LOS ANGELES
Daily Journal
www.dailyjournal.com

VOL. 124 NO. 31 TUESDAY, FEBRUARY 15, 2011

DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: Political committee is entitled to attorney fees incurred in defending against claims concerning composition of committee's membership. *Wilson v. San Luis Obispo County Democratic Central Committee,* C.A. 2nd/6, DAR p. 2416

Employment Law: Sales representatives, who promote prescription drugs to physicians on behalf of pharmaceutical company, are properly classified as 'outside salesmen' and exempt from overtime pay. *Christopher v. SmithKline Beecham Corp.,* U.S.C.A. 9th, DAR p. 2433

Immigration: Parent of formerly abused children qualifies for cancellation of removal after demonstrating that children's father beat children while they lived together. *Lopez-Birrueta v. Holder,* U.S.C.A. 9th, DAR p. 2443

CRIMINAL LAW

Criminal Law and Procedure: Prosecutor does not improperly tamper with juror by telling juror's co-worker to give money to juror to vote guilty, in a joking manner. *In re Price,* CA Supreme Court, DAR p. 2409

Criminal Law and Procedure: Court errs in issuing criminal protective order under Penal Code Section 136.2 where there is no evidence defendant attempted to intimidate alleged victims. *Babalola v. Superior Court (People),* C.A. 2nd/7, DAR p. 2426

Criminal Law and Procedure: Erroneous release of defendant and surety's liability for posting bond do not entitle surety to forfeiture of bond. *People v. Indiana Lumbermens Mutual Insurance Co.,* C.A. 2nd/3, DAR p. 2419

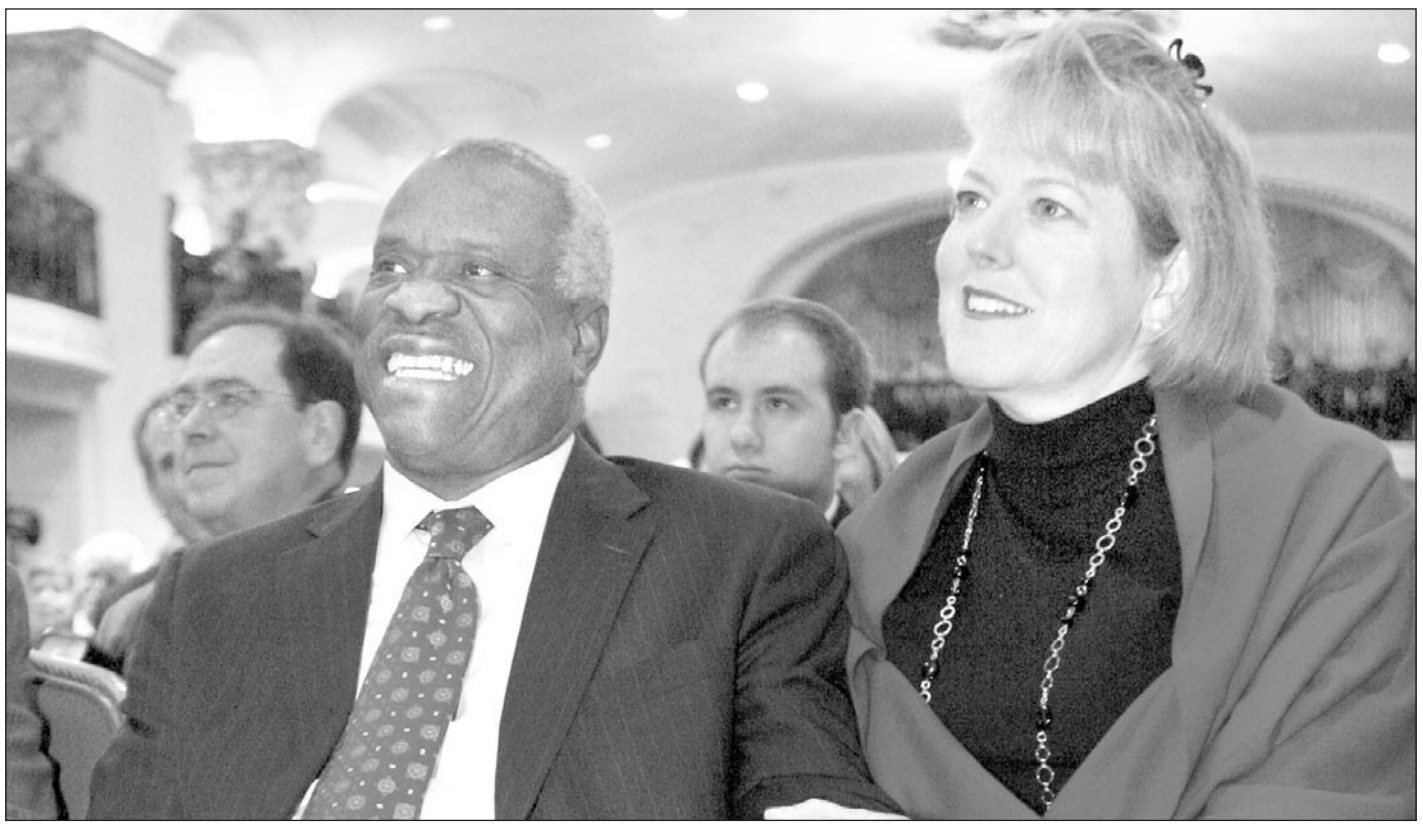
Criminal Law and Procedure: Court errs in calculating defendant's presentence conduct credit pursuant to former version of Penal Code Section 4019. *People v. Zarate,* C.A. 4th/1, DAR p. 2423

