ASSOCIATION OF BUSINESS TRIAL LAWYERS
SAN DIEGO

abtl REPORT

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The Ethics of Contributions in Judicial Elections

By Hon. Patricia Cowett (Ret.)

Hon. Patricia Cowett

An important concern for attorneys and judicial candidates is what restrictions, if any, apply to the solicitation of and acceptance of campaign contributions in judicial elections for state court judges in California. Attorneys wanting to support judicial independence or wanting to support specific candidates for whatever good reason worry about what ethical strictures apply and the appearance of impropriety. In particular, an attorney may question whether the contribution gives the impression of an attempt to improperly influence a judge or the outcome of litigation; what limits apply to the amount of the contribution, if any; and what are the applicable Business and Professions Codes or Canons of Judicial Conduct? Judicial candidates must also be fully knowledgeable about the rules that apply to time, place and manner of acceptance of contributions and clearly also the appearance of any activity that compromises the integrity and impartiality of the judge and the judicial system. The following are some of the most important rules to keep in mind.

As stated in the Preamble to the California Code of Judicial Ethics, "Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and

(see "Ethics" on page 10)

Five Tips from a Criminal Defense Lawyer to a Civil Practitioner

By Robert D. Rose

Robert D. Rose

Just because you practice in civil doesn't excuse you from knowing what lurks in the dark side of the law. Let's face it: isn't everything criminal now? What was regulatory has become criminal; what was local or state has become federal. Two years ago, a law school team added up just the federal crimes on the books: 4,450. In the past decade, Congress has averaged one new crime per week. (That's enactment, not commission.)

So here are five tips from the dark side:

(see "Tips" on page 5)

Inside

The Association of Business Trial Lawyers of San Diego

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John Yoo
Professor of Law, UC Berkeley

While deputy assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice, Professor John Yoo helped shape the nation's policies on foreign affairs, national security and the separation of powers, and not without controversy. Professor Yoo now teaches at the Boalt Hall School of Law at the University of California, Berkeley, and also is a widely published author and columnist.

On June 28, 2010, ABTL San Diego is proud to welcome Professor Yoo to discuss the history of presidential power, the law and the courts, one of the themes of his newest book, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (2010). He will be pleased to sign books at the event.

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President's Letter

By Mark Zebrowski, President ABTL San Diego

Mark Zebrowski

The June primary election has an unprecedented number of candidates challenging incumbent Superior Court judges. On behalf of the Board of Directors of the San Diego chapter of the Association of Business Trial Lawyers, I would like to pass on a few thoughts I hope you will consider and share with others as they prepare to vote.

The California Code of Judicial Ethics includes the following fundamental provisions:

Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. (Preamble.)

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. (Advisory Committee Commentary to Canon 1.)

A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law. (Canon 3(B)(2).)

Judges shall avoid political activity that may create the appearance of political bias or impropriety. (Canon 5.)

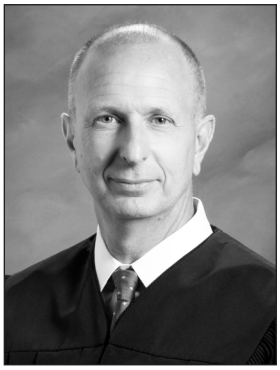
Under the California Constitution, "judges of superior courts shall be elected in their counties at general elections" and "terms of judges of superior courts are six years." Article 6, Sec. 16(b), (c).

So we have a system under which it is essential that our judges be independent, fair and impartial; be faithful to the law regardless of partisan interests, public clamor or fear of criticism; and act without fear or favor in the way they interpret and apply the laws that govern us; yet they must win the support of a majority of the electorate to keep their jobs while people campaign against them, perhaps based on a decision the judge made in a politically or emotionally charged matter.

How then do we reconcile these conflicting interests? I suggest we do so by supporting our incumbent Superior Court judges when they face electoral challenges. If a Superior Court judge violates the Code of Judicial Ethics, he or she is subject to the investigative and disciplinary jurisdiction of the California Commission on Judicial Performance, which is comprised of one justice of the court of appeal, two judges from the Superior Court, two attorneys and six lay citizens. If a Superior Court judge makes an error of law, the error may be corrected on appeal. If a Superior Court judge's "performance" is further "monitored" by a politicized electoral process, we run the risk that our judges cannot be independent, fair and impartial; be faithful to the law regardless of partisan interests, public clamor or fear of criticism; or act without fear or favor in the way they interpret and apply the laws that govern us. If that happens, we all lose. ▲

Brown Bag Lunch: Meet Magistrate Judge William V. Gallo

By Olga May



Judge William V. Gallo

On March 23, 2010, the San Diego Chapter of ABTL, along with the San Diego Chapter of the Federal Bar Association and the Litigation Section of the State Bar of California, co-sponsored a brown bag luncheon hosted by the recently sworn in Magistrate Judge William V. Gallo. Courtroom F on the first floor of the Edward J. Schwartz Courthouse was packed with attorneys who came to meet Judge Gallo and his staff, including his law clerks Lindsey Stevens and Mark Schwartz and courtroom deputy Jennifer Yahl.

