUS Conference. In 2014, 38 PLUS members volunteered at the Sunrise Children's Foundation in Las Vegas, assembling 250 Thanksgiving meal baskets for families that participate in the organization's programs. $43,475 in support was donated to this great organization.

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exists providing for such relief, many states prohibit a pro se litigant or self-represented party from collecting attorney fee awards. Some such jurisdictions include attorneys who represent themselves within that group.

States like Alaska, Colorado, Massachusetts, and Washington have all granted attorney fee awards to self-represented attorneys. Jurisdictions generally allowing the award of attorney fees to self-represented attorneys hold: (1) they expend the same professional time, knowledge and experience in the conduct or defense of their suit as they would have if hired by another attorney to do so; (2) the services rendered by attorneys are presumably as valuable as the same services would have been in the defense or prosecution of another's cause; (3) attorneys, like other professionals, are paid for their time and services, and if they render them in the management and trial of their own cause, it may amount to as much pecuniary loss or damage as if they had paid another attorney to represent them; and, (4) it can make no difference to a party who, by law, is bound to pay costs, including attorney's fees.

On the other hand, courts prohibiting such awards simply believe it just wouldn't be fair. States such as Arizona, California, Idaho, Illinois, Louisiana, Nebraska, Nevada, Ohio, South Carolina, Utah and Wisconsin, to name a few, generally prohibit pro se lay litigants from recovering attorney's fees and also typically deny such an award to pro se attorney litigants for the following reasons: (1) disparate treatment of attorney and non-attorney pro se litigants; (2) it should be against the policy of the law to allow one to become his own client and charge for his professional services; and, (3) attorneys representing themselves, realizing that they may be awarded a fee for their efforts, might be tempted to prolong litigation for the sake of their professional profit only.

Oftentimes, the contractual or statutory language at issue specifically requires that the fees requested be "incurred" or includes some other limiting language providing the courts justification for denying such an award above and beyond pure public policy grounds. In the absence of express language in either the contract or statute itself, or the statute's legislative history, courts have turned to public policy concerns.

The frequently cited California Supreme Court case *Trope v. Katz* (1995) 11 Cal.4th 274, 45 Cal.Rptr.2d 241, 902 P.2d 259, sets the stage for prohibition, holding that to allow pro se attorney litigants to recover fees as compensation for their time would result in disparate treatment. The court explained that the legislature certainly did not intend to allow doctors, architects, painters or any other non-attorneys to receive compensation for their valuable time spent litigating a legal matter on their own behalf. Even though the lawsuit listed the individual partners as the plaintiffs, the court treated the firm and its partners as interchangeable, thus representing the interest of the firm. This decision focused on the language of the statute at issue and the fact that fees were not "incurred."

Statutory or contractual language has also been used to make allowances. The court in *Bode & Grenier, LLP v. Knight* (2014) 31 F.Supp.3d 111, held that the central question concerning the fee-shifting provision in the parties' retention agreement was not what Congress intended, but what the parties intended, and no language in the parties' contract suggested the parties intended to preclude fees incurred by the self-represented firm.

Similarly, in the unpublished but instructive opinion of the Michigan Appellate Court in *Payne Broder & Fossee, P.C. v. Shefman*, 2014 WL 3612699 (Mich. App. July 22, 2014), the court disagreed with the argument that fees had to be incurred and held that there is no disparate treatment between attorneys and non-attorneys as both parties to the contract were attorneys. The court further noted that a contractual provision for attorney's fees represents damages, the measure of which is attorney's fees as well as out-of-pocket expenses.

Despite general prohibitions, many courts are following the example set by the Supreme Court in *Kay v. Ehrler*, and making the determination on a case-by-case basis, resulting in various allowances. Trends seem to be emerging as to granting attorney's fees in particular types of cases, including cases concerning only the "personal interest" of the attorney-litigant, attorney fees awarded as sanctions for abuse of litigation, and cases involving public interest and substantial benefit.

What Qualifies As Self-Representation?