Summaries and full texts appear in insert

BRIEFLY

A Beverly Hills criminal defense lawyer pleaded no contest Monday to charges that he snuck heroin into a secure lock-up at a downtown Los Angeles courthouse. Michael Inman, 48, accepted a plea deal that dismissed three felony drug charges in exchange for his plea on a felony count of unlawfully bringing drugs into a jail. Sheriff's deputies say they discovered Inman alone with a baggie of heroin last June in a secure lock-up at the courthouse. Inman was waiting to meet two defendants he represented. Inman will serve 120 days in jail, and was placed on three years' probation by Superior Court Judge Michael Abzug, who approved the plea deal. Inman also agreed to submit paperwork to the State Bar placing his law license on inactive status, according to the Los Angeles County District Attorney's Office.

Showing a commitment to paying for poor Americans' access to legal counsel even as pressure for lower government spending mounts, the Obama administration requested an increase to Legal Services Corp.'s funding to $450 million in the 2012 budget request announced Monday. That's $30 million more than the organization's current operating budget and $90 million more than what House Republicans are seeking to shear from its funding. Legal Services Corp. distributes grants to 136 nonprofit groups nationwide, including 11 in California.



Associated Press

U.S. Supreme Court Justice Clarence Thomas and his wife Virginia Lamp Thomas.

A Supreme Court Above Reproach

Recent Ethical Concerns Regarding Some Justices Call for Change in Law

By Erwin Chemerinsky

Throughout history, one of the U.S. Supreme Court's greatest strengths and virtues has been the impeccable ethics of its justices. The Court has rarely been tainted by scandal. When there were allegations of improprieties by Justice Abe Fortas, he quickly resigned from the bench. Even rumors of ethical transgressions by justices are exceedingly rare.

GUEST COLUMN

In recent weeks, however, ethical concerns have been raised about some of the justices. Perhaps most significantly, it was revealed that Justice Clarence Thomas had not disclosed his wife's income for a number of years, even though this is required by law. On Jan. 24, Thomas said this was inadvertent and based on his not reading the forms correctly. But year after year, he clearly represented on these forms that his wife had no income, when that was not at all the case. Also, concerns have been raised about his wife's political activities and who has been funding them.

