LAW

SPECIALTIES

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Keller/Anderle LLP
BUSINESS TRIAL LAWYERS

Why You Should Hire a Trial Attorney for a Case That Will Never Go to Trial

By Jennifer Keller and Jesse Gessin

Litigation can feel like a never-ending safari. And actually going to trial can seem as likely as encountering a white rhino. In 2015, there were 4,734 federal civil jury trials, down almost forty percent from 7,933 in 2000. Federal trials have also gotten shorter. In 2015, only 14 lasted twenty days or more, compared to 85 in 2000. Local trends are the same. In California, there were 1,726 civil jury trials in 2015, down more than fifty percent from 3,868 in 2000. And here in Orange County, there were only 176 civil jury trials in 2014, down from 364 in 2000.

These statistics raise the question: if trials are becoming an endangered species, why hire a trial attorney? The answer: dispute resolution, like any other business decision, should be cost-effective. Seasoned trial attorneys are best equipped to save companies money because they know how to avoid distractions and focus on what is important in a case. And hiring a veteran trial attorney shows the other side you're serious, and prepared to go the distance.

Trial Lawyers Frame the Case for Trial from the Outset

The only way to become a trial lawyer is by trying cases. Due to the scarcity of civil jury trials, it takes many years, often in public practice as a prosecutor or criminal defense attorney, for an advocate to develop into an effective trial attorney. Trial advocacy is a skill mastered only in the courtroom, not in the classroom or from an office.

Unfortunately, many people who claim trial expertise have conducted few, if any, actual trials. Perhaps they've "been members of a trial team," which could mean being one of dozens who worked on a case in the office, but never examined a witness in court. The client needs to bluntly ask, how many jury trials have you personally "first chaired" to jury verdict? Not mediations, not arbitrations, not summary judgment motions or bench trials, but trials to jury verdict. Surprisingly often, the answer will be none.

Spending years in front of juries trains an attorney to appreciate from a case's outset what a jury will find to be significant. This vision separates trial lawyers from litigators. Even before the first discovery request is served, a trial lawyer conducts an extensive internal review and frames the case in a tight narrative supported by meritorious legal theories and intuitive storytelling themes. The narrative is grounded in the causes of action or defenses most likely to survive pretrial motions and end with a jury verdict.

Discovery is the process by which trial attorneys *refine*, not *discover*, the narrative. The story becomes the fulcrum upon which a trial attorney decides between what is important and what is meaningless. By framing the case for trial from the start, less becomes more. Every aspect of pretrial litigation is custom-fit to distill the narrative. Trial attorneys avoid litigation jousting over things that do not affect the story, and that waste the client's time and money. And trial attorneys understand that overindulgence in discovery will merely educate the opponent about their respective clients' trial strengths and weaknesses.

Trial Lawyers Conduct Discovery by Agreement

Trial attorneys start discovery with agreements, not disputes. From the very beginning of every case, plaintiff or defense, trial attorneys seek to agree on discovery covenants. These agreements naturally move cases towards trial and avoid litigation that seeks to stall and delay going to trial. Discovery disputes should rarely be taken to court, and only when the issue is critical to the narrative. By slimming down the discovery process, the client will benefit from increased efficiency. They will also be likely to see a courtroom far earlier than they normally would.

Trial Attorneys Use Depositions to Prepare for Trial

Whether taking or defending a deposition, a trial-focused approach creates austerity in depositions. The best trial attorneys take only necessary depositions, and those tend to be bespoke. Meandering questioning of witnesses fritters away time and money, while misuse of potent impeachment evidence may accomplish nothing more than to educate the opposition about its weaknesses. This is especially true of experts. Every question should be surgical, purposeful, and tied to the trial theory.

When defending depositions, trial attorneys lean on experience to thoroughly prepare their witnesses to give trial testimony during the deposition. Near the end of the deposition, when the opponent and witness are exhausted, trial attorneys seize on opportunities to elicit testimony helpful to their own case. A transcendent deposition may cause the opponent to abandon calling the witness at trial, while preserving the trial attorney's ability to introduce choice parts of the deposition testimony at trial.

Trial Attorneys Emphasize Teamwork

Adept trial attorneys pair with accomplished pretrial litigators to prepare cases for trial. This teamwork has been the norm for hundreds of years in England, where barristers and solicitors develop cases together. Work is not leveraged through multiple layers of lawyers of different experience and billing rates. Instead, each task is handled by the one lawyer best suited for the task. "One task, one attorney" is the rule, not the exception. And the team uses streamlined communication and technology to assure unimpeded work flow and avoid duplication.

Trial Attorneys Use Their Experience to Leverage Better Settlements

Trial attorneys enjoy immeasurable leverage in settlement negotiations. In civil dispute resolution, the best negotiating tool is the looming threat of trial against a top-notch trial lawyer. An opponent with few, if any, jury trials under the belt, has an inherent incentive to settle. Fear of the unknown is a powerful motivator. Dread over being exposed to the client as a trial novice is another. Meanwhile, the experienced trial lawyer is comfortable sizing up the boundaries of what a real-life jury may actually do, and crafts a settlement offer accordingly. Judges, for their part, quickly determine which lawyer seems to be the more knowledgeable practitioner. The pressure mounts on the novice. (And the novice might be a 40-year litigator who has somehow always avoided a jury, and whose client has no idea that is the case.) Even while posturing for the client, the trial rookie becomes queasy hearing the jurors' footsteps coming up the courthouse stairs, and frequently settles immediately before the panel is sworn.

If Your Case Goes to Trial…

Finally, while jury trials are getting rarer, they are sometimes inescapable, especially in bet-the-company scenarios. If your case turns out to be the white rhino and your company's fate will be entrusted to "twelve good people and true," you need a seasoned, fearless, winning trial lawyer at your side. A trial attorney with nerves of steel honed by years of experience is your best insurance policy against injustice in a legal system designed to reward the best advocate.

Jennifer L. Keller is one of America's most successful trial attorneys. Her practice focuses on high-stakes commercial, intellectual property, white collar criminal and securities litigation. She has received innumerable awards for excellence as a trial lawyer, including: "The Best Lawyers in America®"; The Lawdragon 500 Leading Lawyers in America; Benchmark Litigation's "Top 100 Trial Lawyers"; and ten times on the Los Angeles Daily Journal's "California's Top 100 Lawyers"; and a 2018 inductee into the California Lawyers Association Trial Lawyer Hall of Fame, one of only 31 attorneys so honored throughout the years. In three separate years, in starkly different subjects, Jennifer's trial victories have led to California Lawyer Attorneys of the Year (CLAY) awards. Ms. Keller is a fellow of the invitation-only American College of Trial Lawyers, widely considered the most significant honor a trial attorney in North America can receive. Contact her at (949) 476-8700 or jkeller@kelleranderle.com.

Jesse Gessin, partner, is an outstanding trial lawyer. He has tried close to thirty jury trials to verdict as lead or co-lead counsel. His areas of practice include complex commercial litigation, appellate litigation and white collar criminal defense. As a deputy federal public defender, Jesse won fourteen jury trials through acquittal, dismissal, hung jury or reversal on appeal. Jesse's appellate experience has included drafting and arguing over fifteen cases to the Court of Appeals, with impressive results. Jesse also teaches trial advocacy at the University of California Irvine School of Law, and has lectured on trial strategy and techniques throughout the United States. Contact him at (949)476-8700 or jgessin@kelleranderle.com.

