

Federal Bar Association

Los Angeles Chapter

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Winter 2021

FBA-LA Annual Meeting and Dean Chemerinsky's Supreme Court Review

By Katherine Rubschlager, Esq.

On October 1, 2020, the Los Angeles Chapter of the Federal Bar Association hosted its annual United States Supreme Court Review and Judge Barry Russel Federal Practice Trial Award event. While the event could not be held in person this year, the Chapter held the event by Zoom. Judge Michael W. Fitzgerald began the meeting with a brief moment of silence in honor of Supreme Court Justice Ruth Bader Ginsburg. The incoming Board of Directors were then sworn in, followed by the presentation of the Judge Barry Russel Practice Awards. For the main event, Dean Erwin Chemerinsky reviewed the Supreme Court's October 2020 term, highlighted the importance of appointing a new Justice, and pointed out a few cases to keep an eye on in during October 2020 term.

Swearing in the New Board of Directors

The Honorable Philip S. Gutierrez, Chief Judge of the U.S. District Court for the Central District of California, swore in the new Board of Directors for the Los Angeles Chapter of the Federal Bar Association. Jeff Westerman succeeded Judge Fitzgerald as President for the 2020-2021 year.

President Westerman is joined on the Executive Committee by President-Elect Yuri Mikulka, Sandhya Ramadas Kogge as Treasurer, and Brittany Rogers as Secretary.

Judge Barry Russel Federal Practice Award

The Honorable Barry Russell, Bankruptcy Judge of the U.S. Bankruptcy Court for the Central District of California, presented his annual Federal Practice Award to one law student from each of the five ABA-accredited law school in the greater Los Angeles Area. The students were honored for their exceptional performance in the study of federal practice and procedure. The recipients of this year's award were Olivia Selmanson of Loyola Law School, Alexandra Boutelle of Pepperdine Caruso School of Law, Bianca P. Chavez of Southwestern Law School, Cheryl Wilson of UCLA School of Law, and Latrice Burks of USC Gould School of Law. Each of these women received a plaque recognizing their achievement, a \$400 award, and a signed copy of Judge Russell's *Bankruptcy Evidence Manual*.

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PRESIDENT'S MESSAGE

Jeff Westerman
FBA CHAPTER PRESIDENT

1. We just witnessed an historic example of the importance and role of an independent judiciary.

On December 12, the Washington Post published an article that described the objective, diverse characteristics of the over 80 judges that ruled on presidential election cases in the past few weeks. It provides some welcome real-world validation for the statement of Chief Justice John G. Roberts Jr. on November 21, 2018 that:

"We do not have Obama judges or Trump judges, Bush judges or Clinton judges, What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."

As stated in the article this weekend:

"The Post review found striking diversity in the political orientation and experience among the judges who ruled against Trump or his allies. Fifty-four were men, 32 were women. They ranged in age from 42 to 82."

"What the judges have in common, [Professor] Geyh said, is education and experience that have 'acculturated them to take the law seriously.'"

https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html

Now one can only hope that the judicial vacancies in the Central District will continue to be filled to enable our independent judiciary to function as it should.

2. How should we conduct litigation to get through Covid?

The unofficial answer to the question is simple and summed up by a federal judge at a recent Bar web meeting, when talking about how we all need to address interacting for scheduling extensions and day to day litigation conduct, "Be a good human."

As it turns out, this sentiment is also official for lawyers. Rule 9.4 of the California Rules of Court, effective May 27, 2014, supplemented the attorney oath for new lawyers since that date to add the following:

"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."

These words promote Civility. In the current age of Covid, these words, and especially courtesy, take on increased importance. Not only is Civility the right thing to do, but it will make life easier for you and the Courts.

Shortly after the Rule was adopted, I attended a joint annual mixer of the Consumer Attorneys Association of Los Angeles and the Southern California Association of Defense Counsel. The updated oath was administered to the approximately 200 attorneys in attendance.

Regardless of when you were admitted, all practicing lawyers should commit to the current full oath.

PRESIDENT'S MESSAGE

Jeff Westerman
FBA CHAPTER PRESIDENT

3. You Can Connect with the Federal Court and Legal community through the FBA.

We started this year in a strong position thanks to the leadership of my predecessor as President, and long-time Board Member, the Hon. Michael Fitzgerald, and the work of an active Board.