A few weeks ago, Common Cause asked the U.S. Department of Justice to investigate whether Justice Antonin Scalia or Thomas acted improperly in participating in the Court's decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 676 (2010). The concern was their having spoken and received benefits from those who directly gained from the decision. There has been extensive publicity about these charges.

These allegations have significant costs because it is so important that the justices be beyond reproach. Codes of judicial ethics require that judges avoid even the appearance of impropriety. Nowhere is that more important than for the most visible court in the country — the U.S. Supreme Court.

Several steps should be taken to help insure that there is both the perception and reality of a Court complying with the highest possible ethical standards. First, the ethical standards, which are applied to lower federal court judges, should be applied to Supreme Court justices. With the exception of a few laws, those that regulate ethics for all other judges are not applicable to the Supreme Court. This should be changed immediately. There is no justification for this omission.

Second, no longer should it be left to each justice to decide for himself or herself whether to participate or be recused. If a party requests that a justice be disqualified, it is entirely up to the justice as to what to do. This came to national attention a few years ago when Scalia went hunting with Vice President Dick Cheney while Cheney had a case pending in the Supreme Court. A motion to recuse Scalia was made, but he refused to disqualify himself and declared that he could be sufficiently fair and impartial.

It should be axiomatic that a justice should not be ruling on his or her own disqualification. A simple alternative procedure would be to choose three other justices at random to rule on any motion that a justice be recused. Of course, there is the danger that the justices will simply defer to each other. But it is reasonable to assume that the justices will take this responsibility seriously and no matter what, it is better than the current approach to recusal.

> With the exception of a few laws, those that regulate ethics for all other judges are not applicable to the Supreme Court.

Finally, if a justice is disqualified from a case, a procedure should be devised whereby a retiring justice, chosen at random, can participate at the Supreme Court instead. This year, for example, Justice Elena Kagan is recused from about one-third of the cases on the Court's docket because they were matters which were being handled in the Solicitor General's office when she was running the office. There is a real danger of 4-4 splits in a large number of cases this year, which means the lower court decision will be affirmed by an evenly decided court. This serves no one's interests. All of the time spent briefing and arguing the case is wasted. And the law remains unsettled until the Supreme Court can find another case posing the issue.

See Page 4 — ETHICAL

Howrey Loses Another Rainmaker, As San Francisco IP Group Goes to Hogan Lovells

By Craig Anderson and Sara Randazzo
Daily Journal Staff Writers

PALO ALTO — The disintegration of Howrey LLP's California law offices continued Monday with the news that San Francisco-based rainmaker K.T. "Sunny" Cherian and four other intellectual property partners left over the weekend for Hogan Lovells US LLP.

The departure of Cherian, San Francisco-based hiring partner R. Scott Wales and three other Howrey attorneys comes as more than 75 percent of the firm's partners weigh offers from Winston & Strawn LLP to join the Chicago-based firm.

A Howrey spokeswoman declined to comment Monday on Cherian's departure or its impact, but the latest defections raise further questions about whether there will be enough partners — and business — in California to allow some sort of Winston-Howrey combination to go through.

Larry Watanabe, a recruiter with Watanabe Nason in San Diego, said he suspects Winston & Strawn could start pulling offers off the table now that "so many people they had wanted won't be able to make it."

> The continued defections of major players in Howrey's California offices could prompt Winston & Strawn to pull offers to take up to three-quarters of the partnership.

Howrey partners were given offers Jan. 30 and have until this weekend to make a decision. Many people familiar with the situation said the offers are contingent on enough partners accepting them, and as California defections mount the viability of Winston expanding in the state becomes more uncertain.

Michael L. Charlson, a partner at Hogan Lovells' Palo Alto office, said Monday he is pleased about the additions, which he said would strengthen the international firm's IP litigation practice.

"Sunny and Scott are seasoned trial lawyers and have strong relationships with technology clients in California," Charlson said. "We see a lot of opportunities to leverage their capabilities with our existing clients."

Along with Cherian and Wales, patent litigators John D. Hamann, Sarah M. Jalali, and Constance F. Ramos joined Hogan Lovells as partners.