Judge Gallo was warm, collected, and open about his views regarding his new appointment. He briefly spoke about his diverse background, which included 20 years of service as an Assistant U.S. Attorney, 27 years as a Marine Corps officer, and service in Iraq. Now he is very enthusiastic about his new position and feels like he has started a whole new career.

Judge Gallo has been on the bench since October 2009. Working on the criminal cases comes naturally for the former prosecutor, but he also discovered a whole new world of civil law, which constitutes the bulk of his calendar. Having received the high caseload transferred to the new chambers, both Judge Gallo and his staff have been burning midnight oil.

Judge Gallo has chambers rules and proce-

(see "Gallo" on page 14)

Tips

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1. Take Governmental Inquiries Seriously

Investigators don't start with searches and arrests. Detectives and agents are trained to work the periphery -- interview employees at home, drop by the business to ask a few questions, send an informal request for records, issue a records-only subpoena, talk with the tax return preparer, serve the bank with a subpoena that bars notice to the customer with the threat of prosecution for violation.[1] IRS agents particularly adore former bookkeepers and treat them as if they had run the company. Investigative contacts need your immediate follow up—with the people on both sides of the contact.

2. Don't Let Your Clients Be Private Investigators

While it's tempting to secretly press the "record" button while talking with an adversary, your client does so at the risk of committing a crime.[2] In addition to invasion of privacy issues, there are criminal and civil penalties. [3] Similar temptations for clients (and for lawyers who advise them) include videotaping, physical surveillance, computer hacking, and dumpster diving. Each of these has its perils, which you will appreciate if you followed the saga of former celebrity private investigator Anthony Pellicano, now serving a fifteen-year sentence.

Criminal lawyers use licensed reputable private investigators and so should civil practitioners. Private investigators are often retired detectives and agents, with decades of experience in knowing where to look for evidence. They subscribe to on-line services that offer much more than Google. They know how to interview. They are also trained witnesses and pose more of a risk to your adversary than will your amateur detective client.

3. It's Tough Keeping A Secret

"Three may keep a secret if two of them are dead." - Poor Richard's Almanack (1735)

Prosecutors and defense counsel know that humans recall past events at different speeds and some simply remember faster than others. As lawyers, we need to learn what is important *before* it causes more harm. But, once we learn that something harmful has occurred, client and lawyer need to decide whether its transmission should be stopped or postponed.

(see "Tips" on page 6)

Articles of Interest in Current ABTL Reports

Northern California

"Attorney Fee Weirditudes"

"Prop. 64 Five Years Later: Has The 'Shakedown Loophole' Been Closed?

"Motions in Limine: How Far Can They Reach?"

Los Angeles

"Making The Evidence Code Work For You"

"The Business Of Practicing Law: Now At Risk As Courts Close"

"California Joins The E-Discovery Age"

"Mentoring Towards The Pursuit Of Good Judgment: A 'Do' And 'Don't' List For New Attorneys"

Orange County

"Q&A With The Honorable James J. Di Cesare"

"Saving Or Waiving Attorney-Client Privilege During IP Due Diligence: Supporting Or Criticizing Hewlett-Packard v. Bausch & Lomb, Inc."

"California's Electronic Discovery Act"

For these and other articles of interest, visit and search www.abtl.org/reports

Tips

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There is a privilege in federal and state Constitutions that doesn't belong exclusively to criminal lawyers. Your client, acting on your advice, has a Fifth Amendment privilege in civil proceedings. The immediate effect of its assertion is to stop the flow of information. In a federal case, assertion will give rise to an adverse inference from the silence, but that is not the case in California state courts. Perhaps obtaining a stay will postpone the decision—to the close of discovery or to one last chance to reconsider before trial. Occasionally, immunity is granted.[4] The point is, once the incriminating words are out, you should expect they will always be out.

We warn deponents that they are testifying under oath and, thus, are subject to the penalties of perjury. But trial lawyers know those penalties stand virtually no chance of ever being enforced. Nevertheless, it is remarkable what true statements are made in depositions, as if no one will ever read the transcripts. Most notable are confessions of tax fraud. Could there be an easier case for a tax collector than to be delivered a transcript of sworn testimony by an errant taxpayer, whose lawyer was focused solely on the problem of that deposition day?

Lest you take too much comfort from having a protective order entered in your civil case, the Ninth Circuit Court of Appeals has ruled that a court-ordered protective order sealing documents in a settled civil case is trumped by a grand jury subpoena.[5]

A final thought, about protecting client secrets in your own files: In pursuit of the nation's gatekeepers for their complicity in financial crimes, prosecutors are regularly challenging assertions of attorney-client privilege via the crime-fraud exception. So, information in your files is not necessarily exempt from being used against your clients.