Stuart Kane LLP

Letters of Intent: A Sometimes Neglected Way to Save Time and Money

"They are slow and cost too much," is how the decision-maker at a long-standing client of mine described the lawyers he used prior to engaging my firm. That was literally the description he used – perhaps a veiled warning to me, but ultimately something I took inspiration from.

In searching for ways to deliver better cost savings and efficiency when negotiating transactions for clients, one aspect that is often neglected but provides an opportunity to achieve both is the letter of intent.

Road Map to Efficiency

Request for proposal, term sheet, letter of intent – when used correctly, they will be a road map to efficiency. When broad strokes are first agreed upon in a letter of intent for a purchase and sale agreement, lease, loan, joint venture or equity investment, the goal is to create a smoother negotiation for the definitive documents that follow.

But beyond broad strokes, when additional effort is made to cover more topics and detail in the letter of intent, there is a value proposition to make further progress in the overall negotiation in a shorter period of time, and with less legal fees incurred.

The math is simple: a few hours of legal fees spent on a 25-point letter of intent will offset the need to spend many more hours negotiating to add or remove those same concepts at the definitive document stage.

Even better, the well-negotiated letter of intent does more than just summarize the broad strokes of the transaction. It clearly states what each party has agreed to honor in the definitive document. Even if the letter of intent is non-binding, having a meeting of the minds reflected in the letter of intent allows for each party to use it as a benchmark during the later stage of negotiation.

Put another way, "front-loading" the negotiation at the letter of intent stage allows the attorneys to negotiate the deal faster, and keep legal fees lower, as compared to transactions that lack a clear mandate at the start due to a letter of intent lacking the enhanced detail and content.

Business Casual or Stuffed Suit

With the non-binding nature of most letters of intent, there should be a less formal, more relaxed frame of mind for the parties engaged in the early stage negotiations. The back-and-forth can be more free-wheeling and creative, and more can be accomplished in a shorter period of time, as compared to the more stressful environment of the later stage definitive document negotiation.

Once the letter of intent is final, the formality and time pressure changes. With greater ramifications stemming from the binding definitive document, negotiating parties are less inclined to compromise. Heightened concern over the gravity of negotiations results in more time being spent on drafts, meaning higher legal fees being incurred over protracted negotiations.

Penny Wise, Pound Foolish

"Penny-wise, pound foolish" is another way to explain the importance of the letter of intent. A client that calls their lawyer only after the letter of intent is signed has missed the opportunity for their lawyer to make sure the letter of intent covers more issues that will ultimately still need to be addressed in the definitive document. That client has also missed the opportunity to save money on the total legal fees to be spent on the transaction, as once the definitive document negotiations begin, it is too late to go back and use the more efficient legal fees that were not spent at the letter of intent stage.

If it is more efficient to load up the non-binding letter of intent with details that will take more time to negotiate in the later stage, the client that involves the attorney at the early letter of intent stage may spend more on legal fees up front, but if done effectively, those early expenditures will result in a cost savings on the backend, with less legal fees being needed to reach the final definitive document.

Of course, it is important to not over-do the letter of intent negotiations. Taken to an extreme, this strategy can balloon into a full negotiation of the definitive document in disguise. But for clients and attorneys that can find the right balance of quality and quantity in the letter of intent negotiation, there is savings to be achieved.

The aggregate spend on legal fees over both stages should ultimately be less, as compared to a deal when no fees are spent at the letter of intent stage. And when coupled with a more efficient process that gets the deal signed earlier, the result is a faster transaction at a lower legal cost.

Finish What You Started

Perhaps worse than a letter of intent that is too brief, is the letter of intent that is never finished. Parties often curtail or abandon negotiations before the letter of intent is signed, in favor of anxiously moving to the definitive document. Unfortunately, that lack of closure on the letter of intent can doom the definitive document stage to a longer negotiation, incurring more time and legal fees.

When disagreements arise during the definitive document negotiations, being able to point to the precedent-setting letter of intent is a much better position than having to instead argue why your side neglected to raise the issue in the early negotiations. And when the letter of intent was never final or signed, both sides lose that argument of established precedent.

Letters of intent can also be "finished" by including more detail than would usually be included. While the letter of intent should serve primarily as a short-hand summary of the points to be fully realized in the definitive document to come, in more complicated transactions, it is acceptable to have the actual, specific language to be used in the definitive document negotiated and included verbatim in the letter of intent, ready to simply be cut and pasted into the definitive document.

Right Place at the Right Time

They say time kills deals, so if a good letter of intent can achieve efficiency, that should be reason enough for investing the time at the early stage of negotiations. Of course, sometimes there is no substitute for simply being in the right place at the right time. In this context of the letter of intent, that adage applies to how legal fees are spent. Resources allocated to letter of intent negotiations may seem premature to some, but others recognize the benefit of those resources as being used at the right time (early), especially if it ultimately gets the deal done under their legal budget.

Josh C. Grushkin

Josh Grushkin is a founding partner of Stuart Kane LLP. His practice encompasses all aspects of commercial real estate transactions, including leasing, finance, joint ventures, and land acquisitions and dispositions for commercial and residential developers, homebuilders, investors and corporate users. In May 2015, Mr. Grushkin co-authored the pre-cursor to this article, "Early Collaboration for Greater Protection: Don't Wait to Assemble Your Team," with his law partner Javier F. Gutierrez, appearing in Orange County Business Journal Volume 38 Number 19. Mr. Grushkin can be reached at (949)791-5151 or jgrushkin@stuartkane.com.

New facilities, student credentials, record gifts contribute to momentum of Fowler School of Law

In the world of legal education, Chapman University's Dale E. Fowler School of Law is relatively young—next year marks its 25th anniversary—but the Orange, California institution has experienced growth and success in several areas that finds it outpacing many of its well-established peers.

Named one of preLaw Magazine's Best Law Schools for Practical Training, the Fowler School of Law has distinguished itself by providing a personalized and practice-focused approach to legal education. Its student competition teams are among the best in the country, tying for fifth place out of 154 law schools in the American Bar Association's 2018-2019 Competitions Championship. The law school's alumni include judges, law partners, corporate executives, civil servants and general counsel. And several graduates have ascended to top positions in the sports and entertainment fields, including an agency founder who Forbes named one of the "World's Most Powerful Sports Agents."

The law school's most recent incoming class is one of its most well-qualified, with a median LSAT score of 158 and median GPA of 3.49—indicators of student preparedness that have sharply risen over the last three years, more so than almost any other U.S. News & World Report-ranked law school. The new crop of Fowler Law students is also one of its most diverse, with 42% minority representation and 26% first-generation college students.

"This is one of the strongest classes in the history of the Fowler School of Law," said Dean Matt Parlow. "Their impressive credentials speak to the momentum we're experiencing, and we look forward to providing these students with our trademark individualized support to help them achieve their academic and professional goals."

