SAN FRANCISCO
Daily Journal
www.dailyjournal.com

VOL. 118 NO. 139 THURSDAY, JULY 19, 2012

Undocumented bar hopeful has many friends

State Supreme Court receives dozens of briefs supporting immigrant's bid to join the bar

By Don J. DeBenedictis
Daily Journal Staff Writer

Dozens of bar and community groups urged the state Supreme Court on Wednesday to admit an undocumented immigrant to practice law in California.

In one amicus brief, 16 county and ethnic bars, led by the Los Angeles County Bar Association, argued that "immigration status is irrelevant" to whether someone is fit to be a lawyer.

The brief, signed by former state Supreme Court Justice Carlos R. Moreno of Irell & Manella LLP, was one of the first of at least a dozen expected to be filed in response to the court's request for comment on the first-impression question. *In re Garcia on Admission*, S202512 (Calif. Supreme Ct., filed March 16, 2012).

Moreno said the U.S. Supreme Court decision last month striking down parts of Arizona's immigration statute indicates that the State Bar should not have to figure out the immigration status of would-be lawyers. *Arizona v. United States*, 2012 DJDAR 8655 (U.S., June 25, 2012).

"We clearly have no role in immigration," he said in an interview.

In a brief for the state, Attorney General Kamala D. Harris argued that allowing undocumented lawyers "would be consistent with state and federal policy that encourages immigrants, both documented and undocumented, to contribute to society." Her brief stated that the applicant in this case "is a model of the self-reliant and self-sufficient immigrant envisioned by federal policy."

As of Wednesday afternoon, only one person had submitted a brief arguing against allowing an undocumented immigrant to practice law. All the other briefs filed by press time support Sergio C. Garcia's application for admission.

The State Bar Committee of Bar Examiners endorsed Garcia's application last year in a confidential petition to the Supreme Court. In May, the court responded by calling for briefs about whether any federal law prevents admission and whether an undocumented bar member could work as a lawyer.

The court also inquired about "other public policy concerns," and it specifically requested the state and federal Justice Departments submit briefs.

See Page 7 — AMICI

Dial 'P' for privacy... or not

Courts split on cellphone searches.

By Robert Iafolla
Daily Journal Staff Writer

WASHINGTON — Recent UC Berkeley School of Law research found that a vast majority of Americans consider their cellphones to be private, revealing what level of privacy protections people expect for the ubiquitous, information-rich devices.

Three in four people surveyed said they believe information on their cellphones to be at least as private as their home computers and that police should need a court's permission to search them, according to the Berkeley Center for Law & Technology study released last week.

But don't count on that survey data showing up in any future U.S. Supreme Court opinions laying out what Fourth Amendment protections might apply to cellphones. Despite the fact that the leading judicial test for privacy rights turns on people's reasonable expectations of privacy, the court has shown little interest in empirical evidence about what the public expects, legal experts said.

"Basically, the court issues empirical decisions without any empirics," said Stephen E. Henderson, a University of Oklahoma College of Law professor who's written extensively on privacy issues. "Lower courts have followed the Supreme Court's lead in attempting to intuit what a reasonable person would expect, without using empirical data."

Noted criminal procedure scholar Christopher Slobogin of Vanderbilt Law School has been particularly critical of the court's avoidance of real-world examples to help decide privacy expectations. In a 2010 Minnesota Law Review article, Slobogin called a series of surveillance decisions "conceptually bankrupt" because the court didn't look to existing privacy protections or public opinion to gauge expectations of privacy.

The high court created the reasonable expectation of privacy standard in a 1967 ruling that a government wiretap of a pay phone violated the Fourth Amendment. The test, which

See Page 3 — CELL

Associated Press

Two people talk on their cell phones while sitting along Market Street in San Francisco in 2010.

Two lawyers bolster Jones Day's Palo Alto office

Cooley white-collar, Latham corporate partners jump ship

By Ameera Butt
Daily Journal Staff Writer

Jones Day announced Wednesday the additions of a prominent white-collar defense partner from Cooley LLP and an emerging companies partner from Latham & Watkins LLP for its Palo Alto office.

Neal Stephens, who successfully defended former McAfee Inc. General Counsel Kent Roberts against stock options backdating charges while at Cooley, joins the corporate criminal investigations practice. Greg Chin, previously with Latham in Menlo Park, will be a member of the capital markets practice group.

