SAN DIEGO DEFENSE LAWYERS

THE UPDATE

SPRING 2014

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?

> ***"[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."***
>
> The Right Honourable Gordon Hewart, 7th Lord Chief Justice of England, in *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233) .

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

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President's Message

By David B. Roper
Lorber, Greenfield & Polito, LLP

If 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. And I feel in this day and age, there is little if any effective control over outright sensationalism that is used to bait the electorate into supporting otherwise unqualified judicial candidates who challenge well qualified sitting judges.

San Diego Defense Lawyers does not endorse candidates for any office or take partisan political positions. And I do not mean to do so here. However, I do urge you to perform your own due diligence regarding this-year's judicial candidates. Do not allow the proliferation of roadside signs and bumper stickers to influence your judgment, even subconsciously. Information is at your fingertips; Google the men and women who are running. Consider carefully your experiences before the sitting judges who are running for reelection. Check out the State Bar website. Speak to your colleagues. Share what you learn with your friends and family. Complacency is not an option. A competent and independent judiciary requires us all to get involved. Doing so is part of our duty as citizens and officers of the court. ■

David B. Roper

MEMBERSHIP INFORMATION

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are $145/year. The dues year runs from January 1 to December 31. Applications can be downloaded at: www.sddl.org

THE UPDATE

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www.aprilwdesign.com

The Update is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers in the San Diego metropolitan area. All views, opinions, statements and conclusions expressed in this magazine are those of the authors, and they do not necessarily reflect the opinions or policies of the SDDL or its leadership. The SDDL welcomes the submission of articles by our members on topics of general interest to its membership.

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"LUNCH AND LEARN" PROGRAMS

Duty to Whom? Loyalty, Confidentiality and Modern Society

By Patrick J. Kearns
Wilson Elser Moskowitz Edelman & Dicker LLP

On May 13, 2014, Mr. Ed McIntyre presented to a packed house at the SDDL's fifth Lunch and Learn of the year. Mr. McIntyre, who has been practicing here in San Diego for over 35 years, was formerly general counsel and the firm's professional responsibility partner at Solomon Ward. In January of this year, Mr. McIntyre left the firm to focus exclusively on professional responsibility, legal ethics and risk mitigation. He currently counsels lawyers, law firms, and serves as an expert witness in matters of legal ethics and professional responsibility. He is also the immediate past-chairman of the San Diego Bar Association's Legal Ethics Committee and a former member of the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC).

Ed's one-hour ethics presentation was titled "Duty to Whom? Loyalty, Confidentiality and Modern Society". Not one to be a mere "talking head", the program was interactive which resulted in a lively debate among the attendees. The discussion raised several issues pertaining to the "impact" of our fundamental duties of confidentiality and loyalty to our clients and the relationship between those duties and a "duty" to society at large. Ed discussed, for example, that California's State Bar Act (specifically, B&P Code 6068 et seq.) contains only a single, non-mandatory, exception to client-confidentiality; that is, a lawyer may disclose client confidences if they believe the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death or substantial bodily harm to another. In contrast, the Model Rules (which every jurisdiction, other than California, adheres to in some form or another) allows, but does not require, disclosure of client confidences if to prevent substantial injury to financial interests. Do these "exceptions" to confidentiality undermine the public's confidence in their attorneys? In the legal system? Do confidentiality or loyalty requirements, in general, conflict with societal interests? Ed offered some examples, such as whether an attorney who is unquestionably doing their job, owes another duty to "society". To illustrate, an attorney for an automobile manufacturer who provides advice on legal risks which arise from a defective part known to cause accidents. Does the duty of loyalty in that circumstance conflict with a general duty to society; e.g. a duty to do the right thing for the public?

Ed sparked another interesting discussion when discussing California's "No Rat Rule" status. That is, the ABA Model Rules (Rule 1.8), which California does not adhere to, requires attorneys "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" to report that misconduct to the "appropriate professional authority." Does California's decision to functionally "opt out" of that requirement undermine the public's confidence in attorneys? Does the "No Rat Rule" help avoid instances of abuse by angry opposing counsel? As Ed noted during the presentation, there are no absolutely "correct" answers to these questions, but consideration and discussion of these issues is thought provoking and worthwhile.

As always, the SDDL's Lunch and Learn programs are free to SDDL members and a catered lunch is provided. We hope to see you at the next presentation in June!