The class of 2022 is among the first to enjoy the benefits of new investments into the facilities at the Fowler School of Law, including the recently opened Center for Student Engagement. Made possible by Chapman University capital funding and a generous donation by Fowler School of Law Board of Advisors Chairman Park Kennedy, the Center houses the law school's Career Services, Student Affairs, and Academic Achievement offices.

"This suite is a one-stop shop for students to access the services we provide that support them in achieving success and happiness in law school," Parlow said. "We hope that by bringing these different areas together, we can build on creative synergies that will help us achieve greater levels of personalized student support and engagement and, ultimately, student success."

In addition to providing new offices, the renovated suite includes a reception area, a conference room, and three interviewing rooms, all in a bright, modern setting bathed in natural light—making the space open and inviting to students and employers alike.

The construction and opening of the Center for Student Engagement is just the latest in a series of enhancements to both the law school's facilities and programs, which have been made possible by a record number of gifts over $1 million received by the Fowler School of Law in the last several years.

"Gifts at this level are rare in legal education," said Parlow, "and our receiving four of them within the past two years is a testament to the belief, support, and confidence that donors have in the important and impactful work that we do with our students."

Those contributions from donors such as Park Kennedy, James M. Bergener, and alumnus Samuel Mirejovsky (JD '14) have established professorships, created scholarships, and helped fund such projects as a high-tech renovation of the Wylie A. Aitken Trial Courtroom, an update of the Hugh & Hazel Darling Law Library, and a full remodel of the Bergener Mirejovsky Student Lounge.

"We are always looking for ways to keep Kennedy Hall one of the best and most up-to-date law school buildings in the country," Parlow said.

The most recent $1 million gift establishes a new endowed professorship that will help expand the institution's innovative bar exam preparation program. Made by a donor who was moved by a family member's experience with the program, the new endowment recognizes the success of all of those involved, including its executive director, Professor Mario Mainero, Professor Tom Caso, adjunct professors John Bishop and Kent Sommer, and the many Fowler School of Law alumni and friends who grade students' work in the program.

"This endowment reflects our unparalleled efforts in developing resources to support our students, as well as the dedication and hard work of the entire Fowler School of Law bar prep team," Mainero said. "The endowment will, over the years, be instrumental in giving students the additional assistance they need in meeting the challenges of the nation's most difficult bar exam."

For more information about the Fowler School of Law, please call (714) 628-2500 or visit www.chapman.edu/law.

Recent enhancements to the Fowler School of Law's home inside Kennedy Hall include a $1 million renovation of the Wylie A. Aitken Trial Courtroom.

Knobbe Martens

Appellate Court Decides Appointment of Patent Judges is Unconstitutional, Giving Some Patent Owners a Second Chance

In 2012, Congress introduced new proceedings for challenging issued patents. This has had a significant impact on patent litigation and how companies protect their inventions. The most popular of these proceedings is the *inter partes* review ("IPR"), in which patent judges within the U.S. Patent Office review already issued patents to determine whether they should have been issued. Often, the answer has been "no." So far, these proceedings have invalidated thousands of claims from issued patents. The Patent Office statistics show that most IPRs are "instituted" (allowed to proceed on the merits), and most IPR final decisions invalidate all the challenged patent claims. Many patent holders and practitioners are alarmed by the high rate at which patent judges are invalidating issued patents.

Earlier this month, in a case titled *Arthrex, Inc. v. Smith & Nephew, Inc.*, the Court of Appeals for the Federal Circuit issued an important decision affecting IPRs and possibly other Patent Office proceedings. The decision vacated an IPR decision because the process for appointing patent judges was unconstitutional. Final IPR decisions by these patent judges may be directly impacted by this ruling, if they are still subject to appeal.

In the *Arthrex* case, the Federal Circuit decided that the U.S. Patent Office's appointment process for patent judges is unconstitutional. Arthrex appealed an unfavorable IPR decision on the basis that the patent judges are "principal officers" of the United States that should have been nominated by the President and confirmed by the Senate under the Constitution. Because patent judges are currently appointed by the Secretary of Commerce, Arthrex argued that their appointment was improper. Arthrex raised this argument for the first time on appeal. The Federal Circuit agreed with Arthrex, vacated the IPR decision, and remanded to have the case decided by different patent judges. The Federal Circuit also attempted to salvage constitutionality of future IPR decisions by striking a portion of the statute to effectively allow patent judges to be fired by the Patent Office director.

The Court found that Arthrex had not waived its constitutional argument by raising it for the first time on appeal. But shortly thereafter, the Federal Circuit held that this constitutional argument must be presented in or before the appealing party's opening appeal brief. A practical effect of the Federal Circuit's decision is that, for a short time, the losing party in a previously issued IPR decision may seek to have the decision vacated and decided again by a different panel of patent judges. Further effects of the *Arthrex* decision, including whether the decision will be challenged further and whether the decision will be extended to apply to other Patent Office proceedings, such as *ex parte* appeals, will continue to unfold.

Ben J. Everton is a partner in the Orange County office of Knobbe Martens. Ben focuses his practice on helping companies protect their innovations and successfully resolving high stakes technology disputes. He has extensive experience representing both patent owners and petitioners before the PTAB in inter partes review proceedings. Ben can be reached at (949) 760-0404, or ben.everton@knobbe.com.

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CCPA Requires "Reasonable Security": but You Can't have Reasonable Security Without Proper Vulnerability Management (and Why this Matters)

By: Divya Gupta and Cody Wamsley

With the California Consumer Privacy Act ("CCPA") set to take effect January 1, 2020, with statutory damages and data breach class action litigation for failure to implement "reasonable security" on the horizon, reducing or mitigating harms that result from such cyber-attacks is more important than ever. As no industry is risk free when it comes to adequate data security, implementation of reasonable security controls is now a critical component of CCPA compliance.

Managing or mitigating risk requires implementing "reasonable security," which derives from the Center for Internet Security's Top 20 Critical Security Controls (CSC 20) [https://www.cisecurity.org/controls/cis-controls-list/]. In California's 2016 Data Breach Report, then California Attorney General Kamala Harris stated that "[The CSC 20] are the priority actions that should be taken as the starting point of a comprehensive program to provide reasonable security." More explicitly, the same report states, **the failure to implement all the Controls that apply to an organization's environment constitutes a lack of reasonable security.**

Thus, the CSC 20 likely comprise a defensive list to detect, prevent, respond to, and mitigate security incidents. These controls are important for any organization seeking to avoid liability under the CCPA.

The CSC 20 comprises three main categories of controls: Basic, Foundational, and Organizational. While the full scope of the CSC 20 is beyond this article, an organization may be hard-pressed to assert that it has "reasonable security" in place if it does not at least adhere to the Basic 6 controls. Of those, #3, Continuous Vulnerability Management, is the most important to prevent data breaches. Indeed, this control has risen to become the #3 control in the CSC 20.

Vulnerability management's main purpose is to identify and remedy software vulnerabilities as quickly as possible. An attacker can easily exploit published vulnerabilities and once a software vendor releases a patch, knowledge of its associated vulnerability quickly becomes widespread. Organizations that do not scan for and proactively address vulnerabilities are at great risk for a breach.