Greg Lanier, partner in charge of Jones Day's Palo Alto office, said the additions would broaden the talent in the office.

"It's an example of a couple of really talented lawyers who figured out that we are growing and going pretty far forward into the future," Lanier said. "We are really adding to the quality of the matters that we can do. We've already led some very big M&A transactions and have been involved in some big litigation matters."

Stephens' expertise will aid in some ongoing corporate criminal investigations Jones Day is handling. "For example, we are deeply involved in investigations with Wal-Mart, and Neal [Stephens] brings a lot of experience in those matters," Lanier said.

Stephens said the move allows him to continue representing large corporations and dealing with government regulation.

"My practice area was something they were looking to build on in the Bay Area and mesh it in with what they do nationally and globally," Stephens said. While at Cooley, Stephens defended Roberts, the former general counsel for McAfee Inc., against stock options backdating charges brought by the Department of Justice and the Securities and Exchange Commission. A jury acquitted Roberts of the criminal charges in October 2008 and the SEC dropped its civil enforcement complaint in March 2009.

Michael G. Rhodes, Cooley's litigation department chairman, wrote in an email, "Neal is a fine lawyer and friend to many here at Cooley. We wish him the best."

Meanwhile, Chin said he would be focusing on emerging companies and capital markets work as well as life sciences and the convergence of life sciences, information technology and clean tech.

"Greg is a great emerging companies lawyer," Lanier said.

Chin said, "Jones Day is expanding in California and I'm excited to build something significant here."

Frank Pizzurro, a spokesman for Latham & Watkins, said "Greg was a valuable member of our corporate department and we wish him well in his new endeavors," said .

ameera_butt@dailyjournal.com

DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: Court does not abuse discretion in striking answer and declaring default after considering sanctioned party's willful disobedience and pointlessness of lesser sanctions. *Hester v. Vision Airlines Inc.,* U.S.C.A. 9th, DAR p. 9891

Civil Procedure: Non-pecuniary motives do not disqualify public entity litigants from obtaining attorney fees pursuant to Code of Civil Procedure Section 1021.5. *City of Maywood v. Los Angeles Unified School District,* C.A. 2nd/7th, DAR p. 9925

Contracts: Arbitration agreement is not unconscionable because litigant failed to establish both substantive and procedural unconscionability. *Nelsen v. Legacy Partners Residential Inc.,* C.A. 1st/1, DAR p. 9956

Family Law: In guardianship proceeding, 'stable placement' provision within Family Code Section 3041 is not dependent on child first being abandoned with nonparent. *Guardianship of Vaughan,* C.A. 3rd, DAR p. 9898

Juveniles: Juvenile court errs in denying mother's petition to vacate finding that her children's stepmother was their presumed mother. *D.S., a Minor,* C.A. 4th/1, DAR p. 9905

Taxation: Relator's share from successful Medicare fraud qui tam action under False Claims Act is not capital gain, but taxed as ordinary income. *Alderson v. United States,* U.S.C.A. 9th, DAR p. 9883

CRIMINAL LAW

Criminal Law and Procedure: No 'Brady' violation occurs where information is speculative and would not affect accused's guilt or sentence. *Runningeagle v. Ryan,* U.S.C.A. 9th, DAR p. 9865

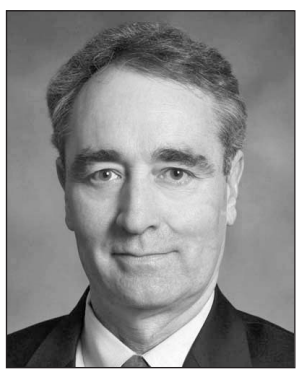
Criminal Law and Procedure: Grant of habeas relief is improper where 'some evidence' supports denial of parole based on prisoner's current dangerousness due to his allegiance to co-offender. *In re Tapia,* C.A. 4th/3, DAR p. 9912

Full rulings and summaries are online by 4 p.m. the day they are issued. www.dailyjournal.com

BRIEFLY

The State Bar is demanding that 2,600 lawyers prove they completed their minimum continuing legal education requirement last year. The bar announced Wednesday that it is auditing the MCLE compliance of about 5 percent of lawyers who turned in completion certificates in February. Those lawyers come from the group whose last names begin with the letters H through M.California lawyers must complete 25 hours of education courses every three years. In a much smaller audit last year of 635 lawyers from the N-Z group, the bar found that 98 — 15 percent of those audited — had problems proving they met their MCLE requirement. Eventually, 27 of those lawyers were referred to discipline prosecutors for possible further action.This time, the bar selected about 500 lawyers for audit because they showed "potential problems" in claiming a reduction or exemption from the education requirement. The remaining 2,200 audit targets were chosen at random, according to the bar announcement. Next year, the bar plans to audit 10 percent of lawyers in the A-G group, it said.