Ed McIntyre can be reached at edwardmcintyre1789@gmail.comn. ■

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 first-hand 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, sole 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@bwlawllp.com. The SDCBA can be reached at 619.231.0781 or at www.sdcba.org. ■

SDCBA SAN DIEGO COUNTY BAR ASSOCIATION

2014 Judicial Candidate Ratings

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:

Joseph Adelizzi	Qualified
Douglas Crawford	Lacking Qualifications
Ken Gosselin	Lacking Qualifications
Michele Hagan	Lacking Qualifications
Carla Keehn	Qualified
Hon. Michael J. Popkins	Well Qualified
Hon. Ronald S. Prager	Well Qualified
Hon. Lisa Schall	Well Qualified
Hon. Jacqueline M. Stern	Qualified
Paul Ware	Qualified
Brad A. Weinreb	Qualified

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://gov.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 reviewers 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 very helpful; 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, then 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 vets applicants before they go to the JNE Commission, not after, like the prior administration.

The governor's Judicial Appointments Unit pores 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 "secret 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 bars for them to vet. Groban stated that the value of the JNE Commission in the process is that it is very thorough, its questionnaire is very helpful, it often has in-person interviews with applicants before the governor's office ever meets 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 Process

Casting aside typical gatekeeper rules, this governor will appoint candidates 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 topic.

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 is 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 yjackson@sfbar.org and you can follow her on Twitter at YolandaSFBar.

This article is reprinted from San Francisco Attorney magazine with permission from The Bar Association of San Francisco. ■

HOWELL DISCOVERY: Three Takeaways For Defense Counsel From New Decision

By Cayce Greiner, Esq. and Daniel P. Fallon, Esq.
TYSON & MENDES

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 *Howell v. Hamilton Meats* 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 Permanente 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 If legitimate concerns exist regarding confidential or proprietary information, courts are empowered to enter tailored protective orders regarding documents sought by way of subpoena. C.C.P. § 1987.1(a).

2. Present Expert Opinion Regarding the Reasonable Value of Plaintiff's Medical Treatment: Medical billing experts are essential tools for defense counsel when disputing and explaining a personal injury plaintiff's damages at trial, particularly when plaintiff has chosen to sign liens for the medical services received. *Dodd* recognized the opinions of medical billing experts may be based on information received through subpoenaed records. Specifically, the amount a medical provider accepts as full payment from a factoring company for the medical treatment provided may evidence its reasonable value. An expert may base his or her opinion regarding reasonable value of medical treatment on the factoring company's purchase price of the medical lien.

The *Dodd* court provided no opinion as to whether the amount MedFi paid for the surgery lien is admissible to prove Dodd's past economic damages, so defense counsel should be prepared to argue admissibility at trial. The court explained the "amount paid by a factor for a medical lien may be different than the reasonable value of medical services because when a health care provider sells its lien to a factor, it 'transfers the expense of collection and the risk of nonpayment onto someone else.'" 223 Cal.App.4th 942 (citing *Katiuzhinsky 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.

3. *Dodd* May Apply Beyond Narrow Subpoenas To Third Party Factors: Defense counsel should leverage the *Dodd* ruling beyond its narrow application to factor subpoenas. The *Dodd* court's reasoning 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 liens 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, are the most a plaintiff should be able to recover for past medical damages at trial.

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Bottom Line

Butz Dunn & DeSantis Defeats Class Certification Motion

On March 4, 2014, Orange County Superior Court Judge Kimberly G. Dunning issued a 13 page order denying plaintiffs' motion for class certification in *Valdovinos vs. American Logistics Company, LLC.* Defendant American Logistics Company is a transportation coordination company that, on behalf of healthcare networks, schools, and governmental agencies, matches the transportation needs of students, patients, and disabled persons, with local independent contractor service providers. Those service providers operate a wide variety of vehicles, such as wheelchair-accessible vans. American Logistics Company, represented by Kevin DeSantis, James McFaul and David Cardone of the San Diego law firm Butz Dunn &

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The Usefulnesss of Roth IRA Conversions

By Zach A. MacDougall
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Expanded Roth IRA conversion[1]

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.[2] Beginning in 2010, both the income limit and the filing status restriction are 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."[3]

