

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Meet the New Boss . . . California's New Rules of Professional Conduct

New Rules of Professional Conduct took effect on November 1. The new rules have new numbers, which correspond more closely to the ABA's Model Rules of Professional Conduct, but they retain the principal differences between California law and the ABA Rules and they introduce some new differences. We were not a Model Rules jurisdiction before the revision, and we are not a Model Rules jurisdiction now.



David McGowan

The most salient aspects of the new rules may be divided into three categories: New substantive provi-

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State Court Funding: The Good News, the Bad News, and How You Can Help

New money is flowing into the California state court system for the first time in a long time, although precious little will be available to improve the civil justice system. On the other hand, with help from the bar, Superior Court judges are committed to enhancing efficiency in civil proceedings, which should in turn benefit counsel as well as clients.



Judge Patricia Lucas

1. The Good News

The good news about state court funding is that, in this 2018-19 fiscal year budget and for the first time in about ten years, the Legislature and the Governor have approved critically needed new funding for the judicial branch: approximately \$150 million for court operations and another \$32 million for courthouse construction. Moreover, there's good reason to believe that we've arrived at an inflection point and that this positive change will hold true for at least one more fiscal year. The 2019-2020 budget proposed by Governor Newsom in January, while of course still subject to legislative approval, holds steady on court funding.

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sions, renumbered deviations from ABA norms, and uncontroversial additions.

New Substantive Provisions

After years of debate, ethical screens are permitted under new California Rule 1.10(a), which allows screens to rebut the presumption that every lawyer in a firm knows what any lawyer in a firm knows. Screening is limited to personal interest conflicts or conflicts arising from a lawyer's work at a prior firm, and screening only works if the conflicted lawyer "did not substantially participate" in the same or a substantially related matter at a prior firm. Whether participation was substantial is a multi-factor inquiry designed to discover how close the conflicted lawyer was to the relevant matter and how much confidential information they were likely to have received.

Screening also is endorsed by Rule 1.18, which addresses duties to prospective clients. Confidential information disclosed by a prospective client is subject to the confidentiality rules discussed below, which means confidences learned from prospective clients can create conflicts that lead to disqualification. Rule 1.18(d) allows for screening lawyers who received such confidences, but only if the screened lawyer takes "reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client." A case decided using the new rule (though before it formally took effect) construed this requirement strictly. *Skybell Technologies, Inc. v. Ring, Inc.*, SACV 18-00014 JVS (JDEx) (September 18, 2018) ("The Rule explicitly contemplates that the attorney take some type of affirmative step or act to limit or avoid exposure to more information than is necessary."). *Skybell* confirms that under new Rule 1.9(c), which forbids the use of former client information unless it has become generally known, and which the court used to inform its analysis under Rule 1.18, information may be confidential even if it could be acquired from public sources and even if it would be produced in litigation. In short, screening is now part of the rules but it should not be considered a silver bullet against conflict assertions. Facts still matter.

Rule 8.4.1 effectively absorbs existing laws against discrimination into the Rules of Professional Conduct. California's old rule forbid knowing discrimination in the management or operation of a law practice, but required a finding of unlawful discrimi-

nation as a predicate to disciplinary action. Rule 8.4.1(a) extends to client work, not just law practice management, and forbids unlawful harassment, discrimination, or retaliation based on a comprehensive list of characteristics, with no need for a predicate finding of a violation. Rule 8.4.1(b) pertains to law firm operations, and provides that lawyers shall not commit unlawful harassment, discrimination, or retaliation, or knowingly permit such conduct, with "knowingly permit" being defined effectively to require lawyers to advocate corrective action when they know such activity has occurred. Rule 8.4.1 extends beyond the ABA's anti-discrimination Rule, 8.4(g), which has been rejected by several states and adopted only by one: Vermont. (Several other states have non-ABA rules relating to discriminatory or harassing conduct.) Some state attorneys general and some academics have opined that the ABA Rule 8.4(g) is an unlawful "speech code" for lawyers. These criticisms are theoretically unsound and overstated as a practical matter. Rule 8.4.1 will provide a useful test of predictions that the sky will fall if the ABA Rule is adopted. (It won't.)

New Rule 4.3(b) may be a significant change. It provides that in communicating with an unrepresented person a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know may not be revealed "without violating a duty to another or which the lawyer is not otherwise entitled to receive." This provision is not part of the ABA rules, and it goes beyond existing doctrine.

Everyone knows it is risky to interview a witness who might disclose privileged information, because acquiring privileged information may lead to disqualification. But historically the prohibition in such cases arose from a legal rule of confidentiality, such as the attorney-client privilege or work product doctrine. Contractual obligations, such as the terms of the NDA most former employees will have, were not enough. The most analogous general rule, Section 102 of the Restatement (*Third*) of the Law Governing Lawyers, states that a lawyer may not seek information protected by a duty of confidentiality "imposed by law," and comment c to that rule states that it does not extend to "confidentiality duties based only on contract" And ABA Rule 4.4(a), which California did not adopt, forbids only the use of "methods of obtaining evidence that violate the legal rights of" a third person (emphasis added). Hacking into a computer is such a method; interviewing a former employee is not. The comment to ABA Rule 4.4(a) refers to "privileged relationships, such as the attorney-client relationship," not to garden-variety employment agreements.

