

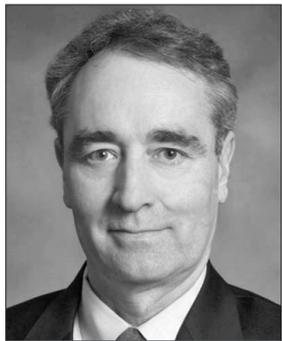
GUEST COLUMN
California's unrivaled capacity for innovation

By Martin Kenney

Every few years the *New York Times* or a Texas governor solemnly pontificate about how deep fiscal problems, a bad business climate, a dysfunctional state government, a faltering economy, or too many environmental or other regulations have broken California's business dynamism and innovative capacity. So for fun, I began preparing a summary of measures of innovation and entrepreneurship in California. As I gathered the data, the results shocked me. One of these days the pessimists may surely be proven correct, but, so far, their conclusions appear to be wishful thinking. For Californians, it is important to recognize our advantages, continue to capitalize upon them, and think about how we can strengthen them.

Ultimately, economic success is based upon innovation and creativity. In part, but certainly not entirely, innovation and creativity is nurtured by education. Despite serious problems in the K-12 system, according to the most reputable global university ranking index, California has

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MARTIN KENNEY
 UC Davis

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CIVIL LAW

Civil Procedure: Internet service provider is not entitled to attorney fees following denial of church's subpoena seeking email addresses of gay rights group members. *Mount Hope Church v. Bash Back!*, U.S.C.A. 9th, DAR p. 15860

Contracts: Oklahoma Supreme Court improperly ignores Federal Arbitration Act's substantive arbitration law by deciding whether non-competition agreement is invalid. *Nitro-Lift Technologies L.L.C. v. Howard*, U.S. Supreme Court, DAR p. 15843

Contracts: In contractual dispute between dental implant company and university, expert witness testimony regarding lost profits is too speculative to be allowed. *Sargon Enterprises Inc. v. University of Southern California*, CA Supreme Court, DAR p. 15846

CRIMINAL LAW

Criminal Law and Procedure: Government may still argue that warrantless search of car was permissible after failing to file a timely response to motion to suppress evidence. *U.S. v. Scott*, U.S.C.A. 9th, DAR p. 15866

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Daily Journal

UC Berkeley School of Law professor Marjorie Shultz co-wrote a study showing that the LSAT didn't predict how well a student would perform as a lawyer. The exam is a major component in law school admissions and future job placement.

New tests, websites redefine how firms find good lawyers

By Ryne Hodkowski
 Daily Journal Staff Writer

What makes a good lawyer, and more importantly, how do you find him or her? To answer that question, law firms are beginning to take more unconventional tacks in reaching out to recent graduates and prospective employees beyond visiting top schools and conducting on-campus recruiting and interviews. They're increasingly looking at studies showing that undergraduate and law school grade point averages, LSAT scores and law school pedigree show less about an attorney's effectiveness than factors such as life experiences, personality, grit and attitude, all of which encompass the field of psychometrics. They're also more often employing Internet match-making sites to find lawyers who will fit in at the firm.

"There is definitely a need and a desire to do things differently," said Stacy Trzesniewski, law school recruiting manager of Wilson Sonsini Goodrich & Rosati PC. The firm is one of several that have begun recruiting based on sites such as JD Match. "Firms are tired of guessing and are starting to believe that we know it when we see it," Trzesniewski said.

Marjorie M. Shultz, a professor at UC Berkeley School of Law and Sheldon Zedeck, a professor at UC Berkeley's graduate school, released a 2011 study showing that the LSAT — one of the major components of law school admissions and thus eventual job placement — didn't predict how well one would perform as a lawyer.

In fact, the study found that attorney effectiveness rested on 26 characteristics, including fact-finding, creativity and innovation, diligence, stress management, negotiation skills and the "ability to see the world through the eyes of others."

Zedeck said he and Shultz spent roughly two years interviewing attorneys and asking them about traits that lead to success as a practitioner. They ultimately whittled their findings down to the 26 characteristics. They then asked 1,100 attorneys to rate themselves on the traits and asked colleagues and supervisors to evaluate the attorneys as well.

While Zedeck noted that the importance of these factors varied from attorney to attorney based on practice field, the characteristics were able to predict lawyer effectiveness, while the LSAT had the opposite correlation.

"The better you did on the LSAT, the worse you did on factors related to being a good professional," Shultz said. "The LSAT was significantly correlated with 12 factors and eight of them were negative, from which we would draw the LSAT was not a very good predictor of effectiveness."

