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AMBER HOLDERNESS
President
Office of County Counsel
105 E. Anapamu Street, #201
Santa Barbara, CA 93101
T: (805) 568-2969
aholderness@co.santa-barbara.ca.us

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Legal Aid Foundation
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Santa Barbara, CA 93101
T: (805) 963-6754
ediaz@lafsbc.com

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3905 State Street Ste. 7-104
Santa Barbara, CA 93105
T: (805) 708-0748
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jduffy@fmam.com

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The Law Offices of J. Jeff Chambliss
140 E. Figueroa Street
Santa Barbara, CA 93101
T: (805) 895-6782
jeff@chamblisslegal.com

Directors

JOSEPH BILLINGS
Allen & Kimbell, LLP
317 E. Carrillo Street
Santa Barbara, CA 93101
T: (805) 963-8611
jbillings@aklaw.net

DEBORAH BOSWELL
Mullen & Henzell LLP
112 Victoria Street
Santa Barbara, CA 93101
T: (805) 966-1501
dboswell@mullenlaw.com

LARRY CONLAN
Cappello & Noel LLP
831 State Street
Santa Barbara, CA 93101
T: (805) 564-2444
lconlan@cappellonoel.com

IULIA DAVIES
800 Anacapa Street, Suite A
Santa Barbara, CA 93101
T: (805) 260-9096
iuliadavies@gmail.com

STEPHEN DUNKLE
Sanger, Swysen, & Dunkle
125 E. De La Guerra, Suite 102
Santa Barbara, CA 93101
T: (805) 962-4887
sdunkle@sangerswysen.com

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Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101
T: (805) 963-1622
tmessing@environmentaldefensecenter.org

CHAD PRENTICE
Maho & Prentice
629 State Street Ste. 217
Santa Barbara, CA 93101
T: (805) 962-1930
cprentice@sbcalaw.com

MICHELLE ROBERSON
President
Sierra Property Group, Inc.
5290 Overpass Road, Bldg. C
Santa Barbara, CA 93111
T: (805) 692-1520 *102
michelle@sierrapropsb.com

JEFF SODERBORG
Barnes & Barnes
1900 State Street Ste M
Santa Barbara, CA 93105
T: (805) 687-6660
jsoderborg@barneslawsb.com

ROSALEEN WYNNE
Law Offices of James F. Cote
222 E. Carrillo St. Ste 207
Santa Barbara, CA 93101
T: (805) 966-1204
rosaleen@jfcotelaw.com

LIDA SIDERIS
Executive Director
15 W. Carrillo Street, Ste 106
Santa Barbara, CA 93101
T: (805) 569-5511
Fax: 569-2888
sblawdirector@gmail.com

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Santa Barbara County Bar Association

The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.

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CONTRIBUTING WRITERS
Tanya Ahlman
Steve Balash
Herb Fox
Barry Kurtz
Robert Sanger
Katherine L. Wallman

EDITOR
Stephen Dunkle

ASSISTANT EDITOR
Joe Billings
Lida Sideris

MOTIONS EDITOR
Michael Pasternak

VERDICTS & DECISIONS EDITOR
Allegra Geller-Kudrow

PHOTO EDITOR
Mike Lyons

DESIGN
Baushke Graphic Arts

PRINTING
Printing Impressions

Submit all **EDITORIAL** matter to sblawyermagazine@gmail.com with "SUBMISSION" in the email subject line.

Submit all **VERDICTS AND DECISIONS** matter to: Allegra Geller-Kudrow at ageller-kudrow@mullenlaw.com

Submit all **MOTIONS** matter to Michael Pasternak at pasterna@gmail.com

Submit all **ADVERTISING** to **SBCBA**, 15 W. Carrillo Street, Suite 106, Santa Barbara, CA 93101 phone 569-5511, fax 569-2888
Classifieds can be emailed to: sblawdirector@gmail.com

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On the Cover

Santa Barbara Courthouse cover shot courtesy of Sarah Sinclair.

Attorneys and their Pets

Left: Bearski and Lynn Goebel. Right: Marty Cohn & Chloe

For more coverage, see page 25

All Rise

By Steve Balash

Bill Duval was many things; husband, father, brother, gourmet barbecue chef, and lawyer. Bill was a lawyer in the Atticus Finch tradition. No fancy suits or PowerPoint presentations. He didn't try for the million-dollar verdicts or for his name in the paper, but he personally affected the lives of many people in Santa Barbara.

Bill relied on common sense and a sound knowledge of human nature. This much I learned from Bill through several trials as co-counsel, either for a single defendant or with codefendants.

Bill was unflappable. During a trial when we were representing codefendants, Bill's client decided to take a leave of absence. The judge was not pleased and the trial continued with one empty chair at counsel table. At closing argument Bill never missed a beat. He simply explained to the jury that his client had lost faith in the jury system and, did the only thing that seemed reasonable to him, he left. The jury convicted the empty chair but it was a great argument.

Bill's quiet, dry sense of humor could always be counted on to take the edge off a tense pretrial chamber's conference. Bill used the same approach in dealing with his clients. He was respectful and straightforward and always with a touch of that dry humor. An offer of ten years in prison in exchange for a guilty plea is not a laughable matter, but Bill could convey the message in such a way that the client could understand it.

An example of the high regard in which Bill was held by his clients was the following: One of our mutual clients, whose family has contributed to the prison population over the years, recently called me asking when and where services would be held because she intended to be there. Bill didn't, couldn't, win every case but no client ever felt that Bill didn't care or do his best.

It is hard to imagine a criminal readiness and settlement calendar called and not see Bill Duval seated in the front of the courtroom. He will be missed.

Court is in recess. ■

To celebrate the life of one of Santa Barbara's best-known attorneys, Bill Duval, who passed away August 11, 2019, the Santa Barbara Bar County Association will host an event at the Mural Room October 3, 2019 at 4:30 p.m. to be followed by a reception at the University Club. All are invited.

The Juror Who Knew Too Much

By Herb Fox

Herb Fox

Jury deliberations are sacrosanct – until they are not. While jurors are free to bring common sense and common life experience into the deliberations, they cannot interject specialized knowledge or other evidence that was not presented to them at trial.

Such is the lesson provided in a recent published opinion authored by **Justice Kenneth Yegan** reversing a defense verdict after a five week personal injury trial held in San Luis Obispo. The Court found that the misconduct by a "rogue juror" who wandered "apart from fellow jurors, [did] not follow the court's instructions, and violate[d] the juror's oath", was a prejudicial miscarriage of justice.

In that case, Plaintiff claimed that a steel nipple was improperly screwed into a plastic bushing on a vineyard irrigation system. The bushing failed, causing a 20-pound valve assembly to blow off a pump station pipe and strike Plaintiff in the head. Plaintiff sued on a theory of negligent design and construction. The jury returned a 9-3 special verdict that the Defendant that designed and installed the irrigation system, was not negligent.

> Jurors are not permitted to inject extraneous evidence, standards of care, or defense theories into the deliberations.

After the jury returned a 9-3 special verdict for the defense, Plaintiff moved for a new trial on the grounds of juror misconduct. The trial court (**Judge Donald G. Umhofer**) found that juror misconduct occurred but was not prejudicial.