Under new Rule 4.3(b), you may be subject to disci-

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pline if you interview an unrepresented third party witness and seek to discover even unprivileged information you should know would be covered by an NDA. Because most well-advised companies use NDAs, and because they are quite broad, this rule could impede informal investigation significantly. I can easily see it leading to disqualification motions and motions for sanctions. Subpoenas are always an option, of course, but they introduce filters in the form of counsel for the former employer, and they do not help establish the factual foundation necessary to get the case on file in the first instance. The rule does not apply to represented parties, of course, so one would always have the option of retaining a lawyer for the former employee (conforming to Rule 1.8.6 regarding third party payors) and proceeding from there, but it remains a material change nonetheless.

With Rule 1.5(c), California joins the ABA in condemning contingent fees in criminal representation or divorce cases. In my view, the rule has nothing to commend it with respect to criminal cases, but it does bring us into line with the ABA Rule. Unlike Rule 4.3(b), it is new to California but not new in general. New Rule 1.7(b) extends current client conflicts to situations in which clients may not be across the table (or the caption) from each other but in which there is a significant risk that the lawyer's ability to represent one client is materially limited by a duty to another client. This has long been the ABA Rule. New California Rule 1.15(b) allows a flat fee to be deposited into a firm's operating account so long as the client is told in writing that the client may require that the fee be placed in a trust account until it is earned and that the client has a right to refund of any amount of the fee that is not earned. This rule provides useful and practical guidance not found in the corresponding ABA Rule. Just remember the mandatory written disclosure.

Renumbered Deviations From ABA Norms

New Rule 1.6 retains California's idiosyncratic confidentiality law. The rule forbids disclosure of information protected by Section 6068(e)(1), which functionally can be understood as all confidential information, subject only to an exception allowing disclosure a lawyer reasonably believes necessary to prevent a criminal act reasonably likely to result in death or substantial bodily harm to an individual. ABA Rule 1.6(b)(1), in contrast, allows disclosure to save life or limb regardless whether a criminal act would be committed. Unlike

California, the ABA thus allows disclosure to prevent State execution of a factually innocent person, and disclosure to allow a lawyer to prevent or rectify client fraud committed using the lawyer's services.

ABA Rule 1.6(b)(7) allows non-prejudicial disclosure of client names to clear conflicts in connection with lateral moves. California's new rule does not, and language in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, 2018 WL 4137013 at *11 n.8, confirms that California has no general exception allowing disclosure to clear conflicts or obtain consent to a conflict. California Rule 1.6 has no exception to allow a lawyer to disclose confidential information to defend against an allegation of misfeasance or nonfeasance, but prior cases created a limited self-defense exception, which presumably continues to be good law. Unlike the ABA rule, California's exception is limited to allegations leveled by clients or former clients, not third parties. *E.g. Solin v. O'Melveny & Myers*, 89 Cal.App.4th 451 (2001).

Perhaps most notably, under ABA Rule 3.3(c) a lawyer's obligation of candor to the tribunal trumps the client's confidentiality right. That obligation includes a duty of disclosure to the tribunal if the lawyer learns that false material evidence has been presented. Under new California Rule 3.3(a)(3), as under the old law, California's confidentiality rule trumps the duty of candor in such a case. (New California Rule 3.3(a)(1) does require a lawyer to correct a misstatement of fact or law the lawyer has made, however.) Similarly, ABA Rule 1.13, governing entity client representation, allows disclosure of confidential information in certain circumstances where ABA Rule 1.6 would not allow disclosure. New California Rule 1.13(c) makes clear that Business & Professions Code section 6068(e) controls entity representation.

With respect to inadvertently transmitted documents, new Rule 4.4 adopts the holding of *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007), and requires that recipient counsel examine the document no more than necessary to determine that it is privileged or work product and then promptly inform the sender. The ABA's Rule 4.4(b) requires prompt notification of the sender but does not explicitly require the receiving lawyer to stop reading. (Though one hopes the risk of disqualification combined with common sense would lead to the same result under the ABA Rule.)

California quirks also persist in new Rule 1.8.5(b)(2), which allows lawyers, after retention, to lend money to a client based upon a written promise to repay the loan. ABA Rule 1.8(e) forbids such loans. California Rule

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State Court Funding

2. The Bad News

Now for the bad news: while \$150 million is not an insignificant sum, it does not approach the amount that has been cut or “borrowed” (and never returned) from the judicial branch: approximately \$1.5 billion. The modest new funding offers little or no relief for the beleaguered civil justice system.

Some of the new funding has been specifically earmarked for certain uses, and cannot be used for general civil cases. In imposing restrictions on the use of the new operations money, the Legislature communicated their priorities: dedicated funding for self-help centers to assist court users representing themselves, and for language access for limited-English-proficiency court users—important priorities for ensuring access to justice.

How will the balance, not specifically earmarked, be used? The portion of the new money consisting of unrestricted discretionary funds will be distributed among the 58 Superior Courts by the Judicial Council, based on recommendations from the Trial Court Budget Advisory Committee and in accordance with the Workload Allocation Funding Methodology (WAFM), based largely on the number of filings in each court. Each individual court will use this operations funding somewhat differently, because restoring what has been cut looks slightly different in each county. Not surprisingly, each court responded differently to the budget cuts based on local resources, local culture, and local needs.

