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GUEST COLUMN

Property rights at Martin's Beach

By Christopher Kieser

Last week, the California Court of Appeal weighed in for the first time in the dispute over public access to Martin's Beach, a privately owned beach in Half Moon Bay. *Friends of Martin's Beach v. Martin's Beach 1 LLC*, 2016 DJDAR 4060 (April 27, 2016). Principally at issue in this case was whether the public trust doctrine as codified in the California Constitution gives the public the right to cross private property to reach state-owned tidelands. In a win for coastal property owners statewide, the court unanimously

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Criminal Law and Procedure: Doctor properly convicted of involuntary manslaughter in death of liposuction patient where substantial evidence supported he was criminally negligent in performing procedure. *People v. Mohamed,* C.A. 2nd/1, DAR p. 4267

Criminal Law and Procedure: In elder abuse prosecution, son's prior acts of elder abuse against his mother admissible in relation to offense of making criminal threats. *People v. Fruits,* C.A. 3rd, DAR p. 4279

Daily Journal photo

Federal public defender Hilary Potashner is among those unhappy with a decision by the U.S. Administrative Office of the Courts that says their job does not include filing clemency petitions for imprisoned convicts.

Federal defenders worry clemency clock is ticking

By L.J. Williamson
Daily Journal Staff Writer

Federal public defenders are lamenting their lack of power in helping thousands of inmates who qualify for lower sentences under the Obama administration's clemency initiative.

There were approximately 10,000 nonviolent offenders who had done well in prison and were preparing to file clemency petitions, said Hilary Potashner, federal public defender for the Central District of California, during a panel discussion at Loyola Law School. And then, "we were given a footnote in some memo which precluded us from filing… They said that's outside of what you're entitled to do for your clients."

The clemency initiative was announced in a January 2014 speech to the New York State Bar Association by then-Deputy Attorney General James M. Cole. It generated enthusiasm that was quickly tempered by a July 2014 decision of the U.S. Administrative Office of the Courts. It said federal public defenders could not file clemency petitions for their clients, nor could they be appointed to represent prisoners in clemency matters.

"We were able to gather records and do screening work and administrative assistance," said Kathryn N. Nester, federal public defender for the District of Utah and member of the national steering committee for Clemency Project 2014, a working group that helps to recruit and train attorneys on screening for prisoners who meet clemency criteria. The move to preclude public defenders from filing clemency petitions was "obviously a very disappointing decision because defense are best suited to understand these cases backwards and forwards," Nester said.

Potashner and other public defenders turned prepared files over to private pro bono attorneys. She estimates that at present, of those 10,000, only four or five hundred petitions made it to the pardon office. "That leaves 9,000-plus people who are not going to get due consideration. It's been a real failing on the part of the federal public defense system," she said. "And the clock is ticking."

There's great doubt that the number of pending clemency petitions will be processed by the end of the current administration, said Reuben C. Cahn, executive director at Federal Defenders of San Diego Inc. "What's disturbing has been the failure to move through them expeditiously, though a large number of those petitions clearly meet the criteria Obama and [former Attorney General Eric] Holder set out."

Cahn praised the private attorneys who did "tremendous pro bono work," but said this was clearly not the most efficient path. "This is not any way to run a country — you don't take the people that are best able to accomplish a job and sideline them, and then ask volunteers to complete the task."

Nonprofit organizations, attorneys working pro bono and law students haven't been as effective without the help of the public defenders who knew the cases well, Potashner said. "We need that expertise in order to give any individual in court a fighting chance. The answer is not pro bono and not pulling people from other disciplines — the answer is having people properly paid."

Clemency Project 2014 Project Manager Cynthia Roseberry also called the decision to lock out public defenders a blow, but said that the level of assistance her organization has procured has been impressive and unprecedented, with more than 1,500 attorneys volunteering.

"We have courageous members of the bar who've stepped up, but of course there is a learning curve. We have to train lawyers who've never touched a criminal matter. This is an historic effort."

The question of whether or not an applicant's sentence would in fact be shorter if given under current laws is not often an easy one to answer, and the screening process requires a great deal

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Sony to pay $13M to settle suit

Animation arms also won't cooperate with other defendants

By Steven Crighton
Daily Journal Staff Writer

Sony will pay $13 million to settle anti-poaching claims in a putative class action against some of Hollywood's top animation studios, and has agreed to stipulations that could undermine the remaining defendants' case.

