The Fundamental Importance of Electing the Best Judges

By Russell Carparelli

Lord Chief Justice Hewart’s ninety-year-old exhortation about the fundamental importance of justice being done, offered in the context of what was otherwise apparently just another dispute that came before him, is often quoted because it reminds us that the public must trust that justice is being done in our courts. Indeed, public confidence in our judicial system is essential to social order and commercial vitality.

The rule of law is the foundation of our freedom, and our courts preserve the rule of law in tens of thousands of courtrooms every day. Lawyers dedicate themselves to knowing the law, advising others about its requirements, and representing them in our courts. In that sense, we are the keepers of the door to the courthouse, and, in turn, guardians of the rule of law.

Unfortunately, in the competition for audiences, modern media tend to focus public attention on failures rather than successes. In the process, public opprobrium for the failures too often extends indiscriminately to judges and attorneys who well and successfully fulfill duties to the rule of law and the public.

Civil defense attorneys play a crucial role both in ensuring that justice is done and in ensuring that the public knows when and where justice is being done . . . and where it is not being done. But, in the context of judicial elections, lawyers often sit back and do not help the public identify which judges have demonstrated the skill and courage to “do justice,” and which have not. Why do they not do so? Don’t they owe it to their clients, present and future, to inform voters about the qualities to look for in judicial candidates, and to ensure that they know which judges have demonstrated those qualities?

California, like many other states, elects its judges. California voters, like voters in other states, often express frustration that they do not know enough about judicial candidates (and the judicial system) to cast an informed vote.

Although it is continued on page 11
President’s Message
By David B. Roper
Lorber, Greenfield & Polito, LLP

I f all goes according to plan, this issue of the Update should reach you shortly before the Statewide Primary Election that will take place on June 3, 2014. In the run up to that date, the focus of the media will undoubtedly be the primary battles for Governor, State Senator, U.S. Representative, and other major political offices. However, real elections – and not just primaries – will also take place on June 3rd, and those elections could prove more important to San Diego attorneys and their clients than the high-profile primaries. I’m talking about the judicial elections, particularly the contested elections for San Diego Superior Court Offices 9, 19, 20, 25, and 44.

Until recently, I always took the judicial appointment process for granted. I felt reasonably comfortable with the idea that the governor, of whichever party, took the appointment of judges to be serious business and that extraordinary diligence was exercised in the process. The application alone seems designed to cull marginal candidates from the start. And then of course the Judicial Selection Advisory Committee and State and local bar associations weigh in. Disciplinary history is checked. Resumes, endorsements and references are verified. Scholarly accomplishments, intellectual curiosity and life experience are examined. And that all-important intangible, judicial temperament is evaluated.

The pre-appointment vetting process stands in stark contrast to the mechanism of direct election of judges, where this arduous vetting mechanism is replaced by a surprisingly unpredictable political process. While I would never question anyone’s right to run for office, or to support a candidate of her choice, I cannot help feeling a fair degree of skepticism regarding a process that, time after time, rewards big money over merit, ambition over humility, and name recognition over real accomplishment.

The discussion raised several issues, but consideration and discussion of these issues is thought provoking and worthwhile. As always, the SDL’s Lunch and Learn programs are free to SDL members and a catered lunch is provided. We hope to see you at the next presentation in June!

Ed McIntyre can be reached at edwardmcintyre789@gmail.com.
INFORMING THE ELECTORATE: Why the San Diego County Bar Association Publishes Ratings of Judicial Candidates

By Jon R. Williams

The average San Diegan utilizes our court system infrequently, and probably spends even less time contemplating what qualities and characteristics a good judge should possess. But as lawyers regularly working in the judicial system, most of us have firsthand knowledge about how our court system works, and how vitally important it is to that system to have qualified judges making the tough decisions they are called to make every day.

Yet disproportionate to the importance of that position, there is very little information available publicly regarding candidates for judicial office. Consequently, the voting public is left to find that information anecdotally, if at all. This is precisely why, as a matter of public service and awareness, the San Diego County Bar Association (SDCBA) has been providing and publicizing ratings for judicial candidates in contested elections since 1978. Doing so is consonant with one important aspect of the SDCBA’s overall mission: Serving the public by enhancing the legal system.

In offering those ratings, the SDCBA does not compare opposing candidates in a particular race. Nor does it endorse or oppose the election of specific candidates. Instead, using the same criteria and standards applied by the Commission on Judicial Nominees Evaluation (JNE) when judicial candidates are considered for appointment by the Governor, the SDCBA simply provides ratings as a way to inform the public whether a candidate, based upon that criteria, is Well-Qualified, Qualified, or Lacking Qualifications to be a bench officer. Indeed, as candidates seeking to become a judge through the election process (as opposed to the appointment process) may not undergo review by JNE, the SDCBA makes sure that the voting public has the same evaluation information when it comes time to vote that the Governor has at his or her disposal when making judicial appointments.

To accomplish that task, the SDCBA reaches far and wide to seek a broad base of varied information about candidates, including soliciting input from within our own profession and from the greater San Diego community. Candidates are evaluated on their qualifications to serve as judicial officers based on the following factors: judicial temperament, intellect and ability, knowledge of the law, trial experience, professional reputation, industry and work habits, decisiveness, fairness and objectivity, courtesy and patience, judgment and common sense, compassion and understanding, integrity and honesty, administrative ability, physical and mental health, courage, writing and research skills, and any other factor that might affect the candidate’s ability to serve as a judge. Neither the area nor type of law practice, or the candidate’s religious or political beliefs, are factored into that evaluation process. Furthermore, candidates are rated by a committee comprised of 21 attorneys who represent a cross-section of San Diego’s legal community by gender and ethnicity, including lawyers from both the public and private sectors, civil and criminal law practitioners, corporate counsel, solo practitioners, and members of small, medium, and large firms. Those evaluations are performed in confidence to both ensure candor and participation, and to minimize any concerns about bias and reprisals for that participation.

California has our country’s largest court system, serving California’s 38 million residents. We have approximately 15,000 lawyers practicing in our county. It is incumbent upon each of us, as part of our professional responsibility as stewards of the court, that we do everything we can to help educate the public about the importance of our justice system, and to ensure that it continues to serve every San Diegan.

Mr. Williams in the current president of the San Diego County Bar Association. His email is williams@bradwill.com. The SDCBA can be reached at 619.231.0781 or at www.sdcba.org.

Ratings of Judicial Candidates

The San Diego County Bar Association rates candidates in contested judicial elections because there is often little information available to the public. The ratings are:

<table>
<thead>
<tr>
<th>Name</th>
<th>Rating</th>
</tr>
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<tbody>
<tr>
<td>Joseph Adelizzi</td>
<td>Qualified</td>
</tr>
<tr>
<td>Douglas Crawford</td>
<td>Lacking Qualifications</td>
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<tr>
<td>Ken Gosselin</td>
<td>Lacking Qualifications</td>
</tr>
<tr>
<td>Michele Hagan</td>
<td>Lacking Qualifications</td>
</tr>
<tr>
<td>Carla Keenh</td>
<td>Qualified</td>
</tr>
<tr>
<td>Hon. Michael J. Popkins</td>
<td>Well Qualified</td>
</tr>
<tr>
<td>Hon. Ronald S. Prager</td>
<td>Well Qualified</td>
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<tr>
<td>Hon. Lisa Schall</td>
<td>Well Qualified</td>
</tr>
<tr>
<td>Hon. Jacqueline M. Stern</td>
<td>Qualified</td>
</tr>
<tr>
<td>Paul Ware</td>
<td>Qualified</td>
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<tr>
<td>Brad A. Weinreb</td>
<td>Qualified</td>
</tr>
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Information is collected from the legal community and is used to rate the candidates on the following criteria:

