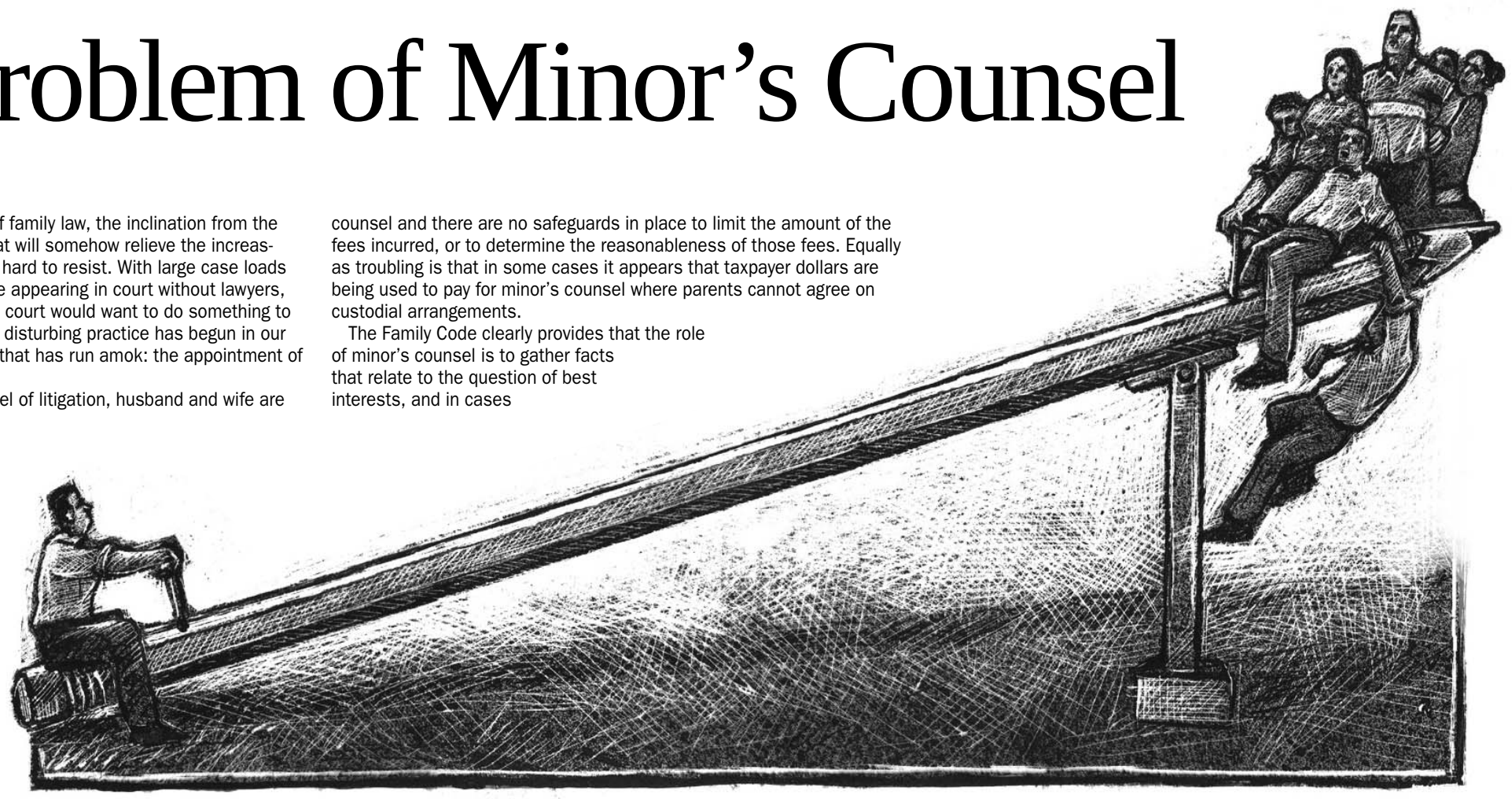
Daily Journal

The Problem of Minor's Counsel



In the overcrowded world of family law, the inclination from the bench to do something that will somehow relieve the increasing build up of pressure is hard to resist. With large case loads and more and more people appearing in court without lawyers, one can understand why a court would want to do something to shift its burden. However, a rather disturbing practice has begun in our family courts, and it is something that has run amok: the appointment of minor's counsel.

