Going Full Circle

Edmund Willcox Clarke Jr. is back in the court where he tried his first case. This time he's the judge.

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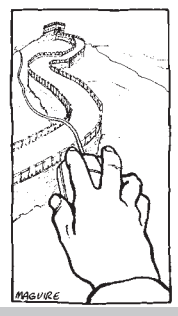
An Indecent Ballot Proposal

A proposed ballot measure to outlaw gay marriage favors maintaining the status quo above equality and respect, write Stacy D. Phillips and Jacqueline Shaprow. **FORUM PAGE 6**



Red Tape

Supplying services from within China raises thorny issues of law and practice, write Lothar Determann and Allan Marson.

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Summaries and full texts appear in supplement

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Criminal Law and Procedure: Court properly imposes more lenient sentence on defendant whose counterfeit 'access cards' gave customers free access to DirectTV. *U.S. v. Whitehead,* U.S.C.A. 9th, DAR p. 10733

Questions Abound Around Same-Sex 'I Dos'

Lawyers Sort Out Answers to Particularities of State's Marriage Law

By Laura Ernde
Daily Journal Staff Writer

S. TODD ROGERS / Daily Journal

Deborah Wald of the Wald Law Group in San Francisco advises on same-sex marriage law. "We're trying to anticipate as much as we can," she said. Wald chairs the National Family Law Advisory Council for the National Center for Lesbian Rights. She blogs on the subject at debwald.blogspot.com.

SAN FRANCISCO — Deb Wald has some news for Wisconsin's lesbian and gay couples who are thinking of coming to California to get hitched: You could face up to nine months in prison and a $10,000 fine.

Under Wisconsin law, anyone who leaves the state to enter into a marriage that is prohibited in "America's Dairyland" is committing a crime. The antiquated law was designed to prevent underage couples from going to other states to wed.

"We obviously don't anticipate that anybody will be prosecuted, but we feel people should know about it," said Wald, a San Francisco attorney.

The oddity is just one of many novel legal issues that have cropped up in the wake of May's California Supreme Court decision allowing same-sex marriage here.

Attorneys who advise same-sex couples said they have been inundated with questions about how the law affects their particular situation in terms of health insurance, estate planning and taxes.

Most of the confusion can be traced to the fact that most states and the federal government do not recognize same-sex marriage, creating a hodgepodge of different rules.

Complicating matters further is the evolving nature of laws covering same-sex unions, which in California began with domestic partnership legislation in 1999.

"We're trying to anticipate as much as we can," said Wald, who chairs the National Family Law Advisory Council for the National Center for Lesbian Rights and has been writing about same-sex marriage issues on her blog, debwald.blogspot.com.

Domestic partners are asking whether they should end their domestic partner registration when they get married.

The answer is generally, no, because it's unclear whether the marriage would continue to be valid if a voter initiative banning same-sex marriage passes in November. For the same reason, some attorneys are recommending same-sex couples who are entering into a union for the first time complete their marriage and domestic partnership in the same day.

Gay couples who married elsewhere — such as Massachusetts, Canada or Spain, where it already was legal — are asking whether they should remarry in California.

That answer largely depends on whether the first marriage was valid, Wald said.

Valid marriages from other jurisdictions are recognized in California as of June 16, the date the Supreme Court decision took effect, although their date of marriage remains the same.

Marriages that might be considered invalid include some from Massachusetts because of the requirement that both parties be legal residents of that state.

"There are a lot of same-sex couples walking around with legally dubious marriages," Wald said.

Yet family lawyers generally discourage people from getting married multiple times because it creates confusion about the length of the marriage.

"That's the stickiest issue we're grappling with. We're really taking it on a case-by-case basis,"

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Court Affirms Millions for Rampart Cops

L.A.'s Internal Probe 'Fraught With Discrepancies'

Settlement Vetoed

By Peter B. Matuszak
Daily Journal Staff Writer

LOS ANGELES — The 9th U.S. Circuit Court of Appeals ruled Monday that the city of Los Angeles must pay a jury award of $5 million each to three former police officers who were prosecuted and acquitted of criminal charges in connection with the Rampart scandal.

The three-judge panel also approved U.S. District Judge Cormac Carney's award of attorney fees of about $2.5 million, including interest, to the the plaintiffs' attorney, Joseph Y. Avrahamy of Encino — for a total of about $17.5 million.

Public Show?

"They didn't really have too many legal issues in question, so we felt very good going into the appeal," Avrahamy said. "Then in the oral argument, at one point [U.S. District Judge Frederic Block] even asked them if they were just appealing as a policy of the city to put on a show for the public."

Kimberly Colwell, a partner at Meyers Nave Riback Silver & Wilson, represented the city earlier in the case and had negotiated a settlement of all outstanding matters, including two outstanding employment lawsuits and a second civil suit, for $1 million less than the verdict, Avrahamy confirmed.

But the City Council unanimously vetoed the deal in October and continued with the appeal.

Parks Individually Named

Representatives from City Attorney Rocky Delgadillo's office declined comment because they said it was handled by outside counsel.

Representatives from Mayor Antonio Villaraigosa's office and Councilman Bernard Parks, who served as police chief at the time of the scandal, did not return calls for comment. Parks was also named individually in the lawsuit.

Appellate attorney Edward J. Horowitz represented the city before the 9th Circuit panel, which included Judges Jerome Farris, Richard A. Paez and Block — a senior district judge sitting on designation from the Eastern District of New York.

