Q&A

Tracking Complex Litigation

Conversation With Judge Ronald M. Sabraw

Judge Ronald M. Sabraw

In February 2000, six California superior courts embarked on the new Complex Civil Litigation Pilot Program, created to give judges training and resources that would help them manage complex civil cases with greater efficiency. In Alameda County, Judge Ronald M. Sabraw led implementation efforts that resulted in that court's innovative complex litigation department.

Helping him meet that challenge was the fact that Judge Sabraw was no stranger to complex business litigation. Prior to his appointment to the bench in Alameda County in 1987, he had a private law practice focusing on business litigation (1977–1987). For the past four years, he has been a member of the Judicial Council's Civil and Small Claims Advisory Committee, serving as chair of its Case Management Subcommittee in 1999 and as chair of the full committee last year. Chief Justice Ronald M. George appointed him to the Judicial Council in 2000.

Recently Court News *spoke with Judge Sabraw on the current state of business litigation and the Complex Civil Litigation Pilot Program.*

You spent 10 years as a business litigator before being appointed to the bench. What skills are required to be successful in this area, from the perspectives of both the attorneys and the judge?

Having an appreciation of both sides of the case is most helpful as a business litigator. Obviously, from the lawyer's perspective, you are representing the interests of your client first and foremost. But having an appreciation of the opposing side provides the opportunity to explore avenues where compromises can be reached and settlements can be effected. Sometimes counsel's focus is so narrow, there isn't an appreciation of the bigger picture.

Gaining an appreciation of both sides of the case is also critical for the judge. Listening and being attentive to what the lawyers are saying is extremely important—not only in terms of their arguments and discussions before the court but also in the pleadings and points and authorities that are submitted. Having an ability to see the big picture and hear what is being advocated from both sides is a necessary skill to be an effective judge—not only for business litigation but for any kind of litigation.

Another element of being an effective judge is to educate yourself on particular areas of the law that are being tried in your court. Business litigation tends to be specialized. When you are dealing with issues such as antitrust or securities litigation, having a fundamental understanding of the nature of those causes of action is of critical importance if the judge is to meaningfully participate in case management and settlement discussions. This holds true for all business litigation, whether it concerns a real estate transaction, securities litigation, or any other business matter.

How has business litigation changed over the past 25 years?

I haven't seen substantial changes in the more fundamental business practice areas, such as drafting real estate documents, contract disputes, and the standard collection action. The same issues are repeatedly in play in these areas.

However, there are certainly discrete areas of law that are entirely different today than they were 25 years ago. There has been a significant evolution of the law in environmental litigation. The California Environmental Quality Act has spawned a tremendous amount of litigation. There have been significant developments, as well, in the areas of employment law and disability rights.

In February 2000, you were charged with helping to implement the Judicial Council's Complex Civil Litigation Pilot Program in Alameda County. What is the status of the program? What kinds of cases are you hearing?

We have a good variety of cases that we are hearing in our complex civil litigation court, including antitrust and securities litigation, matters coming under the Consumer Legal Remedies Act, and unfair competition laws. We see a fair number of class action lawsuits in the employment area. We also have construction defect matters, tobacco cases, and mass torts, such as the approximately 300 hip replacement cases that have been coordinated here in Alameda County.

The broad range of cases we hear in this department makes it an interesting place to work. Every day is different, and the cases present a wide spectrum of issues.

How is the Complex Civil Litigation Pilot Program faring in your county? Challenges? Advantages?

The goal of the complex litigation program, in terms of providing greater resources and increasing efficiency in case management, has certainly been achieved from the court's perspective. But it is difficult to assess the overall success of the program here in Alameda County because it is hard to receive feedback from the parties involved.

But we are certainly keeping statistics and reporting those data to the Administrative Office of the Courts. We are presently managing between 75 and 100 complex cases. This number of cases presents particular challenges in terms of case management because we have only one judge, one research attorney, one courtroom clerk, and some additional administrative staff that are responsible for keeping the program on track. We are beginning to reach the point where resources are being strained in terms of the caseload.

As far as benefiting the parties, the most effective tool we have used in our program has been an informal dispute resolution process. For example, when the parties have a discovery dispute, the court (the judge and research attorney) makes itself available for informal conference calls with very little notice. We can normally schedule 15-minute conferences the same day, if necessary, to try to resolve disputes over the taking of a deposition, answers to interrogatories, or requests for production of documents. Often counsel cannot resolve these disputes on their own, and the court's informal meet-and-confer process helps to keep the case moving along. I should add that this process is not intended to preclude the parties' bringing formal motions on these issues, because sometimes an attorney wants to preserve the record to protect his or her client's interest.