In the traditional family law model of litigation, husband and wife are represented by counsel, and each advocates his or her position as to what may or may not be in the best interests of their minor children. Traditionally, if there were issues of a complex nature that required the assistance of a mental health professional, a psychologist or psychiatrist was appointed to perform a child custody evaluation. The mental health professional, as the court's witness, submitted a report and recommendations. The parents could stipulate or challenge the findings, and the court would hear evidence to determine whether or not to accept the recommendations. These evaluations are time-consuming and costly. However, when employed they give each party the opportunity to confront the expert witness and be heard.

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In recent years, it has become fashionable with many bench officers to appoint counsel for the minor children. Whereas five or more years ago this practice was virtually unheard of, and only used in a minute number of cases, today the practice has become commonplace. Judges seem to think that the appointment of minor's counsel operates as another source for fashioning custody orders. But it is the bench that must determine what is in the child's best interests, not the lawyer appointed to represent the children. The manner in which counsel are being appointed and what they are being called upon to do violates the provisions of the Family Code, and deprives the parents of their right to notice and an opportunity to be heard.

In many cases the parties are ordered to split the fees of minor's counsel and there are no safeguards in place to limit the amount of the fees incurred, or to determine the reasonableness of those fees. Equally as troubling is that in some cases it appears that taxpayer dollars are being used to pay for minor's counsel where parents cannot agree on custodial arrangements.

The Family Code clearly provides that the role of minor's counsel is to gather facts that relate to the question of best interests, and in cases where it is appropriate to express the child's preference on custody. Counsel is charged with the responsibility of reviewing records. The Family Code specifically states that minor's counsel is not to take on the responsibility of a social worker, mediator, custody evaluator and is not to provide non-legal services to the child. Yet, in almost every case where minor's counsel is appointed, the court asks that counsel provide recommendations as to what he or she believes is in the child's best interests. The function that was formerly delegated to a qualified mental health professional has now been given to a lawyer, even though this is prohibited by the Family Code. In many cases, the judge simply defers to the recommendations of minor's counsel rather than making the call on best interests.

In addition, minor's counsel frequently appear in court without filing any report in advance, and without giving either side an opportunity to review and respond to minor's counsel's position. Whereas the parties are always required to file written papers in advance of a hearing setting forth their positions and affording time to respond, this is not the case for minor's counsel. It is commonplace for counsel to appear in court on the day of hearing, file a report or written statement, and have the court consider the same without giving either of the parents the opportunity to review and respond in writing. In what is clearly a flaw in the Family Code, minor's counsel can be instructed to file a "Statement of Issues," but only if requested by the court, not as a matter of practice.

The court may order the fees of minor's counsel to be paid by the parties. If the court determines that the parties are able to pay minor's counsel, they are ordered to do so. However, there are no limitations placed on what minor's counsel may charge. In addition to paying their own counsel, the parties take on the additional expense of paying for another lawyer. The court rarely seems to consider the reasonableness of minor's counsel fees, which is normally required of the court. In some cases, these fees have run into the tens, hundreds, or thousands of dollars. A party can instruct his or her counsel, limiting the actions to undertake, and thus, controlling the amount of fees incurred. When minor's counsel is appointed, there are no such controls.

The Family Code provides that when the court determines that the parties cannot afford to pay for minor's counsel, the county must pay. In that regard, taxpayers are now paying for the appointment of counsel for children whose parents cannot agree on custody arrangements. With the creation by some courts of minor's counsel "panels," resulting in a pool of lawyers available for such appointments, some attorneys appear to be operating entire practices funded by taxpayers' dollars. In this day of budgetary constraints, where courts are being closed in order to save expenses, and where court staff are subjected to salary reductions, one has to wonder how these funds are available for this practice.

The burden of determining the best interests of children when their parents cannot agree is a duty relegated to the court. The practice of involving minor's counsel, with its ongoing complications, due process issues, and expense issues must stop. As it now stands, these appointments only serve to complicate matters and create more burden for the litigants and taxpayers. Judges need to stop punting to minor's counsel at the expense of the parties and the public whom they are there to serve.