The settlement requires Sony Pictures Animation Inc. and Sony Pictures Imageworks Inc. provide certain documents related to the case at the plaintiff's request and use its best efforts to answer plaintiff's questions on the documents' contents, according to a motion for settlement filed by plaintiffs on Tuesday. *Nitsch v. Dreamworks Animation Skg Inc., et al,* CV-14-4062 (N.D. Cal., filed Sept. 8, 2014)

Sony also agreed to "provide no voluntary cooperation to the other defendants in this litigation, including submitting declarations in the opposition to class certification."

The lawsuit accuses several top-tier studios, including Sony, The Walt Disney Company, and Dreamworks Animation Skg. Inc., of agreeing in secret not to "cold-call" each other's employees and to notify each other when one of their employees applied to the other for a job. According to the complaint, the "gentlemen's agreement" among the companies, which was allegedly established in the 1980s by George Lucas, then-head of LucasFilm Ltd. LLC, and Steve Jobs, then-head of Pixar, deprives thousands of workers, particularly animators and graphic artists, of better wages and opportunities to advance their careers.

Plaintiff's attorney Brian S. Kabateck of Kabateck Brown Kellner LLP, who is not involved in the case, said the stipulation disallowing Sony from cooperating with the remaining defendants is uncommon.

"It's not saying they'd fail to comply with a subpoena, but it's saying they wouldn't cooperate voluntarily. That's key … That's a clear indication that they're flipping on the defendants," Kabateck said. "If you're a plaintiff's lawyer, good for you. But it's a bad day at the office for the defendants."

Disney, along with its subsidiaries named in the suit, Pixar and Lucasfilm are likely the plaintiff's primary targets, Kabateck said. Dissociating themselves from Disney, which has a much larger pool of animators than Sony, ahead of a potentially expensive trial could explain Sony's willingness to settle, he said.

The motion notes the settlement is only 16.7 percent of the $78 million the plaintiff's expert witness estimated Sony should pay. The plaintiff's decision to accept the significantly smaller sum could be interpreted as a way for them to "send a shot over the bow at the captains of the other ship," Kabateck said.

"I would guess that Disney is being recalcitrant, which may be one of the reasons for the cooperation

See Page 2 — STUDIOS

Job prospects improving for law school graduates

By Joshua Sebold
Daily Journal Staff Writer

Law firm leaders and recent studies indicate that getting hired in the legal field is becoming slightly less daunting for recent and upcoming graduating classes, as the recession fades into memory and firms adjust to a new normal.

Though the plight of new graduates continues to be a prominent theme in the legal field, the class of 2016 appear to be heading for a more promising start to their careers than any of their post-recession peers.

Recent studies from the American Bar Association and the National Association for Law Placement Inc. indicate that the market is improving for new law school graduates seeking employment in fields that value their degrees.

The ABA report indicated legal employment for new graduates held steady at roughly 70 percent, maintaining the growth from prior years, and the prospects look even better for the class of 2016.

A recent NALP report showed that the summer associate class that will graduate in 2016 saw "the most robust summer associate recruiting and new associate hiring cycle since the recession."

Even firms like Procopio, Cory, Hargreaves & Savitch LLP, which nixed its summer associate program about 20 years ago, are seeing an uptick in hiring and recruiting recent graduates, although the firm does this on a one-off basis rather than bringing in traditional summer classes.

"The market is clearly becoming healthier and healthier for first-year attorneys, said Thomas W. Turner Jr., Procopio's managing partner. "With that said, it's coming up from a very sad state in recent years."

Meanwhile, firms that maintained their summer programs are mostly sticking to a conservative approach compared to the runup to the recession, when firms were still expanding their rosters, which saw only 69 percent of summer associates receive offers from their firms as the economy cratered.

By contrast, more than 95 percent of summer associates from the class of 2016 have received offers. The classes are smaller, but summer associates are significantly more likely to be hired after graduation.

"We are still very interested in hiring outstanding junior lawyers, and we have a pathway for them to advance to partnership in our firm,"

See Page 3 — GRADS

New York Times

Vinod Khosla is the owner of Martin's Beach in Half Moon Bay.

Beach access ruling a win for property rights

Continued from page 1

held that it does not.