Have you received any responses from attorneys to the complex civil litigation program?

It is hard to measure the responses from attorneys in an objective fashion when in the court environment, but I think that it has been generally favorable, and some attorneys have expressed that sentiment. Lawyers seem to appreciate the increased access to the court in terms of scheduling motions and arranging for case management conferences and informal dispute resolution. I think they are also pleased by the fact that one department will be managing the case from start to finish.

What is Alameda County doing to educate attorneys and promote the program?

Our county has developed a Web site devoted to our complex civil litigation program. Visitors can log on and see a list of all the cases that are managed in that department. They can also bring up all the documents that have been filed in a particular case, including court rulings. Attorneys thinking about submitting their cases to the complex litigation department can visit the site and find similar types of cases that have been adjudicated in our court. They can read the pleadings and determine what the court's rulings were on those issues.

One resource that we cannot currently provide on the Web site but hope to add in the next several months is the posting of the documents from Judicial Council coordinated proceedings. The volume of pleadings and other paperwork in those cases has delayed their posting to the site.

In addition to the Web site, our court was involved in an educational program on complex litigation sponsored by the bar association. The program, intended to inform attorneys about complex litigation projects, was attended by court representatives from Alameda, Contra Costa, San Francisco, and Santa Clara Counties.

To help guide pilot courts with their complex litigation programs, the Complex Civil Litigation Task Force developed the *Deskbook on the Management of Complex Civil Litigation*. Has this tool been useful?

The deskbook has been a significant asset and resource for both the court and counsel. In most instances, after cases are designated as complex, I commend the volume to counsel and they are appreciative for the resource. The deskbook is often cited in pleadings before the court in regard to issues of case management. It is also an excellent source of case management forms.

What are your expectations for the complex litigation program? Do you anticipate expansion of the program?

I would like to see the pilot program become a permanent program in Alameda County and in courts throughout the state. I hope and expect that we will also continue to receive funding for these programs so we can staff these departments. I think devoting resources to complex litigation programs allows courts to realize efficiencies elsewhere. Dispersing these complex cases among several court departments would ultimately be less efficient and more costly. I anticipate that other judges participating in the pilot programs, like me, are finding them effective and successful in dealing with the special problems presented by complex cases. ■

Three Strikes Meets Prop. 36

JUDGE J. RICHARD COUZENS
SUPERIOR COURT OF
PLACER COUNTY

Proposition 36, enacted by California voters in November 2000, made sweeping changes in the manner in which courts handle drug possession cases. The new law applies to any felony or misdemeanor nonviolent drug possession offense, regardless of the traditionally prescribed punishment.

The new law does not come without limitations. A defendant may be excluded from its protections in four designated circumstances: when the defendant, in the same proceeding, is convicted of a non-drug-possession crime (Pen. Code, § 1210.1(b)(2)); uses a gun (§ 1210.1(b)(3)); refuses treatment (§ 1210.1(b)(4)); or has two prior narcotics convictions with two chances at treatment, and the court finds the defendant unamenable to treatment (§ 1210.1(b)(5)). The law also applies to any defendant who has been convicted of one or more strike offenses, unless for five years the defendant (1) has remained free of prison custody and (2) has not been convicted of a felony (other than a nonviolent drug possession offense) or a misdemeanor "involving physical injury or the threat of physical injury to another person." (§ 1210.1(b)(1).)

PROPOSITION 36 EFFECTIVELY AMENDS THE THREE-STRIKES LAW

Both the initiative and legislative versions of the three-strikes law contain restrictions on the ability to amend Penal Code sections 667(b) et seq. and 1170.12. These statutes may be amended only by the Legislature, upon a two-thirds roll call vote, "or by a statute that becomes effective only when approved by the electors." (Prop. 184, § 4; Pen. Code, § 667(j).) Proposition 36 did not directly amend either of the three-strikes statutes. The amendment was accomplished indirectly by specifying that its provisions would apply "notwithstanding any other provision of law." (§ 1210.1(a).) Although the two versions of the three-strikes law contain similar language (see, e.g., §§ 667(c), 1170.12(a)), it seems clear for two reasons that Proposition 36 "trumps" all other statutes. First, the voters enacted Proposition 36 later. Second, the electors would have had the three-strikes law in mind because of its specific application to qualified strike offenders listed in Penal Code section 1210.1(b)(1). Proposition 36 is therefore the first and only statutory exception to the application of the three-strikes sentencing law.

