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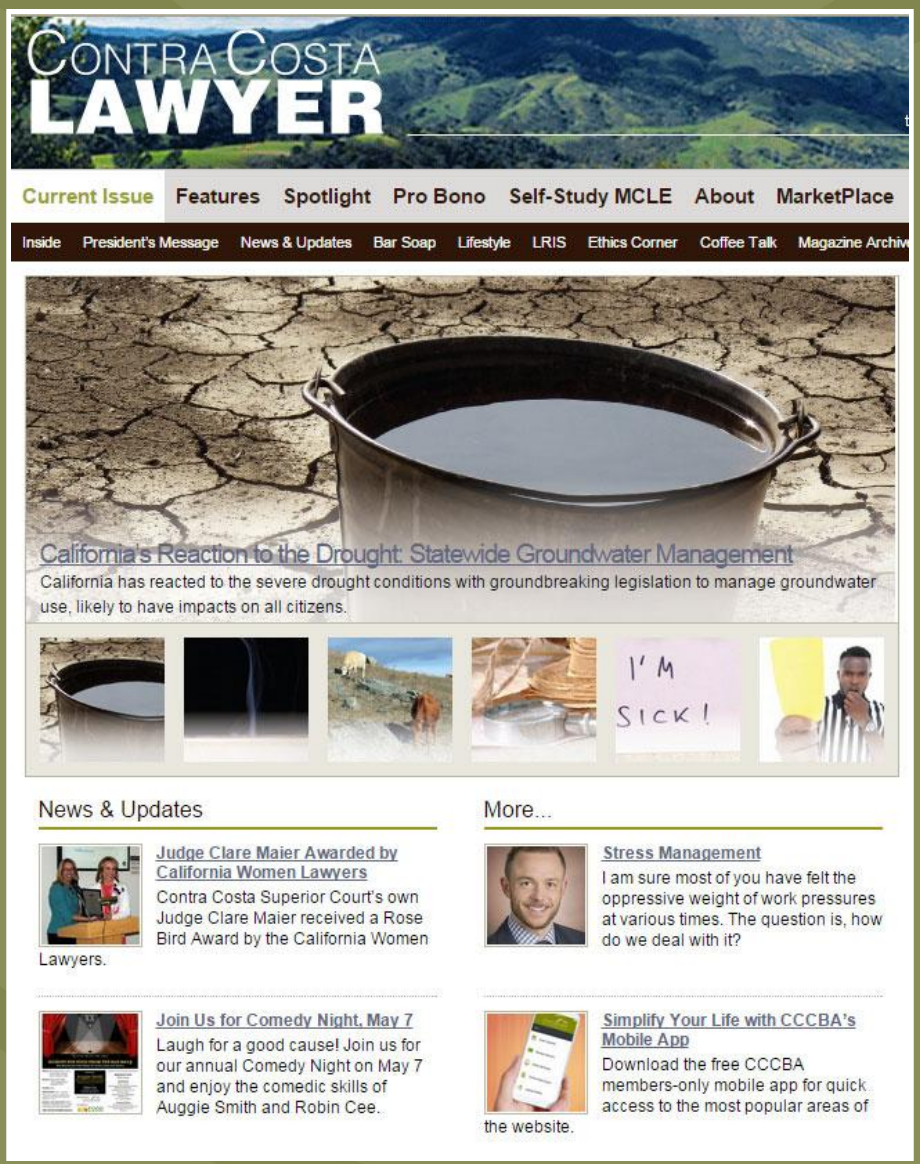

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year - in six print and 12 online issues.

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Go Green!

Wednesday, April 01, 2015

Welcome to the Environmental Law issue of the Contra Costa Lawyer magazine. As it appears that we are quickly running into the fourth year of the California drought, I wanted to take a moment to make a couple of suggestions for how we can work together to reduce our footprint and save water.

As a business, consider becoming a certified green business. There are a lot of measures we can take as business owners that can help the environment. At my firm, Paladin Law Group LLP, we are a certified green business and in 2012, we were honored by the State Air Resources Board CoolCalifornia Small Business Awards as the only firm to receive the award.

As individuals, there are so many ways we can reduce our use of water. Below are just some of the steps we can take to lessen our environmental impacts:

1. Water Wise.

Install 1.5 gallon/minute showerheads with on-off buttons at your house; purchase high efficient washers (dish and clothes) to save even more water; and during the months when we do get rain, turn off your sprinklers and let Mother Nature water your plants.

2. Showers to Flowers.

Use grey water from your washing machine or shower to water flowers and fruit trees. Water can also be captured and stored in a rain barrel for reuse later.

3. Smart-Scape.

Replace your water-demanding lawn with native and drought tolerant plants. Some cities and water agencies even offer "cash for grass" incentives. A yard irrigated by grey water and drip-irrigation (as opposed to sprinklers) can save thousands of gallons of water over the years.

4. Drive a Fuel-Efficient Vehicle.

Upgrade from hybrid to plug-in hybrid. Depending on your commute, consider an electric-only vehicle. Better yet, who needs a car anyway? One attorney commutes on his Vespa scooter and gets 60 mpg! No Vespa? Hop on your bicycle and use your own energy to power your commute!

5. Would You Like a Bag? No, Thank You.

Many cities, like Walnut Creek, have already instituted a ban against one-use or plastic bags at stores (including grocery stores, Target, etc.) but many have not. That doesn't mean you have to use their bags, though! Bring your own, or go one step further and refuse takeout bags, lids, straws and silverware at restaurants.

6. Reduce, Reuse, Recycle.

It's not just cans, bottles and paper. Don't forget to recycle your household hazardous waste such as batteries and electronics (computers, TVs, that old VHS player) by bringing them to your local electronics recycling center.

7. Downsize.

Want to make a big statement by going small? You can significantly reduce your carbon and water footprint by moving from a large home into smaller one. One attorney moved into a 900 square-foot open floor plan loft in a highly walkable community. Not only is she saving resources, her utility bills have dropped dramatically.

8. Go Local.

Buying food and other items made or grown where you live reduces the carbon impact of transportation. Keep it local and take the opportunity to support your weekly farmer's market. Maybe ride your bike to get there!

9. Grow Your Own Food.

Some attorneys have their own small crops of herbs and vegetables. Not only am I a green lawyer, I have a green thumb to boot. My family and I grow all kinds of vegetables in our backyard. We even get honey from our own beehive! If you have extra, consider selling your fruit to local markets instead of wasting it.

These are just a few suggestions from me and my fellow attorneys at Paladin Law Group. I hope you find them inspiring.

Go Green!

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Stress Management

Wednesday, April 01, 2015

Unquestionably, the greatest occupational hazard of our chosen field is stress. It is sometimes one of the first things that people we meet ask us: Isn't being a lawyer stressful? The answer, inquisitive one, is yes. Yes, it is. Stress is by no means unique to lawyers, but studies have shown that the profession always ranks highly in terms of stressful jobs.