This past year many different people in our Chapter worked very hard to put on eleven programs with impressive slates of speakers that drew over 4,500 registrants. Some of our events are annual, like the Supreme Court Update with Dean Chemerinsky, and the 17th Annual Bankruptcy Ethics Symposium. Others are conceived and implemented by members to address current events or issues, like the trilogy of Police/Reform/US Code Section 1983 programs put on this summer; or the programs with the Central District judges on the impact of Covid on the Court, or the Crypto Currency program; or the Path to the Bench of LGBTQ Judges. FBA-LA took the lead in putting on these programs that were joined by over 30 other Bar organization co-sponsors. You can view the program flyers at <http://www.fbala.org/PreviousEvents.php>

We encourage you to suggest new programs and consider joining any of our Committees: Programs; Young Lawyers; Public Service/Pro Bono Clinic; Mentorship; Law Students/Externships/Clerkships; Diversity and Inclusion; Membership/Law Firm Membership; Technology; Government Relations; 9th Circuit High School Civics Contest; and the Committee to publish this Newsletter.

Our Board consists of 30 attorneys in a variety of government positions, law firms and practice areas. Our Honorary Board includes our Central District Judicial members and Past Presidents.

<http://www.fbala.org/BoardDir.php>

It is easier than you might think to get involved in our FBA-LA activities for the coming year. We welcome you to contact the Officers, or any of the Board members you may know, to participate.

The FBA-LA and the national Federal Bar Association are communities dedicated to preserving our democracy's commitments to independent adjudication and justice under the rule of law. If you are a member, accept my thanks for supporting our Chapter and the Association. If you are not yet a member, we hope that you will join us. There is no separate charge to be in our LA Chapter. <http://www.fbala.org/Join.php>

Good Health and Happy Holiday wishes to all.

Jeff Westerman
President, Federal Bar Association-Los Angeles



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Message from the Clerk's Office

By Kiry Gray



2020 certainly has been challenging and I'm looking forward to this year being in my rearview mirror. The year has taught me that the Central District of California is stronger than ever. We have endured many challenges, yet we stayed committed to the mission of the court by providing outstanding customer service to the judiciary and the people that we serve while keeping our employees safe. We are grateful for three judicial vacancies filled in September; however, we have seven more vacancies.

Yes, our courthouse doors are closed to the public for now but that has not stopped us from meeting our goals. Litigants continue to e-file and video and telephone

conferences have been made available for civil and criminal hearings, civil bench trials, and to many agencies, including the prisons. Until recently, grand jury proceedings continued throughout the district.

In 2021, we expect to resume jury trials. I cannot give you an exact date, but they will commence when it is safe for all parties involved. In the meantime, many judges will continue to utilize video conferencing for civil and criminal hearings and civil bench trials. Also, I encourage you to stay updated by visiting our COVID-19 webpage (<https://www.cacd.uscourts.gov/news/coronavirus-covid-19-guidance>). There you will find the most current orders of the court as they relate to COVID-19 policies as well as Notices from the Clerk offering additional guidance.

We hope you and your families have a safe holiday season and that the new year brings much health and happiness to everyone.

Excerpts from Order of the Chief Judge, 20-179 (December 7, 2020)

- All Courthouses of the Central District of California will be closed to the public except for hearings on criminal duty matters, as discussed below.
- No in-person hearings will go forward except for hearings on criminal duty matters, as discussed below.
- In civil cases, all appearances will be by telephone or video conference.
- Criminal bench duty will continue to take place in each division by telephone or video conference with the defendant's consent and in court absent consent. All criminal document duty will be handled by each division in the normal course of business. In other criminal matters, all appearances will be by telephone or video conference.
- Jury trials remain suspended.
- All regularly scheduled grand jury proceedings are suspended and grand jurors will not otherwise be required to report for service or to call in to the United States Attorney's Office for reporting purposes during the period for which grand jury proceedings are suspended.

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Dean Chemerinsky's Annual Supreme Court Review

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Dean Chemerinsky's Annual Supreme Court Review

Erwin Chemerinsky, Dean of Berkeley Law, then conducted his annual U.S. Supreme Court review. The Los Angeles Chapter has had the honor of hosting Dean Chemerinsky for his annual review for 26 consecutive years. Dean Chemerinsky began by noting that it was an amazing and difficult time to talk about the Court. The Supreme Court would be returning the following Monday just a few weeks after the passing of Justice Ginsburg with a nomination looming. Dean Chemerinsky then shared five observations about where the Supreme Court was in 2019, where it is now, and where it is going to frame his discussion.