FREE OF PRISON CUSTODY FOR FIVE YEARS

Penal Code section 1210.1(b)(1) specifies that a defendant having a serious or violent felony prior conviction will not be eligible for drug treatment if he or she has not been free of *prison* custody for five years. Since the language of section 1210.1(b)(1) is similar to the "washout" provisions of section 667.5 limiting enhancement for prior prison terms, appellate decisions interpreting that statute likely will be useful in defining this portion of Proposition 36. "Prison" should be used literally; the term does not include county jail time. The five-year clock runs from the date of release from prison and must be continuous. (See *People v. Nobleton* (1995) 38 Cal.App. 4th 76, 84; *People v. Young* (1987) 192 Cal.App.3d 812, 816.)

MISDEMEANOR CRIMES INVOLVING ACTUAL OR THREATENED PHYSICAL HARM

Penal Code section 1210.1(b)(1) excludes defendants with serious or violent felony prior convictions if, within five years of the current drug possession crime, the defendant was convicted of any felony other than a nonviolent drug possession offense or any misdemeanor "involving physical injury or the threat of physical injury to another person."

A crime "involving physical injury" appears relatively clear; such offenses undoubtedly include any situation where the defendant inflicts objective harm on the victim, however slight. The statute probably will apply to any crime that results in injury, even if it is not great bodily injury. There is no requirement that the district attorney in the current proceeding specifically plead and prove the existence of the prior crime with injury in order to exclude the defendant from Proposition 36. There is no requirement that the prior injury must have been pled and proved in the prior proceeding. Where injury is not an element of the prior conviction, the court probably must find the evidence of injury from appropriate portions of the "record of conviction." Seemingly, the requisite injury could be found in crimes ranging from simple battery (Pen. Code, § 242) to assaults with weapons (§ 245(a)(1)).

Far less clear is the application of the law to misdemeanors "involving . . . the threat of physical injury to another person." Many crimes carry a theoretical threat of physical injury; reckless driving, driving under the influence of alcohol, and brandishing a weapon all pose a potential threat of physical injury. Will any misdemeanor conviction exclude the defendant, regardless of how remote the threat of injury, so long as injury is possible? Does the exclusion apply only to those crimes that have as one of their elements an actual threat of physical harm, such as an assault with a deadly weapon (§ 245(a)(1)) or making a criminal threat (§ 422)? Might the voters have intended to exclude persons who have been convicted of shooting at an airplane or an occupied dwelling (§ 246) or shooting from a motor vehicle (§ 12034(d)), even though potential injury is irrelevant to the proof of the crime? The full meanings of this and other portions of Proposition 36 will require judicial interpretation.

Beginning with the next issue of Court News, *Judge Couzens will expand the subjects covered by his column. His new series, "Crime and Punishment," will continue to address new developments in three-strikes sentencing and will also discuss other sentencing and disposition issues, such as Proposition 36, the "one-strike" law, and the sexually violent predator law.* ■

Judge J. Richard Couzens

Judge Couzens is a former member of the Judicial Council and past chair of its Criminal Law Advisory Committee.

Examining Disposition Reporting

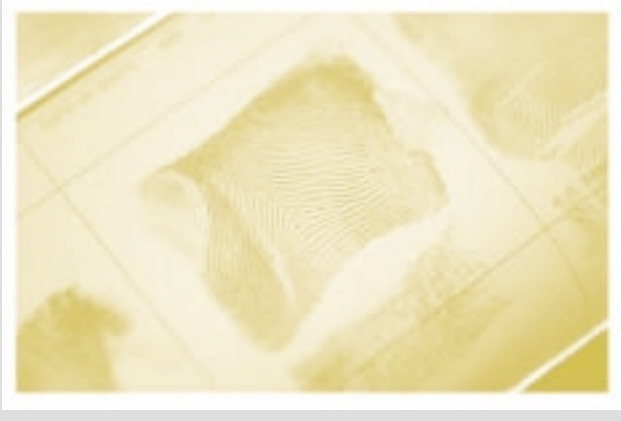
Earlier this year, in an effort to improve the completeness of the California Department of Justice's (DOJ) arrest and disposition records, the state's Attorney General proposed legislation that would have created a pilot project in which certain California courts would include the defendant's thumbprint on every disposition report submitted to the DOJ. That proposed legislation was set aside, however, while the DOJ and the Administrative Office of the Courts (AOC) considered nonstatutory alternatives for improving fingerprint reporting.

