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GUEST COLUMN

Support the bar's special dues bill

By Edward J. McIntyre

Who wants to receive a dues bill? Honestly, none of us. But unless the California Supreme Court grants the State Bar's petition for a special assessment, not only the State Bar but all California lawyers will suffer. Why?

Some Background

First, a quick background primer. The Legislature and State Bar were in negotiation over a dues bill, with some legislators pushing for substantial changes in the discipline system; no final

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DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: Motion for relief from judgment erroneously denied where two-day delay in filing amended complaint was excusable under 'Pioneer' factors. *M.D. v. Newport-Mesa Unified School district,* USCA 9th, DAR p. 10364

Civil Procedure: Shuttle operated for select casino patrons may be subject to higher duty of care owed by operators of 'common carriers' in suit stemming from injury caused during boarding. *Huang v. Bicycle Casino, Inc,* C.A. 2nd/8, DAR p. 10389

Civil Procedure: Negligence action brought by patient who fell off gurney while at hospital properly barred as untimely, where one-year, rather than two-year, statute of limitations applies. *Nava v. Saddleback Memorial Medical Center,* C.A. 4th/3, DAR p. 10371

Consumer Law: Action properly dismissed where trustee of California deed of trust is not a 'debt collector' under Fair Debt Collection Practices Act. *Ho v. ReconTrust Co.,* USCA 9th, DAR p. 10375

Remedies: Imposing preliminary injunction on Caltrans interferes with its statutory duty to control encroachments upon state highway right-of-way, resulting in reversal in Caltrans favor. *Jamison v. Dept. of Transportation,* C.A. 3rd, DAR p. 10397

WEEKLY APPELLATE REPORT Podcast

Hosted by Rulings Editor Brian Cardile

Ian Fein (Orrick) chats the Ninth Circuit's new review standard for FOIA appeals after ALDF v. FDA; Prof. Scott Dodson (UC Hastings) discusses his recent book The Legacy of Ruth Bader Ginsburg as SCOTUS' new term opens.

Online at www.dailyjournal.com

From left, Debra Archuleta, Steven Schreiner and Efrain Eceves are among eight candidates for Los Angeles County judgeships on the Nov. 8 ballot.

LA county's judicial races enter the home stretch

By Justin Kloczko
Daily Journal Staff Writer

A former outspoken blogger and current deputy district attorney versus a relatively young, ambitious civil litigator. Two Hispanic attorneys both touting their criminal caseloads. A prosecutor facing an uphill battle for the second time. These match-ups are some of the judicial runoffs on Los Angeles County ballots on Nov. 8.

After the June primaries, various contested ballot designations, and months of campaigning and fundraising, four seats are to be filled.

Gang prosecutor Steven P. Schreiner said he has the experience and temperament to be a judge, but is under no illusion that he is the underdog in a race against fellow prosecutor Debra R. Archuleta for Office 11.

Despite Schreiner's endorsements from two newspapers and the Los Angeles County Bar Association, Archuleta garnered nearly half the primary votes compared to Schreiner's 26.2 percent. "What I learned in the primaries is unless you are spending a fortune on some marketing, it is just your name and your ballot designation," said Schreiner, who came last in a three-way primary race for a judicial seat in 2014.

In this race Schreiner was unsuccessful three times in convincing a judge to strike Archuleta's ballot designation describing her as a "violent crimes prosecutor." Schreiner said it misrepresented her work at the time, as she was in the white collar crimes unit. He said the designation was based on a single attempted murder case that comprised most of her work.

Archuleta, however, said the designation is representative of the work she has done currently and throughout her career. She said she has prosecuted the vast majority of crimes, from sexual assaults to elder abuse to gang crimes.

"The depth and breadth of my experience is much broader than my opponent's," said Archuleta, who has been a deputy district attorney for 26 years and prosecuted more than 100 cases.

Schreiner said he has done 219 felony jury trials, 81 of them murders.

"It boils down to demeanor and, 'Do you have the appropriate judicial demeanor? She has a more confrontational, abrasive personality," said Schreiner, who has raised about $400,000, while Archuleta has raised $300,000 in campaign contributions.

"I think to be a judge you have to have a brain and a heart at the same time," said Archuleta.

Office 42 pits an immigration attorney against a deputy district attorney running as a "child molestation prosecutor." Alicia Molina tried running as a "domestic violence attorney," but her opponent, Efrain Matthew Aceves, successfully contested her ballot designation."I think I am ready and prepared to be in the courtroom every day," said Aceves. "I've done over a hundred jury trials and she's done zero."

Molina did not respond to requests seeking comment.

Aceves, who got 29.7 percent of the primary vote to Molina's 32.8 percent, said he has endorsements from both sides of the political aisle, including Democratic Assembly Speaker Anthony Rendon, current Los Angeles County District Attorney Jackie Lacey and former district attorney Stephen Cooley. He also has the backing of more than 50 judges.

"All the judges who endorsed me — I have appeared in their courtroom, they've seen my work. I bring a lot to the table," said Aceves, who has raised over $300,000. He achieved endorsements from two newspapers and was dubbed "well qualified" by LACBA. Molina was rated "not qualified."

"We need more diversity on the bench. I grew up in a broken home. I was born in Mexico and I worked to accomplish what I accomplished," said Aceves, who said he would strive as a judge "to treat everyone fair and with dignity no matter what walk of life they come from."

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Legislators are being subpoenaed

Recent cases have tested protection against deposition

By Malcolm Maclachlan
Daily Journal Staff Writer

SACRAMENTO — When can a sitting state legislator be compelled to give a deposition?

Case law largely exempts state officials from subpoenas. However, recent cases have been testing the limits of these protections for legislators.

Sacramento County Superior Court Judge Steven H. Rodda weighed in last week when he turned down a motion to dismiss a personnel case involving the office of Sen. Tom Berryhill, R-Modesto.

Rodda cited the fact that Berryhill had yet to comply with another judge's order to submit to a "written deposition."

Douglas Miller sued the state Senate for discrimination, harassment and retaliation after he was dismissed from a job in Berryhill's district office in Modesto in 2013. *Miller v. California State Senate*, 00170071 (Sac. Super. Ct. filed Oct. 10, 2014).

Miller's attorney, Mary-Alice Coleman, submitted a request in June to depose Berryhill. She has also unsuccessfully sought to depose former Senate Pro Tem Darrell Steinberg, the mayor-elect of Sacramento, in the case.

"We even offered to conduct Senator Berryhill's deposition when the Legislature was out of session, but the defendants would not agree," said Coleman, founder and principal of the Law Offices of Mary-Alice Coleman PC in Davis. "They opposed our subpoena based on this heightened standard that high level officials are not subject to legal process."

The legislative session ended on Aug. 31. Berryhill did not face re-election this year.

The Office of the Legislative Counsel and private attorney Timothy G. Yeung, a partner with Renne Sloan Holtzman Sakai LLP in Sacramento, submitted arguments on behalf of the Senate, opposing the subpoenas. Calls to Yeung, the Office of Legislative Counsel, and Berryhill's office were not returned.

In a July 25 order, Sacramento County Judge David I. Brown wrote, "The general rule in California is that high-level government officials are not subject to depositions absent compelling reasons (*Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1467-1468)."

He added, "A narrow exception to this general rule exists when the official: (1) has direct, personal, factual information pertaining to material issues in the action, and (2) the deposing party shows that information to be gained from the deposition is not available through any other source (*Westly v. Superior Court* (2004) 125 Cal.App.4th 907)."

Westly is a key case cited by state officials fighting subpoenas. The 4th District Court of Appeal reversed a San Diego County judge's ruling that Controller Steve Westly and Attorney General Bill Lockyer could be

See Page 3 — SENATE

Alameda County commissioner faces CJP charges

By Banks Albach
Daily Journal Staff Writer

The Commission on Judicial Performance has levied several charges of willful misconduct and "conduct prejudicial to the administration of justice" against Alameda County Superior Court Commissioner Taylor R. Culver.

The charges vary from confrontational dialogue with defendants, setting an air of prejudgment during trials, accepting guilty pleas without proper explanation of the charges, to forcing traffic fines on defendants instead of community service. Culver has until Nov. 3 to respond to the commission's allegations.

Arthur J. Harris, of Murphy, Pearson, Bradley & Feeney PC, is representing Culver in the proceedings.

"Commissioner Culver disputes the charges brought against him by the commission and he looks forward to a fair and impartial hearing to respond to those allegations," Harris said.

The 30-page commission notice, released on Wednesday, lists dozens of charges against Culver stemming from judicial ethics code violations, beginning with several quarrelsome and hostile exchanges with defendants during traffic court proceedings.

In one instance in April 2015, Culver told a defendant in four traffic cases, "Then keep your mouth shut," and then threatened to have the defendant placed in a holding cell after she cursed in the courtroom, according to the CJP's documents.

He followed by saying, "I wish I didn't have this robe on," to which the defendant responded, "So you're threatening me…"

Culver ended the exchange by allegedly stating, "We would straighten this out."

The commissioner also engaged defendants sarcastically and disrespectfully, according to the charges, telling one person in December 2012, for example, "I don't care what you think," and, "You're not special, you're just you."

Culver allegedly threatened on several other occasions to lock up defendants, which exceeded his authority.

The CJP also alleges that Culver set an air of prejudgment and bias during several trials by stating to defendants that the police were going to call them liars and discounting on several occasions defendant claims in red light camera cases that they weren't the offending driver.

During a December 2014 pro-

See Page 3 — CULVER

Disarming Demeanor

San Mateo County Judge Steven Dylina's cordiality, wit and legal wisdom put people at ease.

By Phil Johnson
Daily Journal Staff Writer

REDWOOD CITY — San Mateo County Superior Court Judge Steven L. Dylina's gaze is unusually disarming. Sit in the spacious chambers across his desk and he looks people in the eye with a near-beatific expression.