As the Court of Appeal summarized, the motion for a new trial focused on a juror who had been a pipefitter for 35 years who farmed in the Central Valley. He had designed and built an irrigation system for his almond ranch. Plaintiff submitted four juror declarations stating that, on the first day of deliberations, the jury vote "was split between yes, no, and undecided." During deliberations, the juror said he had " 'been doing this for years,' " that " '[a]nybody would have put [the system] together the exact same way,' " and that " '[the Defendant] installed the system like everybody in the industry does.' " " '[T]hey installed the system the way the AG industry does it, that's just how it's done.' " " 'Everybody does it this way and this is industry standard.' " " '[O]nce the system was put together, and [Defendant] had done their testing, the ownership of the system transferred to the owner of the vineyard, *and then anything that happened was the vineyard's responsibility.*' "

In opposition to the Motion for New Trial, the Defendant submitted two juror declarations stating that that the juror offered opinions, just as the other jurors did. In a separate declaration, the subject juror denied that he was biased or told the other jurors how he was going to vote before the jury commenced deliberations. He did not, however, refute the precise allegations of the other jurors' declarations, two of whom voted for a defense verdict.

Citing law previously set down by our Supreme Court, Justice Yegan wrote that there is a "fine line… between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,' which we have described as [juror] misconduct."

Here, the trial court found that the juror crossed that line because his remarks "introduced a fact, not in evidence, that is, how others design and use materials. No witness ... gave evidence that he/she/it actually designed and used materials the way that [Defendant] ... did in this case. This adds the fact that others routinely construct [irrigation] systems [the way] that [Defendant] ... did here."

The trial court found this was juror misconduct, but that Plaintiff was not prejudiced because the jurors were free to draw different inferences from Reed's remarks. The Court of Appeal disagreed, concluding that the juror misconduct

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The SEC and DOJ at Work

By Robert Sanger

Robert Sanger

This month's *Criminal Justice* column undertakes an analysis of a recent resolution of a potential civil enforcement and criminal prosecution by the Securities Exchange Commission (SEC) and the Department of Justice (DOJ) regarding violations of the Foreign Corrupt Practices Act (FCPA). Theoretically, the FCPA would not be a favorite of the current Administration in that it inhibits individuals and organizations from freely doing business with foreign governments and corporations by using practices, such as buying influence of foreign officials. Somewhat famously, Donald Trump, then as Chairman and President of the Trump Organization, said of the FCPA in a 2012 interview, "It's a horrible law and it should be changed; I mean, we're like the policeman for the world. It's ridiculous."[1] Yet, as President, there is no indication that he has done anything to attempt to repeal or amend the law and, his Attorney General, from the start said he would enforce it.[2]

It is difficult to measure the level of enforcement across the board because the goals of the enforcing agencies and the protracted and nuanced nature of proceedings make universal metrics impossible. It is also the case that there seems to be a lack of the application of the FCPA (or, at least, application that has been publically acknowledged) to members of the highest levels of the Administration. However, legal practitioners need to be vigilant because the working lawyers and staff of the SEC and DOJ[3] are pursuing enforcement and prosecution vigorously with regard to ordinary individuals and corporations in the business world.

So this is a cautionary tale for transactional lawyers whose clients have even the slightest interaction with foreign governments or foreign commerce. Whether in–house counsel or counsel with outside firms, lawyers who do not specialize in FCPA matters, but represent people and corporations which have foreign dealings, need to be vigilant. While one may be convinced that the Administration would not want to enforce these laws or that compliance is not a priority with senior Administrator officials, the fact is, the working members of the government are marching forward enforcing the FCPA as to ordinary individuals and ordinary corporate America.

The specific example for the purpose of this month's *Criminal Justice* column is a relatively mundane—but, hopefully, interesting—example of the working lawyers at the SEC and the DOJ doing what they perceive to be their job. It is not a multi-billion dollar resolution—it is just multi-millions. It does not even include an admission of liability. However, it serves as an object lesson on the value of advising clients to strictly abide by the requirements of the FCPA. And, by analogy, it should remind lawyers that corporate compliance is still mandatory whatever tone seems to be set from the top.

The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, *et seq*. (FCPA), is a collection of statutes that regulate the interaction of registered corporations and persons associated therewith (15 U.S.C. § 78dd-1), domestic concerns and persons associated therewith (15 U.S.C. § 78dd-2), or any other person while in the territory of the United States (15 U.S.C. § 78dd-3). Such persons and entities are prohibited from offering anything of value to a foreign official, directly or indirectly, for the purpose of seeking influence for any governmental advantage. In other words, it is a corrupt practice to try to bribe anyone associated with a foreign government or convey anything of value that may have an influence on any foreign governmental policies or actions.

The penalties for violation of the three subsections (15 U.S.C. §§ 78dd-1, 2 and 3), include a fine of not more than two million dollars, civil penalties of $10,000 for "juridical persons" and a criminal fine of $100,000 and imprisonment of not more than five years, or both, along with a civil fine of $10,000 for "any natural person." (15 U.S.C. §§ 78dd-2(g) and 78dd-3(e).) In other words, it can be a major civil violation enforced by the SEC (or other agencies) or it can be a civil or criminal action enforced by the DOJ. Furthermore, if criminal, sentencing in federal court is guided by the United States Sentencing Guidelines which prescribe greater or lesser punishment for individuals based on a variety of factors,[4] including the amount of loss,[5] and greater or lesser

punishment for corporations based on factors,[6] including cooperation.[7] If a case gets to the sentencing stage, there is much that can be done but, for transactional lawyers, the idea is not to get there.

There are, of course, defenses, so again, if a civil enforcement action or criminal prosecution is pending or threatened, work can be done. The government has to prove the elements of the criminal case beyond a reasonable doubt which would include, for instance, knowledge and intent. There are also affirmative defenses relating to some limited acceptable payments or promises of value. It should also be noted that it is a valid strategy to seek a conference pre-filing or pre-indictment with counsel for the government to discuss avoiding litigation. In particular, in the case of the SEC, there is an established process by which it is possible to have a meeting with the SEC Enforcement staff pre-filing, referred to as a *Wells* conference.

From the SEC's own reporting, there have been eight enforcement actions that have been resolved in 2019.[8] They involve Microsoft Corporation, Walmart, Inc., Telefonica Brasil, S.A., Fresenius Medical Care, Mobil TeleSystems, Cognizant and two individuals with Cognizant. The DOJ lists Microsoft Hungary, Kolorit Dizayn Ink Limited Liability Company and 17 individuals as well as some of the same corporate defendants claimed by the SEC as well.[9] Neither of these lists, as of the time of this writing, included the most recent settlement relating to Juniper Networks, Inc.

> [L]egal practitioners need to be vigilant because the working lawyers and staff of the SEC and DOJ[14] are pursuing enforcement and prosecution vigorously with regard to ordinary individuals and corporations in the business world.

The Juniper Case

The Commission (the SEC) agreed to a civil settlement with Juniper Networks, Inc. and its related entities whereby the Commission made certain cease and desist orders and further agreed that the company would "pay $4,000,000 in disgorgement, $1,245,018 prejudgment interest, and a civil penalty of $6,500,000, for a total payment of $11,745,018 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury."[10] The agreed resolution, which was without an admission by Juniper as to the findings, included a recitation of findings by the Commission and a conclusion that Juniper violated the internal accounting controls and recordkeeping provision of the FCPA under 15 U.S.C. §78m. The narrative of the findings, without citation, recites violations of bribery that could have been a basis, if proven, of a prosecution for 15 U.S.C. §§ 78dd-1, 2 and 3.[11]

An 11 million dollar payment in disgorgement, interest and penalties is not a particularly large settlement for FCPA violations. For instance, Walmart agreed to pay a total of $282 million in June 2019 and Mobil TeleSystems agreed to pay $850 million in March 2019.[12] What is interesting is the conduct that gave rise to the Juniper case. Even more interesting is that this conduct was prosecuted by the SEC with assistance of the DOJ (meaning that criminal prosecution was most likely at least considered). And more interesting than that is the fact that the same kind of conduct has been making the news relating to high level people who have not, perhaps as yet, been prosecuted.

