



# Litigation Update

Litigation Section News

February 2014

## First Case Of The Year Grants Admission Of Undocumented Immigrant To The State Bar.

An undocumented immigrant's [the California Supreme Court said its use of this term refers to a person who is not a U.S. citizen and who is in the U.S. but who lacks the immigration status required by federal law to be lawfully present in this country] name was submitted for admission to the California State Bar by the Committee of Bar Examiners. One of the primary issues faced by the California Supreme Court was 8 U.S.C. § 1621, that "generally restricts an undocumented immigrant's eligibility to obtain a professional license but that also contains a subsection expressly authorizing a state to render an undocumented immigrant eligible through the enactment of a state law. A few weeks after the Supreme Court heard oral argument on this matter, *Business and Professions Code* section 6064, was amended, authorizing the court to admit "an applicant who is not lawfully present in the United States [who] has fulfilled the requirements for admission to practice law." The Supreme Court stated: "In light of the recently enacted state legislation, we conclude that the Committee's motion to admit Garcia to the State Bar should be granted." (*In re Sergio C. Garcia on Admission* (Cal. Sup. Ct.; January 2, 2014) (Case No. S202512).)

## The Five-Year Rule Is Still Here.

Plaintiff filed a complaint on November 13, 2006. During the following years, there were various events. At one point, the trial court stayed the action while the parties engaged in mediation. One of the plaintiffs passed away. One of the defendants was in bankruptcy for many months. The complaint was amended five times. In May 2012, some of the defendants moved to dismiss the action under *Code of Civil Procedure* section 583.360, known as "the five-year rule." The trial court dismissed the action. A divided appellate court affirmed

the dismissal with regard to all of the defendants named in the original complaint, but reversed with regard to a defendant, Doe 31. The majority explained: "While the original complaint included fictitiously named defendants as Does 1-30, Does 31-50 were not included until the Fourth Amended Complaint, which was filed on January 2006." The dissenting justice stated: "In my view, the trial court abused its discretion in that the twists and turns of this case made appellant's ability to bring the case to trial within five years of filing the complaint 'impossible, impracticable, or futile.'" (*Gaines v. Fidelity National Title Insurance Company* (Cal. App. Second Dist., Div. 8; December 12, 2013) 222 Cal. App.4th 25.)

## Pedestrian Did Not Qualify For Underinsured Motorist Coverage Of Her Father's Insurance Policy.

Two pedestrians were killed by an underinsured motorist. The father of one of them, who had his own underinsurance coverage, claimed that his insurance company also provided insurance for his daughter. The daughter was 39 years old, and while she had lived with her father, for at least a year prior to the accident, she lived elsewhere. The trial court granted summary judgment, finding neither the policy nor the law provided underinsurance motorist coverage for pedestrians. The appellate court affirmed, noting that she did not live in the household of the insured and that "she was a pedestrian at the time of the accident, so she was not engaged in an activity related to one of the covered vehicles." (*Berendes v. Farmers Insurance Exchange* (Cal. App. Third Dist.; November 18, 2012) 221 Cal. App.4th 571, [164 Cal.Rptr.3d 498].)

## Evidence Permitted Against Defendant Dismissed Pursuant To Nonsuit.

A woman underwent the surgical removal of her gallbladder.

Problems started the next day with shortness of breath, low blood pressure and chest pain. She was taken to ICU and multiple tests and procedures were performed. She was placed on a ventilator. A problem ensued with the ventilator and a nurse manually provided oxygen while a technician switched out the ventilator. Her pulse dropped precipitously and a Code Blue was called. A neurologist later determined she suffered from anoxic brain injury due to lack of oxygen. She died several days later. A medical malpractice/wrongful death action against the hospital and her doctor followed. The court granted a nonsuit in favor of the hospital and the action against the doctor proceeded to a jury trial. The jury found in favor of the doctor. On appeal, the woman's family contended the trial court erred in permitting the doctor to present evidence that a ventilator malfunction, rather than physician negligence, was the cause of death because *Code of Civil Procedure* section 581c, prevented the doctor from "lay[ing] blame" on the hospital. The appellate court noted: "At the heart of plaintiffs' appeal is the scope of section 581c, which provides, in relevant part, that "[i]n actions which arise out of an injury to the person or to property, when a motion for judgment of nonsuit was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion." In affirming, the appellate court stated: "We do not believe the statute was intended to prevent a defendant from presenting, in good faith, relevant evidence related to a causative factor for which there is no culpable party." (*Leal v. Mansour* (Cal. App. Second Dist., Div. 8; October 30, 2013) (As Mod. November 20, 2013) 221 Cal.App.4th 638, [164 Cal.Rptr.3d 695].)

