

At Issue

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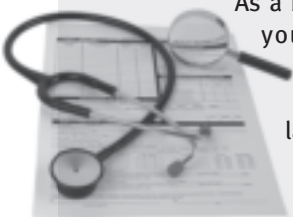
Holiday Greetings from SRC!



Stone, Rosenblatt & Cha hopes your holiday season is a joyous one, and wishes you and yours health, happiness, and prosperity for the New Year.

Say Ahhhhhhhhhh—The Advantages of Periodic “Legal Checkups”

By Robert C. Norton



As a business person, you probably will not want to consult with a lawyer when there is no pending legal problem in hand. After all, legal fees are expensive, and it seems counterintuitive to incur them when there is no immediate need. But just as doctors encourage patients to practice preventive medicine, and mechanics perform preventive maintenance, there are times when it is wise to use your lawyer in a preventive role.

Litigation in business is costly and time-consuming; if your lawyer can diagnose potential legal problems, and help you correct them in order to avoid future liability, you may have just saved yourself from significant financial liability, and can continue to concentrate on your primary concern—running your business.

An annual “legal checkup” by your attorney can help you to spot potential legal problems in your business, and provide the opportunity to take corrective action before liability attaches. But what is a legal checkup?

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Legally Speaking



Ira Rosenblatt authors a recurring column called "Legally Speaking" which regularly appears in the San Fernando Business Journal.

Q: Are oral contracts enforceable?

A: Subject to certain exceptions outlined in the California Civil Code and commonly referred to as the "statute of frauds," oral contracts in California are every bit as enforceable as written contracts. In fact, business executives routinely enter into "hand shake deals," which is fine if everyone lives up to their end of the bargain and has perpetual, defect-free memories. Unfortunately, life teaches us that either one or both of these assumptions frequently does not hold true. As a result, when executives enter into oral contracts, often their next move is to engage counsel to reduce the agreement to a comprehensive written contract.

There are good reasons why better business practices dictate that agreements be reduced to writing. For one, if you ever have to sue to enforce a contract or seek damages caused by another party's breach, you will first have the burden of proving that a contract existed. If you can't satisfy this burden, your case will be over very quickly and you will be out of luck. Moreover, not only can a written contract help you prevail in court if you find yourself in litigation, it can also help prevent litigation in the first place by memorializing specifics of an agreement that one party or the other may otherwise claim to "forget" (either innocently or by design) over time.

Another benefit written contracts deliver is the option to confer rights and remedies which are often otherwise unavailable. For example, as a general rule, parties to litigation are not usually entitled to recover their attorney's fees. However, a prevailing party may recover attorney fees provided the underlying contract contains such a provision (commonly referred to as an attorney fee provision).

The bottom line is that, although oral contracts are enforceable, there is a good reason you've heard the old saying "oral contracts are not worth the paper they are written on." If a deal is worth making, it is worth papering. Reduce your important business deals to writing.

Q: My partners and I have been in business for four years and things are going well. We do business as a partnership. In connection with year-end, I recently noticed that our existing partnership agreement does not contain a buy-sell provision. I am considering suggesting to my partners that we get a buy-sell agreement drawn up. What do you think? What benefits would it confer?

A: First, I commend you for taking the time to review your business agreements. It is good practice to regularly review your core business agreements. Business, like life, is a dynamic process and things are consistently changing.

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Editor's Notes

We are pleased to provide you with the Fall 2006 Edition of "At Issue."



Our feature article, authored by Robert C. Norton, addresses the importance of scheduling periodic "legal maintenance" checks to ensure that your company/business

is running smoothly. In addition, Kristi Weiler Dean addresses current efforts by the Department of Insurance to change the legal definition of "agent" and the impact that those efforts will have on the insurance industry. Finally, we feature the third installment of Ira Rosenblatt's "Legally Speaking" which provides clients, colleagues and friends with an opportunity to have their general legal questions addressed by one of SRC's founding directors.

We would like to thank our clients and friends for their comments regarding our newsletter. As our newsletter is comprised entirely of original material researched and written by the attorneys of SRC, we can address any topic that you, the reader, desires. Please do not hesitate to contact me with any topics that you would like addressed in future editions of "At Issue."