4. Be Careful What You Put In Your Pleadings

This is a true story. "Smith" consults with a developer on removing asbestos from an old mall. Smith tips off "Jones" to bids, so that Jones' company gets the contract and pays kickbacks to Smith. Payments slow down, so Smith sues Jones to collect kickbacks. Jones sues Smith, alleging extortion, death threats, and that Smith claimed mob connections. Smith counter-sues, claiming his actions were ordinary collection efforts. Developer notices lawsuits. So does District Attorney. Both go after Smith and Jones. District Attorney seizes Smith's brokerage accounts as funds that rightfully belong to developer. The message? Lawsuits are public records. Choose your words—and your causes of action—wisely.

5. Don't Threaten a Criminal Prosecution to Resolve a Civil Case

Two words -- it's unethical. [6] But you can help your victimized clients use the criminal laws to get results—often at much less expense. Overworked agents and prosecutors may welcome the arrival of an evidence package, with witness statements and, perhaps, the suggestion of relevant charges. However, a note of caution: if you opt for criminal treatment, don't expect to have any control over how it proceeds. And, if you have a parallel civil case, expect a stay motion.[7]

Federal law offers rewards for information leading to successful prosecutions, such as defrauding the U.S.[8] and tax cases.[9] Federal and state criminal laws impose mandatory restitution on felons, where the government and probation office enforce payment schedules. The pot has been sweetened again for whistleblowers, with enhanced protections from retaliation. ▲

Bob Rose is a partner at Sheppard Mullin's San Diego office. After prosecuting federal criminal cases for 12 years, he now defends his clients in all phases of investigation and trial.

1 18 U.S.C. 1510(b).
2 Cal. Penal Code § 630 et seq.
3 (see 18 U.S.C. §§ 2511, 2520)
4 Daly v. Superior Court (1977) 19 Cal. 3d 132.
5 In re Grand Jury Subpoena, 62 F.3d 1222 (1995).
6 DR 7-105.
7 Pacers, Inc. v. Superior Court (1984) 162 Cal.App. 3d 686.
8 (18 U.S.C. 1031).
9 (26 U.S.C. 7623).

Dukes v. Wal-Mart – the Ninth Circuit's Analysis of How "Merits" Evidence Is To Be Weighed In Deciding Class Certification

By Alan M. Mansfield, Co-Editor, *ABTL Report*

Alan M. Mansfield

In April, the Ninth Circuit Court of Appeals issued its long-anticipated decision in *Dukes v. Wal-Mart Stores, Inc.*,[1] announcing its position on the question addressed by several other federal circuit courts as to the quantum of evidence that must be considered by the trial court in connection with a motion for class certification. In a 6-5 *en banc* decision, the ninth circuit affirmed the trial court's order certifying a nationwide class of Wal-Mart employees asserting claims for sex discrimination under Title VII of the 1964 Civil Rights Act that alleged women employed in Wal-Mart stores: (1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer--and wait longer for--promotions to in-store management positions than men.

While issuing its decision in the Title VII context, the ninth circuit attempted to harmonize the other sister circuit decisions that had addressed this issue in other class certification contexts, asserting that there was really no substantive conflicts between the circuits on this issue. The court also addressed the question of when certifying a Federal Rule of Civil Procedure Rule 23(b)(2) class may be more advantageous for both sides and the court.

This article provides a short factual background of the *Dukes* litigation, a summary of the Court's conclusions, and some observations on the implications of this important ruling for both practitioners and the courts who address these complex issues.

Background of *Dukes*

In June 2001, plaintiff Betty Dukes and ultimately six other Wal-Mart employees filed a Title VII class action lawsuit against the company, asserting a pervasive practice to discriminate against women when it came to filling a range of Wal-Mart positions from part-time entry-level hourly employees to salaried managers. After several years of pleadings, motions, extensive discovery, detailed briefing, competing expert submissions and a hearing, in 2004, in an 84-page decision, Judge Martin Jenkins in the Northern District of California certified a class encompassing all women employed by Wal-Mart in approximately 3,400 retail locations nationwide any time after December 26, 1998.

In its class certification ruling the court certified the proposed class with respect to issues of alleged discrimination (including liability for punitive damages, as well as injunctive and declaratory relief); however, the court rejected the proposed class with respect to the request for back pay, determining that data relating to the challenged promotions was not available for all class members. The court also exercised its discretion to provide for notice and an opportunity for employees to opt out of the punitive damages portion of the class.

Pursuant to Rule 23(f), Wal-Mart appealed the decision of the trial court, contending that the court erred by: (1) concluding that the class met Rule 23(a)'s commonality and typicality requirements; (2) eliminating Wal-Mart's ability to respond to individual plaintiff's claims; and (3) failing to recognize that plaintiffs' claims for monetary relief predominated over their claims for injunctive or declaratory relief. Plaintiffs cross-appealed from the trial court's limitation of back pay relief for many of plaintiffs' promotion claims. After the ninth circuit issued a decision affirming the trial court's class certification ruling in 2007, Wal-Mart successfully petitioned for *en banc* review, and another round of briefing ensued.