While patching software security is a no-brainer, there are many challenges. Organizations should automate their processes, remediate vulnerabilities on networks and systems, and institute vulnerability and patch management policies now. Modernizing vulnerability management programs should be a focus in the short-term run up to the CCPA's effective date.

[1] https://oag.ca.gov/sites/all/files/agweb/pdfs/dbr/2016-data-breach-report.pdf

[2] 1. Inventory and Control of Hardware Assets, 2. Inventory and Control of Software Assets, 3. Continuous Vulnerability Management, 4. Controlled Use of Administrative Privileges, 5. Secure Configuration for Hardware and Software on Mobile Devices, Laptops, Workstations and Servers, 6. Maintenance, Monitoring and Analysis of Audit Logs.

Cody Wamsley, CISSP
Associate, Minneapolis
(612) 492-6858
wamsley.cody@dorsey.com

Divya Gupta
Partner, Costa Mesa
(714) 800-1493
gupta.divya@dorsey.com

FERRUZZO

Creating a Common Enemy: Naming a Neutral Trustee to Continue Your Family Business

For many business owners, the family business is a legacy to be passed on to the next generation. After decades of planning and sacrificing, a business owner may create an estate plan that contemplates preservation of the family business. The estate plan will name a successor trustee to take on the important first steps in the transition of ownership from one generation to the next. This decision may have the most significant impact on the duration, expense, and emotional toll of trust administration.

More often than not, one or more of the business owner's children will be named the successor trustee. For some families, naming a child who works closely with the business owner makes sense and may provide a smooth transition. For others, it leads to unnecessary stress, instability, and even litigation among beneficiaries. Often, when a business owner names a child as the successor trustee with responsibility for maintaining the family business, that child may have a separate full-time career, does not have the knowledge required to step into that role, and accepts the role out of a sense of obligation. Before making that decision, a business owner may want to answer the following questions:

(1) Are your children capable of acting?

In most families, each child has a distinct set of talents. When appointing a child as successor trustee, a business owner may want to consider whether that child has the skills and abilities to preserve the value of the business and make an informed decision concerning the continued operation of the business after the business owner has passed.

The successor trustee has a duty to take reasonable steps to preserve and make trust property productive. Probate Code §§ 16006-16007. This includes retaining employees and customers, maintaining finances and operations, and avoiding the loss of business assets. Some points to evaluate include familiarity with the family business, and general business management and past experience working with the family business.

The trustee will also need to consider whether to keep or sell the family business. The trustee shall administer the trust with the reasonable care, skill, and caution of a prudent person. Probate Code § 16040. If the death of the business owner is likely to have a significant impact on the prosperity of the business, it may be prudent to sell the assets rather than continue operating. Additionally, if the business itself carries significant risk of liability, even if the continued operations are not impacted by the transition of ownership, the successor trustee's fiduciary duty to the beneficiaries may require a sale. The business owner may need to consider whether his or her child is capable of evaluating these issues before naming the child as successor trustee.

If the trustee does not meet the requisite standard of care, the trustee may be liable for any loss or depreciation in value of the trust estate. Probate Code § 16440. Naming a professional trustee with the skills and experience to meet the standard of care not only takes the exposure to liability away from the child, but may also provide additional protections to the beneficiaries by reducing the risk of error.

(2) Will naming a child destroy family relationships?

Family dynamics often change after a loss and create opportunities for conflict. Past grievances create anger and mistrust, and a power struggle may ensue when one child is appointed to oversee the family trust and family business. Additionally, when children held positions within the family business during the business owner's life, but a child's performance did not translate to the child's title, salary, or responsibilities, other family members may seek an opportunity to change "the way things were done" in the past.

The successor trustee has a duty to deal impartially with all beneficiaries and act impartially in managing the trust property, taking into account any differing interests of the beneficiaries. Probate Code § 16003. Beneficiaries are typically income or remainder beneficiaries. Income beneficiaries are interested in maximum distributions of income, while remainder beneficiaries look for principal to be reinvested to increase the value of remainder principal distributions in the future. When it comes to a family business, the successor trustee is charged with balancing these competing interests, including making decisions to retain or sell the family business. Naming a child as a successor trustee with the responsibility of choosing between benefiting one family member over another, or selling the family business, places an emotional burden on that child and may lead to public trust litigation.

(3) Are there conflicts of interest?

After carefully considering the successor trustee's duties, skills, and abilities to manage business interests, a business owner may want to look at potential conflicts of interest that may impede the successor trustee's role. Probate Code § 16004 establishes the successor trustee's duty to avoid self-dealing, including taking part in any transaction in which the trustee has an interest adverse to a beneficiary and enforcing claims against trust property that the trustee purchased in contemplation of, or after appointment as, trustee. These transactions are presumed to be a violation of the trustee's fiduciary duty and may be grounds for removal.

When the successor trustee is a close family member, friend, and/or beneficiary of the trust, there may be a history of business dealings in which a beneficiary could argue that the successor trustee violated his or her fiduciary duty to avoid self-dealing. Many times, the successor trustee finds the transition from the "old way of doing things" to his or her new role as a fiduciary, to be difficult and even counterintuitive to what the successor trustee believed the decedent intended. This, coupled with the emotions following the passing of a loved one, may lead to broken relationships and litigation.

Finally, one of the most important questions for a business owner to ask is whether the child wants to act as successor trustee. Not every child has the time and inclination to take on the responsibility of acting as trustee when it comes to the family business. If the child has not expressed an interest in a career running the family business, that child may not want to act as trustee. If the business owner chooses to name a child, the business owner should consider that the child may decline the appointment as successor trustee in this situation, and the business owner may need to consider an alternative successor. One option is to nominate a professional trustee, such as a trust company or a licensed private professional fiduciary, to take on the responsibility of managing the trust.

Ferruzzo & Ferruzzo, LLP regularly advises its clients on trust administration services and provides business succession planning, including transitioning family businesses through estate planning. Both our Trust Administration and Business Law Practice Groups are available to assist with your legal needs.

DANIELLE R. GUERRERO is a Senior Associate with the Firm's Trust Administration Practice Group. Her practice focuses on guiding clients through the trust administration process including assisting business owners with the succession of their business. Additionally, she regularly provides legal advice to trustees on their fiduciary obligations.

TIMOTHY J McELFISH, Esq. is a Senior Partner and chairs the Firm's Corporate and Real Estate Practice Group. His practice group dedicates themselves to representing business owners and entrepreneurs. Mr. McElfish also handles all aspects of Corporate Governance, Merger and Acquisitions, Real Estate Acquisition and Dispositions, and Business Succession Planning.

CONTEMPORARY PIECES

FROM LUGANO DIAMONDS

Lugano Diamonds jewelry is meant to be worn – and worn often. *"Our clients' commitments and passions command a demanding social calendar. Oftentimes they are leaving the office directly for a donor reception or holiday cocktail party. To ensure they're exceptional at every moment of every occasion, we craft an extensive line of jewelry that speaks to their mood, style and need,"* shared Moti Ferder, CEO and founder of Lugano Diamonds.