His eyes are bright and his mouth rests just short of a smile. Add a heaping helping of hospitality – "Tea, water, how about some nuts?" — and within a few minutes it's like being in the company of an old acquaintance.

That easy air is part of what makes Dylina one of the most respected superior court judges in the state, according to colleagues and those who appear before him. Though he now handles complex civil trials, Dylina made his name as a settlement judge. From 2010 until mid-2015, Dylina was the last judge that attorneys spoke with before taking a case to trial in San Mateo County.

"I wish all California judges had the patience and wisdom of Judge Dylina," said Jeffrey H. Belote, a partner at Morris Polich & Purdy LLP who has tried two cases before the judge.

"He is extremely cordial to everyone who enters his courtroom," Belote added. "He has an innate appreciation of the law and especially understands the equitable issues bearing on a case. His good sense of humor and quick wit puts attorneys and jurors at ease."

Dylina says he found his groove as a judge in 2006, when he and Judge Carol L. Mittlesteadt opened San Mateo's complex civil litigation department. He describes his relationship with Mittlesteadt as symbiotic.

"She is 100 percent brighter than me. I felt my IQ increased just by being around her," Dylina said. "What did I offer? I'm a great settlement judge."

Steven L. Dylina

Superior Court Judge
San Mateo County (Redwood City)

Career highlights: Appointed San Mateo County Superior Court Judge by former Gov. Gray Davis, April 5, 2000; San Mateo County Counsel's Office, 1990-2000; private practice, 1977-1990

Law School: San Francisco Law School, 1977

Sam Attal / Special to the Daily Journal

Dylina estimates he settled three-fourths of his cases while working with Mittlesteadt. He also settled about half of her cases. His strategy is simple: After working through motions in limine, he invites the attorneys to chat before calling the jury.

"I think about what motivates people. I tell them I keep lines of communication open and encourage them not to let their ego get involved," Dylina said. "But I only facilitate the settlement process. Attorneys reach outcomes themselves."

In April 2011, Dylina was assigned the 528 individual torts related to the Pacific Gas & Electric Co. San Bruno fire. Facing an enormous task, Dylina began by inventorying the cases.

Suits related to the eight deaths and another 20 or 30 serious injuries were handled first.

Frank M. Pitre of Cotchett, Pitre & McCarthy LLP served as lead plaintiffs' counsel in the San Bruno case.

"Judge Dylina understood the human tragedy that occurred and understood the need for resolution," Pitre said. "He put together a case management plan guaranteed to provide prompt resolution."

"By identifying and handling cases that needed most urgently to be heard, he got all the cases moving forward," he added. "What normally would have taken five or six years was completed in three."

The case management model was used as a template to follow in the handling of suits related to the 2015 Butte fire, Dylina said.

Pitre, who in 2013 was named California's Consumer Attorney of the Year for his work in the PG&E case, also praised Dylina's communication skills. Before major hearings, Pitre said, Dylina issues an agenda posing questions to counsel one week before their appearance.

"He says, 'Please address these cases,'" Pitre said. "It tells you what he's analyzed and what he wants. And the questions he asks in court demonstrate he's done his own research."

Born in Spokane, Washington, Dylina moved 12 times while growing up. His father's work as a federal penitentiary officer made it difficult for Dylina to make long-term friends, but seeing so much of the country helped Dylina learn about himself and where he fit in.

Dylina, a Democrat, hangs a six-foot tall picture of Robert F. Kennedy in his chambers. In 1968, young Dylina worked on Robert Kennedy's presidential campaign. He was in San Jose the day Sirhan Sirhan shot Kennedy in Los Angeles.

Another hero, John Glenn, also appears in Dylina's chambers.

"He was my childhood role model," Dylina said. "I loved his ebullience. He was honest and forthright."

Dylina was 27 when he enrolled in law school. His first career as a financial analyst for General Electric Co. required he frequently move. When he was informed of a job waiting for him in Schenectady, New York, he sought a different path.

"I didn't want my life determined by a corporation," Dylina said.

He ended up enrolling in night classes at San Francisco Law School. While there, he met his future wife, Ann, with whom he practiced for 14 years.

Set to turn 70 next month, Dylina is thinking about retirement, but has no set date. His mind and body remain in good shape. He regularly runs 2.5 miles, and it shows in his easy gait.

Attorneys who appear before him are happy to have him around as long as possible.

Paul F. Utrecht of Utrecht & Lenvin LLP described Dylina as "an excellent settlement judge."

"He is unfailingly solicitous of the jury," Utrecht said. "He allows the lawyers to try their own cases in their own way. And, in my experience, he is very receptive to fairness arguments."

Pitre described Dylina as nothing short of "an icon of what a judge should be."

"He's earned the respect of lawyers on both sides of the fence," Pitre said. "People trust him to guide them and their client to the best result. His intellectual honesty and avuncular demeanor makes him unique."

Here are some of Judge Dylina's recent cases and the attorneys involved:

•*Osborn v. Costco*, CIV518105 — wrongful termination

For the plaintiff: Barbara Lawless, Lawless & Lawless

For the defense: Giovanna Ferrari, Seyfarth Shaw LLP

•*Myers v. Cresson*, et al., CIV518271 — fraud

For the plaintiff: Jeffrey H. Belote, Morris Polich & Purdy

For the defense: Paul F. Utrecht, Utrecht & Levin LLP

•*PG&E San Bruno Fire Cases*, JCCP4648A

For the plaintiff: Frank M. Pitre, Cotchett, Pitre & McCarthy LLP

For the defense: Gayle L. Gough, Gough & Hancock LLP

•*Karow v. Evenflo*, CIV505103 — wrongful death, product liability

For the plaintiff: Joseph Carcione, Law Offices of Carcione, Cattermole, Dolinski, Stucky, Markowitz & Carcione

For the defense: Peter M. Hart, LeClairRyan

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Law responding to balcony collapse coming in January

By Alka Ramchandani

The California Division of Occupational Safety and Health (Cal/OSHA), after consultation with the California Contractors' State Licensing Board, will transmit to the board copies of any citations or other actions taken by Cal/OSHA against any of the over 290,000 contractors licensed by the board under Senate Bill 465, signed by Gov. Jerry Brown last month. The new law becomes effective on Jan. 1, 2017.

Existing law allows the board to license, regulate and discipline contractors for their construction activities. Previously, the law required only Cal/OSHA to provide investigative reports to the board on licensed contractors. SB 465 requires Cal/OSHA to consult with the board and transmit any citations or other actions taken by Cal/OSHA against a contractor. The bill authorizes the board to enter into an interagency agreement with any other state or local agency that may possess information relevant to protect the public.

The legislation, motivated in response to the 2015 balcony collapse in Berkeley, passed the Assembly and Senate with bipartisan unanimous votes. In contrast to the licensing boards of other professions, such as engineers and architects, which collect reports of settlements and judgments, California state law does not require contractors to report defect settlements to the board. Contractors involved in the construction of the Berkeley building had a history of paying millions in construction defect settlements.

Earlier versions of the bill included a reporting requirement for significant settlements. In a compromise, the amended bill approved by Brown includes a provision requiring the board to conduct a study and report to the Legislature, by Jan. 1, 2018, the results to determine if broader reporting regulations regarding judgments, arbitration awards or construction defect settlement payments are needed to enhance the board's ability to protect the public.

The bill also requires a licensee to report to the board registrar within 90 days of the date it receives notice of any felony or criminal conviction related to the qualifications, functions or duties of a licensed contractor.

New York Times

Workers prepare to remove the balcony below the one that collapsed, leaving 6 dead and several critically injured, at the Library Gardens Apartments in downtown Berkeley, June 17, 2015.

This new collaboration of state organizations is sure to create new difficulties for contractors. Once a citation is received, Cal/OSHA may hand over the citation regardless of whether the contractor ultimately is found guilty of a violation. The board has not yet issued information regarding how the newly acquired information will be utilized in the licensing process, what the effects will be on licenses being issued, renewed or revoked, or what the reconciliation process will be for removing citations from the record of a contractor if the citation is later withdrawn by Cal/OSHA after challenge or investigation. However, the board likely will issue disciplinary actions, such as requesting additional bond coverage or suspending the license of a contractor, if it determines the contractor is acting in a way that negatively affects the pubic.

It is essential that contractors actively engage in safety and health efforts for their businesses to successfully navigate Cal/OSHA inspections. The following steps can help ensure the safety of workplaces and avoid the issuance of citations, or challenge citations that have been issued:

• Review and update of safety policies and procedures annually

• Develop written standard operating procedures for inspection protocols

• Ensure management is properly trained to respond to inquiries from the board and Cal/OSHA inspectors

• Designate personnel who will interface with Cal/OSHA inspectors

• Maintain detailed and organized safety records, including equipment manuals, maintenance and service documents

• Conduct training and preserve relevant materials, including presentations, handouts, attendance sign-in sheets and certification records

• Regularly inspect worksites to identify and remediate hazards

• Conduct mock inspections

• Consult with counsel whenever there is a Cal/OSHA inquiry

Construction contractors must remain diligent with respect to their safety and health efforts and proactively work to ensure compliance with Cal/OSHA standards.

Alka Ramchandani *is an associate in Jackson Lewis PC's San Francisco office.*

Sex crime defendant slits own throat after conviction

By Meghann M. Cuniff
Daily Journal Staff Writer

A former teacher cut his throat in a Santa Ana courthouse on Wednesday, seconds after a jury convicted him of three felony sex charges for his abuse of a young girl.

Jeffrey Scott Jones, who had been out of custody on $1 million bail since shortly after his arrest in 2013, is expected to survive, said Capt. Larry Kurtz, spokesman for the Orange County Fire Authority.

Jones cut himself with a razor blade he'd smuggled into the courthouse, but "he was unable to cut any major arteries," Kurtz said. Paramedics took Jones to a local hospital, where he remained Wednesday afternoon.

Gwen Vieau, a spokeswoman for Orange County Superior Court, said the sheriff's department and court management are reviewing security procedures "to determine how the blade entered the building, and to determine if modifications need to be made in the screening process."