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 roll over 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 not 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.[4]
- You will believe income tax rates will be higher when you begin taking 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 distributions 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 nondeductible 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.[5] 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 the 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 59½.
5 - See the "Medicare & You" guide at www.medicare.gov/Publications/Pubs/pdf/10050.pdf

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(Cover Story Continued) Electing the Best Judges

fairly common for lawyers to make financial contributions to judicial election 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. Is it 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 ding 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 SDDL thanks the author for his public service and this contribution to the Update. ■

California Civil Law Update

By Monty McIntyre
Mediations, Arbitrations & Motions

U.S. SUPREME COURT

Equal Protection

Schuette v. BAMN _ U.S. _ (2014): The U.S. Supreme Court reversed the Court of Appeals' decision that invalidated a Michigan constitutional amendment prohibiting race-based preferences as part of the admissions process for state universities. There is no authority in the Constitution of the United States or in Supreme Court precedents for the Judiciary to set aside Michigan laws that commit, to the voters, the policy determination of who may decide how to resolve the debate about racial preference. (April 22, 2014.)

First Amendment (Establishment Clause)

Town of Greece v. Galloway _ U.S. _ (2014): The town of Greece did not violate the First Amendment by opening its meetings with ceremonial prayer. Ceremonial prayer recognizes that, since this Nation was founded, many Americans deem that their own 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.)

9TH CIRCRUIT COURT OF APPEAL

Class Actions

Stockwell v. City & County of San Francisco _ F.3d _ (9th Cir. 2014), 2014 WL 1623636: The Court of Appeal reversed the district court's denial of class certification in an action by San Francisco police officers over age 40 claiming disparate impact based upon age when the City abandoned 1998 examination results in making promotions and work assignments. The district court's determination was an abuse of discretion because it disregarded the existence of common questions of law and fact and impermissibly addressed the merits of the class's claims. (April 24, 2014.)

Contracts

Technica LLC v. Carolina Casualty Insurance Company _ F.3d _ (9th Cir. 2014), 2014 WL 1674108: The Court of Appeals reversed the district court's order granting summary judgment to defendants. The rights and remedies under the Miller Act may not be conditioned by state law. The district court erred when it concluded that California's contactor licensing law, which prohibits unlicensed contractors from suing for compensation, applied to bar plaintiff's Miller Act action. (April 29, 2014.)

Employment/Labor

Haro v. City Of Los Angeles _ F.3d _ (9th Cir. 2014), 2014 WL 1013244: The Court of Appeal affirmed the district court's summary judgment rulings for plaintiffs. Plaintiffs were fire department dispatchers and fire department aeromedical technicians (paramedics assigned to air ambulance helicopters) who were denied standard overtime pay because the City of Los Angeles (City) classified them as employees "engaged in fire protection." The Court of Appeal found that plaintiffs were entitled to standard overtime pay; the statute of limitations should be extended from two to three years because of the City's willful violation of the Fair Labor Standards Act (FLSA); liquidated (i.e. double) damages should be awarded because the City could not show good faith or reasonable grounds for violating the FLSA; and offsets should be calculated on a week-by-week basis. (March 18, 2014.)

Stockwell v. City & County of San Francisco _ F.3d _ (9th Cir. 2014), 2014 WL 1623636: See summary above under Class Actions.

Evidence

City of Pomona v. SQM North America Corporation _ F.3d _ (9th Cir. 2014), 2014 WL 1724505: The Court of Appeals reversed the district court's order excluding the plaintiff's expert witness testimony and affirmed the denial of SQMNA'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 contested facts 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 as to whether Pomona's claims were barred by the economic loss rule or by the applicable statute of limitations. (May 2, 2014.)

Insurance

Garcia v. Pacificare of California, Inc. _ F.3d _ (9th Cir. 2014), 2014 WL 1814180: The Court of Appeals affirmed the district court's summary judgment for defendant. 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

Loeffler v. Target Corporation (2014) _ Cal.4th _ , 2014 WL 1714947: The California Supreme Court affirmed the Court of Appeal decision (for slightly different reasons) affirming the trial court's granting of defendant's demurrer without leave to amend. The tax code provides the 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 employed 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 companies 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 while failing to give plaintiffs the same right. 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 agreement and the DRRP. 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. HWH Corporation (2014) _ Ca.App.4th _ , 2014 WL 1691371: The Court of Appeal affirmed in part the trial court's judgment that a component part manufacturer was not required to indemnify the retail seller of a motor 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 to 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 J'Aire 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.)