During my two years as presiding judge of the Santa Clara Superior Court, and in particular during my one-year term as chair of the Trial Court Presiding Judges Advisory Committee to the Judicial Council, I participated in many meetings with legislators with the goal of educating them about the impact on their constituents of a decade of budget cuts and underfunding. Courts are people-intensive organizations, with salaries and related expenses amounting to 80-90% of operating expenses. In such a scenario, the only way to deal with chronic cuts is to reduce staffing; no amount of cost-trimming in other areas will suffice. Over the last ten years, nearly all Superior Courts have drastically reduced their staffing, either by layoffs or attrition or both, to approximately 60-70% of 2008 levels. Could you do the same amount of client work if your office had 6 people when you used to have 10?

By the same token, the courts were unable to maintain the level of public service which court users

expected and deserved. Backlogs ballooned, services were cut, lines got longer, and phones were not answered. Courthouses were closed, case types were consolidated, and access to justice was compromised. Particularly in the Bay Area courts, the driving force behind reduction of services (for example, increased wait time for hearing dates) was not a limitation on judicial resources, but rather the lack of a clerk to staff a courtroom or to process a filing in the clerk’s office and set a hearing date.

The pain of the budget cuts has not been evenly distributed. Because of constitutional and statutory requirements in criminal filings, juvenile delinquency and dependency cases, and family court disputes, the civil division was nearly always the first to feel the cuts and the last to get relief when staffing and services are restored. As a practical matter, little if any of the new operations funding will benefit unlimited civil cases in which the parties are represented by counsel (i.e., the province of ABTL). If the first increment of new funding might be enough to improve either the process for getting a domestic violence restraining order or for getting a trade secret restraining order—but not both—chances are the resources will be focused on the former and not the latter.

While the new funding may provide civil backlog relief in a few courts, some of the changes in the civil justice system that have come about during the years of budget cuts are unlikely ever to be reversed. Dedicated state funding for complex civil departments is gone, and few courts have the resources, even with limited new operational funding, to restore the practice of providing a court-employed court reporter in every proceeding in every civil case. What you see now in civil court operations is likely to be the new normal.

3. What Can ABTL Members Do to Help?

First, participate in legislative advocacy. ABTL conducts its own legislative outreach, and organizations such as the Bench/Bar Coalition, ABOTA, and the Open Courts Coalition likewise play an important role ensuring that the legislators hear from all those affected by inadequate court funding.

Let your legislators know that you and your clients support increased court funding, and in particular, unrestricted discretionary operational funding. Legislators need to understand the hazard of restricted funding. Although the Legislature understandably wants to advance its own priorities by specifying particular uses of court funding, a requirement that operational funds be used only for stated purposes deemed desirable by legislators results in unfair and possibly

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JOSEPH MAUCH

On TRADEMARKS

A smart business owner launching a new business or product will investigate to ensure that no one is using a similar brand on a similar good or service. An even smarter business owner will engage an attorney to conduct that research and consider seeking a trademark registration for the new name or brand.

The importance of such a “clearance search” should be well-known to the ABTL community, regardless of your particular knowledge of trademark law. Every client operating a business should ensure that its trademarks are not infringing, and not being infringed by, other trademarks. Many, however, never conduct such a search. In my practice, I have heard every excuse for this failure, from avoiding attorney fees to believing that a brand consultant had already performed a search when it recommended the new name. While I understand where these reasons are coming from, none of them justify not doing a clearance search. Attorney fees and costs for such a search are usually quite reasonable, and they are nothing compared to the costs of a lengthy infringement dispute or, even worse, having to rebrand a product or company.

Even those business owners that do ensure pre-launch that their proposed trademark is clear often make the mistake of failing to monitor the field of trademarks as time goes on. These later searches can be incredibly important. Even a so-called “senior user” of a trademark can have its trademark rights affected by one or more “junior users” of the same or similar trademark on a similar good or service. For example, a toaster company using the brand STRAWBERRY may rightfully believe it has strong trademark rights after running a clearance search and determining that no one was using STRAWBERRY in the home appliance space, but if one or more other companies start using STRAWBERRY on their appliances in the intervening years this could weaken the toaster company’s trademark and make it difficult to stop those infringers, especially if the other use goes on for a long time. In short, you want to stop infringement as soon as possible, and stopping infringement requires knowing about it.

Many business owners are confident they will learn

about any problematic brands without formalized monitoring, but this is not always the case. In this modern world of serial entrepreneurs and startups, there are so many new companies, products, and services in so many different industries hitting the market every day that it is difficult if not impossible to protect your mark without a more formal process. The recent proliferation of companies and brands in the blockchain and cryptocurrency space presents a telling example.

Everyone has heard of Bitcoin, but it is just the tip of the iceberg of new ventures involving blockchain technology. With these new ventures has come an explosion of new trademarks. A search of the Patent and Trademark Office database reveals approximately 2,000 trademark applications or registrations involving the term “blockchain” or “cryptocurrency.” And these are just the ones that took the time to apply for a registration; many, perhaps most, have not.