The Orange County Health Care Agency also is offering assistance to jurors who witnessed the incident, and the court is reminding staff of its Employee Assistance Program.

"The court is aware that incidents such as these can cause physical or emotional reactions," according to a news release.

Jones' attorney, T. Edward Welbourn of Corrigan Welbourn Stokke PLC, praised the quick actions of courtroom bailiffs. He was seated next to Jones at the defendant's table when Jones' head hit the table and Welbourn noticed blood around his neck "and could see the blade."

Bailiffs worked to stabilize Jones, and medics soon arrived to take him to an ambulance.

Jurors had deliberated for about an hour and a half following a month-long trial, said Deputy District Attorney Heather A. Brown. Jones was convicted of two counts of aggravated sexual assault of a child under 14 and one count of continuous sexual abuse. Judge Steven D. Bromberg presided.

Jones used to teach at Libra Academy in Huntington Park and at Bell High School. His victim was not one of his students, but Brown said she told jurors of Jones having sex with former students and of class assignments he used to identify vulnerable girls.

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Commssioner faces CJP counts

Continued from page 1

ceeding, for example, a woman told Culver her daughter was the driver pictured, according to the charges.

Culver responded that the daughter should step forward to get her "off the hook," and that this "'ain't me' defense" isn't going to work. If the police can't find someone else, "it's you," he allegedly told the defendant.

The commission contends in another count that Culver made a habit of denying defendants the right to do community service, instead requiring them to pay fines regardless of their income restraints. This reflected a blanket sentencing policy when the fine was above $1,000 and amounted to prejudgment, according to the commission.

While the preponderance of charges center on Culver's judicial demeanor and alleged procedural missteps, a stand-alone charge alleges he made lewd sexual remarks to his clerks after an earthquake rattled the courthouse.

After the tremors subsided, he allegedly stated to his female staff that if he thought he was going to die during the quake he would jump over to them to get "some kissing going on" and "see that [they] got taken care of." On another occasion, he allegedly remarked that he should have a bumper sticker made highlighting his "ability to sustain an erection."

Depending on the outcome of the hearings, which should begin by March at the latest, Culver could face public or private admonishment, censure, or removal from his post. He was elected commissioner in 2005 by Alameda County Superior Court judges.

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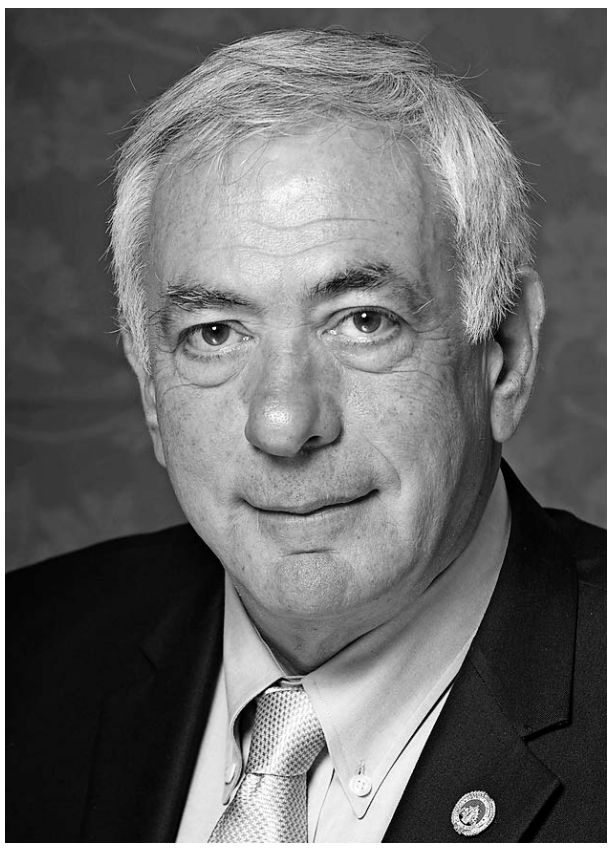


LA County Superior Court judicial races enter final stretch

Continued from page 1

As the deputy district attorney in charge of the West Covina office, Javier Perez leads one of the busiest offices in the county. Last year, it reviewed 15,000 cases, filing 10,000, Perez said. But he says he isn't a trigger-happy district attorney who will prosecute anyone a police department will put in front of him. "It takes courage to say no to them because we are bound to cases where we can prove beyond a reasonable doubt. It's not a matter of convicting someone. It's looking at a case objectively," said Perez, who has been a deputy district attorney for 26 years and is running because he says he has the right judicial disposition.

He declined to comment about his opponent, Susan Jung Townsend. She received 36.3 percent of the primary vote versus Perez's 31.1 percent.

Townsend, a deputy district attorney who said she has handled more than 50 jury trials throughout an 18-year career, said she is uniquely qualified. "I am one of the few people running who has experience doing fraud cases," said Townsend, who said such cases are a different beast, requiring lots of discovery and time.

She said her Korean immigrant parents bestowed upon her a sense of public service duty. She simply loves going to court. "I like having discussions with people in the courtroom," she said.

She touts 100 endorsements from judicial officers, including from Los Angeles Superior Court Judge George Lomeli, whom she held up as the type of judge she would strive to be: fair, respectful and professional.

In the race for Office 158, California Department of Justice civil litigator Kim L. Nguyen has little trial experience, but said she is ready to become a judge because of her 16 years handling multiple types of law. "I honestly don't think it is too early. I think it is a perfect time," said Nguyen, who lauds her experience litigating in the public and private sector in civil, criminal and juvenile dependency law.

If elected, she said she will be the only sitting Vietnamese-American judge. She mentions her upbringing as a child of refugees to graduating from Harvard Law School. Her mother sowed garments and she remembers her father crying when he took the oath of allegiance for citizenship. Today Nguyen, a mother of two daughters, also does pro bono work helping others obtain citizenship.

"I do believe that our court system is ultimately meant to serve the public, to service our community. I would strive hard every day to make sure that every person who walked into my courtroom not only has the opportunity to be heard, but is heard and has a fair shot at justice. Regardless if you could afford a lawyer, if you speak English or whether you are the plaintiff or the defendant," she said.

Nguyen attracted 34.2 percent of the primary vote while Deputy District Attorney David A. Berger received 27.4 percent. Both have raised about $300,000.

Berger, has 20 years of experience and is running with the blessing of Judge Elden S. Fox, who is vacating the office. Berger, a British native, attracted national attention in the U.S. during his time as a prosecutor for instituting a policy barring convicts from entering certain parts of town. The plan, dubbed the Lancaster Community Appreciation Project, called for those on probation or parole to stay away from areas riddled with crime or drugs. The program received criticism, including from the American Civil Liberties Union, saying the condition keeps people from seeing family or getting jobs. Berger said there were no businesses in such areas and the only reason offenders would there was to secure drugs.

"I think it was a great misunderstanding of what we were trying to do. All we did was define certain areas where drug users congregate," Berger said. He left the program after federal funding dried up, but the program is still in place.

He has endorsements from the Los Angeles Times, but LACBA rated him not qualified, telling Berger, "Your temperament and demeanor in the context of political activity evidences a lack of the temperament necessary to perform the judicial duties satisfactorily."

Nguyen was rated "well qualified."

Berger said the poor rating was due to the bar's unfavorable view of his writing on Los Angeles legal happenings for his Dragnet blog, which included criticism of his former opponents and allies. "Nothing in my mind breached any rules," he said. Berger said he was exercising his free speech in much the way judges do when they cast their views in columns for news organizations. He said would stop writing the blog permanently if elected.

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FOURSEASONS hed here here here here here

By America Hernandez
Daily Journal Staff Writer

A $300 million breach of contract dispute between a Beverly Hills hotel owner and the property's managing company, Four Seasons Hotels Ltd., was reopened Tuesday by the 9th U.S. Circuit Court of Appeals, which vacated an arbitration award due to errors of law made in several pro-defense rulings.

Appealing on such grounds is rare, and was possible only because the parties agreed to arbitrate mid-case and specifically wrote in provisions allowing errors of law to be considered appealable jurisdictional overreach, attorneys said.

The trial had been scheduled to take place in April 2012, when U.S. District Judge Philip S. Gutierrez imposed a 10-hour maximum trial time limit on each side, then issued a last-minute continuance pushing trial 10 months later with no order explaining why, according to docket entries in the case.

The litigants subsequently agreed to arbitrate. *Burton Way Hotels Ltd v. Four Seasons Hotels Ltd,* 11-CV303 (C.D. Cal., filed Jan. 11, 2011).

The now-vacated award had granted summary judgment to defendant Four Seasons and awarded it $15.3 million in attorney fees and costs, with a $5 million reduction to account for the chain's admitted intentional shredding of key documents in the case.

The plaintiff, Burton Way Hotels Ltd., had initially asked Gutierrez to vacate the award on the grounds that Brian Parmelee, an executive at JAMS Inc. in charge of generating business, spent 19 years working for Four Seasons immediately prior to joining JAMS and once reported to key witnesses in the case.

This fact had not been disclosed by the arbiters during proceedings, according to court documents.

Gutierrez declined to vacate, citing statements by JAMS and Four Seasons affirming the two did not discuss aspects of the case, according to a November 2014 minute order. On appeal, the circuit court ordered a second arbitration to take place, though it is unclear whether it must still take place with JAMS.

The failure to disclose a possible conflict was not one of the grounds for appeal. *Burton Way Hotels Ltd v. Four Seasons Hotels Ltd,* 14-56846 (9th Circ., Oct. 18, 2016).

"Burton Way is delighted that the 9th Circuit reversed summary judgment against it on the breach of contract claim and remanded the evidence spoliation issue for a new determination of the appropriate penalty against Four Seasons," said the plaintiff's appellate counsel, Rex S. Heinke, a partner at Akin Gump Strauss Hauer & Feld LLP in Los Angeles. Four Seasons was represented by Forrest A. Hainline III and Anthony M. Feeherry, partners at Goodwin Procter LLP in San Francisco and Boston, respectively.