Paez, writing for the panel, surmised that the jury acted reasonably in believing the accused

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GOP Senators Pressure Democrats to Confirm Judicial Nominees

By Lawrence Hurley
Daily Journal Staff Writer

WASHINGTON — Senate Republicans Monday ratcheted up their election year campaign to put political pressure on Democrats to speed up confirmation of President Bush's judicial nominees.

Their criticism, aired at a partisan event on Capitol Hill, is largely directed at Senate Judiciary Chairman Sen. Patrick Leahy, D-Vt., who they say has prevented votes on several qualified nominees. The committee has to vote before the full Senate can confirm any judicial nomination.

So far in the 110th Congress, which commenced in January 2007, the Senate has confirmed 10 circuit court nominations and 44 district court nominees.

Republicans point to the fact that during President Clinton's last two years in office, the then Republican-led Senate confirmed 15 circuit court nominees and 57 district court nominees.

"The current president has been treated dramatically worse by the judiciary committee than any other president in the last 30 years," said Senate Minority Leader Mitch McConnell, R-Ky.

Highlighting judicial nominations in an election year is a tactic that Republicans used with some success in the 2004 elections. In addition to President Bush winning reelection, Republicans secured the defeat of then-Senate Minority Leader Tom Daschle of South Dakota amid claims that he had obstructed numerous judicial nominees.

Speaking in front of a sign proclaiming "Protecting American Justice," Sen. Arlen Specter, R-Pa., the ranking member on the judiciary committee, sought Monday to undermine Leahy's reasoning for slow-walking certain nominations.

Leahy has repeatedly referred to the so-called "Thurmond rule," named for the late Sen. Strom Thurmond, R-S.C.

In the waning months of President Carter's presidency in the summer of 1980, Thurmond, then the ranking member, suggested the committee not confirm any more judicial nominations.

But according to the nonpartisan Congressional Research Service, in data highlighted by Specter Monday, Thurmond did not follow through on his threat.

As late as September 1980, the Senate confirmed 12 judicial nominees.

What Specter described as "the most conclusive proof" the Thurmond rule does not exist was the November 1980 nomination of Stephen H. Breyer to the 1st U.S. Circuit Court of Appeals.

His swift confirmation within a matter of weeks can, however, partly be explained by the fact that he was the committee's chief counsel at the time of his nomination.

In something of a one-man fight, Specter has on several occasions called for a reform of the judicial confirmation procedure to prevent unnecessary delays.

He wants to change Senate rules so that judicial nominees are guaranteed a hearing after 30 days, a committee vote after another 30 days, and an up-or-down vote on the Senate floor after a further 90 days.

There's little sign that he has any support

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State Report Heats Up Litigation Over San Diego Wildfires

By Pat Broderick
Daily Journal Staff Writer

Associated Press

A July 9 report by the California Department of Forestry and Fire Protection placed the blame for last fall's devastating wildfires on San Diego Gas & Electric Co.

SAN DIEGO — A report released last week by the California Department of Forestry and Fire Protection, assigning blame for three devastating fires last October, could be a boon to lawsuits now pending against San Diego Gas & Electric Co.

The report, released July 9, blamed arcing power lines for helping to ignite the fires that consumed more than 200,000 acres, destroyed almost 1,900 homes and left two dead, at an estimated cost of $24.5 million, according to figures supplied by Cal Fire.

"We owe Cal Fire a tremendous debt of gratitude for helping us preserve evidence related to the origins of the fires," said Robert W. Jackson, who runs an office in Fallbrook, and is spearheading two mass tort lawsuits involving the fire victims.

Jackson, Debra L. Hurst, a partner in Hurst & Hurst, and Tracee Lorens, of Lorens & Associates, represent 225 clients who were involved in the Rice Canyon fire in San Diego's North

See Page 4 — PLAINTIFFS'

High Court Ruling Could Make Public Projects Hard to Fund

By Laura Ernde
Daily Journal Staff Writer

The California Supreme Court Monday made it harder for local governments to raise money for everything from preserving open space to controlling mosquitoes.

A unanimous high court said judges must independently review whether voter-approved special assessments meet strict requirements spelled out in a 1996 constitutional amendment.

Previously, state appellate courts allowed judges to uphold special assessments as long as there was "substantial evidence" the assessments passed constitutional muster.

Proposition 218 amended the constitution to make sure assessments are limited to "special benefits" and that property owners are assessed in proportion to the benefit received.

"Proposition 218 was designed to prevent a local legislative body from imposing a special tax disguised as an assessment," Justice Ming W. Chin wrote for the majority.

While property tax increases must be approved by a two-thirds majority of voters, special assessments require a simple majority.

Monday's ruling also overturned a special assessment in Santa Clara County that raised $88 million to buy land for parks and recreation. *Silicon Valley Taxpayers Association Inc. v. Santa Clara County Open Space Authority,* 2008 DJDAR 10675.

Santa Clara County Superior Court Judge William J. Elfving and a 2-1 panel of the 6th District Court of Appeal upheld the assessment.

But the state Supreme Court said

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GOP Pressures Democrats to Confirm Judicial Nominees

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from his colleagues on either side of the aisle.

Leahy dismissed Monday's event as an election-year stunt that is an attempt to divert attention from more serious problems, including rising gas prices and the troubled economy.