- Judicial temperament
- Intellect and ability
- Knowledge of the law
- Trial experience
- Professional reputation
- Industry and work habits
- Decisiveness
- Fairness and objectivity
- Courtesy and patience
- Judgment and common sense
- Compassion and understanding
- Integrity and honesty
- Administrative ability
- Physical and mental health
- Courage
- Writing and research skills
- Any other factor that might affect the candidate’s ability to serve as a judge

For more information on the SDCBA’s ratings process, visit: www.sdcba.org/2014ratings

*The SDDL does not endorse candidates for elected office. The San Diego County Bar Association’s 2014 Judicial Candidate Ratings are provided on behalf of the SDCBA to the SDDL membership.*
NAVIGATING JUDICIAL APPOINTMENTS UNDER THE BROWN ADMINISTRATION

By Yolanda Jackson

Josh Groban, senior advisor to the governor in the Judicial Appointments Unit, traveled to The Bar Association of San Francisco (BASF) from Sacramento on a Thursday evening in January to speak to a crowded room of aspiring judges and bar association representatives about how to get a judicial appointment in the Governor Jerry Brown administration. The evening was presented by BASF’s Judicial Mentorship Program.

Groban, before joining the governor’s office, served as legal counsel for Governor Brown’s 2010 campaign and previously practiced law at Munger, Tolles & Olson in Los Angeles. Prior to that, he practiced at Paul, Weiss in New York and also clerked in the Southern District of New York.

Groban was extremely candid, factual, and well received. Here are the nuggets of information he had to share with people interested in becoming a judge.

The Application

The California Judicial Application can be found online at http://gmc.ca.gov/s_judicialappointments.php.

 Spend the necessary amount of time carefully completing your judicial application. This is an online process and the application is lengthy. Be sure to carefully catalog the major cases that you have worked on. It is recommended that you notify, in advance, those people that you have listed as references. Make sure there are no typos or grammatical errors in your application and be sure to read the instructions thoroughly and follow them closely. Proofread and then proofread again and then let a trusted friend or colleague proofread your final application.

Letters of Recommendation: Be sure to include “thoughtful” letters of recommendation. The ideal number is two to six letters, definitely not thirty or forty letters. They should be from people who really know you, your work ethic, your skills, and your attributes. The references are not impressed by politician or celebrity names if the letters from them don’t convey that they “know” you and your professional values. Supplemental materials, such as letters of recommendation, can come in after you submit your packet and will be attached to your application. However, it is best if your letters are submitted early because this administration does its review and thorough vetting of applications before they go to the Commission on Judicial Nominees Evaluation (JNE).

Endorsements: Endorsements from bar associations are not required however, the bar associations should clearly explain the vetting process they went through in recommending you. If the vetting process does not appear to be thorough, the endorsement is not given much weight.

Governor Brown’s Process

Governor Brown appointed a Judicial Appointments Unit instead of a Judicial Appointments Secretary like past governors have done. One unique feature of the unit is that it heavily vet applicants before they go to the JNE Commission, not after, like the prior administration.

The governor’s Judicial Appointments Unit screens through every application (including letters of recommendation) that it receives. The unit will make phone calls to the references listed by the applicant and others, and the governor himself will sometimes make phone calls on an applicant. But frankly, not much weight is put on the feedback from these references.

Regarding the infamous Judicial Selection Advisory Committees (JSAC), often referred to as the “scaring committees,” Groban emphasized that “yes” they are consulted, but they are not kingmakers and that under the Brown administration these committees do not keep applicants from getting through the process. The main role of these committees is to assist with vetting and reference phone calls.

The governor’s office sends a batch of applicants’ names to the JNE Commission every three to four months. It also sends names to various county bar associations to vet the candidates in person, and its feedback from these interviews is instructive and useful. However, Groban emphasized that the governor has the power to appoint judges, not the JNE Commission.

Once the JNE Commission, the JSAC, and county bar associations have vetted the applicants that were originally sent through the process by the governor’s office, the governor’s office then decides who it will interview.

Governor Brown’s Focus

Casting aside typical gatekeeper rules, Governor Brown appointed judges who belong to other political parties. There is no candidate that is too young or too old. These criteria are no longer barriers to being appointed. There are certain types of past experience that are not barriers to appointment by this administration. An applicant’s past experience can include in-house counsel, transactional work, public defender, or academia. The number of cases an applicant has tried is not an issue with this governor.

He will also consider candidates who were previously sent to the JNE Commission under a prior administration, but who were never appointed. An applicant’s ties to more than one county can be a plus, as that candidate will be considered for appointment to the bench in more than one county.

Governor Brown may appoint an applicant to the appellate court without that applicant having first served on the superior court.

What This Governor Is Looking for in Traits and Attributes

Josh Groban was clear in stating that Governor Brown is looking for judicial candidates who have intellectual curiosity. Governor Brown is known to participate in some of the interviews of candidates so that he can personally explore the candidates’ undergraduate studies, what the topic of their thesis was, who their favorite authors are, the subjects of scholarly articles they may have written, and what their personal focus was on law review in law school, for example.

He is interested in individuals who are well rounded, interesting, and who have rich life experiences. He learns this by asking questions such as how the candidate is engaged in his or her community and what books the candidate has read lately.

The governor has a “no jerks policy” in that he wants candidates who are known for having a good and judicial temperament. He wants judges who have good values and who are fair. He often views this through the lens of “whether their minds can be changed” on any given issue.

On March 1, 2012, the Administrative Office of the Courts (AOC) released demographic data on the ethnicity, race, gender, gender identity, and sexual orientation of California state judges and justices.

The data show an increase in the percentage of female appellate court justices and trial court judges in 2011. Women now represent 31.1 percent of the judiciary, compared to 27.1 percent in 2006, continuing a steady upward trend over the past six years. Changes over the past six years in the percentage of justices and judges in race and ethnicity categories included Asian up 1.2 percent; Black up 1.3 percent; Hispanic up 1.9 percent; and White down 2.2 percent. These changes reflect judicial retirements and other departures from the bench, new judicial appointments, and an increase in the number of trial court judges who have provided race/ethnicity information.

Since the beginning of his term, Governor Jerry Brown has been very clear that he is interested in appointing a diverse group of judges. He is accomplishing this by casting aside the gatekeeper rules that have traditionally existed, in part by changing the ways the JNE Commission and JSAC are utilized in the vetting process. Look for future AOC demographic data to reflect the efforts of the Brown administration’s work to diversify the California bench.

Yolanda Jackson is the interim executive director, general counsel and director of diversity for The Bar Association of San Francisco and the Justice & Diversity Center. She can be reached at jjackson@ sbbar.org and you can follow her on Twitter at YolandaSBBar.

This article is reprinted from San Francisco Attorney magazine with permission from The Bar Association of San Francisco.
By Cayce Greiner, Esq. and Daniel P. Fallon, Esq.

CASE OVERVIEW
Dodd v. Cruz
223 Cal.App.4th 933 (2014)

In this personal injury case, a third party factoring company purchased a lien for plaintiff’s medical costs from the health care provider. Defendant subpoenaed business records from the factoring company regarding the purchased lien and specific contractual agreements between the factoring company and the medical provider.