Recently, I had a moment when I felt as much work-related pressure as I had ever experienced. It was late January, and the next day I was to address our Bar Association at the Installation Lunch as the incoming Board President. In three days, I was to start a week-long federal jury trial by myself in a very contentious civil rights case.

To top it all off, my trusty companion, Hachi, a one-year-old Shiba Inu, had been sick all week, and I had to wake up 2-3 times in the middle of the night to let him out. In my stress-addled and sleep-deprived state, the thought of hopping a boxcar and living as a vagabond was more than a fleeting thought. Spoiler alert: I did not choose this option.

Instead, I decided to go for a jog. As I trudged up and down the hills of neighboring Bernal Heights, the preoccupations with my speech the next day, and with my opening statements the following Monday, slowly receded. I focused on maintaining even and measured breathing, as well as on the stunning views of San Francisco that Bernal Heights Park affords.

By the time I got home, the endorphins had kicked in and I felt miraculously good. That evening, I slept like a baby, and even Hachi cut me some slack and slept through the night.

Stress is a natural response that all animals possess; in its most primitive form, stress triggers the fight-or-flight response that allows creatures to survive against external threats. In low doses, stress is a performance enhancer, flooding the body with hormones that boost energy and speed up mental faculties.

It is when stress reaches acute or chronic levels that it becomes problematic. The idea that stress kills is more than a colloquialism: Science has proven that chronic stress can lead to potentially fatal disorders like hypertension and cardiovascular disease.

Unless you are one of the blessed who does not encounter stress as a lawyer, I am sure most of you have felt the oppressive weight of work pressures at various times. Since we all have lives outside of our careers, sometimes the stress of work and life intersect in a "perfect storm," heightening the feeling of being under siege. The question is, how do we deal with it?

My "go to" coping mechanism is exercise. Physical exertion allows me to quiet the noise in my head, and afterwards I always feel calmer and more centered. During evenings and weekends, I often opt for blissful escape, not of the boxcar vagabond variety, but the escape of watching a movie, reading an immersive book, or going out to dinner with friends.

There are countless methods for managing stress to stay healthy and happy. A general rule of thumb for finding positive stress-reducing activities is doing something that makes you feel good, whatever that may be. When we settle into these activities and stay in the moment, stress has a tendency to melt away, leaving us feeling recharged.

Stress is an unavoidable peril of our profession. The key is in finding healthy coping strategies to manage these pressures. The benefits of a balanced, healthy lifestyle flow directly to us, to our clients and to our loved ones.

As an associate with Casper, Meadows, Schwartz & Cook since 2007, ***Nick Casper*** represents injured individuals in cases involving catastrophic injury, wrongful death, medical malpractice, employment discrimination/harassment and civil rights violations. Nick has been lead counsel in five civil jury trials.

California's Reaction to the Drought: Statewide Groundwater Management

Wednesday, April 01, 2015

In the midst of a multi-year drought,[1] California recently passed two major pieces of legislation which are aimed at having significant impacts to water management statewide. On September 16, 2014, Governor Brown signed three companion bills, SB 1168, AB 1739 and SB 1319, which constitute the Sustainable Groundwater Management Act (SGMA)[2]—the first statewide groundwater management legislation in California's history, leaving Texas as the only state in the nation without such legislation on its books.

Soon after, on November 4, California voters approved Proposition 1, a $7.5 billion general obligation bond to fund investments in water programs and projects statewide. Together, the two pieces of legislation are set to have impacts statewide.

Sustainable Groundwater Management Act (SGMA)

The SGMA creates the first comprehensive framework for regulating groundwater in California, placing managerial and monitoring responsibilities in the hands of local agencies while also creating mechanisms under which state agencies may oversee and potentially even intervene in groundwater management.[3]

The "locally-controlled" system of sustainable groundwater management purports to leave a limited role for state intervention when necessary to protect the resource.

"Sustainable groundwater management" is defined as the maintenance of groundwater use in a manner that does not cause "undesirable results."[4] An "undesirable result" is the occurrence of at least one of the following:

- Chronic lowering of groundwater levels, indicating a significant and unreasonable depletion of supply.
- Significant and unreasonable reduction of groundwater storage.
- Significant and unreasonable seawater intrusion.
- Significant and unreasonable degradation in water quality.
- Significant and unreasonable land subsidence that substantially interferes with surface land uses.
- Surface water depletions that have significant and unreasonable adverse impacts on beneficial uses of the surface water.[5]

The basic approach of the SGMA is for local agencies to adopt groundwater management plans that meet the sustainability criteria set by state agencies. The goal is for local stakeholders to have a heavy hand in decision making throughout the process; however, if the local agencies fail to adopt a sufficient plan, the SGMA provides

mechanisms for the state to step in and develop a plan.

The Basic Steps

At a local level, the main benchmarks are:[6]

- Step One: Local agencies must form local groundwater sustainability agencies (GSAs), organized by groundwater basin, by June 30, 2017.
- Step Two: GSAs in basins deemed high- or medium-priority must adopt groundwater sustainability plans (GSPs) within five to seven years, depending on whether a basin is in critical overdraft. Deadline of January 31, 2020, for "critical overdraft" basins, or January 31, 2022, for basins not in critical overdraft.
- Step Three: Once the GSPs are in place, the GSAs have 20 years to fully implement them and achieve the sustainability goal (final target of January 31, 2025).

Proposition 1 will provide $100 million in funding to GSAs for the development and implementation of GSPs. Some GSAs have already been identified.[7]

The Basic Requirements and Parameters

The SGMA provides options for local agencies to develop the required plans and applies to basins or sub-basins designated by the DWR as high- or medium-priority basins, based on a statewide ranking that uses criteria including population and extent of irrigated agriculture dependent on groundwater. It is anticipated that about 125 basins throughout the state will be designated as high- or medium-priority basins—accounting for 90 percent of California's annual groundwater use.[8]

Once formed, GSAs will have broad groundwater management and investigatory powers to prepare and execute the GSP, and will have the authority to regulate and limit groundwater extractions, require the submission of annual extraction reports or impose well spacing requirements, among other substantial powers.[9]

Impact to Private Rights is Potentially Ambiguous

Under California common law, unless otherwise altered by state statute, senior priority water rights holders are generally not required to reduce extractions. Although requirements under the SGMA may result in regulating, limiting or suspending extractions by individual well owners, the SGMA expressly states that it does not determine or quantify water rights.[10]

Therefore, significant conflicts may arise in the development of a GSP where water rights priorities are contested or the allocations and equities of a proposed GSP are disputed.

