



## DAILY APPELLATE REPORT

### CIVIL LAW

**Civil Procedure:** Removal jurisdiction is proper under Convention on Recognition and Enforcement of Foreign Arbitral Awards where defendant raises defense related to foreign arbitration award. *Infuturia Global Ltd. v. Sequus Pharmaceuticals Inc.*, U.S.C.A. 9th, DAR p. 2098

**Employment Law:** Janitor who entered into explicit mutual wage agreement with employer cannot seek payment for overtime wages when salary covered overtime work. *Arechiga v. Dolores Press Inc.*, C.A. 2nd/8, DAR p. 2120

### CRIMINAL LAW

**Criminal Law and Procedure:** District court errs in reducing defendant's sentence when it ignored Sentencing Commission's Policy Statement, which has authority in interpreting sentencing guidelines. *U.S. v. Fox*, U.S.C.A. 9th, DAR p. 2089

**Criminal Law and Procedure:** Search warrant is valid where discovery of single image of child pornography is accompanied by exigent circumstances to support finding of probable cause. *U.S. v. Krupa*, U.S.C.A. 9th, DAR p. 2092

**Criminal Law and Procedure:** Court errs in issuing no-visitation order against alleged sexual offense child victim because defendant was never sentenced for the alleged crime. *People v. Ochoa*, C.A. 3rd, DAR p. 2105

**Criminal Law and Procedure:** Attempted murder convictions are valid where defendant shoots at crowd with intent to kill specific individuals that, unknown to defendant, were not present. *People v. Pham*, C.A. 3rd, DAR p. 2107

Summaries and full texts appear in insert

### BRIEFLY

**Facing a possible legal malpractice lawsuit** from former client, Dodgers owner Frank McCourt, Bingham McCutchen LLP has retained a team of lawyers from Gibson, Dunn & Crutcher LLP, sources say. Claire Papanastasiou, a Boston-based spokeswoman for Bingham, would not confirm the events. In a statement, Papanastasiou wrote, "We have asked Gibson Dunn to advise us concerning various matters of California law related to the on-going situation. Like anyone in these circumstances, we have taken and take advice on a variety of matters from various internal and external sources, including Gibson Dunn." Bingham attorney Larry Silverstein testified in September that he changed the wording of a marital property agreement after Frank McCourt and his ex-wife Jamie had signed their names to it. Los Angeles County Superior Court Judge Scott Gordon threw out the agreement in December.

**Direct purchaser plaintiffs who claimed** Static Random Access Memory manufacturers engaged in a conspiracy to fix prices notified U.S. District Judge Claudia Wilken Monday that they had reached a settlement with the last remaining defendant in the antitrust case, Samsung Electronics Co. The terms of the deal, announced to the court on the day jury selection was supposed to start, were not disclosed. The direct purchaser plaintiffs had already reached settlements totaling more than \$25 million with other defendants. Indirect purchaser plaintiffs had previously settled with all defendants in the case for more than \$41 million.



Sacramento County District Attorney Jan Scully

Courtesy of the Sacramento Bee

## Cash-Strapped Agencies Turn To Out-of-Work Lawyers for Free Labor

### Volunteers Are Doing Jobs Without Any Promise of Employment

By Emily Green  
Daily Journal Staff Writer

SACRAMENTO — When half the lawyers in the Sacramento County Public Defender's misdemeanor trial unit were laid off in 2010, Brooks G. Parfitt, a volunteer attorney in the unit, took on many of their cases. A few blocks away, volunteer lawyers at the district attorney's office strategized about prosecuting those cases.

It became so common for volunteer lawyers to prosecute misdemeanor cases in the county that "at one point, it was much more likely than not that you would go up against a volunteer," said Parfitt, now an attorney with Orrick, Herrington & Sutcliffe LLP in Silicon Valley who specializes in intellectual property litigation.

Sacramento is not alone. At an unprecedented level, fiscally strapped public defender and city and district attorney's offices across California are relying on young, unemployed lawyers to try misdemeanor cases. Recent law school graduates, in turn, are flocking to the unpaid gigs as a way to shore up resumes at a time when jobs are limited.