Why does this matter? Besides the fact that studies show mentioning blockchain in this column will make you more likely to read it, this proliferation of new companies and brands matters a lot because with it comes a host of trademark infringement issues for both the new companies and existing ones. The issues that arise with any spate of trademark applications (a few years back it was “cloud applications”) are compounded with blockchain brands because one of the key attributes of blockchain technology is the way it can be used across a wide array of industries. The new blockchain companies are thus incentivized to define their services broadly (and, often, nebulously), while existing companies are left to determine whether a similar trademark related to blockchain technology presents a problem. For example, does STRAWBERRY BLOCKCHAIN used in connection with blockchain software applications for smart appliances infringe on our toaster company’s trademark?

In my own practice, I have dealt with — on both sides — six different trademark disputes involving blockchain companies in just the last few months. My existing blockchain clients, my financial services clients, and my software clients all want to protect their brand from new infringing trademarks, while my new blockchain clients want to ensure they can launch with their preferred brand in a competitive space. Clearance searches and ongoing monitoring don’t resolve these issues, but they certainly help identify them. For this reason, they have been essential to my clients to achieve their branding goals. They should be at the top of the list for your clients as well.

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1.5.1 allows a division of fees (as in a referral fee) where the division is in writing, the client consents in writing, and the fee does not increase solely by reason of the division. ABA Rule 1.5 allows a division only where the division is in proportion to work performed or each lawyer assumes responsibility for the matter. California Rule 5.6(A)(2) continues to forbid any agreement restricting a lawyer's right to practice, whether made as part of a settlement or otherwise. ABA Rule 5.6(b) is limited to settlements.

Lastly, a new California Rule 3.10 forbids any threat to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. There is no ABA counterpart for this rule. New Rule 5.6(b) forbids any offer or agreement not to report a violation of the rules of conduct; Business & Professions Code 6090.5 is to the same effect. California declined to adopt ABA Rule 8.3, which, subject to the confidentiality restrictions of Rule 1.6, requires lawyers to report conduct that violates a rule or calls into question another lawyer's fitness to practice law. One of the purposes of Rule 8.3 is to undercut a lawyer's ability to sell silence, however, so Rule 5.6(b) addresses at least one of the purposes of the ABA rule.

Uncontroversial additions

Some new rules should be uncontroversial. New Rule 5.1 requires that lawyers with management authority ensure that their firm follows practices designed to comply with the Rules and the State Bar Act. Rule 5.1(c)(1) imposes responsibility on a lawyer who orders or ratifies rule-violating conduct, and Rule 5.1(c)(2) imposes responsibility on a lawyer who learns of the conduct at a time when its consequences can be avoided or mitigated but who fails to take remedial action. Rule 5.2 imposes responsibility on subordinate lawyers, but not if the subordinate acted according to a superior's reasonable resolution of an arguable question of duty. New Rule 1.8.2 forbids the use of confidential client information to the detriment of the client, which was a principal of Agency law and common sense before.

New Rule 1.9(b), which in substance tracks the ABA Rule, effectively provides that a lawyer who leaves a firm may rebut the presumption of shared knowledge that applies to lawyers who remain at the firm (and which is the subject of the screening rule discussed above). The rule thus carries forward the holding of *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th

1324 (2001). And new Rule 1.10(b) allows a firm to be adverse to a client of a former lawyer if no lawyer remaining at the firm has confidential information material to the prior matter. It thus carries forward the holding of *Goldberg v. Warner/Chappel Music, Inc.*, 125 Cal. App. 4th 752 (2005).

New Rule 4.1 forbids knowing misstatements of fact or law to third persons, and also requires disclosure of material facts when disclosure is necessary to avoid assisting a criminal or fraudulent client act. The disclosure requirement is subordinate to Rule 1.6, however, and Rule 1.6 has no exception allowing disclosure to prevent or rectify client financial misconduct. California's Rule 4.1 therefore may have little bite, unlike its ABA counterpart. In ABA jurisdictions, Rule 4.1 can combine with Rule 1.6(b), which permits disclosure to prevent or rectify financial harm caused by conduct that used a lawyer's services, to yield a mandatory disclosure requirement.

Finally, of interest to those looking to create or expand a marijuana-related practice, the new rules follow a modest trend of aligning state disciplinary rules with state rather than federal law. Comment six to California Rule of Conduct 1.2.1 states that the rule "permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws . . . even if the client's actions might violate the conflicting federal or tribal law." The comment cautions, however, that "the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict."

Choice of law

Given our variations from other jurisdictions, California lawyers still need to be attentive to the choice of law. Rule 8.5(a) provides that California lawyers may be disciplined in California regardless where their conduct occurs, just as out-of-state lawyers may be disciplined in California if they offer legal services in California. Under Rule 8.5(b), the rules of the jurisdiction in which a tribunal sits govern conduct before that tribunal, unless the tribunal's own rules say otherwise. For conduct outside a tribunal, the relevant rules are the rule of the jurisdiction in which conduct occurred or in which its predominant effect is felt. Rule 8.5 does not carry forward the prior language that required California lawyers to follow the California rules unless "specifically required" by another jurisdiction to do otherwise.