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Dukes

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The *Dukes* Decision

The court in *Dukes* first recognized the trial court's decision as to the factual underpinnings of whether the requirements of Rule 23 were satisfied was subject to a "clear abuse of discretion standard," and that "[o]ur review is limited to whether the district court correctly selected and applied Rule 23 criteria."[2] It then engaged in a comprehensive analysis of both Supreme Court, sister circuit court and district court decisions addressing the standards applied in ruling on class certification, and specifically to what degree the underlying merits of the litigation were to be considered by the trial court in ruling upon the class certification motion. After recognizing that several courts had taken the "no inquiry into the merits" too far in the opposite direction, the court initially concluded, "The core holding across circuits that have considered the issue is essentially unanimous: district courts must satisfy themselves that the Rule 23 requirements have been met before certifying a class, which will sometimes, though not always, require an inquiry into and preliminary resolution of disputed factual issues, even if those same factual issues are also, independently, relevant to the ultimate merits of the case." [3]

Referencing another 2010 ninth circuit decision that had reversed a district court's denial of class certification, the court then went on to explain how many of these decisions have "have correctly threaded the needle" between all of these precedents, and how several have gone astray in terms of detailing when and how the underlying merits of the action interplay with the class certification decision:

> Writing for the court in *United Steel Workers v. ConocoPhillips Co.*, Judge Bybee explained that it is the plaintiff's *theory* that matters at the class certification stage, not whether the theory will ultimately succeed on the merits. *See 593 F.3d 802, 2010 WL 22701, at *5 (9th Cir. 2010)*. We thus found reversible error because the district court did not consider whether the plaintiff's legal theory "was one in which common issues of law and

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Dukes

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> or fact did not predominate," and instead found the class did not meet Rule 23's requirements because "'there can be no *assurances* that [plaintiffs] w[ould] prevail on this theory.'" *Id.* (citing the district court) (first emphasis added). In short, we have consistently held that when considering how the facts and legal issues apply to a class under *Rule 23(a)*, the district court must focus on common questions and common issues, not common proof or likely success on the questions commonly raised.[4]

Based on this analysis, the ninth circuit "clarified" what is the appropriate class/merits analysis the parties must undertake as part of the class certification inquiry then applied its analysis to the findings of the trial court:

> First, when considering class certification under *Rule 23*, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of *Rule 23* have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims. It is important to note that the district court is not bound by these determinations as the litigation progresses.
>
> Second, district courts may not analyze any portion of the merits of a claim that do not overlap with the *Rule 23* requirements. Relatedly, a district court performs this analysis for the purpose of determining that each of the *Rule 23* requirements has been satisfied.
>
> Third, courts must keep in mind that different parts of *Rule 23* require different inquiries. For example, what must be satisfied for the commonality inquiry under *Rule 23(a)(2)* is that plaintiffs establish common *questions* of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment.
>
> Fourth, district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini-trial on the merits at the certification stage.
>
> Fifth, different types of cases will result in diverging frequencies with which the district court will properly invoke its discretion to abrogate discovery. As just one example, we would expect a district court to circumscribe discovery more often in a Title VII case than in a securities class action resting on a fraud-on-the-market theory, because the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions and demonstrate the appropriateness of class resolution. Plaintiffs pleading fraud-on-the-market, on the other hand, may have to establish an efficient market to even raise common questions or show predominance.[5]

After explaining how it believed the trial court had correctly followed this analysis in reviewing the four Rule 23(a) criteria, the court then discussed when and why Rule 23(b)(2), as compared to (b)(3), certification was appropriate. In the process, the court in part overruled its previous discussion of this issue in *Molski v. Gleich*[6] as having improperly required courts "to engage in a nebulous and imprecise inquiry into the plaintiffs' intent in bringing a particular suit."

> Rule 23(b)(2) certification is not appropriate where monetary relief is "predominant" over injunctive relief or declaratory relief. To determine whether monetary relief predominates, a district court should consider, on a case-by-case basis, the objective "effect of the relief sought" on the litigation. See *Allison[v. Citgo Petroleum Corp*., 151 F.3d 402, 416 (5th Cir. 1998)]. Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature--as measured by recovery per class member--raise particular due process and manageability

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Ethics

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apply the laws that govern us… Intrinsic to the code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system… The Code… establishes standards for ethical conduct of judges on and off the bench and for candidates for judicial office.