The factual issues related to what were called travel practices in Russia and China. Essentially, a "common fund" was set up so that Juniper (and its related entities)[13] could have a travel and leisure fund to spend on Juniper employees but also on customers, including foreign officials. However, there were no allegations of foreign officials or people on their behalf being given large gifts like condos, discounts on real property purchases, or large sums of money. Rather, with regard to Russia, they involved excursions where, "In some of these instances, the trips included sightseeing tours, amusement parks, national park excursions and meals and entertainment for customers and, in some instances, customer family members." Regarding China, the allegation is that, "local employees of Juniper China paid for the domestic travel and entertainment of customers, including foreign officials, that was excessive and inconsistent with Juniper policy."

Conclusion

It is a common observation that the tone is set from the top in organizations. FCPA enforcement in both the SEC and the DOJ seems to be vigorous and not influenced by the top Administration's disdain for the Act. Within the organizations, there are strong statements from the SEC and the DOJ (and even the CFTC) about enforcement of the FCPA. More importantly, the proof is in the pudding: the FCPA is, in fact, being enforced. It is a good time for transactional lawyers to be sure that their clients doing any business outside the country fully understand the seriousness of giving anything of value to anyone with the hope it will influence policy or obtain a favor. ■

Bench and Bar Meetings
2019 Schedule

As Presiding Judge, the Honorable Michael Carrozzo has set the schedule for the Bench and Bar Meetings - final meeting will take place in 2019 as follows:

November 20, 2019 – 12:15 pm to 1:15 pm

Each meeting will be held at the Santa Barbara Court Video Conference Room in the Figueroa Division of the Santa Barbara Courthouse. For those who are not familiar, these Bench and Bar Meetings provide a forum for local members of the bar to engage in an informal dialogue with the presiding judge as a means of raising issues and concerns that may not otherwise be addressed. All attorneys and paralegals are welcome to attend.

For any practitioners wishing to submit agenda items for consideration before any of the scheduled meetings, please email those items to the Santa Barbara Bar Association Bench & Bar relations chair, Jeffrey Soderborg at jsoderborg@barneslawsb.com. We look forward to seeing you at the upcoming meetings!

Criminal Justice

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a litigation partner at Sanger Swysen & Dunkle in Santa Barbara for over 45 years. He is a Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS) and Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization. He is a Director of Death Penalty Focus and an Associate Member of the Council of Forensic Science Educators (COFSE).The opinions expressed here are his own and do not necessarily reflect those of the organizations with which he is associated. ©Robert M. Sanger.

Endnotes

1 CNBC Interview, May 15, 2012, at: https://www.cnbc.com/video/2012/05/15/trump-dimons-woes-zuckerbergs-prenuptial.html?play=1.

2 See, "Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference, Washington, D.C.," Monday, April 24, 2017 at: https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual.

3 Other agencies, such as the Commodity Futures Trading Commission (CFTC) can also pursue enforcement actions. See, e.g., U.S. Commodity Futures Trading Commission, "Enforcement Advisory," (March, 2019) at: https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.

4 USSG §2C1.1 subsections (b)(1) through (3) and subsection (c).

5 See, USSG §§2C1.2 incorporating §2B1.1.

6 USSG §8C2.3.

7 USSG §8C2.5.

8 SEC, "SEC Enforcement Actions: FCPA Cases" at: https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

9 United States Department of Justice, "Enforcement Actions: 2019," at: https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2019.

10 See: Order Instituting Cease-and-Desist Proceeding Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, dated August 29, 2019, at: https://www.sec.gov/litigation/admin/2019/34-86812.pdf.

11 This is not to cast Juniper in a bad light; there was an acknowledgment that Juniper cooperated and took appropriate remedial actions.

12 SEC, "SEC Enforcement Actions: FCPA Cases" at: https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml

13 For brevity, we will refer to Juniper to include the parent company and its related entities but distinctions are made between the entities in the Order itself. See, Order Instituting Cease-and-Desist Proceeding Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, dated August 29, 2019, at: https://www.sec.gov/litigation/admin/2019/34-86812.pdf.

14 Other agencies, such as the Commodity Futures Trading Commission (CFTC) can also pursue enforcement actions. See, e.g., U.S. Commodity Futures Trading Commission, "Enforcement Advisory," (March, 2019) at: https://www.cftc.gov/sites/default/files/2019-03/enfadvisoryselfreporting030619.pdf.

Public Charge in Immigration Law

By Tanya Ahlman

Tanya Ahlman

"Give me your tired, your poor. . . who can stand on their own two feet, and who will not become a public charge"

Introduction

A bronze plaque at the base of the Statue of Liberty contains the now-famous poem "The New Colossus" by Emma Lazarus which says: "Give me your tired, your poor, your huddled masses yearning to breathe free. . ." While the poem by Emma Lazarus has become part of the ethos of the United States, the current administration is increasingly restricting immigration by instituting policies to keep individuals who are the most marginalized groups from being able to immigrate to the U.S. As most recently stated by Ken Cuccinelli, acting director of U.S. Citizenship and Immigration Services, the poem etched on the Statue of Liberty welcoming immigrants to America should include a line qualifying that they be able to "stand on their own two feet."[1]

The notion of a public charge is arguably one of the oldest aspects of U.S. immigration law today. The concept of public charge in immigration law can be traced back to colonial times, when British colonial authorities introduced "poor laws" to the Americas. After the United States gained independence, state and municipal governments inherited the exclusionary practice, which later became known as public charge. The implementation of the rule became more pronounced during the 19th century, when the United States began receiving large numbers of immigrants, especially Irish Catholics and other immigrants from southern and eastern Europe.

The public charge rule was included in the Immigration Act of 1882, the first comprehensive immigration reform bill in U.S. history. The law, adopted by the same Congress that enacted the Chinese Exclusion Act, required barring entry for "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Nowhere did Congress define the term "public charge," so consequently it was quickly utilized by anti-immigrant administrations to keep out individuals deemed to be undesirable, particularly immigrants from non-Western European countries.

Historically, this test has been used to discriminatorily exclude certain groups of people, such as women, children, elderly individuals, and people from countries perceived as poor, based on the idea that they were incapable or unwilling to work to support themselves.[2] During the Great Depression, the State Department leaders directed consular officers to use the public charge provision to limit immigration. The State Department continued using the public charge provision for decades to bar gay men, lesbians and the disabled from getting immigrant visas.

Public Charge Ground of Inadmissibility

For the last twenty years, the term "public charge" has been used to define a person "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense."[3] Individuals applying for lawful permanent residence (green card) are subject to the public charge ground of inadmissibility unless they fall under certain statutorily exempted categories. All immigrants requesting permanent residence through a family-based petition are subject to the public charge test. There are a number of groups of people who are either exempt from public charge requirements or may apply for a waiver of the public charge ground such as Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), and applicants for humanitarian forms of relief, such as victims of crime, human trafficking, and domestic violence.

To meet the public charge test, applicants are currently required to show that they are not likely to become primarily dependent on the government for support. Primary dependence refers to reliance on cash-aid for income sup-

Continued on page 13

Ahlman *continued from page 11*

port or long-term care paid for by the government. To decide whether an individual is likely to become a public charge, immigration officers are required to consider the totality of multiple factors specified in the Immigration and Nationality Act, such as the person's age, health, family status, assets, resources, financial status, education, and skills, in additional to an affidavit of support.[4] An affidavit of support is a contract between the immigrant's U.S. sponsor and the federal government, indicating that the sponsor will reimburse the government should the immigrant require aid. This affidavit of support offers strong evidence that the immigrant will not become primarily dependent on the government. A healthy person "in the prime of life" cannot ordinarily be considered likely to become a public charge, "especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency."[5] Thus, in most cases before USCIS, the affidavit of support requirement ensures the applicant will not be found to be a public charge. Use of publicly funded health care (Covered California), nutrition (WIC), and housing programs (Section 8) are not currently a bar for purposes of public charge.