## Employer's Cross-Complaint Against Employee Tossed.

An employee sued his employer for wrongful termination. The employer cross-complained for malicious prosecution, contending the employee had maliciously prosecuted a meritless claim for unemployment insurance benefits. The employee's special motion to strike under the anti-SLAPP statute [*Code of Civil Procedure* section 425.16] was denied. The court of appeal reversed, stating: "Having determined that the malicious prosecution cause of action satisfies the first prong because it arises from activity protected under section 425.16, subdivision (e), and having also determined that the second prong is satisfied because [the employer] cannot show a probability of prevailing, we conclude that the malicious prosecution cause of action is a SLAPP within the meaning of section 425.16." (*Kurz v. Syrus Systems, LLC* (Cal. App. Sixth Dist.; November 22, 2013) 221 Cal.App.4th 748, [164 Cal.Rptr.3d 554].)

## Employers's Demurrer Overruled On Appeal.

Plaintiffs worked for a company about to be sold. The owners allegedly promised that if plaintiffs would stay on until the sale was complete, they would be paid a bonus sufficient for them to retire. The company sold for \$30 million and the promised bonuses were not paid. Plaintiffs brought an action for several causes of action including fraud and breach of contract, and their action was dismissed after the trial court sustained defendant's demurrer. In reversing, the appellate court found "the first amended complaint alleges facts sufficient to state causes of action for fraud, breach of contract, and promissory estoppel, and fails to adequately allege causes of action for intentional infliction of emotional distress, negligent misrepresentation, and estoppel in pais." (*Moncada v. West Coast Quartz Corp.* (Cal. App. Sixth Dist.; November 22, 2013) 221 Cal.App.4th 768, [164 Cal.Rptr.3d 601].)

**Sister State Judgments.** The Court of Appeal was asked to decide two issues in a matter involving the Sister State and Foreign Money-Judgments Act [SSFMJA; *Code of Civil Procedure* section 1710.10]: 1) "Is a judgment creditor which is a foreign limited liability company re-

quired to qualify to do business in California as a precondition to applying for entry of a sister state judgment under the SSFMJA?"; and 2) "Is the 30-day limit to make a motion to vacate the judgment triggered by service on a corporate judgment debtor's designated agent for service, without regard to when the judgment debtor obtained 'actual notice' of entry of the sister state judgment under SSFMJA?" The appellate court found: "A judgment creditor which is a foreign limited liability company does not have to qualify to do business in California in order to enforce a sister state judgment under the SSFMJA. Substantial evidence supports the trial court's findings judgment debtors were served properly with process in the sister state action and with notice of entry of the judgment through their designated agent for service in California. Such service on the designated agent, not a judgment debtor's 'actual notice,' triggers the 30-day limit for making a motion to vacate the judgment, so long as the judgment debtor was effectively served with process in the sister state action. *Code of Civil Procedure* section 473.5, which is a procedural remedy regarding relief from a default or default judgment, is inapplicable to a judgment entered under the SSFMJA." (*Conseco Marketing, LLC v. IFA and Insurance Services Inc.* (Cal. App. Second Dist., Div. 1; November 22, 2013) 221 Cal.App.4th 831, [164 Cal.Rptr.3d 788].)