We truly hope you enjoy our publication. If you are tired of sharing your "At Issue" with your colleagues or know of someone who would like to be placed on our mailing list, please drop me a line at ggarfinkel@srclaw.com and we will make sure that they receive all future editions. Also, should you ever need additional copies of our newsletter, or back editions, please let us know. If you wish to speak with us directly, call (818) 999-2232. Once again, we truly hope you enjoy "At Issue." **SR&C**

Gregg S. Garfinkel, Editor

"At Issue" is the newsletter of Stone, Rosenblatt & Cha, A Professional Law Corporation. "At Issue," which is published quarterly, is designed to keep our clients, colleagues and friends apprised of recent decisions and legal trends which affect our mutual areas of interest. The articles and case briefs contained herein are of a general nature and are not intended to be interpreted as advice on specific legal issues. Also, the mere receipt of this newsletter does not create an attorney-client relationship. Questions or comments regarding "At Issue" should be directed to:

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Attorney Profile: Kristi Weiler Dean



We are pleased to profile Kristi Weiler Dean, who has been a principal of the firm since mid 2005. Kristi received her Bachelor of Science degree from California State University at Fresno in 1981 and her J.D. degree from Pepperdine University of Law in 1984. Kristi served as Judicial Clerk

to the Hon. Armand Arabian, Justice of the California Court of Appeal, in 1984. In 1986, Kristi formed the partnership of Isman and Weiler, managing the firm's Encino office until Mr. Isman's death in 1989. She then formed the Law Offices of Kristi Weiler Dean APC, one of the few insurance defense firms in Southern California founded by a woman. Over the next decade she expanded her firm to include six other attorneys while remaining the sole shareholder of her firm, during which she directed the firm towards a specialty in insurance law and litigation.

Kristi has a unique understanding of the operations, procedures, responsibilities, and concerns of the insurance industry, including retail agencies, surplus line brokers, and underwriters in the MGA and GA capacities. She has been regularly invited as guest speaker for many insurance trade groups including the California Insurance Wholesalers' Association, Los Angeles Insurance Woman's Association, West Valley Claims

Association, Insurance Agents and Brokers of Orange County, and San Gabriel Valley Claims Association. She has spoken on major issues of concern to the insurance industry, including e&o risk management for agents and brokers, unfair business competition, diligent search compliance, and agency/producer agreements. She is a member of the California Insurance Wholesalers' Association, the National Association of Surplus Lines Offices ("NAPSLO"), and a member of the Association of Southern California Defense Counsel.

Kristi shared with us her profound gratitude in being able to provide her clients with more diverse resources offered by SRC. "I now can offer my clients the benefits of a larger firm in the form of litigation support and resource management. I can provide them with the synergistic legal specialties that they need, which I was unable to previously offer, such as corporate formation, business litigation, labor law and employers liability. I have the benefit of trusted and experienced specialists in these areas, as well as the camaraderie of seasoned and creative litigators in every aspect of civil litigation. My clients appreciate and benefit by it, and so do I." She emphatically added, "I am surrounded by talent, professionalism and good humor, and without exception I have found these traits in every member of our firm. I am very blessed!"

Kristi enjoys gardening, horseback riding, and her Weimaraner, Gracie. [SR&C](#)

Acronyms

Sometimes, "talking the talk" is as important as "walking the walk." More often than not, that talk is full of acronyms. So, if you're NVQ (not very qualified) in business lingo, this list may help you decipher those memos from the boss, woo a new client, or impress your audience at an upcoming holiday party.

A2O (Apples to Oranges): A comparison of dissimilar things; an inappropriate comparison. "I think we should ignore Smith's suggestion; the analysis is totally A2O."

B2B (Business to Business): Marketing-speak for a business supplying another business, as opposed to consumers or government. "They're strictly B2B, so you won't find their products in retail stores."

BHNC (Big Hat, No Cattle): Adapted from cowboy parlance. Used to describe someone who is all talk and no action, full of self-importance, and/or a poser. "She brags about her 'fabulous' job all the time, but she's BHNC."

CLM (Career-Limiting Move): A move that blocks your career path, or gets you fired, as in: "Wow, he made a real CLM when he showed up an hour late for the big pitch meeting."

CTD (Circling the Drain): Something that is on its last breath and about to die. Possibly related to disposing of a dead pet goldfish or a similar flushing-something-down-the-toilet scenario. "We all know the project is CTD, so most of us have started looking for new jobs."