Why Last Term Was So Different?

Dean Chemerinsky began his observations by discussing why the last term was different than all of the past terms. During the October 2019 term, the Supreme Court issued just 53 signed opinions after oral arguments, the fewest number of opinions since 1862. Due to the COVID-19 pandemic, the Court canceled oral arguments during the months of March and April. The last time the High Court cancelled a month of oral arguments was in October 1918 because of the flu pandemic. The oral arguments for ten of the cases effected by cancellations were rescheduled to May via telephone. Despite being so resistant to video and live broadcasts in the past, the Court adapted and held telephonic oral arguments by live broadcast, allowing all Americans to observe oral arguments concerning some of the most important legal and social issues of our time.

The Roberts Court

Next, Dean Chemerinsky discussed the role of Chief Justice John Roberts during the October 2019 term. Dean Chemerinsky observed that the October 2019 term was truly "the John Roberts Court." Chief Justice Roberts was in the majority of 97% of all decisions issued by the Court, and in only two dissents. It is important to note that when the Chief is in the majority, the Chief assigns who writes the opinion. Roberts assigned himself some of the most significant decisions of the term, many of which are discussed below.

Following Justice Anthony Kennedy's resignation, Justice John Roberts became both the median justice ideologically and the "swing" justice. This is the first time in recent history that a chief justice has occupied either role.

The Term That Defies Easy Ideological Characterization

Dean Chemerinsky then focused on the ideology of the Court. During the October 2019 term there were both surprising liberal victories and surprising conservative victories, and other cases that were harder to describe from an ideological perspective. As an overall snapshot, there were fourteen 5-4 decisions out of the 53 total cases. In ten of the fourteen 5-4 decisions, the justices in the majority were Roberts, Thomas, Alito, Gorsuch and Kavanaugh. In two of the fourteen, the justices in the majority were Roberts, Ginsburg, Breyers, Sotomayor, and Kagan. So, while there were some important liberal victories, Dean Chemerinsky explained that the last term was clearly a conservative court.

Dean Chemerinsky began by discussing the surprising liberal victories. In *Bostock v. Clayton County, Georgia*, No. 17-1618, the Supreme Court held 6-3 that Title VII forbids employment discrimination based on sex, orientation, and gender identity. Before this decision, only about half of the states had laws prohibiting employment discrimination based on sex, orientation, and gender identity. Justice Gorsuch, writing for the majority, said that "statutes should be interpreted based on their plain meaning," and the statutes' prohibition of discrimination based on sex, prohibits discrimination based on sexual orientation and gender identity. Dean Chemerinsky also noted that Justice Alito wrote an angry and lengthy dissent. In fact, the dissent was so long that it crashed the Supreme Court's website. The opinion left open the question of whether an exception would apply to religious employers.

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Dean Chemerinsky's Annual Supreme Court Review

(Continued from page 6)

Another significant liberal victory was the 5-4 decision in *Department of Homeland Security vs. Regents of the Univ. of California*, No. 18-587. This case involved President Obama's executive order establishing the Deferred Action Childhood for Childhood Arrival Program ("DACA"). DACA was rescinded as part of President Trump's immigration policies. The Supreme Court granted review after several district courts found that rescinding DACA violated the Administrative Procedures Act ("APA"). The Supreme Court held in a 5-4 decision that rescinding DACA violated the. Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, concluded that the decision to rescind DACA was "arbitrary, capricious, and unreasonable." The government needed to articulate a legitimate reason at the time the decision was made, which it did not do, thereby violating the APA.

The third surprising liberal victory was *June Medical Services vs. Russo*, No. 18-1323. Here, the Court reviewed a Louisiana law requiring admitting privileges at a hospital within 30 miles from where an abortion is performed. This law was identical to the Texas statute struck down just four years earlier in *Whole Women's Health v. Hellerstedt* ("WWH"), 136 S. Ct. 2992 (2016). Many wondered whether the Court would overrule WWH, especially with the additions of Justices Gorsuch and Kavanaugh. But in a 5-4 decision, issued without a majority, the Supreme Court invalidated the Louisiana. For the first time since joining the court, Chief Justice Roberts, in his concurrence, struck down a restriction on abortion citing *stare decisis*.

Dean Chemerinsky called *Bostock, Dept. of Homeland Security*, and *June Medical* stunning liberal victories in a conservative court. Dean Chemerinsky then reminded the audience that one should be careful of generalizing from small samples and proceeded to discuss the important conservative victories from last term.