Other Major Milestones on the Horizon

Assuming all goes according to plan, and the Department of Water Resources (DWR)[11] and the State Water Resources Control Board (SWRCB) do not have to invoke oversight powers and designate basins as probationary,[12] the following major milestones are expected:

- June 1, 2016: DWR must adopt regulations for evaluating GSPs (the local plans).
- January 1, 2017: DWR must publish best management practices for the sustainable management of groundwater.
- June 30, 2017: A local agency must be named as GSA for all high- and medium-priority basins.

- January 31, 2020: A GSP must be adopted for high- or medium-priority basins in a critical condition of overdraft.
- January 31, 2022: A GSP must be adopted for all other high- or medium-priority basins.
- January 31, 2025: The state water board may designate as probationary any basin which has not met the deadlines, or which has adopted a GSP which the DWR has found inadequate.

Proposition 1 – Statewide Funding for Water Programs

As noted, Proposition 1 is a $7.5 billion general obligation bond to fund investments in water programs and projects statewide, including programs for water conservation, water recycling, groundwater cleanup, and water storage. The bond funds are to be distributed through a competitive grant process, which will be overseen by various state agencies, including the California Water Commission, DWR and the SWRCB.

Proposition 1 is intended to leverage additional local and regional funds to potentially quadruple the total investment—but limited to projects that are deemed to be for "public benefits."[13] Projects that could potentially tap into the funding range from surface storage projects identified in the CALFED Bay-Delta Program,[14] groundwater storage or contaminated groundwater remediation projects that provide water storage benefits, local and regional surface storage projects, various water recycling projects, drinking water protection and recharge projects, and statewide flood management projects.

Critics say too many funds under Proposition 1 are focused on building more dams and surface storage projects, while doing little for near-term drought relief.[15] As the drought continues, increased surface storage capacity may largely be useless if there is no snowmelt and rainfall to fill such reservoirs. Even so, Proposition 1 provides a comprehensive state water plan, at least marginally in line with the statewide focus of the SGMA.

California has reacted to the severe drought conditions with groundbreaking (in California, at least) legislation to manage groundwater use, likely to have impacts on all citizens and each level of government, and with a renewed push to fund statewide water resource projects.

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[1] January 2015 was the first time in recorded history that the City of San Francisco had zero rainfall in the month of January.

[2] *See* http://www.water.ca.gov/groundwater/groundwater_management/legislation.cfm.

[3] For the latest developments by the DWR, see http://www.water.ca.gov/groundwater/sgm/.

[4] Cal. Water Code § 10721(u).

[5] *Id.* § 10721(w).

[6] For a detailed timeline, *see* http://www.water.ca.gov/groundwater/sgm/pdfs/GW%20Legislation%20Timeline_DWR_draft6.pdf.

[7] *See* http://www.water.ca.gov/groundwater/sgm/gsa.cfm.

[8] *See* http://www.acwa.com/sites/default/files/post/groundwater/2014/04/sustainable-gw-management-act-brochure.pdf. Groundwater basins subject to a previous groundwater adjudication are exempt.

[9] *Id.*

[10] *See, e.g.,* Cal. Water Code §§ 10720.5(b), 10726.4(a)(2) & 10726.8(b).

[11] On Dec. 15, 2014, the DWR announced that the basin prioritization finalized in June 2014 will be used as the initial prioritization required by the Act. http://www.water.ca.gov/groundwater/Sustainable_GW_Management/SGM_BasinPriority.cfm.

[12] Water Code § 10735.2(a)(1); *see* http://www.water.ca.gov/groundwater/sgm/pdfs/GW%20Legislation%20Timeline_DWR_draft6.pdf.

[13] "Public benefit" projects include restoring habitats, improving water quality, reducing damage from floods, improving recreation, and responding to emergencies.

[14] *See* http://www.calwater.ca.gov/calfed/about/ and http://theyodeler.org/?p=9789.

[15] *See* https://cavotes.org/vote/election/2014/november/4/ballot-measure/proposition-1. Indeed, the CWC is underway with making plans for allocating $2.7 billion in bond funds for the public benefits of specified water storage projects. The CWC included discussions on this topic at its January 21, 2015, meeting. *See* https://cwc.ca.gov/Pages/2015/01_January/012115agenda.aspx. See more on the CWC's efforts towards "Defining and Quantifying the Public Benefits of Water Storage Projects" at https://cwc.ca.gov/Pages/PublicBenefits1.aspx.

Intruder Alert: The Volatile Landscape of Vapor Intrusion Regulation

Wednesday, April 01, 2015

One of the hottest issues facing the world of environmental investigations and cleanups is the migration of volatile organic compounds (VOCs) into indoor air space in residential and commercial buildings, referred to as VI. VI is one pathway of exposure considered when evaluating risk to human health posed by a chemical.

The Environmental Protection Agency (EPA), Department of Toxic Substances Control (DTSC) and San Francisco Bay Regional Water Quality Control Board (RWQCB) have recently issued guidance and screening levels for indoor air that have widespread effects on real property transactions, environmental cleanups and related litigation.

Background

Two commonly detected VOCs are trichloroethylene (TCE) and perchloroethylene (PCE, also called tetrachloroethylene or “perc”). TCE is a solvent commonly used as a degreaser. PCE is commonly used as dry cleaning solvent. When VOCs are present in soil or groundwater, they release vapors that travel up through the space between soil particles, through pathways such as utility lines or cracks in the concrete slab and into the air inside buildings, where they can accumulate.

The EPA concluded that certain VOCs may cause long- and short-term human health risks, even after relatively short exposure periods. For this reason, EPA Region 9 and the RWQCB recently lowered the levels at which action is required at VOC-contaminated sites.

Regulatory Guidance: Unsettled Territory

In 2002, the EPA Office of Solid Waste and Emergency Response (OSWER) published draft guidance for evaluating VI, which was never finalized.[1] The EPA Office of Inspector General in 2009 issued a report criticizing the 2002 guidance for not addressing mitigation of VI risks or monitoring the effectiveness of mitigation efforts.[2]

In 2013, OSWER released a draft VI guidance in response to the Inspector General’s recommendations.[3] Some features of the 2013 guidance include:

- Lowered threshold for initiating detailed site investigations.
- Pre-emptive mitigation even before fully investigating VI.
- Site-specific sampling to establish background levels of VOCs instead of using generic tables.
- VI Screening Level Calculator with updated toxicity levels, providing recommended screening-level concentrations and “calculation of site-specific screening levels based on user-defined target risk levels and exposure scenarios.”[4]

A 2011 EPA toxicological review concluded that TCE posed significant health risks to developing human embryos, including cardiac malformations, and for the first time classified TCE as a human carcinogen by all routes of exposure.[5] Thereafter, EPA Region 9, DTSC and RWQCB separately issued guidance documents with requirements such as taking rapid measures to mitigate VI of TCE when even low concentrations are detected, collecting multiple rounds of samples in various locations, establishing short-term TCE exposure levels and establishing various sampling protocols.[6]

Uncertainty and confusion abound concerning which standards apply in which situation, especially when there are conflicts. When VI issues arise, this regulatory minefield should be navigated carefully by experienced environmental professionals.