Cherian, who was traveling Monday, could not be reached for comment.

Watanabe said he does not think Winston, which currently has offices in Los Angeles and San Francisco, would open an East Palo Alto office with the group of attorneys remaining there.

See Page 5 — HOWREY

Lawmakers Act To Install More Oversight Of Court System

By Emily Green
Daily Journal Staff Writer

SACRAMENTO — By the end of this week, state lawmakers will have introduced at least three pieces of legislation designed to curb the power of the California Judicial Council or provide for greater transparency in how the council manages courthouse construction and a technology upgrade.

The bills address different aspects of council responsibilities, but collectively reflect a growing concern among some lawmakers that the Administrative Office of the Courts poorly manages big-money projects and doesn't operate with enough oversight.

A state audit last week criticized the AOC for bungled contracts and massive cost overruns in developing the Court Case Management System, or CCMS, adding to concerns among some lawmakers. CCMS is designed to link court dockets statewide. As a result of the audit, Assemblywoman Bonnie Lowenthal, D-Long Beach, introduced a bill that would require the AOC to regularly report to the Legislature on the development and progress of CCMS.

"The AOC has been ignoring good advice," said Lowenthal. "They need a time-out, and my bill will at least demand better proof they are following best practices."

On Monday, the AOC announced it would adopt the auditor's recommendations for proceeding with CCMS.

Concern over courthouse construction inspired a second bill, AB 314, authored by Assemblyman Jeff Gorell, R-Camarillo, that would eliminate the judiciary's exemption from following the Public Contract Code for the acquisition and construction of courthouses. The Public Contract Code is a set of rules that governs state contracts. Gorell said the AOC has entered into contracts for building courthouses that are "exponentially higher"

See Page 8 — LAWMAKERS

FDA Guidance Leaves Biotechs In the Dark

By Mandy Jackson
Daily Journal Staff Writer

Biotechnology executives looking for clear terms under which they could face career-ending misdemeanor charges for misdeeds at their companies are still in the dark after the U.S. Food and Drug Administration released guidance on the Park Doctrine this month.

Based on a 1975 U.S. Supreme Court case, the Park Doctrine says the government can charge a responsible corporate officer with a misdemeanor violation of the Food, Drug and Cosmetic Act, even when the executive was not involved in or had no knowledge of wrongdoing at his or her company.

It is rare for the FDA to use the 36-year-old law, but agency officials said last year that they would step up prosecutions of pharmaceutical and medical device executives for drug and device marketing violations and manufacturing abuses.

Lawyers awaiting clear criteria for charging executives with misdemeanors under the Park Doctrine said newly posted guidelines on the FDA's website by the agency's Office of Criminal Investigations offer little clarity.

"I don't think it sheds much new light," said Sanford J. Hillsberg of TroyGould PC in Los Angeles.

The FDA criteria are similar to standards Department of Justice prosecutors routinely use in deciding whether to prosecute individuals in any industry, according to Maurice A. Leiter, partner at Arnold & Porter LLP in Los Angeles.

"The guidelines don't give any guidance on the kinds of cases the FDA or Department of Justice will pursue under the Park Doctrine, so our guidance over time will come from

See Page 8 — FDA

MORE NEWS

Litigation

Raised by show business parents, Judge Michael O'Gara pivoted from ice-skating to dreams to a law career and his current misdemeanor calendar. **Judicial Profile, Page 2**

Alana Rotter of Greines, Martin, Stein & Richland asks if the current anti-SLAPP provisions strike the right balance. **Page 3**

A Humboldt County prosecutor accused of bribing a juror on a death penalty case a decade ago was cleared by the state Supreme Court Monday. **Page 4**

Ecuadoreans have won an $8.6 billion judgment against Chevron Corp. in an environmental case, but the oil company has already secured orders preventing the plaintiffs' attorneys from trying to collect. **Page 4**

How the effects of California's business franchise laws have spilled over into other practice areas. By David Gurnick of Lewitt Hackman. **Page 4**