He also accused Republicans of hypocrisy, pointing out that they blocked "more than 60" of President Clinton's judicial nominees when they controlled the Senate in the late 1990s.

He added that the Democratic-led Senate is almost certain to confirm more of President Bush's nominees than the 158 confirmed by the Republican-led before the 2006 election.

"The partisan, election-year rhetoric over judicial nominations, at a time when judicial vacancies have been significantly reduced, is a reflection of misplaced priorities," Leahy said.

High profile nominees yet to be voted out of committee include Robert Conrad, Rod Rosenstein, and Steve Matthews, all nominated to the 4th U.S. Circuit Court of Appeals, and Peter Keisler, who was nominated to the D.C. Circuit Court of Appeals.

There is currently one vacancy on the 9th U.S. Circuit Court of Appeals, but President Bush has not named a nominee.

There are two California district court nominees pending confirmation: James Rogan for the Central District and Michael Anello to the Southern District.

Rogan is unlikely to be confirmed as Sen. Barbara Boxer, D-Calif., has declined to endorse the nomination.

According to Senate tradition, a nomination is not voted on if a home state senator voices an objection.

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At Supreme Court, No One Is Rushing to Retire

By Mark Sherman
Associated Press

WASHINGTON — John Paul Stevens still plays tennis at 88. Ruth Bader Ginsburg, 75, works out regularly in the Supreme Court gym.

The oldest two justices — half the court's liberal wing — top the list of those considered likely to retire during the next presidential administration. Despite Stevens' and Ginsburg's apparent vigor, change on the Supreme Court is more likely than not over the next four years.

"One would think that over the course of the next four years the actuarial tables would catch up with the oldest members, as they do for us all," said Pepperdine University law professor Douglas Kmiec.

With five justices 70 or older by the time the court meets again in October, interest groups and commentators have been talking about the court's role in the presidential election. One change on a court that divides 5-4 in key cases can alter the results.

But their forecasts depend on three factors — who wins the presidency, who leaves the court and who is appointed.

Democrat Barack Obama would most likely be replacing liberal justices with like-minded successors, while Republican John McCain could get the chance to fulfill a campaign pledge and put a conservative justice on the court in the mold of Chief Justice John Roberts or Justice Samuel Alito.

Alito, among President George W. Bush's two selections, has repeatedly demonstrated the difference one justice can make on a closely divided court. The result in disputes over abortion, religion and school desegregation almost certainly would have been different had Sandra Day O'Connor not retired in 2006.

"Given the likely retirements, the next election probably will determine whether the court gets more conservative or stays ideologically the same," said Erwin Chemerinsky, dean of the law school at University of California, Irvine.

The Supreme Court rarely becomes a big issue in the presidential campaign and this year — with $4-a-gallon gas, steep declines in the stock market and two wars — appears to be no exception.

The one case decided recently that could have elevated the court's importance in the campaign came out in favor of Americans' gun rights, placating the highly energized and politically effective gun rights groups.

If the case "had come out the other way, we'd be having a very different conversation," Thomas Goldstein, a Supreme Court watcher and advocate, told a Federalist Society meeting a week after the guns decision.

The unpredictably of Supreme Court retirements is another reason why the court rarely becomes an issue in presidential campaigns.

What if the justices decide to grow even older together?

It has happened before. Nine of the last ten justices who retired or died in office were at least 75, and six of those were 79 or older.

No one left the court during Jimmy Carter's four years in office, Bill Clinton's second term or Bush's first.

On the other hand, six justices ranging in age from 76 to 85 stepped down between 1986 and 1994, spanning three presidencies.

And Bush had two appointments in the space of three months in 2005. He filled them with two men in their 50s, Roberts and Alito.

Goldstein boldly predicts that only Stevens will retire during the next four years and not before he surpasses Oliver Wendell Holmes to become the oldest sitting justice. That would happen in February 2011.

Goldstein's views shifted as he watched the court over the past year. He used to expect the retirement of three justices — Stevens, Ginsburg and Justice David Souter. Though only 68, Souter has made no secret that he prefers New Hampshire to Washington and intends to return there someday.

But justices find it hard to leave the court unless they're in poor health, Goldstein said.

Chief Justice William Rehnquist didn't retire even after he was diagnosed with cancer. His death in 2005 created the second vacancy for Bush.

9th Circuit Affirms Millions For Wrongly Accused Officers

Continued from page 1

officers' testimony over "the city's account, which was fraught with unreasonable inferences, discrepancies and material omissions."

Horowitz said that although the judges criticized his application of the facts in the case as too general at times, the court's opinion was guilty of the same flaw.

"I see some points in here that I think I can question based on the record," Horowitz said. "I have to rely on the record. I can't make stuff up."

The city paid $65,000 for his representation as outside appellate counsel on this case.

The next step, if the city wants to continue the challenge, would be to petition for en banc review, but Horowitz has not yet discussed the option with city leaders, he said.

In the appeal, argued Nov. 7, the city questioned the facts on which the original trial court jury based its substantial damages award of $5,000,001 each for officers Paul Harper, Brian Liddy and Edward Ortiz.

The three men were implicated by former Rampart Division officer Rafael Perez in a conspiracy of widespread corruption within the Los Angles Police Department in the late 1990s. Perez was arrested in 1998 for stealing cocaine from an evidence room. He pleaded guilty after a mistrial to theft of cocaine and was given a five-year sentence and immunity from further prosecution. The deal was made in exchange for his testimony against other officers in the division.