With input from the DOJ, the AOC developed a survey on booking and fingerprinting issues that was sent to all 58 superior courts in March. The results show that (1) the courts do not agree on whether fingerprinting should be the responsibility of the court or of law enforcement agencies; (2) a large percentage of the courts have concerns about being given that responsibility; and (3) there is no single solution to the problem.

The study also reports that any solution will necessarily include the participation of district attorneys, sheriffs, and police departments. Accordingly, staff from the AOC and the DOJ met with representatives of those three groups, who expressed their support and agreed to assist in developing a plan of action.

The DOJ staff is currently analyzing its databases and collection processes to begin to identify the most appropriate and least intrusive ways to improve fingerprint reporting. It will then develop recommendations for improving the completeness of its records.

● For more information, contact June Clark, Office of Governmental Affairs, 916-323-3121; e-mail: june.clark@jud.ca.gov.



ABA Commission Urges Public Financing of Judicial Campaigns

A report by the American Bar Association's Commission on Public Financing of Judicial Campaigns sets out the following principles for guiding the transition to publicly funded judicial elections.

- States must be sensitive to constitutional limitations on their power to regulate judicial campaign financing.
- One size does not fit all; legal culture and interstate variation in the method of judicial selection affect the viability of public financing.
- Public financing should generally start with the highest court seats.
- Public financing programs should provide candidates with enough funding to cover the full cost of campaigning.
- States should limit participation to serious candidates.
- Funding should be conditioned on two commitments: to spend it only on legitimate campaign expenses and to not raise money from private sources.
- Public financing must be funded from a stable and adequate revenue source.

Source: American Bar Association

In a report citing increased public cynicism about the effects of campaign donors and issue advertising on the independence and integrity of state judges, an American Bar Association (ABA) commission is urging states with judicial elections to finance the campaigns with public funds. The report from the ABA Commission on Public Financing of Judicial Campaigns was released in July.

"There has been an alarming increase in attempts by special interests to influence judicial elections through financial contributions and attack campaigning," said ABA President Martha Barnett in an ABA press release about the commission's report. "The public sees the same patterns of financial contributions to judges, and issue advertising related to judicial campaigns, that have created cynicism about elections of our political leaders. That cynicism is transferred to our courts and taints the concept of judicial independence. We cannot afford to allow our legal system to be perceived as for sale to the highest campaign donor, or as subject to intimidation by attack advertising by special interest groups. We must stem this tide before it rises any further."

DEVELOPMENT OF THE REPORT

In 2000, the ABA's Standing Committee on Judicial Independence compiled statistics showing that 80 percent of state judges nationwide stand for election at some point during their tenure on the bench, and most judicial candidates must tap resources outside their personal finances for campaign funding. In light of these findings, the committee sought and received a $213,376 grant from the Joyce Foundation to develop guidelines for public financing of state judicial elections. Based in Chicago, with assets of approximately $1 billion, the Joyce Foundation supports efforts to strengthen public policies on education, employment, the environment, gun violence prevention, money and politics, and culture.

The grant enabled the committee to create the national, bipartisan ABA Commission on Public Financing of Judicial Campaigns to identify methods of publicly financing judicial candidates. The committee—which is composed of leading members of the judiciary, legal professionals, and members of other national public interest organizations—oversaw the new commission in its development of the standards.

The commission sought comment on the public financing of judicial elections from groups such as the League of Women Voters, the Conference of Chief Justices, Citizens for Independent Courts, the American Judicature Society, and other groups involved in the judicial process. In addition, it scheduled public hearings to encourage broad input and ensure the currency of the information gathered. It invited experts to testify about structuring public financing, including how funds might be distributed and what conditions might be associated with grants of public funding. The commission also sought testimony from key actors in the process of establishing a public financing scheme, including state legislators and local civic organizations interested in campaign finance reform.

NEED FOR REFORM

Carolyn Jefferson-Jenkins, president of the U.S. League of Women Voters and a member of the commission, pointed to escalating campaign costs in judicial races in some parts of the country. "In Michigan in 1994, the winning Supreme Court candidate raised $180,000; by 1998 the winner's war chest was $1 million," she said in the ABA's press release. "In Pennsylvania in 1987, two candidates for the Supreme Court raised a total of $523,000; by 1995 the tab was up to $2.8 million. In Illinois, three Supreme Court candidates raised more money in primary elections than any candidate had ever raised previously in their entire campaign. Limited resources for suddenly expensive judicial campaigns creates a perception of impropriety. Regardless of the merits of a case, a judge who decides in favor of a contributor appears to be paying a political debt."