Defense counsel noted that Burton Way is precluded by the opinion from reviving any fraud or breach of fiduciary duty causes of action, which it called a partial victory.

"We were happy to see two issues of California law clarified in our favor," Feeherry said.

The dispute concerns a 1987 agreement by which Four Seasons managed a hotel owned by Burton Way on the condition no other Four Seasons-operated hotels could compete within eight miles, according to the complaint.

The parties disagree about whether that agreement and subsequent amendments prevented Four Seasons from acquiring the Regent Beverly Wilshire a mile away, rebranding it, and including it on the Four Seasons website.

Burton Way claims the move resulted in competition among brand-loyal customers, causing lost profits exceeding $100 million.

Prior to arbitration, a federal judge found the contract's terms were ambiguous and that extrinsic evidence could be considered to decide the agreement's meaning.

Four Seasons admitted to shredding some of that evidence, namely six years' worth of Four Seasons executive meeting minutes, after being notified of litigation.

Circuit Judges Stephen R. Reinhardt, John B. Owens, and Michelle T. Friedland unanimously found that the three JAMS Inc. arbiters on the case improperly weighed the remaining extrinsic evidence when finding the contract unambiguous and clearly in Four Seasons' favor.

"Such fact-finding at summary judgment by the panel is legal error," the unpublished memorandum reads. "Under California law, inquiry into the relative merits of the extrinsic evidence is a matter to be determined at a full, evidentiary hearing."

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Sacramento judge seeks legislator's subpoena response

Continued from page 1

deposed in a tribal gaming case.

In denying the deposition, Brown added an additional comment allowing deposition by written questions, which can be allowed under the state civil code as a less intrusive means of discovery.

In last week's ruling, Rodda noted that the two sides had agreed on 209 of 211 questions and wrote, "Plaintiff still does not have the senator's answers."

Coleman said the two questions at issue are among the most important: the ethnicity of other state Senate employees dismissed in recent years, and if they were terminated by their Senate offices or the Senate Rules Committee.

Miller is Hispanic, and contends race played a role in his alleged harassment and firing. Attorneys for the state Senate have argued Berryhill had little involvement in Miller's termination.

The case is one of three personnel lawsuits against the Legislature that Coleman is litigating. She has also been a frequent critic of the fact that legislative employees do not have union representation and aren't protected by the California Whistleblower Protection Act.

In June, Sen. Isadore Hall, D-Compton, was served papers at his election night party after qualifying for the November general election as he seeks a seat in Congress. Plaintiffs in a lawsuit against a housing development where Hall lives were seeking to call him as a witness.

Last month, Los Angeles County Judge Yvette M. Palazuelos ruled Hall should be deposed, but agreed to Hall's attorney's request to strictly limit the type of questions and delay the deposition until after the Nov. 8 election, even though the trial is scheduled to start Oct. 31.

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MICHAEL FARRELL, 1938-2016

Retired LA judge remembered for his geniality and empathy

By Eli Wolfe
Daily Journal Staff Writer

Retired Los Angeles Superior Court Judge Michael Farrell, described by family and colleagues as a gentle giant who wielded a fair hand in the courtroom, died Sunday at 78 after a long battle with cancer.

Farrell was appointed to the Los Angeles Municipal Court by Gov. George Deukmejian in 1986. He was elevated to the superior court in 1989 and sat chiefly in the Van Nuys Courthouse.

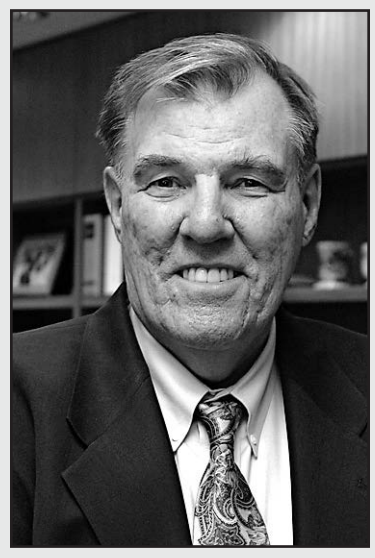
He retired from the bench in 2006 and worked as a private mediator for several years.

Farrell's brother, John Farrell, who also served on the Los Angeles County Superior Court bench, said his late brother was a large man, standing at 6 feet 6 inches, and "was a big imposing presence as a judge."

But according to attorneys who knew him, Michael Farrell's intimidating frame concealed a kind heart and a deep reservoir of empathy for everyone who appeared before him.

"He just went out of his way to make his courtroom your home," said Linda Bauermeister, an attorney at Barber & Bauermeister Law Offices in Santa Ana who had several cases before Farrell.

"He was really cognizant of the jury and I could tell they really connected with him" Bauermeister added.



FARRELL

Linda Rice, an attorney with Rice & Bloomfield LLP, said in an email Farrell ran an efficient and effective courtroom. But this didn't stop him from having fun.

"His courtroom was the place to be on St. Patrick's Day," Rice added. Farrell was renowned for throwing a party for staff from the building with corned beef and cabbage, Irish soda bread, and Irish cheese.

"As a judge, you want fairness and a great judicial temperament, and he had both," said Michael Alder, a senior trial attorney at Alder Law PC who had a case before Farrell. "He was thoughtful and tried extremely hard to get it right."

Born in New York City on March 9, 1938, Farrell graduated from Loyola High School in Los Angeles and studied engineering at Loyola University. Bored with his studies, Farrell left to serve in the National Guard for six months before returning to finish his degree at UCLA.

After graduating from Loyola Law School in 1965, Farrell served as an associate with Early, Maslach Foran & Williams and then Hunt & Finn before becoming corporate counsel for Global Marine Inc. The company assigned him to the Philippines, where he and his family lived for five years.

According to his brother, Farrell loved walking outdoors and spending time with his family. After his retirement, he purchased land in Ireland with the intention of building a house.

Farrell is survived by his wife, Susan, his five children, 12 grandchildren, his sister Mary and his brother John.

The rosary will be said at 7 p.m. on Sunday at Utter McKinley San Fernando Mission Mortuary in Mission Hills. A funeral mass will be held Oct. 24 at San Fernando Mission Church in Mission Hills.

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Sam Attal / Special to the Daily Journal

Tech Veteran

CORPORATE COUNSEL Q&A

DataStax General Counsel Clint Smith brings a broad perspective to the database startup.

Clint Smith has seen many sides of the technology sector, working for companies that were acquired by titans of the industry.

He worked for Macromedia Inc. in the run-up to its sale by Adobe Systems Inc. He was preparing to take a database startup, MySQL AB, public, before Sun Microsystems Inc. swooped in with a last-second acquisition offer. Most recently, he helped e-commerce payment program TrialPay Inc. grow from startup status toward an eventual acquisition by Visa Inc.

Now he's helping DataStax Inc., another database startup, navigate a complicated world of privacy regulations, cybersecurity and public-private partnerships.

DataStax helps businesses deploy an enterprise version of Apache Cassandra, an open-source database management application used by a bevy of Fortune 100 companies.

But making the most out of the application can be difficult for companies that don't themselves specialize in "big-data" technologies. That's where DataStax steps in.

The company has many similarities to his prior stop at MySQL, which was also the enterprise face of a popular open-source database. Now, a decade later, Smith is using the knowledge he gained at MySQL to help create what he thinks is the database company of the future.

Daily Journal staff writer Joshua Sebold spoke with Smith about the difficult regulatory climate for data companies, the law firms he trusts with his business and Datastax's homemade legal management software. What follows is an edited transcript of their conversation.

Clint Smith

Vice President, General Counsel and Corporate Secretary

DataStax Inc.
Santa Clara

Size of legal department:
6 attorneys

Daily Journal: Please explain the DataStax business model and its relationship to Cassandra:

Smith: DataStax is the source of the best version of Apache Cassandra. Apache Cassandra is an operational database that is used by some of the world's largest organizations for their mission-critical activities.

Users include Netflix and Uber and more traditional companies like Walmart and Home Depot and Bank of America.

The software operates at massive scale and is always on. Its unique architecture ensures that customers never have downtime for their mission critical data-driven applications.

The Apache Software Foundation is an open source software foundation that enables individuals to collaborate and build software together. We have many individual employees who contribute their time to improving software projects at the Apache Software Foundation.

DataStax takes software developed by the community within the Apache Software Foundation, enhances it, does extensive quality assurance on it and adds features such as enhanced security, before delivering it as a finished package to our enterprise customers.

DJ: Which regulations do you spend the most time thinking about?

Smith: Regulations around data privacy and cross-border data flows are critical to our company. Information security and cybercrime is a related issue that is also front and center for us.

It's important to understand that it's not just Europe but that regulators in China, Korea and elsewhere are also becoming active and may follow processes around policy-making that are less transparent than those followed by our colleagues in Europe.

The regulation of data flows and the protection of consumer expectations in data privacy are one of the most fundamental policy questions of our time. I think for the remainder of my career they will remain issues requiring constant attention and subject to constant change.

We are members of the Business Software Alliance, a trade association that represents leading software companies. We do no direct advocacy for DataStax.

DJ: What keeps you up at night?

Smith: In addition to my general counsel role, I'm currently managing our human resources team, as well as our training team.

What keeps me up at night is not our legal department, which I think is well staffed and well managed, but rather these new functions where I approach it as a learner and a new manager rather than someone with vast experience.

When I meet with general counsel at peer companies, I'm always interested to learn of the responsibilities they take on in addition to the legal role. I've seen colleagues manage human resources, corporate development, corporate communications, even customer support.

One trend I expect to continue is that general counsel at growth companies will be asked to wear many hats and apply their general management skills to new issues and new problems.

Currently I'm managing training, teaching software developers how to harness the power of our database platform. It's a role I never would have expected to receive but I enjoy it and I think I'm adding value.