## Court Sanctions For Violation Of State Bar Rules Reversed.

A lawyer was sanctioned \$43,000 under *California Rules of Court*, rule 2.30(b) for violating the California State Bar Rules of Professional Conduct by negligently hiring an attorney ineligible to practice law to assist her by acting as counsel at trial. In reversing, the appellate court stated: "As rule 2.30(b) does not authorize sanctions for violations of the *Rules of Professional Conduct* nor does the rule apply in family law proceedings, the rule did not authorize the sanctions imposed in this case." (*In re the Marriage of Gregory J. and Marcela Bianco (Winifred Whitaker)* (Cal. App. Fourth Dist., Div. 1; November 22, 2013) 221 Cal.App.4th 826, [164 Cal.Rptr.3d 785].)

## Sometimes A Legal Malpractice Action May Be Assigned.

Pursuant to *Goodley v. Wank & Wank, Inc.* (1976) 62 Cal.App.3d 389, [133 Cal.Rptr. 83], a legal malpractice action may not be assigned in California. In the present matter, the trial court determined an assignee plaintiff lacked standing in a legal malpractice action and entered a judgment of dismissal. Finding the usual public policies concerns were not at issue, the Court of Appeal reversed, ruling: "Specifically, a cause of action for legal malpractice is transferable when (as here): (1) the assignment of the legal malpractice claim is only a small, incidental part of a larger commercial transfer between insurance companies; (2) the larger transfer is of assets, rights, obligations, and liabilities and does not treat the legal malpractice claim as a distinct commodity; (3) the transfer is not to a former adversary; (4) the legal malpractice claim arose under circumstances where the original client insurance company retained the attorney to represent and defend an insured; and (5) the communications between the attorney and the original client insurance company were conducted via a third party claims administrator." (*White Mountains Reinsurance Company of America v. Petrini* (Cal. App. Third Dist.; November 26, 2013) 221 Cal.App.4th 890, [164 Cal.Rptr.3d 912].)

## No Code Of Civil Procedure Section 128.7 Sanctions For Proceeding With Arbitration.

At the time the trial court confirmed an arbitration award in favor of defendants, it also denied a separate defense motion for sanctions made under *Code of Civil Procedure* section 128.7 for advancing frivolous claims. The appellate court noted the primary purpose of section 128.7 is deterrence of filing abuses, not to provide compensation for those impacted by those abuses. In affirming, the Court of Appeal stated: "There is no authority supporting the position that a superior court, after a matter has been stayed and ordered to binding arbitration, may impose section 128.7 sanctions for an attorney's prosecution of a client's meritless claim before the arbitrator." (*Optimal Markets v. Salant* (Cal. App. Sixth Dist.; November 26, 2013) 221 Cal.App.4th 912, [164 Cal.Rptr.3d 901].)

## Case Removed To Federal Court Stays There Absent Evidence The Matter Is One Of Local Controversy.

Plaintiff filed a class action against defendants in state court, alleging violations of various provisions of state law relating to automobile contracts. Defendants removed the matter to federal court. Presenting no evidence, but arguing the way the class was defined in the complaint supported the request, plaintiff requested the federal trial court to return the matter to state court under the local controversy exception to the Class Action Fairness Act of 2005 [CAFA; 28 U.S.C. § 1332(d) (4)(A)]. The class members were defined in the pleading as “all persons who, in the four years prior to the filing of this complaint, (1) purchased a vehicle from Ron Baker for personal use to be registered in the State of California, and (2) signed a [Retail Installment Sale Contract (RISC)] that failed to separately disclose, on the RISC, the amounts paid for license fees and/or the amounts paid for registration, transfer, and/or titling fees.” The case was ordered back to state court and defendants appealed in federal court. The Ninth Circuit reversed, stating: “We conclude that there must ordinarily be facts in evidence to support a finding that two-thirds of putative class members are local state citizens, which is one of the local controversy exception’s requirements, if that question is disputed before the district court. A pure inference regarding the citizenship of prospective class members may be sufficient if the class is defined as limited to citizens of the state in question, but otherwise such a finding should not be based on guesswork.” (*Mondragon v. Capital One Auto Finance* (Ninth Cir.; November 27, 2013) 736 F.3d 880.)