The ownership of Martin's Beach traces back to the Treaty of Guadelupe Hidalgo, which ended the Mexican-American War in 1848. In the treaty, the United States government agreed to recognize the property rights of Mexican property owners living in California. One such property was the area now known as Martin's Beach, and a federal statute passed in 1851 recognized a fee interest in the land long before the California Constitution recognized the public trust doctrine. Eventually, the property passed to the Deeney family, who operated a general store on the land and maintained a billboard encouraging people to visit Martin's Beach. The Deeneys generally charged for parking to visit the beach.

Several years ago, venture capitalist Vinod Khosla acquired Martin's Beach. Because it was losing money, Khosla decided to end the fee-for-parking program and close access to the beach. His decision sparked local protests, and a group known as the Friends of Martin's Beach sued him, claiming that Article X, Section 4 of the California Constitution guaranteed the public the right to cross his land to reach the publically-owned tidelands. They also argued that the Deeneys had, through their actions, dedicated Martin's Beach to the public. Khosla prevailed on both claims in the trial court.

> The unanimous panel recognized that the right to exclude unwanted persons from private property is among the most significant incidents of property ownership.

Most importantly, the Court of Appeal rejected the argument that the public trust doctrine encompassed in the state constitution grants broad public access across Martin's Beach. The unanimous panel recognized that the right to exclude unwanted persons from private property is among the most significant incidents of property ownership. It held that imposition of a public-access easement would be a significant derogation of the fee interest protected by the treaty and federal statute and Article X, Section 4 does not require it.

Although the court's reasoning relied heavily on the treaty and the grant of property rights that preceded the state constitution, its treatment of the right to exclude will have broader ramifications for property rights. Should this opinion stand, the state and outside groups will have a very difficult time establishing public access across coastal land as a means of reaching the wet beach. The court's recognition that deprivation of the right to exclude trespassers is a very significant loss of property rights means that all coastal landowners will be able to cite this case, along with *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), to defend against public access.

Indeed, the court's reliance on *Nollan* and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), indicates that even if the Friends' constitutional argument was correct, such an expansive reading of the public trust doctrine would effect a taking requiring just compensation under the Fifth Amendment of the U.S. Constitution. Those two U.S. Supreme Court cases demonstrate that even when the government takes an easement across private property, it must pay for it. Under the court's reasoning, the same would be true if the state began interpreting Article X, Section 4 of the state constitution to require access easements across coastal land. The prospect of takings liability makes it less likely that the state or local governments will assert such an expansive reading of the public trust doctrine. And it provides a strong counter-argument for property owners if private groups like the Friends make the same claim in the future.

The court did reverse the trial court's ruling on the Friends' "dedication" argument. The panel remanded that claim for trial because it found that there is a factual dispute about what exactly the Deeney family did during its many years of ownership and whether, under California law, their actions were sufficient to effect a dedication of land for public access. Whereas the constitutional argument had the potential for statewide ramifications, the dedication claim is highly fact-intensive. The eventual result will affect only the Martin's Beach property, and property owners will generally be able to take actions to avoid dedication of private property to the public in the future.

The Court of Appeal's rejection of the Friends' expansive public trust easement claim is welcome news for all coastal property owners in the state. It is difficult overstate the practical implications had the court come out the other way. If the plaintiffs were successful, the opinion's reach would have necessarily burdened all coastal land in the state with a public-access easement, so long as no route existed to reach the tidelands without traversing private property. Thanks to this decision, California coastal landowners remain free to exercise their fundamental right to exclude trespassers from their property.

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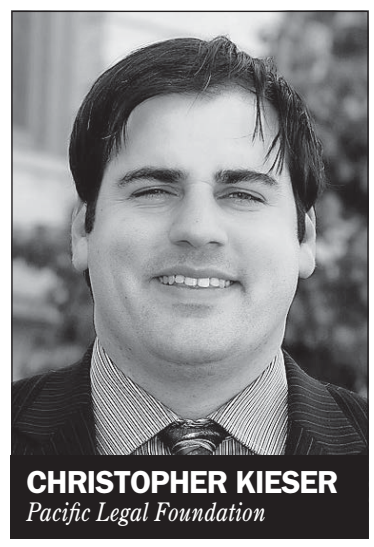

CHRISTOPHER KIESER
Pacific Legal Foundation

The term is 'legal research attorney,' nothing more, nothing less

By Michael Acker

Old structures are often maintained due to nostalgia; that warm fuzzy feeling we get when an object or societal practice reminds us of good times we experienced in our past. From his last article, it seems like this is true for Myron Moskovitz and the term "law clerk." While my colleagues and I can appreciate the sweet feeling of nostalgia that Moskovitz receives from that term, there is a reason he recently received such a backlash for using it.