While this is not a new trend — government agencies have long utilized volunteer lawyers — what's different is its progression from the use of ad hoc volunteers seeking jury trial experience to a systemized push to hire volunteers who stay for long periods of time

and who can be relied upon to perform critical responsibilities.

"It became more of a necessity than a luxury," said Barry G. Borden, chief deputy district attorney for Marin County, one of California's wealthiest jurisdictions.

For the past six years, the Marin County District Attorney's Office had a volunteer program in which law firms sent attorneys with an average of seven years of experience to the

"We used to get maybe eight to 10 resumes every four months and hire one or two people. Now we are consistently getting closer to 30 resumes and hiring four or five. These are people willing to take a job that pays zero."

— Kwixuan H. Maloof

district attorney's office for eight-week rotations. But the office needed more volunteers, having lost nearly a fifth of its prosecutors through layoffs and attrition since 2007. So last May, Borden began advertising with the California District Attorney's Association for volunteer lawyers who could work a minimum of six months.

"There's no salary, no wages, no benefits," he said. "There's free parking."

In return, the volunteers — who need only be good-standing members of the California

Bar and able to pass a criminal background check to qualify — become sworn deputy district attorneys with responsibilities ranging from handling daily criminal calendars to conducting legal research and trying misdemeanor jury trials.

The story is similar in San Diego County. For years, law firms occasionally sent an attorney to the district attorney's office for a month so that he or she could get courtroom experience. But in 2009, budget cuts left the office unable to hire an incoming class of deputy district attorneys. In response, it initiated a minimum six-month volunteer program for lawyers wanting jury trial experience. To date, the office has trained and deputized 23 lawyers to prosecute misdemeanor cases, none of whom it has hired on a permanent basis.

"Many of them just volunteered to do the job that would have been done by them if they had been hired," said Cheryl M. Ruffier, chief deputy in charge of employee relations for the San Diego County district attorney.

"As a short-term, stopgap measure, we've made it work," Ruffier said. "We're simply trying to bridge the budget gap."

While the concept of volunteer lawyers is in many ways a win-win situation — district attorney's offices rely on an unpaid workforce to provide essential functions, and young lawyers get jury trial experience in the process — it's also less than ideal.

Young lawyers do the same work for free they would have been paid for just three years ago, and public defender's and city and district attorney's offices don't have the opportunity to invest long-term in the professional

See Page 6 — VOLUNTEERS

### GUEST COLUMN

#### Children under 5 make up 44 percent of all car backup deaths and injuries. Is there a remedy in sight? By Jonathan Michaels of Michaels Law Group.

Few things in life are more tragic than the loss of an innocent young life. There is just something about the playful innocence, the insatiable curiosity, and yes, the mischief and trouble that causes our society to go to great lengths to protect our young. It is because of this that we have the AMBER Alert (America's Missing Broadcast Emergency Response) and Megan's Law (which grants the public access to California's 63,000 registered sex offenders), and that list is about to expand.

To be completely correct, it actually already has, yet few are likely aware of it. In 2007, President George W. Bush signed into law the "Cameron Gulbransen Kids Transportation Safety Act," which aims to change the way cars are designed and manufactured to provide better protection for children. However, because the law

deferred its impact until 2011, the bill went largely unnoticed; but, all of that is about to change as the law requires the U.S. Department of Transportation to propose new rulemaking no later than Feb. 28, 2011.

It is expected that in three weeks, Transportation Secretary Ray LaHood will announce a major revision to Federal Motor Vehicle Safety Standard No. 111 — the standard that regulates rear view mirrors. LaHood has indicated that he is looking to require that all new cars be equipped with backup cameras to guard against what has become (or perhaps, what has always been) a serious problem with blind spots when cars are in reverse. The regulation is being phased in September 2012 and will take full effect by 2014.

Blind spot injuries have become somewhat of an epidemic in the nation, par-

ticularly with the proliferation of larger multi-purpose vehicles. According to figures maintained by the National Highway Traffic Safety Administration (NHTSA), on average 292 people are killed every year from being inadvertently backed over, with another 17,000 injured — 3,000 of whom suffer incapacitating injuries.