### Ninth Circuit Grants Review In Case Where Man Was Subjected To Persecution In Russia Because He Is Homosexual.

The Board of Immigration Appeals dismissed a man’s appeal from an order denying his application for asylum. He contends he has a wellfounded fear of future persecution if he is removed to Russia because he is a homosexual. The immigration judge had concluded the man did not carry his burden of demonstrating the Russian government was unable or unwilling to control his non-

governmental persecutors who had subjected him to persecution in the past. The Ninth Circuit granted the man’s petition for review and remanded the matter to the immigration court for further proceedings “regarding whether there has been a change in Russia regarding the persecution of homosexuals and whether it would be reasonable for [the man] to relocate within Russia.” (*John Doe v. Eric H. Holder, Jr.* (Ninth Cir.; November 27, 2013) 736 F.3d 871.)

### Smoke Got In Their Eyes.

In a trademark infringement claim involving the vocal group, The Platters, the Ninth Circuit considered whether the likelihood of irreparable harm must be established, rather than presumed, by a plaintiff seeking injunctive relief in the trademark context. The appeals court decided a showing was required and reversed the district court’s grant of an injunction. (*Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.* (Ninth Cir.; December 2, 2013.) 736 F.3d 1239.)

### No Compensation Or Indemnity In California For WNBA Athlete.

Athlete was drafted by the Cleveland Rockers, a professional basketball team in the Women’s National Basketball Association [WNBA]. She later played for other teams, but never for any team in California. She played only one game in California, in 2003. She filed for Workers’ Compensation in California, alleging cumulative injuries, and was awarded disability indemnity. The appellate court annulled the decision because “California does not have a sufficient relationship with Johnson’s injuries to make the application of California’s workers’ compensation law reasonable and California law has no obligation to apply the workers’ compensation law of any other state. Thus, as a matter of due process, California does not have the power to entertain Johnson’s claim.” (*Federal Insurance Company v. Workers’ Compensation Appeals Board (Adrienne Johnson)* (Cal. App. Second Dist., Div. 5; December 3, 2013) 221 Cal.App.4th 1116.)

### After-Acquired Evidence Doctrine Inapplicable.

Plaintiff, an African American, twice applied to become a union organizer, but both times the po-

sition was filled by white men. He filed a discrimination complaint with the Department of Fair Employment and Housing, and received a right to sue letter. He then filed an employment discrimination action. During discovery, he admitted he had been convicted of possession of narcotics for sale and served time in prison. Although the union was unaware of plaintiff’s felony previously, upon learning about it, the union demanded that plaintiff dismiss his action because, pursuant to 29 U.S.C. § 504(a), he was legally unqualified for the position he sought. Later, the union sought dismissal through a motion for summary judgment, which the trial court granted. On appeal, plaintiff contended the after-acquired evidence doctrine precluded the trial court from considering his felony conviction, and that the decision not to hire him was racially motivated. In affirming, the appellate court found that, since plaintiff was not qualified for the organizer position, he cannot show a prima facie case for racial discrimination.” (*Horne v. District Council 16 International Union of Painters and Allied Trades* (Cal. App. First Dist., Div. 4; December 3, 2013) 221 Cal.App.4th 1132.)

### Government Informant...The Man Of The Hour.

The informant formerly belonged to a group who perpetrated home invasions. The group dressed in law enforcement uniforms and used a stolen law enforcement battering ram to break down locked front doors. He informed on his associates and received a lighter sentence. Less than a month after his release, the informant was caught stealing, and offered to disclose evidence about new home invasions. A sting operation followed, and a defendant was arrested. The defendant contended his conviction for conspiracy to possess with intent to distribute cocaine and possession of a firearm should be reversed because the government engaged in outrageous conduct. The Ninth Circuit affirmed, stating: “Indeed, it was precisely because of his past experience as a criminal that [the informant] was useful to the ATF in its efforts to minimize the risks inherent in apprehending groups who were engaging in home invasions. We do not require the government to enlist a person with no criminal experience to help with the appre-

hension of a group of hardened criminals.” (*United States of America v. Hullaby* (Ninth Cir.; December 4, 2013) 736 F.3d 1260.)