MEGO (My Eyes Glazed Over): A sign of extreme boredom. "I had a serious case of MEGO after that accounting presentation."

PEBCAK (Problem Exists Between Chair and Keyboard): Tech-speak used when the "problem" is within hearing range. "I took a look at her machine and it's clearly a PEBCAK situation," said one technician to the other.

PURE (Previously Undiscovered Recruiting Error): A new employee who isn't working out as well as expected; an employee who looked good on paper but isn't cutting it on the job. "The new assistant buyer is definitely a PURE. Her qualifications are stellar, but she's so rude!" [SR&C](#)



Legislative Two-Step: The California Department of Insurance's Attempts to Sidestep Due Process and Rewrite the Definition of "Agency"

By Kristi Weiler Dean



Litigation and legislation often focus on the definitions of "agent" and "broker" in the insurance industry. Unfortunately, these terms are pervasively misused in both the legal and insurance communities, from lay-persons and insurance professionals to lawyers and judges. This is

not a surprise. The California *Civil Code* has eight definitions of "agent" which often seem inconsistent with the four definitions of "agent" and "broker" in the *Insurance Code*. Legal treatises and trade journals regularly address the application of these terms in policy procurement. Judges and juries use this information to assess responsibility and impose liability when a mistake results in uncovered insurance claims.

The California Department of Insurance has sidestepped the debate and now attempts to impose its own definitions of "agency" vs. "broker" which significantly differ from current law. As a result, carriers may find themselves liable for the actions of the brokers and agents involved in a policy procurement beyond that which is set forth in their agency agreements. Similarly, wholesalers may unwittingly assume legal responsibility for the acts of their retailers and, in so doing, expose the insurer to additional liability. Indeed, all involved in the chain of procurement may find themselves legally liable for the acts of other participants due to the "precedential decision" recently designated by the California Department of Insurance.

On May 9, 2006, the Department of Insurance filed a Notice of Noncompliance and Order to Show Cause against an admitted insurer, American Reliable Insurance Company, its general agent, Cabrillo General Insurance Agency, and its wholesale producer, Superior Access Insurance Services. The CDI alleged that Superior Access was an agent of American Reliable because it had written binding authority and, through issuance of company guidelines by which Superior Access agreed to abide, was given underwriting authority. As a result of this "agency" relationship, the broker fees charged by Superior Access were imputed to American Reliable. Because the broker fees were not disclosed in American Reliable's rate filings, the CDI charged American Reliable with illegally "permitting" its "agent" to collect unapproved fees in violation of *Insurance Code* section 1861.01(c). Because the broker fee was unique to the placements made by Superior Access, the carrier was also charged with unfair rate discrimination in violation of *Insurance Code* section 1861.05(a). On June 30, 2006, American Reliable and the CDI settled their differences and, as part of the settlement, American Reliable agreed to pay fines and disgorge some payments that it had "constructively" received from customers of Superior

Access. Also as part of the settlement, American Reliable waived its right to challenge the CDI's findings of fact and conclusions of law.

The Decision and Order of the American Reliable settlement was recently designated by the CDI as a "precedential decision" under *Government Code* section 11425.60(b), effective immediately. As a result, this decision can be relied upon by parties to current cases, cited in their briefs, and also relied upon by Administrative Law Judges in making proposed decisions. According to this designated decision, if a producer engages in any activity that could benefit an insurer, that producer risks the characterization that he is the insurer's "agent" for all purposes. In this decision, a producer is acting as the insurer's "agent" whenever the following occurs:

- the insurer gives the producer discretion to issue insurance binders;
- the insurer obtains the producer's express or tacit agreement to apply specific underwriting or rating factors before submitting applications to the insurer;
- the insurer permits the producer to display the insurer's logo;
- the insurer refers potential or existing insureds to the producer, or vice versa;
- the insurer attempts or reserves the right to discipline the producer;
- the insurer offers financial incentives to its producer through contingent compensation.

Acting on behalf of over 14,000 insurance professionals, California's Insurance Brokers and Agents of the West (IBA West) filed a petition with the Office of Administrative Law which challenged the CDI's efforts, stating that the agency's actions were tantamount to underground regulation calculated to sidestep the legal requirements which must be met before an agency can make new law. Filed on September 26, 2006, IBA West seeks to overrule the CDI's label of the settlement as a "precedential decision," arguing that it disregards the minimum due process requirements and grossly misstates the current law on "agency vs. broker" capacity.

