

Glimmers of comity in the 9th Circuit

By John Roemer
Daily Journal Staff Writer

The U.S. Supreme Court voted to review fewer decisions from the 9th U.S. Circuit Court of Appeals in 2012, possibly signaling an increased alignment between the views of the justices and those of circuit judges.

And the 9th Circuit voted to rehear en banc fewer of its own decisions by 3-judge panels this year, perhaps indicating improved comity within the court as well.

The high court voted to review 10 cases from the 9th Circuit this year, with three conferences remaining in January at which it could make additional grants. That's down from 26 in 2011. Last year, 9th Circuit cases made up 30 percent of the SCOTUS docket. This year it's half that, though one of them — the Proposition 8 case — will likely attract more attention than any other in years, except for the companion Defense of Marriage Act case from the 2nd Circuit and the high court's Obamacare affirmation last June.

In the Prop. 8 review, the high court will consider whether to ratify the 9th Circuit's decision that a voter-backed ban on gay marriage

See Page 4 — FEWER

DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: On remand, new judge may reconsider whether case involving accident in Utah may properly be tried in California because prior judge had retired. *Williamson v. Mazda Motor of America Inc.*, C.A. 4th/3, DAR p. 17285

Civil Rights: Federal court may not hear capital defendant's challenge to state court's denial of request to obtain additional DNA testing of evidence. *Cooper v. Ramos*, U.S.C.A. 9th, DAR p. 17342

Labor Law: Grocery store may not prevent union from picketing at store's entrance because California statutes prohibit certain activities from being enjoined during labor disputes. *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, CA Supreme Court, DAR p. 17298

CRIMINAL LAW

Criminal Law and Procedure: Gang member, who acted alone in attempted robbery, does not violate 'criminal street gang participation' statute, even if his conduct benefited gang as a whole. *People v. Rodriguez*, CA Supreme Court, DAR p. 17316

Criminal Law and Procedure: Defendant's testimony at suppression hearing may be used to impeach defense expert's testimony when testimony at hearing was contrary to expert's opinion. *People v. Spence*, C.A. 4th/1, DAR p. 17325

Criminal Law and Procedure: Sex offender may obtain certificate of rehabilitation seven years after completing sentence because imposing longer 10-year rehabilitation period violates equal protection. *People v. Schoop*, C.A. 1st/4, DAR p. 17373

Criminal Law and Procedure: Prosecutor's pervasive pattern of improper statements throughout trial causes reversal of order adjudging defendant as sexually violent predator. *People v. Shazier*, C.A. 6th, DAR



Ryne Hodkowski / Daily Journal

Eric P. Early, managing partner of Early Sullivan Wright Gizer & McRae LLP

Small firms foresee work to build on advantages over next decade

By Ryne Hodkowski
Daily Journal Staff Writer

The legal playing field has leveled considerably in recent years. Advances in technology, increasingly money-conscious clients and the innovation and implementation of hybrid billing rates are a few of the many factors allowing smaller law firms to compete against the Goliaths of the industry. Over the next decade, industry observers say, the world is small firms' oyster. Law school graduates are finding employment at small firms at an increasing rate, with 60.8 percent of the class of 2011 going to work for firms with 25 attorneys or fewer. That's 15.5 percent higher than in 2008, according to the National Association for Law Placement.

FUTURE OF LAW FIRMS

However, as a result of the mass matriculation, small firms now find themselves at a crossroads. Do they keep their lawyer ranks flat, or do they look to grow with new hires or mergers? If it's the latter, how do they go about it in a way that avoids pitfalls?

"There is no question that a highly-leveraged, highly-focused small firm has a place in this market," said Wendy Tice-Wallner, of counsel at 34-lawyer Sideman & Bancroft LLP in San Francisco. President of her own law firm advisory group, The Tice-Wallner Group LLC — a company that consults with businesses on strategic planning and growth — she is also former board chair of Littler Mendelson PC.

"The key is that they need to decide what practices are going to grow and grow them, and see what practices are dragging their bottom line and minimize or get rid of them."

Attorneys agree that there are several hurdles to jump when it comes to growing a firm. Maintaining overhead, possible deterioration of a tightly knit, established culture and over-staffing are all factors that managing partners have to consider.