In California, there is a small army of attorneys who work for the state court system. Some are permanent positions, and some are term positions for two years at most. These attorneys have no human client, they keep track of no billable hours, and they bear the heavy burden of "justice" on every case they manage — compared to seeking the best result for their client within the bounds of the law. Their client is the law (there is some debate on this issue), and they must weigh each case with the same amount of objectivity that is required for judges and justices of our superior courts, Court of Appeal, and Supreme Court. After all, those are the institutions that employ them.

MICHAEL ACKER
Legal research attorney

These attorneys are properly titled 'legal research attorneys,' because that is the only thing they do: legal research.

These attorneys are properly titled "legal research attorneys," because that is the only thing they do: legal research. As with all research, the results are placed in written form, and although this form has a handful of nicknames, it is properly termed a "judicial" or "bench" memorandum, because judges and justices are the only audience who will ever read the document.

By contrast, "law clerk" is an ambiguous term that is broad enough to encompass a legal research attorney's duties, plus the administrative duties of the clerk of court and the judges or justice's personal assistant. If a research attorney gets coffee for a judge, it is usually because that attorney offered to, not because it is expected of them as a price they must pay for the golden ticket of clerkship.

If that last sentence threw you off a bit, that is because it contains a hint of the many social issues connected to "law clerk" that caused Moskovitz to suffer criticism for using that term to describe a legal research attorney. Not only is "law clerk" a misnomer to communicate the general duties legal research attorneys perform, it is also a term that contains the stench of elitism that a supermajority of research attorneys do not enjoy or condone.

The term "law clerk" is not even an entry in the Oxford English Dictionary. Upon a brief review of that source, one discovers that "clerk" was historically used to separate the duties of the elite, prestigious positions in the Orthodox and Catholic Church, and the duties performed by the common layman. Two definitions given for the term "clerk" in the OED describe the differences in ancient usage compared to modern usage:

"In early times, when writing was not an ordinary accomplishment of the laity, the offices of writer, scribe, secretary, keeper of accounts, and the transaction of all business involving writing, were discharged by clerks."

"Hence, in current use: a. The officer who has charge of the records, correspondence, and accounts of any department, court, corporation, or society, and superintends the general conduct of its business; as Clerk of the Kitchen, Clerk to the Schoolboard, etc. See also town clerk n."

These two definitions describe an *administrative* function that legal research attorneys do not have, and rarely perform unless promoted to a supervisory role in counties large enough to need that role. Thus, "law clerk" is incorrect.

Unlike legal research attorneys, who hail primarily from modest backgrounds not comprised of top-20 law schools, "law clerks" are handpicked from elite institutions who encourage and actively participate in the placement of these positions in order to maintain the prestige factor that makes up far too much of the current U.S. News ranking methodology. Those positions are not only golden tickets to much higher incomes than any legal research attorney will likely ever make, they also are one-year appointments with little recourse for bad legal analysis, given that a law clerk's mistakes will not be uncovered until long after he or she has finished clerking for that court. After all, law clerks are both hired and fired at the same time, with a one-year notice period of termination, and it takes twice that long for a higher court to review a clerk's work if it was adopted by his or her judge.

This, by the way, may explain why some former law clerks produce poor work product when they move on to become associates. Clerks do not benefit from a summer internship, where a partner can catch and correct poor work, or identify a lack of ability to produce good work product. Ask any legal research attorney, and they will go on ad nauseam about the poor quality of work product they must wade through on a daily basis; much of it from former clerks working for "white shoe" firms who charge their clients far too much for poor quality work product.

On the other hand, if a legal research attorney performs poorly, and that work is adopted and relied upon in a ruling or an order, that attorney will have to face the judge or justice for whom the bench memorandum was written, for the rest of that attorney's career, which may be cut short if that happens too often.

Therefore, it is not only more accurate, but also much more appreciated, when people use the term "legal research attorney" instead of using "law clerk" to refer to lawyers who are tirelessly doing research for the court.

Michael Acker *is a legal research attorney for the Kern County Superior Court, and was a legal research attorney for San Francisco County and Los Angeles County Superior Courts.*

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