**Chapter 13 Filing Does Not Preclude Appeal.** Following confirmation of an arbitration award, the trial court awarded defendants \$19,826 in costs and later \$158,471.25 in attorney’s fees. Plaintiff filed a chapter 13 bankruptcy petition which listed the trial court’s cost award, but not the attorney fee award. Defendants filed their proof of claim in the bankruptcy court, listing both the costs and the fee awards. A month later, plaintiff filed her notice of appeal. After that time, the bankruptcy court confirmed her chapter 13 debt repayment plan. Defendant moved to dismiss her appeal. The state appellate court denied the motion to dismiss, stating: “The confirmed chapter 13 plan does not preclude plaintiff’s appeal challenging the trial court’s cost and attorney fees award. No doubt, plaintiff acknowledged the existing debt in her chapter 13 plan and voluntarily agreed to make payments on it. But nothing in federal bankruptcy law prevents her from, outside the bankruptcy proceeding, challenging the trial court’s authority to impose the obligation on her in the first instance.” (*Edwards v. Broadwater Casitas Care Center* (Cal.App. Second Dist., Div. 5; December 5, 2013) 221 Cal.App.4th 1300.)

**Unexpected Consequences In Removing Employment Case To Federal Court.** Plaintiff brought a discrimination action against her employer under California’s Fair Employment and Housing Act [FEHA; *Government Code* section 12900]. Defendant removed the action to federal court on the basis of diversity of citizenship. A jury awarded plaintiff \$27,280 for gender discrimination, and the court awarded \$697,971.80 for attorney fees. The sole basis of the employer’s appeal was its contention the district court abused its discretion in awarding fees. The Ninth Circuit, in a split decision, affirmed [except for a portion of the fees awarded for paralegal services]. The majority noted the trial court had reduced the amount of fees requested, so that it was clear the trial court recognized it had the discretion to reduce the fee award. Recognizing there was a disparity between the

damages recovered and the fees awarded, the majority stated: “We are not convinced that California law requires the trial court to reduced that disparity.” (*Muniz v. United Parcel Service, Inc.* (Ninth Cir.; December 5, 2013) (Case No. 11-17282) 120 Fair Empl. Prac. Cas. (BNA) 1549.)

**Decertified Class Ordered Recertified.** Allstate Insurance Company changed the classification of its auto field adjusters from salaried employees to hourly employees in response to litigation challenging their misclassification as employees exempt from protection of overtime wage laws. After the change, Allstate presumed that an adjuster’s workday begins with the first appointment as set by the Work Force Management System. Plaintiff filed a class action alleging Allstate had a policy of not compensating adjusters for work performed before they arrived at their first vehicle inspection of the day or for work performed after completing the last inspection of the day. The class was certified. Several months later, the United States Supreme Court issued *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, [180 L.Ed.2d 374], holding that 1.5 million claimants who alleged gender discrimination had no unifying theory holding together “literally millions of employment decisions.” After *Dukes*, the trial court in the present matter decertified the class. The appellate court issued a writ of mandate directing the trial court to vacate its order decertifying the class and ordering it to recertify it because plaintiffs here allege a company-wide policy of discouraging and limiting overtime. (*Williams v. Sup. Ct. (Allstate Insurance Company)* (Cal.App. Second Dist., Div. 8; December 6, 2013) (As mod. Dec. 24, 2013) 221 Cal.App.4th 1353.)

**En Banc Ninth Circuit Reversed District Court In International Law Decision.**

Last year we reported the following:

**No Jurisdiction.** Plaintiff brought an action against an Austrian-owned railway as a result of her attempting to board a moving train in Innsbruck. She purchased a Eurail pass in California from Rail Pass Experts, a company based in Massachusetts. When attempting to board the train, she fell to the tracks through a gap in the

platform and suffered injuries that ultimately required the amputation of both legs above the knees. She filed a complaint for negligence, failure to warn and design defect in California against the Republic of Austria. The district court dismissed the action and the Ninth Circuit affirmed, noting the sole basis by which courts in the United States may obtain jurisdiction over foreign states is the Foreign Sovereign Immunities Act [FSIA; 28 USC § 1602], and holding no exception applied. (*Sachs v. Republic of Austria* (Ninth Cir.; September 26, 2012) (Reversed and Remanded) 695 F.3d 1021.)