Wendel, Rosen, Black & Dean LLP is now piping its lawyers into listeners' homes, thanks to its Saturday morning segment about legal issues facing green businesses. **Page 5**

Flling a seat that's been declared a judicial emergency, the Senate confirmed Santa Clara County Superior Court Judge Edward J. Davila to the federal bench in San Francisco, **Page 5**

Corporate

As GC for the country's largest higher education system, Christine Helwick must be prepared to handle a wide range of legal issues. **Corporate Counsel, Page 6**

As talk of a joint venture between movie theater giants AMC Entertainment and Regal Entertainment Group to distribute films raised eyebrows, some experts said it showed how relaxed antitrust regulations have become. **Page 6**

Prosecutor Did Not Bribe Death Row Juror, High Court Rules

A convicted murderer had accused the Humboldt lawyer of tipping a juror.

By Laura Ernde
Daily Journal Staff Writer

A prosecutor's barroom joke about bribing a juror in a death penalty case became no laughing matter when the incident caught the attention of the state Supreme Court.

But after ordering a hearing into the matter, the high court on Monday cleared now-retired Deputy Attorney General Ronald Bass of any wrongdoing in Curtis F. Price's 1985 trial. *In re Price*, 2011 DJDAR 2409.

Bass had visited the Waterfront Cafe in Eureka with Geraldine Anne Johnson, an attorney and the wife of his co-prosecutor, when a juror working as a cook appeared from the kitchen to give them menus.

Bass made it clear he couldn't talk to the juror, but while paying the bill told the bartender to share the tip with the cook and "tell her to vote guilty."

Ultimately, the jury on the case voted to convict defendant Price, who is on death row for murdering two people at the behest of the Aryan Brotherhood in 1983.

Ten years later, bartender Robert McConkey told defense lawyers about the incident, apparently embellishing the story to say that McConkey gave the juror $20 and a drink, along with Bass' message. In 2007, the court ordered a hearing into the matter.

On the witness stand, McConkey backpedaled, saying he didn't remember whether alcohol was involved or whether he had relayed Bass' remark about voting guilty. He most likely split the $10 to $20 tip with the juror because that was their practice. The unnamed juror died in 1989.

Bass testified he remembered little about the long-ago evening, other than playing racquetball with Johnson and going to a tavern afterward.

Character witnesses, including retired 1st District Court of Appeal Justice Michael Phelan, vouched for Bass' honesty and integrity.

Humboldt County Superior Court Judge W. Bruce Watson found that no bribe had taken place.

Deferring to Watson's findings, the Supreme Court unanimously rejected Price's accusation of jury tampering.

"McConkey understood that Bass was merely joking because Bass and Johnson were both laughing and because the money that Bass handed him was just a normal amount to leave as a tip," Justice Joyce L. Kennard wrote.

Deputy Attorney General Peter E. Flores Jr. compared the incident to joking about terrorist attacks post-Sept. 11.

"Back in the day in an airport you used to be able to make a joke about a hijacking," Flores said. "Now you can't do that."

Likewise, in a litigious society, prosecutors should be aware that any comments they make could come back to haunt them later.

Attorney Jan Little of Keker & Van Nest, who represented Price in the habeas corpus proceeding, did not return a call for comment Monday.

laura_ernde@dailyjournal.com

Plaintiffs Barred From Collecting Big Judgment Against Chevron

By Rebecca Beyer
Daily Journal Staff Writer

SAN FRANCISCO — Ecuadoreans suing Chevron Corp. for alleged environmental damage in their country won a minimum $8.6 billion judgment Monday, but for the time being, their attorneys can't take steps to collect the money.

Last week, the San Ramon-based oil company won two rulings barring enforcement of any judgment out of the South American country. Chevron has gone on the offensive in the past year in an effort to prove its claims that the plaintiffs' case is based on fraudulent data.