The part of the problem that is particularly troubling is that children under five, who are difficult to see and who like to hide, account for 44 percent of all backup deaths and injuries. To make matters worse, the vast majority of accidents involving children are committed by the child's own parent, as was the case of little Cameron Gulbransen, the namesake of the federal legislation. In 2002, while backing out of his driveway, Dr. Greg Gulbransen accidentally backed over

See Page 3 — CARS

## State Health Cuts Deal Blow By High Court

By Robert Iafolla  
Daily Journal Staff Writer

WASHINGTON — The U.S. Supreme Court dealt California Gov. Jerry Brown a major setback in his effort to shed \$1.7 billion from the state's health care budget with its announcement Monday that it will wait until next term to hear a challenge to a federal court injunction blocking Medicaid cuts.

The court agreed in January to take the case, but its argument calendar is filled through April, meaning it will hear the Medicaid case in October at the earliest — presumably long after passage of California's 2011-12 budget.

Brown's proposed cut would reduce the amount the state reimburses to Medicaid providers by 10 percent, which would total about \$700 million in the next fiscal year. That rate reduction accounts for 40 percent of the spending Brown proposed to slash from Medi-Cal, the state program that covers some seven million low-income and disabled Californians.

"Obviously, our hope is that, whenever they hear the case, the court will give California greater flexibility to set our rates," Brown spokeswoman Elizabeth Ashford said. "In the meantime, we are going to continue to seek waivers from the federal government to help bridge our massive budget deficit."

In January, Brown unveiled his budget proposal, which is designed to close the state's \$25.5 billion spending shortfall by extending tax hikes and cutting spending. In addition to the Medicaid rate reductions, other proposed cuts to Medi-Cal include increases to patient co-payments, as well as limits on the number of doctor visits and prescriptions covered by the program.

Public advocacy lawyers, however, told the Daily Journal last month that they're

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## Simpson, Latham Seal AOL's Nuptials To Huffington

By Ben Adlin  
Daily Journal Staff Writer

LOS ANGELES — California attorneys advised AOL Inc. and The Huffington Post in the deal between the two online companies, announced Sunday.

Simpson Thacher & Bartlett LLP advised AOL in its \$315 million purchase of the news and content aggregation website. Leading the 16-attorney team were partners Peter Malloy, Katharine Moir and Tristan Brown in Palo Alto and Lori Lesser in New York.

Latham & Watkins LLP represented The Huffington Post with a group headed by partner Alex Voxman and counsel David Blood, both in Los Angeles.

Attorneys from Latham & Watkins declined to comment on the deal. Simpson, Thacher & Bartlett did not respond to interview requests.

Under the terms of the deal, AOL will pay \$300 million in cash and the remainder in stock for the website. The Huffington Post's co-founder and namesake, Arianna Huffington, will take the lead role on AOL's content side.

"It's a reasonable price tag for a high-profile, high-growth media property," said Mark Stevens, a partner at Fenwick & West LLP who specializes in digital media transactions. He was not involved in the deal but said the firm's clients have engaged in transactions with AOL.

"You get two things here," Stevens said. "You've got a known brand name — and Huffington Post is a strong, recognizable brand — and you've got revenue growth that's actually hard to find in the public market."

While The Huffington Post is a private company and does not disclose financial information, its executives say the website had revenue of \$31 million last year. They expect

See Page 5 — AOL

### MORE NEWS

#### Litigation



Lee Smalley Edmon, the new presiding judge of Los Angeles County courts, has an affable demeanor. But lawyers who have dealt with her say don't underestimate her toughness. **Judicial Profile, Page 2**

The validity of some settlement offers served along with the complaint is in question, writes Gary A. Watt of Archer Norris. **Page 3**

The state Supreme Court appears to have overlooked the practicalities of mediation. By Nancy Neal Yeend and Stephen Gizzi of Gizzi & Reep LLP. **Page 7**

#### Corporate

As general counsel to Frank Gehry's architecture firm, David B. Olson must manage the many legal challenges of creating memorable structures around the world. **Corporate Counsel Q&A, Page 5**

Latham & Watkins helped Orange County medical device company Beckman Goulter in its \$6.8 billion acquisition of Washington, D.C.-based Danaher Corp. **Page 5**