Stepping into the courthouse alone as both litigant and attorney is clear self-representation. Such a scenario is sure to trigger denial of attorney fees in the majority of jurisdictions prohibiting such an award. However, attempts by lawyers to circumvent such a prohibition are plentiful, and many allowances have been applied throughout the country. The only thread linking jurisdictions across the country on this issue is that there is no bright-line rule.

Members of the Firm

Sidestepping an apparent prohibition against awarding fees to a self-represented attorney by using the law office's associates, contract attorneys or "of counsel" to represent the law firm litigant have, for the most part, failed in many jurisdictions because such attorneys are determined to represent the interests of their employer. California, in particular, has a long line of cases dealing with attorney fee awards to attorney litigants, including review of the many inventive attempts to dodge such a prohibition.

Associates or other attorneys of the law firm are considered the firm's product—when they represent the law firm, they are representing their own interests. *Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1211, 46 Cal.Rptr.3d 845. "Of counsel" and "independent contractors" are often analyzed in much the same way, despite a potentially different meaning within the federal tax rules. Courts look to whether "the relationship between a law firm and 'of counsel' is 'close, personal, continuous, and regular." *Sands & Associates v. Juknavorian* (2012) 209 Cal.App.4th 1269, 1272, 147 Cal. Rptr.3d 725 [the firm and its "of counsel" attorneys constituted a single, de facto firm].

No matter the title used, courts ultimately look to the totality of the relationship between the attorney and "client" and the circumstances of each case. *Carpenter v. Cohen* (2011) 195 Cal.App.4th 373, 124 Cal. Rptr.3d 598, is one of several California cases in which statutory attorney's fees were denied to the prevailing law firm under the state's anti-SLAPP statute (C.C.P. §425.16). Despite arguing that counsel represented the firm and its two partners as an "independent contractor," the trial court found her to be an associate employed by the firm to represent the firm's "clients" notwithstanding the fact that she did not have a direct financial interest in the outcome. Thus, the firm had in effect represented itself and could not recover attorney's fees amounting to "lost opportunity costs."

In *Soni v. Wellmike Enterprise Co. Ltd.* (2014) 224 Cal.App.4th 1477, 169 Cal.Rptr.3d 631, a

California appellate court held that even though the firm's name was identified as a fictitious business name for the attorney himself, the attorney could not recover contractual attorney's fees where the firm operated as a firm and the attorney was represented by associates of the firm, who were essentially representing the interests of the firm. The attorney and the firm were held to be synonymous.

Most recently, in October 2014, California's Third Circuit Court of Appeal held in *Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 178 Cal. Rptr.3d 490, that a "contract attorney," who "was paid in a manner different than a regular 'employee' of [the firm] may render him an independent contractor for taxation purposes, but does not make him separate counsel for [the firm] for purposes of attorney fees under the anti-SLAPP statute."

Arizona has applied the same reasoning. Recently, in *Munger Chadwick, P.L.C. v. Farwest Development and Const. of the Southwest, LLC* (Ariz. Ct. App. 2014) 235 Ariz. 125, 329 P.3d 229, 232, a law firm attempted to avoid the general prohibition by asserting that the firm members who represented the law firm in the fee action against a former client worked on the case in their spare time and in addition to their obligation to the firm to work on assigned cases, thus operating as "outside counsel." The court disagreed, holding that "a pro se attorney who works in her spare time on a case representing herself, separate and apart from her obligations to other clients, is nonetheless not entitled to an award of attorney fees." *Id.* (quoting *Connor v. Cal-Az Props., Inc.* (1983) 137 Ariz. 53, 56). The court further reasoned that it would not be fair for an attorney to be entitled to compensation for her time in representing herself when a lay person would not be able to do so. *Id.*

Other jurisdictions have similarly focused on the attorney-client relationship, but have come to opposite conclusions, finding reasons to allow attorney fee awards to firms represented by its members and the like. For example, the Fifth Circuit U.S. Court of Appeals, applying Louisiana law, distinguished the case of *Gold, Weems, Bruser, Sues & Rundell v. Metal Sales Mfg. Corp.* (2000) 236 F.3d 214, 218-219, from Louisana's general prohibition, holding that a law firm that hired one of its own attorneys to bring a fee claim against a former client was entitled to recover attorney fees for prosecution of the action because the law firm client was an organization with a separate status from the attorney employee.