The California Court of Appeal, Second District, concluded the Los Angeles County Superior Court abused its discretion in granting a motion to quash defendant’s subpoena of records and awarding sanctions in the amount of $5,600. Through application of Heseltine v. Hamilton Meat’s and its progeny, the appellate court held defendants are entitled to subpoenaed documents regarding the “factor’s contractual relationship with the health care provider, including documents disclosing what the factor paid for the lien.” 223 Cal.App.4th 936

FACTUAL BACKGROUND

Plaintiff Dodd alleged he sustained a rotator cuff tear in a motor vehicle accident caused by Defendant Cruz. Dodd received initial shoulder treatment through a Kaiser Permanent medical center and appears to have been insured through Kaiser. Later, Dodd underwent shoulder surgery performed at Coast Surgery Center (“Coast”) on a lien basis. Coast’s final surgery bill was between $40,000 and $50,000.

On the same day as Dodd’s surgery, Coast sold its surgery lien to MedFi, a third party factoring company in the business of purchasing accounts receivable from businesses “at a discount.” 223 Cal.App.4th 937

MedFi claimed it expected Dodd to pay 100% of the “book value” of the medical charges regardless of the reasonable value of the medical treatment determined by a court or a jury.

Defendant Cruz subpoenaed records from MedFi regarding its contractual relationship with Coast and the purchase amount of the medical lien. The parties attempted to resolve the discovery dispute without court intervention by narrowing the scope to three key documents that MedFi ultimately refused to produce:
1. A contractual agreement between MedFi and Coast dated 4 years prior to Dodd’s surgery;
2. A redacted document entitled “Creditor’s Assignment of Claim;” and
3. A document entitled “MedFi’s Open Lien Detail.”

The trial court granted MedFi’s Motion to Quash the subpoena and awarded sanctions in the amount of $5,600 against Cruz, who appealed.

REVERSAL ON APPEAL—DEFENDANT ENTITLED TO FACTORING DOCUMENTS

Dodd concluded Cruz was entitled to obtain the subpoenaed documents regarding MedFi’s contractual relationship with Coast, including documents disclosing the amount MedFi paid for the surgery lien. The subpoenaed documents were reasonably calculated to lead to the discovery of admissible evidence related to:
- The value of the health care services received by Dodd; and
- The amount of medical expenses Dodd actually incurred.

Though Dodd and MedFi maintained Dodd is responsible for the full amount Coast billed for the surgery, the Court determined “Cruz is entitled to obtain documents relating to MedFi’s collection activity and policies and procedures, because they may support Cruz’s position that Dodd is not actually responsible for the full amount billed.” 223 Cal.App.4th 942

DEFENSE COUNSEL’S THREE KEY TAKEAWAYS FROM DODD v. CRUZ

1. Be Ready to Counter Objections: In Dodd, plaintiff failed to assert a “legally cognizable, reasoned argument” or to cite any authority supporting his objection the subpoenaed information was “confidential and proprietary.” Dodd provides authority for defense counsel to counter these objections on the basis factoring company records are relevant to past economic damages or, at minimum, are “reasonably calculated to lead to the discovery of admissible evidence.” 223 Cal.App.4th 942 (citing Katiczynski v. Perry (2007) 152 Cal.App.4th 1288, 1298). Deposition questioning of Persons Most Qualified regarding billing and collection practices of both medical providers and factoring companies regarding “reasonable value” of medical treatment may provide additional evidence to support Howell arguments at trial.

2. Dodd May Apply Beyond Narrow Subpoenas To Third Party Factors: Defense counsel should leverage the Howell ruling beyond its narrow application to factor subpoenas.

3. Dodd’s ruling also applies to subpoenas of billing records from medical providers themselves. When insured plaintiffs intentionally forgo available health insurance benefits and choose to treat on lien in order to inflate damages, contractual agreements between medical providers and health insurance companies for otherwise insured medical services are relevant to plaintiffs’ past medical damages.

Dodd provides additional support to compel the production of these contractual agreements because the agreements are reasonably calculated to lead to the discovery of admissible evidence regarding (1) the reasonable value of medical services rendered and (2) the reasonable value of medical expenses actually incurred. The negotiated rates between a plaintiff’s available insurance carrier and medical providers are evidence of the reasonable value of services rendered, and therefore, the most a plaintiff should be able to recover for past medical damages at trial.

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Experience. Your best solution.
The Usefulness of Roth IRA Conversions

By Zach A. MacDougall
Financial advisor
zachary.macdougall@northstarfinancial.com

The effectiveness of Roth IRA conversions depends on several factors, including your current tax situation, your future tax projections, and the potential for future tax changes. A Roth conversion can help reduce the tax burden on your retirement savings, but it also involves a significant upfront investment. Before making a Roth conversion, it is important to carefully evaluate the potential benefits and drawbacks, and to consult with a financial advisor to determine if a Roth conversion is right for your situation.

Expanded Roth IRA conversion

Starting in 2010, the income limits and restrictions for Roth conversions were eliminated. Prior to 2010, the ability to convert traditional IRAs or other qualified retirement plans to a Roth IRA was only available if your modified adjusted gross income was $100,000 or less and you did not file married, filing separately. Beginning in 2010, both the income limit and the filing status restriction were eliminated for conversion eligibility. Virtually anyone with a traditional IRA, SEP-IRA, SIMPLE IRA or qualified retirement plan can convert those accounts to a Roth IRA. Beneficiaries who have inherited qualified plans can also convert to an "inherited Roth IRA."  

What is a Roth conversion?

A Roth conversion is a rollover from another type of retirement plan, such as a traditional IRA, SEP-IRA, SIMPLE IRA or 401(k) to a Roth IRA. This "rollover" is generally taxable in the year of the distribution to the extent the amount rolled over includes deductible or pre-tax contributions. You have 60 days to contribute your distribution to a Roth IRA or you can direct the financial institution to directly rollover the distribution to your Roth IRA. You can convert a portion of your retirement plan to a Roth IRA, you do not need to convert the whole account.

The "non-deductible" tax trap

Generally, traditional IRAs are funded with pre-tax or deductible contributions, or with pre-tax qualified plan rollovers. Roth IRA conversions from these pre-tax accounts are 100 percent taxable. However, if you made non-deductible IRA contributions or rolled over after-tax money from a qualified retirement plan to a traditional IRA, you now must consider the pro-rata distribution rules.

The IRS considers all of your IRAs, SEP-IRAs and SIMPLE IRAs as one giant IRA pool. You are responsible for keeping track of your non-deductible amounts (both contributions and after-tax rollovers) in this pool with IRS form 8606. Say, for example, your IRA is worth $25,000 and is funded with $20,000 in non-deductible contributions, and you also have a SEP-IRA funded by your employer worth $75,000. Your total IRA pool is $100,000. You cannot pick the $20,000 non-deductible contributions out of the pool and convert that amount, tax free, to a Roth IRA.

If you choose to convert $20,000, you need to consider your total IRA asset pool in the pro-rata calculation. This formula is generally: Basis/ (End of Year Total of all IRA account balances + distribution amount) x distribution amount = amount of distribution or conversion subject to tax.

Using this formula (or the worksheet in IRS form 8606), the non-taxable portion of your $20,000 conversion is $4,000. You will owe income tax on $16,000. You must continue to keep track of your basis in your IRA using form 8606 each time you take a distribution or convert any amount to a Roth IRA.

One possible solution is to rollover your pre-tax IRA, SEP-IRA, or SIMPLE IRA accounts to an employer sponsored qualified plan such as a 401(k). Qualified employer plans are not included in the pro-rata formula.

Should I convert to a Roth IRA?

You may benefit from switching to a Roth IRA if any of the following situations apply:

• You will have sufficient income in retirement and do not need or want income from your IRA. Roth IRAs do not have Required Minimum Distributions (RMDS) during your lifetime. The account can accumulate until your death, at which time your beneficiaries must begin distributions.