Litigation and Transaction Implications

VOCs are hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and as such, current owners and operators are strictly liable for the cleanup of VOCs.[7] Past owners and operators at the time the VOCs were released are also liable under CERCLA.[8]

Under the recently issued regulatory guidances, investigations will be longer and may result in more costly remediations. This new landscape even affects closed Superfund sites that had no findings of VOC contamination, because under Section 121 of CERCLA, such sites are subject to review every five years.[9] In 2012, OSWER issued Directive 9200-2-84, recommending that VI be considered when conducting five-year reviews.

With respect to real property transactions, the Phase I environmental site assessment customarily conducted during the initial phase of property transfers may identify potential sources of VOCs. The ASTM standard governing Phase I does not consider VI, so ASTM published standard E2600 “intended for use on a voluntary basis ... to determine if a [vapor encroachment condition] is identified.”[10] When VI is identified during Phase I, a Phase II environmental site assessment may be conducted, requiring the collection of samples to identify contamination.

Transactions where a VI risk is encountered will be more complex, involve more negotiations concerning environmental liability and indemnity, and potentially encounter complications in obtaining financing. Protections provided to bona fide prospective purchasers under CERCLA, and the fact that mitigation of VI can be relatively inexpensive under certain circumstances, could make acquisition of contaminated property attractive to buyers with an experienced team to negotiate the regulatory hurdles.

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[1] OSWER Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance), November 2002.

[2] Evaluation Report: Lack of Final Guidance on Vapor Intrusion Impedes Efforts to

Address Indoor Air Risk, Report No. 10-P-0042, December 14, 2009.

[3] OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Source to Indoor Air, April 11, 2013. The public comment period is now closed on the 2013 guidance, but as of the date of this publication it has not been made final. A second VI guidance concerning release of petroleum hydrocarbons from underground storage tanks was also released in 2013: Guidance for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites, April 2013.

[4] Vapor Intrusion Screening Level Calculator User's Guide.

[5] TCE was previously classified as "potentially carcinogenic." Toxicological Review of Trichloroethylene, In Support of Summary Information on the Integrated Risk Information System (IRIS), September 2011.

[6] EPA Region 9 Guidelines and Supplemental Information Needed for Vapor Intrusion Evaluations at the South Bay National Priorities List Sites, December 3, 2013. EPA Region 9 Memorandum: Response Action Levels and Recommendations to Address Near-Term Inhalation Exposures to TCE in the Air from Subsurface Vapor Intrusion, July 9, 2014. DTSC Guidance for the Evaluation and Mitigation of Subsurface Vapor Intrusion to Indoor Air (Vapor Intrusion Guidance), October 2011. RWQCB Interim Framework for Assessment of Vapor Intrusion at TCE-Contaminated Sites in the San Francisco Bay Region, October 16, 2014.

[7] 42 U.S.C. §9607(a)(1).

[8] 42 U.S.C. §9607(a)(2).

[9] 42 U.S.C. §9621(c).

[10] Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions.

Pacheco's Past: Natural and Man-made Environmental Catastrophes

Wednesday, April 01, 2015

Sleepy Pacheco was once the county's bustling commercial center, a shipping port for the grain grown in the Ygnacio, San Ramon and Tassajara valleys. Warehouses, a flour mill and shops grew up along the creek. Walnut Creek flowed deep and free into Suisun Bay. For over 20 years, Pacheco was a major port for central Contra Costa County.

By 1851, American settlement began in the Ygnacio Valley. Farms sent their wheat, oats and barley to Pacheco. Initially, sailing craft of 100 tons traveled six miles up Walnut Creek to Pacheco. Soon small stern wheelers steamed up Walnut Creek to load grain for the San Francisco market.

What happened?

The destruction of Pacheco's shipping channel is a detective story with clues in our historical records. By the early 1830s, large-scale cattle raising began in central Contra Costa. The Pacheco, Martinez, Moraga and Welch families ranchos covered most of central Contra Costa.

The introduction of large-scale cattle raising drove the native bunch grasses to near extinction. The delicate native grasses were replaced by wild oats, mustard and ripgut, all foreign imports. Wild oats evolved in southern Europe alongside domestic cattle and were better able to handle the pressure from large cattle herds.

Cows that before the gold rush sold for four dollars a head, sold for as much as 500 dollars a steer in 1849. Cattle herds were driven to California from Mexico, Texas and the Midwest to satisfy the demands of the expanding mining camps. A pre-gold rush population of half a million head of cattle quickly exploded to over 3 million. Whatever grass the cattle did not eat, the introduction of millions of sheep devoured.

The deep, large and matted root system of the native bunch grass absorbed the heavy winter rains and released groundwater slowly into Walnut Creek watershed. The smaller, shallow root system of the wild oat grass produced faster runoff during the winter rains. The result was increased erosion of Contra Costa's hillsides and the dumping of sediments into Walnut Creek and its tributaries.

Another environmental blow came in the 1850s with the clear cutting of the redwood forests on the Berkeley/Oakland Hills. The rapid growth of San Francisco created an intense demand for lumber. By 1860, the redwood forests were gone. Now the winter rains and moisture-laden fogs were not captured and absorbed by the forest. Heavy rains falling on Contra Costa's coastal hills were no longer slowly released into the groundwater system.

Clear cutting of the redwood forests, extinction of the native vegetation and overgrazing led to more rapid runoffs producing increased erosion, debris flows and landslides. In early November 1861, the winter rains began and continued through December. By December 9, the Sacramento Bee editorialized about the "Deluge of 1861." Rivers overflowed their banks and the San Joaquin Valley began to flood. Thousands of cattle

drowned.

The worst was yet to come. Heavy rains persisted through January 1862. When the rain finally ended, San Francisco records show that the city had received around 50 inches. The Central Valley became a lake 300 miles long and 20-60 miles wide.

On the newly exposed hillsides of Contra Costa, stripped of its native grasses and redwood forests, the overwhelming winter rains proved disastrous. The unprecedented runoff eroded millions of tons of soil from the Walnut Creek watershed. Cargo ships could no longer reach Pacheco's wharves. George Loucks was forced to move his warehouse three-quarters of a mile downstream due to the rapid upstream filling of Walnut Creek.

In California, a wet winter is commonly followed by drought. After the extreme rainfall of 1861-62, there began a horrendous two-year drought that permanently changed the economic face of California. From 1862-63, there was only 15 inches of rain measured in San Francisco. In Los Angeles, only four inches were recorded. In the next year (1863-64), it was even worse. Los Angeles received only a trace of rain for the entire year. A usually rainy San Francisco recorded only nine inches.