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DOUGLAS DEXTER

CHANDRA ANDRADE

On EMPLOYMENT

This fall, Governor Jerry Brown signed into law several #MeToo-inspired bills that will significantly impact California employers' workplace obligations and the litigation arising from those obligations. This article highlights three features of these new laws with major practical implications for employment litigators entering #MeToo's second year.

First, SB 1300's pronouncement of more pro-claimant standards in sexual harassment suits—including that a single incident of harassment may be enough to survive summary judgment—may induce defendants to focus discovery away from classic summary judgment issues (such as severity and pervasiveness of the claimed conduct) and toward practical trial concerns (such as discrediting the plaintiff's version of events and capping potential damages).



Douglas Dexter

Second, SB 820, prohibiting post-litigation settlement from requiring non-disclosure of facts underlying certain sexual harassment and related claims may induce more pre-filing settlements.

Third, SB 820's restrictions on NDAs and public policy pronouncement favoring publicity of sexual harassment claims may increase plaintiff's use of similar-conduct discovery.

Summary Judgment & Evidentiary Strategy

SB 1300 establishes a strong legislative intent against summary adjudication of hostile environment claims. Its operative provisions include, specifically, that a single incident of harassment may be sufficient to create a triable issue regarding a hostile environment. More generally, SB 1300 advises that hostile environment cases are "rarely appropriate" for summary judgment. Thus, defendants will have reduced confidence in their ability to win summary judgment by arguing that conduct did not rise to the "severe or pervasive" standard—a historically common argument in dispositive motions.

So, rather than focusing on how the alleged conduct was not serious enough even if it did happen, defen-

dants may shift their focus in discovery towards demonstrating that the conduct did not happen at all. Of course, defendants rarely will be able to demonstrate that no material fact exists on this issue, absent video surveillance footage. For trial, such evidence may include contemporaneous witness testimony, or calendar entries negating the plaintiff's account. Defendants may also focus discovery on establishing the harassment was isolated and thus minimally damaging. This may heighten interest, for example, in discovery of plaintiff's social media activity and medical records (or absence thereof).

Absent incontrovertible evidence disproving the plaintiff's account, defendants will need to assess more critically whether to invest in summary judgment at all, or perhaps to pursue only summary adjudication of the non-harassment claims.

Settlement Timing and Strategy

SB 820 will prohibit settlements requiring confidentiality of facts relating to sexual assault, harassment, discrimination, and retaliation claims alleged in a civil or administrative action. Because SB 820 does not affect settlements entered pre-litigation, it may incentivize settlements at the demand letter stage. Employers' concerns may be tempered by SB 820's carveout permitting agreement not to disclose settlement amount.

Also weighing in the parties' settlement calculus will be defendants' aforementioned summary judgment challenges, combined with another feature of SB 1300 denying FEHA defendants fees and costs unless the court finds the action was "frivolous, unreasonable, or totally without foundation," regardless of any Section 998 offer. Harassment defendants thus face a double-whammy: they are denied the tool of a Section 998 offer, and their ability to threaten summary judgment is greatly curtailed.

Indeed, SB 820's early-settlement incentives might stem the growth of administrative agency filings of harassment claims. The EEOC's recently-released data marking the 1-year anniversary of #MeToo revealed that, compared to the prior year, sexual harassment charge filings increased by 13.6% (the first time the number had increased in five years), the number of EEOC-filed sexual harassment lawsuits increased by 50%, and the number of successfully conciliated charges alleging harassment increased by 43%. Yet, under SB 820, plaintiff-side attorneys seeking early resolution may view an administrative filing (triggering



Chandra Andrade

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unintended consequences. That approach fails to take into account the reality, mentioned earlier, that every one of the 58 Superior Courts responded differently to the ongoing budget cuts.

Another potential point of advocacy is to help the Legislature understand that judges and court staff do not have less work just because total filings may have decreased, and that in fact workload has been increased by numerous unfunded legislative mandates. Don't be fooled by the gross numbers: filings do not equal workload, and not all filings are created equal. While filings have decreased in traffic and other infractions (cases which generally resolve with little expenditure of court resources), filings have increased in case types which are far more demanding of court and judicial resources such as mental health and probate, and in some counties, felonies.

Moreover, the Legislature routinely asks the courts to do more, by taking on new functions and conducting new types of hearings not previously required: recent reforms concerning bail and juvenile justice are good examples of this. Rarely is this additional work accompanied by the funding to accomplish it. And of course, in the last decade every cost of doing business has increased for the courts, as it has for everyone else.

Second, participate in state-wide judicial branch governance. You don't have to be a judicial officer to lend your experience and expertise to the process by which decisions are made within the branch, including decisions concerning funding and allocation of funding. Attorneys serve as voting members of the Judicial Council, the governing body of the judicial branch, as well as the numerous advisory committees that formulate recommendations to the Judicial Council. Such service could well be the most interesting and rewarding pro bono commitment you could make to our justice system. Besides, you will gain knowledge and insight that could be helpful to your practice, and you will meet the best and brightest in our state legal system. You might find the Civil and Small Claims Advisory Committee or the Appellate Advisory Committee to be most suited to your experience, but check out the entire list (<http://www.courts.ca.gov/advisorybodies.htm>), find an area of interest, and become involved.