The underlying environmental case, which dates back nearly two decades, involves claims that Chevron is responsible for damage caused by its predecessor, Texaco Inc. Because of a remediation agreement Texaco signed with Ecuador in 1992, Chevron argues it is not responsible for any damage.

As judgment in the case loomed, Chevron began a two-pronged attack on any potential award in the plaintiffs' favor. First, the company initiated arbitration proceedings in The Hague against the Republic of Ecuador, seeking a finding of no liability under the remediation agreement. Second, Chevron's attorneys, led by Gibson, Dunn & Crutcher LLP, began using a U.S. discovery law, 28 U.S.C. 1782, to uncover evidence they claim proves the plaintiffs manipulated the Ecuadorean court system in their favor. On Feb. 1, Chevron compiled what it had found into a racketeering suit against the plaintiffs' lawyers and consultants, claiming their case is an extortion scheme.

The company's efforts paid off with two major victories last week. First, U.S. District Judge Lewis A. Kaplan of the Southern District of New York, granted Chevron's request for a temporary restraining order barring the plaintiffs from trying to enforce any future judgment until he rules on the merits of Chevron's racketeering case.

Kaplan based his ruling on what he called "serious questions" about the legitimacy of the plaintiffs' case. He also found the balance of hardships tipped in Chevron's favor because of the plaintiffs' strategy to enforce the judgment around the world. That enforcement strategy was outlined in a memo entitled "Invictus," which Chevron's attorneys obtained after using 28 U.S.C. 1782 to depose one of the plaintiffs' lead attorneys.

> 'We are dealing here with a company of considerable importance to our economy that employs thousands all over the world.'
>
> — *U.S. District Judge Lewis A. Kaplan*

"We are dealing here with a company of considerable importance to our economy that employs thousands all over the world, that supplies a group of commodities … on which every one of us depends every single day," Kaplan said, according to a transcript of the Feb. 8 hearing.

"I don't think there is anybody in this courtroom who wants to pull his car into a gas station to fill up and finds that there isn't any gas there because these folks have attached it in Singapore or wherever else," he said referring to a potential seizure of assets.

The arbitration panel issued its own ruling a day later, requiring Ecuador to "take all measures … to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment."

Kaplan's temporary restraining order expires March 8. The judge is scheduled to hold a hearing Friday on whether to issue a preliminary injunction barring enforcement of the judgment, which a spokeswoman for the plaintiffs said was at least $8.6 billion, based on an initial review of the lengthy ruling in the case.

"Without taking anything for granted, I think the company's in good shape, because respected tribunals and judicial officers have all recognized that there are very significant impediments to enforcement of any judgment in this case," said Scott A. Edelman, one of Chevron's attorneys and a partner at Gibson Dunn's Century City office.

Chevron issued a statement Monday, calling the judgment "illegitimate and unenforceable."

The judgment "is the product of fraud and is contrary to the legitimate scientific evidence," the company said. "Chevron will appeal this decision in Ecuador and intends to see that justice prevails."

Pablo Fajardo, one of the lead Ecuadorean attorneys for the plaintiffs, said in a statement that the judgment "affirms what the plaintiffs have contended for the past 18 years about Chevron's intentional and unlawful contamination of Ecuador's rainforest."

Fajardo called on Chevron to "end its polemical attacks and search jointly with the plaintiffs for common solutions."

"We believe the evidence before the court deserves international respect, and the plaintiffs will take whatever actions are appropriate consistent with the law to press the claims to a final conclusion," he said.

rebecca_beyer@dailyjournal.com

The Long Reach of Franchise Laws

By David Gurnick

Laws can have effects beyond the problem they solve. California's business franchise laws are an example. Distribution of goods and services through franchising expanded widely in the 1960s and 1970s. But so did fraudulent practices, such as franchisors promising returns and assistance they could not deliver.

In 1970, Gov. Ronald Reagan signed the Franchise Investment Law (FIL) making California the first state with legislation to protect potential franchisees. The FIL seeks to prohibit sales of franchises that involve fraud or likely breach by franchisors, and to provide information to help prospective franchisees make informed decisions on buying a franchise. (Corporations Code Section 31001). Franchisors must register with the state before offering and selling franchises; present a detailed disclosure document and audited financial statements to potential franchisees; and allow a cooling-off period before a new franchisee signs any agreement or pays the franchisor any money.