After two years of extreme drought, the cattle industry in Contra Costa nearly vanished. In Southern California, starving steers were sold for 37 1/2 cents apiece. Over 2.5 million cows died. Crushed by debt, most of the remaining large ranchos were broken up and sold.

During 1865-68, the heavy rains returned. Pounding the unprotected, drought-ravaged hillsides, water cascaded down the slopes, turning gullies into deep ravines. The following is a quote from the history of Contra Costa County written in 1882 by Munro-Fraser. He begins by discussing the pioneers, Elam Brown and Nathaniel Jones, who arrived in the late 1840s:

"The country in its general aspect has been greatly changed since their arrival, especially in the matter of ditches, many of these which now are of considerable magnitude, being then more drains. The prime cause of this we believe to have been the breaking of the upper crust of the soil by the trampling of stock, which increased in number year by year and consequently caused the greater damage as their hundreds were changed into thousands."

During the 1860s, increased deposition of mud and silt into Walnut Creek and its slough made the navigation of cargo ships to Pacheco increasingly difficult. Walnut Creek's gradual sedimentary fill up reduced the creek's water-carrying capacity, producing annual floods that clouded Pacheco's prosperity.

In 1869, offers of inexpensive land to the flood prone Pacheco merchants by Salvio and Fernando Pacheco were warmly received. The site of the new settlement, Concord, lay two miles to the east on higher ground. This was the final blow to the future of Pacheco. In 1873, even the Contra Costa Gazette abandoned Pacheco and moved to Martinez.

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Insurance Archaeology: Looking for Buried Treasure

Wednesday, April 01, 2015

Lawyers and the businesses they represent often get so involved in defending claims that the availability of historic insurance policies to help defray the costs of defense is not given the attention it deserves. Even when a search for historic insurance policies is commenced, it is often called off too early, especially considering the value of such policies.

The search for and analysis of historic insurance policies is often called "insurance archaeology." Like the traditional archaeologist, the insurance archaeologist digs for evidence—much of it easily passed over by the untrained eye—and painstakingly assembles it to reconstruct a picture of the past—in this case, a business' insurance coverage from decades ago.

Although businesses typically undertake insurance archaeology after claims have been asserted against them, the rapidly disappearing nature of historic insurance information counsels in favor of businesses taking a proactive approach to identifying, preserving and assessing their historic insurance assets before those assets are needed.

Indeed, insurance archaeology should be part of the "due diligence" required in mergers and acquisitions and real estate transactions. Any business that has the potential for long tail liabilities (e.g., environmental, asbestos, welding fumes and products liabilities) should search its records posthaste.

Insurance Basics

Generally, liability insurance policies impose upon insurance companies two important duties: the duty to defend and the duty to indemnify. If a business is sued and the claims asserted against it are potentially covered by an insurance policy, then its insurance company has a duty to defend the business, i.e., the insurance company must pay for the defense of the case.

In addition, if the claims are covered by the policy, then the insurance company has a duty to indemnify the business for liability up to the limits specified in the policy (after any applicable deductible).

Insurance policies written today typically exclude coverage for bodily injury and property damage caused by traditional kinds of pollution and for asbestos, but that was not always the case. Indeed, insurance may be available today under policies that were written, and for property damage and bodily injury that occurred, many years ago.

In the 1960s, for example, liability insurance policies did not contain pollution exclusions. It was not until the early 1970s that the insurance industry started writing policies containing pollution exclusions, but the exclusion contained a glaring exception—the so-called "sudden and accidental" or "unexpected and unintended" exception.

These policies provide coverage for property damage caused by pollution resulting from sudden and accidental events. After years of paying out claims, the insurance industry

changed again in the mid-1980s and put in place the so-called “absolute pollution exclusion.” The insurance industry has taken the position that this exclusion prevents coverage for all bodily injury and property damage caused by “pollution” regardless of circumstances or facts. (Even so, some courts have found that even these policies may not always exclude such coverage.[1]

Likewise, insurance companies began writing exclusions for asbestos in the 1980s. But the exclusions vary and coverage may be available on policies written in the 1990s or later.

These changes in liability insurance policies are particularly important because the old occurrence based policies never expire. They can continue to provide coverage today for events that took place decades ago!

Suppose, for example, a claim is brought against a business today based on property damage or bodily injury that first occurred way back in 1970. A liability insurance policy written for that business in 1970 could provide coverage for that claim today. And if that initial exposure continued to cause additional property damage (e.g., spreading the contamination deeper into the soil and groundwater) or bodily injury (e.g., illness progressing due to exposure to asbestos or toxic fumes), then later policies could provide coverage as well. In that way, each of the insurance companies that provided insurance after the initial exposure also have an independent obligation to defend and indemnify the business.

In order to obtain coverage, however, the business must be able to prove up the existence and essential terms of the relevant insurance policies and that can be a very difficult task when the policies are many decades old. Every time a business does some “spring cleaning,” every time someone moves their office, files get discarded in the process, and millions of dollars in insurance coverage can be lost if these files contain old insurance policies.

The “Dig”

All is not necessarily lost even if old insurance policies have been discarded. Experienced insurance archaeologists are frequently told by the businesses that hire them that they have already searched their records for old insurance policies and found nothing. A business, however, does not always need the actual insurance policy to obtain coverage. Secondary evidence of the policy may be sufficient.[2]

Secondary evidence might include policy numbers, partial policies, correspondence with insurers or testimony from insurance brokers. This secondary evidence often proves indispensable to proving the terms and conditions of “lost” insurance policies.

In order to ensure that these valuable historic insurance assets are not lost and are available should the need ever arise, business owners should take a proactive approach to identifying and understanding their historic insurance assets. More often than not, upon receipt of an environmental claim, products liability claim, or other long tail or historical type of injury (such as welding fume or asbestos injuries), everyone’s focus turns to how to defend the claim, and the identification of insurance that could provide coverage for that claim takes a distant back seat.

Acting early to identify insurance, without the pressure of defending a claim, can put a

business in a strong defensive position by allowing it to immediately tender to its insurance companies should a claim later arise.

The time to act is now. The people who handled insurance matters 20, 30 or 40 years ago are advancing in age, and may become unable to assist the insurance archaeologist.

Take the time now to secure and understand the terms and conditions in your insurance policies. Consider reviewing the policies with the assistance of an attorney who is experienced with insurance law in general and insurance archaeology in particular. Lastly, protect the insurance documents that have so painstakingly been assembled—have them scanned and backed up onto two sets of discs (and store each set in separate locations) for safekeeping.

John Till is a founding partner of Paladin Law Group and also serves as the firm's managing partner. Paladin Law Group is a boutique multidisciplinary environmental and sustainability firm.

[1] *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal. 4th 635.