Third, volunteer to serve as a temporary judge at your local court. All courts in the Bay Area, and nearly all courts in the state, have a temporary judge program through which attorneys serve in a variety of judicial roles such as presiding over court hearings and conducting settlement conferences. Your service as a

temporary judge pursuant to California Rule of Court 2.810 et seq., is of great assistance to the court, as it allows judges to manage more cases more effectively. For example, in our Santa Clara civil division, pretrial judges are managing three or four settlement conferences at the same time, but when each one can be supervised by a temporary judge, the judge can allocate time among the conferences to be as effective as possible. While assisting the court, you will also be learning and making new contacts in your legal community. Just check the court's website, and here's the link for Santa Clara: http://www.scsccourt.org/general_info/jo/temp_judges.shtml

Last but not most importantly, conduct your own cases professionally and with respect for the resources of the court system. Any time that good lawyers meet and confer, and litigate their cases thoughtfully, the clients benefit as well as the courts. When you present a complex motion or conduct a trial, keep in mind that the judge has fewer resources than you do. Other than designated complex civil litigation courtrooms, almost no trial judge has a dedicated law clerk or research attorney, and very few judges have a secretary. With limited resources and support, judges work hard to discern the legally correct result, and greatly appreciate advocacy presented in a respectful pedagogical tone, which assists judges in locating and parsing the relevant law. Since judges talk about lawyers almost as much as lawyers talk about judges, such an approach will earn you a reputation as an advocate of integrity, whose representations about the law and the facts can be trusted.

Thank you, counsel, for your patience, understanding and support for our courts of general jurisdiction.

Honorable Patricia M. Lucas is the immediate past presiding judge of the Santa Clara Superior Court.



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Thus, as was the case before, lawyers who appear *pro hac vice* in ABA-based jurisdictions need to follow the local version of Rules 3.3 and 1.6, not California's, and lawyers who make statements whose predominant effect will be felt in ABA-based jurisdictions need to do the same with respect to Rules 4.1 and 1.6. The new Rule would appear to allow federal courts sitting in California to adopt the ABA Rules, or at least specific Rules, such as the ABA's stronger duty of candor to a tribunal, but the author is not aware of any federal court having done so in the past.

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PEGGY OTUM

On ENVIRONMENTAL POLICY

At the Halfway Mark, Environmental Policy and Litigation in California: A Look Back and What to Expect in the Final Years of the Trump Administration

“We’ve got the scientists, we’ve got the lawyers, and we’re ready to fight,” California Governor Jerry Brown vowed in a heated speech about environmental policy one month before President-Elect Donald Trump’s inauguration. Two years later, a look back at the first half of the Trump Administration’s tenure shows that Governor Brown’s words were far from an empty promise. From air, to water, to land, California’s environmental policies have spurred a wave of more than 20 lawsuits pitting the Golden State against the federal government.



Peggy Otum

Climate change stands at the forefront among the most contentious battles between the Trump Administration and State of California. California has taken an active role in leading the charge against President Trump’s decision to withdraw the United States from the Paris Agreement. In response, Governor Brown signed into law Senate Bill 100, which seeks to “meet[] the state’s climate change goals by reducing emissions of greenhouse gases associated with electrical generation.” To accomplish this goal, Senate Bill 100 requires that California obtain all of its electricity from zero-carbon sources by 2045. Governor Brown also issued an executive order calling for the entire California economy to become carbon-neutral by 2045; the Paris Agreement, in comparison, calls for humanity to become carbon neutral between 2060 and 2070.

The Trump Administration, on the other hand, is seeking to curtail California’s ability to regulate carbon emissions within its own borders. In August 2018, U.S. EPA announced that it plans to relax federal standards on auto emissions by revoking a longstanding waiver under the Clean Air Act that empowers California to set stricter emissions standards than the federal government. The California Air Resources Board responded by unanimously passing a regulation requiring automakers to comply with California’s emissions standard to continue selling cars in the state. If the Trump

Administration elects to move forward and revoke California’s waiver, the state would likely sue in response, as it did when the George W. Bush Administration attempted a similar measure in 2007. The Obama Administration dropped the federal challenge to the waiver before the case was resolved.

Litigation between the Trump Administration and California has also focused on the state’s coast and waters. In September 2017, the State of California and the California Coastal Commission, joined by several environmental advocacy groups, sued the Trump Administration after the Department of Homeland Security (“DHS”) issued waivers under Section 102(c) of the Illegal Immigration Reform and Responsibility Act of 1996 (“IIRRA”) exempting all border wall construction projects from federal environmental laws—including NEPA, ESA, and the Coastal Management Zone Act. *State of California and California Coastal Commission v. United States et al.*, 3:17-cv-01911 (S.D. Cal. Apr. 26, 2018). While the California plaintiffs alleged that the issuance of the waivers was ultra vires and unconstitutional on the grounds that IIRRA Section 102(c) only authorized waivers for a narrow set of “barriers and roads under this section,” the Southern District of California found that DHS’ interpretation of IIRRA’s waiver provision as applying to all of the border wall’s “physical barriers and roads” was plausible and granted the United States’ motion for summary judgment. Plaintiffs appealed this decision to the Ninth Circuit, which heard oral argument on August 7, 2018, and has yet not issued its decision. *Center for Biological Diversity et al. v. USDHS et al.*, 18-55476 (9th Cir. Aug. 7, 2018).