DJ: Which outside law firms do you rely on?

Smith: There are so many fine firms in Silicon Valley. You have very good choices when it comes to corporate law. We use Fenwick & West for corporate law. Because we have employees in more than 20 states, we use Jackson Lewis for employment law matters and find they have excellent cost-efficient advice on a 50-state basis that is not available from Silicon Valley firms. For European matters, we rely on Taylor Wessing, which has a very specialized group of attorneys helping U.S. technology companies expand in Europe.

DJ: How do attorneys lose your business?

Smith: The way to lose my business is to profess an expertise that does not exist at your firm. Be honest about what your firm is great at and we will work together for a long time.

DJ: What's your day-to-day like?

Smith: My legal team's chief priority is supporting the company's revenue growth. We focus on that first every day. We also are taking the steps for preparing the company for becoming a public company. Tackling issues such as employment compliance, anti-corruption trainings and export controls.

My current general counsel role is one I refer to as a synthesis role. I haven't been hit yet with any new issue that I haven't encountered before in my career, however I'm doing the work better than I've ever done it before in that I have more experience and can bring a broader perspective to the issues I'm encountering.

DJ: Tell me about your legal team.

Smith: My DataStax legal team has five exceptional individuals in addition to myself. I have four employees in North America and one in Europe.

I have two senior attorneys in North America. One handles employment, IP and litigation in addition to revenue contracts. The other senior attorney covers our partner programs and Asia-Pacific expansion in addition to revenue contracts. My colleague in London is a generalist who supports both our revenue growth as well as the broad array of employment, real estate and regulatory matters that emerge in his region.

DJ: Do you plan to grow that team?

Smith: We certainly expect to expand our team in 2017. We're at the stage where we can offer individuals a diverse role that includes some elements of supporting our revenue contracts combined with specialized areas such as anti-bribery compliance, intellectual property or data privacy.

We're in the midst of the 2017 planning process, so we don't have a clear indication of how much we'll expand next year. We'll certainly look to add a colleague on the East Coast to add some geographic diversity to the North American team.

We're very proud that we have built a legal department infrastructure that will scale as the company grows. We have legal department work-flow tools that allow us to know the status of every contract that we're working on across the group. We have a contract database, built on DataStax's own product.

That allows us real-time access to the full text of every contract we've ever signed, from a laptop or mobile device. We're proud that we have systems and infrastructure that in some cases are better than what is in place at much larger companies.

We've taken the time to design these tools and these parts of our legal team infrastructure now, with an eye to them continuing to serve us as we grow from a five-member legal team to a 50-member legal team.

In the spirit of open source software, we would be happy to make our contracts database product available to other legal teams that wanted to use it.

DJ: What's the connection between the companies you've worked for?

Smith: I've always been drawn to emerging growth companies with interesting products. I fell in love with what they were doing and how their products were changing the world. From that perspective, I wanted to be fully engaged with one client whose innovative products were having an impact on the world.

DJ: Have you ever taken a company through an IPO?

Smith: That's on my bucket list and I haven't achieved it. At MySQL we were on the verge of filing our S-1. It was days away from being filed when we agreed to an acquisition offer from Sun Microsystems for $1 billion. The economics of the offer from Sun were so much greater than what we could achieve in our IPO that it was the right decision to take that offer.

DJ: Tell me about your advisory roles with other companies:

Smith: To be a successful member of an executive team, you have to constantly bring interesting and impactful ideas from outside the company to the executive team for consideration. By serving as an adviser and investor in different startups, I'm exposed to new business models, new management practices, new communication strategies.

My DataStax CEO, who himself serves on the board of directors of Tableau Software, encourages the executives to get meaningful roles outside the company so that we have this constant influx of best practices and innovative ideas.

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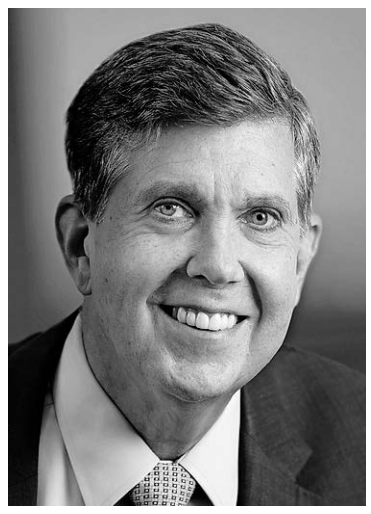
DEALMAKERS

M&A

Water brands merge with counsel from trio of firms


LUER

Ervin Cohen & Jessup LLP advised Glacier Water Services Inc., an operator of self-service water vending machines, in its sale to Primo Water Corp. The deal, announced Oct. 12, is valued around $263 million.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan LLP and K&L Gates LLP advised Primo Water, a supplier of purified bottled water, self-service refill water and water dispensers.

The consideration includes roughly $50 million in cash, about $36 million in Primo common stock, $177 million of net debt along with preferred stock that is assumed or retired and five-year warrants to buy 2 million shares of Primo's common stock at $11.88 each, subject to adjustments based on any increases in Glacier's debt and certain transaction expenses, according to deal terms.

The assumed debt includes Glacier's trust preferred securities due in 12 years which will not be affected by the deal. The board of directors of both companies have unanimously approved the deal, expected to close later this year, subject to customary closing conditions.

Brian McInerney, CEO of Glacier Water, and other members of the company's management team will stay on at the combined refill business. The company will be headquartered in Winston-Salem, North Carolina though it will keep a presence in Vista after the deal closes.

The deal gives Primo 46,000 retail locations throughout the country and in Canada, almost doubling its number of locations.

The deal unites two complementary brands, generates operating scale through a larger refill and exchange network, is expected to drive cross-selling opportunities and increase cost savings and cash flows, according to a news release.

The companies said the deal creates a combined company with about $272.6 million in net sales, $14.3 million in income from operations and $45.4 million in adjusted earnings before interest, taxes, depreciation and amortization based on numbers from last year. The companies said the combination is expected to generate from $6 to $7 million in annual operational and shared service synergies within two and a half years after the deal closes.

Howard F. Hart and Kenneth A. Luer (pictured) led the Beverly Hills-based Ervin Cohen & Jessup team which included Gary Q. Michel, Harrison Finch and Vanja Habekovic.

The Smith Anderson team advising Primo Water was led by Raleigh, North Carolina partners Gerald R. Roach, Lee M. Kirby Jr. and Amy M. Batten along with associate Joshua M. Diver.

The K&L Gates team included Charlotte, North Carolina partner Sean Jones and associate Michael Hutson.

M&A

FameBit finds new home with help from Fenwick


LAMPRON

Fenwick & West LLP advised Science Media LLC, a Los Angeles-based startup-focused investment firm, in selling its portfolio company, FameBit LLC, to Google. Fenwick disclosed the details of its involvement in the deal Oct. 13. Terms of the deal were not released.

FameBit is a technology startup that helps marketers connect with digital influencers. The service is designed to boost branded content deals in online video, according to other media reports.

Google's relationship with brands and YouTube's partnership with creators will help FameBit connect to even more brands to creators and enhance brand marketing, according to a news release.

The Fenwick team advising Science Media included Seattle partner William H. Bromfield along with Mountain View partners Shawn E. Lampron (pictured) and David L. Forst. Associates Michael E. Riskin, Russell N. Wong, Marshall C. Mort and Elizabeth Chang provided support.

M&A

SoulPancake cooks up deal with Participant Media with counsel from Cooley, Latham


BREARTON

Cooley LLP advised SoulPancake, a video entertainment company in its sale to Participant Media. Cooley disclosed the details of its involvement in the deal Friday. Financial terms were not disclosed.

Latham & Watkins LLP advised Participant Media, a media company founded about 12 years ago. "Spotlight," "Contagion," "Lincoln" and "The Help" are some of the company's Academy Award-nominated films.

Rainn Wilson, an actor known for his performance on "The Office," founded SoulPancake about seven years ago.

"Kid President" and "The Science of Happiness" are some of the web series SoulPancake has created. The company said its content has more than 300 million video views and reaches more than 8.8 million social media fans, including 1.7 million YouTube subscribers. SoulPancake has a television team that creates scripted and unscripted specials and series that have aired on The CW, MTV, VH1, Discovery Family and many other channels.

Dave Young, a Santa Monica partner, led the Cooley team that included partner Barbara R. Mirza along with associates Matt Hallinan and Katja M. Decker-Sadowski. Palo Alto partner Mark Windfeld-Hansen aslo advised along with Leslie V. Cancel, special counsel in San Francisco.

The Latham & Watkins team advising Participant Media included Century City partner Christopher D. Brearton (pictured), counsel Glen G. Mastroberte and associates Liliana S. Paparelli and Caroline S. Ryon. Partner Pardis Zomorodi, resident in both the Los Angeles offices provided counsel along with San Francisco associate Julie D. Crisp. Los Angeles partner Laurence Seymour also advised with associate Kathryn Harrington.

Venture Capital

Gunderson Dettmer advises Postman in $7M Series A funding round


IRVINE

Gunderson Dettmer Stough Villeneuve Franklin & Hachigian LLP advised Postman in its $7 million Series A funding round.

Postdot Technologies Pvt. Ltd. develops Postman, a platform that helps developers build, test, document and share their application programming interface.

The round was led by Nexus Venture Partners, a venture capital firm that specializes in seed, startup, growth capital and early-stage investments domestically and in India.

The Postman app debuted about four years ago and now has more than three million active installations and over 1.5 million active monthly users at 30,000 companies, the company said in a news release. Postman has free apps for the Chrome, Mac and Windows operating systems. The company offers Postman Cloud, a paid subscription service that provides collaboration tools for development teams.

Postman, headquartered in Bangalore, India, has offices in Austin and San Francisco.

The Gunderson team included Michael H. Irvine (pictured), a San Francisco partner, and associate Maggie White.