[2] *Dart Indus., Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal. 4th 1059.

California Mandates Detailed Sick Leave Requirements for Employers

Wednesday, April 01, 2015

The Legislature, responding to concerns that many employees have no paid sick leave with which to lessen the impact of an illness, enacted the Healthy Workplaces, Healthy Families Act of 2014,[1] which basically requires that employees be able to use three paid sick days for every year of work. The law takes effect July 1, 2015, except that obligations to post information about rights to sick leave and mandatory record keeping have already been in effect since January 1, 2015.

Accrual and Usage Provisions

Although the subject seems simple, the legal framework, which will apply to nearly every employer in the state, no matter how small and including most attorneys, is fairly complex. The short statement is that employees have available three paid sick leave days per year. However, there are many questions remaining, such as: (1) what is the accrual rate? Are part time employees entitled to the same three days as full time employees? (2) if the employee does not use all sick days in a year, do the unused days carry over? and (3) what are the reasons for which sick leave can be used?

The law applies to all employers who have at least one employee who works more than 30 days in a year in California (including part-time and temporary employees), except for employees covered by certain collective bargaining agreements, certain providers of in-home support services and certain airline industry employees. It requires employers to provide employees with paid sick leave, which accrues at the rate of at least one hour of paid sick leave for every 30 hours worked. This is approximately 8.67 days of leave per year for a 40-hour a week employee.

Employees who are exempt from overtime requirements are deemed to work 40 hours per workweek, unless the employee's normal workweek is less than 40 hours, in which case the employee accrues sick days based upon their normal number of hours.

There are limitations on usage and accrual. First, although the employee accrues one hour of leave per every 30 worked, an employer is only required to allow an employee to use three days (24 hours) of paid sick leave per year. Also, while an employee begins to accrue leave immediately upon employment, an employer may prohibit use of accrued sick days until the ninetieth day of employment, after which the employee may use paid sick leave days as they accrue. Paid sick leave also may be advanced if proper documentation is maintained. An employer also may set a reasonable minimum increment for the use of this leave, not to exceed two hours.

Second, accrual of paid sick leave can be capped at 48 hours per year. The reasoning underlying an accrual at a higher level than usage is to permit a carry over into the following year, so that an employee who becomes ill early the next year has accrued

leave to use.

An employer is not required to provide additional paid sick leave if the employer has a sick leave or general Paid Time Off (PTO) policy which provides leave that may be used for the same purposes and under the same conditions of the new law. It must also provide at a minimum an accrual, carry over and usage in accordance with the new law or puts the full amount of leave (24 hours) into the employee's leave bank at the beginning of each year of employment, or calendar year or 12-month basis.[2]

One major difference between having a separate paid sick leave policy as compared to including paid sick leave as part of a PTO policy is that upon termination, employers are not required to pay out accrued but unused sick leave when they are kept separate. However, while it does not have to be paid out, if an employee separates but is rehired within one year, the employee is entitled to reinstatement of the accrued but unused sick leave.

On the other hand, if the employer uses a PTO policy, that generally means there will be a payout of accrued amounts on termination of employment. Thus, while a PTO policy integrating paid sick leave provisions might be easier to manage, it might cost more in light of the need to pay accrued but unused amounts.

The rate of pay for sick leave is the same wage as the employee earns during regular work hours. Payment for sick leave taken must be made by the payday for the next regular payroll period after the leave occurred.

Employees must be allowed to use this leave to care for themselves or other "family members," broadly defined to include: (1) a biological, adopted or foster child, stepchild, legal ward or child to whom the employee stands in loco parentis (regardless of the age or dependency status); (2) a biological, adoptive or foster parent, stepparent or legal guardian of the employee or the employee's spouse or registered domestic partner, or person who stood in loco parentis when the employee was a minor; (3) a spouse; (4) a registered domestic partner; (5) a grandparent; (6) a grandchild; or (7) a sibling.

Sick leave may be used for diagnosis, care or treatment of an existing health condition, preventative care or where the employee is the victim of domestic violence, sexual assault or stalking.

Notice, Posting and Record Keeping Requirements Imposed on Employers

California's sick leave law adds new notice, posting and record keeping requirements. At the time of hiring (and for current employees, by July 8, 2015), an employer must provide each employee a written notice which includes:

- The rate or rates of pay, including for overtime.
- Information about the employer, such as names used, address, telephone number and information about the employer's workers' compensation insurance carrier.
- The regular payday.
- The fact that an employee has a right to accrue, request and use accrued sick leave without fear of termination or retaliation, and has the right to file a complaint against an employer that retaliates.

Exceptions to these requirements are certain public employees, employees exempt from

overtime laws and those covered by certain collective bargaining agreements.[3]

Also, beginning July 1, 2015, an employer must state the amount of paid sick leave available on the employee's itemized wage statement (along with any other required items) or in a separate writing provided on the designated payday. Employers who have not been providing running totals of leave accruals will have to start doing so. Employers also must keep records of hours worked and paid sick days accrued and used by an employee for three years.

Employers also must display a poster about this new law. Templates of the notices to be posted and provided to new hires can be found at http://www.dir.ca.gov/dlse/ or at www.sohnenandkelly.com.

Separate Oakland and San Francisco City Ordinances

Employers with employees working in Oakland or San Francisco also must be aware that those cities have ordinances requiring paid sick leave which vary from the state law. For example, both cities set higher accrual caps than does the state law. The San Francisco ordinance also prohibits any waiting period before sick leave may be used. Compliance with the highest requirements must be met if the employer is subject to these ordinances.

While the concept of three days of paid sick leave a year seems simple, there are varying arrangements which make its implementation complicated. Paid leave brings with it "accrual," "use" and "caps." Accrued leave balances must now be reported regularly. Nearly every California employer will have to take action to comply with the new law effective in 2015!

Patricia Kelly is a partner at Sohnen & Kelly in Orinda, which has substantial experience addressing a broad range of employment issues, including wage and hour class action lawsuits, disciplinary actions, discrimination, harassment, wrongful termination and severance agreements. They represent primarily small companies and individuals.

[1] California Labor Code sections 245 through 249.

[2] Cal. Lab. Code § 246(e); California Department of Industrial Relations, FAQs, http://www.dir.ca.gov/dlse/Paid_Sick_Leave.htm.

[3] Cal. Lab. Code § 2810.5.

Discovery Referees Rules and Roles

Wednesday, April 01, 2015

What is a Discovery Referee?

A discovery referee is an individual, or group of up to three individuals, appointed by the court upon stipulation of the parties, motion of a party, or motion of the court, to determine a particular discovery issue.[1]

While discovery procedures can be altered by stipulation of the parties,[2] litigation of discovery motions before a discovery referee proceeds in the same manner as it would were it before the court.[3] However, a discovery referee is privately compensated by the parties to the litigation.[4] Thus, in essence, a discovery referee serves as a court-appointed arbitrator of discovery disputes.