In 1980, California enacted the Franchise Relations Act (FRA) to benefit franchisees in their ongoing relationship with franchisors. The FRA protects franchisees in the ongoing relationship with a franchisor. It limits grounds and sets procedures for termination and non-renewal of franchises. The FRA prohibits a franchisor from terminating a franchise before expiration of its term, or refusing to renew at the end of the term, without good cause. It also gives a deceased franchisee's heirs a right to succeed to ownership of the franchise.

These laws have done more than help franchisees. They have also had significant impacts in other practice areas. Here are a few examples:

Family Law. Family law practice often involves valuing assets of divorcing couples. Valuations help assure equal division of property. If a divorcing couple owns a franchise that one spouse will keep, the other spouse wants money or other property having equal value. See, for example, *Hawksley v. Gerow* 10 A.3d 715 (Maine 2011) (concerning valuation of a divorcing couple's two H&R Block tax franchises).

The value of a business franchise is based partly on its duration. Some lawyers and clients simply look at the franchise agreement's stated term. But the franchisee's statutory right to renew at the end of the term may enlarge the duration, and the value, of the franchise. Likewise, FRA protection against being terminated before expiration can also increase a franchise's value. Conversely, the FRA states some circumstances when a franchisor has good cause to terminate a franchise. (Business & Professions Code Section 20021). The franchisor's right to terminate, can decrease the franchise's value.

> Laws can have effects beyond the problem they solve. California's business franchise laws are an example.

For these reasons, the FRA is of interest to family law practitioners whose clients own franchises, or are franchisors. The FRA is a tool that counsel can use to advance the interest of a client who seeks to accurately maximize, or reduce the valuation of a business franchise.

Estate Planning and Estate Administration Practice. In estate planning and administration, it is also necessary to value assets. See, for example, *Estate of Blouin* 490 A.2d 1212 (Maine,1985) (decedent's Dairy Queen franchise needed to be valued). The same considerations discussed above may increase or decrease the value of a decedent's interest in a franchise. Thus, estate planning and estate administration attorneys can also benefit from having knowledge of the FRA.

The FRA has another impact in estate law. Many franchisors and franchisees believe that when a franchisee dies, the agreement ends. But the FRA assures surviving spouses, heirs and estates of deceased franchisees (also deceased majority shareholders of franchisee entities) the chance to own the franchise. The franchisor must give the spouse, heirs or estate a reasonable time to either qualify for ownership, or transfer the franchise to someone who qualifies. (Business & Professions Code Section 20027). Trust and estate planning attorneys whose clients own interests in a franchise, need to be aware of this estate planning benefit, and tool.

Intellectual Property Practice. Trademark, copyright and patent lawyers often negotiate inbound or outbound licenses in which a client grants or receives a right to use a valuable trademark, copyright or patent. Some intellectual property licenses include all the elements that make a business relationship a "franchise." This can occur when: the license grants a right to distribute goods or services, and includes permission to use a trademark; the licensor grants the licensee an exclusive territory, or suggests a marketing plan, or provides other significant assistance in the use of the intellectual property; and the licensee pays the licensor a royalty or other fee (Corporations Code Section 31005). When this happens, an intellectual property attorney may need to advise a licensor client of the possible need for franchise law compliance; or may need to advise a licensee client on protection available under the FIL and FRA.

Transactional and Finance Law. In business sales and finance transactions, sellers or borrowers must often provide buyers or lenders a warranty, and sometimes a legal opinion, that the seller is complying with all laws. A typical warranty may state: "The company has complied with and is in compliance with all material applicable federal and state laws in the operation of its business, and has full power and authority to conduct its business in the manner now being conducted."