The first important conservative victory Dean Chemerinsky covered was *Espinoza v. Montana Department of Revenue*, No. 18-1195. In a 5-4 decision, the Supreme Court reversed a Montana law giving individuals a tax credit who donated to private non-profit scholarship programs that prohibited scholarship recipients from using the funds at religious schools. Following the Court's decision in *Trinity Lutheran*, the

Court held that whenever the government gives any aid to secular private institutions, it must give aid to religious private institutions unless doing so would violate the establishment clause. This decision reflects a recent shift in cases under the Establishment Clause. Over the last 75 years the Court has focused on what the government *may* give to religious institutions, but in the last three years the Court has focused on what the government *must* give to religious institutions.

The next case discussed was *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267, involving lay teachers at two Catholic schools. The "ministerial exception" under the religion clauses of the First Amendment precludes the application of federal discrimination laws to leaders of religious organizations. In a 7-2 decision, the Supreme Court reversed a Ninth Circuit decision and extended the exception to lay teachers at religious institutions. The Court held that it prevents free exercise of religion for federal discrimination laws to interfere with religious institutions' decisions about the teachers they employ.

Last, Dean Chemerinsky pointed to two decisions that were harder to characterize, both of which involved subpoenas of President Trump's financial records. The first, *Trump v. Vance*, No. 19-635, involved subpoenas issued to Trump's accountants during a New York grand jury investigation into potential campaign finance law violations. Trump sought to squash the subpoenas. In a 7-2 decision, Chief Justice Roberts, writing for the majority, concluded that Article II and the supremacy clause of the Constitution do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting president.

The second case, *Trump v. Mazars USA, LLP*, No. 19-715, involved subpoenas issued by congressional committees to President Trump's accountant and bank. Again, in a 7-2 decision, the Supreme Court held that congress can issue congressional subpoenas to a sitting President but there must be careful attention to separation of powers in the enforcement of those subpoenas. In his decision, Chief Justice Roberts articulated a four-part test that must be followed by the court when enforcing such subpoenas.

(Continued on the next page)

Dean Chemerinsky's Annual Supreme Court Review

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A Court Without Justice Ruth Bader Ginsburg

Dean Chemerinsky then embarked on his fourth observation. He began by discussing the legacy of Justice Ginsburg. Few Supreme Court justices had had careers as practicing attorneys that were so great that they would have been just as renowned if they were never appointed to the high court. Justice Ginsburg is one of those justices, along with Justice Louis Brandeis and Justice Thurgood Marshall. Moreover, no Supreme Court justice has become a public icon like Justice Ginsburg. Justice Ginsburg became a lawyer at a time where very few women went to law school. As the second woman to serve on the Court, her experiences as a woman and a woman of Jewish faith were reflected in her decisions on the Court and even influenced and swayed some her colleagues.

Dean Chemerinsky then highlighted some of Justice Ginsburg's most famous opinions and fiery dissents. Many of these cases focused on the importance of women's rights, including equal protection between men and women, equalizing pay, and women's reproductive freedoms. Lastly, Justice Ginsburg was an advocate for the separation of church and state.

To end his discussion on his fourth observation, Dean Chemerinsky briefly discussed the effect of replacing Justice Ginsburg. At the time this event was held, Justice Amy Coney Barrett had not yet been confirmed to the Court. Dean Chemerinsky projected that replacing Justice Ginsburg with Justice Barrett, would mean that many of the 5-4 decisions from the previous term, will now be 6-3. He also noted that it is important to not only focus on the effect of replacing Justice Ginsburg, but also the effect of replacing both Justices Kennedy and Ginsburg within the span of just a few years.

The October 2020 Term

Fifth and finally, Dean Chemerinsky discussed what this term may look like for the Court. The term

opened with just eight justices on the bench, which the Court previously experienced after the passing of Justice Antonin Scalia. While Dean Chemerinsky shared his hopes that a new justice would not be pushed through before the election, he projected that it would be unlikely.

Dean Chemerinsky identified three cases to be on the lookout for in the 2020 term. These cases are *Fulton v. City of Philadelphia*, No. 19-123. The issue before the court is whether to revisit the landmark 1990 decision *Employment Division v. Smith*, which held there are no religious exceptions to general laws. The second case is *California v. Texas*, No. 19-840, involving another constitutional challenge to the Patient Protection and Affordable Care Act. Dean Chemerinsky questioned whether the Court would strike down a law providing healthcare to an estimated twenty-one million people in the midst of the global pandemic. Last, intellectual property folks like myself should be on the lookout for *Google LLC v. Oracle, America Inc.*, No. 18-596, which he noted might be the intellectual property decision of the century.