The investigation into the unit led to the overturning of 106 criminal charges and more than $125 million in settlements for the city.

The first trial of Harper, Liddy and Ortiz on charges of falsifying a police report in 2000 ended with a jury acquitting all three. But the city's unsuccessful appeals lasted until 2004.

Jeffrey Isaac Ehrlich, who represented the officers in their federal case during the appeal, said he was concerned about the eight months it took for the opinion to be issued by the 9th Circuit but was pleased with the outcome.

"What struck me since I first took this case — I understood why the jury was so outraged," Ehrlich said. "These officers were made the face of the Rampart scandal and they had never done anything wrong.

"As large as the verdict is, they really had their lives destroyed. No rational person would take the money over what these officers have been through."

Harper is still an LAPD officer, Liddy is no longer with the department and Ortiz recently won reinstatement.

"This ruling is very positive," said Hank Hernandez, general counsel of the Los Angeles Police Protective league. "It proves that there were good cops that had their lives destroyed by a bad investigation."

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Low Health Insurance Caps Stranding Patients

By Tom Murphy
Associated Press

Mary Wusterbarth thought her toddler was struggling with an ear infection when she seemed sluggish. Instead, a virus had attacked the little girl's heart, damaging it beyond repair. Brea needed a transplant.

Within three weeks of a 2007 doctor visit, the 20-month-old had exhausted the $1 million lifetime maximum on her health insurance. Her parents have scrambled ever since for ways to cover thousands of dollars in monthly medical costs.

"We have no idea what kind of financial future we have," said Wusterbarth, of Wake Forest, N.C. "The medical bills come almost daily. There's never an end."

Insurers set lifetime limits to keep rates low on some policies, but holders are learning that individual caps that seemed large quickly max out as health care costs soar. Several patient advocacy groups are prodding insurers to raise the caps, which generally don't adjust for inflation. Congress also is considering two bills that would do that.

Only 1 percent of employer-offered group plans — the largest health insurance segment — had caps as low as $1 million last year, according to a survey by The Henry J. Kaiser Family Foundation. But 22 percent had caps of less than $2 million, and some want to see all these relatively low maximums eliminated.

Insurers, however, say most health coverage already offers either a comfortable maximum of several million dollars or unlimited coverage. They note that more government regulation could lead to higher coverage costs, and low lifetime caps help them offer a greater variety of coverages.

"I think the discussion needs to move into why do some health care services cost hundreds of thousands of dollars and what can we do to address those issues," said Robert Zirkelbach of America's Health Insurance Plans, a trade association representing nearly 1,300 insurers.

Kelly and Tom Treinen used to think the $1 million individual cap that came with the insurance they had for seven years offered plenty of protection. In fact, they chose that plan, which Kelly received through her job as an elementary school principal, over a higher-priced option through Tom's business. That one offered a $5 million cap.

Then doctors diagnosed their teenage son, Michael, with an aggressive form of leukemia in May 2007. His treatment called for 10 doses of a chemotherapy drug that cost $10,000 per dose. A 56-day stay in an intensive care unit cost about $400,000.

Michael reached his $1 million lifetime maximum in less than a year. The Noblesville, Ind., family had to issue a public plea for help after a hospital told them it needed either $600,000 in certified insurance or a $500,000 deposit to continue preparing for a critical bone marrow transplant.

The Treinens raised $865,000 in six days. Money came from all over the United States and as far away as Germany. But Michael's cancer had stopped responding to chemotherapy, and he died May 25 before he could receive the transplant.

The family had no idea how fast costs were piling up. Some initial bills didn't arrive until months after treatment started. Then they would receive multiple mailings for each treatment, each listing a different amount — the hospital cost, the insurance discount, the amount they owed.

"When you're dealing with constant care of your child, you're not going home with a calculator and adding up to see where you're at," Kelly Treinen said.

California Lawyers Field Questions as Same-Sex Couples Answer 'I Do'

Continued from page 1

she said.

Same-sex couples are also consulting lawyers to protect their financial arrangements in marriage.

One person they have been turning to is Virginia Palmer, a partner in the trusts and estates group at the Oakland-based Fitzgerald, Abbott & Beardsley.

Palmer said couples have come to her worried that a marriage will make them ineligible for certain kinds of federal benefits.

"You have to look at individual cases," she said. "People with disabilities you have to be especially cautious with."

Another issue concerns pre-registration agreements, similar to prenuptial agreements, that some couples signed before they registered as domestic partners.

Couples who are getting married should consider making a short addendum to the agreement noting that they intend it to remain valid.

"You don't want to have your estate plan undone because of that change in status," Palmer said.

Wald said she and other attorneys are preparing such documents for free for couples who agree to donate the money they would have spent on legal fees toward defeating the November initiative.

Attorneys say they expect to see additional legal issues arise as people run into unforeseen snags along the way.

"These are things people aren't thinking about when they get married," Wald said.

Family and estate planning specialists aren't the only lawyers fielding questions as a result of the same-sex marriage ruling.

Employers nationwide are asking whether they need to extend benefits to same-sex spouses who were married in California but may live anywhere in the nation, said Denise M. Visconti, an associate in Littler Mendelson's San Diego office.