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Some say FCPA guide lacks specificity

White-collar lawyers wanted more guidance in new standards for 1977 act

By Hadley Robinson
 Daily Journal Staff Writer

Defense attorneys did not get the specifics they were hoping for when the government issued extensive guidelines on the Foreign Corrupt Practices Act earlier this month.

Instead of clarifications on the benefits of self-disclosure, what constitutes a foreign official and what regulators expect of a compliance program, attorneys found a bundle of the government's previously stated positions, opinions and case law in the 120-page document.

"I think the surprising thing about the guidance is how unsurprising it was," said Robb C. Adkins, a San Francisco-based partner at Winston & Strawn LLP, who has both prosecuted and defended FCPA cases.

The Department of Justice and the Securities and Exchange Commission agreed last fall to issue guidance on the FCPA, following pressure from the U.S. Chamber of Commerce and attorneys grappling with how to advise their clients. Enacted in 1977, the act cracks down on companies giving bribes or making other inappropriate payments when doing business in other countries.

With FCPA enforcement efforts increasing in recent years, many companies want more government assistance in determining the requirements for staying in compliance, attorneys say, because there is very little case law to give clarity.

Enforcement spiked in 2010, with 23 companies paying a record \$1.8 billion in fines and penalties, and stayed high in 2011, when 15 companies paid \$506 million, according to Richard L. Cassin of CassinLaw LLC, who writes a blog on the FCPA.

Some attorneys acknowledged the new guidelines show extensive effort from the Department of Justice, and that having a roadmap — even if it's not a new roadmap — is useful.

"I think it's going to be helpful for some companies with some questions," said Pamela R. Davis, a San Francisco-based partner at Orrick, Herrington & Sutcliffe LLP. "The bigger questions are still out there."

The most frustrating vagueness in the guidelines for Davis is the government's position on self-disclosure. The government does not have a detailed policy on incentives to voluntarily cooperate and disclose internal issues, leaving defense attorneys in a tough position to help their clients.

"In advising companies, it is often times the most difficult part of the engagement," Adkins said. "It's difficult because there's not clear guidance on what the benefit is."

"Both DOJ and SEC place a high premium on self-

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State courts can vet some expert witness testimony

By Fiona Smith
 Daily Journal Staff Writer

The state Supreme Court unanimously ruled Monday that trial court judges must act as "gatekeepers" and exclude expert testimony that is speculative and based on faulty logic.

The decision reversed an appellate holding that would have allowed a dental implant company to offer evidence alleging USC was liable for more than \$1 billion in lost profits because it botched a clinical study. *Sargon Enterprises Inc. v. USC* 2012 DJDAR 15846 (Cal. Nov. 26, 2012).

The decision brings the state closer to the federal standard, which grants judges more power to question the credibility of evidence in cases, said Edward Imwinkelried, a profes-

sor at the UC Davis School of Law who co-authored an article supporting the stance the high court took in Monday's decision.

The ruling empowers the state's judges to go beyond explicit statutory restrictions on expert testimony and look at whether the testimony is based on a flawed methodology or bad comparisons, he said.

"This is going to reduce the incentive for forum shopping between federal and state court in cases which are heavy in expert testimony," Imwinkelried said.

Encino-based Sargon Enterprises Inc., which invented a new type of dental implant, fought to include evidence of its lost profits as part of a lawsuit against USC. The university agreed to study the effectiveness of the implants, but did not complete the study.

Sargon's expert witness claimed that the

company lost anywhere from \$220 million to \$1.1 billion. He compared Sargon to the six major dental implant companies, based on their innovation, market share and profits, among other factors. The trial court excluded the evidence, but was overturned 2-1 by the 2nd District Court of Appeal.

"This resounding win for USC is also one of the most important decisions on California evidence law in the last several decades."

— Kathleen Sullivan

Sargon's attorney, Eric M. George of Browne George Ross LLP, argued that Los

Angeles Superior Court Judge Terry A. Green had abused his discretion. George could not be reached for comment Monday, but Sargon Lazaros, the company's president, called it a "sad day for California law" and said the ruling would discourage companies from developing revolutionary technology in California.

Kathleen M. Sullivan, a partner at Quinn Emanuel Urquhart & Sullivan LLP and former dean of Stanford Law School, argued for USC and welcomed the decision in an emailed statement.