Soni v. Wellmike Enterprise Company 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 as 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

Falcon v. Long Beach Genetics, Inc. (2014) _ Cal.App.4th _ , 2014 WL 1101297: 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 47(b) barred plaintiff's 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 $35,000, and the settlement agreement provided that the sum of $85,000 would be due upon a default. The trial court properly set aside the default judgment of $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 suffer 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 1153392: 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 prelitigation 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 procedurally unconscionable as 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 prelitigation procedures because it found only a low level of procedural unconscionability and no substantive unconscionability. (C.A. 5th, March 24, 2014.)

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California Civil Law Update

Civil Procedure (anti-SLAPP, costs, statute of limitations)

American Master Lease LLC v. Idanta Partners, LTD. (2014) _ Cal.App.4th _ : See summary below under Torts.

Desaulles v. Community Hospital Of The Monterey Peninsula (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, because 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 summary judgment for defendants. Plaintiffs 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 339 applied, and plaintiffs filed their complaint more than two years after the first broadcast of Ghost Hunters. (C.A. 2nd, filed April 1, 2014, published April 28, 2014.)

Schwarzburd v. Kensington Police Protection and Community Services District Board (2014) _ Cal.App.4th _ , 2014 WL 1681562: The Court of Appeal reversed the trial court's denial of an anti-SLAPP motion as to individual board members but affirmed the denial as to the Board. The writ petition claimed the Board failed to give proper advance notice of the business items that were discussed at a meeting where the General Manager/Chief of Police's compensation was increased, and also alleged the Board impermissibly extended the meeting after failing to secure the four votes at 9:45 p.m. that were required to continue the meeting past 10:00 p.m. The Court of Appeal agreed with the trial court that the claim did not arise out of protected First Amendment voting and legislative deliberative activities concerning an important public issue as to the Board, but disagreed as to the three individual defendants. The Court of Appeal reversed the trial court ruling as to the individual defendants because petitioners failed to demonstrate a probability of prevailing on the merits. (C.A. 1st, April 30, 2014.)

Roger Cleveland Golf Company Inc. v. Krane & Smith, APC (2014) _ Cal.App.4th _ , 2014 WL 1435944: Disagreeing with the decisions in Vafi v. McCloskey (2011) 193 Cal.App.4th 874 and Yee v. Cheung (2013) 220 Cal.App.4th 184, which held that Code of Civil Procedure section 340.6 is the applicable statute of limitations for a malicious prosecution action against an attorney, the Court of Appeal ruled that the statute of limitations for malicious prosecution is two years under Code of Civil Procedure section 335.1 irrespective of whether the defendant is a former adversary or the adversary's attorney. This two-year period is tolled during the pendency of an appeal taken from the judgment in the prior action that is the basis for the malicious prosecution complaint. However, the Court of Appeal affirmed the trial court's ruling granting an anti-SLAPP motion because plaintiff failed to establish the probability of prevailing on the merits as it did not make the minimal evidentiary showing of malice. (C.A. 2nd, April 15, 2014.)

Talega Maintenance Corporation v. Standard Pacific Corporation (2014) _ Cal.App.4th _ , 2014 WL 1440925: The Court of Appeal affirmed the trial court's denial of anti-SLAPP motions brought by defendants who were accused of committing fraud, negligence, and breach of fiduciary duty in performing their duties as board members. The homeowners association (HOA) alleged it was not financially responsible for repairing damaged trails - the developers were - but the developer board members wrongly represented that the HOA was responsible and expended HOA funds to investigate and repair the trails. The trial court properly denied the anti-SLAPP motions because defendants failed to prove that their conduct 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 trial court properly found plaintiffs' complaint failed for lack of specificity, and plaintiffs failed to establish abuse of discretion in denying leave to amend the complaint. (C.A. 6th , March 26, 2014.)

Falcon v. Long Beach Genetics, Inc. (2014) _ Cal.App.4th _ , 2014 WL 1101297: See summary above under Civil Code.