Generally, employers are allowed to extend benefits to same-sex couples regardless of the law in their state, but aren't required to in states where same-sex marriage is not legal or recognized.

"For employers' part they are not saying, 'Do we absolutely have to?'" Visconti said. "They're saying should we, is this a good idea?"

If they decide to offer the benefit, employers then have to figure out whether they need to tax a benefit that would otherwise have been provided tax-free to an opposite-sex spouse.

The Federal Defense of Marriage Act passed by Congress in 1996 prohibits the federal government from recognizing same-sex marriages for any purpose, including benefits and tax breaks.

The same rule applies on the state level in the 41 states that have approved statutes banning same-sex marriage, according to Stateline.org, a nonprofit group that reports on trends and issues in state politics.

In addition, 27 states have approved constitutional amendments prohibiting same-sex marriage much like the initiative pending in California in November.

One question none of the attorneys can answer is whether the initiative, if passed, would nullify the same-sex marriages that took place between June 16 and the election.

"It's probably better left to the constitutional scholars," Visconti said.

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Plaintiffs' Lawyers Say Report Bolsters San Diego Fire Cases

Continued from page 1

County. *Valerie Whiting Curtis v. San Diego Gas & Electric Co.*, 37-2008-00085002 (S.D. Super. Ct., filed June 3, 2008). Later this week, they plan to file a second mass tort suit for 30 clients connected to the Witch Creek fire, located between Santa Ysabel and Ramona, which had merged with the Guejito fire in October.

In a statement issued July 9, following the release of the Cal Fire report, SDG&E didn't address its potential impact on pending ligitation. The utility did say that it wasn't surprised by the report, and in fact has been cooperating with Cal Fire in its investigation over the past nine months. A spokesperson said the firm has hired Quinn Emanuel Urqhhart Oliver & Hedges to work on the fire litigation.

The utility has not conceded any liability, blaming "hurricane-force Santa Ana winds," as being a major factor in the fires, as well as the damage to their facilities.

SDG&E also cited a report issued earlier this year by the San Diego County Civil Grand Jury that raised its own concerns about the county's response to the fires.

The report, filed in May, found that "organized firefighting in the unincorporated areas of San Diego County is fractured; coverage and response time is not uniform for all residents; dispatching is not consolidated; not all fire protection districts are staffed around the clock; and volunteer districts are not under the Office of Public Safety."

As for legal liability, SDG&E contends that government reports, such as Cal Fire's, "are not admissible in a court of law as evidence of liability."

Jackson disagreed.

"The opinions expressed in the report may not be admissible, but the underlying evidence, witnesses and the massive amount of ground work that Cal Fire personnel has laid as a foundation is absolutely admissible," he said.

City attorney Mike Aguirre, who last month filed his own lawsuit against the utility, is equally stoked.

"Cal Fire should be commended for having the courage to say what happened," he said. "This will help our lawsuit, to recover the city's losses, and, more importantly, to hold SDG&E accountable so that we won't have problems in the future."

In the suit filed June 19 in San Diego County Superior Court, Aguirre is seeking a jury trial and unspecified damages against SDG&E for loss or damages to city property, the costs of firefighting and relief activities, negligence for not properly maintaining transmission equipment, and for worker's comp claims made by city employees related to the fire. *Michael J. Aguirre v. San Diego Gas & Electric Co.,* 37-2008-00086025, (S.D. Super. Ct., filed June 19, 2008).

While no actual dollar amount was specified, Aguirre estimates that when all the damages are added up, the figure will be at least $45 million. No trial has been set, but Aguirre said, "With the Cal Fire report, we hope that it will be sooner rather than later."

Jackson, whose Rice Canyon suit is now in the discovery phase, isn't attaching a dollar amount for damages, either.

"We're in the process of evaluating individual clients' claims for damages," he said. "Some folks lost their entire home, years of personal possessions, memories and treasures that were passed on from generation to generation. Some only lost an outbuilding or landscaping."

A mass tort has advantages over a class action, Jackson added.

"In a class action, you can't recover for emotional distress," he said. "And with class actions, the concept of being certified as a class is immediately appealable. It could be held up in the appellate courts for years."

Jackson said that he intends to ask the court for permission to consolidate the two cases.

Meanwhile, Aguirre said, "We are working very hard to get SDG&E to better safeguard its grid, and, secondly, working to get them to meet their legal obligations to transition to renewable energy, which is safer."

SDG&E said that it is working "to maintain and operate our system safely."

Among its actions: replacing wooden poles with steel, increasing the distance between power lines and using heavier wire on the transmission system in rural areas; expanding aerial inspections of its distribution and transmission lines, and using new equipment; and changing procedures during hot, dry weather to restore power after outages only when it's safe to do so.

But the utility also said that, "No electrical power system can be protected 100 percent from the kind of severe weather conditions we experienced last fall."

The case raises some complex legal questions, said Joy Delman, a professor at the Thomas Jefferson School of Law in San Diego, who specializes in torts.

"There is some pretty clear evidence that SDG&E may have violated its own procedures," she said. "But this may not be enough. There were a lot of factors, including weather. The plaintiffs have to prove that not only arcing power lines caused the fire, but that SDG&E's conduct at the time was unreasonable."

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Public Projects Will Be Hard to Fund Under High Court Ruling

Continued from page 1

it did not provide a distinct benefit to the property owners in the district and the flat $20-per-parcel fee was not imposed proportionally to the benefit received.