California and the Trump Administration have also battled over the management of federal lands in the state. In response to a February 2018 bill proposed in the U.S. House of Representatives that would have transferred millions of acres of federal land in the Western United States to private or state ownership, the California Legislature passed Senate Bill 50, which prohibited the recording of any deeds for federal lands transferred to third parties without the state’s first refusal. The federal government sued the State on pre-emption grounds, *United States v. State of California and California State Lands Commission*, No. 2:18-cv-721 (E.D. Cal. Nov. 1, 2018), after Governor Brown signed the bill into law in October 2017. While proponents of the Senate Bill 50 argued that the law was constitutional because it only regulated private purchasers’ ability to record property—and not the federal government’s ability to sell it—the Eastern District of California struck down the law in a November 5, 2018 summary judgment ruling on the grounds that it violated the doctrine of intergovernmental immunity. The

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Letter from the President

The Association of Business Trial Lawyers (ABTL) is the largest bench/bar organization in the nation. Since its founding in Los Angeles in 1973, ABTL has grown in size to almost 6,000 members statewide. Our Northern California chapter and the Los Angeles chapter are the two largest chapters, and we expect membership in our chapter this year to exceed 2000 members, which would make Northern California the largest chapter in the state. As your President for 2019, I and my fellow officers will do everything we can to ensure ABTL continues to be the leading bench/bar organization in California. To that end, this year's officers - Vice

President Bruce A. Ericson (Pillsbury Winthrop Shaw Pittman LLP), Treasurer Rachel S. Brass (Gibson, Dunn & Crutcher LLP) and Secretary Molly Moriarty Lane (Morgan, Lewis & Bockius LLP) - and I will focus our efforts in the following areas.

First, we are dedicated to continuing to present excellent dinner programs and events from leaders in the legal, business and political arenas. We just completed our first dinner program, "A Conversation

with Attorney General Xavier Becerra," and it was a resounding success with over 350 attendees at our new home at the Hyatt Regency Embarcadero. Although switching from the Four Seasons Hotel to the Hyatt Regency Embarcadero will result in some transition issues, I believe you will find that the Hyatt is a much better facility for us for a variety of reasons (cost, location, support, etc.). In addition, ABTL Northern California is known for presenting unmatched dinner programs and this year's Dinner Programs Committee members - The Honorable Christine Van Aken (S.F. Superior Court), Walter F. Brown, Jr. (Orrick), and Michael K. Plimack (Covington & Burling LLP) - are superb. I am confident that under their leadership, 2019 will be the best year yet for outstanding dinner programs.

Mark your calendars now for our dinner programs in San Francisco on March 5, May 7, September 7 and November 19, 2019. In addition, our Silicon Valley Program will take place on June 4, 2019 at Menlo County Club in Woodside, California.

In addition, we have moved up the start time for our dinner programs. Cocktails will now begin at 5:45 p.m., dinner at 6:30 p.m., and the speaking portion of the program to begin no later than 7:30 p.m. We changed the start time in order to allow our members and dinner program attendees to be able to

get home earlier than in past years.

Second, we want to revamp and improve the website and marketing materials for ABTL. Our current website needs an upgrade and I am currently coordinating with other chapter presidents to obtain a consensus on how best to improve not only our website but our overall presence online and through other forms of media. These improvements will happen in 2019.

Third, we are committed to increasing our membership in Northern California. To this end, I want to thank Membership Co-Chairs Daniel B. Asimow (Arnold & Porter Kaye Scholer LLP) and Stephen H. Sutro (Duane Morris LLP) for their efforts in getting us off to a smashing start to 2019. Our current membership total, as compared with the same time in 2018, is dramatically higher. We are working hard to ensure that 2019 has the largest membership in ABTL history, and we are well on our way. One area that we are continuing to improve upon is obtaining members from in-house legal departments in the Bay Area. If any of your clients would like to obtain more information on the benefits of joining ABTL, please feel free to have them contact Dan Asimow, Steve Sutro, Michele Silva (our Event Coordinator) or me.

Fourth, we are redoubling our efforts in community outreach. ABTL holds a unique place in the community and we have an opportunity to help those in need. Our Community Outreach Co-Chairs this year are Nicole Valco (Latham & Watkins) and Stephen Steinberg (Bartko, Zankel, Bunzel & Miller) and we expect great things from this committee in 2019.

Fifth, we continue to attract outstanding members to our Board of Governors. At our last Board meeting we elected five new members: The Honorable Stephen P. Freccero (Marin County Superior Court), Kevin P. Dwight (Manatt Phelps & Phillips, LLP), Jill J. Jaffe (Nossaman, LLP), Quyen L. Ta (Boies Schiller Flexner, LLP), and Sean Unger (Paul Hastings, LLP). In addition, our new Chair of the Leadership Development Committee is Adam Trigg (Bergeson, LLP). I want to welcome our new Board members and thank our current Board members for all the work they do to make ABTL the organization that it is today.