In that spirit, Lugano offers a simple and elegant solution to transition from office to evening: bespoke pieces that are chic and timeless.

Lustrous Luxury

Intrinsic to your sophisticated sense of style, Lugano offers the Single Cut and Brushed Finish Bangle Bracelet. This sleek piece blends brushed 18k white gold with nearly four carats of round brilliant collection VS diamonds. This bangle beautifully marries contemporary with classic elements. Slip on for the perfect amount of statement and sparkle.

Refined Rubies

Enhance your cufflink game with Lugano's handsome Ruby Titanium Cufflinks. At the center of each link is a radiant cabochon cut ruby surrounded by luxe black titanium. On the edge of each link are pave round brilliant collection VS diamonds supported by 18k rose gold bars. Add a smart blazer and hit the town.

Spur of the Moment or Just Because

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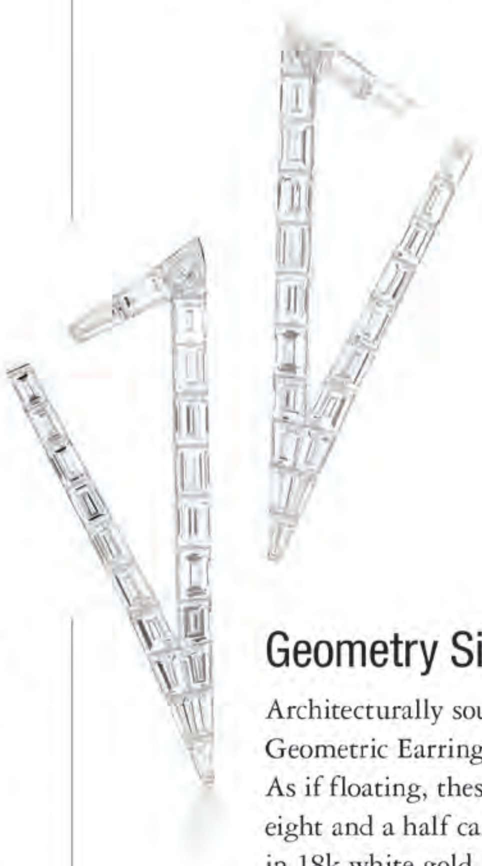


Geometry Simplified

Architecturally sound and shimmering, Lugano's Invisible Geometric Earrings beam light with each turn of the head. As if floating, these bespoke wonders suspend more than eight and a half carats of emerald cut diamonds outlined in 18k white gold.

LUGANO® DIAMONDS

An experience as remarkable as our collection

We welcome you to view our stunning collection at the Lugano Diamonds Grand Salon located at 620 Newport Center Drive, Suite 100, Newport Beach, and our additional locations in Aspen and Palm Beach. Please call 866.584.2666 or email info@luganodiamonds.com for more information.

Why Your Intellectual Property Counsel Should Understand Your Business

By Jared Braithwaite and Paxton Lewis

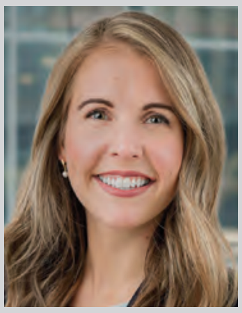
Intellectual property rights do not—and should not—exist in a legal vacuum. The value of those rights is not inherently derived from simply owning a legally recognized, intangible asset. Rather, the value of IP rights derives from exclusivity, which provides strategic opportunities to obtain market advantages over competitors and to protect the long-term success of a business. Thus, there is an inherent and substantial overlap between a business's IP rights and its commercial success, and there is the growing percentage of businesses whose IP rights make up a significant portion of their value. Despite that overlap, a business's IP and general business strategies are often developed independently. That approach may miss opportunities to exploit a business's IP to capture the full value of those assets in the marketplace.

IP rights themselves represent marketplace catalysts that open channels of opportunity to protect or gain a competitive advantage. And exploitation of those opportunities increases the value of IP rights and consequently the value of a business. For example, a business's patented method to improve a product's quality adds value by creating consumer demand for the improved quality that results from the patented method and by ensuring exclusivity and prohibition against competitors using the patented method. Further economic value increases by building a reputation around the quality of products using additional IP rights—such as design patents, trademarks, and trade dress—that encourage consumers to associate certain symbols or designs with the improved product. But capital expended on such IP rights for the exploitation of one product depends on several factors, including the nature of the product, competitive nature of the industry, consumer demand, and business objectives. Thus, businesses should consider how they will benefit from acquiring IP rights as part of an overall legal and general business strategy.

Those same factors should likewise be considered when determining how to enforce IP rights against competitors. While litigation is always an option, that does not necessarily mean it is the best option. The burden and cost of litigation can be significant. But other factors, such as the long-term effects litigation may have on customer relationships, may also deter pursuing litigation. Thus, it is important for IP attorneys to understand a business as a whole in order to develop an enforcement strategy that enhances a business's overall value while protecting its IP rights.

An optimal IP strategy should consider a holistic approach that extends beyond myopic legal analysis and accounts for the unique value that IP rights offer individual businesses. To do that efficiently and successfully, businesses and their IP counsel should work together to understand the relationship between business objectives, the nature of the relevant industry, and the available IP protection mechanisms—traditional and otherwise—that will result in the growth according to the business objectives.

Jared Braithwaite, a partner in the Irvine office of Maschoff Brennan, and is an experienced litigator in patent, trademark, copyrights, unfair competition, trade secrets, and other matters relating to business contracts.



Paxton Lewis is a litigation associate at Maschoff Brennan.

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ATTORNEYS AT LAW

McCune Wright Arevalo, LLP Recalls 2010 $203 Million Class Action Verdict Against Wells Fargo, Led by Partner Richard D. McCune

McCune Wright Arevalo, LLP, always seeks justice on behalf of his clients who have been victimized by unscrupulous practices. In the mid-2000s, a working college student who was struggling financially approached Founding Partner Richard D. McCune for help; she was ensnared in Wells Fargo's overdraft profit scheme which inflated the number of overdraft fees charged consumers who chose to entrust their money with the bank.

Through the scheme – which was engineered to increase the bank's profits from overdraft fees, which were generally $30 or more per fee – the bank changed the way that it posted and deducted daily transactions from a customer's account such that the customer would incur an inflated number of overdraft fees if they accidentally overdrafted their account. For example, if a customer had ten transactions on a given day, and only one of which might have incurred an overdraft fee under the system of posting the transactions in the order they occurred, the bank's system worked so that the transactions would be processed high-to-low, an order guaranteed to maximize the number of overdraft fees on that day, and to charge fees on transactions even though there was money in the account to pay the transactions.

The bank also had practices that made it very difficult for the customers to know when their account was overdrafted, including rather than declining the transaction that would cause the overdraft, the bank would authorize the overdraft without the customer being notified at the point of purchase it was going to cause an overdraft. This became known as the $40 cup of Starbucks coffee.

Through Richard's actions in bringing this class action, the bank's fraudulent business practices were brought to light in federal court and $203 million was recovered for 1.14 million California consumers injured by the practices instituted at Wells Fargo. This class action also directly resulted in a Court order forbidding Wells Fargo Bank from any further misrepresentation of its overdraft posting process.