In-House Counsel

More and more firms are utilizing "in-house" counsel today than ever before because it is a fixed cost rather than out-of-pocket. Courts are effectively promoting such a use by treating attorneys identified as "in-house" counsel differently from those who are simply identified as "associates," "of counsel, "contract attorneys," and other such "members of the firm" as discussed above. Recognition of the "in-house" attorney-client privilege by many jurisdictions, among other such distinctions, has gone a long way to analogize "in-house" with "outside" counsel. Similarly, attorney fee awards denied to attorney-litigants represented by "members of the firm" are increasingly being granted to "in-house" counsel for representing the firm that employs them.

In *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, the California Supreme Court explained that in-house attorneys, like private counsel, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a non-lawyer. A corporation represented by in house counsel is in an agency relationship, meaning that it has hired an attorney to provide professional legal services on its behalf. The court analogized that payment of a salary to in-house attorneys is like hiring a private firm on a retainer.

However, like other issues surrounding this topic of litigation, there is no bright-line rule spanning jurisdictions across the country. The distinct treatment being given to "in-house" counsel has fueled attempts to stretch the definition, at least as far as attorney fee awards are concerned, resulting in varying degrees of success. In *Jones v. Ippoliti* (1999) 52 Conn. App. 199, 727 A.2d 713, the law firm sought "in-house" counsel fees for its time spent assisting trial counsel, claiming the firm's attorneys and paralegals spent time, prior to and during trial by drafting pleadings, briefs, conducting research and other tasks, taking time away from other work. It urged the court to adopt the trend in other jurisdictions granting fees to outside and in-house counsel who participate in the prosecution of claim. The court denied the request, holding that the firm's employees were not in-house counsel and did not act as attorneys in the case because they never filed an appearance. Even if they had appeared, the firm would have been in pro se, thus not entitled to fees.

Still, many jurisdictions have not kept up with the changing structure, dynamic and operations of the modern law firm as it relates to these issues. To increase the chances of "in-house" counsel recognition by the courts, firms are encouraged to make a clear designation of such counsel; prepare a policy describing duties, internal claims handling/reporting parameters and discovery protocol; and, ensure that all firm attorneys protect and respect the information exchanged with "in-house" counsel as privileged. It is equally important to recognize that representation by "in-house" may not always be the best decision, particularly in highly specialized legal matters, matters where "in-house" attorneys were involved in the circumstances leading to the claim, where objectivity may be impaired or a conflict of interest exists, highly publicized cases, cases seeking large damages, or matters filed in outside jurisdictions, to name a few.

All About The Benjamins?

Money may be the overriding factor for some when deciding to hire outside counsel, whether it be saving or, perhaps, the hope of earning some money; however, there are many other important considerations attorney-litigants must acknowledge before making that choice. Lawyers and legal malpractice insurers alike should consider, or re-consider, their position on self-representation if they haven't already. Most lawyers' professional liability primary policies are duty to defend policies, meaning the insurer controls the defense and has a right to select defense counsel. Lawyers are encouraged to openly discuss the possibility of self-representation with their insurer to determine when it is permissible, if at all, or if it can be. There is no better time to do this than when renewing or purchasing your coverage. If self-defense is allowed by the insurer, find out how it will impact the deductible or self-insured retention and what the billing rates are for in-house counsel representation. Whatever you do, do not start self-defending before notifying your insurer. Check your policy terms for a duty to report claims to be sure you're in compliance with reporting requirements. The bottom line—a penny saved is not a penny earned in many jurisdictions and under many circumstances. Check the law in your state and speak to your insurer before you elect self-representation.