The Ninth Circuit, *en banc*, heard the case and held otherwise. In reversing and remanding, the court stated: “We hold that the first clause of the FSIA commercial activity exception applies to a common carrier owned by a foreign state that acts through a domestic agent to sell tickets to United States citizens or residents for passage on the foreign common carrier’s transportation system.” (*Sachs v. Republic of Austria* (Ninth Cir.; December 6, 2013) 737 F.3d 584.)

**Still Pursuing Art Stolen By Nazis.** Plaintiffs allege their ancestors “were a well-known Jewish family that played a prominent role in Germany’s economic and cultural life” and purchased a painting of artist Camille Pissarro in 1898. As a condition to leaving Germany in 1939, the family was required to surrender the painting to the Nazis. In 1943, the painting was sold to an anonymous buyer. After the war, the family received compensation for the painting through German courts. In 1976, an art collector purchased the painting. In 1993, an agency of Spain purchased the collection which included the painting. In 2000, the family discovered the painting was on display in a Spanish museum. A lawsuit was filed in 2005. The federal district court dismissed the action after finding the statute of limitations set forth *Code of Civil Procedure* section 338, subsection (c)(3), was unconstitutional in this context. California’s statute “provides for a six-year statute of limitations for ‘an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer.’” The Ninth Circuit found that the trial court erred when it held *Code of Civil Procedure* section 338, subsection (c)(3), “intrudes on foreign affairs,” and reversed and remanded

the matter for further proceedings in the trial court. (*Cassirer v. Thyssen-Bornemisza Collection Foundation* (Ninth Cir.; December 9, 2013) 737 F.3d 613.)

**Argument Is Not Evidence For Damages Award.** In a wrongful termination action, plaintiff's lawyer stated in closing argument that plaintiff suffered \$44,000 in lost wages for the eight months he was unemployed. This is what the jury's verdict form said:

"Past economic loss: lost salary \$198,000.00

"lost bonuses \$ 0

"Past mental suffering, emotional distress \$ 0

"Future mental suffering, emotional distress \$ 0

"TOTAL \$198,000.00"

On appeal, the employer contended the award was excessive. In affirming the award, the appellate court pointed out that argument is not evidence and stated: "Since the jury could reasonably conclude the [job plaintiff got after he was terminated] was inferior, it was reasonable for the jury to not use [plaintiff's] National wages to mitigate." (*Villacorta v. Cemex Cement* (Cal.App. Fourth Dist., Div. 2; December 11, 2013) 221 Cal.App.4th 1425.)

**Abuse Of Pension Plan.** In a marital dissolution action, the husband [who is also a lawyer] claimed that pursuant to the Employee Retirement Income Security Act [ERISA; 29 U.S.C. § 1001], his pension plan was exempt from levy on a writ of execution to pay his spouse's attorney for attorney fees. The court rejected his argument "on the ground there was substantial evidence that [the husband] abused the pension plan by secreting community assets and funneling them through his pension plan." The appellate court affirmed the trial court's order, stating that because the husband "was the employer sponsor of the plan and the sole employee, beneficiary and trustee of the pension plan, the trial court reasonably concluded that ERISA was inapplicable and the pension plan was therefore not exempt from the writ of execution under ERISA." (*In re Marriage of Nathan and Robin LaMoure* (Cal.App. Fourth Dist., Div. 2; December 11, 2013) 221 Cal. App.4th 1463.)