Dealmakers — A roundup of recent mergers and acquisitions and financing activity and the lawyers involved. **Page 5**

#### Government

Lawyers and law enforcement agencies are trying to educate property owners about their rights and obligations in the event tenants are caught engaging in illegal activity. **Page 6**

John Liebert, a prominent management-side labor lawyer for public agencies and founder of Liebert Cassidy Whitmore, died Monday. **Page 6**

# Early 998 Offers: Wicked Weapon or Wise Tactic?

By Gary A. Watt

Code of Civil Procedure Section 998 offers rest upon a simple concept. As one appellate court put it, 998 offers “encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting a 998 settlement offer. (This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.)” (*Bank of San Pedro v. Superior Court* (1992) 3 Cal. 4th 797, 804.) But if the carrot and stick is a simple concept, the actual business of making and interpreting 998 offers can be complicated.

Another way to characterize 998 offers is that the stick is comprised of fee shifting to the offeror if the offeree rejects a 998 offer and “fails to obtain a more favorable judgment or award.” (Code of Civil Procedure Section 998(c) and (d).) The sooner the offer is made increases the amount of post-offer fees that can be shifted. As such, there can be a built-in incentive to make 998 offers early in a case. And that is not necessarily a bad thing — shorter litigation can mean savings to the parties and the courts. So it is probably not surprising that there are cases involving service of 998 offers with a complaint. But are such offers valid?

The answer is, “it depends.” To be valid, a 998 offer must be “reasonable and made in good faith.” (See *Nelson v. Anderson* (1992) 72 Cal.App.4th 111, 134.) And in some circumstances, a 998 offer served with a complaint, can be valid. A recent decision sheds light on such validity. In *Najera v. Huerta* (5th Dist., 2011) 191 Cal.App.4th 872, the Court of Appeal agreed with the trial court that a 998 offer served with the plaintiff’s complaint was neither reasonable nor made in good faith. Therefore, although the defendant-offeror that did not accept the 998 offer, failed to obtain a more favorable judgment at trial, shifting of expert witness fees and prejudgment interest (under Civil Code Section 3291) to the tune of almost \$100,000 was denied.

Yet, as plaintiff contended on appeal, another case, *Barba v. Perez* (3rd Dist., 2008) 166 Cal.App.4th 444, 450-451, held that a 998 offer served with the summons and complaint was valid and fees were shifted. So what gives? According to the 5th District in *Najera*, *Barba* is unique on its facts. In *Barba*, the plaintiff’s foot was broken while moving a refrigerator at the request of a friend. Along with the complaint, plaintiff also served defendant with a 998 offer in the amount of \$99,999.99. Defendant



did not accept the 998 offer and at trial, plaintiff obtained a verdict of \$117,053.

Plaintiff sought expert witness fees and prejudgment interest pursuant to Section 998. Defendant objected, contending that a 998 offer served with the complaint did not afford an opportunity to evaluate the claim. Therefore, defendant argued, he lacked a basis upon which to believe the offer was fair. But the trial court awarded plaintiff the fees and interest.

In *Najera v. Huerta* (5th Dist., 2011) 191 Cal.App.4th 872, the Court of Appeal agreed with the trial court that a 998 offer served with the plaintiff’s complaint was neither reasonable nor made in good faith.

The Court of Appeal in *Barba* affirmed. Although the 998 offer was served with the complaint, plaintiff “was not playing ‘hide the ball.’” “The parties had a close, semi-familial relationship, and there was free flow of information between them.” Information had actually been provided in connection with the 998 offer. But *Barba* also recognized that when information is sparse, and requests for extensions of the time to respond or for information are rejected or ignored, “such obstinacy would be viewed as potent evidence that plaintiff’s offer was neither reasonable nor made in good faith.”