The California Code of Judicial Ethics is issued by the Supreme Court of California, and enforced by the Commission on Judicial Performance.[1] Canon 5[2] applies specifically to political activities, i.e. judicial elections. All candidates for judicial office (i.e. attorneys, commissioners, judges) are required to adhere to Canon 5. Of course candidates who are judges must also comply with all the Canons, not just Canon 5. A person is a candidate when seeking election for or retention of judicial office by election. A person becomes a candidate as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation of or acceptance of contributions or support.

Accepting Donations From Attorneys

Judicial candidates have the right to raise funds as do other candidates for public office including the right to hold fundraisers, subject to the rules of disclosure and disqualification. Fundraising can begin well in advance

"Judicial candidates may accept contributions from attorneys, including those who appear in their courtrooms. This is in contrast to the prohibition on accepting gifts from attorneys governed by Canon 4D(6)."

of the election if the candidate has filed a Form 501- "Candidate Intention Statement" with the FPPC. Judicial candidates may accept contributions from attorneys, including those who appear in their courtrooms. This is in contrast to the prohibition on accepting gifts from attorneys governed by Canon 4D(6). Further there is no limit specified in Canon 5 on the amount that may ethically be accepted from an individual attorney. However since the Canons require that disclosure be made of significant contributions from parties, attorneys, or material witnesses (usually in excess of $100.00) and these disclosures must be made on the record, many judicial candidates refuse contributions from any one source, particularly attorneys, above a specified dollar amount (i.e. $100.00). Not only is such a self-imposed restriction helpful to

"[M]any judicial candidates refuse contributions from any one source, particularly attorneys, above a specified dollar amount (i.e. $100.00)."

ensure there is no failure to disclose significant contributions, but it obviates the necessity of careful monitoring of contribution amounts on a daily basis. However, the primary reason for self-imposed limits is to allow the candidate to avoid the appearance of impropriety that would stem from the assumption of undue influence on the impartiality of the judicial function that larger contributions would imply.

Rules Governing Judicial Contributions to Other Candidates

Canon 5 does specify that a judge or judicial candidate cannot make contributions in excess of $500.00 to any one political organization, party or non-judicial candidate or make aggregate contributions of over $1,000.00 per year to all political parties, organizations or non-judicial candidates. These limitations do not apply if a judge or candidate wishes to make a contribution either to a fund for distribution among judges who are candidates for re-election or to any judicial candidate.

Time, Place and Manner of Accepting Contributions

Disclosure and recusal obligations can arise from at least two other scenarios: (1) When the campaign contribution is disproportionately large when compared to the total

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amount of the judge's campaign fund or (2) when non-monetary contributions are accepted such as active support as a member of the candidate's campaign committee. Attorneys can and do frequently serve as members of the campaign committee, such as in the role of treasurer.

It is improper for a judicial candidate to engage in any form of campaigning in the courthouse. Judicial candidates are also prohibited from using any governmental resources for campaign purposes. Thus, staff, equipment and official stationary may not be used for campaign purposes. These restrictions do not preclude staff, colleagues, or other supporters from participating in campaigning away from the courthouse and during non-duty hours. Judges also should be mindful of soliciting support from subordinate judicial officers versus soliciting fellow judges. Since subordinate judicial officers are employees of the judges, there is the risk of the appearance of undue coercion on the part of the judge.

CRPC 5-200 and Business and Professions Code Section 6068 (d) correlate closely with conduct by an attorney that is prejudicial to the "administration of justice." Model rule 8.4 implies an ability to improperly influence a governmental agency or official (8.4(e)) and prohibits knowingly assisting a judge or judicial officer in judicial misconduct (8.4(f)).

Endorsements and Fundraisers

What about endorsements? Anyone may formally endorse a judicial candidate, including other judges, elected officials, political parties, news media and community leaders subject to other restrictions of their positions. Judicial officers, on the contrary, may only endorse candidates for judicial office. They may not endorse

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nonjudicial candidates. The reason judges are permitted to endorse judicial candidates is that they have a special obligation to uphold the integrity and impartiality of the judiciary and are uniquely qualified to know the qualifications to competently serve as a judicial officer. Judicial candidates can attend fundraisers and political events during the campaign for nonjudicial candidates as long as these activities do not appear to endorse political parties, issues or the nonjudicial candidates. At such events, judicial candidates can hand out their own promotional material and meet voters and supporters.

"Judicial officers, on the contrary, may only endorse candidates for judicial office. They may not endorse nonjudicial candidates."

Finally, fundraisers for judges should not be held at locations owned and operated by organizations known to practice invidious discrimination, for obvious reasons.

The Commission on Judicial Performance can investigate and discipline sitting judges and attorneys who win judicial elections for ethical campaign violations once they take the oath of office. California Rule 1-700 gives the State Bar authority to discipline unsuccessful candidates who violated the Canon during the campaign.