Distributions from a Roth IRA to your beneficiaries will generally be income tax free. You will believe income tax rates will be higher when you take the distributions from your IRA or qualified plan. Future distributions from a Roth IRA are generally tax free. To minimize the portion of your Social Security benefits subject to income tax, Roth IRA distributions will not impact Social Security benefit taxation.

Traditional IRA or qualified plan distribution amounts are included in income and could increase the portion of your Social Security benefits subject to income tax.

• If your IRA has experienced a drop in value, now may be a good time to convert to a Roth IRA.

• You have sufficient assets, other than the account you are converting, to pay the income taxes due on the conversion.

• You have made non-deductible contributions to your IRA. Only earnings and deductible contributions will be taxed upon conversion. (See “The non-deductible tax trap” on page 1)

Considerations

• The additional income from the conversion may push you into a higher marginal tax bracket. Consider a partial conversion. You can convert a portion of your IRA or retirement plan each year.

• If you are a Medicare beneficiary, or will become one within the next few years, the increased taxable income created from a conversion may cause your Medicare Part B premiums to temporarily increase.

Higher income beneficiaries pay higher Part B premiums.

1 - The Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) passed in May 2006 and removed the eligibility limitations on Roth IRA conversions with a delayed effective date of 1/1/2010.

2 - Income for purposes of the Roth conversion means “Modified Adjusted Gross Income” without taking into account any non-taxable converted amount or any Required Minimum Distribution.

3 - For more details on beneficiary Roth IRA conversion rules see IRS Notice 2007-7, IRS Notice 2008-30 and IRS Notice 2009-75.

4 - Qualified distributions from a Roth IRA are income tax free. To be qualified, the Roth IRA holder must have met the five-year holding period AND the distribution must be due to the Roth IRA holder’s death, disability, first-time homebuyer or upon attaining age 59 1/2.

5 - See the “Medicare & You” guide at www.medicare.gov/Publications/Pubs/p10050.pdf

This information is a general discussion of the relevant federal tax laws. It is not intended for, nor can it be used by any taxpayer for the purpose of avoiding federal tax penalties. This information is provided to support the promotion or marketing of ideas that may benefit a taxpayer. Taxpayers should seek the advice of their own tax and legal advisors regarding any tax and legal issues applicable to their specific circumstances.

Mr. MacDougall does not provide tax or legal advice and this article should not be considered as such. Please consult a tax or legal professional for advice regarding your specific tax or legal situation.

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fairly common for lawyers to make financial contributions to judicial elections campaigns, it is not common for lawyers to speak out in support of the best judges. Yet, doing so would contribute to the quality of our courts and the justice they provide. Doing so would also foster public confidence that so many of our sitting judges are dedicated public servants. And doing so is in the best interest of future litigants. It is truly necessary to remain neutral when a candidate opposing the judge attacks the judge on the basis of rulings that honored and respected the rule of law? Should we remain neutral when an excellent candidate opposes a judge who does not honor and respect the rule of law? Voters need this information and attorneys are uniquely qualified to provide it. Are we upholding the state and federal constitutions and guarding the rule of law when we sit on the sidelines? At the beginning of the 20th Century, there was widespread distrust of America’s courts. In 1913, the American Judicature Society was formed as an independent nonpartisan membership organization to address the causes of that distrust. For more than 100 years, AJS has been at the forefront of improvements in judicial selection, judicial ethics, and court processes. As lawyers, as guardians of the rule of law, we must diligently work to ensure that justice is done and that the public sees and trusts that it is being done. The American Judicature Society encourages you to support the re-election of California’s best sitting judges and the election of the state’s best judicial candidates.

Russell Carparelli is the Executive Director of the American Judicature Society, and a former judge of the Colorado Court of Appeals. For more information about AJS, contact him at rcarparelli@ajs.org or visit www.ajs.org. The SDLL thanks the author for his public service and this contribution to the Update.
First Amendment (Establishment Clause)


The reason the decision did not violate the First Amendment by opening its meetings with ceremonial prayer. Ceremonial prayer requires that, since this Nation was founded, many Americans believe that religious existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case had a permissible ceremonial purpose. (May 5, 2014.)

Evidence

City of Pomona v. SQM North America Corporation _ F.3d _ (9th Cir., 2014) _

The Court of Appeals reversed the district court’s order excluding the plaintiff’s expert witness testimony and affirmed the denial of SQM’s motion for summary judgment. Expert testimony may be excluded by a trial court under Rule 702 of the Federal Rules of Evidence only when it is either irrelevant or unreliable. Facts casting doubt on the credibility of an expert witness and expert witness testimony regarding the strength of a particular scientific method are questions reserved for the fact finder, so the district court erred in excluding Dr. Sturchio’s expert testimony. In addition, viewing the evidence in the light most favorable to the non-moving party, SQMNA failed to show there was no genuine factual dispute, whether Pomona’s claims were barred by the economic loss rule or by the applicable statute of limitations. (May 2, 2014.)

Employment/Labor

Hara v. City Of Los Angeles _ F.3d _ (9th Cir., 2014) _

The Court of Appeal affirmed the district court’s summary judgment ruling for defendant. PacIfiCare’s categoric exclusion of myoelectric prosthetics from a health insurance plan did not violate California’s contractor licensing law, which prohibits unlicensed contractors from soliciting, obtaining, and applying to bar plaintiff’s Miller Act action. (April 29, 2014.)

Insurance

Garcia v. Pacificare of California, Inc. _ F.3d _ (9th Cir., 2014) _

The Court of Appeals reversed the district court’s order granting summary judgment to defendants. PacIfiCare’s categorical exclusion of myoelectric prosthetics from a health insurance plan did not violate California Health & Safety Code section 1367.18. (May 8, 2014.)

CALIFORNIA SUPREME COURT

Consumer Rights

Leffler v. Target Corporation _ Cal.App.4th, 2014 WL 1719497: The California Supreme Court affirmed the Court of Appeal’s decision (slightly different reasons) affirming the trial court’s granting of defendant’s demurrer without leave to amend. The tax code provides an exclusive means by which plaintiffs’ dispute over the taxability of a retail sale may be resolved, and their current lawsuit is inconsistent with tax code procedures. The consumer protection statutes under which plaintiffs brought their action cannot be applied to avoid the limitations and procedures set out by the Revenue and Taxation Code. (May 1, 2014.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Carmona v. Lincoln Millennium Car Wash, Inc. (2014) _ Cal.App.4th, 2014 WL 1569182: The Court of Appeal affirmed the trial court’s denial of a petition to compel arbitration. The trial court properly found the arbitration agreement was procedurally and substantively unconscionable. The agreement was procedurally unconscionable because the car wash companies presented the agreement on a “take it or leave it basis;” they did not provide the applicable rules of the AAA; they gave plaintiffs insufficient time to review the agreement; and they translated some parts of the agreement into Spanish but did not translate some key provisions. The arbitration agreement was substantively unconscionable for lack of mutuality. The enforceability clause allowed the car wash company to bring their claims for damages or injunctive relief against plaintiffs in court, but plaintiffs were restricted to arbitration. The clause also stated any breach of the confidentiality subagreement would result in immediate, irreparable harm to the car wash, and plaintiffs did not get the benefit of a parallel presumption on their claims. The enforceability clause further permitted the car wash companies to recover their attorney fees by failing to give plaintiffs the same rights. Finally, a representative of the car wash companies did not sign the agreements. (C.A. 2nd, filed April 21, 2014, published May 9, 2014.)