New Public Charge Policy

On August 14, 2019, the Department of Homeland Security (DHS) published a new rule related to public charge in the Federal Register. This rule is not scheduled to take effect until October 15, 2019, but will likely be delayed due to pending litigation. The new rule (which is over 800 pages long) is a drastic change from longstanding policy. The new rule reinterprets a provision of the Immigration and Nationality Act (INA) pertaining to inadmissibility. INA § 212(a)(4) states that a person is not admissible to the U.S. if they are likely to become a public charge. While the test for whether someone is likely to become a public charge will still be prospective as required by the statute, the new rule changes the definition of a public charge. Now, instead of assessing whether an applicant is likely to become primarily dependent on the government for income support, the new rule looks to see if a person has received any number of public benefits over the past 36-month period of time.

The new rule creates a set of "heavily weighted negative factors" and a couple of "heavily weighted positive factors." A heavily weighted negative factor is the receipt of more than 12 months of public benefits in the aggregate over the 36-month period of time before submitting the application for adjustment or admission. Each benefit used counts toward the 12-month calculation. For instance, if an applicant receives two different benefits in one month, that counts as two-months' use of benefits.

The new rule also expands the list of publicly funded programs that immigration officers should consider when deciding whether someone is likely to become a public charge. Under the new rule, Medicaid, the Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps), Section 8 housing assistance and federally subsidized housing will also be used to demonstrate that an applicant is inadmissible under the public charge ground. The final rule also states that all use of any cash aid—including not just Temporary Assistance to Needy Families (TANF) and SSI, but also any state or local cash assistance program—could make an individual inadmissible under the public charge ground.

The new rule also elaborates on criteria for considering financial status, size of family, age, education, skills and employment, among others. The rule allows immigration officers to consider English proficiency (or lack thereof), medical conditions and availability of private health insurance, and past use of immigration fee waivers.

The new rule does contain certain exemptions, such as benefits received by other family members, Medicaid received by applicants while under age 21, and medical care during pregnancy. In addition, the proposal does not change long-standing policies that allow immigrants to access emergency medical care and disaster relief without public charge repercussions.

Disproportionate Impact of New Public Charge Policy

Redefining the public charge ground is causing public-benefit effects and will have immigration effects. The immigration effects will occur once this legislation is enacted and the administration denies applications for lawful permanent residency. The public-benefits impact has already started. In November, when non-partisan Migration Policy Institute researchers in a study applied the then-proposed public charge test to immigrants who had received permanent residence in the past five years, they found 69 percent had at least one factor that could negatively impact their immigration prospects. The public charge rule, the researchers found, could have a "disproportionate effect on women, children and the elderly" and "shift legal immigration away from Latin America and towards Europe in particular."

While most undocumented immigrants do not qualify for federal public benefits (including Medicaid and Section 8 Housing), U.S. citizen children of undocumented immigrants are eligible for assistance. Non-citizens make up only a fraction of those getting Medicaid and food assistance (6.5

percent and 8.8 percent, respectively, according to the Associated Press). Of the over 17 million children enrolled in Medicaid and Children's Health Insurance Programs (CHIP), a study published in the *Journal of the American Medical Association Pediatrics* estimated that 8.3 million children who are currently enrolled in Medicaid, CHIP, and Supplemental Nutrition Assistance Program (SNAP) are at risk of forgoing benefits. The study said the initial proposed rule would likely cause parents to disenroll between 800,000 and 1.9 million children with specific medical needs from public health and nutrition benefits.

Millions of people in immigrant households (both citizens and noncitizens) who qualify for public benefits are fearful of receiving public benefits because of this new policy. Individuals in need of government assistance have started disenrolling from or have refrained from applying for benefits for themselves and other family members because of fear that receipt of benefits will have negative immigration consequences. Out of fear, parents (including naturalized and permanent resident parents) are opting out of benefits for U.S. citizen children that include services at school, Medicaid, financial aid for college, and food stamps. A national survey found that 13.7% of adults in immigrant families declined to participate in non-cash benefits when this rule was initially proposed in 2018 for "fear of risking future green card status." The rate was even higher, at 20.7%, for low-income families, according to the Urban Institute's 2018 Well-Being of Basic Needs Survey.[6] A follow-up report found that SNAP and Medicaid were the services most commonly avoided.

The public charge regulation threatens denial of permanent residence for using government programs that provide low-income families with health care, nutrition, and other basic support.

Due to the lack of clear guidance and widespread fear, individuals who would not be subject to the public charge rule are withdrawing from services for their children. A study by the UCLA Center for Health Policy Research said the new rule could have a chilling effect on up to 2.2 million Californians in immigrant families who might disenroll from Medi-Cal and CalFresh, the food stamps program, most of whom would not actually be legally subject to the proposed new public charge test.

By targeting public benefits, such as SNAP and housing assistance, immigrant children will be significantly affected. The public charge regulation threatens denial of permanent residence for using government programs that provide low-income families with health care, nutrition, and other basic support. It imposes an untenable choice for immigrants and their families between disenrolling from these safety net programs or jeopardizing their future immigration status.

Disabled children often require and receive government benefits to assist with their education. Parents fear that receiving benefits for disabled children will prevent the parents and children from gaining permanent residency. Immigrant parents of children with disabilities who receive special services at school have removed or are considering removing these children from school. Some parents even worry about signing a portion of an Individualized Education Plan (IEP), which allows a school district to get Medi-Cal reimbursements for services a child receives.

This new policy disproportionately affects already marginalized individuals. Members of marginalized groups already face significant hurdles in terms of employment and housing as a direct result of discrimination which impacts their ability to meet the public charge test. The multiple and intersectional identities of marginalized immigrants mean greater risk for a lifetime of discrimination that restricts educational, employment, and other opportunities. The intersection of multiple marginalized identities (such as woman, person of color, transgender, etc.) exponentially increases the risk of discrimination, making these individuals more likely to use some of these government programs designed to help working families with health care, nutrition, and other basic family supports.

Immigrants with disabilities will be disproportionately affected. Federal health care programs are vital for people with disabilities who require long-term services, like an in-home nursing attendant. Federal health care programs also lower the cost of buying wheelchairs and other medical equipment, services that often aren't covered by private insurance plans and can be prohibitively expensive for people paying for them out of pocket. Before this new rule, immigrants on Medicaid were only considered a "public charge" if government services were used to pay for institutional, long-term care. Now, disabled immigrants who receive federal assistance or subsidies would be ineligible. Even if an immigrant with disabilities makes the difficult decision to forgo Medicaid, they could still be penalized based upon their income. People living with disabilities face higher barriers to finding stable housing and employment. The income test itself will disproportionately impact people with disabilities because disabled individuals earn less and

incur a higher cost of living (such as costs for accessible housing and transportation that people without disabilities don't have to face).