Copyright That Collection!

The Copyright Act allows two types of registrations for collections of visual art designs: group registrations or single work registrations. Many people, including some courts, still misunderstand the requirements for registering "collections" of visual art designs as copyrighted works. In 2005, the Third Circuit correctly analyzed the group registration requirements for visual art designs. In *Kay Berry Inc. v. Taylor Gifts, Inc.*, the court correctly reasoned that group registrations are permitted under Section 408(c) of the Copyright Act, but only apply to certain enumerated types of works, which do not include visual art. 37 Code of Federal Regulations Section 202.3(b)(4)-(9) ("automated databases," "related serials," "daily newspapers," "contributions to periodicals," "daily newsletters," and "published photographs"). Still, many people do not follow or are unaware of the "single work registration" requirements.

A collection of visual art designs may be registered as a single copyrighted work if the requirements are satisfied for a published or unpublished collection. The Copyright Act defines "publication" as the "distribution of copies ... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies ... to a group of persons for purposes of further distribution, public performance, or public display." Moreover, the copyright application includes a space for indicating whether the work is published and on what date the publication occurred. In determining the applicable date for a published collective work, the date should be when the collection was completed and published for the first time. The owner then has the ability to distribute and register the collective work. For a published collective work, the work must be "published" as a single collective unit and the copyright claimant the same for all designs in the collection.

In practice, disputes can arise as to whether the work was truly published as a "single unit of publication" and whether the copyright claimant is the same. Although the rules do not define a "single unit of publication," the words must be read together to understand the intent and meaning of the phrase. The artwork included in a single unit of publication should be offered for sale or sold together in one piece or item. The visual art designs cannot be displayed or sold to the public separately or individually.

The other requirement for registering a collection of published designs is to ensure that the copyright claimant is the same for all designs. The copyright claimant must establish title and ownership to all of the unpublished designs in the collection prior to publication and registration. Frequently, issues can arise when various authors contributed to the collective work. In these cases, the owner may not satisfy the single work registration requirements, and the owner may need to apply for individual registration of the designs.

For unpublished designs that are combined in a single unpublished "collection," the copyright claimant must comply with following four requirements: the elements are assembled in an orderly form; the combined elements bear a single title identifying the collection as a whole; the copyright claimant in all of the elements, and in the collection as a whole, is the same; and all of the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element.

These requirements for registering a "collection" seem relatively straightforward, but many people either do not understand them or do not follow them. The underlying concept for registering multiple unpublished designs is that all the designs constitute a true "collection." Although there is no requirement that the designs are related (as there is for group registrations), a "collection" implies that the multiple works should constitute a set or a group. A musical CD is a good example of a true collection in which the owner distributes the songs on the CD in a collection. Copyright claimants routinely fail to appreciate and/or understand these requirements, and they risk having a court declare that their copyrighted work is invalid.

The question then becomes whether inaccurate information on a copyright registration for multiple works of visual art will invalidate the copyright registration. This question is significant because the Copyright Act provides that a plaintiff cannot file a copyright infringement action until the work is registered in accordance with the applicable requirements.