Choice-of-Law Provisions continued from page 3

conclusion to enforce the arbitration provision, the *Boghos* court explicitly rejected the insured's argument that a bad faith claim reflects a fundamental public policy of California:

> While insurance bad faith claims were for a time thought to have a statutory basis in the Unfair Practices Act (Ins. Code, §790 *et seq*.), we definitively rejected that position in *Moradi-Shalal v. Fireman's Fund Ins. Cos*. (1988) 46 Cal.3d 287, 304 … and expressly overruled prior contrary authority … For the same reason, insurance bad faith claims also cannot properly be described as tethered to a statute, in the sense that *Tameny* claims subject to arbitration under *Little* are necessarily "'based on policies "carefully tethered to fundamental policies … delineated in constitutional or statutory provisions"'" … While the business of insurance is sufficiently affected with a public interest to justify its regulation by the state … the fact of regulation does not suffice to demonstrate that any given insurance-related claim entails an unwaivable statutory right, or that any given claim seeks to enforce a public policy articulated in a statute.[24]

Because enforcing an arbitration provision would deprive a policyholder of its ability to recover tort remedies in a court proceeding, the *Boghos* court necessarily considered and *rejected* the notion that a policyholder has a fundamental public policy right to pursue such damages against an insurer.

And while *Foley*, 47 Cal.3d 654, 683-700, *Egan v. Mutual of Omaha Ins. Co*. 26 Cal.3d 809, 820 (1979) and other decisions certainly recognize the special nature of insurance contracts and the rationale for permitting tort remedies for an insurer's bad faith, such cases do not hold that the ability to recover tort damages against an insurer is a *fundamental* policy in California.

In California, "[p]ublic policy is defined as a policy covering health, safety or welfare and established by constitutional provision, statute, or administrative rule."[25] *Boghos* confirmed that the right to sue an insurer in tort is not established by statute.[26] Nor are such causes of action established by constitutional provision or administrative rule. It is the lack of these attributes, which should have precluded the *Tri-Union* court from concluding an insured has a fundamental policy right to seek tort remedies for bad faith.

California has long recognized and protected the freedom to contract. It has eschewed rewriting contracts by failing to give effect to plain and unambiguous wording. California recognizes the special nature of insurance policies and has in that regard regulated such contracts and even allowed for tort recovery where an insurer breaches a policy in bad faith. But California has not elevated the right to redress such grievances with tort remedies as a fundamental public policy that overrides enforcement of a valid choice-of-law provision where it satisfies *Nedlloyd*. Insurers, like any other business entity, should be entitled to rely upon such provisions.

Endnotes

1 *Archdale v. American Int'l Specialty Lines Ins. Co.,* 154 Cal.App.4th 449, 467 & fn.19 (2007), citing *Foley v. Interactive Data Corp,* 47 Cal.3d 654, 684 (1988).

2 *See Chateau Chambray Homeowners Assn. v. Assoc. Int'l Ins. Co.,* 90 Cal.App.4th 335, 346-347 (2001) ("'The mistaken [or erroneous] withholding of policy benefits, if reasonable or based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability.'").

3 *See e.g., Rocanova v. Equitable Life Assur. Society of the U.S.,* 634 N.E.2d 940, 945 (N.Y. 1994).

4 *Frazier Nuts, Inc. v. American A.G. Credit,* 141 Cal.App.4th 1263, 1274 fn.12 (2006).

5 *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1264 (1992).

6 *See Rosen v. State Farm Gen. Ins. Co.,* 30 Cal.4th 1070, 1077-1078(2003).

7 *Aerojet-General Corp. v. Transport Indemn. Co.,* 17 Cal.4th 38, 75 (1997) ("But the pertinent policies provide what they provide. [The insured] and the insurers were generally free to contract as they pleased ....").

8 *See e.g., Downey Venture v. LMI Ins. Co.,* 66 Cal.App.4th 478 (1998).

9 *Nedlloyd Lines B.V. v. Superior Court,* 3 Cal.4th 459, 464-467 (1992) (*"Nedlloyd"*); *see also Frontier Oil Corp. v. RLI Ins. Co.,* 153 Cal.App.4th 1436, 1450 fn.7 (2007) (citing *Nedlloyd* as the applicable test where a policy contains a choice-of-law provision).