Different Scopes of Discovery Referees

The primary difference between the scope and power of a discovery referee is determined by whether the discovery referee is appointed as a result of the stipulation of the parties, or as a result of the motion of one party or the court.[5] In the case of discovery referees appointed pursuant to the stipulation of the parties, "the decision of the referee ... upon the whole issue must stand as the decision of the court."[6]

In the instance of a discovery referee appointed as a result of a motion of one party or the court, "the decision of the referee ... is only advisory. The court may adopt the referee's recommendations, in whole or in part, after independently considering the referee's findings and any objections and responses thereto filed with the court,"[7] which may be filed within 10 days after the service and filing of the report with the court.[8]

Appointment of a Discovery Referee

When the court determines it necessary to appoint a discovery referee, whether by stipulation or pursuant to a motion, the California Code of Civil Procedure and the California Rules of Court mandate particular items be included in the order. Specifically, the order must state:

1. The name, business address, telephone number and State Bar number (if a member of the Bar) of the referee.
2. What the scope of the reference to the discovery referee is (e.g., for all purposes or a limited purpose).
3. Whether the discovery referee will be privately compensated.
4. Whether court facilities may be used.[9]

In addition, if a discovery referee is appointed following a motion, the order must also include:

1. A particularized discussion of the items at issue in the case creating exceptional circumstances warranting referral of the matter to a discovery referee.
2. That the discovery referee "is authorized to set the date, time and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings; take evidence; and rule on objections, motions and other requests made during the course of the hearing."
3. Specify the maximum rate of compensation for the discovery referee.

4. Include a finding regarding which party, if any, has established an economic hardship sufficient to exclude that party from payment of the discovery referee's fees.[10]

There exist other procedural requirements, such as the filing of the acceptance and certification of the discovery referee.[11] Any person planning to serve as discovery referee should closely examine the requirements of California Code of Civil Procedure sections 638 through 645.2 and California Rules of Court 3.900 through 3.932.

Benefit and Detriment of a Discovery Referee

Discovery referees are most beneficial in cases in which large amounts of discovery will be propounded, and disputes are likely to arise. By referring to a discovery referee, the parties can shorten the time period within which motions are heard, while not clogging the court's docket with repeated discovery motions. In the instance of stipulated discovery referees, this process is even faster, as the court need not review the decision of the discovery referee.[12]

In the case of a discovery referee appointed without stipulation, the vast majority of the legwork is provided by the discovery referee; while the court has complete review authority over the recommendation of the discovery referee,[13] in light of the fact that the court elected to appoint the person to serve as discovery referee, great deference will likely be given to the recommendation.

Additionally, when all parties stipulate to the discovery referee, they have the added advantage of being able to stipulate to the terms of the appointment, including the discovery procedures and the manner of providing the ruling.[14] When appointed without stipulation, the discovery referee must make a ruling in writing, filed with the court within 20 days.[15]

While the parties may object directly to the recommendation of a discovery referee appointed without stipulation,[16] the decision of a discovery referee appointed by stipulation "may be excepted to and reviewed in like manner as if made by the court." [17]

That is, "If the referee has failed to consider certain evidence, the party whose interest is affected must notify the referee *as soon as possible,* whether during the reference or after the report is issued, so that the referee may have a chance to rectify any oversight or error he or she may have made. If no change to the report is necessary, the party's objection should nonetheless be noted in the report. Alternatively, the party may move to set aside the report. Such a motion should be made *promptly* following the date the report is filed with the court. The failure to file a written objection to the contents of the referee's report or to properly move to set aside the report results in the waiver of the right to object to the referee's findings."[18]

The appointment of a discovery referee can also act as a strategic advantage. By allowing the expedient resolution of discovery disputes, the merits of cases requiring heavy discovery can be determined more quickly. Despite the added immediate costs, the abbreviation of the total time to trial could result in an overall reduction in costs to the client. Similarly, the added upfront cost, coupled with the hastened understanding of the relevant facts, could cause clients on both sides to realistically evaluate the prospects of the case, and resolve the matter without protracted litigation, reducing the slow bleed that can result from extended litigation.

The clear downside to the appointment of a discovery referee is the cost to the litigants. When compensation is required, referral to a discovery referee will result in clients paying both for their own attorneys and the discovery referee, doubling the costs in the short term. However, in instances where voluminous discovery and corresponding motions are anticipated, this upfront cost can ultimately cut costs in the long term. Conversely, cases with relatively little discovery should steer clear of the discovery referee process, if possible, as the added costs could serve to cripple the economic viability of a claim.

Finally, some litigants and lawyers shy away from discovery referees because they prefer to have a judge decide motions (and would rather not have an attorney make the initial recommendation). While an appointment can be made without stipulation, each party is permitted to challenge a discovery referee once pursuant to California Code of Civil Procedure Section 170.6, just as they could a judge.[19]

Thus, if confronted with a situation in which a litigant or her counsel is directed to a discovery referee with whom the litigant is not comfortable, counsel should make certain to timely file a peremptory challenge, affording another opportunity for an appointment which may be perceived as more favorable.

Andy Verriere is an attorney in the San Francisco office of Seyfarth Shaw LLP. Andy is well versed in all matters of discovery, and is available to serve as a discovery referee. You can contact Andy at averriere@seyfarth.com.

[1] Cal. Civ. Proc. Code §§ 638, 639.

[2] Cal. Civ. Proc. Code § 2016.030.

[3] *See, e.g.*, Cal. Civ. Proc. Code §§ 638(a)-(b), 639(a)(5); Cal. R. Ct. 3.922(e), 2.400, *et seq*.

[4] Cal. Civ. Proc. Code §§ 638(c), 639(d)(5)-(6), 645.1; Cal. R. Ct. 3.922(f).

[5] Cal. Civ. Proc. Code § 644.

[6] Cal. Civ. Proc. Code § 644(a).

[7] Cal. Civ. Proc. Code § 644(b).

[8] Cal. Civ. Proc. Code § 643(c).

[9] Cal. R. Ct. 3.902; *see also* Cal. Civ. Proc. Code §§ 638, 639.

[10] Cal. R. Ct. 3.922.

[11] Cal. R. Ct. 3.924.

[12] Cal. Civ. Proc. Code § 644(a).

[13] Cal. Civ. Proc. Code § 644(b).

[14] Cal. Civ. Proc. Code §§ 638, 643(b).

[15] Cal. Civ. Proc. Code § 643(a).

[16] Cal. Civ. Proc. Code § 643(c).

[17] Cal. Civ. Proc. Code § 645.

[18] *Martino v. Denevi*, 182 Cal. App. 3d 553, 556 (1986) (footnote omitted) (emphasis added); *accord In re Marriage of Demblewski*, 26 Cal. App. 4th 232, 237 (1994).