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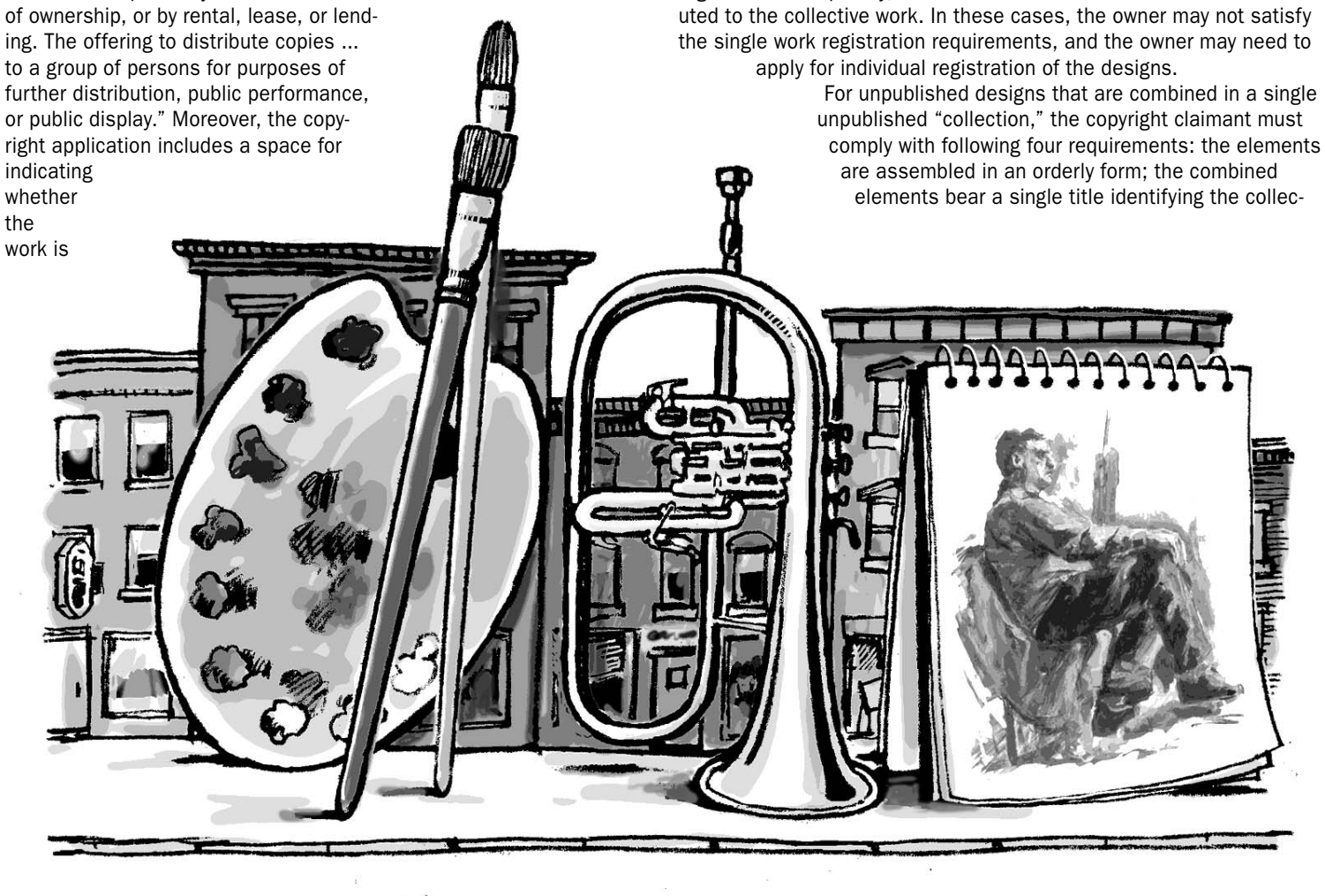
Before the Prioritizing Resources and Organization for Intellectual Property Act passed in October 2008, a federal court could invalidate a copyright registration and dismiss a plaintiff's case for lack of standing if the inaccurate information was a material error. Now, however, the Prioritizing Resources and Organization for Intellectual Property Act has amended Section 411 of the Copyright Act. Section 411(b), as amended, provides that a copyright registration containing inaccurate information may nevertheless be valid, unless: "the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate; and the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration." Additionally, even if a court is inclined to dismiss a case for invalidity of the copyright registration under Section 411, the new law requires that the court first request an advisory opinion from the Copyright Office regarding the validity of the copyright registration, although the court is not required to accept the Copyright Office's position.

It is unknown how the federal courts and the Copyright Office will respond to cases involving invalid "collective" visual art designs that do not comply with the requirements discussed above. The Copyright Office will probably continue to register collective works of visual art that do not comply with the requirements, simply because the Copyright Office must assume that the facts stated in the application are correct. However, when presented with facts demonstrating failure to comply with the single work registration requirements, the Copyright Office and the federal courts will most likely reject and invalidate erroneous registrations.