GUEST COLUMN



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.*

Entrepreneurship and venture capital in China

For the last decade, China has been one of the hottest venture capital markets in the world. Because it was so easy to list Chinese firms on U.S. markets and other markets such as Hong Kong and Singapore, venture capitalists were eager to invest. Many of the major Silicon Valley venture capitalists including Accel, DCM, Kleiner Perkins, Sequoia and Technology Crossover Ventures have offices or joint ventures in China and other less aggressive firms have a partner dedicated to China or a tie-up with a Chinese VC firm. Finally, there are a number of Asia-oriented funds such as H&Q Asia Pacific, Walden and WI Harper that have mandates to invest in China among other Asian locations.

The Chinese market has had tremendous investment opportunities for a number of reasons. First, the entire economy has grown at approximately 9 percent compounded for nearly three decades. Second, prior to the opening in the early 1980s China had a dearth of the amenities such as hotel, restaurant, retail and a myriad of other services offered by chain retailers. Third, today China has more Internet and cell phone users than any other nation in the world. Fourth, the Chinese government protects the home market in any number of fields and has been particularly zealous in excluding U.S. Internet firms — usually under the guise of national security or the need to control objectionable content. In terms of capital invested, these factors have combined to make China the second most attractive VC investment market in the world.

For many of us watching developments in China, the puzzle is whether Chinese firms and

See Page 4 — VENTURE

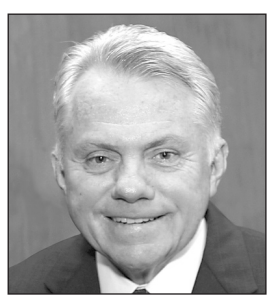
MORE NEWS

Litigation
A Family Affair

Judge Robin Miller Sloan, a third-generation judge, followed her father and grandfather into the law.
Judicial Profile

Page 2

Litigation
Reprehensible Conduct



How much impact should defendants' finances have on punitive damage awards? By Rex Heeseman of the Los Angeles County Superior Court

Page 3

Corporate
High-Security Analysis

Debra Schreoder, general counsel at RAND Corp., handles work for the famous research group.
Corporate Counsel Q&A

Page 5

Perspectives
Don't Sue the Messenger

Technology has blurred the line between facilitating access and creating content, but courts are slow to adapt when applying the immunity provisions of the Communications Decency Act. By Chris Chiou, David Russell and Alex Smith of Jenner & Block

Page 6

Embezzlement lands former lawyer in jail

By Henry Meier
Daily Journal Staff Writer

LOS ANGELES — An attorney who pleaded no contest to embezzling client and employee funds was sentenced Wednesday to three years in Los Angeles County jail.

David M. Robinson admitted stealing nearly $370,000 dollars from 11 clients and one employee between April 2007 and April 2010, according to the Los Angeles County district attorney's office, which prosecuted the case.

The attorney pleaded to a total of 10 felony counts for making off with his victims' money. Most of the money was from cases he settled for clients, which he would deposit in a trust fund, according to the district attorney's office.

Instead of distributing the money to the individuals who retained his services, Robinson withdrew large portions of it for his personal use, the district attorney's office said.

Robinson, who continued to practice law even while suspended from the State Bar between April 2007 and February 2008, was formally disbarred last September.

The State Bar led the investigation into Robinson's embezzlement and was assisted by the district attorney's office and the U.S. Department of Labor.