Davis attorney Tony J. Tanke represented the two taxpayer associations and eight individual taxpayers that have spent seven years fighting Santa Clara County's special assessment of $20 per parcel.

"The California Supreme Court's decision recognizes the constitutional rights of taxpayers not to have their homes and businesses assessed for general public spending projects that do not directly benefit property," Tanke said in a statement.

Pacific Legal Foundation, a nonprofit that advocates for property rights and limited government, called Monday's decision the first big vindication of Proposition 218.

"Property owners should not be singled out to pay for special programs that have the effect of benefitting everybody," foundation attorney Harold Johnson said in a statement.

An attorney who represented the open space authority said he was disappointed by the decision, especially since three different appellate courts applied a "substantial evidence" test instead of an independent review. "The Supreme Court has a right to make these decisions, but doing so kind of altered the landscape somewhat," said James R. Parrinello of Nielsen, Merksamer, Parrinello, Mueller & Naylor of Mill Valley.

California has created more than 3,400 special districts to provide a wide variety of public services. Those include fire suppression, parks and recreation, water treatment and distribution, sewage collection and treatment, police protection, libraries and mosquito control.

In an amicus brief to the court, David W. McMurchie of Folsom, an attorney for the California Special Districts Association, predicted such a ruling "would have devastating impact on the financing, and therefore the availability of such public services and public improvements throughout the state."

The Mosquito and Vector Control Association of California is particularly concerned because agencies rely on special district assessments to provide mosquito control to more than 18 million people, McMurchie wrote.

The Sacramento Area Flood Control Agency also warned the court that its ruling could prevent agencies from using assessment districts to fund large public works projects.

Because the projects protect large swaths of land, it would be nearly impossible to calculate the specific benefit to each person's property, agency attorney Timothy N. Washburn said in his amicus brief.

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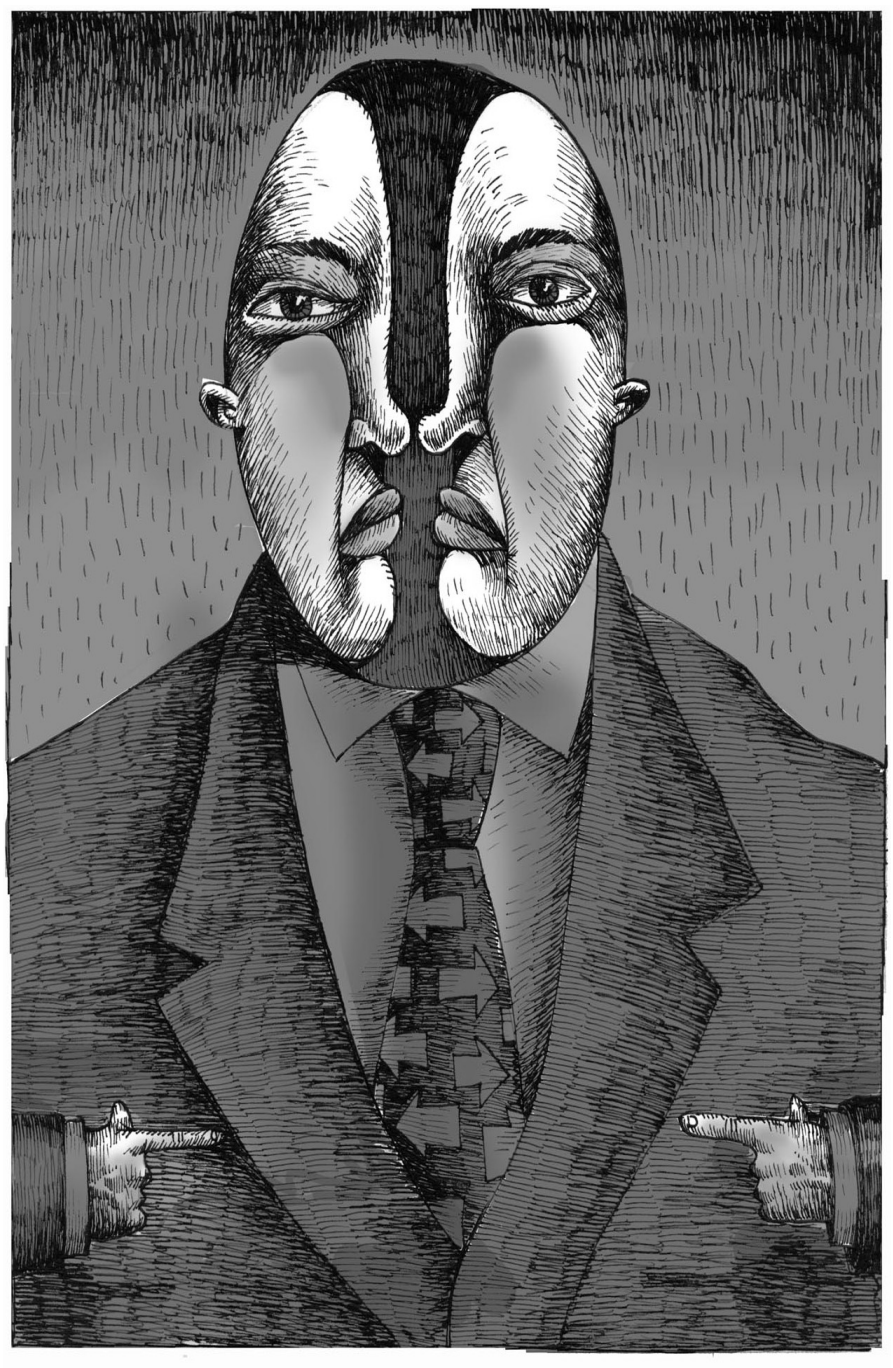
Keeping Up Appearances