And that brings us back to the recent decision in *Najera*. There, although plaintiff served the insurance carrier with a prelitigation demand letter, when the carrier asked for more information, none was provided. The next thing that happened was service of the complaint and the 998 offer. When panel counsel received the new file including the 998 offer, 17 days had already run. And when defense counsel wrote to plaintiff’s counsel objecting to having insufficient time to learn the facts of the case and substantiate the damages, the

response was merely that plaintiff’s counsel considered the offer in good faith in light of its amount, \$50,000 compared to the prior policy limits demand letter. No additional information was provided. Thus, *Najera* concludes that unlike *Barba*, “there were no special circumstances present to show that at that early (and time critical) juncture...defendant’s counsel had access to information or a reasonable opportunity to evaluate plaintiff’s offer within the 30-day period.” Therefore, the 998 offer was invalid.

So what are the takeaways? First, in personal injury cases, the real motivation behind serving a 998 offer with a complaint probably has more to do with prejudgment interest than shifting expert witness fees. After all, in most cases, the expert will not get substantially involved until later in the case, so there usually is not much in the way of fees to shift yet. But Civil Code Section 3291 states that in a personal injury action, “the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff’s first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment.”

Second, if counsel receives a 998 offer with service of the complaint (or later), ask for the necessary time and information to evaluate the case including an extension of the expiration date of the 998 offer, so ask. Third, if plaintiffs’ counsel insists on maximizing the fee and interest-shifting potential of a 998 offer by service with the complaint, (a risky proposition, as *Najera* demonstrates), then make sure that maximum information is also provided and reasonable requests for extensions are accommodated. Otherwise, absent unusual circumstances like those in *Barba*, the 998 offer will probably be found unreasonable and lacking good faith, and there will be no fee shifting.

Service of a 998 offer with a complaint will seldom be well taken by defendants. In *Barba*, one justice dissented, describing the majority’s approval of the 998 offer as adding “another wicked slider to a plaintiff’s arsenal of hardball litigation tactics.” But if plaintiffs’ counsel fails to provide sufficient information or accommodate requests for time to evaluate the offer, then that wicked slider may nevertheless sail way over the strike zone.



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# Cars in Reverse: Do It for the Kids

Continued from page 1

and killed his 2-year-old son, Cameron. Secretary LaHood has suggested that backup cameras will cut the casualty rate in half, and looks to have all passenger cars, pickup trucks, minivans, buses and low-speed vehicles with a gross vehicle weight rating of up to 10,000 pounds equipped with backup cameras by 2014. And, this has the industry in knots.

By itself, the cost per vehicle to add the backup camera does not seem like much. For vehicles that already have video screens, the cost is about \$58 to \$88; if the vehicle does not have a screen, it is about \$159 to \$203. But all of this changes when 16.6 million new cars are factored in (the number of new cars the Dept. of Transportation believes will be sold in 2014), with the total cost reaching an estimated \$1.9 to \$2.7 billion annually.

Lobbyists for automakers are resisting the proposal, calling the rulemaking overreaching — and they may have a legitimate argument. Under Executive Order 12866, the Dept. of Transportation is required to es-

tablish the “economic value of a statistical life” for the purposes of analyzing safety measures. The Dept. of Transportation’s current valuation of a statistical life is \$6 million — and that is where the problem comes in.

With a cost of \$1.9 to \$2.7 billion annually, the backup camera proposal results in a cost of \$11.8 to \$19.7 million per life saved, or about 2 to 3 times over the Dept. of Transportation’s standard — and the standard of virtually every other federal agency. For instance, the Food and Drug Administration uses a statistical value of \$6.5 million; the Environmental Protection Agency uses \$7 million. Hence, with the department greatly exceeding its own statistical standard — and the standard of all other agencies — this proposal may be ripe for judicial or congressional challenge as an administrative act beyond the agency’s authority. Mercedes, Honda, Nissan and GM have already voiced their concerns over the proposal, and they may be willing to take their fight even farther.

LaHood appears to be undaunted by the tremors of a challenge to come, and for that he should be applauded. Is the proposed rule in excess of the department’s guidelines? Perhaps. Is the mandate, as a whole, going to be expensive for the industry? Undoubtedly. But, sometimes good sense and common decency have to prevail over a cold statistical analysis. As LaHood recently noted, “There is no more tragic accident than for a parent or caregiver to back out of a garage or driveway and kill or injure an undetected child playing behind the vehicle.” With the cost of this proposal being less than the average cost of a stereo upgrade, it is time that we as a society take responsibility for protecting our leaders of tomorrow.



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