10 *Nedlloyd*, at 467 citing Restatement (Second) of Conflicts of Law, s. 187, comment f.; *see also Hughes Electronics Corp. v. Citibank Delaware*, 120 Cal.App.4th 251, 258 (2004) ("'If one of the parties resides in the chosen state, the parties have a reasonable basis for their choice.'").

11 *Nedlloyd*, at 466 & fn.5.

12 *Id*. at 466-467.

13 2015 U.S. LEXIS 23441 at *9 & *23.

14 3 Cal.4th at 470, emphasis added.

15 2015 U.S. LEXIS 23441 at *31, emphasis added.

16 *See e.g., Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1090 (1992) overruled on other grounds by *Green v. Ralee Eng'r Co.*, 19 Cal.4th 66, 80 fn.6 (1998) (". . . courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy which deserves recognition at law.'"); *Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 297 (1982) ("We continue to believe that, aside from constitutional policy, the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state.").

17 *See Foster-Gardner, Inc. v. Nat. Union Fire Ins. Co*., 18 Cal.4th 857, 882 (1997) ("Although insureds certainly deserve no less than the benefit of their bargain, insurers should be held liable for no more."); *Aerojet*, 17 Cal.4th at 75 ("But the pertinent policies provide what they provide. [The insured] and the insurers were generally free to contract as they pleased ... We may not rewrite what they themselves wrote.").

18 *See* 2015 U.S. LEXIS 23441 at *31.

19 *Boghos*, 36 Cal.4th at 499-501.

20 *Id.* at 509.

21 36 Cal.4th at 506-508.

22 *Id.*, at 505-507.

23 *Id.*, at 507, citations omitted.

24 *Boghos*, at 507, citations omitted.

25 *Foley*, at 694 fn.31.

26 *Bogus*, at 507, citing *Moradi-Shalal*, at 304.

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Calendar of Events

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**Many Chapter event dates will be finalized and reported in future issues. You can also visit the PLUS website to view the most up-to-date information.*

Chapter Events*

Canada Chapter
- May 20, 2015 • Educational Seminar • Montreal, QC
- June 2015 • TBD • Toronto, ON

Eastern Chapter
- June 2015 • Educational Seminar • New York, NY
- August 3, 2015 • PLUS Foundation Golf Outing • Westfield, NJ

Hartford Chapter
- May 28, 2015 • Educational Seminar • Hartford, CT
- September 18, 2015 • PLUS Foundation Golf Outing • Cinnaminson, NJ

Mid-Atlantic Chapter
- May 18, 2015 • Educational Seminar • Philadelphia, PA
- July 14, 2015 • PLUS Foundation Golf Outing • Location TBD

Midwest Chapter
- June 24, 2015 • Educational Seminar • Kansas City, MO
- July 8, 2015 • PLUS Foundation Golf Outing • Chicago, IL

New England Chapter
- June 8, 2015 • PLUS Foundation Golf Outing • Cohasset, MA
- September 2015 • Educational Seminar • Boston, MA

North Central Chapter
- Summer 2015 • Educational Seminar • Minneapolis, MN

Northern California Chapter
- June 4, 2015 • Educational Seminar • San Francisco, CA
- Fall 2015 • Educational Seminar • Eas Bay, CA
- October 15, 2015 • PLUS Foundation Golf Outing • San Francisco, CA

Northwest Chapter
- August 2015 • Networking Reception • Seattle, WA

Southeast Chapter
- May 21, 2015 • Educational Seminar • Fort Lauderdale, FL
- June 18, 2015 • Networking Reception • Atlanta, GA
- September 10, 2015 • Educational Seminar • Richmond, VA

Southern California Chapter
- June 2015 • Networking Reception • Los Angeles, CA
- August 3, 2015 • PLUS Foundation Golf Outing • Los Angeles, CA
- September 2015 • Educational Seminar • Los Angeles, CA

Southwest Chapter
- Fall 2015 • Educational Seminar • Las Vegas, NV
- Fall 2015 • Educational Seminar • Scottsdale, AZ

Texas Chapter
- August 6, 2015 • Networking Reception • Austin, TX
- September 2015 • Educational Seminar • Dallas, TX
- September 2015 • Educational Seminar • Austin, TX

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