By Jeffrey Dintzer
and Tony Brown

The California Supreme Court will soon be deciding in *Morongo Band of Mission Indians v. State Water Resources Control Board*, S155589, whether due process requires unitary administrative agencies — those that function as both accuser and adjudicator on matters within their jurisdiction — to ensure that their staff attorneys serve only as prosecutors or legal advisers at any given time. The decision will affect hundreds of proceedings currently being heard by such agencies across the state. Indeed, there are 18 cases now pending before the State Water Board itself.

The State Water Board claims that its current policies, particularly those prohibiting ex parte communications, allow its attorneys to perform overlapping functions without any effect on the fairness of adjudicatory proceedings before it. The State Water Board's position is out of step with the developing standards of due process and at odds with its own practices.

In *Morongo's* underlying administrative proceedings, the Morongo Band of Mission Indians faces the revocation of a water license by the State Water Board. The attorney prosecuting those proceedings for the State Water Board also happened to be acting as a legal adviser to the State Water Board in another pending matter. Morongo objected to the arrangement. It believed, not unreasonably, that if the State Water Board trusted the attorney to provide legal advice in one matter, it would be inclined to credit her arguments in favor of revoking Morongo's license. At the very least, Morongo claimed, the situation created an appearance of bias necessitating the attorney's replacement by someone who was not concurrently advising the Board. The State Water Board disagreed. But on Morongo's writ petition challenging that decision, the trial court sided with Morongo and issued a writ of mandate ordering the attorney's disqualification. On the State Water Board's appeal from that decision, the 3rd Appellate District affirmed, holding that the State Water Board's practice of allowing an attorney to don a prosecutorial hat in one proceeding and an advisory hat in another created a risk of unfairness that amounted to the denial of due process.

The 3rd Appellate District got it right. The requirements of due process in administrative proceedings have evolved in the past decade. The 2nd and 4th Appellate Districts have also held that the appearance of bias, not actual bias, is the relevant due process standard. They, too, agree that, where an attorney maintains too close a relationship with the administrative decision-maker — by, for example, advising it in one matter and appearing before it as prosecutor in the same or a related matter — it creates an appearance of bias that requires the attorney's disqualification.

But the State Water Board seems not to be aware of these developments. For example, it argued in Morongo that only evidence of an actual financial interest triggers disqualification. And, in its own proceedings, it continues to require that parties show some actual bias before it will act on their motions to disqualify. Most recently, in proceedings over a draft cease and desist order issued against California American Water Company, the State Water Board refused to disqualify — or even permit legal briefing on whether due process required it to disqualify — a staff member who had advised the State Water Board in related adjudicatory proceedings involving California American Water and is now apparently assisting the prosecution team.

Just as troubling as the State Water Board's out-of-date understanding of due process principles are the State Water Board's representations about its own ex parte policies. As it did in the Court of Appeal, the State Water Board argued in its briefing to the Supreme Court that these policies safeguard against the realization of any apparent risk of bias from its staff members' overlapping roles. By repeatedly mentioning the existence of these prohibitions on ex parte contacts, the State Water Board clearly wants the Supreme Court to infer that the State Board rigorously and steadfastly follows them in all cases.

But even while the State Board was penning this argument, it was in the process of turning over numerous ex parte communications in another adjudicatory matter pending before it, *In the Matter of Rialto-Area Perchlorate Contamination at a 160-Acre Site in the Rialto Area*. (In the interests of full disclosure, our firm represents Goodrich Corporation in those proceedings.) These ex parte communications included a PowerPoint presentation identifying "the two main responsible parties" by the Rialto matter's chief prosecutor to the State Board and hearing officer, Tam Doduc. They also included multiple communications between Doduc's advisory team and the chief prosecutor; e-mails between Doduc and Gov. Schwarzenegger's office; and briefings by the State Board to the California EPA, in which the board — before any hearing on the merits — treated the designated parties' liability as a fait accompli. Although required to do so, the State Board did not initially disclose these improper ex parte communications. Only after repeated motion practice and a federal subpoena did it finally release them. Despite its obvious impropriety, the State Board has refused to disqualify the hearing officer or any members of the board, the hearing officer's advisory team or the prosecution team.

Due process requires that the State Water Board take measures to avoid any appearance of bias in its proceedings. Instead, the State Board's conduct in the Morongo, California American Water and Rialto proceedings demonstrates that it abuses due process and then exacerbates the resulting unfairness by forcing parties to seek costly relief from the courts. Since parties appearing before the State Board cannot confidently rely on its compliance with prohibitions against ex parte communications, those policies alone are not an adequate safeguard, either in theory or in practice. The potential for bias arising from overlapping functions must therefore be safeguarded against by other means. The Supreme Court should affirm the Court of Appeal's decision, and require that a unitary administrative agency's prosecutorial and advisory functions be structurally independent to ensure the fairness and neutrality of proceedings before it.