The Administrative Procedure Act sets forth two ways in which administrative agencies can "make law." The first is regulation through formal rule-making. This requires lengthy and protracted notice and comment procedures, including publication of the proposed text and the reasons for it, a 45 day public comment period, public hearings, a published final statement of reasons, "redline" comparisons of any modifications to the original text, and a summary of comments. The second way that an administrative agency can make new law is through adjudication against a licensee which consists of an

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Legislative Two-Step *continued from page 4*

evidentiary hearing (similar to a civil trial), a determination of facts, and a decision based upon that determination. Non-parties whose rights may be “substantially affected by the proceeding” may seek leave to intervene in order to be heard on the impact of the ongoing adjudication.

IBA West argues that the CDI’s actions failed to comply with either avenue of law-making. The CDI/American Reliable settlement was negotiated in the spirit of compromise and did not provide an opportunity for industry intervention. It was based upon a specific factual context, and should impact only the parties who signed it. Without a public disclosure and full debate, there is no assurance to the public that the agency’s conclusions were based on adequately information, were reasonable in light of the industry, or were properly constrained by law. Without an adversarial proceeding, there was no evidence, argument or expertise upon which the decision-maker could reach a sound judgment based upon precedent and public policy. If allowed to remain, this new “precedential decision” may adversely impact every segment of the insurance industry. It could affect imposition of legal responsibility and, ultimately, will restrict availability of insurance products to California consumers. [SR&C](#)

SRC Super Lawyers!

SRC is pleased to announce that Ira Rosenblatt, Greg Stone, John Cha, Adam Soibelman, Robert Norton, and Gregg Garfinkel were recently named Southern California Super Lawyers. Super Lawyers is a joint project of Law & Politics and the publishers of Los Angeles Magazine. Super Lawyers are nominated by members of the bar and selected by a blue ribbon panel after applying a multi-step process including careful securitization of each nominee’s credentials, practice areas, and capabilities. Although less than five percent of admitted lawyers are selected for this honor, Stone, Rosenblatt & Cha is proud to have 6 attorneys named Southern California Super Lawyers. [SR&C](#)



Principal Opportunities at SRC

SRC is currently seeking principal candidates who possess specialized skills in their respective fields and a significant portable synergistic “book of business” to join our Business Transactions, Commercial Litigation, and/or Employment & Labor practice groups.

Commitment to ethical conduct, support of our Mission Statement and Company Values, and a positive attitude towards work and life are required.

If you or someone you know is passionate about client service and desires to associate with a group of like-minded professionals in a collegial and positive environment, please e-mail Ira Rosenblatt at irosenblatt@srclaw.com. Please insert “Career Opportunity” in the subject line. Serious inquiries only please. All inquiries will be kept strictly confidential.

— Thank you.

OUR MISSION STATEMENT

SRC will deliver premium legal services through the dynamic combination of knowledge, integrity, innovation, commitment, and teamwork. Our goal is to achieve our clients’ objectives.

Say Ahhhhhhhhhh—The Advantages of Periodic “Legal Checkups” *continued from page 1*

Generally speaking, a legal checkup is a review of your company’s books, records, material contracts, methods of operation, procedures and controls that is intended to identify any material issues or shortcomings before they result in possible exposure to liability, including potential litigation, on the part of the Company or its owners, directors, or officers.

The legal checkup encompasses a variety of areas. First and foremost is a review of the Company’s organizational documents and records of meetings of owners, directors, or managers (depending on the type of entity—corporation, LLC or partnership). The principal purpose of this examination is to determine that the documents are still accurate, that they properly reflect the interests of the owners, and that they continue to provide the maximum protection from personal liability on the part of the owners, officers, or directors.

The legal checkup will also extend to reviewing material contracts of the Company, including customer and vendor contracts, leases, loan agreements, guarantees, and license agreements. Periodic review of these important agreements will insure that the Company remains in compliance with their respective terms. Hopefully, important contracts are reviewed by counsel before they are signed. It may be appropriate to establish protocols within the Company with regard to the execution of material contracts—for example, who is authorized to sign what types of contracts; and to what extent are officers and employees empowered to bind the Company with respect to any contract.