Complicating matters is the fact that small firms have fewer resources and less time to devote to such decisions.

"Big firms have people sit around and talk solely about how the firm can modify and grow," said Michael Wolf, founder of 46-attorney Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP. "We have lunch and talk about mundane problems. In a small firm, it's hard to envision."

Wolf said his firm has undergone organic growth in the past without the aid of planning. He added that stagnation is a "danger" to any business, including a law firm.

One of the challenges of growing, Wolf said, is not only adding

competent attorneys, but solid support staff, as well.

"A really good IT person — the demand for his services is high, and the price that a small firm can afford is generally lower than what he can get in the marketplace," the attorney said. "We interview people, and sometimes their compensation demands are 20 to 25 percent above the highest I've paid."

E. Scott Palmer, co-founder of 22-attorney Palmer, Lombardi & Donohue LLP, said that upon establishing the firm 13 years ago, he set goals to reach 20 to 25 attorneys, develop practice areas in securities, banking, litigation and real estate and cover Northern California and Southern California. With those initial goals accomplished, he said the future growth of his firm is in the hands of its clients.

"The most important thing for us is to grow prudently and based on the real needs and opportunities presented to us by our clients," he said. "We don't want to be a 'build it and they will come' type of law firm."

Palmer's attitude is in line with several other managing partners of small- and mid-sized firms.

Alex Weingarten, founder of 10-attorney Los Angeles-based Weingarten Brown LLP, said the firm has gone through "explosive growth" since its 2005 founding but that expansion isn't something that's given much thought.

"We don't have a goal to be X number of lawyers by Y date or merge or open another office," Weingarten said. "I don't measure success by any metric like that. Our five to 10 year plan is to grow to provide the services our clients need. I think the people that go and chase money have a harder time finding it."

Firms need to continue to pay "laser-sharp attention to what the clients want," said Tice-Wallner.

See Page 5 — SMALL

Paradigms shifting as juvenile justice matures

By Henry Meier

Daily Journal Staff Writer

"This is a time of tremendous change."

That was how Elizabeth Calvin, a senior advocate for the children's rights division of Human Rights Watch, summed up Gov. Jerry Brown's decision to sign Senate Bill 9 in September.

The bill, which allows young offenders sentenced to life in prison to receive a judicial hearing after serving 25 years, was cheered by juvenile justice reform groups and is one of several major developments that changed the face of the law affecting children in 2012.

SB 9 "reflects an understanding that youth offenders are not the same as adults," Calvin said.

Along with the legislation, both the U.S. and California Supreme Courts handed down decisions constraining overly long and punitive sentences for juvenile defendants.

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the country's high court continued to advance its protections of juveniles in light of scientific evidence showing that their undeveloped cognitive capacities made them more impulsive and less likely to understand the consequences of their actions. The justices' decision banning mandatory life sentences in

Miller followed similar decisions in *Graham v. Florida*, 560 U.S. ___ (S. Ct., 2010) and *Roper v. Simmons*, 543 U.S. 551 (S. Ct., 2005) in the last decade.

The state Supreme Court followed suit by restricting "de facto life sentences" in *People v. Caballero*, 55 262 (Cal. App. 4th, 2012). The case looked at sentences that, while including the possibility of parole, effectively condemned a youth offender to life in prison for non-homicide crimes because of "stacked" sentencing enhancements.

Taken together, the new protections for juveniles represent a movement away from the "incapacitation" policies of the past, ac-

ording to Daniel Macallair, director of the Center for Juvenile and Criminal Justice in San Francisco.

"There's a trend toward reversing many of the policy flops of the past 20 or 30 years," he said. "Our current understanding of juvenile justice turns into myth what were essentially the ideas that drove public policy."

Those policies were the product of the "super-predator" scare propagated in reaction to crime spikes — especially those committed by children — in the 1980s and early '90s, Macallair said. The system of that period, he said, did little to differentiate between

See Page 3 — JUVENILE

Litigation/Perspective

Santa Rosa's genteel jurist

Described by advocates as an 'old-school gentleman,' Rene Auguste Chouteau seeks equity.