Two useful resources for further information concerning judicial elections are a pamphlet prepared by the California Judges Association Committee on Judicial Ethics entitled

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"Ethics in Judicial Elections, a guide to judicial election campaigning under the California Code of Judicial Ethics" (revised April 2010) and a Metropolitan News Enterprise article, "New Ethical Restrictions on Lawyers in Running for Judgeships, Part 1 Rule 1-700 Closes a Loophole."[3]

Also because the California Judicial Council's Commission for Impartial Courts is presenting recommendations for changes to the California Constitution, the Code of Judicial Ethics and various laws related to aspects of judicial elections, candidates and others would be well advised to monitor the progress of these recommendations during the 2010 election cycle. One way to do this is for candidates to contact the CJA Ethics Hotline at (415) 236-4600 for updates. ▲

Judge Cowett is a mediator with ADR Services, Inc and the American Arbitration Association. She previously served 29 years as a Municipal and Superior Court Judge.

1 California Constitution Article VI Sections 8, 18, 18.5.

2

CANON 5

**A Judge or Judicial Candidate*
Shall Refrain from Inappropriate Political Activity**

Judges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, avoid political activity which may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates* for judicial office.

A. Political Organizations

Judges and candidates* for judicial office shall not

(1) act as leaders or hold any office in a political organization;*

(2) make speeches for a political organization* or candidate* for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office;

(3) personally solicit funds for a political organization* or nonjudicial candidate;* make contributions to a political party or political organization* or to a nonjudicial candidate in excess of five hundred dollars in any calendar year per political party or political organization* or candidate,* or in excess of an aggregate of onethousand dollars in any calendar year for all political parties or political organizations* or nonjudicial candidates.*

ADVISORY COMMITTEE COMMENTARY

The term "political activity" should not be construed so narrowly as to prevent private comment.

This provision does not prohibit a judge from signing a petition to qualify a measure for the ballot without the use of the judge's official title.

In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge's campaign may receive attorney contributions.

*Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute an express public endorsement of a nonjudicial candidate*or a measure not directly affecting the administration of justice otherwise prohibited by this Canon.*

*Subject to the monetary limitation herein to political contributions, a judge may purchase tickets for political dinners or other similar dinner functions. Any admission price to such a political dinner or function in excess of the actual cost of the meal shall be considered a political contribution. The prohibition in Canon 5A(3) does not preclude judges from contributing to a campaign fund for distribution among judges who are candidates for reelection or retention, nor does it apply to contributions to any judge or candidate*for judicial office.*

*Under this Canon, a judge may publicly endorse another judicial candidate.**

*Although members of the judge's family*are not subject to the provisions of this Code, a judge shall not avoid compliance with this Code by making contributions through a spouse or other family member.*

B. Conduct During Judicial Campaigns

A candidate* for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit or appear to commit the candidate* with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate* or his or her opponent.

ADVISORY COMMITTEE COMMENTARY

This code does not contain the "announce clause" that was the subject of the United States Supreme Court's decision in Republican Party of Minnesota v. White (2002) 536 U.S. 765. That opinion did not address the "commit clause," which is contained in Canon 5B(1). The phrase "appear to commit" has been deleted because, although judicial candidates cannot promise to take a particular position on cases, controversies, or

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issues prior to taking the bench and presiding over individual cases, the phrase may have been overinclusive.

Canon 5B(2) prohibits making knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons.

C. Speaking at Political Gatherings

Candidates* for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office.

D. Measures to Improve the Law

Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law,* the legal system, or the administration of justice.

3 January 29, 1998 pg 7, available at www.metnews.com.

Gallo

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ment may be reached.

Judge Gallo requires that the ENE or any settlement conference be attended by a person with full settlement authority. This gives the decision-making party an opportunity to meet the judge and familiarize themselves with the litigation process and the prospect of getting to trial in over a year.

If no settlement is reached at the ENE, the parties will receive the initial scheduling dates and the case will be set for a Case Management Conference (CMC). CMCs are conducted by phone. In response to a question from the audience, Judge Gallo said that no special format of scheduling was provided for class actions.

Judge Gallo prefers to resolve discovery disputes informally, through letter briefing and a telephonic conference. The procedure depends on the nature and scope of the dispute. Larger disputes have been resolved through in-person hearings, with the judge staying until 6 or 7 p.m. If the parties prefer to create a record, a formal motion can be filed, although the parties should dures posted on the Southern District's web site. The judge stressed that he is still streamlining his procedures, trying and selecting what works best for the court and the parties. Two things, however, Judge Gallo is very clear and decided about. First, he expects counsel to be punctual, "If you are not early, you are late." There is a simple reason for this: the proceedings cannot start until all counsel are present. Judge Gallo had to make this point on the very first day he took bench, when an attorney was late and received a good tongue-lashing. The judge is serious about enforcing his punctuality requirement – if an attorney is late, the proceeding may be rescheduled and the culprit sanctioned in the amount of costs.