Also, this year's Annual Seminar will be hosted by the Orange County Chapter. It will be held on October 3-6 at the breathtaking La Quinta Resort and Spa in La Quinta California.

ABTL is an outstanding organization. But like everything else, we can improve. I and my fellow officers are committed to enhancing the work and reputation of ABTL. If there is anything you would like us to explore, or thoughts you have to help improve your experience as an ABTL member,

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Daniel J. Bergeson

Letter from the Editor

As I write this, 2018 is drawing to a close. It has been another interesting year for our country, and for our local, state, and federal judicial systems.

On the local Bay Area level, 2018 saw several contested judicial elections. Four (in San Francisco) were challenged on the basis of the political affiliation of the Governor who had appointed them. Those four elections were carried by the incumbents; another (in Santa Clara, where the challenge was based on different grounds) was not. All told it was a high water mark for such things at least during my time as a member of the local legal community.



Ragesh Tangri

On the state level, Governor Brown continued to appoint judges and justices at an impressive pace (although sadly, as Judge Patricia Lucas reports in this issue, the budget has not exactly kept pace). Having appointed 95 judges in 2017, he has topped that handily in 2018. As of early December he had appointed one Supreme Court justice, approximately two dozen justices of the Courts of Appeal, and approximately 150 Superior Court judges. Although demo-

graphic data on the Governor's 2018 appointments won't be released until March of 2019, the 2017 data released in March of 2018 shows that his appointments were drawn from very diverse backgrounds, with a majority of his 2017 appointments being women and almost forty percent of those appointed over the course of his administration identifying themselves with backgrounds other than Caucasian. California's bench will look more like California upon Governor Brown's departure than it did when he took office, and one would hope that will inspire in all Californians a greater confidence in the administration of justice.

On a national level, the country survived another election cycle (though my recycling bin is still recovering from the extra volume of mailers!). And on the national judicial level, we saw the Supreme Court confirmation process play out in a fashion that it seems fair to call unprecedented (and one we can hope is not to be repeated). Shortly thereafter, we saw the leader of our federal judicial system, Chief Justice John Roberts, moved to come to the defense of the system itself, in response to an effort to categorize a highly-regarded member of our Northern District bench as an "Obama judge."

All of that serves for me as a reminder that all of us – as ABTL members and hence members of the legal community – have an increasingly important obligation to remind our friends and neighbors, our clients, and ourselves that the judicial system really is different. We have an obligation to ensure that the courtroom is a place where facts – not alternative facts – matter. We have an obligation to ensure that judges and justices – regardless of by which President or Governor they were appointed – are respected for their public service. And we have an obligation to treat each other – as befits the purpose of the ABTL – not just as the face of our clients' adversaries, but as fellow participants in that increasingly important and increasingly besieged judicial system.

Regesh Tangri is a partner at Durie Tangri LLP and the Editor of ABTL Report, Northern California.



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On EMPLOYMENT

confidentiality bars) as a potential barrier to settlement. We may see more pre-filing demand letters.

Discovery Considerations

Another practical implication of SB 820's NDA restrictions is that plaintiffs may more aggressively pursue discovery of prior sexual harassment allegations. Sexual harassment plaintiffs commonly request such discovery, countered by employers' relevance and privacy objections. Plaintiffs now may have more success overcoming such objections given SB 820's pronouncement that post-suit nondisclosure agreements will be void as against public policy. Courts balancing the plaintiff's need for such information against defendants' privacy objections may now be less likely to favor the latter in light of this stated legislative policy.

Conclusion

With the #MeToo movement has come a social and now legislative shift in the way sexual harassment cases will be litigated. With these new statutes, employment litigators will be reconsidering their settlement, summary judgment, and discovery strategies in 2019.

Chandra Andrade is a senior associate at Farella Braun + Martel LLP, focused on employment law.

Doug Dexter is a partner and head of employment practice at Farella Braun + Martel LLP.



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Letter from the President

please do not hesitate to contact me or my fellow officers. With that said, I think you will be happy with what we have planned for 2019.

Finally, I want to thank our 2018 President, Larry M. Cirelli. Larry served on the ABTL board for over 10 years and was a tireless worker on behalf of ABTL. On behalf of ABTL, thank you Larry for your excellent service to our organization.

Daniel J. Bergeson



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On ENVIRONMENTAL POLICY

California State Land Commission has not indicated whether it will appeal the decision.

Looking ahead, further conflict between California and the Trump Administration seems inevitable. In a campaign video titled "Leading the Nation in Environmental Protection: My Environmental Plan" Governor-elect Gavin Newsome criticized President Trump for "overturning 52 critical environmental rules" since January 2018 and pledged that "California must work harder than ever to protect our beautiful state." As shown by the first half of the Trump administration's tenure, neither side is likely to back down.

Peggy Otum is a partner at Arnold & Porter who represents clients in complex environmental litigation.



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California's New Rules of Professional Conduct

Conclusion

Many smart people spent many years working to revise the California Rules. The result is not a radical departure from prior law, but I don't think California lawyers in general wanted a radical departure. For better or worse, lots of people find California exceptionalism appealing. The numbers have changed, but that spirit survives.

Let's be careful out there.

David McGowan is a partner at Durie Tangri and the Lyle Jones Professor of Law at the University of San Diego



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