"This resounding win for USC is also one of the most important decisions on California evidence law in the last several decades," Sullivan wrote. "It greatly clarifies California law on the admissibility of expert testimony and

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Litigation

Making his own way
 Judge Joseph Farris' personal history shaped him, but he defies molds. **Page 2**

Learning on the go
 One of the most difficult jobs facing general counsel today is how to effectively manage an intellectual property case. A recent case highlights some of these challenges. By Ben M. Davidson and Heather H. Fan **Page 3**

Litigation/Law Firm Business

Wikimedia claims dismissed
 San Francisco-based Wikimedia Foundation dodged a bullet earlier this month when a lawsuit against it was dismissed in Los Angeles federal court. **Page 4**

Firm grows
 Procopio, Cory, Hargreaves & Savitch LLP announced it has added five lawyers, including IP partner Miku Mehta from Sughrue Mion LLP, for its Silicon Valley office. **Page 5**

Perspective/Corporate

California Tax
 With the passage of Prop. 30, even higher taxes are coming to California. Here are a few tips you might not know about filing taxes in the Golden State. By Robert Wood **Page 6**

M&A, financing roundup
 Latham & Watkins LLP advised Arlington-based Wright Medical Group Inc. in its agreement to purchase regenerative medicine researcher BioMimetic Therapeutics Inc. for \$380 million. **Page 7**

'I want you' ...to help veterans find jobs

By Adam Garson
and Christian Orozco

The San Diego community needs to come together to help returning veterans struggling with unemployment. Every year on Veterans Day America recognizes and applauds veterans for their service, and this year was no different. Yet, 200,000 veterans cannot find work. Now is the time to help them.

Currently, 9.7 percent of the nation's post-9/11 veterans are unemployed. This figure is alarming considering the national unemployment rate is only 7.8 percent. Because San Diego boasts one of the largest concentrations of veterans in the country, the unemployment numbers are worse.

For San Diego residents, these men and women are not just statistics — they are former shipmates, fellow neighbors and future coworkers. They deserve help.

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Members of the San Diego community have taken innovative steps to begin to address this problem, but they should strive to become the model for other American cities.

Some San Diego for-profit and non-profit organizations are already



Homeless veterans fill a long line of tables receiving their nightly meal at a seasonal shelter for homeless veterans in San Diego.

Associated Press

making headway. For instance, the San Diego Workforce Partnership funds job training programs throughout San Diego County. Veterans Village of San Diego operates one of these programs and provides veterans with the opportunity to attend subsidized vocational training programs.

Occupational Training Services administers another program called

the Connection to Work. This on-the-job training program helps companies find qualified workers, while providing financial reimbursement for some of the cost to train new employees.

In partnership with Microsoft, veterans and their eligible spouses can receive free vouchers for IT skills training and certification at local One-Stop Career Centers. There are

a number of locations in San Diego.

Another organization, A-DA Homeless Veterans Reintegration Program, provides veterans with guidance in the ever-changing job market. To help veterans, this organization collects and distributes donated business clothing, hosts resume building workshops and teaches interview skills.

For those veterans seeking to

start or manage their own business, specialized training is available through the Entrepreneurship Bootcamp for Veterans with Disabilities at DLA Piper. In these courses, veterans gain entrepreneurship skills and the tools to open or grow small businesses.

Because high unemployment impacts the crime rate, the San Diego criminal justice community has

also come together to help veterans get jobs. To further this goal, San Diego implemented the specialized Veterans Treatment Court. The VTC handles specific criminal cases for veterans struggling with PTSD, mental trauma or substance abuse issues. In lieu of serving jail time, veteran participants agree to receive treatment and rehabilitation. After successful completion, the VTC may expunge portions of the veterans' criminal record, enabling the veteran to look forward to a future with broader employment opportunities.

Moreover, San Diego employers may receive a tax benefit when hiring veterans. Last year, Congress passed bi-partisan legislation providing tax credits to those who hire veterans. Specifically, the Returning Heroes Tax Credit offers businesses that hire unemployed veterans with a maximum credit of \$5,600 per veteran hired, and the Wounded Warriors Tax Credit provides businesses that hire veterans with service-connected disabilities with a maximum credit of \$9,600 per veteran.

Ultimately, San Diego must support the veterans in our community. With great military preparation, plentiful post-service training, remarkable treatment opportunities, and available tax credits, the time for San Diego to help, and even hire, veterans is now.

Adam Garson is an attorney at DLA Piper and leader of the firm's signature pro bono project, *Serving Those Who Serve Our Country*, which provides legal and community services to veterans and military families in San Diego.