The proposed rule would empower USCIS to deny permanent residence to immigrants living with serious ongoing medical conditions, such as HIV/AIDS. The new public charge policy undermines the ability of immigrants living with HIV/AIDS to meet their health care needs, and encourages immigrants living with HIV/AIDS to discontinue treatment. Medicaid is the single largest source of insurance coverage for people with HIV, estimated to cover more than 40 percent of people with HIV.[7] While the proposed rule doesn't explicitly list the AIDS Drug Assistance Program (ADAP) or the Ryan White Programs for consideration in public charge determination, HIV/AIDS patients are reportedly forgoing access to life-saving medications due to their fear that their permanent residence application could be rejected. The Trump administration's expansion of the public charge rule puts HIV-positive individuals in a heartbreaking position of choosing between receiving life-saving treatment or keeping their family together. The rule also singles out "communicable disease[s] of public health significance" as negative factor in public charge determinations. Therefore, individuals who receive government assistance to treat HIV/AIDS would potentially have two significant negative factors for permanent residence. The fear of being labeled as having a communicable disease and being unable to receive the support necessary to treat the disease will prevent immigrants from accessing HIV prevention services supported by federal programs, as well as discourage regular HIV testing (which increases the likelihood of contracting HIV).

Current State of Litigation

The day after the new public charge policy was published, representatives for Santa Clara County and San Francisco filed a lawsuit seeking a temporary injunction in the District Court for the Northern District of California. The next day, thirteen states, led by the Washington Attorney General, sued the Department of Homeland Security over the new rule. These states include Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico and Rhode Island. According to the Attorney General of Washington, "[t]he Trump Administration's message is clear: if you're wealthy you're welcome, if you're poor, you're not."

On August 16, 2019, California (joined by Maine, Oregon, Pennsylvania, and the District of Columbia) also sued the Trump administration, challenging the legality of the new public charge rule, with the State Attorney General stating that "this cruel policy would force working parents and families across the nation to forgo basic necessities like food, housing and healthcare out of fear. That is simply unacceptable."

Conclusion

The new public charge rule is an act of discrimination in regulatory form that further marginalizes immigrants, particularly targeting the poor, disabled, and people of color. It invokes the anti-immigrant sentiments from the 1930s used to keep out immigrants perceived as undesirable. It unjustly penalizes people who are legally entitled to apply for benefits. The new public charge rule was designed to create fear in immigrant families. As stated by Marielena Hincapie, Executive Director of the National Immigration Law Center, "This pernicious regulation would create a byzantine structure designed to send one message and one message only: If you are not white and wealthy, you are no longer welcome in this country, the land of opportunity." ■

Tanya is a Junior Partner at Kingston, Martinez & Hogan LLP. She is a Certified Immigration and Nationality Law Specialist recognized by the State Bar of California. Tanya practices immigration law, specializing in representing employers and employees in employment-based immigrant and non-immigrant visa petitions, as well as post-conviction relief. Tanya can be contacted at tanya@kmhimmigration.com.

ENDNOTES

1 *New York Times*, 'Huddled Masses' Meant Europeans, Official Says. Aug. 14, 2019, Section A, Page 19 of the New York edition.
2 *See, e.g.*, Matter of Harutunian, 14 I. & N. Dec. 583, 589–90 (BIA 1974)
3 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999)
4 7 INA § 212(a)(4)(B); *see also* Matter of Perez, 15 I. & N. Dec. 136, 137 (BIA 1974)
5 Matter of Martinez-Lopez, 10 I. & N. Dec. 409, 421–22 (BIA 1962)
6 Well-Being and Basic Needs Survey by Urban Institute, December 2018
7 Kaiser Family Foundation. *Assessing the Impact of the Affordable Care Act on Health Insurance Coverage of People with HIV*. January 2014, https://www.kff.org/hivaids/issue-brief/assessing-the-impact-of-the-affordable-care-act-on-health-insurance-coverage-of-people-with-hiv/

Thanks to Our Fee Arbitration Panel!

The SBCBA would like to thank the following Mandatory Fee Arbitration attorneys and arbitrators for their service in 2019. The program, which operates under the auspices of the State Bar of California, provides services to resolve fee disputes between clients and attorneys.

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Gary Goldberg
Diana Lee
Steve Penner
Barbara Tzur
Victor Zilinskas

Thank you also to the committee members of the fee arbitration program, Chair Eric Berg, Naomi Dewey and Vanessa Kirker Wright.

Accidental Franchises – What You Don't Know Can Hurt Your Client

By Barry Kurtz and Katherine L. Wallman

Barry Kurtz

Katherine L. Wallman

Why should all business attorneys be concerned about franchise laws? Businesspeople and attorneys often are unaware that franchise laws impact a variety of business relationships. Under federal law, as well as in California, it does not matter whether you call a business arrangement a "partnership," a "license," a "dealership," a "joint venture" or something else when you draft the agreement, or whether the agreement disclaims the existence of a franchise; if the elements of a franchise are present, it is a franchise. Knowing the following basics can help you identify franchise arrangements and prevent your business clients from becoming accidental franchisors, or from inadvertently contracting with an accidental franchisor.

What is a Franchise Under California Law?

Under California law, a business relationship is a "franchise" if: (1) the business will be substantially associated with the franchisor's trademark; (2) the franchisee will directly or indirectly pay a fee to the franchisor for the right to engage in the business and use the franchisor's trademark; and (3) the franchisee will operate the business under a marketing plan or system prescribed in substantial part by the franchisor.

If a business uses another company's trademark to identify itself it can be argued that the business is "substantially associated" with the franchisor's trademark. Courts have broadly interpreted the "substantial associated" element. *See, for example Kim v. ServoSnax*, 10 C.A.4th 1346 (1992) (holding that the trademark element was satisfied in a licensing arrangement even though the licensor's trademark was not communicated to the public or to customers).

The "fee" element is also easily satisfied. Just about any payment to the licensor or its affiliate for licensing or distribution rights can fulfill the "fee" element. However, payments that do not exceed the bona fide wholesale price of inventory are excluded from the definition of a franchise fee, if there is no accompanying obligation to purchase excessive quantities. Further, ordinary business expenses are not franchise fees.

The third element, which requires that the franchisee operate the business under a marketing plan or system prescribed in substantial part by the franchisor, is known as the "control" element. The "control" element is so broadly interpreted that the mere promise of assistance, even if unfilled, will satisfy this element.

If the three elements of a franchise exist, then the relationship is a franchise, no matter what the parties call it.

Risks of Mischaracterizing the Business Relationship

California courts have little compassion for trademark owners that claim they did not know the law or argue that there was no intent to create a franchise. *See, for example Boat & Motor Mart v. Sea Ray Boats*, 825 F.2d 1285 (9th Cir. 1987) (finding that a dealership agreement between a boat dealership and the manufacturer was a franchise despite the manufacturer's argument that it did not prescribe a marketing plan to its dealers).

The California Department of Business Oversight (DBO) monitors franchisor-franchisee arrangements and may assess penalties of $2,500 per violation of the California Franchise Investment Law. The DBO also has the authority to require franchisors to provide its franchisees with written notice of the violation, offer rescission of the franchise, and refund payments made by the rescinding franchisees.

Attorneys representing business owners must be able to spot the telltale signs of a franchise, or a potential franchise, to avoid unwittingly assisting their clients in becoming

Continued on page 19

The Santa Barbara County Bar Association Proudly Presents:

A Reception with the Appellate Justices of Division Six

Please join us on
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Viva, Santa Barbara – 1114 State Street

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Kurtz and Wallman, *continued from page 17*

accidental franchisors, as well as inadvertently contracting with accidental franchisors.

Understanding the Differences between Franchises and Other Business Arrangements

Licensing, Distributorships, and Dealerships. Licensing, distributorship, and dealership arrangements are not franchises because they are missing at least one of the three elements of a franchise. Under a typical licensing arrangement, one company licenses another to sell its products or services in exchange for a specified amount of the proceeds without any additional involvement of the licensor. However, if the licensor provides additional support, such as training or promotional assistance that constitutes a sufficient amount of control, the licensor has become a franchisor.