Page 2

Criminal review

A look back at a few of the criminal cases that captured headlines in 2012. By Lou Shapiro

Page 5

Corporate/Law Firm Business

Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Page 5

Western hospitality

Founded by a part-time gunslinger, the state's oldest law firm set up camp in Santa Barbara back when bandits on horseback roamed the region's canyons.

Page 6

Corporate/Perspective

Tax rate driving deals

Companies have begun selling themselves at a lower price than valued for fear of an assumed tax structure in 2013 that could potentially hurt them if a deal is postponed

Page 7

Homeowners' rights

Beginning Jan. 1, California homeowner's will have a new set of statutory rights to assert during foreclosure. Review some of the more significant provisions. By Patrick T. Wong and Yesenia Garcia Perez

Page 7

Governor appoints 30 new judges

Brown's choices include former Assembly member and an AOC lawyer

By Paul Jones

Daily Journal Staff Writer

Gov. Jerry Brown's office announced 30 judicial appointments Thursday, and the pool included three Republicans, a slightly more bipartisan mix than in his previous appointment batches.

Brown's picks also include former 10th District state Assemblywoman Alyson L. Huber to the Sacramento Superior Court and Administrative Office of the Courts attorney Annabelle G. Cortez to the Sacramento County Superior Court.

Huber and Cortez are Democrats. Huber, 40, just left office. She decided against running for re-election after changes to her district in the redrawing of California's electoral map and is also in the midst of a divorce and mortgage-related financial problems, according to news accounts. Previously, she worked as an associate at Bartko Zankel Tarrant and Miller from 2003 to 2008.

Cortez, 43, has worked for the Administrative Office of the Courts since 2007 and previously was managing attorney, attorney and law clerk for the Marcos Camacho Law Corporation.

Brown's year-end picks also represent a diverse set of legal backgrounds. Among the appointees are corporate attorneys, private firm lawyers, court commissioners, public defenders, district attorneys and U.S. attorneys.

The governor has drawn praise from some for diversifying the bench with respect to judges' legal backgrounds, which some experts, including Santa Clara University Law Professor Gerald F. Uelman, say provides the judiciary with broader legal experience and perspective.

Brown appointed Republicans Michael J. Reinhart, 54, to the Kings County Superior Court, Matthew C. Perantoni to Riverside County Superior Court and Lily L. Sinfield to San Bernardino County Superior Court. In addition, he picked two independent judges: Michael R. Deems, 54, to Butte County Superior Court, and Pamela P. King, 62, to San Bernardino County Superior Court.

The other appointments announced Thursday were:

- Kimberly E. Colwell, 54, and Brad Seligman, 61, to the Alameda County Superior Court;
- Lori R. Behar, 59, Daniel L. Brenner, 61, Robert B. Broadbelt III, 53, Patrick A. Cathcart, 67, Robert S. Draper, 70, Marc D. Gross, 56, Joseph R. Porras, 40, Tony L. Richardson, 57, Michael J. Shultz, 47 and Lynne Hobbs Smith, 47, to the Los Angeles County Superior Court;
- Mark Andrew Talamantes, 40, to the Marin County Superior Court;
- Harry L. Jacobs, 67, to the Merced County Superior Court;
- Elia M. Ortiz, 39, to the Napa County Superior Court;
- Linda J. Sloven, 58, to the Nevada County Superior Court;
- Terri K. Flynn-Peister, 38, and Elizabeth G. Macias, 41, to the Orange County Superior Court;
- Michael W. Jones, 56, to the Placer County Superior Court.