Stock Offering

Cooley, Latham counsel in Cidara Therapeutics follow-on offering


DESCHAINE

Cooley LLP advised Cidara Therapeutics Inc., a biotechnology company developing novel anti-infectives including immunotherapies, in its public offering, a deal closing announced Oct. 13.

The offering included 2,475,248 shares of Cidara Therapeutics common stock, plus 277,389 additional shares as the underwriter partially exercised its option to buy additional shares at $10.10 each. The underwriter has until early next month to exercise its option to buy 93,898 more shares of Cidara's common stock at the public offering price.

Latham & Watkins LLP was counsel for the underwriter. Cantor Fitzgerald & Co. was the sole underwriter for the offering.

Cidara Therapeutics, headquartered in San Diego,said it intends to use the net proceeds from the offering for working capital, capital expenditures and other general corporate purposes, which may include funding future acquisitions.

The company said it expects to receive about $27.8 million in gross proceeds if the underwriter decides not to buy any more shares, before deducting underwriting discounts and commissions and other offering expenses.

San Diego partners Charles J. Bair and Karen E. Deschaine (pictured) led the Cooley team which included associates Nathan H. Figler, Denny Won and Phillip S. McGill. Susan C. Philpot, a San Franciso partner also advised. Latham's team was led from San Diego by partners Cheston J. Larson and Michael E. Sullivan.

M&A

C3 changes hands with guidance from Shearman & Sterling


DORF

Shearman & Sterling LLP is advising a consortium of buyers including Everstone Capital Partners III LP and Sunrise BPO Pte. Ltd in their acquisition of C3/CustomerContactChannels Holdings Inc. Shearman disclosed the details of its involvement Monday.

C3 has a business process outsourcing model serves many industries like health care, travel and hospitality, consumer internet, financial services, health care, travel and hospitality. C3 also provides training and consulting services for the customer management solutions sector.

Everstone Captial is an India and Southeast Asia focused private equity and real estate investment firm with more than $3.3 billion in assets under management. Everstone said it has around 200 employees across offices in Mumbai, Delhi, Bengaluru and Mauritius.

Sunrise BPO, a Singapore-based provider of business and management consultancy services, will lead efforts in operating C3 and bringing in capital while Everstone will be the largest financial investor and help grow the company, according to other media reports.

The deal is expected to close before the end of the year if customary closing conditions are satisfied.

The Shearman & Sterling team is led by partner Sidharth Bhasin in Singapore. San Francisco partner Michael S. Dorf (pictured) and Menlo Park partners Laurence E. Crouch and Richard C. Hsu provided support along with counsel Eileen M. O'Pray and associates Benjamin A. Petersen and Marc S. Elzweig.

Fund Formation

Simpson Thacher advises Swedish asset manager in fund formation


MOIR

Simpson Thacher & Bartlett LLP advised Brummer & Partners in forming of its second Bangladesh fund, Frontier Bangladesh II LP. Simpson Thacher disclosed the details of its involvement in the deal Oct. 11.

The fund reached a final close with $104 million in commitments. International Finance Corp. was one of the investors, according to media reports.

Brummer is an asset manager headquartered in Stockholm with 16 billion under management and other offices in London, Singapore, New York, Dhaka and Manila. The first Frontier Bangladesh fund provides long term growth capital to private companies there.

The Simpson Thacher team included Hong Kong partner Adam C. Furber and Katharine P. Moir (pictured), a Palo Alto partner.

M&A

Technology company taps O'Melveny for acquisition


SCRIVANO

O'Melveny & Myers LLP advised Celanese Corp., a global technology and specialty materials company, on its agreement to acquire SO.F.TER. S.P.A., a deal announced Monday. Financial terms were not disclosed.

Forli, Italy-based SO.F.TER is a provider thermoplastic compounds that are used in many industries including the automotive, household appliance, electronic, construction and sports footwear sectors. With roughly 550 employees in Italy, Mexico, Brazil and the United States, the company said it has four manufacturing facilities in Europe and four of them in the Americas.

Celanese will buy SO.F.TER.'s product portfolio of engineering thermoplastics and thermoplastic elastomers. Celanese will get all customer agreements and all manufacturing, technology and commercial facilities, according to deal terms.

The acquisition will nearly double Celanese's global engineered materials product platforms, extend its solutions capability and project pipeline and SO.F.TER. Group's manufacturing facilities and product portfolio will provide growth and investment opportunities, according to a news release.

The deal is expected to close in the last quarter of the year, pending customary closing conditions and regulatory approvals.

Paul S. Scrivano (pictured), a partner that divides time between New York, San Francisco and Menlo Park led the O'Melveny team.

— Melanie Brisbon

www.dailyjournal.com/dealmakers

Are defense bills sent to insurers privileged?

By Erica Villanueva and Nathan Anderson

On Oct. 6, the California Supreme Court heard oral argument in *Los Angeles Board of Supervisors v. Superior Court*, S226645, a case that, while seemingly far removed from the insurance field, could create problems for policyholders who submit defense bills to their insurers. On appeal, the court will decide whether legal invoices sent to the Los Angeles County by outside counsel are within the scope of attorney-client privilege and thus exempt from disclosure under the California Public Records Act. An affirmative answer to this question could present insureds with a conundrum: If attorney invoices are privileged communications, how can insureds submit those bills to insurers without waiving the privilege and making those invoices accessible to plaintiffs?

This problem arises from the broad rationale underlying the decision of the Court of Appeal in *County of Los Angeles Board of Supervisors v. Superior Court*, 235 Cal. App. 4th 1154 (2015). There, the court held that production of attorney bills could not be compelled because they are "confidential communications" within the meaning of California Evidence Code Section 952. Significantly, the court held that the L.A. County Sheriff could not be required to simply redact portions of the attorney time descriptions that reflected attorney opinions or advice. Indeed, the court concluded that a communication between attorney and client, arising in the course of representation for which the client sought legal advice, need not include "legal opinion or advice" at all in order to qualify as a privileged communication. Because the bills were, by definition, an attorney-client communication, they were privileged *in their entirety*.

> On appeal, the court will decide whether legal invoices sent to the Los Angeles County by outside counsel are within the scope of attorney-client privilege and thus exempt from disclosure under the California Public Records Act.

Such a broad rule could affect policyholders. Insurers often argue that the sharing of privileged communications between an insurer and its insured is protected by a common interest or joint defense privilege. It is true that in situations where the insurer is defending without a reservation of rights, the insured's and the insurer's interests are completely aligned and the two are effectively joint clients. But where the insurer has reserved its rights to deny coverage, the proposition is questionable; California law is strict when it comes to the recognition of a common interest privilege, and courts may not recognize the existence of such a privilege two parties' interests diverge in some ways. *See, e.g.*, *OXY Resources California LLC. v. Superior Court*, 115 Cal. App. 4th 874 (2004). The partial divergence of interest created by an insurer's reservation of rights may ruin any purported common interest privilege.

Insureds do have some statutory protection if their policy imposes a duty to defend upon the insurer. California Civil Code Section 2860(d) states, "When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes … Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.". However, Section 2860 does not expressly apply to insurance policies providing for a duty to pay or a duty to advance defense costs. Many insurance policies are written on such a basis, including directors' and officers' liability, management liability and professional liability/errors and omissions, among others. Under these kinds of insurance policies, if defense bills are privileged communications, submitting them to the insurer could constitute a waiver.

At the Los Angeles Board of Supervisors oral argument, the California Supreme Court seemed inclined to affirm the Court of Appeal's decision. Noting that information regarding litigation tactics and strategy could be gleaned from a careful review of client invoices, several justices repeatedly expressed concern that finding that the invoices were not privileged would permit interested parties to impermissibly gain information within the scope of the privilege. However, several justices indicated discomfort with the county's position that, because the attorney-client privilege extends even after litigation ends, it could bar access to all information in the invoices forever.

With these arguments in mind, the problem for insureds comes into view. Even if the court narrows the lower court's holding and crafts a rule that protects invoices only during the pendency of litigation, that rule would be of little use to policyholders, who are seeking to submit their defense bills promptly, for contemporaneous payment. While the court at oral argument acknowledged the importance of billing at several points — the client wants to know what he is paying for, and litigation decisions are often made with cost in mind — it did so without explicitly considering the third-party payor context. Thus, neither the justices nor counsel raised the potential risk of requiring policyholders to waive the privilege to secure payment of defense bills.

An affirmance in *Los Angeles Board of Supervisors* could leave insureds in a quandary: By providing defense bills to an insurer who has reserved its right to deny coverage — or who has not yet taken a coverage position at all — is the insured waiving privilege? And if the plaintiff in the underlying lawsuit demands that the insured produce "all communications with its insurer," could the insured then be required to produce its legal bills to plaintiff?

Insureds should proceed with caution in their defense costs submissions, particularly in the "duty to pay" context, knowing that the bills are afforded protection as privileged communications. Certainly, the insured should not provide defense bills until the insurer has taken a formal, written position on coverage. If the insurer acknowledges its obligations but reserves rights, then the bills will have to be submitted — but the insured should proceed with extraordinary caution. The insured should provide the bills with a cover letter stating that the billing statements are being provided to the insurer alone, and that no broad waiver of privilege is intended. The insured may want to request a formal joint defense agreement from the insurer. And to eliminate the risk that a court could find "divergent interests" between the insured and the insurer, the insured should still redact sensitive information, especially information bearing on coverage issues.

Erica Villanueva *is a partner and* **Nathan Anderson** *is a law clerk in Farella Braun + Martel's Insurance Recovery Group in San Francisco. They can be reached at evillanueva@fbm.com and nanderson@fbm.com.*

VILLANUEVA

ANDERSON

Decision sharpens the teeth on an insurer's duty to settle

By Benjamin R. Fliegel, Douglas C. Rawles and Christopher J. Pulido

A California appellate court recently sharpened the teeth of an insurance company's duty to settle in *Ace American Insurance Co. v. Fireman's Fund Ins. Co.*, 2 Cal. App. 5th 159 (2016). Where a primary insurer rejects a reasonable settlement demand within its policy limits, *Ace American* holds that it can be liable to an excess insurer if the case settles for an amount over the primary policy limits. This decision highlights an existing split of authority among the California appellate courts — here, three divisions of the 2nd District Court of Appeal — in which Division 1 held an excess settlement gives rise to the rights of the excess insurer against the primary insurer, but Division 2 held that an excess insurer could not be made whole absent a judgment. Division 4's ruling in *Ace American* embraces, and rightly so, the Division 1 approach as it reinforces the uncontroversial principle that an insurer should accept a reasonable settlement demand within policy limits.