In dealership and distributorship arrangements, independent businesses operate under their own trade names and usually buy products or services from another party at wholesale prices and then resell them to the public. Generally, distributorship arrangements do not constitute franchises because the definition of a "fee" is not met. A "fee" does not include payment for the purchase of initial and ongoing inventory at bona fide wholesale prices. If the distributor begins to sell items not intended for resale, such as displays, sales kits, or advertising, the "fee" element may be triggered. Further, marketing and training assistance could trigger the "control" element and inadvertently turn the relationship into a franchise.

Franchises Require Pre-Sale and Ongoing Legal Compliance

Franchise Registration. Non-franchise trademark licenses are private contracts. Licensors do not have to make public disclosure about their financial condition or other sensitive business information. Franchising, however, is a highly regulated industry. Under California's Franchise Investment Law, it is unlawful to offer or sell a "franchise" in California unless the offering has been registered with the DBO or it is exempt from registration. If a business relationship satisfies the elements of a franchise under California law, the franchisor must: (1) file a franchise disclosure document with the DBO outlining the franchise opportunity in detail and providing information regarding the franchisor's own background and business experience before entering into any discussions with potential franchisees; (2) disclose potential franchisees with its registered disclosure document and wait at least 14 full days before having the franchisee execute any franchise documents or accepting any payments; and, (3) obtain DBO approval for any "material modifications" to its registered franchise documents before presenting them to franchisees. These burdens are not imposed in licensing, distributorship and dealership relationships.

Franchise Relationship Laws. The regulation of a franchise relationship does not end once the franchise disclosure document is registered and the franchise agreement is signed. Twenty-four states, including California, have enacted franchise relationship laws that aim to limit franchisor abuses of the franchise relationship. These laws regulate what the franchisor can contractually do under the franchise agreement, including enforcement of system standards, renewal, and termination of franchise rights and noncompetition covenants. These relationship laws will apply throughout the life span of the franchise.

Why Franchise?

Franchising can be a highly effective expansion strategy. Creating a franchise system allows franchisors to expand already successful business concepts, achieve greater brand recognition, and diversify risk through the investments of its franchisees. Franchisees enjoy many notable benefits from the franchisor-franchisee relationship, including access to a proven business system, a wider customer base, greater brand name recognition, and a stronger market presence; group purchasing discounts, professional marketing, research and development benefits; continuing education and training; and support from their franchisor and other franchisees with similar goals, needs, and challenges.

Wrap-up

The determination of whether a license, distribution or dealership arrangement should be treated as a franchise must be made after a thorough analysis of your client's business structure. Understanding the basics of franchising will allow you to better advise your clients and, when necessary, will help you recognize when it is time to contact a franchise law specialist to assist you and your client through a potential minefield of unintended consequences. ■

Barry Kurtz, a Certified Specialist in Franchise and Distribution Law by the California State Bar Board of Specialization, is the Chair of the Franchise & Distribution Law Practice Group at Lewitt Hackman in Encino, California. Barry may be reached at bkurtz@lewitthackman.com.

Katherine L. Wallman is a member of the Franchise & Distribution Law Practice Group at Lewitt Hackman in Encino, California. Katherine may be reached at kwallman@lewitthackman.com.

Barristers' Cruisers

President Nick Behrman addressing Barristers

Barristers' Cruise

Nicholas Behrman (president), Lorraine Pereverziev, Allegra Geller-Kudrow, Taylor Fuller, Jessica Anticouni, Angela Rico Cornwell, Jake Ainciart

Santa Barbara County Bar Association & Santa Barbara Women Lawyers Mixer

SBCBA Board members: Chad Prentice, Stephen Dunkle, Joe Billings, Jeff Soderborg, Larry Conlan

Verdicts & Decisions

Stanley Vincent v. State of California (California Highway Patrol)

SANTA BARBARA SUPERIOR COURT – ANACAPA DIVISION

CASE NUMBER:	16CV05599
TYPE OF CASE:	Employment
TYPE OF PROCEEDING:	Jury Trial
JUDGE:	Hon. Donna D. Geck
LENGTH OF TRIAL:	12 Days
LENGTH OF DELIBERATIONS:	1 Day
DATE OF VERDICT/DECISION:	July 25, 2019
PLAINTIFF:	Stanley Vincent
PLAINTIFF'S COUNSEL:	Michael J. DePaul of DePaul Law, Inc. Jason M. Erlich of McCormack and Erlich, LLP
DEFENDANT:	State of California (California Highway Patrol)
DEFENDANT'S COUNSEL:	Supervising Deputy Attorney General Elisabeth Frater and Deputy Attorney General Eric Fox of the Office of the Attorney General
PLAINTIFF'S EXPERTS:	Paul Berg, Ph.D – Clinical and Forensic Psychologist Charles Mahla, Ph.D – Economist Dr. Roger Malary, Psychiatrist/Treating Physician for Plaintiff's Sibling (Non-Retained)
DEFENDANT'S EXPERTS:	None

OVERVIEW OF CASE: Plaintiff worked as a Patrol Officer for the California Highway Patrol ("CHP") for seven years. In 2014, Plaintiff took a three-week long emergency leave of absence from work, in order to look for his missing sister, who suffers from schizophrenia and resides in Haiti.

Plaintiff brought claims against Defendant CHP for violations of the California Family Rights Act ("CFRA") and the Fair Employment and Housing Act ("FEHA"), stemming from Defendant's failure to grant Plaintiff's requested leave, refusal to return him to his Patrol Officer duties upon his return to work, and retaliation following his request for leave.

FACTS AND CONTENTIONS: *Per Plaintiff:* Plaintiff contended that, for more than 15 years, he has acted as a parent for his disabled sister, providing her with a home, visiting her as often as possible, supporting her financially and emotionally, and acting as her health care advocate. Plaintiff argued that he stood in an "in loco parentis" relationship with his sister, qualifying him for a protected family medical leave of absence to care for her—leave which he alleged Defendant refused to grant either at the time of his request or retroactively when he returned to work and provided medical certification of his sister's health condition. Plaintiff contended that Defendant had instead labeled him as "AWOL" and refused to return him to his Patrol Officer duties in retaliation for his request for family medical leave—demoting him, investigating him, and ultimately terminating him under false pretenses of performance and attitude issues that had never been the subject of disciplinary proceedings.

Per Defendant: Defendant CHP contended that Plaintiff did not request or qualify for CFRA (California Family Rights

Act) leave and did not stand in an "in loco parentis" relationship with his sister, and that—even if he did—Plaintiff failed to provide Defendant with proper notice of his need for family medical leave, and he knowingly left without formal authorization. Following an investigation into Plaintiff's AWOL status, Defendant asserted that Plaintiff was found to be a dishonest, insubordinate, and low-performing officer, warranting his subsequent termination.

SUMMARY OF CLAIMED DAMAGES: Plaintiff claimed past and future economic losses, including the loss of his State health benefits and pension. He further claimed that he had been unable to find comparable employment and that his law enforcement career had been effectively ended when Defendant terminated him. In addition to economic damages, Plaintiff sought damages for emotional distress.

RESULT: The Jury found in favor of Plaintiff and against Defendant (11-1) on all four claims: (i) Interference in Violation of the California Family Rights Act ("CFRA"); (ii) Retaliation in Violation of CFRA; (iii) Retaliation in Violation of the Fair Employment and Housing Act ("FEHA"); and (iv) Failure to Prevent or Correct Retaliation in Violation of FEHA.

The Jury awarded damages to Plaintiff as follows:	
Past Economic Loss:	$344,591
Future Economic Loss:	$2,115,255
Past Emotional Distress:	$1,000,000
Future Emotional Distress:	$350,000
Future Medical Expenses:	$60,000
Total:	**$3,869,846**

Jocelyn Rae Shelley v. Katelin Elizabeth Ridenour et al.