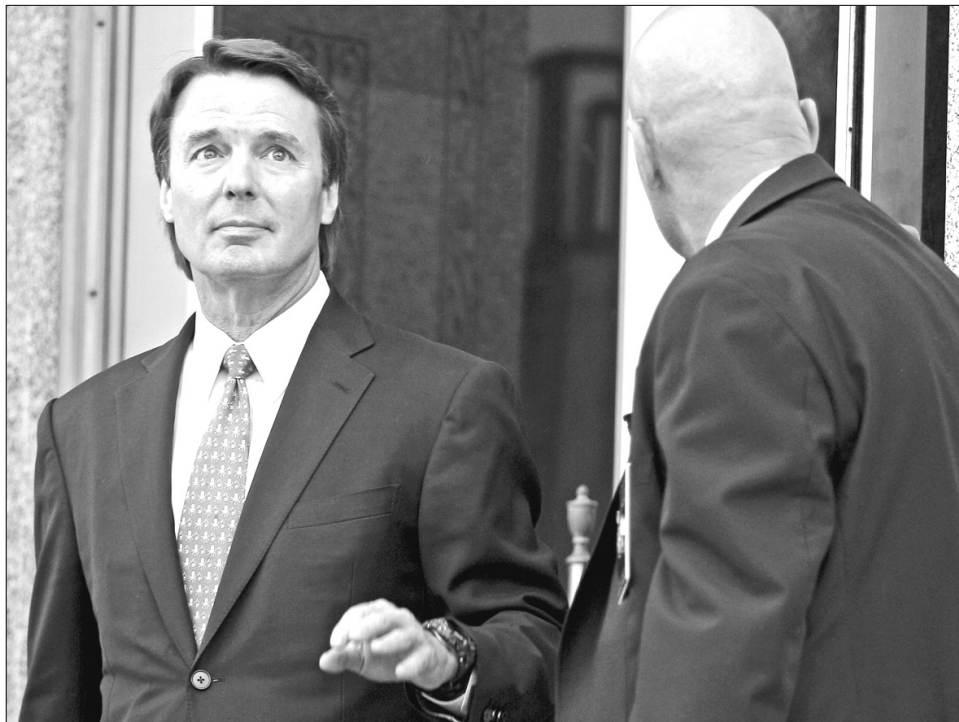
See Page 4 — BROWN

2012 criminal cases, a look back

By Lou Shapiro

2011 was the year of captivating criminal cases. We had Dr. Conrad Murray, Casey Anthony and Lindsay Lohan to name a few. 2012, however, was a year of thought and debate in criminal law. It's not the names of the defendants that caught our attention inasmuch as the broader emotional and practical influences that they had on society.

Let's begin with the George Zimmerman and Treyvon Martin case. Zimmerman is charged with 2nd degree murder and is asserting self-defense. Originally Zimmerman was not charged in the case. A national public outcry changed that *quickly*. The case has stirred up the debate on how far the right-to-use self-defense truly extends. Originally, the way the evidence was slowly being leaked made the case look like a slam dunk for the prosecution. Once Zimmerman's medical records were released and eyewitnesses came forward, the tide changed and Zimmerman's self-defense theory picked up steam. The trial is scheduled for June 2013 and it certainly will be the one to look out for this coming year.



Former presidential candidate and Sen. John Edwards leaves a federal courthouse in Greensboro, N.C. Associated Press

It certainly reminds us attorneys that, if we are representing someone who may have a mental health condition, we have a duty to the public to try to connect the client with mental health services.

Then, to shift gears, we had former Sen. John Edwards, who was found not guilty of seven felony counts involving allegations of receiving illegal campaign contributions. The other remaining counts were dismissed. The trial lasted over a month, and the jury heard stories about infidelity and large sums of money changing hands. Hats off to the defense on this one — Edwards was not a very sympathetic defendant. After the verdict, some claimed that Edwards was prosecuted more for his moral decisions rather his legally culpable ones. Most defendants in Edward's shoes would be able to claim victory and lead life anew. This one — not so simple.

In June, here in the Golden State, a San Bernardino jury found U.S. Marine Anthony Orban guilty of charges including kidnapping and rape. Orban unsuccessfully argued that he was not guilty by reason of insanity. His theory was that the Zolof medication that he was taking rendered him unconscious at the time of the attack. Both sides had experts to support their respective positions. The insurmountable dilemma that the defense attorney faces in this kind of case is that the juror is generally thinking, "if I was the victim of rape, would I excuse the rapist because of the medication he was taking?" Remember, there is a crying victim on the witness stand and everyone agrees she is a victim. When there is a victim, the jury is going to want there to be a defendant.