Richard D. McCune has over 30 years of experience in representing plaintiffs throughout the United States, California and Orange County in class actions, product liability, catastrophic personal injury and business fraud cases. Richard has also been involved in numerous settlements and verdicts that have generated over one million dollars for individual clients. MWA's Orange County office is located in the prestigious Boardwalk in Irvine. There, Richard is accompanied by some of the highest caliber attorneys in Southern California. This office primarily focuses on representing mid-sized businesses in commercial litigation cases having claims for damages of over $5 million but desire a contingency fee arrangement over an hourly fee to allow clients to monetize their litigation assets. You pay us only if we win. Contact us today for a free consultation by calling **(949) 326-9300** or visit **McCuneWright.com.**

McDermott Will & Emery

China Attempts to Block U.S. "Long Arm Jurisdiction"

With the increased trade tensions between the U.S. and China, much has been written about tariffs, trade deficits, and altering supply chains. Yet the fact remains that many U.S. companies do business in China either directly or through subsidiaries or joint ventures. These companies should be aware of the International Criminal Judicial Assistance Law enacted with immediate effect on October 26, 2018 by the Peoples Republic of China (the "ICJAL").

The ICJAL is considered to be a blocking statute designed to limit or block the ability of foreign criminal authorities to obtain documentary and testimony evidence from China. The statute appears to be a direct response to the exercise of long arm jurisdiction by U.S. authorities — such as the Department of Justice ("DOJ") — against Chinese businesses, individuals, and those doing business in China. Interestingly, just a few days after the ICJAL took effect, DOJ's "China Initiative" was announced by then-Attorney General Jeff Sessions on November 1, 2018. Whether or not this was a coincidence, the fact remains that U.S. anti-corruption enforcement laws and policies may now directly conflict with Chinese law, with U.S. businesses caught in the middle.

So what does the ICJAL mandate? It applies in situations both where the PRC requests criminal assistance from another country or where a foreign country requests criminal assistance from the PRC. The statute sets out specific procedures required to obtain approval from the relevant Chinese authorities.

The ICJAL has potential implications for those doing business in China because of its broad and quite comprehensive definition of assistance which includes investigations and evidence collection, witness testimony, and confiscation of illicit gains. The statute grants the Chinese authorities broad discretion in determining whether to approve or deny a request for assistance. Moreover, while the statue uses the term "criminal" proceedings, the determination of whether a foreign country's proceeding is "criminal" in nature is a matter the Chinese authorities could construe differently than, for example, the United States. Thus, while all might agree that a DOJ request arises in the context of a criminal proceeding, the Chinese might well view an SEC request the same despite the SEC's limited jurisdiction to bring only civil actions.

To date, there have been no publicized matters in which the ICJAL has been invoked in response to a U.S. regulator's or agency's request for information from a company or individual in China. Certainly it will come into play in current or future U.S. investigations.

Statutes like the ICJAL highlight the need for seasoned and knowledgeable counsel to advise a company embroiled in a cross-border investigation on appropriate steps to be taken both in China and the U.S. during each phase of the investigation. MWE and its China practice, MWE China, are well-positioned to provide this advice and counsel. Both have experienced former prosecutors and regulators on the team who can provide the insight needed to successfully navigate and conclude a government inquiry, be it of Chinese or U.S. origin.

Mike Piazza

Mike Piazza is a Co-Chair of McDermott Will & Emery's SEC Enforcement Practice and is a resident in MWE's Los Angeles and Orange County offices. His practice focuses on securities and white collar litigation, accounting liability matters, and complex commercial litigation. He regularly handles the defense of individuals and companies faced with allegations of wrongdoing asserted by U.S. and foreign regulators and criminal authorities. Mike also focuses on FCPA compliance matters, from risk assessments and building an effective global compliance program to leading internal investigations into potential corrupt activities within a company.

New Employment Laws for 2020

By: James J. McDonald, Jr., Fisher Phillips

McDONALD

The California legislature was very busy this year erecting new challenges for the state's employers. Here are the most significant new laws enacted this year:

Independent Contractors. AB 5 codified last year's *Dynamex* decision by the California Supreme Court and extended it to apply to most issues arising under the Labor Code, unemployment compensation and workers' compensation. *Dynamex* imposed the "ABC" test for proper classification of independent contractors that makes it almost impossible to qualify workers as contractors. AB 5 creates numerous exemptions from the *Dynamex* test for various professions and businesses that can still apply the old and more flexible *Borello* test. Those excepted from *Dynamex* include licensed insurance agents, physicians, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, accountants, private investigators, securities brokers, investment advisors and direct sales salespersons. Also excepted are other professional services providers who operate independent businesses such as marketing consultants, human resources consultants, travel agents, graphic designers, grant writers, fine artists, IRS enrolled agents, photographers, photojournalists and freelance writers, editors and cartoonists. Licensed estheticians, electrologists, manicurists, barbers and cosmetologists are exempt if they meet certain criteria. Certain business-to-business contractors and referral agencies are also exempt, but "gig economy" companies are *not* exempt.

Mandatory Arbitration Agreements. AB 51 prohibits employers from requiring applicants and employees to sign arbitration agreements as a condition of employment, continued employment, or the receipt of any employment benefit. Voluntary arbitration agreements, as well as mandatory arbitration agreements signed before January 1, 2020, will remain enforceable but AB 51 prohibits retaliation for declining to sign an arbitration agreement so employers will have to show that agreements signed in the new year were signed voluntarily. It is widely thought that this law will be held by the courts to be pre-empted by the Federal Arbitration Act but it will take some time for the legal challenge to work its way through the courts.

Longer Statute of Limitations. AB 9 extends the statute of limitations for claims of harassment, discrimination and retaliation from one year to three years. This will make it likely that stale claims will be filed that will be difficult to defend in the absence of thorough documentation. Therefore, all employment decisions such as hiring, promotions, demotions, discipline and termination will need to be well documented. Investigations of workplace misconduct, including harassment complaints, will need to be well-documented too, including via signed witness statements that can be used to jog memories years later. Similarly, the interactive process of determining a reasonable accommodation of an employee with a disability and all medical leaves will also need to be thoroughly documented.

No "No-Rehire" Provisions. AB 749 prohibits "no rehire" provisions in settlement agreements that would bar a person from obtaining future employment with the company just sued, or with any parent, subsidiary or affiliate of that company. The prohibition only applies where a claim or lawsuit has been filed, so these provisions might still be lawful in severance agreements where there is no pending dispute. The prohibition does not apply where the employer has made a good faith determination that the employee engaged in sexual assault or sexual harassment.

Expanded Lactation Accommodations. SB 142 dramatically expands the requirements for providing lactation accommodations. Employers must provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for her infant child each time she needs to do so. Employers additionally are required to provide the employee with a room or place, other than a restroom, for her to express breast milk in private. The lactation room or location must be in close proximity to the employee's work area, shielded from view, and free from intrusion while the employee is expressing milk. In addition, the lactation room or location must be safe, clean, and free of hazardous materials. It must contain a surface on which to place a breast pump and personal items, as well as a place to sit. It must have access to electricity needed to operate an electric or battery-powered breast pump. There must also be access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace. Employee handbooks must contain a specific policy regarding employees' right to lactation accommodations.