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Grand Jury Transcripts Offer Peak Into Events Behind Judge's Indictment

Commissioner Testifies She Was Involved in Bribery Case

By Greg Katz
Daily Journal Staff Writer

LOS ANGELES — Superior Court Judge Harvey A. Silberman allegedly used a court commissioner as an intermediary to offer a bribe to a political opponent, according to testimony in newly unsealed grand jury transcripts.

Silberman is accused of offering a bribe to Deputy District Attorney Serena Murillo, and his former political consultants, Randy Steinberg and Evelyn Jerome Alexander, are accused of soliciting bribes from her. Prosecutors said both were attempts to get Murillo to run for a different judicial seat than Silberman after he learned they were both vying for the same one.

> 'I don't know if I said the words "Harvey would pay," but there was money.'
>
> — LORI-ANN JONES, SUPERIOR COURT COMMISSIONER

According to the transcripts, Murillo testified that Superior Court Commissioner Lori-Ann Jones called Murillo on Feb. 10, 2008, and said Silberman could pay her fees to run for another seat.

Murillo testified that Jones told her, "You're going to think I'm crazy, but Silberman said he would pay for your filing fee if you run in another race."

Murillo said she declined the offer. She told the grand jury she never spoke directly to Silberman about it. Jones, who was also running for a judgeship at the time, testified with immunity.

She said Alexander, who was her campaign consultant as well as Silberman's, was with her at her house when she made the calls, records show. Jones said the two were strategizing about what seat she should run for and calling other candidates to see which seats would be competitive.

Daily Journal file photos

Harvey A. Silberman is accused of offering to bribe to his opponent in a Superior Court race; Lori-Ann Jones testified she relayed the message.

Jones testified she could not recall whether she or Alexander contacted Silberman, but did not dispute that the judge offered to pay Murillo's filing fees if Murillo switched seats.

Jones testified she called Murillo "to tell her that if she wanted to move, that Harvey would pay the money or that — I don't know if I said the words 'Harvey would pay,' but there was money."

She acknowledged to the grand jury that it was a different version of events than Jones told district attorney investigators looking into the accusations earlier.

A source speaking on the condition of annonymity said Jones' first interview occurred before she had immunity. Jones told investigators she had no memory of Silberman offering money, records show.

Silberman's defense may seize on those discrepancies.

"Judge Silberman denies ever offering Serena Murillo money to move to another race," said Daniel V. Nixon of Byrne & Nixon in Los Angeles, "and there is no credible evidence establishing that he offered the payment of money to Serena Murillo to move to another race."

Silberman, who ultimately beat Murillo in the 2008 election, has been on paid leave since his indictment.

He had been working as a family law judge at the Stanley Mosk Courthouse in downtown Los Angeles.

Jones, who is sitting as a criminal and traffic commissioner in Inglewood, declined to comment on the case.

She testified that, when she was

See Page 8 — COMMISSIONER

Same-Sex Partner Wins LAPD Pension

By Catherine Ho
Daily Journal Staff Writer

The same-sex partner of an LAPD officer killed in last year's Metrolink crash will be allowed to receive her deceased partner's pension even though the two never formally documented their relationship, a Los Angeles Superior Court judge has ruled.

The case, *Gerritsen v. City of Los Angeles* is believed to be the first case in which the Los Angeles Fire and Police Pensions, the body that administers retirement benefits for the city's fire and police officers, has had to deal with questions over whether a same-sex partner is entitled to a deceased partner's pension when their relationship has not been formally registered.

Judge Judith C. Chirlin ruled Tuesday that Laura Gerritsen, whose partner Spree DeSha died last September in the deadly train collision, is entitled to collect pension benefits even though the couple did not submit documentation proving their union prior to DeSha's death. Gerritsen is also an

See Page 8 — SAME

Rehab Faces Cuts Despite High Recidivism

By Matthew Pordum
Daily Journal Staff Writer

SACRAMENTO – Although California's prison inmates lead the nation with a 70 percent recidivism rate, the state Department of Corrections and Rehabilitation is cutting one third of its budget dedicated to adult offender rehabilitation programs and eliminating 1,000 positions to reach the final piece of a $1.2 million budget reduction.