Christian Orozco is a DLA Piper/Krantz Pro Bono Fellow whose work is dedicated exclusively to pro bono matters.

Saying sayonara to California, for tax purposes

By Robert W. Wood

If you're like me, you love California. But California's high taxes are another matter. And with Gov. Jerry Brown's victory on Proposition 30 at the ballot box, even higher taxes are coming. More than a few people find that they want to distance themselves from the state, either partially or wholly for tax reasons. Often, they consider Nevada's lack of state income tax as they contemplate a major income event.

They might be selling a business or real estate, taking a company public, or winning a large legal settlement. Whatever the impetus for thinking about your California tax bill, it can be awfully tempting to tally up the tax savings by leaving. After all, one can always consider moving back after a few years of living somewhere else.

Here are a few tips culled from over 30 years of tax practice in the Golden State. A California resident is anyone in the state for a purpose that isn't temporary or transitory in nature. It also includes anyone domiciled here who is outside the state for a temporary or transitory purpose. That's a broad definition, and the burden is on you to show you're not a Californian.

There are legal presumptions too. If you're in California for more than nine months, you are presumed to be a resident. Conversely, if your job requires you to be outside the state, it usually takes 18 months outside to be presumed truly gone from the state. California gets you coming and going.

Domicile is another legal concept. Your domicile is your true, fixed permanent home — the place where you intend to return even when you're gone. You can have only one domicile, and where it is depends on your intent to remain and to return.

How do you measure intent? With objective facts. That means many relevant facts must be examined, starting with where you own a home. If you own several homes, their size and value will be compared. If you claim a homeowner's property tax exemption as a resident, then that

is relevant, showing where you consider your home to be.

Where your spouse and children reside counts too, as does the place where your children attend school. And speaking of school, if you claim not to be a California resident, make sure you are paying non-resident tuition for college students. The small details matter.

The number of days you spend inside and outside the state is also important, as is the purpose of your travels. Where you have bank accounts, and the location of your social, religious, professional and other organizations are all relevant. Voter's registration, vehicle registration and driver's licenses count, too.

Fortunately for California tax advisers, though, the mere fact that you hire a California tax lawyer to advise you about your California tax exposure does not mean you're a resident.

Not surprisingly, where you are employed is key. You may be a California resident because it is your home base, even if you travel extensively and are rarely in the state. Where you own or operate businesses matters, as does the relative income and time you devote to them. You can own investments far and wide, but you can expect them to be compared, especially if you manage them actively.

Even where you obtain professional services matters. That includes doctors, dentists, accountants and attorneys. Fortunately for California tax advisers, though, the mere fact that you hire a California tax lawyer to advise you about your California tax exposure does not mean you're a resident.

Some authorities suggest that a key issue is whether you maintain a California base in a state of constant readiness for your return. That's why if you leave California it is so important to sell your residence (which

is preferable), or at least to lease it out on a long-term lease. Consider all these numerous factors at once. Many of these points are probably not too significant on their own. Yet they tend to have a cumulative effect, either pro or con.

Almost by definition, if you are thinking seriously about these rules you are probably about to collect some significant money. You may already be calculating how much your California tax hit might be. Whatever you may read online, don't assume that you can simply get a post office box in Nevada and call it a day.

Plainly, this doesn't work. In fact, if you do that kind of a false move on paper only, you will end up far worse off with a high amount of interest and penalties added to the California taxes you will still have to pay. If you're going to move, you need to actually do it.

If you want to maximize the chances that your exit from California will be graceful, do not wait until the night before your big lawsuit settles or your company is sold. Plan ahead. Get some legal advice and plan carefully. Like other high tax states, California is likely to come after you and probe how and when you stopped being a resident. The best way to prevail is to plan carefully and be fully prepared.

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ROBERT WOOD
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California's unrivaled capacity for innovation

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three universities in the Global Top 10 (Stanford, UC Berkeley and Cal Tech) and a total of 10 universities in the global Top 50 (UC Los Angeles, UC San Diego, UC San Francisco, UC Santa Barbara, UC Irvine, USC and UC Davis). The closest competitor nation is the UK with five universities in the Top 50 and the closest state is New York with four universities in the Top 50. In 2012, California has the most dominant brain trust that any location in the world has ever had. In terms of public universities, there is, quite literally, no state in the U.S. that is even close.