**Hiring Decision Involved Exercise Of Free Speech.** Plaintiff filed a discrimination complaint alleging that CBS Broadcasting refused to hire him as a weather news anchor because of his gender and age. CBS filed a motion to strike the complaint pursuant to the anti-SLAPP statute [*Code of Civil Procedure* section 425.16], arguing that its selection of a newscaster qualified as an act in furtherance of its free speech rights. The trial court denied the motion, concluding that plaintiff's claims did not arise from CBS's hiring decision, but rather from its discriminatory employment practices. The appellate court found plaintiff's claims involve the exercise of free speech, and reversed the order and remanded for the trial court to consider whether plaintiff demonstrated a reasonable probability of prevailing on the merits of his claims. (*Hunter v. CBS Broadcasting, Inc.* (Cal.App. Second Dist., Div. 7; December 11, 2013) 221 Cal.App.4th 1510, [165 Cal.Rptr.3d 123].)

**What Do You Say To A Telephone Company When It Wants To Install An Antennae In A City Park?** "Hi, My Name Is NIMBY." Cities have authority to enter into licenses of city-owned property. But in 1990, a charter city passed a measure which amended the city charter to place limits on the use of city-owned property: "No. . . structure costing more than \$100,000 may be built on or in any park or beach or portion thereof . . . unless authorized by the affirmative votes of at least a majority of the total membership of the City Council and by the affirmative vote of at least a majority of the electors voting on such proposition at a general or special election at which such proposition is submitted." After obtaining licenses, a telecommunications company commenced construction of an antennae in two city parks. When residents complained, the City Council told the company that voter approval was required. Instead of seeking voter approval, the company filed an action in federal court, and the district court determined the Telecommunications Act of 1996 [TCA; Pub. L. No. 104-104] preempted the city's decision to require voter approval. In reversing, the Ninth Circuit found the 1990 measure was outside the TCA's preemptive scope. (*Omnipoint*

*Communications, Inc. v. City of Huntington Beach* (Ninth Cir.; December 11, 2013) 738 F.3d 192.)

**"The Degree Of Civilization In A Society Can Be Judged By Entering Its Prisons."** – FYODOR DOSTOYEVSKY. In California, an individual with a disability who is between 18 and 22 years of age and has not yet earned a regular high school diploma is entitled to continue to receive special education and related services. The California Supreme Court posed and answered the question whether *California Education Code* section 56041, which provides generally that for qualifying pupils between the ages of 18 and 22 years, require the school district where the pupil's parent resides to be responsible for providing special education and related services to a disabled individual who is incarcerated in a county jail? The court's answer was in the affirmative: "[T]he statutory language is broad enough to encompass special education programs for eligible county jail inmates between the ages of 18 and 22 years, and no other statute explicitly assigns responsibility for the provision of special education to such individuals. Applying the terms of section 56041 to assign responsibility in this setting is consistent with the purposes of the statute and the special education scheme as a whole, and does not create absurd or unworkable results." (*Los Angeles Unified School District v. Garcia* (Cal. Sup. Ct.; December 12, 2013) 58 Cal.4th 175.)

**Big Difference For Real Estate License When Criminal Conviction Is Dismissed "In The Interests Of Justice" Under Penal Code Section 1385 Than When It's Expunged Under Penal Code Section 1203.4.** In January 2009, a licensed real estate agent pleaded no contest and was convicted of misdemeanor hit and run with property damage in violation of *Vehicle Code* section 20002(a). In April 2010, after negotiations with the district attorney, the court granted the real estate's motion to set aside her no contest plea. The court also granted the people's motion to amend the complaint to allege a violation of the basic speed law in violation of *Vehicle Code* sec-

tion 22350, an infraction. The real estate agent pled guilty to the infraction, and the court dismissed her hit and run conviction *nunc pro tunc* to her January 2009 plea, “in the interests of justice.” An administrative law judge ordered the real estate agent’s license revoked. The real estate agent brought a writ for administrative mandamus in superior court. The trial court said section *Business and Professions Code* section 10177 authorized the California Bureau of Real Estate to revoke the license of a real estate salesperson convicted of a crime. However, the court held the order was not to expunge the real estate agent’s conviction pursuant to *Penal Code* section 1203.4, but was an order to dismiss “in the interests of justice” under *Penal Code* section 1385. Accordingly, the trial court ordered the Bureau to set aside its decision revoking the agent’s real estate license. The appellate court affirmed, stating, “[W]e hold that section 10177 does not authorize the license revocation in this case because that section does not allow discipline when there has been a dismissal unless the dismissal is pursuant to *Penal Code* section 1203.4, i.e., an expungement. Here, the dismissal was not pursuant to *Penal Code* section 1203.4, and there is no other evidence supporting the Bureau’s revocation of [the real estate agent’s] real estate license.” (*Ryan-Lanigan v. Bureau of Real Estate* (Cal.App. Third Dist.; December 13, 2013) 222 Cal.App.4th 72.)