Cuts to the department by lawmakers last week only accounted for $1 billion of the previously unallocated reductions, leaving Matthew Cate, the secretary of the corrections department, with the

See Page 8 — PRISON

DAILY APPELLATE REPORT

CIVIL LAW

Attorneys: Due process right to present defense is not violated where law firm asserted that it could not defend itself without ethical violations. *Dietz v. Meisenheimer & Herron*, C.A. 4th/1, DAR p. 13763

Environmental Law: 'Voluntary cessation' exception to mootness applies where EPA consistently delayed in responding to complaints related to civil rights violations. *Rosemere Neighborhood Association v. U.S. EPA*, U.S.C.A. 9th, DAR p. 13784

Immigration: Applicant is not ineligible for cancellation of removal where receipt of stolen property conviction did not constitute categorical crime of moral turpitude. *Castillo-Cruz v. Holder*, U.S.C.A. 9th, DAR p. 13788

CRIMINAL LAW

Criminal Law and Procedure: Application of sentence enhancement for abuse of position of trust requires defendant to have professional or managerial discretion. *U.S. v. Contreras*, U.S.C.A. 9th, DAR p. 13792

Criminal Law and Procedure: Trial court may not reopen preliminary hearing to establish crime's commission where revised testimony, which showed illegality of conduct, was not minor. *Garcia v. Superior Court (People)*, C.A. 6th, DAR p. 13776

Summaries and full texts appear in insert

BRIEFLY

Latham, Wilson Team on Adobe Deal

Latham & Watkins picked up a new client when it represented Adobe Systems Inc. in its $1.8 billion all-cash purchase of online business software company Omniture Inc.

Wilson Sonsini Goodrich & Rosati represented Omniture in the deal, which was negotiated over the summer and announced Tuesday, according to Martin Korman, who leads the Palo Alto firm's mergers and acquisitions practice.

Cooley Godward and now-departed partners that included Keith Flaum, who left earlier this summer for Dewey & LeBoeuf, have represented Adobe in the past. But Adobe decided to hire Latham & Watkins and partners Peter Kerman and Luke Bergstrom. Partner Glenn Nash handled the intellectual property aspects of the deal.

Wilson Sonsini partner Bradley Finkelstein also worked on the deal along with a Seattle-based partner who dealt with the IP work.

Korman said the pace of mergers and acquisitions work seems to be picking up. Dewey & LeBoeuf recently represented eBay in a sale of a majority stake of Skype, and Cooley also has been involved in several recent deals, according to a firm spokeswoman.

"I don't want to make any predictions, but things seem to be going at a good pace," Korman said Thursday.

— Craig Anderson

MORE NEWS

Choosing Law

Judge Debra Cole-Hall, left, was born in Mississippi during the height of the civil rights movement. Although she was too young at the time to understand the struggle of African-Americans in communities like her own, her mother insisted that she not 'let other people determine who you are going to be.' | PAGE 4

Warrantless Wiretapping Case Drags On

A federal judge on Thursday suggested that an attorney for former Bush administration leaders is relying on the state secrets privilege as a tactic to delay litigation. | PAGE 3

Med-Mal Reform Grants Are Announced

The Obama administration announced Thursday it will pay out $25 million in grants for the development of alternatives to the medical liability system, further fleashing out an idea he first raised in his prime-time speech last week. | PAGE 2

ON THE MOVE

MORE COOLEY EXITS

Two more partners have left Cooley Godward Kronish, the 10th and 11th partners to leave the Palo Alto-based law firm this summer.

Intellectual property partners Thomas C. Meyers and Robert J. Tosti left the firm's Boston office, which they helped to found two years ago, to join Brown Rudnick. Associate Adam Schoen is joining them.

As other departing partners have done before them, Meyers and Tosti hailed the international reach of the firm they are joining.

"One of the most attractive things about Brown Rudnick was that has a strong London offices to attract European companies," Meyers said Thursday.

Cooley Godward Kronish, with 650 attorneys, has more than three times the number of attorneys as Boston-based Brown Rudnick, but its offices are all in the United States.

While the firm has lost four practice group leaders and other high-profile lawyers, it has added IP partners this summer. In late August, the firm hired Palo Alto-based partners Heidi Keefe, Mark Weinstein and Mark Lambert away from White & Case.