On the set of Warner Brothers' superhero film "Green Lantern," a stunt gone wrong injured a special effects supervisor, who then sued Warner Brothers Entertainment Inc. and related entities to recover damages for his injuries. Warner Bros. had a $2 million primary policy and $3 million umbrella policy with Fireman's Fund, and an excess policy of $50 million with *Ace American* to respond to the accident.

The plaintiff made several settlement demands that were within the policy limits of the two Fireman's Fund policies; Fireman's Fund rejected each demand. Six months later, the lawsuit settled for "an amount substantially in excess" of the $5 million limits of the two Fireman's Fund policies. *Ace American* contributed to the settlement the amount excess to the $5 million Fireman's Fund policy limits.

Ace American then sued Fireman's Fund for equitable subrogation and breach of the covenant of good faith and fair dealing contending that Fireman's Fund had wrongfully failed to accept a reasonable settlement demand within its policy limits. *Ace American* argued that it could stand in the place of the insured to enforce the duty to accept a reasonable settlement within policy limits.

Fireman's Fund demurred on the ground that an "excess judgment" is required before an excess insurer can sue a primary insurer for failing to settle within policy limits, citing *RLI Insurance Co. v. CNA Cas. of California*, 141 Cal. App. 4th 75 (2006) (Division 2). Fireman's Fund argued that, because Warner Bros. settled the case, no judgment issued, and therefore *Ace American* has no right to equitable subrogation. *Ace American*, relying on *Fortman v. Safeco Ins. Co.*, 221 Cal. App. 3d 1394 (1990) (Division 1), opposed, but the trial court sustained Fireman's Fund's demurrer following the reasoning in *RLI*.

In reversing the trial court, Division 4 considered *Fortman* and *RLI* in detail, concluding that *Fortman* had it right. In *Fortman*, Division 1 concluded that actions between liability insurers are not based on contract, but instead are based on "equitable principles designed to accomplish ultimate justice in the bearing of a specific burden." The court also considered the fact that a rule requiring a judgment as a condition to an excess insurer being made whole for avoidable losses arising out of the unreasonable refusal to settle by the primary insurer would encourage trials in matters which otherwise might settle. Thus, *Fortman* permitted the excess insurer to pursue an action for equitable subrogation against a primary insurer that settled a case over its policy limits after it had refused to accept a reasonable settlement demand within its limits.

Sixteen years later, the Division 2 reached the opposite result in *RLI*. The *RLI* court concluded that an "excess insurer cannot maintain a subrogation action against the primary insurer, based on an unreasonable refusal to settle the underlying tort claim, because the tort claim did not go to trial, and no excess judgment was entered against the insured." *RLI* relied heavily on the 2002 California Supreme Court ruling *Hamilton v. Maryland Cas. Co.*, 27 Cal. 4th 718 (2002), which *RLI* interpreted to state a clear rule: "a judgment in excess of the policy must be entered before there can be a claim for breach of the primary insurer's duty to settle."

In *Ace American*, Division 4 prepared an 18-page analysis that included a lengthy discussion into the *RLI*, *Fortman* and *Hamilton*. The *Ace American* court concluded that, rather than distinguishing between damages in an excess judgment versus and excess settlement, *Hamilton* was focused on the "sufficiency of evidence of actual damages" in the $3 million stipulated judgment.

Ace American puts greater pressure on a primary carrier to accept a reasonable settlement demand within policy limits, which the court acknowledged met public policy goals. Primary insurers are already aware that they may be liable to their insurers for an excess judgment after trial if they rejected a reasonable policy limits settlement offer. Now primary insurers must consider that they may be liable to the excess insurer, if the excess damages are incurred by settlement.

Imagine a relatively common litigation scenario: Before filing a lawsuit, the plaintiff tenders a policy limits demand, with the "threat" that once a complaint is filed, the plaintiff will seek much larger damages. After *Ace American*, the primary insurer must heavily consider whether it will accept a reasonable demand at that point or take its chances in litigation. An excess carrier may expect the primary insurer to pay the full amount of any later settlement exceeding the policy limits. Under *RLI*, the primary insurer would not be obligated to the excess insurer for damages exceeding its policy limits if the case is settled before trial.

The rule in *Fortman* and *Ace American* should encourage primary insurers to accept reasonable settlement demands within policy limits. This is a good thing for policyholders, and is consistent with general insurance principles of law and policy. Where a policyholder is facing an insured risk which can reasonably be settled within its insurance limits, its insurer should attempt to get the policyholder out of harm's way. If it attempts to litigate the case for a better outcome and fails, then it is the insurer's loss — not the policyholder's. *Ace American* adds weight to that rule, and forces a primary insurer to consider seriously the risks of rejecting a reasonable settlement demand, regardless of how the litigation ultimately resolves.

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California's uniform parentage laws bear little resemblance to original act

By Deborah H. Wald

California adopted the Uniform Parentage Act in 1976, as part of an effort to end the distinction between "legitimate" and "illegitimate" children. This act, codified at Family Code Sections 7600 et seq, sets forth the rules for determining who the legal parents are of any California child. However, the act has been amended repeatedly since 1976, and portions of it now bear little resemblance to the original version. One area where many amendments have been needed is in the area of assisted reproduction.

As originally enacted, the act did not base any determinations of parental status on the intentions of the parties. Instead, the act set forth a series of clear rules which differentiated "parents" from "non-parents." These rules depended almost exclusively on a combination of genetics (DNA testing) and marital status.

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Since 1976, changes in reproductive medicine have caused our courts to have to consider a whole range of issues not anticipated when the act was adopted. Now, hundreds if not thousands of California children are born each year with the assistance of various reproductive technologies. As the medicine changes, the law also has had to adapt and change.

Until 2016, there was no clear law in California determining when a woman was a mother versus when she was an egg donor. Egg donation was not mentioned anywhere in our Family Code, and a search of published cases on Westlaw, using the term "egg donor" produces only one published case dealing directly with egg donation. In that case, a lesbian couple had children together using the eggs of one woman, fertilized with donor sperm and then transferred into the uterus of the other woman (a practice I refer to as "co-maternity"). The women broke up when the resulting twins were approximately five years old, and the woman who had given birth argued that her ex-partner was an egg donor and not a parent. The case went all the way to the California Supreme Court, which concluded that a woman could not be simply an egg donor if she was providing her eggs to her intimate partner with the intention of conceiving children that the two women would raise together in their shared home. *K.M. v. E.G.*, 37 Cal. 4th 130 (2005).

However, effective Jan. 1, 2016, California now has a statutory definition of "egg donor." Pursuant to Section 7613 (c), a woman who donates her eggs for use in assisted reproduction by a person other than her spouse or nonmarital partner is treated in law as if she were not the natural parent of a child thereby conceived *unless* the court finds satisfactory evidence that the donor and the person to whom the eggs are being donated mutually intend for the donor to be a parent. Under this definition, unless eggs are being donated within the context of the donor's own intimate partnership (as in *K.M. v. E.G.*), the *only* way to tell an egg donor from a mother with 100 percent certainty is to look to the documented intentions of the parties.

The law of sperm donation has become equally dependent on documented intentions. Up until 2016, a sperm donor was a man who provided his sperm to a physician or surgeon, or to a sperm bank, for the purpose of causing a pregnancy in a woman other than his wife. (Family Code Section 7613, (b). It did not matter whether the man was a close friend or an anonymous donor; nor did it matter whether the actual insemination occurred in a medical facility or at home. (Many women who purchase sperm from sperm banks take that sperm home and perform the inseminations themselves, in the privacy of their own homes, rather than in a medical facility.) The critical question was to whom the initial sperm donation was made.

This definition of "sperm donor," while appealing for its simplicity, was both underinclusive and overinclusive. It was underinclusive because it provided no protection to the many men donating sperm to friends and family members without the involvement of medical personnel, or to the women to whom they were donating; and it was overinclusive because it automatically stripped unmarried men requiring medical assistance to conceive of their legal rights as fathers (because they were providing their sperm to physicians for purposes of causing pregnancy in women other than their wives). This problem was solved by a series of amendments to Section 7613(b) that went into effect in January of 2016.

Under the new Section 7613(b), a man still is a sperm donor if he provides his sperm to a physician or sperm bank, *absent a written agreement between him and the recipient of his sperm documenting a mutual intention that he be a parent*. But a man also will be a sperm donor, and not a father, if the donor and the person to whom he is donating agreed in a writing signed prior to conception that their mutual intention was for him to be a donor and not a father. This simple change allows people using donated sperm — and their donors — to create legal clarity about everyone's parental status by entering into a written sperm donation agreement prior to the sperm being used, without having to seek assistance from health care providers unless there is a medical reason to do so.

These, along with other, changes to California's Uniform Parentage Act have made it more important than ever for people seeking to become parents through assisted reproduction (egg donation, sperm donation, embryo donation and surrogacy) to have written agreements in place that clearly document their intentions regarding parentage prior to a child being conceived. Our courts have recognized for over 20 years that, in the area of assisted reproduction, a party's documented intentions may be determinative on parentage. *See, e.g., Johnson v. Calvert*, 5 Cal. 4th 84, 94 (1993) (citing with approval the argument of Professor Marjorie Shultz of U.C. Berkeley School of Law, that "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.") Now, with the recent changes to Section 7613, documented intentions indeed can make the difference between someone being a mother versus an egg donor, and someone being a father versus a sperm donor. Given the importance of these distinctions to an adult's rights and obligations with regard to their genetic offspring, the importance of well-drafted legal agreements on these issues cannot be overstated.