One month later the tragic Colorado massacre happened. It is anticipated that James Holmes will plead not guilty by reason of insanity. This, of course, brings to mind the recent Connecticut school shooting by Adam Lanza, whose mental health history is still being investigated. Some say this is about gun control

while others say it's about a failing mental health system. Everyone is searching for the solution but can't agree on the problem. It certainly reminds us attorneys that, if we are representing someone who may have a mental health condition, we have a duty to the public to try to connect the client with mental health services. There are extraordinarily patient and kind social workers throughout California who can and will provide assistance. Sometimes we are the gatekeepers by default.

Finally, just a few weeks ago murder charges were dropped against professional tennis umpire Lois Goodman. The defense took great initiative in hiring their own pathologist early on and, more importantly, shared their findings with the prosecution before things got messy in court hearings. To question is to live and that's what the defense did. They questioned how could an elderly victim being struck to the head with a coffee cup then make it up the stairs to go to sleep. They questioned motive on their client's part to do such a heinous thing. When the questions outnumbered the answers the prosecution dropped the case.

It shows that sitting down with the other side and engaging in open and meaningful dialogue is sometimes the best defense.

On that note, may we all strive to have year of peace, productivity and prosperity.

Lou Shapiro is a criminal defense attorney and legal analyst in Los Angeles. He can be reached through www.LouShapiro.com.



LOU SHAPIRO
Criminal defense attorney

Small firms see need to maximize pluses

Continued from page 1

"Firms competing over the next five or 10 years will need to be attuned to those needs, especially because there are a lot of things people can do without a lawyer that they couldn't do 20 years ago."

Given recent successes, some see the next few years as the perfect opportunity to continue to grow and further challenge larger firms.

Eric P. Early, managing partner of 19-attorney Early Sullivan Wright Gizer & McRae LLP, said that cyclical world of law firms will continue — certain large firms will cease to exist, while some small firms will grow and replace them as titans in the industry.

Early sees his firm as one that can emerge as a powerhouse.

"We want to be one of the great firms of Los Angeles and beyond," he said. "We believe we have laid a solid foundation for that."

Despite the disparity in Early's and other attorneys' attitudes toward growth and the future, Early agrees that a firm needs to grow within its means. He said one of the greatest challenges in expansion is finding "top-flight" lawyers to bring aboard.

"You see great resumes and credentials all the time, but a surprisingly small percentage are lawyers that you would ultimately put in a star category or even in an up-and-coming star category," he said. "Attorneys in management in many firms, no matter the size, would likely agree."

For small firms, many lawyers say 25 attorneys seems to be a magic number. Once that number is exceeded, overhead begins to increase significantly and more business needs to be generated for the firm to stay afloat. Because of that, Glen L. Kulik, founding member of 12-attorney Sherman Oaks-based Kulik Gottesman & Siegel LLP, said firms that have between

roughly 25 and 200 attorneys will decrease over the next five to 10 years.

"The middle class is disappearing," he said. "The resources needed to run a firm of around 80 attorneys are sufficiently large. You have to raise your rates and are now competing against the firms that have more than 1,000 attorneys. I think these mid-sized firms will either retrench or merge with another firm."

Kulik said his firm has remained at between a dozen and 18 attorneys for nearly two decades. He sees it hovering around those numbers into the next decade, as well.

He said nearly all the firm's business is generated by three attorneys. If it were to exceed 25 lawyers, he said, it would have to bring on an older, more experienced practitioner to help generate more business. And if it did that, it would have to delve into equity partnership agreements.

"It's very tough for a small firm," he said. "You can't just bring a stranger on and then start growing, because the whole point of a small firm is to work with people you know and like."

Whether or not a small firm is looking to grow, Tice-Wallner said it must maintain a balance that is "adequate capacity but not excess capacity."

She acknowledged that reducing excess capacity at smaller firms can be more difficult than at larger firms, since smaller outfits are naturally more interpersonal. Still, she said, it's a necessity small firms will need to continue to grapple with in the coming years.

"You can't pay attention to the growing practices without recognizing the dragging ones. You need to pay attention to both sides of the ledger," she said. "You can't rob Peter to pay Paul."

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Law students charged in Vegas bird beheading

By Michelle Rindels
Associated Press

LAS VEGAS — Prosecutors filed charges Thursday against two University of California, Berkeley, law school students accused of decapitating an exotic bird at a Las Vegas casino earlier this year.