A company whose business relationships with resellers, distributors and dealers include all the elements that make them franchises, may have been required to register under the FIL. If the company did not register, it may be in violation of the FIL, and unable to give the above warranty, or if given, the warranty will be incorrect.

Sometimes in transactions, a party who cannot give an unqualified warranty will list exceptions from the warranty. The above warranty might be modified to state, "except as follows" and then note any exceptions. But FIL violations are felonies (Corporations Code Sections 31410-31411). Listing possible FIL violations as warranty exceptions could potentially admit a crime. Thus, transactional lawyers whose clients have agreements with resellers, distributors or dealers, or may buy such a company, need to be aware of the FIL to assess legal compliance, and nuance in making warranties in a purchase agreement.

Distributor and Dealer Law. For product distributors and dealers, the FRA provides a shield against termination, as well as compensation for losses from a wrongful early termination. These provisions apply even where the parties did not recognize that their relationship was a franchise. For example, in *To-Am Equipment Co. v. Mitsubishi Caterpillar Forklift America Inc.* 152 F.3d 658 (7th Cir. 1998) a manufacturer terminated a Mitsubishi equipment dealer nine years into the relationship. The 7th U.S. Circuit Court of Appeals agreed with the terminated dealer that the business relationship was an accidental franchise, protected against termination. The manufacturer was required to pay the wrongly terminated dealer damages totaling more than $1.5 million. Recently in Hawaii, an Isuzu dealer claimed it was a franchise, thereby requiring the manufacturer to repurchase inventory following an early termination. *JJCO Inc. v. Isuzu Motors America Inc.* 2009 WL 1444103 (D. Haw. 2009)).

Associated Press

An H&R Block store in Mountain View.

Energy Law. Practitioners must be aware of the Petroleum Marketing Practices Act (PMPA) 15 U.S.C Section 2801-2806, which regulates distribution of motor fuels through franchised gasoline stations. The PMPA restricts termination and non-renewal of gasoline station franchises, and in some situations gives franchisees a right to buy the real estate they lease for their gas station locations.

Land Use. An unusual, uncodified provision enacted in 1980 with the FRA, states: "In a regional shopping center located in a city with a population under 60,000 in a county of the first class, a franchise can be relocated within the regional shopping center with the consent of the franchisee and the management of the regional shopping center or the franchisor and the management of the regional shopping center." (Calif. Stats.1980, c. 1355, p. 4896, Section 5). Though not mentioned in any reported decision, this obscure statute could possibly be used to overcome zoning or other municipal challenges to relocation of a franchise within the confines of a shopping center.

David Gurnick is with Lewitt Hackman in Encino. He represents franchisors and franchisees in regulatory compliance and litigation. He is certified as a specialist in franchising and distribution law by the State Bar Board of Legal Specialization and can be reached at dgurnick@lewitthackman.com.

Ethical Concerns Regarding Some Justices Prompt Calls For Change in the Law

Continued from page 1

In many states, including California, if a state Supreme Court justice is recused, then a Court of Appeal justice fills in. Such a system could be adopted, by statute, at the federal level. An easy solution would be to allow a retired Supreme Court justice to participate. At this moment, there are three retired justices — Sandra Day O'Connor, David H. Souter, and John Paul Stevens. Both O'Connor and Souter continue to actively serve as judges, regularly sitting by designation on U.S. Courts of Appeals. If a justice is disqualified, then one of the retired justices should be chosen at random. The result is to ensure that there are always nine justices to hear every case. This also can lessen the pressure on justices to participate even when a conflict of interest, or the appearance of one, should cause them to withdraw. Sen. Patrick Leahy has introduced legislation to accomplish this and it should be adopted.

Courts throughout the world have been plagued at times with ethical improprieties by their judges. Sometimes this has been true in the state courts. But ethical concerns about Supreme Court justices have been rare. Now that such concerns have surfaced, steps must be taken to ensure adherence to the highest ethical standards in the most visible and the most important court in the country.

Erwin Chemerinsky is Dean and Distinguished Professor of Law at the University of California, Irvine, School of Law.