SANTA BARBARA SUPERIOR COURT – ANACAPA DIVISION

CASE NUMBER:	18CV02471
TYPE OF CASE:	Unlimited Auto
TYPE OF PROCEEDING:	Jury Trial
JUDGE:	Hon. Thomas P. Anderle
LENGTH OF TRIAL:	7 Days
LENGTH OF DELIBERATIONS:	3 Hours
DATE OF VERDICT/DECISION:	August 28, 2019
PLAINTIFF:	Jocelyn Rae Shelley
PLAINTIFF'S COUNSEL:	Anthony Kastenek and Ranger Wiens of Harris Personal Injury Lawyers, Inc.
DEFENDANT:	Katelin Elizabeth Ridenour
DEFENDANT'S COUNSEL:	Brian Plessala and Edward O'Connor of Law Offices of Wolf & O'Connor – Employees of Liberty Mutual Group, Inc.
INSURANCE CARRIER:	Safeco
PLAINTIFF'S EXPERTS:	Eugene Vanerpol – Accident Reconstructionist/Biomechanical Engineer Alan Moelleken, MD – Orthopedic & Treating Physician Lawrence Lievense – Billing
DEFENDANTS' EXPERTS:	Daniel Voss – Accident Reconstruction/Biomechanical Engineer David Karlin, MD – Radiologist Russell Nelson, MD – Orthopedics Agnes Grogan – Billing

OVERVIEW OF CASE: Plaintiff claimed neck and low back injuries following a motor vehicle collision. Defendant admit-

ted liability but disputed the nature and extent of Plaintiff's injuries.

FACTS AND CONTENTIONS: *Per Plaintiff:* Plaintiff contended that her vehicle was rear-ended by Defendant driver at a speed of approximately 13-16 miles per hour. Plaintiff was treated for her alleged injuries in a hospital, as well as by her primary care physician and chiropractor. She was additionally treated for these injuries and provided with pain management care at an orthopedic center. Plaintiff eventually underwent a series of rhizotomy procedures, to relieve pain in her lumbar spine and cervical spine regions.

Per Defendant: Defendant contended that the arthritis at Plaintiff's facet joints—where the rhizotomies were performed—was present prior to the collision. Instead of undergoing a series of injections, Defendant argued that Plaintiff should have been put in an extensive physical therapy/rehabilitation program to address her allegedly "deconditioned" state.

SUMMARY OF CLAIMED DAMAGES: Plaintiff sought damages for past medical expenses of $172,914.58; future medical expenses of $423,000 for rhizotomy treatments; past pain and suffering in the amount of $360,000; and future pain and suffering in the amount of $243,000. Plaintiff requested a total verdict of $1,214,544.58.

Defendant argued that the damages were past medical expenses of $23,636 and zero future medical expenses. Defendant further argued for past pain and suffering of $30,000.

SUMMARY OF C.C.P. § 998 OFFERS: Plaintiff submitted a C.C.P. § 998 off in the amount of $215,000.00. Defendants submitted a C.C.P. § 998 offer in the amount of $126,998.97.

RESULT: As liability was not in issue, the jury found for Plaintiff on the matter of damages, as follows:

Past Medical Expenses:	$139,930.71	(Jury 11-1)
Future Medical Expenses:	$50,000.00	(Jury 11-1)
Past General Damages:	$30,000.00	(Jury 12-0)
Future General Damages:	$45,000.00	(Jury 12-0)
Total:	**$264,930.71**	

Plaintiff has expressed an intention to file a motion to recover prevailing party costs and expert witness fees, totaling approximately $60,000.00. Defendant intends to file a motion to tax costs.

Cassandra Glanville & Ivy

Lynn Goebel and her backyard pets (which reside in two hive boxes—the bees, not Lynn).

Attorneys and their Pets

Rodrigo Rengifo, Tara Messing & Graham

Travis and Angela Rico Cornwell & Gizmo

Santa Barbara County Bar Association

The In-House Counsel & Corporate Law Section and The Intellectual Property/Technology Business Section of the Santa Barbara County Bar Association present:

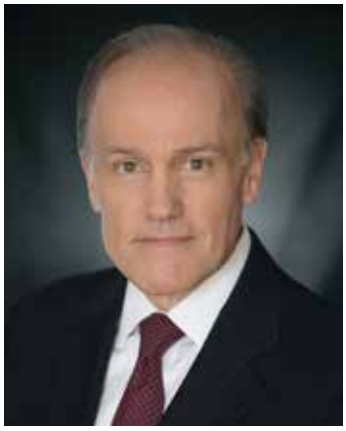
Trade Secrets: Why They Matter and How to Protect Them

About:

Trade secrets encompass confidential business information and data with competitive value, ranging from customer lists to strategic plans, research, and secret proprietary formulas. How can businesses protect these important assets? This program will explore the practical issues involved in counseling clients to manage their data assets in order to avoid loss and contamination in our high-velocity global digital environment.

Speaker:

James Pooley



James Pooley is an internationally recognized expert in trade secret law. He is the author of the treatise *Trade Secret Law* and of *Secrets: Managing Information Assets in the Age of Cyberespionage*. The U.S. Senate Judiciary Committee relied on Mr. Pooley for expert testimony and advice during consideration of the landmark 2016 Defend Trade Secrets Act. In 2014 he completed a five-year term as Deputy Director General at the World Intellectual Property Organization in Geneva. He is a past president of the American Intellectual Property Law Association and currently serves as co-chair of the Trade Secret Task Force of the International Chamber of Commerce. Mr. Pooley has an active law practice in Silicon Valley representing clients in trade secret, patent, and technology-related commercial disputes, and provides advice on IP strategy and data security management. He also serves as a special master, expert, and arbitrator, and teaches trade secret law at the UC Berkeley School of Law.

Date and Time:

Wednesday, October 23
Noon – 1:15 p.m.

Location:

Santa Barbara College of Law, 20 East Victoria Street, Santa Barbara

Reservations:

Reserve via email to Chris Kopitzke,
Chair of Intellectual Property/Technology Business Section,
by Friday, October 18, ckopitzke@socalip.com

Cost and Payment:

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MCLE:

One hour credit applied for

The SBCBA Family Law Section Presents:

"Tracing Issues and Marriage of Ciprari"

When:
November 1, 2019 at Noon

Where:
Santa Barbara College of Law

MCLE:
1.0 Hour of General MCLE

Speaker(s):
Ron J. Anfuso, CPA, ABV, CFF, CDFA, FABFA

About the Event:
Ron Anfuso, CPA, ABV, CFF, CDFA, FABFA provides expert forensic accounting services in marital dissolution cases. His tracing in the recently published decision, Marriage of Ciprari, met the burden of proof at the trial court level and was upheld on appeal. Mr. Anfuso will discuss tracing issues in dissolution of marriage cases in the wake of Marriage of Ciprari. This promises to be a fascinating discussion on whether Marriage of Ciprari really does loosen the standards for overcoming the Family Code section 760 presumption.

Price:
$30 for members/$35 for non-members

Contact Information/R.S.V.P.:
Mail checks payable to the Santa Barbara County Bar Association c/o Renee M. Fairbanks, CFLS, 226 E. Canon Perdido Street, Ste. F, Santa Barbara, California 93101 no later than October 21, 2019.

Santa Barbara County Bar Association

Motions

Katy Graham, who spent more than a dozen years working closely with renowned justices of the California Court of Appeal's Second District, including Presiding Justice Arthur Gilbert, has joined the **California Appellate Law Group**'s Los Angeles office as the firm's 15th appellate attorney.