Discrimination Based on Hairstyles. SB 188 prohibits race discrimination based upon hairstyles. Employers therefore may not prohibit hairstyles such as braids, locks and twists.

Application of Consumer Privacy Law to Employers. AB 25 exempts employers from certain aspects of the California Consumer Privacy Act, at least temporarily. However, employers will still have to notify applicants and employees, by January 1, 2020, regarding which categories of personal information they collect and the purposes for which they do so.

Gun Violence Restraining Orders. AB 61 allows employers and co-workers (with their employer's approval) to obtain a gun violence restraining order from a court against an employee upon a showing that the employee poses a danger to him- or herself or others. Such an order would prohibit the owning or obtaining of a firearm. Previously only family members or law enforcement could obtain such orders.

Penalties for Late Wage Payments. AB 673 allows employees to file claims with the Labor Commissioner for penalties against employers for not paying wages on time.

Extended Deadline for Harassment Training. SB 778 is the only good news from the legislature this year. It postpones the deadline for providing harassment training to non-management employees and to management employees of smaller employers to January 1, 2021. It also states that employers that provided such training in 2019 need not repeat the training again until two years later.

The legislature is likely to be as busy next year as this year. Topics expected to be in focus include more paid sick days, potential limits on drug testing for marijuana, and predictability of employee work schedules. More industries will lobby for exemptions from *Dynamex*, and the legislature will likely further attempt to undermine arbitration of employment disputes. With a lack of balance of power in the legislature and a governor more willing to sign groundbreaking employment laws than his predecessor, employers should not expect much good news to be coming from Sacramento any time soon.

James J. McDonald, Jr. is managing partner of the Irvine office of the national labor and employment law firm Fisher & Phillips LLP. He is author of the book, *California Employment Law: An Employer's Guide*, published by the Society for Human Resource Management.

RUTAN

RUTAN & TUCKER, LLP

Issues in the Enforceability of Cannabis Contracts

There have been many challenges to the enforceability of contracts related to the cannabis industry. Given that cannabis is illegal at the federal level, parties to cannabis contracts face challenges in drafting contracts to ensure enforceability. Though California passed AB 1159 which, among other things, provides that compliant commercial cannabis activity is a lawful object of a contract and not against public policy, parties to cannabis contracts should still proceed with caution when drafting contracts.

There are many different types of contracts that cannabis companies may enter into such as management agreements, employment agreements, LLC agreements, leases, and acquisition agreements. This article will discuss generally some issues surrounding enforceability of cannabis contracts and will list some current best practices.

As an initial matter, parties to cannabis contracts should strongly consider always including choice of law and venue provisions. Further, parties should strongly consider making the choice of law and the venue be where the business is licensed and also consider excluding federal courts as a potential venue to litigate disputes since federal judges will not hear cases to enforce contracts regarding an illegal substance. As a practical matter (and to avoid disclosing sensitive information in court), arbitration may be the most practical dispute resolution avenue.

Even though a contract may be governed by state law, parties should still address federal law. For instance, one party may fear that the other may try to use federal law as a defense to a breach of contract since the contract itself is illegal under federal law. To address, parties should consider adding express language providing that federal law will not be a defense to a breach of the contract. Additional considerations related to federal law are discussed further in this article.

Due to specialized issues that arise in cannabis rules and regulations, there may be unintended issues arising in contracts. For instance, in California, “owners” or “holders of a financial interest” of a cannabis business may need to be disclosed to the State of California, disclosed on the license, fingerprinted, and subject to a background check. If an employment agreement (or any agreement for that matter) contains a payment provision based on royalties, share of revenue, or commissions, a person receiving such payments may inadvertently be classified as a holder of a financial interest of a cannabis business.

Classification as an “owner” is not only dependent on having a financial interest. Participation in the control or direction of a cannabis business could cause the party exercising that control to also be classified as an “owner” of the cannabis business and, thus, may be subject to the previously mentioned requirements. A common example of a party which may be construed as an “owner” is an investor with customary investor protections and veto rights typically negotiated by investors generally.

As another example, cannabis companies often put a significant amount of investment in equipment. In their lease agreement, they should consider whether the landlord should get possession of fixtures or have a right of entry to any facilities.

Another basic provision parties should consider adding is one that addresses compliance with local and state laws, rules, and regulations. For example, if one party to a contract is a “plant-touching” entity, the other party should require that the plant-touching entity represent and warrant that it has obtained all approvals, permits, and licenses to operate its business, that it will timely comply with all state and local rules and regulations (which can include timely filing of certain reports, payment of taxes and fees, and so on), and that it will maintain good standing. If a party to a contract requires certain information from, for example, suppliers or vendors, it should consider requiring the other party to provide copies of the relevant documents. A plant-touching party should agree to obtain any additional licenses or permits as applicable law and rules change. It would behoove the parties to also negotiate for reasonable audit rights in order to confirm each other’s compliance with law and other matters and for the right to receive notice if the other party receives any notice of a material violation, suspension, or cancellation of any permit to operate a cannabis business.

It also almost goes without saying that parties need to recognize that the rules applicable to cannabis are constantly changing. Therefore, parties should strongly consider adding provisions that enable the parties to negotiate an amendment to the contract due to changes in cannabis law, changes in federal enforcement priorities, or if terms are deemed illegal by state or local courts or government agencies. Further, if the parties agree to such provisions, consideration should be given as to who determines whether an amendment is necessary and whether an amendment should be entered into if it is *required* or merely *advisable*. If the parties are unable to agree on an amendment, the contract should also allow either party to terminate the agreement.

In addition, despite the parties’ best efforts, there will almost always be ambiguities in language. Another consideration that parties often neglect is that the agreement should be interpreted to ensure compliance. This can go a long way to resolve differences of interpretation between the parties.

No relationship lasts forever. Parties to cannabis contracts should consider adding exit options to their contracts in case, among other things, federal enforcement priorities change such that a party is in violation of civil or criminal law if it continues its obligations under the contract. The contract should also allow a party to terminate if state or local laws change such that performing under the contract violates law. In addition, it is worth considering adding language that upon the occurrence of certain events (such as a crackdown by a federal agency), then the contract is automatically terminated.

An interesting and novel issue is calculating damages. Because the industry is in its early stages, calculating damages is very difficult. One approach taken by some attorneys is to add a liquidated damages clause, but there are issues to address if taking that approach. Consulting with an attorney is critical.

A non-legal issue that often arises in the cannabis industry is that the parties on opposite sides of a contract may have significantly different attitudes toward conducting business. Without indulging too much into stereotypes, cannabis operators may have less experience with negotiating deals than investors. Operators may conduct business informally on “handshake” deals. Investors, on the other hand, typically have much more experience negotiating complicated agreements, working with attorneys, and so on. In addition, investors may view cannabis businesses from a purely opportunistic perspective, while some operators may have much more emotional attachment to the business and industry. This dynamic, of course, may reveal itself in negotiations and throughout the business relationship.