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How to take an effective deposition

By Henry Brown and Thomas Jay Leach

Deposition taking is a primary skill of most civil-practice lawyers. On the surface it appears simple and straightforward: The deposition taker asks questions and gets answers. But one's first experiences when actually taking a deposition reveal many layers of difficulties, chief among them the fact that one is usually trying to get answers from the other side's witnesses, who are hostile to the taker's intent and goals.

Here are four top tips for taking effective depositions:

Treat the information-gathering segment as direct examination, not cross

Generally a lawyer has two primary goals in taking a deposition: information-gathering and gaining admissions/testing theories. When gathering information, the lawyer seeks both to find out what the witness knows and to confirm what she has learned from other sources. The lawyer will then use the information gained in the deposition and from documents and other sources to test theories favorable to her case and obtain important admissions from the witness.

While admissions are essential for dispositive motions and potential impeachment, the majority of the deposition time is taken with gathering information. The traditional open-ended questions of a news reporter are the best tools for this goal: who, what, where, when, why, how, describe and tell-us type questions. These encourage the witness to give maximum information, and thus they are analogous to direct-examination questions. In this phase of the deposition, avoid leading questions and even closed questions (such as: "Did you see this sentence on the second page of the contract?") except when a closed question is required to get to the point you are after.

The deposition-taker who avoids unfavorable information by not pursuing it in the deposition only delays the inevitable — even worse, this taker does not know what to expect in the subsequent stages of the matter.

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Welcome all the information, even when it is bad for your case

The beginning lawyer feels his heart sinking when, in response to his open-ended questions, the witness launches into a long speech that contains facts highly favorable to the other side's case. He feels, "I am making a record for my opponent here." This concern is premised on two misconceptions.

First, the lawyer is operating under the mistaken belief that what is left unsaid during the deposition will not become of record pretrial or at trial.

This lawyer is living in a fool's paradise. The other side has collected the information favorable to its case and unfavorable to the taker's; they will bring it all to the trial or to their declarations in support of summary judgment proceedings.

The deposition-taker who avoids unfavorable information by not pursuing it in the deposition only delays the inevitable — even worse, this taker does not know what to expect in the subsequent stages of the matter.

Second, in most instances there is no "record" being made — the deposition cannot be offered into evidence in place of or in addition to this witness's live testimony at trial. (We admit this is an overstatement: the deposition will substitute for a witness who is unavailable through death, disability or departure from the reach of a subpoena. Federal Rule of Evidence 804(b)(1). However, the risk of those events is small compared to the great advantage of knowing everything as early as possible.)

A "failed" theory is a success

The second major goal of deposition-taking — theory testing — is generally defined as the taker's effort to paint a picture favorable to her case. In essence she is thinking: "I'm betting this is what was really going on, what really motivated the events. Let me see if I can get the witness to buy into my version." This phase of the deposition is analogous to cross-examination. By means of leading questions and amassing facts that point to the lawyer's conclusion, one tests if the witness can be led to admit, "Yes, that is what happened."

But the beginning lawyer fears what will happen if the theory "fails" — if the witness says, "No, that is not what happened," and, seemingly worse, "here's my very persuasive explanation to prove my point, not yours." In actuality, however, there is a hidden but important benefit to what appears at first to be lack of success: the lawyer now knows what not to present at trial. In this setting, avoiding a strikeout is just as good as getting a base hit.

Know how the deposition will be used in dispositive motions and trial

Given that the primary uses of depositions are to support or oppose dispositive motions and to impeach the witness at trial if he tries to alter or add to his deposition testimony — two elements of deposition skill are vital.

First, always close off the sum total of the witness's knowledge on the topic you are exploring. Get the witness to assure you, on the record, that he has nothing to add — that you now "have it all." That will prevent, or at least make very difficult, the witness's bringing new facts to motion papers or trial.

Second, foresee and close off any escape routes the witness might use to explain why he is now (in motion papers or at trial) changing or adding to his deposition testimony: illness, distraction, fatigue, misunderstanding the question, not knowing he could ask for clarification, etc. One does this by getting the witness's agreement early on in the deposition to the "commitments" (some call them the "admonitions") by asking:

- Is there any reason you cannot participate fully in today's proceeding?
- Will you tell me if you are getting tired, so we can take a break at the next reasonable opportunity?
- Will you tell me if you do not understand my question?
- Will you ask me to clarify a question if it is unclear to you in any way?

These two methods give you the ammunition you need to show the witness to be a liar or a sneak if he tries to play cute in motion papers or at trial. They have two further advantages:

- They show your opponent you know the ropes when it comes to taking depositions.
- They boost your confidence in your deposition-taking ability.

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Attorneys should support State Bar's special assessment

Continued from page 1

aggrement came about, so the Legislature adjourned. Then the Supreme Court, exercising its absolute authority over lawyer discipline and admission (*In re Attorney Discipline System*, 19 Cal. 4th 582 (1998)), directed the State Bar to file by Sept. 30 a petition for a special dues assessment; interested parties had until Oct. 11 to file amicus curiae letters. The matter is now before the court. Without a dues assessment, the State Bar runs out of cash early 2017.

Protection of the Public: An Effective and Meaningful Discipline System

We have to recognize, especially with the statutory mandate that "protection of the public shall be the highest priority" for the State Bar; and, against all other functions, public protection "shall be paramount" (Bus. & Prof. Code Section 6001.1), that an effective and functioning discipline system is *sine qua non* of that mandate. Many are as aware of the well-publicized recent criticism of the Office of Chief Trial Counsel, as we are enthusastiac about the new State Bar leadership's commitment to meaningful discipline reform.

No one, however, can expect the State Bar to fulfill its public protection mandate without adequate resources. Accordingly, we have to look at the State Bar's request — not just for funding to maintain the *status quo*, but for funding sufficient to develop a discipline system that functions fairly, efficiently and also inspires confidence in the public — as a request that also serves the intesests of all of us.

A strong and effective discipline system not only protects the public. It also serves the many thousands of California lawyers who treat their clients honorably,

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who uphold the integrity of our profession in their practices, and who serve the interest of justice as they appear in our courts. At present, a few cynics ask whether — in light of recent criticism of the discipline system — "legal ethics" has become an oxymoron. While the comment is ignorant and, given the dedicated work of many in OCTC, cruel, it reflects a public perception that must change.

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Whenever the State Bar discipline system does not function fairly and effectively, our whole profession suffers ... First, while cases linger in OCTC, lawyers who have, in fact, not engaged in misconduct have a discipline cloud hanging over them.

Only if the State Bar has the resources necessary to maintain a fair and effective discipline system that can address the very small percentage of lawyers who engage in misconduct will it enhance the public's perception of the integrity of our profession and provide evidence that we can function as a self-regulating profession in the public interest. That's why the State Bar must have the resources to achieve it.

Protection of the Public: Proactive Measures

Although a fair and effective discipline system is critical to the State Bar's public protection mission, the State Bar would fall far short of its duty if its activities were limited to after-the-fact correction of professional misconduct. At that point, a client or clients, and perhaps the judicial system, have already suffered harm — harm that discipline, even disbarment, cannot adequately address.

Most lawyers do not intentionally seek to engage in misconduct. Rather, some are misinformed about ethics issues; others fail to pause and ask critical ethics questions; still others are distracted, attempting to run a practice — and, if among our younger colleagues, to pay off accumulated student debt. Moreover, in an ever-changing environment — in which social media is but one aspect — the application of ethics principles to shifting facts takes thought, analysis, reflection.

Thus, both the legal community and the public interest are best served when the State Bar has adequate resources, not just to maintain a discipline system, but also, of equal if not greater importance, to carry out its ethics education functions through — to cite but a few examples — the work of the Office of Professional Competence, the Office of General Counsel, and the Committee On Professional Responsibiity and Conduct. These are resources that the great percentage of California lawyers, never caught up in the discipline system, striving to practice with integrity, critically need to understand their ethical duties in a rapidly changing world.

In addition, the Commission on the Revision of the California Rules of Professional Conduct's task nears completion. A substantial revision of our ethics rules will go to the Board of Trustees shortly; to the Supreme Court by March 2017. Thus, we face the possibility that, in 2017, all California lawyers will have to address substantially revised or new ethics rules. In the likely event that our Rules change in 2017 — and change substantially — the State Bar's ethics education mission will only increase even beyond what it is at present. In short, it needs resources.

Integrity of the Legal Profession: In Itself and as Perceived

Whenever the State Bar discipline system does not function fairly and effectively, our whole profession suffers in at least three respects. First, while cases linger in OCTC, lawyers who have, in fact, not engaged in misconduct have a discipline cloud hanging over them.

Second, lawyers who have engaged in misconduct that should subject them to discipline continue to practice without sanction; in some reported instances, they continue to harm clients; some continue to engage in misconduct before the courts. That has a direct impact on all lawyers who strive to practice ethically.

Third, if the public perceives the discipline system to be ineffective — or worse, as letting lawyers "get away with anything" — the integrity of the our profession as a whole suffers. We are all the poorer for it.

The importance of the reforms the State Bar has already begun putting in place, especially through the efforts of its new leadership, cannot be underestimated. But those efforts have a cost. As those efforts bear fruit, that cost ultimately benefits all California lawyers, as well as the public whom we serve and the courts before whom we practice.

Bottom Line

No one "likes" a special assessment, whatever the amount. But each of us owes our profession to contribute meaningfully to maintaining its integrity, both in fact and in the public's eyes.

That's why all lawyers should support the State Bar's petition. It needs the funds, not just in the minimum amount to keep the discipline system afloat, but sufficient to to provide broad ethics educational resources to all California lawyers; to insure that young lawyers in particular have the ethics resources they need — so that they never learn about the inner workings of the discipline system or the State Bar Court.

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