Casas v. Carmax Auto Superstores California LLC (2014) _ Cal.App.4th, 2014 WL 1099699: The Court of Appeal reversed the trial court’s denial of a motion to compel arbitration in an action for wrongful termination. The trial court found the arbitration agreement was “illusory” because the company’s Dispute Resolution Rules and Procedures (DRRP) allowed CarMax to alter or terminate the DRRP at its discretion. The Court of Appeal concluded the arbitration agreement was not unconscionable because it provided a specific date for any amendment of the agreement, or the DRRP (December 31 of every year) and required 30 days’ notice and posting at CarMax locations. In addition, California law provides that even when a modification clause does not provide for advance notice, this will not render an agreement illusory because the agreement also contains an implied covenant of good faith and fair dealing. (C.A. 2nd, filed February 26, 2014, published March 20, 2014.)

Attorney Fees

Mega RV Corporation v. WHH Corporation (2014) _ Cal.App.4th, 2014 WL 5091371: The Court of Appeals affirmed in part the trial court’s judgment finding that a component part manufacturer was not required to indemnify the retail seller of an accessory to a home, but reversed the part of the judgment awarding attorney fees to the component manufacturer under the tort of another doctrine. A component part manufacturer is only subject to Civil Code section 1792 obligations if it has provided an express warranty for the consumer pertaining to the component part at issue. Mega RV owed no duty of care to the component manufacturer under the factors listed in Aix Corp. v. Gregory (1979) 24 Cal.3d 799. Absent a duty, there was no tort; and without a tort, the tort of another doctrine did not apply. (C.A. 4th, April 30, 2014.)

SJS & JH Group, Inc. v. Milliken Enterprise Ltd. (2014) _ Cal.App.4th, 2014 WL 1244277: The Court of Appeal affirmed the trial court’s denial of plaintiff’s motion for attorney fees as the prevailing party. Substantial evidence supported the trial court’s finding that plaintiff operated a law firm and was represented by employees or associates of the firm, not by outside counsel. (C.A. 2nd, March 26, 2014.)

Civil Code

Faison v. Long Beach Genetics, Inc. (2014) _ Cal.App.4th, 2014 WL 6110397: The Court of Appeal affirmed the trial court’s summary judgment for defendants. The trial court properly ruled that the litigation privilege in Civil Code section 4575 applied to this action for negligence arising out of an erroneous DNA test result used to determine a minor’s paternity. (C.A. 4th, March 21, 2014.)

Purcell v. Schweitzer (2014) _ Cal.App.4th, 2014 WL 1004430: The Court of Appeal affirmed the trial court’s order setting aside a default judgment. A lawsuit on a note for $85,000 was settled for $58,829.35 finding that it constituted an unenforceable penalty because the amount of the judgment bore no reasonable relationship to the amount of damages plaintiff would actually sustain as a result of the breach. (C.A. 4th, filed February 24, 2014, published March 17, 2014.)

The McCaffrey Group, Inc. v. Superior Court (Cital) (2014) _ Cal.App.4th, 2014 WL 1151392: The Court of Appeal granted a writ of mandate reversing the trial court’s denial of a builder’s motion to compel ADR and stay the action that sought to enforce alternative petitigation procedures (to statutory procedures in the Right to Repair Act (Civil Code section 895 et seq.) in home purchase contracts. The trial court denied the motion finding the contracts were procured with the understanding of the contracts of adhesion and the alternative procedures were substantively unconscionable. The Court of Appeal disagreed and granted a petition for writ of mandate compelling the parties to engage in the contractual petitigation procedures because it found only a low level of procedural unconscionability and no substantive unconscionability. (C.A. 5th, March 24, 2014.)
Civil Procedure (anti-SLAPP, costs, statute of limitations)

American Master Lease LLC v. Identa Partners, LTD (2014) Cal.App.4th __, 2014 WL 1724043: The Court of Appeal reversed the trial court’s order awarding costs to defendant. Although the settlement agreement was silent as to costs, plaintiff agreed to dismiss two of her seven causes of action with prejudice in exchange for a payment of $23,500 from defendant, plaintiff was entitled to costs under Code of Civil Procedure 1032 because she was the party with the net monetary recovery. (C.A. 6th, May 2, 2014.)

NBC Universal Media, LLC v. Superior Court (Montz) (2014) Cal.App.4th __, 2014 WL 1665035: The Court of Appeal granted a petition for writ of mandate and ordered the trial court to grant the summary judgment for defendants. Plaintiff sued for breach of implied contract and breach of confidence claiming they had pitched a ghost hunter television series that ultimately became the popular show Ghost Hunters. The trial court erred in not granting defendants’ motion for summary judgment because the two-year statute of limitations under Code of Civil Procedure section 338.3 applied. (C.A. 2nd 2014.)

HBO Universal Media, LLC v. Superior Court (Maxton) (2014) Cal.App.4th __, 2014 WL 1724043: The Court of Appeal reversed the trial court’s order sustaining a demurrer without leave to amend. The trial court properly found plaintiff’s complaint failed to state a claim; defendants failed to prove that the claims arose from protected activity. (C.A. 4th, April 15, 2014.)

Cansino v. Bank of America (2014) Cal.App.4th __, 2014 WL 1229660: The Court of Appeal affirmed the trial court’s order sustaining a demurrer without leave to amend the complaint. The trial court properly found that plaintiff’s complaint failed to state a claim for negligence per se. (C.A. 4th, March 26, 2014.)


Piedicot v. MidFirst Bank (2014) Cal.App.4th __, 2014 WL 1244435: The Court of Appeal affirmed the trial court’s denial of plaintiff’s demurrer to grant the motion for dismissal of a demurrer to his second amended complaint, to dismiss his action without prejudice under Code of Civil Procedure section 581. The term “commencement of trial” in section 581 is not restricted only to jury or court trials on the merits; it also includes pretrial procedures that effectively dispose of the case. Plaintiff’s request for dismissal was untimely because it was made after the commencement of the demurrer hearing. (C.A. 2nd, March 26, 2014.)

Nucci v. Wharton (2014) Cal.App.4th __, 2014 WL 1022877: The Court of Appeal affirmed the trial court’s order granting defendant’s motion to dismiss plaintiff’s complaint for failure to state a claim for breach of express or implied employment contracts. The Court of Appeal concluded defendant’s action had to be dismissed due to a lack of subject matter jurisdiction resulting from Saffer’s failure to timely exhaust his administrative remedies with the FTC as required by the Financial Institutions Reform, Recovery and Enforcement Act of 1989. 12 U.S.C. section 1813, et seq. (FIRREA). (C.A. 110th, April 29, 2014.)

White v. County of Los Angeles (2014) Cal.App.4th __, 2014 WL 1478701: The Court of Appeal reversed the judgment for plaintiff. When an employee takes leave under the Family and Medical Leave Act (FMLA) (29 U.S.C. § 2601 et seq.), the employee is entitled to be restored to employment upon certification from the employee’s health care provider that the employee is able to resume work. The employer is not permitted to seek a second opinion regarding the employee’s fitness for work prior to restoring the employee to employment. If the employer, however, is not satisfied with the employee health care provider’s certification, the employer may restore the employee to work but then seek its own evaluation of the employee’s fitness for duty at its own expense. (C.A. 2nd, April 15, 2014.)


Employment/Labor


Saffer v. JP Morgan Chase Bank (2014) Cal.App.4th __, 2014 WL 1678172: The Court of Appeal vacated the judgment dismissing the action and remanded to the trial court with directions to enter an order of dismissal against Saffer for lack of subject matter jurisdiction. Saffer’s suit alleged the defendants constructively discharged him in violation of public policy and in breach of express or implied employment contracts. The Court of Appeal concluded the action had to be dismissed due to a lack of subject matter jurisdiction resulting from Saffer’s failure to timely exhaust his administrative remedies with the FTC as required by the Financial Institutions Reform, Recovery and Enforcement Act of 1989. 12 U.S.C. section 1813, et seq. (FIRREA). (C.A. 110th, April 29, 2014.)