Employment matters will be an important part of any legal checkup. Employment related lawsuits make up between 25-40% of all new lawsuits filed in California. These claims run the gamut from straight wage and hour claims to wrongful termination and discrimination claims. Periodic reviews of employment practices, application forms, employee manuals, hiring processes, and procedures for reporting alleged misconduct and the Company’s procedures for dealing with claims can materially assist a Company in limiting its exposure under the rather byzantine regulations governing employment in California.

Operations are another area that can benefit from additional scrutiny. All businesses are subject to government regulation to a greater or lesser degree. Do you have all required licenses and permits, and are they current? Are you complying with all statutory record-keeping requirements? Do you know which regulations apply to your business? Are there environmental or land use restrictions that apply to your business? Are you subject to any reporting requirements?

Loans and loan covenants are another area that should be periodically reviewed. Have there been any changes to your business or operations that need to be reported to your lender? Are you in compliance with loan covenants, and if not, is the breach of covenant sufficient to cause the loan to be called? Does your lender require periodic financial reports, and are they up to date and properly prepared? Are

there any anticipated problems with the loans that should be addressed now?

A legal checkup should also include a review of the following:

- compensation planning for officers and key employees, including employee benefit plans;
- succession planning, with a review of buy-sell agreements among owners, including a valuation update for the enterprise, and preparation or update of the business contingency plan for death or disability;
- recent legal developments to determine if newly passed legislation will affect the business operation (recent examples include new privacy, health information and overtime rules);
- intellectual property and technology updates and review of trade secret, trademark, and patent protection and licensing agreements; and
- the Company’s future business plans.

By incorporating legal checkups into normal business operations, a Company can be proactive in planning legal affairs, rather than merely reacting to crises. By making counsel a part of the planning team, Companies will likely experience lower legal fees and view legal fees as an investment in the long-term future, rather than a short-term expense. By establishing a close relationship with legal counsel, so that counsel is familiar with the Company’s operations and expectations, counsel will be more productive and effective in helping the Company reach its goals and to deal with legal matters before significant problems arise. **SR&C**

Quotable Lawyer

“We can imagine . . . no better way to counter a flag-burner’s message than by saluting the flag that burns. . . We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.” **SR&C**

—William J. Brennan, Jr. *Texas v. Johnson*,
109 S. Ct. 2533, 2547-48 (1989)



Legally Speaking *continued from page 2*

It is important to ensure that your core business agreements are still relevant and consistent with the owner's intent and business objectives.

Although it is unusual for a partnership agreement not to include a buy-sell provision, it is not unprecedented. However, now that things are going well, I strongly suggest you take action. You and your partners may either revise your Partnership Agreement to include buy-sell provisions or have a separate Partnership Buy-Sell Agreement prepared.

Buy-sell provisions are often a critical part of any business relationship (although your business is a partnership, buy-sell provisions—although different in structure—are equally important for corporations and limited liability companies.) They offer predictability and control in the event that a partner either dies, withdraws, becomes disabled, is expelled, or seeks to sell his or her partnership interest (any one or more of these events are sometimes referred to as “trigger events”).

If your business is a service business, what happens in the case of a trigger event may be even more critical than if your business is less dependent on your partner's direct involvement (e.g., a partnership invested in real estate may not require the active management participation of all partners). In fact, absent a buy-sell provision in your Partnership Agreement or a stand-alone Buy-Sell Agreement, not only might you find yourself without a partner one day, worse yet, you might find yourself with a partner you had never contemplated (e.g., your partner's wife or husband in the event your partner should suddenly pass away).

As a partnership, you and your partners have a choice. Either you can get together to, discuss, agree, and document what you want to occur in the event of a “trigger event,” or the government will decide for you. That's right. The Uniform Partnership Act of 1994 (sometimes referred to as “RUPA,” and found in the California Corporation Code) contains a buy-sell provision that applies by default in the event a general partner “dissociates” from a partnership, unless the partners previously agree otherwise or elect to dissolve the partnership within 90 days of the dissociation event.

Consequently, you will be doing your partners and your business a service by bringing this issue to the attention of your partners, getting their approval, and retaining a business lawyer to assist you in either amending your existing Partnership Agreement to incorporate a buy-sell provision, or to draft a separate buy-sell agreement. It will be more economical to engage one lawyer to handle this matter, but you must be aware that absent agreement by you and your partners on a single lawyer (and waiver by each of you of the conflict of interest created by the representation of each partner by a single lawyer), you and your partners have the right to each seek independent counsel.