Pielstick v. MidFirst Bank (2014) _ Cal.App.4th _ , 2014 WL 1244345: The Court of Appeal affirmed the trial court's denial of plaintiff's request, at the hearing on 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 to only jury or court trials on the merits; it also includes pretrial procedures that effectively dispose of the case. Plaintiff's request was untimely because it was made after the commencement of the demurrer hearing. (C.A. 2nd, March 26, 2014.)

Noceti v. Whorton (2014) _ Cal.App.4th _ , 2014 WL 1022877: The Court of Appeal affirmed the trial court's denial of mandatory relief under Code of Civil Procedure section 473(b), but remanded for consideration of discretionary relief under section 473(b). Properly noticed plaintiffs who failed to appear for trial because their attorney miscalendared the date - a trial at which the court granted judgment of $0 to the appearing defendant after reviewing the entire file - were not entitled to mandatory relief under Code of Civil Procedure section 473(b) because the judgment was not a "dismissal" against plaintiffs for which mandatory relief would apply. (C.A. 3rd, March 18, 2014.)

Ramos v. Brenntag Specialties (2014) _ Cal.App.4th _ , 2014 WL 1116961: The Court of Appeal affirmed in part and reversed in part the trial court's order sustaining a demurrer, without leave to amend, on the grounds that the claims failed under the component parts doctrine as applied in *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81 (Maxton). The Court of Appeal, disagreeing with Maxton, ruled that the component parts doctrine does not shield a product supplier from liability when a party alleges that he suffered direct injury from using the supplier's product as the supplier specifically intended. All of the causes of action alleged were viable except for the negligence per se claim. (C.A. 2nd, March 21, 2014.)

Consumer Rights

Mega RV Corporation v. HWH Corporation (2014) _ Ca.App.4th _ , 2014 WL 1691371: See summary above under Attorney Fees.

Contracts

Legendary Investors Group No. 1 LLC. v. Niemann (2014) _ Cal. App.4th _ , 2014 WL 1207891: The Court of Appeal reversed the trial court's granting of a motion for nonsuit for defendant. The bank's decision to draw down on a letter of credit before pursuing other security did not extinguish defendant's obligations as guarantors. (C.A. 2nd, March 25, 2014.)

Employment/Labor

Carmona v. Lincoln Millennium Car Wash, Inc. (2014) _ Cal.App.4th _ , 2014 WL 1569182: See summary above under Arbitration.

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 Saffer 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 FDIC as required by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. section 1811, et seq. (FIRREA). (C.A. 2nd, 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.)

Ellis v. U.S. Security Associates (2014) _ Cal.App.4th _ , 2014 WL 1229038: The Court of Appeal reversed the trial court's judgment on the pleadings for defendant

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California Civil Law Update

regarding a complaint alleging FEHA and other claims for sex discrimination and sexual harassment, failure to maintain environment free 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 employment where she agreed that any claim or lawsuit had to be filed no more than six (6) months after the date of the employment action and she waived any statute of limitations 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 rulings in a case alleging sexual harassment and retaliation. The Court of Appeal found that triable issues of material fact existed and reversed a summary judgment in favor of former supervisor Hickman, and because of this ruling also reversed a judgment on the pleadings for defendant City of Benicia (City) as to the sexual 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 expert, and also reversed and remanded the judgment for the City on the retaliation claim. (C.A. 1st, March 26, 2014.)

Santa Clara County Correctional Peace Officers Association, Inc. v. County of Santa Clara (2014) _ Cal.App.4th _ , 2014 WL 1013230: The Court of Appeal affirmed the trial court's denial of a petition for writ of mandate. The County complied with its obligations to meet and confer before it reduced the working hours of correctional police officers. (C.A. 6th, March 17, 2014.)

Equity

Hopkins v. Kedzierski (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 reasons for the trial court's determination that equitable tolling was inapplicable were legally insufficient, and the matter 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 granting 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 using their 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 pertaining to 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 court trial on the merits for 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 before 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 1647660: 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 remuneration 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

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On The Move

■ **BALESTRERI POTOCKI & HOLMES ATTORNEYS** named 2014 Southern California Super Lawyers.