Deputy District Attorney Fernando Guzman led the prosecution. Superior Court Judge Craig Richman handed down the sentence.

henry_meier@dailyjournal.com

BRIEFLY

A man shot by a California Highway Patrol officer during a central coast domestic violence incident has been charged with the attempted murder of a peace officer. A Santa Barbara Cottage Hospital spokeswoman says 18-year-old Michel Paul Ledesma is still in critical condition. The CHP officer, who wasn't hurt, pulled over a car on Sunday after a woman placed a 911 call and said she was in a car and Ledesma was threatening her and her infant daughter with a knife. The Santa Maria Times says Ledesma got out of the car and confronted the officer with a knife. The officer fired and Ledesma was hit several times. Santa Barbara County prosecutors on Tuesday charged Ledesma with assault and attempted murder of a peace officer with a gang enhancement

Covington tees off in sheriff's trial

California lawyers go to Arizona to try civil rights case against well-known official.

By Hadley Robinson
Special to the Daily Journal

Associated Press

Maricopa County Sheriff Joe Arpaio

An Arizona sheriff's efforts to crack down on illegal immigration will go before a federal judge today as Latino citizens and civil rights groups challenge his policies in court with pro bono help from Redwood Shores-based Covington & Burling LLP attorneys.

Maricopa County Sheriff Joe Arpaio has made a name for himself taking immigration enforcement into his own hands, including by having his deputies question, detain and frequently arrest people they identify as potential undocumented immigrants.

The complaint alleges Latinos and people of color — even ones in the United States legally — are targeted by Arpaio and often subjected to prolonged detentions and arrests for routine traffic stops. Covington & Burling partner Stanley Young is lead counsel on the case, joined by partner Andrew C. Byrnes, and attorneys from the American Civil Liberties Union and the Mexican American Legal Defense and Educational Fund.

"I think a victory against [Arpaio] would have a substantial impact," Byrnes said. "That would be a tremendous win for those of us who care about the Constitution and care about the residents of that area."

First filed more than four years ago, the lawsuit is similar, though narrower in scope, to one the Department of Justice filed against Arpaio in May. Both involve claims of racial profiling and use some of the same evidence, including traffic stop records and the sheriff's internal documents, but the government's case extends beyond traffic violations and into workplace raids and alleged mistreatment of Latinos in the county jails.

Byrnes said he believes his clients have substantial evidence that Arpaio is acting unconstitutionally, including complaint letters citizens wrote to Arpaio suggesting he investigate people who speak Spanish. While the letters from the citizens don't implicate the sheriff, Byrnes said the notations Arpaio wrote on the letters do. The notations include reminders to send thank-you notes to the citizens and for deputies to investigate the complaints. Byrnes also said his clients' case relies on internal sheriff's office emails that include racist comments and jokes.

Neither Arpaio nor his attorney, Tim Casey of Schmitt Schneck Smyth Casey & Even PC, responded to requests for comment.

Although the lawsuit is specifically about Arpaio's department and the alleged racial profiling of people of color in the Phoenix area, some experts think what happens in the case could provide insight into what may eventually happen with what remains of an aggressive Arizona immigration law. Last month, the U.S. Supreme Court struck down three of the four challenged provisions of SB 1070, but let stand the so-called show-me-your-papers provision, 2b, which requires law enforcement to check the immigration status of people arrested or stopped if they have reasonable suspicion that the people might be in the country illegally.

Despite upholding the provision, Justice Anthony M. Kennedy, who wrote the majority's decision, suggested such checks might be unconstitutional. He wrote that there's "a basic uncertainty about what the law means and how it will be enforced" and that the decision didn't foreclose another pre-emption challenge once the provision takes effect.

Ben Johnson, a native Arizonan and executive director of the American Immigration Council in Washington D.C., said, "I think the Supreme Court, their opinion on 2b was a little naive in terms of underestimating how hard it is to identify characteristics of undocumented immigrants without engaging in racial profiling." He said he hoped Covington's lawsuit "would raise serious questions about whether Section 2b in Arizona is a power that Sheriff Joe ought to have."

Cecillia Wang, director of the ACLU Immigrants' Rights Project and an attorney for the plaintiffs in the case, said Latinos and people of color are being victimized.

"There's no way for local cops to figure out whether somebody is undocumented without relying on stereotypes," she said. "If you're foreign and speak with an accent you have something to worry about."

Byrnes said he believes his clients have substantial evidence that Arpaio is acting unconstitutionally.

Arpaio expressed satisfaction after the Supreme Court ruling, saying it upheld 2b, which he called the most important part of the law. Last month, he issued a press release saying that for the first time since the ruling, federal enforcement agents took custody of two suspected undocumented immigrants his deputies questioned during a traffic stop.

The Federation for American Immigration Reform agrees with Arpaio that illegal immigrants can be identified without racial profiling.