The charges against Justin Teixeira, 24, include felony killing and felony torturing of an animal, while Eric Cuellar, 24, faces a misdemeanor charge of instigating, engaging in or furthering an act of animal cruelty.

"This was a cruel and malicious act," Clark County District Attorney Steve Wolfson said in a statement, adding that an investigation is ongoing and could result in criminal charges against others. "It is important to hold people accountable for their actions."

Police said the two men were seen Oct. 12 laughing and throwing around the body of a dead, 14-year-old helmeted guineafowl at the Flamingo resort-casino on the Las Vegas Strip. The large bird named Turk was part of the Flamingo's Wildlife Habitat, a garden area with ponds and streams that houses many types of birds.

Surveillance video captured the men chasing the bird into some trees, authorities said, and witnesses told police the two emerged

carrying the bird's body and severed head.

Richard Schonfeld, an attorney representing Cuellar, said he was pleased prosecutors opted for a lesser charge for his client.

"Eric has an exemplary background and I'm pleased the DA chose to proceed with a misdemeanor," said Schonfeld, whose client faces up to six months in jail if convicted. "It's an acknowledgment that he did not physically harm the bird."

If convicted on all charges, Teixeira could be sentenced to prison time. His attorney did not immediately return a message seeking comment Thursday afternoon.

Criminal charges — especially felonies — can affect a person's future in the legal field. The State Bar of California, for example, requires applicants to demonstrate good moral character.

A statement on the bar's website notes that people convicted of violent felonies or felonies involving moral turpitude "are presumed not to be of good moral character in the absence of a pardon or a showing of overwhelming reform and rehabilitation."

Gina Greisen, the president of Nevada Voters for Animals and an advocate for the state's newly passed, tougher law against animal cruelty, said those potential consequences are appropriate.

DEAL MAKERS

MERGERS AND ACQUISITIONS

Ropes & Gray advises Altamont Capital on Omnplex World Services Corp. investment

Ropes & Gray LLP represented Palo Alto-based private equity firm Altamont Capital Partners in its majority investment in Chantilly, Va.-based Omnplex World Services Corp.

Terms of the deal were not disclosed.

San Francisco-based partner C. Todd Boes led the Ropes team, which included associates Matthew S. Dunn and Amy E. Olson. Attorneys in New York and Boston aided in the deal.

Holland & Knight LLP advised Omnplex with a Virginia-based team that included partner William J. Mutryn and Jocelyn West Brittin. Omnplex provides protective security personnel.

Ropes & Gray advises Altamont on fast-food franchisee deal

Ropes & Gray advised Altamont Partners on the acquisition, in partnership with management, of Tacala LLC and Boom Foods LLC, both based separately in Birmingham, Ala. Tacala operates more than 100 Taco Bell fast food franchises in the Southeastern U.S., while Boom Foods is a Sonic Drive-In franchisee with more than 60 locations.

San Francisco-based partner C. Todd Boes led the Ropes team, which included associate Brandon S. McGathy. New York-

and Boston-based attorneys also worked on the transaction. Paul Hastings LLP provided counsel to Tacala in a New York team that included partner Thomas E. Kruger and associate Leslie E. Kersey.

Burr & Forman LLP also represented Tacala in a team led by Birmingham-based partner Jeffrey T. Baker.

FINANCINGS

Dickstein Shapiro helps San Diego desalination project get \$922 million

Dickstein Shapiro LLP advised Poseidon Resources in closing the \$922 million financing for its proposed San Diego County-based Poseidon Carlsbad Desalination Project, announced Monday.

Washington, D.C.-based partner Frederick M. Lowther led the Dickstein team. Lowther is one of Poseidon's three original co-founders and previously served as the company's general counsel.

Ropes handles \$75 million drug company Ultragenyx Pharmaceutical Inc. financing

Ropes & Gray LLP represented Novato-based Ultragenyx Pharmaceutical Inc. in raising \$75 million for the company's Series B financing.

San Francisco-based partner Ryan A. Murr led the Ropes team. Adage Capital Partners LP led the financing round as a first time investor.