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

Balestreri has dedicated most of his 32 plus years in practice to the representation of developers, property owners and general contractors in litigation, negotiations and risk management. Balestreri 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 we as the defense of construction 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 defect, 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 High Bluff Drive, Suite 100, San Diego, CA 92130. Dennis or Danielle can be reached at 858-925-7390 (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 has spent the last four and a half years working as an Associate with the law firm Lorber, Greenfield & Polito, LLP, where his primary emphasis was construction defect litigation. Prior to joining Lorber, Greenfield & Polito, Mr. Patel was a Judicial Law Clerk with the Superior Court of the District of Columbia. Mr. Patel served as the Vice Chair of the Civil Litigation section of the San Diego County Bar Association, a board member and the Secretary of the San Diego Defense Lawyers, and a board member and the Treasurer of the South Asian Bar Association of San Diego. In order to be closer to 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 civil engineer **DOUG PAUL** has joined San Diego-based Xpera Group.

As a testifying expert, Mr. Paul provides opinion testimony on Civil Engineering standard of care matters. Mr. Paul also serves as the President of The Paul Company, an engineering consulting firm, focused on securing development entitlement for owners and delivery of complex, underdeveloped properties. 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. ■

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California Civil Law Update

Medical Board of California did not violate patient privacy rights by accessing a computerized database of controlled substance prescription records before issuing the subpoenas. (C.A. 1st, April 15, 2014.)

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 drain system had been a dangerous condition, City's conduct was reasonable. (C.A. 3rd, April 30, 2014.)

DKN Holdings LLC v. Faerber (2014) _ Cal.App.4th _ , 2014 WL 1381358: See summary above under Judgments.

Lyles v. Sangadeo-Patel (2014) _ Cal.App.4th _ , 2014 WL 1496322: The Court of Appeal affirmed the trial court's order sustaining a demurrer without leave to amend. The landlord's failure to deliver a statement required under the local rent control ordinance did not absolve the tenant of their obligation to pay rent. (C.A. 2nd, April 17, 2014.)

The McCaffrey Group, Inc. v. Superior Court (Cital) (2014) _ Cal.App.4th _ , 2014 WL 1153392: See summary above under Civil Code.

Torts

American Master Lease LLC v. Idanta Partners, LTD. (2014) _ Cal.App.4th _ : The Court of Appeal affirmed in part and reversed in part for a new trial on the issue of restitution. A jury found defendants were liable for aiding and abetting breach of fiduciary duty and awarded restitution in the amount of approximately $5.8 million. The Court of Appeal affirmed the trial court rulings that a defendant can be liable for aiding and abetting breach of fiduciary duty without owing the plaintiff a fiduciary duty, that the statute of limitations for aiding and abetting breach of fiduciary duty is three years if based upon fraud or four years if based on non-fraudulent conduct, that the restitutionary remedy of disgorgement is available for aiding and abetting breach of fiduciary duty. The Court of Appeal, however, found that the proper measure of restitution for aiding and abetting breach of fiduciary duty is the net profit attributable to the wrong. (C.A. 2nd, May 5, 2014.)

Sykora 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 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 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, 2013. These facts triggered the defense-waiver provisions of Government Code section 911.3(b). (C.A. 2nd, May 6, 2014.)

Grupp v. DHL Express (USA), Inc. (2014) _ Cal.App.4th _ , 2014WL 1400955: The Court of Appeal affirmed the trial court's motion for judgment on the pleadings for defendant. The action filed by Kevin Grupp and Robert Moll (Relators) on behalf of the State of California (State) pursuant to the California False Claims Act (Gov. Code, § 12650 et seq.), alleging that DHL Express, Inc., DHL Worldwide Express, Inc. and DPWN Holdings, Inc. overcharged and fraudulently billed the State for delivery services, was preempted by the Airline Deregulation Act of 1978 (49 U.S.C. § 41713(b)(1)) and the Federal Aviation Administration Authorization Act of 1994 (49 U.S.C. § 14501(c)(1)). (C.A. 2nd, April 11, 2014.)

Hopkins v. Kedzierski (2014) _ Cal.App.4th _ , 2014 WL 1466282: See summary above under Equity.

Roger Cleveland Golf Company Inc. v. Krane & Smith, APC (2014) _ Cal.App.4th _ , 2014 WL 1435944: See summary above under Civil Procedure.