"If a Maricopa County deputy sheriff pulled somebody over for a traffic infraction and the driver doesn't have identification and can't answer basic questions, then it is perfectly reasonable to think this person might be violating immigration law," said FAIR spokesperson Ira Mehlman.

Most experts say the June ruling on 1070 might not be the high court's last word.

"I think that what the Supreme Court did was take a wait and see attitude. They felt they didn't have enough information," said Hiroshi Motomura, a professor of immigration law at UCLA School of Law. "But if it turns out that there's substantiated allegations of racial profiling, then the Supreme Court left the door open for further lawsuits and further injunctions."

BYRNES

YOUNG

Venture capital and entrepreneurship in China

Continued from page 1

the overall economy exhibit innovative behavior. What does venture investment in China tell us? The message is murky. In the retail sector, many VC-funded firms are building out infrastructure that has long been available in developed nations. For example, consider retail chains delivering all manner of services such as motel (think Motel 6), drug store (think CVS), clothing (think Gap), roadside billboard and fast food chains (think MacDonald's) that deliver a guaranteed level of service and quality. While these have been tremendous investment opportunities, they do not exhibit significant business model innovations beyond adjustment for the Chinese market.

Another field receiving significant investment is all manner of cyberspace ventures. However, nearly all of these appear to be knock-offs of earlier U.S. ventures. So, Baidu is the Google, 51 Jobs is the Monster.com, Ctrip is Expedia, Shanda is an online gaming platform, Sina is Yahoo!, Netease is an aggregator of sites also somewhat like Yahoo!, etc. How does this work? For example, Facebook has been prohibited from operating in China and in the interim Renren with 154 million users and Sina Weibo with 300 million users have occupied the space. Are these innovatory or knock-offs? What do we have in terms of evidence? First, with the exception possibly of Shanda, none of these firms have any measurable market share outside of mainland China. Interestingly, not even Sino-phone Asian nations such as Taiwan or Singapore use these Chinese websites. In many respects, these firms are creations of a Chinese government that has explicitly protected the market from overseas competition — hardly a sign of innovation.

In the newer field of mobile content used in smart phones and, more recently, tablets, are Chinese firms innovators? While less is known about these firms, a number of them have grown rapidly. Still, even here, the question remains, if they are so innovative, why can't they export their innovations globally? The success of the iPhone and Google's Android in the Chinese market suggests that innovation remains limited.

For many of us watching developments in China, the puzzle is whether Chinese firms and the overall economy exhibit innovative behavior.

Enormous fortunes have been made betting on the China market, despite admittedly opaque markets, difficulty with the rule of the law, corruption at nearly all levels of government and a general ambivalence to Western investment. Yahoo! discovered this last year with its stake in Alibaba (an apt name?), when Jack Ma, the founder, attempted to transfer its online payment operation to another of his firms without telling the Board of Directors. Eventually, this was straightened out largely because Yahoo! was able to threaten the ability of Alibaba to launch a U.S. IPO. The larger point is that U.S. investors have little protection from self-dealing and other activities of executive insiders. The venture capitalist investors have some leverage because they can effectively block the IPO on the US market. After the IPO, public investors will have little recourse, because very few of these firms have U.S. assets.

The fact that Chinese firms are not global technological leaders and VC-financed investments are becoming less attractive does not mean that China, as an economy, cannot challenge the U.S. as the global economic leader. As the largest Internet and smart phone market in the world with a now huge economy, even if the current financial bubble collapses, China will almost certainly rival the U.S. in economic importance. The uncertainty is whether it is a safe market for U.S. investors. The best days for investment in Chinese entrepreneurial firms may be over as public market investors become more careful. If ever caveat emptor applied, it does in China.

SUBMIT A COLUMN
The Daily Journal accepts opinion pieces, practice pieces, book reviews and excerpts and personal essays. These articles typically should run about 1,000 words but can run longer if the content warrants it. For guidelines, e-mail legal editor Ben Armistead at ben_armistead@dailyjournal.com.

WRITE TO US
The Daily Journal welcomes your feedback on news articles, commentaries and other issues. Please submit letters to the editor by e-mail to ben_armistead@dailyjournal.com. Letters should be no more than 500 words and, if referencing a particular article, should include the date of the article and its headline. Letters may not reference a previous letter to the editor.