Second, Judge Gallo requires civility. In his courtroom, no sniping or name-calling is allowed. Judge Gallo, however, does not see much of such misconduct among the San Diego bar, which is usually civil. This problem more often arises with out-of-town attorneys. Judge Gallo believes such behavior is neither professional nor persuasive. He expects the attorneys to make their argument, state their authority, and act like adults.

Although strict and uncompromising about his two pet peeves, Judge Gallo applies the exact same rules to himself.

The judge reviewed the procedures established in his chambers. His goal for the Early Neutral Evaluation conference (ENE) is to get the parties together to have a dialogue they may never have had before. This is the parties' opportunity to meet each other, dispose of possible misconceptions, try to understand each other's positions, evaluate credibility, and at least start moving toward a resolution. This is a time when grievances can be aired and catharsis can happen. Productive dialogue is not always instant, however. Judge Gallo has already had to referee a brothers' fight.

Judge Gallo will put his best efforts into any ENE, even one where settlement is not likely. His purpose is to get people talking. When the parties leave, they already have a better picture of the case and a possible resolution.

ENEs are scheduled in two-hour blocks of time, at 9 a.m. or 2 p.m. The judge will put in extra time and keep working with the parties beyond the two-hour limit if it looks like settle-

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be prepared to wait the extra time required for the briefing.

At the end of the luncheon, Judge Gallo turned the floor over to his law clerks, who serve as liaisons between the judge and the parties and who, "as good Marines, insulate their commander."

Mark Schwartz gave the parties a number of practical pointers. In particular, the parties should check the chambers' rules online before calling. The parties refrain from arguing their discovery motions to the law clerk, who will not be making the decision on the motion. The parties should simply state the nature of the dispute to the clerk and confirm their compliance with the meet and confer requirement. In the Southern District, the meet and confer requirement can be satisfied only by an in-person or telephone conversation -- never by correspondence alone. If later the dispute is worked out, the parties need to inform the court. Schwartz echoed the judge in reminding the parties to be professional in their contacts with the court and each other.

Lindsey Stevens emphasized the need for the attorneys to educate their staff and let them know about the resources available on the court's web site. She encouraged the parties to cite legal authority in their ENE or settlement briefs. Stevens seconded her co-clerk in asking the parties to keep the court informed regarding any new developments in discovery disputes or the progress in the meet and confer process, so that court proceedings can be scheduled accordingly.

Judge Gallo concluded the luncheon by reiterating how invigorated he is by his new appointment. After coming back from Iraq, he was looking for a new challenge. The magistrate judge's position provided this welcome challenge. Judge Gallo is obviously up to it. ▲

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> concerns would all be relevant, though no single factor would be determinative.[7]

In rejecting the argument that the moneys plaintiffs were potentially seeking to recover could amount to billions of dollars in monetary relief overall, the court also concluded, "A comparison between the amount of monetary damages available *for each plaintiff* and the importance of injunctive and declaratory relief for each is far more relevant to establishing predominance than the total size of a potential monetary award for the class as a whole."[8]

The court then largely affirmed the trial court's certification order, but remanded for a determination whether a sub-class of employees seeking punitive damages would in fact predominantly be seeking monetary damages "We hold that the district court abused its discretion when it certified a Rule 23(b)(2) class including punitive damages without first undertaking a comprehensive analysis of whether the inclusion of such damages in this case causes monetary relief to predominate."[9]

Practical Implications of *Dukes*

Practitioners and courts can derive several practical observations from the Dukes decision. First, historically both sides have paid short shrift to certifying or opposing certification of a class or subclass under Rule 23(b)(2). In light of the court's observations about the potentially significant differences in the Rule 23(b)(2) and Rule 23(b)(3) certification standards, parties may soon be spending more briefing discussing the importance of a court analyzing both standards, particularly where the monetary relief sought by the class members individually may be relatively minimal and derive from a potential finding of liability, and the need for some form of injunctive relief is more than, in the court's words, "obviously a ruse."

Second, as the court in *Dukes* emphasized, "whether the suit is appropriate for class resolution must be actually demonstrated, not just alleged, to the district court's satisfaction." As a result, the more that the parties need to explain to a court how the claims at issue either

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New & Noteworthy Case Decisions

U.S. Supreme Court Holds Class Arbitration Cannot Be Compelled by an Arbitration Clause Silent on the Issue

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., __ U.S. __, 2010 WL 1655826 (April 27, 2010)

Does a contractual provision that requires the parties to arbitrate disputes between themselves also require those parties to arbitrate a class action arising from a claim one party has against the other if the provision is silent on class arbitration? The Supreme Court recently held it does not. The case involved a putative class action for antitrust damages from a price-fixing conspiracy. The parties' shipping contract had an arbitration clause covering disputes between them arising from performance of the contract. The parties stipulated that the clause was "silent" on class arbitration and that "no agreement" had been reached on the issue. The Court, setting aside an arbitration panel's decision, held the clause did not compel class arbitration.