Q: In an effort to minimize the exposure of sexual harassment claims, we are thinking of implementing a policy preventing our managers from dating other employees. What do you think of this policy? Is it enforceable?

Paws for a Cause



On October 22, 2006, SRC Principal Kristi Weiler Dean and her Weimaraner, Gracie, participated in a 5k walkathon. The event, “Walk for Paws,” raised funds for a very worthy organization called

Lend a Paw. Lend a Paw rescues animals, facilitates their rehabilitation and training, and uses the rescued animals as Social/Therapy dogs for children with Autism. If you want more information regarding this noble cause, please e-mail Kristi at kdean@srclaw.com. **SR&C**

A: With all the attention sexual harassment is getting these days, it is no surprise that practically all California employers have sexual harassment on-the-brain, so to speak. However, exactly how far employers can go in restricting or prohibiting employees' off-duty behavior is currently a subject of heated debate at both the state and federal level. Policies that reach too far risk violating individual's constitutional rights to privacy. The analysis typically centers on the precise policy at issue, how clearly the employer publishes its policy, what specific rights the policy seeks to restrict, and how much of those rights are in fact restricted.

The policy your question contemplates is commonly referred to as a non-fraternization policy. Recently, the California Supreme Court upheld a California employer's non-fraternization policy even though the fraternization between the two employees only occurred during nonworking hours. The court noted that employers have a legitimate interest in avoiding sexual harassment claims. Significantly, the court reasoned that since the employer published its policy, the supervisor employee had notice that his conduct violated the company no-dating policy, and thus a diminished expectation of privacy.

This area of the law continues to evolve. Although non-fraternization policies are currently not expressly prohibited in California, whether your policy will hold up to judicial scrutiny will turn on the facts and circumstances of the particular case. To increase your odds, it is advisable that such policies be unambiguously drafted, equally applicable to employees of both sex, published in handbooks and the like, grounded in sound business judgment (e.g., restricting managers from dating subordinates may be seen as more acceptable than a blanket no-dating restriction since managers conduct may be imputed to the employer irrespective of whether the employer has actual knowledge of the managers conduct or not), and enforced in a non-discriminatory fashion – avoid double standards such as enforcing the policy as to mid-level managers but not high-level managers. **SR&C**

Stone, Rosenblatt & Cha is a business law firm specializing in business transactions and litigation.

We represent businesses and their owners in the areas of Commercial Litigation, Business Transactions, Labor & Employment, Insurance Defense, and Transportation & Logistics.

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Client Corner: A Survey of Results for, and by, the Clients and Attorneys of SRC

Ira Rosenblatt formed several new LLCs and Corporate entities for various SRC business clients. **Ira** and SRC’s Mergers and Acquisitions Practice Group are currently in the process of closing several stock purchase and asset purchase deals for and on behalf of various SRC business clients. Finally, **Ira** was quoted in an article captioned “Special Report: Mergers and Acquisitions—Amid The Frenzy” in last months Business Journal. **Gregg Garfinkel** was a featured speaker at the 2006 Freight Claims and Loss Prevention Annual Conference at Bally’s in Las Vegas. Kudos to **Kristi Weiler Dean** who, after receiving a favorable ruling for its surplus line broker client on a complex unfair business competition claim, successfully defeated two attempts by the opposition to appeal the ruling (all the way to the California Supreme Court). **Kristi** and **Leslie Blozan** attended the annual convention held by the National Association of Professional Surplus Lines Offices in Chicago, Illinois, which was attended by more than 2,500 insurance industry professionals. **Kristi, Leslie,** and **Venessa Martinez** have been coaching the Crespi Carmelite High School Mock Trial Team in preparation for the school’s first level of competition. Kudos are also in order for **Venessa Martinez** who obtained summary adjudication of a contractual limitation of liability provision on behalf of a local moving and storage company. A warm SRC welcome goes out to **Gabriella Garcia-Kornzweig** who recently joined SRC’s Business Transactions practice group. **Gabriella** is a graduate of the University of California at Berkeley and the University of Southern California School of Law. Welcome Aboard! [SR&C](#)



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