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regarding a complaint alleging FEHA and other claims for sex discrimination and sexual harassment, failure to maintain free environment from harassment, retaliation, intentional infliction of emotional distress, negligent hiring, supervision, and retention. The trial court granted the motion based on plaintiff’s application for equitable tolling, where she alleged that any claim or lawsuit had to be filed no more than six (6) months after the date of the employment action or to waive any statutory limitation to the contrary. The Court of Appeal held that the shortened limitation period was unreasonable and against public policy.

(C.A. 1st, March 20, 2014.)

Lewis v. City of Benicia (2014) _ Cal.App.4th _ , 2014 WL 1232694: The Court of Appeal reversed in part and affirmed in part the trial court ruling in a case alleging sexual harassment and retaliation. The Court of Appeal found that triable issues existed and reversed a summary judgment that existed and reversed a summary judgment in favor of former supervisor Hickman, and because of this ruling also reversed a summary judgment on the pleadings for defendant City of Benicia (City) for retaliation and harassment claims. The Court of Appeal found the trial court had abused its discretion by excluding all evidence of Hickman’s alleged sexually harassing conduct and by excluding the testimony of plaintiff’s psychologist, and also reversed and remanded the judgment for the City on the retaliation claim.

(C.A. 1st, March 26, 2014.)


Equity
Hophin v. Kadziorski (2014) _ Cal.App.4th _ , 2014 WL 1466282: Plaintiff sued her employers individually, as the owners of an office building, for negligence and premises liability after she fell from a balcony and was injured. The Court of Appeal affirmed the trial court’s denial of plaintiff’s request for a jury trial on the issues of equitable tolling and equitable estoppel, and affirmed the trial court’s ruling that the doctrine of equitable tolling did not apply. However, the Court of Appeal concluded that the reason the trial court determined that equitable tolling was inapplicable was legally insufficient, and the decision was remanded for factual findings as to whether plaintiff had demonstrated the elements of equitable tolling. (C.A. 4th, April 16, 2014.)

Government
City of San Jose v. Superior Court (Smith) (2014) _ Cal.App.4th _ , 2014 WL 1254821: The Court of Appeal granted a writ of prohibition by the City of San Jose (City), the City’s mayor, and 10 city council members and overturned the trial court’s summary judgment in favor of real party Ted Smith’s request to inspect email and text messages sent or received by public officials and employees on their private electronic devices, including private accounts, Private communications, which are not stored on City servers and are not directly accessible by the City, are “not public records” within the meaning of the California Public Records Act (Government Code section 6250 et seq.). (C.A. 6th, March 27, 2014.)

Insurance
Global Hawk Insurance Company v. Le (2014) _ Cal.App.4th _ , 2014 WL 1478514: The Court of Appeal reversed the trial court’s summary judgment for the insurance carrier. The carrier denied coverage for Le’s injuries claiming that coverage was excluded because Le was an employee. In deciding whether Le was an employee, the trial court erred in not applying California law but instead applying federal regulations governing the trucking industry. The Court of Appeal ruled that California law governed, and the motion should have been denied because there were triable issues of material fact as to the exclusions asserted by the carrier. (C.A. 1st, April 14, 2014.)

Judgments
DKN Holdings LLC v. Faerber (2014) _ Cal.App.4th _ , 2014 WL 1381358: The Court of Appeal affirmed judgments for defendants. In an earlier action, DKN obtained a money judgment for over $3 million against a colessee, Roy Caputo, following a trial court ruling on the merits of monies due under the lease. The lease provided that colessees shall be “jointly and severally responsible” to comply with its terms. Although DKN sued Faerber and Neel in the prior action, along with Caputo, DKN dismissed them without prejudice prior to trial and judgment. When DKN later sued Faerber and Neel in this action, DKN’s claims against them were barred by the claim preclusion aspect of the res judicata doctrine. (C.A. 4th, filed April 9, 2014, published April 25, 2014.)

Bisno v. Kahn (2014) _ Cal.App.4th _ , 2014 WL 1646660: The Court of Appeal affirmed summary judgments granted for defendants. When judgment creditors agreed to delay executing on their judgments in exchange for the payment of forbearance fees in addition to statutory postjudgment interest of 10 percent on the unpaid balance of the judgments, the forbearance fees did not violate California’s usury law. Because the statutory usury law does not expressly prohibit a party from entering into an agreement to forbear collecting on a judgment, usury liability does not extend to judgment creditors who receive renumeration beyond the statutory 10 percent interest rate in exchange for a delay in enforcing a judgment. (C.A. 1st, April 25, 2014.)

Medical Board of California
Medical Board of California v. Chiarottino (2014) _ Cal.App.4th _ , 2014 WL 1427466: The Court of Appeal affirmed the trial court’s order compelling Dr. Chiarottino to comply with investigative subpoenas regarding controlled substance prescriptions. The

On The Move

BALESTREI POTOCKI HOLMES ATTORNEYS named 2014 Southern California Super Lawyers.

San Diego, CA. Thomas Balestri, Jr., Joseph Potocki and Karen Holmes of the San Diego law firm of Balestrei Potocki & Holmes have been selected to the 2014 Southern California Super Lawyers list in the field of construction litigation.

Balestri has dedicated most of his 32 years in practice to the representation of developers, property owners and general contractors in litigation, negotiations and risk management. Balestri has tried a number of high exposure cases with great success. He has received numerous professional awards and honors including Top San Diego Lawyers and Super Lawyers for the last several years.

Potocki’s practice concentrates on litigation, transactional matters and construction contract drafting and negotiation. His extensive litigation experience involves high-value disputes relating to a wide variety of issues in the real estate, business and construction arenas. His professional awards and honors include the Top 25 Attorneys in Construction and Real Estate Law, San Diego Daily Transcript, and Super Lawyers.

Holmes is a successful litigator and trial attorney specializing in professional liability defense and civil litigation. She handles contract review and negotiation as well as defense of claims for delay, extras and defect claims on behalf of architects, engineers and contractors. Holmes has extensive trial experience and has served as Judge Pro Tem as well as arbitrator and mediator for the San Diego Superior Court. She is the recipient of many professional awards and honors including being named a San Diego Super Lawyer since 2007.

DENNIS W. FREDRICKSON and DANIELLE M. GRIFFITH have formed the law firm of Fredrickson | Griffith, LLP. Fredrickson | Griffith, LLP is a boutique law firm that provides focused and efficient representation to a diverse range of individual and business clients with an emphasis on consultation and results driven advocacy in the areas of civil litigation, including business, real estate, insurance defense, construction defense, construction law, general liability matters (personal injury, wrongful death, auto, trucking, asbestos, lead exposure), professional liability, and business and real estate transaction matters. The firm is located at 12707 Hidden Drive, Suite 100, San Diego, CA 92130. Dennis or Danielle can be reached at 858-729-9370 (Phone), 858-926-4089 (Fax), dfredrickson@fglawyersllp.com, dgriffith@fglawyersllp.com or visit www.fglawyersllp.com.

DANIEL P. FALLOn recently joined the La Jolla firm Tyson & Mendes where his practice focuses on professional liability, including legal and accounting malpractice. Mr. Fallon is a member of the SDDL Board of Directors and previously practiced at a civil defense firm in San Diego. He can be reached at (858) 459-4400 or at dfallon@tysonmendes.com. Visit: www.tysonmendes.com.