[19] Cal. Civ. Proc. Code § 639(b).

The Inns of Court Gets Quarantined

Wednesday, April 01, 2015

On February 12, 2015, Judge Cram's group (consisting of Lisa Mendes, Nancy Allard, Jennifer Sommer, Ken Strongman, Kirsten Howe, Don Green, Wally Hesseltine and Rodney Marraccini) provided an unfortunately topical presentation about a BART train becoming the epicenter for a contagion.

Their presentation, organized as if the audience were riders on the BART train, centered on the potential quarantine of a BART train due to Ebola symptoms of Lisa Mendes' character, who had recently returned from Sierra Leone.

Commissioner Don Green played the Contra Costa DA who was running for Lt. Governor and wanted to use this situation as a political opportunity to promote his own brand. He bombastically demanded that the county health officials quarantine the BART train and keep anybody from entering or exiting. He wanted to take the most extreme measures possible to show he was tough on Ebola.

The county officials wanted to take a much more middle-of-the-road approach to this potential crisis. The exceedingly vague information they were putting out to the public was infuriating to the Contra Costa DA.

Comm. Green's character threatened to prosecute the health officials if they failed to follow his orders. The Inns group then discussed what power law enforcement authorities have to quarantine people. For example, police in certain situations can force people to go the hospital.

Ken Strongman provided an interesting history of quarantine from the Byzantine Empire to the present. Diseases such as the bubonic plague or leprosy may seem like a part of history long past, but they reach into modern times.

For example, in San Francisco in 1900, there was an outbreak of bubonic plague in Chinatown. An extremely slow response by the government allowed the plague to gain a foothold and there were future outbreaks, not only in San Francisco, but the rest of the nation.

Additionally, the government's response to leprosy remained shameful until the middle of the 20th century. For example, lepers could not vote until 1946. All lepers in America were legally required to go to a leper colony in Louisiana called Carville, which remained open until around 1999.

Wally Hesseltine provided more information about the legal framework surrounding quarantines. What happens when there are conflicts between federal and state laws? The federal law is supreme in these instances.

For example, the president has executive authority to isolate people, which we all saw

President Fitzgerald Grant III (played by Tony Goldwyn) do back in season two of the political thriller television series “Scandal.” This was right after he was shot by a machine set up by an elite assassin, but before his mistress was taken hostage by mercenaries and sold to the highest bidder on the open market. It is an extremely realistic show. P.S. SPOILER ALERT!

Rodney Maraccini spoke on the various legal challenges to forced quarantine. There are a rather large number of them, with Latin-sounding names like habeas corpus, writ of mandate, and mandamus. These complex legal machinations are not for the faint of heart and should not be tried without a trained adult present. If you do not have a trained adult, you could also try a lawyer. Habeas corpus, for example, is a means by which you can challenge the detention of a prisoner. In this instance, it could be used for the detention of a diseased person.

Then the entire Inns group was quarantined for 40 hours ... for a fun slumber party! OK, that last part did not happen, but it was an interesting look into an issue that seems to rear its head a lot these days, be it for diseases like Ebola or the measles.

The next meeting is on April 9, 2015. If you are interested in applying for RGMAIOC membership, please contact Patricia Kelly at patriciakelly@pacbell.net.

Judge Clare Maier Awarded by California Women Lawyers

Wednesday, April 01, 2015

Contra Costa Superior Court's own Judge Clare Maier received a Rose Bird Award by the California Women Lawyers (CWL) on March 13, 2015. Hosted by JFK University, the award presentation included speeches from the CWL President, the CCCBA Women's Section leader and other judges from the Contra Costa Superior Court.

According to CWL, "the award honors judges for judicial excellence, public service and inspiration to women lawyers."

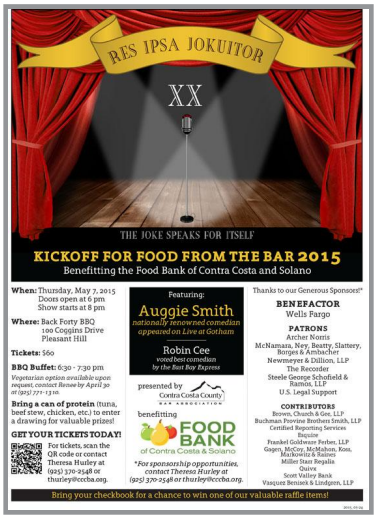
Below are photos from the event. To see more photos, please visit CCCBA's Facebook page.

[gallery ids="10063,10064,10065,10066,10067,10062"]

Join Us for Comedy Night, May 7

Wednesday, April 01, 2015

We are celebrating 20 years of Comedy Night: Res Ipsa Jokuitor XX, the kickoff to our annual **Food From the Bar Drive benefitting the Food Bank of Contra Costa and Solano**.



Justice James Marchiano (ret.) will emcee, nationally renowned comedian **Auggie Smith** will headline and **Robin Cee**, voted best comedian by the East Bay Express, will be the opening act.

Don't miss it—and don't forget to bring your checkbook for a chance to win valuable raffle items!

Laugh for a good cause: **Register today!**

Thursday, May 7, 2015 | 6 pm - 9:30 pm | Back Forty BBQ, Pleasant Hill

Register today! | View the Event Flyer

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Laugh for a good cause: **Register today!**

Simplify Your Life with CCCBA's Mobile App

Wednesday, April 01, 2015

CCCBA members can download the free mobile app for quick access to the most popular areas of the website.

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Questions? Comments? Feedback?

Contact Dawnell Blaylock, Communications Coordinator, at (925) 370-2542 or dblaylock@cccba.org.

Welcome to Our Newest Members!

Wednesday, April 01, 2015

Please welcome our newest members that have recently joined the CCCBA:

Terry Abts Brittany Hendrix-Smith Katie Padilla Harry-Todd Astrov Michael Herman Constantine Panagotacos Brinda Bellur Laxminarayan Taylor Hobin Carla Passero Tanya Brown Ann Marie Jelacich Sophia Priola Ronny Clausner Steven Kronenbert Mark Ressa Joshua Clendenin Conrad Kuyawa Tony Rodriguez Matthew Cody Henry Lewis Nathan Scheg Jana Contreras Jerald Marrs Tara Shine Douglas Crosby Mark Mathison Audrey Smith Michael Davis VickyAnn McAteer Sara Star Deborah Dulay Shanti Michaels Glicel Sumagaysay Roger Fonseca Jacqueline Minor Ryan Sutherland Katherine Fowler Mahal Montoya Jenna Swaney Jorge Guardado Amara Morrison Sheryl Traum Ben Gulbrandsen David Oh Lydia Van't Rood - Percin Hannah Hartshorn Tiffany Owen Monroe Mariela Verdin