Jeffrey D. Dintzer is a partner in Gibson, Dunn & Crutcher's Los Angeles office, where he focuses on litigation involving the environment and land use entitlements. He represents Goodrich Corporation in *In the Matter of Rialto-Area Perchlorate Contamination at a 160-Acre Site in the Rialto Area*. He can be reached at jdinzter@gibsondunn.com. **Tony Brown** is an associate in Gibson, Dunn & Crutcher's Los Angeles office. He represents Goodrich Corporation in *In the Matter of Rialto-Area Perchlorate Contamination at a 160-Acre Site in the Rialto Area*. He can be reached at tbrown@gibsondunn.com.

Health Department Proposal Undercuts State Birth Control Laws

By Cristina Page

The Bush administration's Department of Health and Human Services has been called "ground zero for the ideological wars in this country," and a new Health Department proposal leaked this week proves why. In a spectacular act of complicity with extremists on the right, the Health Department is proposing to allow any federal grant recipient to obstruct a woman's access to contraception.

The American public is nearly unanimous in supporting contraception: 90 percent favor wide availability for birth control, and 90 percent of sexually active women of reproductive age are using it. It is simple common sense: The average woman spends nearly three decades of her life attempting to be sexually active without getting pregnant, and access to contraception is the only proven way to avoid an unintended pregnancy.

For most women, birth control is a basic health care need. But with this new proposal, the Bush administration plans to hand over the gears of health care to the few extremists who want to impose their deeply unpopular right-wing doctrine on the many. The "Pill Kills" fringe has generally been ignored for its warped pseudo-science, but not at Bush's Health Department. Its new proposal would make agencies receiving Health Department funding promise not to discriminate in hiring against anyone who objects to abortion — and then redefines abortion so as to include most commonly used forms of birth control, including oral contraceptives and IUDs.

This is the latest — and now incontrovertible — proof that the anti-abortion movement, and the administration that appears beholden to it, opposes basic pregnancy prevention and is firmly committed to control over Americans' sex lives. If the Health Department proposal is approved, anti-contraceptive operatives will seize health financing, one of the most important levers of control. The regulations would be vast in scope and serve as an open invitation for local extremists to directly meddle with your most important life decisions.

Under the new rule, any health care provider who receives federal funding and would like to prevent women from having access to prescription birth control would have federal protection for doing it. State laws requiring hospitals to give pregnancy prevention to rape victims would be automatically invalidated. Pharmacies nationwide could be granted instant permission to refuse to fill prescriptions for birth control. Health centers may be forced to hire religious extremists who would refuse to provide contraception to their patients, even if contraception service is the main focus of the facility.

The new regulation would overrule laws in 27 states requiring health insurers to cover contraceptives. Keep in mind that reluctance of Health Maintenance Organizations (HMOs) to cover contraception was what led to these state mandates in the first place. Health insurance plans would likely be able to eliminate contraceptive coverage, re-imposing on women 68 percent more in out-of-pocket health care expenses than men pay.

Bush has been committed to restricting Americans' access to pregnancy prevention since his first days in office. In 2001, he attempted to eliminate contraceptive coverage for federal employees and soldiers. At the request of the anti-contraception movement, he has obstructed the U.S. Food and Drug Administration's process of approving proposals for wider access to contraception; appointed self-described anti-contraception leaders to oversee the nation's federal contraception program for the poor; eliminated funding for international family planning programs; appointed anti-condom activists to the Presidential Advisory Council on HIV/AIDS; promoted programs that withhold information about birth control from sexually active teens and sunk unprecedented sums of public funding into these no-sex-until-marriage programs, even after witnessing, as governor of Texas, that the result there was the highest teen birth rate of any state in the union.

The proposed regulation is just one of many campaigns against contraception, all led entirely by the anti-abortion establishment. Few Americans know that not one anti-abortion organization in the United States supports contraception. Even fewer understand that every effort to ensure Americans' access to pregnancy prevention is met with fierce, well-financed and increasingly successful opposition by anti-abortion groups.

The Bush administration has been able to implement these deeply unpopular attacks against birth control and family planning because the American public doesn't really believe that an anti-contraception movement even exists. Under the cover of public denial, behind the banner of "Who could be against contraception?" ideological extremists have accomplished much of their agenda. Approval of the Health Department proposal would be the most encompassing and far-reaching attack on the right to contraception they could hope for. What the anti-birth control extremists need now is for the public to continue to believe it can't happen.

Cristina Page is the author of "How the Pro-Choice Movement Saved America: Freedom, Politics and the War on Sex" and spokesperson for BirthControlWatch.org.

Letter to the Editor

Same-Sex Couples Should Marry and Register

I want to thank you for your excellent article entitled "Questions Abound Around Same-Sex 'I Dos,'" published in the Daily Journal (July 15, 2008), in which I was quoted extensively. I do, however, have one important point to clarify.

While it is absolutely true that attorneys are recommending that same-sex couples *both* register as domestic partners *and* marry, it is generally not for the reason given in the article (in case we lose marriage in November through passage of Proposition 8). Instead, we are making this recommendation because many states — and even some branches of the federal government — are recognizing domestic partnership rights without recognizing same-sex marriages. Therefore, if a same-sex couple wishes to have their relationship recognized in as many geographies and contexts as possible, they are advised to be both registered and married. Because it is likely to take years before we have true, national recognition of same-sex marriage, this will continue to be our recommendation even after we defeat Prop. 8 at the ballot box.

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