The commission's report cites additional examples of the issues presented by privately financed judicial elections. In California, median spending on contested elections in the Superior Court of Los Angeles County rose from $3,000 in 1970 to $70,000 in the early 1990s—an increase of 2,000 percent. The report also states that, in the late 1990s, 9 of 10 voters surveyed in Pennsylvania and Ohio believed judicial decisions were influenced by large campaign contributions, and that the newsletter of the Michigan Manufacturers Association boasted that its contributions had "swayed the Supreme Court election to a conservative viewpoint, ensuring a pro-manufacturing agenda." In 1998, 79 percent of Texas lawyers responded to a survey by stating they thought campaign contributions influenced judicial decisions.

Ms. Jefferson-Jenkins added that, while the appearance of impropriety in any election is troubling, it is especially so in judicial elections. Although 14 states have created public systems to finance campaigns for political offices, only one, Wisconsin, includes judges. That is despite the fact that 39 states elect some or all of their judiciaries. "Governors and legislators are supposed to respond to politics. Judges are supposed to apply the facts of the case to the law without regard to politics," she said.

The report notes that ever since the 1976 U.S. Supreme Court ruling in *Buckley v. Valeo*, Congress and some state legislatures have wrestled with free-speech issues while attempting to regulate campaign contributions and expenditures. It urges states to examine the impacts of independent campaign expenditures and recognize the effects of general issue advocacy on public financing programs.

NEXT STEPS

The ABA's Standing Committee on Judicial Independence circulated its report for comment and evaluation at a public hearing during the 2001 ABA annual meeting in Chicago in August. It plans to submit the report to the ABA House of Delegates for adoption at the association's midyear meeting in February 2002. If the report is adopted by the House of Delegates, the ABA's Standing Committee on Judicial Independence will undertake a campaign to promote the report's recommendations at the state and local levels. The committee plans to use media panels, presentations to state and local bar associations, and outreach to local community groups to draw national and local attention to the guidelines.

● For more information, contact Eileen Gallagher, Associate Director, ABA Office of Justice Initiatives, 312-988-5105 (e-mail: gallaghe@staff.abanet.org), or visit the ABA's Web site at www.abanet.org/judind to view the report. ■

Best Practices With Disabled Adults and Children

The American Bar Association's (ABA) Commission on Legal Problems of the Elderly and its Center for Children and the Law recently published four new guides to help state courts meet the needs of adults and children who receive social security benefits and who cannot manage their own income and resources.

The project of creating these publications grew out of a 1995 review of the representative payment (RP) system, through which benefits are paid to over 6.5 million people—more than half of them children—by the Social Security Administration (SSA). Under this system, representative payees designated by the SSA have guardian-like duties to manage and pay out benefit funds for incapacitated beneficiaries.

The review was conducted by an advisory group appointed by the SSA commissioner and led by Nancy M. Coleman, Director of the ABA Commission on Legal Problems of the Elderly. The reviewers found poor coordination and little information sharing between SSA and the state courts.

Two of the guides focus on courts' exercise of guardianship over adults, and two focus on juvenile and family courts. Each guide consists of a short pamphlet, which provides an overview of the RP system as well as recommended "best practices" that would help courts improve coordination with SSA, and a curriculum offering more in-depth information, including specific training materials. All four publications are intended to strengthen judicial decision making and oversight in cases involving incapacitated adults and juveniles who receive benefits through SSA.

The new publications are:

❑ *State Guardianship and Representative Payment: Orientation/Best Practices Pamphlet for Courts Exercising Guardianship Jurisdiction*

❑ *State Guardianship and Representative Payment: Model Curriculum for Courts Exercising Guardianship Jurisdiction*

❑ *Representative Payment and Kids: Orientation/Best Practices Pamphlet for Juvenile and Family Courts*

❑ *Representative Payment and Kids: Model Curriculum for Juvenile and Family Courts*

The federal State Justice Institute and SSA funded the production of the guides. Single copies may be obtained without charge, as long as supplies last, through the ABA Commission on Legal Problems of the Elderly.

● For more information, contact Tina Lanier, American Bar Association, 202-662-1792 (e-mail: tlanier@staff.abanet.org), or visit www.abanet.org/child/home2.html.