The number of important firms that have directly spun-out of the local universities is worth listing. In addition to the well-documented case of Stanford spin-offs, those linked to the University of California warrant recognition. Nearly all of the major biotechnology firms including Amgen, Chiron, Genentech, Hybritech and many others have roots in University of California campuses. In electronics, UC-related firms include Cadence, Broadcom, Digital Instruments, Qualcomm, Sun Microsystems, Sybase and Synopsis, to name a few of the most famous. There are many other firms whose founders received, at least, part of their education at one of the UCs. The linkage between UC Davis and the Napa Valley wine industry is well-known. In a spot survey of Napa chief winemakers, we found that over 60 percent had an educational background that included UC Davis. When one includes all of the contributions of the California research universities, the impact on the state economy is staggering.

Good universities are not the only way to measure creativity. One of the most widely accepted measures is patenting. Given the presence of so many top-tier universities, one might expect that California would perform well in this regard and this expectation proves correct. In 1998, California was the home of 19.6 percent of all the inventors being granted a patent. In 2011, California's share had increased to over 25.9 percent. Moreover, only inventors in Japan and Germany file more patents in the U.S. than did those from California. In addition, California's increase in annual patenting from 1998 to 2011, 12,358, was greater than runner-up New York's total of 7,584 in 2011. In other words, California's advantage is increasing.

Venture capital investment is often used as a proxy for entre-

preneurial innovativeness. Here again, the situation is remarkable. In the early 1990s, Silicon Valley received slightly over 30 percent of the VC invested annually in the U.S. while California regularly received approximately 40 percent of the total venture capital disbursed nationally. For the first three quarters of 2012, California received 54 percent of the national total and Silicon Valley received 41 percent of all U.S. VC investment. Instead of declining, California's share has been increasing. While some, including myself, have thought that the VC model is experiencing difficulties, so far this has not affected California's share of investment.

In 1998, California was the home of 19.6 percent of all the inventors being granted a patent. In 2011, California's share had increased to over 25.9 percent.

Initial public stock offerings is another way to measure new firm formation success. Of all emerging growth firms (defined as an entrepreneurial firm less than 15 years old at the time of the IPO) that listed on U.S. markets between 2006-2010, California was the home to nearly 35 percent of all new listings and 46 percent of newly listed firms that had received venture financing. The dominance is even greater if only technology-based firms are considered. California's deep technology and managerial base make it the ideal home to new fast-growing firms.

California creativity has come in so many forms that it is sometimes worth reflecting upon its multidimensionality. The contribution to the California economy of the Hollywood entertainment industries in music, film and amusement parks alone is enormous. There has been little remarked upon, however, about the decades-old synergy between Hollywood and the Bay Area technology industry. For example, in 1938, Walt Disney Studios ordered eight oscillators for testing the music equipment from the newly formed Bay Area firm Hewlett-Packard. In 1947, the small Redwood City tape recorder firm, Ampex, convinced Bing Crosby to pre-record his radio show to be broadcast later and launching a long relationship between Ampex

and Hollywood. Later, Silicon Valley computer graphic firms such as Silicon Graphics, Industrial Light and Magic, and Pixar dramatically improved Hollywood special effects. Finally, in the visual arts there is the video game industry, which, though global, has a long historical presence in California stretching from Atari through to today's Electronic Arts.

California creativity expresses itself in many unexpected ways and some of these have also changed the entire industries. For example, mountain biking, as a sport, and the mountain bike, as a new product, emerged in the late 1970s in Marin County as a group of enthusiasts raced Schwinn's down Mount Tamalpais. To further their exploits, a number of them formed mountain bike firms. Specialized is one of the survivors of an early burst of entrepreneurship in this new type of bike. Another California craze that went global was skateboarding, a product of the Orange County surf scene, which today is an entire industry. One of the earliest successful windsurfing firms, Windsurfing International, was formed in Southern California and significant parts of the industry are still located there. Yet another California leader that emerged to take advantage of the post-World War II surf enthusiasm that swept California.

Inventing new sports and then finding ways to commercialize them seems to be a California habit. In fashion, California only trails New York.

California has serious problems including shockingly great income inequality, a seriously deficient K-12 system, a political system that often appears to be dysfunctional, an embarrassingly bad urban mass transit system, and many other ills. And yet, California is also a powerful idea machine that honors the unconventional, wild, and, at times, seemingly crazy endeavors from which new innovations spring. Perhaps this is our greatest strength, and a value that we need to commit to preserving and even further accentuating.

Martin Kenney is a professor in the Department of Human and Community Development at UC Davis and a senior project director at the Berkeley Roundtable of the International Economy at UC Berkeley.

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