The Court first concluded the deferential standard of review for arbitration decisions did not prevent it from addressing the merits and reversing. In the Court's view, the arbitrators' opinion showed their decision was based on their own view of sound public policy, rather than a finding the parties intended to arbitrate class action claims or a default rule in state or federal law that required construing the clause to compel class arbitration. Thus, the arbitrators had "exceeded [their] powers," and their decision had to be vacated under the Federal Arbitration Act (FAA). The Court also rejected the arbitrators' suggestion that Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003) dictated their result, noting that Bazzle did not yield a majority opinion on any issue. The Court further determined the case was ripe for immediate appellate review, even though substantive proceedings before the arbitrator had not yet begun, because Stolt-Nielsen would be subject to an ulta vires arbitration without the Court's immediate intervention.

Turning to the merits, the Court began with the premise that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." There was no express agreement to compel class arbitration and there was too large a difference between bilateral arbitration and class arbitration to infer an implicit agreement from the arbitration clause governing bilateral disputes. The decision to arbitrate, according to the Court, reflects a belief that the lower costs, greater speed and efficiency, and a decision-maker with specialized expertise provided by arbitration outweigh the loss of procedural rigor and appellate review provided by courts. This calculus could shift dramatically when the case is a class action, rather than a simple two-party dispute, because "the relative benefits of class-action arbitration are much less assured." In particular, class arbitration could involve thousands of parties, disrupt the presumption of confidentiality that applies in bilateral arbitration, adjudicate the rights of absent parties, and have stakes that are comparable to class-action litigation.

This case may be important not just for its interpretation of this particular clause, but also for its treatment of the standard of review, its approach to interpreting the clause, its comments regarding Bazzle's precedential value, and its review of a seemingly non-final decision.

- Craig E. Countryman
Fish & Richardson, P.C.

New & Noteworthy Case Decisions

United States Supreme Court Authorizes, But Sharply Limits, Attorneys' Fees "Enhancements" in Federal Civil Rights Cases

Perdue v. Kenny A. (2010) ___ U.S. ___, 2010 U.S. LEXIS 3481

Many federal civil rights statutes authorize the prevailing party to recover "reasonable" attorney's fees, and a frequently litigated issue is whether the trial court may award a fee enhancement (i.e., a multiplier) after it determines the so-called "lodestar" amount (the number of hours worked multiplied by the prevailing hour rates). In this case, the trial court applied a 75% multiplier to a $6 million "lodestar" amount resulting in a $10.5 million fee award. A unanimous United States Supreme Court concluded the trial court may award such fee enhancements under 42 U.S.C. § 1988 in appropriate circumstances. However, in the 5-4 portion of its decision, the Court also held such fee enhancements are justified only in "extraordinary " or "rare" circumstances and that there is a strong presumption that the lodestar amount yields a sufficient fee.

NOTE: This particular decision is immediately applicable to several federal employment civil rights statutes (42 U.S.C. 1981 and 1983) and may also provide a basis for employers to argue so-called fee enhancements should be similarly limited under other statutes authorizing reasonable attorney's fees, including Title VII, the ADEA, and FEHA.

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will or should not be tried on a class-wide basis, the more difficult it may be to assert discovery should be bifurcated into "class" and "merits" discovery phases. This may be particularly true where the difference between the two categories cannot be clearly delineated, or where both parties may need to present experts to explain how the claims either could or should not be presented for trial on a class-wide basis.

Third, while the *Dukes* court spent some time addressing (although ultimately not deciding) the viability of various options available to the trial court, plaintiffs may be more likely after *Dukes* to present the district court with the outline of a trial plan based, if available, on how other courts have handled similarly large and complex class action suits in order to demonstrate the manageability of a particular class action. Obviously this will be dependent and may vary significantly on the type of litigation and claims involved, but both sides should be prepared to explain how the core common issues in the case either will or will not be manageable on

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a class-wide basis at trial.

While the *Dukes* Court spent a great deal of time attempting to explain why it believed there was not a significant divergence of opinion between the circuits on this important issue, recent appellate decisions (and the fact it was a 6-5 *en banc* decision) may cast doubt on this conclusion. [10] As a result, though *Dukes* is approaching its nine-year anniversary, this comprehensive and important ruling may yet be reviewed by the U.S. Supreme Court for further "clarification" on these issues. ▲

1 2010 U.S. App. LEXIS 8576 (9th Cir., Apr. 26, 2010).
2 *Dukes, supra,* U.S. App. LEXIS 8576 at *11.
3 *Id*., at *22.
4 *See Id*. at *34-35 (emphasis in original).
5 *Id*., at *57-58.
6 318 F.3d 937, 955 (9th Cir. 2003).
7 *Id*. at *127.
8 *Id*. at *129.
9 *Id*. at *144.
10 *See, e.g., American Honda Motor Corp v. Allen,* 2010 WL 1332781 (7th Cir. April 7, 2010); *Dukes* dissent op. at *197.

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