There are other considerations and provisions that one would be advised to consider in a cannabis contract. This article discussed a few of these issues, along with some current best practices. As the industry and the law evolve, new practices will emerge and, hopefully, a standard and customary practice will also develop.

Mohammed Elayan

Mohammed Elayan works with individuals and companies on a variety of transactions, across multiple industries, including software, healthcare, manufacturing, technology, and retail. He advises on mergers & acquisitions, financings, commercial and licensing agreements, corporate governance, and entity structuring. Mohammed can be reached at (714) 338-1865 or melayan@rutan.com

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Embezzlement: The Role of CPAs in Forensic Investigation

by Ryan Nguyen, CPA, Senior Forensic Manager, Smith Dickson CPAs

Embezzlement can be defined as the act of theft or misappropriation of funds belonging to an employer which have been placed in the trust of an employee (typically someone in a company's financial department). Embezzlement is a type of financial fraud and is usually is a premeditated crime, performed methodically and cautiously to conceal the theft. When successful, embezzlements may continue for many years without detection.

How can your business detect fraud?
It is important to identify potential financial fraud as quickly as possible in order to limit damages. Understanding how it happened to others can help. The following is a recent engagement in which Smith Dickson provided forensic accounting services.

In this matter, the family-owned business employed a controller who over the years became a trusted member of the management team. She reported to the owner, but supervision was minimal and, as is the case in many smaller companies, there were minimal checks and balances or segregation of duties in place. She had the complete confidence of the owner and decided to take advantage of the close relationship and total access to company funds.

It took years but the scheme finally came under suspicion when the owner uncovered anomalies in the accounting records that caused them to suspect foul play by their controller. Smith Dickson was then hired to provide forensic analysis of expenditures, disbursements, and supporting invoices.

Our forensic investigators reviewed several years of accounting records and found indications of fraud, resulting in the identification of over $2 million that was misappropriated between 2011-2017. It was ultimately learned that the controller created false invoices from legitimate vendors in order to mask her embezzlement. Instead of issuing payments to vendors, she wired money from the company's accounts into her personal bank accounts and credit cards. In the beginning she started with small transactions but became bolder in the course of time.

At the company's request and their legal counsel, Smith Dickson turned over the results of our investigation to the Los Angeles County District Attorney, White Collar Crime Division and the case was subsequently investigated by the Los Angeles Police Department. Eventually, the controller pleaded no contest to two felony counts each of grand theft by embezzlement and filing a false income tax return. She also admitted a special allegation that she engaged in a pattern of related felony conduct that resulted in the loss of more than $500,000. She was sentenced in Los Angeles County Superior Court to 10 years in state prison.

Forensic Accounting Support
At Smith Dickson, our forensic accounting specialists have logged thousands of hours of forensic accounting, deposition and trial experience, both as expert witnesses and consultants in matters ranging from economic damages to fraud and embezzlement.

Ryan Nguyen
Ryan Nguyen, CPA, is a Senior Forensic Manager at Smith Dickson, CPAs. The firm's Litigation Support Services include forensic accounting, expert testimony, intellectual property, fraud and embezzlement, real estate, and trust and estate disputes.
www.smithdickson.com, (949) 553-1020.

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How to Defend Against Data Breach Claims under the CCPA

California's Consumer Privacy Act ("CCPA") becomes effective January 1, 2020, and confers for the first time on California residents the right to sue for damages if their personal information is the subject of a data breach. The CCPA's new right allows class actions with potential recovery of $100 to $750 per person. This potential exposure could be the last nail in the coffin for a California business who suffers a data breach, and may already may be dealing with regulatory, reputational, and business continuity concerns.

The CCPA does not strip businesses of all defenses. A business's implementation and maintenance of reasonable security procedures and practices appropriate to the nature of the information is it's first line of defense. "Reasonableness" suggests a flexible, but uncertain standard. A business must have written procedures and data protection practices which are implemented, tested, and appropriate to the nature of the data, and a designated person responsible for cyber security and for instilling a culture of data privacy.

The second line of defense is the CCPA's 30-day safe-harbor. Before suing for statutory damages, the business must be given 30 days to cure the defect. If a cure is possible and completed, and the business gives written confirmation that it cured and it will never happen again, the consumer cannot sue. History demonstrates that many will still sue and, courts will struggle with the scope of the cure or whether the cure was possible. The 30-day safe harbor, at a minimum, reinforces the need for a business to have proper and tested cyber security and data beach policies and practices mandating that the business act quickly.

A data breach creates enough havoc with a business's reputation and continuity without the liability that the CCPA can impose. Data breaches still happen even with reasonable, tested security procedures in place. But, a business must actually have proper and tested procedures in place to avail itself to these defenses.

***Genevieve Walser-Jolly** is a partner at Severson & Werson and Author of the California Continuing Education of the Bar's Treatise on the California Consumer Privacy Act.*

jackson lewis.

Are Arbitration Agreements Still Viable for Employers in California?

By Jonathan Siegel

Despite Governor Gavin Newsom signing a law (Assembly Bill 51) purporting to prohibit mandatory arbitration agreements beginning January 1, 2020, arbitration agreements might still be a viable option for employers to help deal with workplace claims.

Many states have passed such legislation, but these laws are subject to challenge under Federal Arbitration Act (FAA) preemption principles.

Under Assembly Bill 51, California employers might be prohibited from requiring employees to sign new mandatory arbitration agreements on disputes arising under the California Fair Employment and Housing Act (FEHA), which includes claims for harassment, discrimination, and retaliation based on protected categories, and for claims under the California Labor Code.

The new law prohibits employers from conditioning employment or other employment-related benefits on an employee's consent to waive rights, forums, or procedures for alleged violations of the FEHA or Labor Code. It also prohibits employers from retaliating or discriminating against employees or applicants because of their refusal to waive any rights, forums, or procedures. It makes clear that even voluntary opt-out clauses in mandatory arbitration agreements will not be enough.

The **new law is of limited application in three important ways**. First, it applies only to contracts executed, modified, or extended **on or after** January 1, 2020. Second, and perhaps most important, the new law carves out arbitration agreements, mandatory or voluntary, that otherwise are enforceable under the FAA. In other words, if an arbitration agreement is valid under the FAA, the new law might will not operate to invalidate it.

Third, even without the express FAA carve-out language, the new law is of limited impact because it arguably is subject to FAA preemption. Once challenged, the California law may face a similar fate as other state laws that have fallen under FAA preemption.

Employers that have employees in California should review their arbitration agreements to ensure their validity under the FAA and consider their options given the new law.

Jonathan Siegel is a Principal in the Orange County office of Jackson Lewis P.C. Mr. Siegel provides advice and counsel in all aspects of labor and employment law, including wage and hour law, reduction in force, WARN Act, discipline, leave management, harassment and discrimination issues. He also defends employers regarding different varieties of wrongful termination and discrimination claims. He practices before the Equal Employment Opportunity Commission, National Labor Relations Board, state and federal agencies and courts. He can be reached at Jonathan.Siegel@jacksonlewis.com or (949) 885-1360.