## ADR Spotlight

### Significant Developments in ADR Case Law

**FAA Grounds To Review Arbitration Awards Are Exclusive And Non-Waivable.** In *In re Wal-Mart Wage and Hour Employment Practices Litigation*, (Ninth Cir.; December 17, 2013) (Case No. 11-17718) the class action plaintiffs’ attorneys quarreled over how to allocate a \$28 million fee and agreed to submit the dispute to “binding, non-appealable arbitration.” After the arbitrator rendered his award, some of the attorneys remained dissatisfied and moved to vacate the award. The District Court denied the motion to vacate. The dissatisfied attorneys appealed. Their adversaries argued that the parties’ agreement declaring any arbitration award to be non-appealable and therefore deprived the courts of jurisdic-

tion. The Ninth Circuit concluded that it had jurisdiction. It noted that in *Hall Street Associates LLC v. Mattel, Inc.*, (2008) 552 U.S. 576, [128 S.Ct. 1396, 170 L.Ed.2d 254] the Supreme Court refused to enforce an arbitration clause that expanded the scope of judicial review set forth in Section 10 of the Federal Arbitration Act (FAA) because those grounds were “exclusive.” If the grounds for vacatur of an arbitration award cannot be supplemented, it compels the conclusion that these grounds are not waivable or subject to elimination by contract. The FAA requires as a matter of mandatory federal law that a federal court “must” confirm an arbitration award unless, among other things, it is vacated under Section 10. This language contains no hint of flexibility. By contrast, other provisions in the FAA expressly permit modification by contract, e.g., Section 5 provides rules for appointing an arbitrator that apply “if no method [is] provided [in the arbitration agreement].” If the text of the statute trumps a contractual arrangement to expand review beyond the statute, then it follows that the statute forecloses a contractual agreement to eliminate review. The Court then determined, in an accompanying memorandum opinion, that there were no grounds for vacating the award and affirmed the District Court opinion.

### The Lawyer’s Guide to Drafting ADR Clauses

How to Use a Judicial Reference. Section 638 of the *California Code of Civil Procedure* allows parties to agree to choose a process called “judicial reference.” As with arbitration, judicial reference allows the parties to choose one or three neutral decision makers with specific expertise. Although formally open to the public, hearings before a referee are often held in private offices. Unlike arbitration, the referee must follow the Evidence Code, but the parties can limit discovery to speed up the process. And, unlike arbitration, the decision of the referee will be treated like a court judgment and is subject to the same appeal provisions as a regular judgment. Details of how to draft a Judicial Reference Agreement are spelled out at pages 60-66 of the Publication “Lawyer’s Guide to Drafting ADR Clauses” (Current as of May 30, 2012), which is available free on-line to all mem-

bers of the Litigation Section. [Click Here](#). The Guide also includes advice on how to draft arbitration agreements in light of recent California and United States Supreme Court Decisions.

### Membership in the ADR Subcommittee

The Litigation Section ADR Subcommittee, which is comprised of both ADR professionals and advocates, focuses on recent case law and legislative developments in the field of alternative dispute resolution. The ADR Subcommittee also provides educational programs on ADR issues. Members of the Litigation Section who wish to join the ADR Subcommittee should send an e-mail and resume to the co-chairs of the Committee: Jeff Dasteel ([Jeffrey.dasteel@gmail.com](mailto:Jeffrey.dasteel@gmail.com)) and Don Fischer ([donald.fischer@fresno.edu](mailto:donald.fischer@fresno.edu)).

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