Paulus v. Crane Co. (2014) _ Cal.App.4th _ , 2014 WL 1157824: The Court of Appeal affirmed the trial court's granting of plaintiff's motion to enter the special verdict and denial of defendant's motion for a judgment notwithstanding the verdict. Plaintiff's expert in preventive medicine and occupation medicine testified that his opinions, to a reasonable degree of scientific and medical certainty, were that Cranite and Crane Co.'s valve work was a substantial factor in causing decedent's mesothelioma. He also testified that, if decedent's disease had been lung cancer, decedent's exposure from Cranite gaskets and Crane valves were a substantial factor in the development of his lung cancer. The trial court properly found that this testimony, when considered in context, should be interpreted to refer to exposures for which Crane alone was liable and his other testimony, when combined with other evidence, was sufficient to give rise to the inference that decedent's exposures to Crane asbestos constituted a substantial factor in increasing his risk of mesothelioma. (C.A. 2nd, filed on February 21, 2014, published and modified on March 24, 2014.)

Ramos v. Brenntag Specialties (2014) _ Cal.App.4th _ , 2014 WL 1116961: See summary above under Civil Procedure.

Scott v. Ford Motor Company (2014) _ Cal.App.4th _ , 2014 WL 1244358: The Court of Appeal affirmed the trial court verdict for plaintiffs in an asbestos case but reversed the trial court's decision to invoke Michigan law to strike plaintiffs' demand for punitive damages. Applying California's "governmental interest" conflict of laws analysis, the Court of Appeal concluded that Michigan courts had no interest in seeing the Michigan principle - that it is inappropriate to award punitive damages to punish - applied in California courts which apply a contrary principle and allow punitive damages to punish conduct. The Court of Appeal remanded for a new trial on the issue of punitive damages. (C.A. 1st, March 26, 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 trade 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.)

Trial

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.)

Trusts and Estates

Estate of Sobol (2014) _ Cal.App.4th _, 2014 WL 1571375: The Court of Appeal affirmed the trial court's orders sustaining demurrers without leave to amend to a petition by a formerly named executor to be appointed as the executor of the estate in place of the executors more recently named by the decedent. The trial court properly concluded the petitioner lacked standing under Probate Code section 48. (C.A. 2nd, April 21, 2014.)

Kalenian v. Insen (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 in 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.)

Usury

Bisno v. Kahn (2014) _ Cal.App.4th _, 2014 WL 1647660: See summary above under Judgments. ■

"LUNCH AND LEARN" PROGRAMS

Defeating 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 GrahamHollis 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. ■

SAN DIEGO DEFENSE LAWYERS

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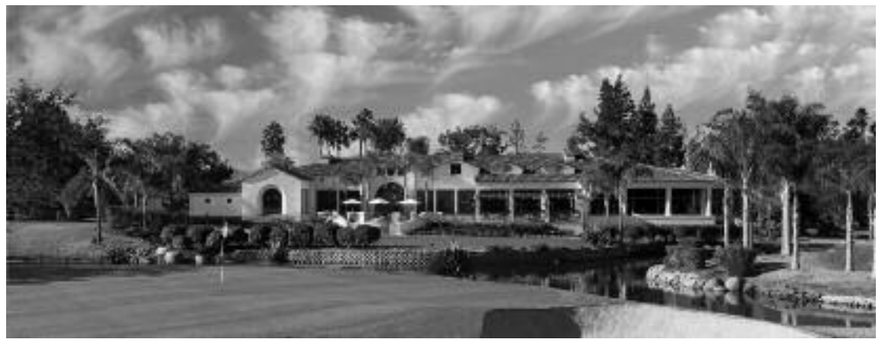

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Another Victory for Revenge Pornography Posters

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 their 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 hotbed 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. ■

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Bottom Line - Butz Dunn & DeSantis Defeats Class Certification Motion

DeSantis, successfully explained why the named plaintiffs' misclassification claims should not be litigated on a class wide basis. Plaintiffs' counsel contended that the claims should be resolved on behalf of a proposed class described as exceeding 1700 drivers. But in denying the motion, the Court ruled that a predominance of common questions of law and fact was not established, explaining that since drivers could "choose their own work" and "operate their own businesses with their own employees," the plaintiffs did not meet their "burden to produce substantial evidence that common issues of law or fact will predominate" and that "the large number of potential class members and the predominance of individual issues compel the court to conclude that a class action would be unmanageable." Plaintiffs have appealed. ■

"LUNCH AND LEARN" PROGRAMS

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. ■

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