SAMIR R. PATEL joins Social Security Administration - Mr. Patel, a 2014 SDDL board member and longtime SDDL member, has accepted a position as an Attorney-Advisor with the Office of Appellate Operations of the Social Security Administration in Arlington, VA. Mr. Patel served as the Vice Chair of the Civil Litigation section of the San Diego County Bar Association, a board member and the Treasurer of the San Diego Bar Association. In order to bring in his family at this point and time, Mr. Patel accepted a position as an Attorney-Advisor with the Office of Appellate Operations of the Social Security Administration in Arlington, VA, where his primary emphasis will be drafting appellate opinions. Mr. Patel thanks the partners and his coworkers at Lorber, Greenfield & Polito, LLP for their continued support and unparalleled legal training.

EXPERIENCED ENGINEER DOUG PAUL has joined San Diego-based Xpera Group. As a testifying expert, Mr. Paul provides opinion testimony on Civil Engineering matters of standard of care. Mr. Paul also serves as the President of the Paul Company, an engineering consulting firm, focused on securing development entitlement for owners and developers, and on developing new property. Prior to establishing The Paul Company, Mr. Paul served as Chairman and Founder of Project Design Consultants (PDC), a professional design services firm, headquartered in downtown San Diego, where he specialized in land planning and civil engineering. It was this role as Principal-in-Charge of PDC that allowed Mr. Paul to work on projects ranging from oversight of residential, commercial, industrial and mixed-use projects to large scale public works and municipal assignments, including final engineering design for the Petco Park baseball facility as well as the comprehensive master plan for expansion of Sea World theme park. For a copy of Doug Paul’s CV please contact Amy Probst at Xpera.
Real Property

Biron v. City of Redding (2014) _ Cal.App.4th __ , 2014 WL 1691350: The Court of Appeal affirmed the trial court's judgment for defendant. Plaintiffs sued for damages to their rental property from flooding in February and March of 2009, alleging inverse condemnation and dangerous condition of public property. As to the inverse condemnation claim, the trial court properly applied the rule of reasonableness to conclude that City's decision to defer upgrades to City's storm drainage system did not pose an unreasonable risk of harm to plaintiffs. As to the cause of action for dangerous condition of public property, the trial court properly concluded City's decision to defer upgrades to the storm drainage system did not create a substantial risk of injury to members of the general public, and that even if the storm drainage system had been a dangerous condition, City's conduct was reasonable. (C.A. 3d, April 30, 2014.)

DKN Holdings LLC v. Faerber (2014) _ Cal.App.4th __ , 2014 WL 1397517: The Court of Appeal reversed the trial court’s judgment granting defendant summary judgment in favor of defendant because plaintiff had not paid the $25 filing fee when his government tort claim was filed. The Board received and file stamped the timely claim but gave no notice that it was incorrectly insufficient or incomplete. It did not request counsel to send a filing fee. The Board received the claim on November 14, 2011, but did not raise the claim deficiency issue until it filed its motion on April 10, 2012. These facts triggered the defense waiver provisions of Government Code section 911.3(b). (C.A. 2d, May 6, 2014.)

Sykes v. State Department of State Hospitals (2014) _ Cal.App.4th __ , 2014 WL 1783754: The Court of Appeal reversed the trial court’s order granting a motion for judgment on the pleadings for plaintiff defendant because plaintiff had not paid the $25 filing fee when his government tort claim was filed. The Board received and file stamped the timely claim but gave no notice that it was incorrectly insufficient or incomplete. It did not request counsel to send a filing fee. The Board received the claim on November 14, 2011, but did not raise the claim deficiency issue until it filed its motion on April 10, 2012. These facts triggered the defense waiver provisions of Government Code section 911.3(b). (C.A. 2d, May 6, 2014.)

Lyles v. Sangadeo-Patel (2014) _ Cal.App.4th __ , 2014 WL 1496322: The Court of Appeal affirmed the trial court’s judgment for defendant. Plaintiffs sued for damages to their rental property from flooding in February and March of 2009, alleging inverse condemnation and dangerous condition of public property. As to the inverse condemnation claim, the trial court properly applied the rule of reasonableness to conclude that City's decision to defer upgrades to City's storm drainage system did not pose an unreasonable risk of harm to plaintiffs. As to the cause of action for dangerous condition of public property, the trial court properly concluded City's decision to defer upgrades to the storm drainage system did not create a substantial risk of injury to members of the general public, and that even if the storm drainage system had been a dangerous condition, City's conduct was reasonable. (C.A. 3d, April 30, 2014.)

Trade Secrets

Altavion, Inc. v. Konica Minolta Systems Laboratory Inc. (2014) _ Cal.App.4th __ , 204 WL 1846104: The Court of Appeal affirmed the trial court’s judgment for plaintiff. Altavion, Inc. invented a process for creating self-authenticating documents through the use of barcodes that contain encrypted data about the contents of the original documents. The trial court properly concluded that defendant misappropriated secrets disclosed by Altavion during negotiations aimed at exploiting Altavion’s technology. The trial court properly based its $1 million damages award on the reasonable royalty measure of damages. The trial court properly awarded prejudgment interest of 7% per annum commencing in late June 2004, and attorney fees in the sum of $3,297,102.50. (C.A. 1st, May 8, 2014.)

Trid

California Crane School Inc., v. National Commission For Certification (2014) _ Cal.App.4th __ , 2014 WL 1848297: The Court of Appeal affirmed the trial court’s decision to limit the trial initially to 10 days, and later to 12 days. The trial court did not abuse its discretion in controlling the trial proceedings as it did. (C.A. 5th, May 8, 2014.)

Torts and Estates

Estate of Sobel (2014) _ Cal.App.4th __ , 2014 WL 1411208: The Court of Appeal reversed the trial court’s denial of a motion to vacate two dismissal orders entered on 2011 that plaintiffs were not given notice of. In the published opinion, the Court of Appeal found that plaintiffs could appeal the denial of their motion to vacate the dismissals under Estate of Baker (1915) 170 Cal. 578, 582-583, because no notice of the 2011 dismissal orders was served upon the parties as required by law and no party was present for the 2011 hearing. In the unpublished portion of the opinion, the Court of Appeal found that plaintiffs were entitled to equitable relief from the 2011 orders. (C.A. 2nd, April 14, 2014.)

Fighting Certification of California Class Actions

On April 8, 2014 the SDDL presented a Lunch and Learn program focused on strategies for handling the defense of class action lawsuits - and in particular in defeating plaintiffs' class certification motions - in California state courts. The speakers, Kevin DeSantis of Butz Dunn & DeSantis and Graham Hollis of Graham Hollis APC, represented the perspectives of the defense and plaintiff’s bar. Mr. DeSantis regularly defends companies facing misclassification and Labor Code violation related class actions. Mr. Hollis regularly represents plaintiffs in similar matters, although he is both a former defense lawyer and past President of the SDDL.

The speakers offered to the standing room only crowd competing insights into how to craft and challenge class definitions, strategies for handling notifications about the class action to putative class members, as well as a discussion about cases presently pending before California appellate courts in the class action arena.

Additionally, the speakers touched on practical risk management tips for defense attorneys to employ in counseling their clients about their own employees - such as the incorporation of class action waivers - in employee handbooks, independent contractor agreements, and the like.

SDDL would like to thank the speakers and Peterson's Court Reporting for providing the venue for its Lunch and Learn series.
Another Victory for Revenge Pornography Posters

By Christine Polito

California’s recently passed revenge pornography law (SB255, Oct. 1, 2013) intended to protect victims from disgruntled past lovers posting his or her intimate photos on the Internet. In reality, the narrowly drawn criminal statute only covers 20% of victims because it excludes self-photography. California’s intention to protect victims of revenge pornography has unfortunately resulted in a victory for bitter redistributors of their ex’s sexy “selfies.”