Katy's work as a Court of Appeal research attorney delved into dozens of areas of substantive law, including environmental law, class actions, Proposition 218 cases, land use and eminent domain litigation, employment disputes, unfair competition suits, construction defect claims, arbitrability questions, and probate and family law appeals. Katy is also the Chair of the Advisory Committee on Appellate Courts for the California Lawyers Association Litigation Section (formerly the State Bar Committee on Appellate Courts), the state's primary organizing association for appellate lawyers.

Before joining the Court of Appeal, Katy served for six years as a research attorney in the Santa Barbara Superior Court, where she drafted tentative decisions for law and motion calendars and provided legal analysis and advice to the judges hearing complex trials. Prior to that, she tried cases in federal and state court for a Los Angeles trial boutique which was selected by National Law Journal for both "Top 10" plaintiff and "Top 10" defense verdicts.

If you have news to report—e.g. a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc., the Santa Barbara Lawyer *editorial board invites you to "Make a Motion!" Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com. Please note that the Santa Barbara Lawyer editorial board retains discretion to publish or not publish any submission as well as to edit submissions for content, length, and/or clarity.*

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Guest Speaker: Xavier Becerra
Attorney General of California

Reception begins at 5:30 PM

Dinner to follow at 6:30 PM

Early Bird Ticket Prices Available Before October 31st:

MEMBER $140 (After November 1st $150)

NON-MEMBER $150 (After November 1st $160)

CALL SBCBA AT (805)569-5511 FOR MORE INFORMATION, TO RESERVE TICKETS, AND FOR SPONSORSHIP OPPORTUNITES!

****Seating is limited****

BUSINESS/TRANSACTIONAL ASSOCIATE SOUGHT

Price, Postel & Parma, a long-standing law firm in Santa Barbara, is seeking a transactional associate with superior credentials, 3-5 years of significant experience and a current license to practice in the State of California. Compensation is commensurate with skills, education and experience. Please submit a cover letter and resume via email to Ian Fisher at ifisher@ppplaw.com.

* * *

HAGER & DOWLING, LLP SEEKS ASSOCIATE ATTORNEY & TRIAL ATTORNEY

Highly respected Santa Barbara civil litigation law firm, seeks experienced litigation attorney with knowledge of and experience in insurance law as well as associate attorney. Candidate must have, excellent verbal and writing skills, enjoy litigation and bring a strong team work ethic.

Competitive benefits include health and dental insurance, free parking and 401k plan. Respond with resume, cover letter and references to kcallahan@hdlaw.com.

* * *

GHITTERMAN, GHITTERMAN & FELD SEEKS WORKERS' COMPENSATION ATTORNEY

Ghitterman, Ghitterman & Feld is committed to providing excellent legal services to protect our clients' rights and a collaborative environment for our employees to flourish. We are seeking a licensed CA Attorney with 0-5 years experience (knowledge of workers' compensation law preferred) to work out of our Santa Barbara or Santa Maria location. Please submit resume to Kaylen Steele at ggfadmin@ghitterman.com.

LEGAL SECRETARY/PARALEGAL Part-time (quarterly)

We are looking for an efficient and detail-oriented individual for a part-time Legal Secretary/Paralegal for our Board of Trustees. Ideal candidate will be highly skilled in taking and transcribing official meeting minutes from our quarterly meetings. May assist in planning meetings; prepares and compiles board reports; maintains board books and other materials; posts materials to board portal site (BOX.net).

This position works approximately one (1) day/quarterly (4 times annually) and potentially two (2) days during Board of Trustees annual retreat.

Skills Needed:

- Preparation of Board agendas
- Taking and transcribing meeting minutes
- Posting documents to Box.net
- Superior oral and written communication, including excellent writing, drafting and editing skills

Salary: Negotiable, depending on experience.

For consideration, please forward cover letter and resume via e-mail:

Dr. Thyonne Gordon, Chair
Pacifica Board of Trustees
TGordon@pacifica.edu

* * *

ASSOCIATE SOUGHT

Central Coast litigation firm seeks associate with a minimum of 7 years of experience, superior analytical capabilities and strong oral advocacy, research and writing skills. Submit resume to lawyerresponse2020@gmail.com.

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a state-wide network of recovering lawyers and judges dedicated to assisting others within the profession who have problems with alcohol or substance abuse. We protect anonymity. To contact a local member go to http://www.otherbar.org and choose Santa Barbara in "Meetings" menu.

2019 SBCBA SECTION HEADS

Alternative Dispute Resolution
Dr. Penny Clemmons 687-9901
clemmonsjd@cs.com

Bench & Bar Relations:
Jeff Soderborg 687-6660
jsoderborg@barneslawsb.com

Civil Litigation
Mark Coffin 248-7118
mtc@markcoffinlaw.com

Criminal
Jeff Chambliss 895-6782
Jeff@Chamblisslegal.com

Debtor/Creditor
Carissa Horowitz 708-6653
cnhorowitz@yahoo.com

Employment Law
Alex Craigie 845-1752
alex@craigielawfirm.com

Estate Planning/Probate
Connor Cote 966-1204
connor@jfcotelaw.com

Family Law
Renee Fairbanks 845-1604
renee@reneemfairbanks.com
Marisa Beuoy 965-5131
beuoy@g-tlaw.com

In House Counsel/Corporate Law
Betty L. Jeppesen 450-1789
jeppesenlaw@gmail.com

Intellectual Property
Christine Kopitzke 845-3434
ckopitzke@socalip.com

Mandatory Fee Arbitration
Eric Berg 708-0748
eric@berglawgroup.com
Naomi Dewey 979-5160
naomi@trusted.legal
Vanessa Kirker Wright 964-5105
vkw@kirkerwright.com

Real Property/Land Use
Joe Billings 963-8611
jbillings@aklaw.net

Taxation
Peter Muzinich 966-2440
pmuzinich@gmail.com
Cindy Brittain 695-7315
cindy.brittain@kattenlaw.com

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Fox, *continued from page 7*

raised a presumption of prejudice, which was not rebutted.

Jurors are not permitted to inject extraneous evidence, standards of care, or defense theories into the deliberations. Here the juror said the Defendant's design and construction met the "industry standard" and that "[a]nybody would have put [the system] together the exact same way....". But there was no evidence of that. The juror vouched for the design and construction based on his expertise as a pipefitter and farmer and said that anything that happened after the system was put together and tested was not the Defendant's responsibility. That was contrary to the evidence and instructions. The case was tried on a negligent design and construction theory. It mattered not whether ownership of the irrigation system transferred to the vineyard owner after Cal West built the system.

A juror may not "discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct. [Citations.]"

The Court of Appeal concluded that the rogue juror here "told the jury about the industry standard, causation, and how the vineyard owner was responsible for anything that happened. It can be fairly assumed that the opinions held by this juror certainly influenced his vote on the crucial question of whether the Defendant was negligent. The juror affidavits further reflect that his statements potentially influenced the votes of as many as four other jurors. This raised a presumption of prejudice that was not rebutted."

The case is *Nodal v. Cal-West Rain Inc.,* 37 Cal.App.5th 607, published on July 17, 2019. The successful Plaintiff and Appellant was represented by **Jacqueline Frederick** and **Sunny Hawks** in Nipomo, and appellate specialist **Neil Tardiff** in San Luis Obispo. The Defendant was represented by **Lora Hemphill** and **Thomas Dowling** of **Hager and Dowling**. ■

Herb Fox is a certified appellate law specialist with offices in Santa Barbara and Los Angeles. He can be reached at hfox@foxappeals.com and at 805-899-4777.

Santa Barbara Lawyer

The Santa Barbara County Bar Association
15 W. Carrillo St., Suite 106
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