Criminalizing revenge pornography lends itself to serious questions about the First Amendment. Does the First Amendment protect vengeful posting of racy photos following an unpleasant break-up? Statutes focusing on the breach of consent and the intent to cause serious emotional distress arguably pull the statute outside the ambit of First Amendment protection. For posters alleging a First Amendment defense, they may be precluded from bringing an Anti-SLAPP motion because the revenge pornography statute criminalizes certain activity as a matter of law. Anti-SLAPP motions are designed to protect defendants from complaints filed to chill free speech on matters of public concern. Posting racy pictures of an ex will rarely constitute a matter of public concern (despite the emotional turmoil for the parties involved). However, in situations where the photo depicts a politician or a celebrity, the posting could very well become an issue worth debating. When sexy photos of New York congressmen Anthony Weiner and Chris Lee went viral, the public questioned their fitness for office. Such situations fall within the statutory construct of revenge pornography, but also present the perfect opportunity for the blogger or journalist publishing the photos to bring an anti-SLAPP motion. If the poster’s Anti-SLAPP motion gets granted, then the case is dismissed and the revenge porn victim pays his ex’s attorney’s fees. Thus, the effects of California’s cutting edge legislation aimed at criminalizing this type of undesirable conduct remains to be seen. What is easy to foresee, however, is that it could become a boondoggle of controversy over how it is applied. Query also how this criminal statute will be utilized in civil privacy litigation.

The Author will graduate in May from Southwestern Law School. She is a 2010 graduate of the University of California at Santa Barbara. Ms. Polito can be reached at christine.e.polito@gmail.com.

Legal Ethics & Social Media

By Patrick J. Kearns, Esq. Wilson Elser Moskowitz Edelman & Dicker LLP patrick.kearns@wilsonelser.com

On Wednesday, February 12, 2014, the SDDL held its second “Lunch and Learn” of the new year. Michael Crowley, Esq. gave a one-hour presentation on “Legal Ethics & Social Media,” an increasingly t-topic in today’s legal field.

Mr. Crowley is the founder and lead attorney of the Crowley Law Group where he has been practicing law for more than 27 years. His practice specializes in all aspects of criminal defense, civil rights, and administrative matters. Mr. Crowley is an adjunct law professor at California Western, Thomas Jefferson and University of San Diego law schools, and has been a long-standing member of the San Diego County Bar’s Legal Ethics Committee.

Mr. Crowley discussed current ethical considerations for attorneys in this age of sites such as Facebook, Twitter, etc., and the increasing use of those sites by attorneys. Michael identified some “real world” examples where attorneys have been disciplined for misusing social media, or otherwise engaging in conduct involving social media that implicated the Rules of Professional Conduct and discussed how attorneys’ fundamental duties of competence, loyalty, and other ethical guidelines often come into play when using social media.
SDDL Member List

Aceves, Sylvia S.
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Allison, Christopher R.
Amundson, Steven Grant
Anderson, Kendra
Angelos, Michele M.
Angeleth, Ashleigh
Armstrong, Lorelei
Bae, Judy S.
Baleskreti, Thomas A.
Barber, D. Scott
Bayly, Andrea P.
Beck, Teresa
Belsky, Daniel S.
Benrubi, Gabriel M.
Berger, Harvey C.
Bernstein, Robert
Bertsche, Corinne Coleman
Blair, Carmela
Bogert, Bruce W.
Bogart, Jeffrey H.
Boles, Darin J.
Bontelli, Eva
Boruszewski, Kelly T.
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Brennan, Moira S.
Brewster, George
Brigden, Lisa S.
Bruhaker, Alan K.
Bryant, English R.
Burt, Christopher W.
Bursch, Charles R.
Calvert, Stanley A.
Campbell, John B.
Campbell, Rachael A.
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Cardone, David D.
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Carvalho, Jeffrey P.
Case, Anthony T.
Catalino, David
Cerros, Fred R.
Chiruvolu, Rekha
Chivinski, Andrew R.
Cho, Sally J.
Cicerco, Keith S.
Clancy, Erin Kennedy
Clark, Kevin J.
Clements, Thomas V.
Clifford, John R.
Conching, Stephen P.
Cramer, N. Ben
Creighton, Jennifer S.
Culver, Jr., John D.
Daniels, Gregory P.
Dea, Michael
Deitz, Eric R.
DeSantis, Kevin
Dickerson, Jill S.
Dixon, Deborah
Doggett, Jeffrey
Doody, Peter S.
Dorsay, Martha J.
Dubí, Jason
Dube, Douglas
Dunn, Elizabeth
Dyer, Roger C.
Ehtesabian, Jonathan R.
Ellert, Anita M.
Eng, Charlie A.
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Falkon, Daniel P.
Farmer, John T.
Fedor, John M.
Feldman, Jacob
Feldner, J. Lynn
Fick, Ryan
Fischer, Jack S.
Florence, David M.
Froehm, John W.
Froh, Robert W.
Freistadt, Christopher M.
Freud, Lisa L.
Furcolo, Regan
Furman, Dana
Gabriel, Todd R.
Gaeta, Anthony P.
Gallagher, Robert E.
Gappy, Dena
Gardner, Joseph S.
Gentes, Stephen A.
Gettis, David E.C.
Gibson, Michael
Glaser, Tamara
Glezer, Iris
Gold, Carleigh L.
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Grebing, Stephen
Greenberg, Alan E.
Greenfield, Joia C.
Greenfield, Kenneth N.
Greer, Jeffrey Y.
Grimm, W. Patrick
Guido, Richard A.
Hack, Philip L.
Hagen, Gregory D.
Hall, David P.
Hallett, David E.
Harris, Cherrie D.
Harris, Dana
Harrison, Robert W.
Harwell, Elaine F.
Haughey Jr., Charles S.
Healy, Kevin J.
Hefl, Robert R.
Higle, Patrick
Hillberg, Scott
Hoang, Khai
Hoffman, Micah M.
Holmes, Karen A.
Holmgren, David B.
Horton, Summer C.
Howard, Benjamin J.
Hudson, Clark R.
Hughes, William D.
Hulbert, Connor J.
Inman, Heidi
Issacs, Jackson W.
Iuliano, Vince J.
Jacobs, Douglas
Jacobs, Michael W.
Jaworski, Todd E.
Joseph, Dan F.
Kaler, Randall
Katz, Bruno W.
Keams, Patrick R.
Kelleher, Thomas R.
Kenny, Eugene P.
Kish, Fernando
Kluehn, Andrew
Knutson, Lucy M.
Kodol, Scott M.
Kope, Jennifer
Landrith, Kevin S.
Lauter, Ronald James
Lea, Chris M.
Lee, Kathryn C.
Leeners, Eric M.
Lenat, Nicole
Lenofsky, Larry D.
Levine, Sandra
Liker, Keith A.
Lin, Arthur Ying-Chang
Lopez, Michelle
Lorber, Bruce W.
Lortz, Thomas
Mahady, Susana
Mangin, Margaret
Manzi, Jeffrey E.
Mardian, Robert
Martin, Michael B.
Martinez, Jennifer
McCabe, Hugh A.
McClain, Robin S.
McCormick, Carolyn Balfour
McDonald, Sarah A.
McFall, James A.
McFaul, James A.
McKee, Dinah
McKeehan, Megan
McMahon, Kerry
Mendes, Patrick J.
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