To conclude, Dean Chemerinsky ended in the same way he began, by noting that it is an amazing time for the Court. He specifically looks forward to hopefully discussing this term in person at the Biltmore hotel next year.



Katherine Rubschlager, Esq. is an intellectual property litigation attorney at Alston & Bird LLP.

A woman with short brown hair, wearing a colorful tweed jacket, is seated at a desk. She is looking towards a large screen in the background that displays a video call with a man. On the desk in front of her is a laptop, a tablet, and a clear water bottle with the letters 'SSO' on it. The background is a blurred office setting.

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8 Keys to a Successful Virtual Mediation

By Maggie Levy, Esq.

Because of the COVID-19 pandemic, most mediations throughout the country are now being conducted virtually rather than in person. Many believe this trend will continue long after the pandemic is over because of the many benefits of virtual mediations. Although there are the obvious disadvantages of not having the opportunity to meet your adversary and opposing counsel face to face, engage in small talk over lunch or in the hallway, or shake hands to seal the deal when a settlement is reached, there are many advantages.

Virtual mediations are more efficient and cost-effective because travel time and expense are eliminated. Out-of-state parties and counsel can avoid the time, expense and delays of air travel and the cost of hotels, meals, and ground transportation. No one needs to be away from their office, home or family for an extended period of time. This makes scheduling a virtual mediation much easier, even when there are numerous parties and counsel. Participants in the mediation do not have to fight traffic, look for parking or pay exorbitant parking fees. As a result, virtual mediations usually start on time. Often there is less tension and stress because the parties and their counsel are in familiar and comfortable surroundings. All of these factors can help make the parties and counsel more amenable to settlement than if they were mediating in person.

What can you do to maximize the potential for a successful virtual mediation? Here are some tips that will help:

- 1. Make sure you, your client, and any other participants who will be in your breakout room are familiar with and comfortable using the mediation platform that will be used, such as Zoom.** Have a practice session a few days before the mediation so that you and your client are comfortable logging in, muting and unmuting your microphone, and turning on your video. Test the lighting to make sure it is adequate and make sure the camera is positioned at eye level so that each participant can be seen and can make eye contact with the mediator and other participants. Familiarize yourself and your client with the concept of separate breakout rooms in which you and your client can talk confidentially. Zoom offers several online tutorials, and most mediation services offer to conduct a practice session at no charge to make sure that all will go smoothly the day of the mediation. This will put you and your client more at ease and make you less anxious about the process. It will also avoid having to download the application the morning of the mediation or the last-minute discovery that a camera doesn't work or a laptop does not have a camera. The device that will be used for the mediation should be used for the practice session. It can be a desktop, laptop, iPad, tablet or smartphone. All devices should be kept fully charged throughout the mediation.
- 2. Each participant should use a separate device when participating in the mediation.** This enables the participants to observe facial expressions and engage more fully in the mediation process. Participants should be in separate locations or socially distanced so that they do not need to wear a mask during the mediation. Sharing devices or wearing masks makes it extremely difficult if not impossible to fully participate and to be heard and understood in a virtual mediation.
- 3. Advise the mediator in advance who should be in your breakout room, and provide the mediator with email addresses and cell phone numbers for each person in your breakout room in case there are technical difficulties.** Be sure to have the mediator's contact information so that you can email documents or copies of cases to the mediator or text the mediator when you are ready for her to come back into your breakout room. Use your phone or a separate device for texting or sending emails during the mediation.

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8 Keys to a Successful Virtual Mediation

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4. **To maintain confidentiality, each participant should be in a private enclosed space where outside parties cannot hear you.** Only a strong secure internet connection should be used, not a public wi-fi network. No third parties should be present during the mediation, and all parties who plan to be present should sign a confidentiality agreement in advance of the mediation. The mediator should provide that to counsel in advance of the mediation, and it can be signed in counterparts and returned to the mediator. All participants should be advised that recording the virtual mediation is strictly prohibited.
5. **Make every effort to minimize background noises and distractions.** Since many people are working from home, there may be children playing, dogs barking, gardeners mowing and blowing, construction, trash collection, and other distractions. Not all of these can be avoided or anticipated, but plan in advance to the extent possible so that you can move to a quieter more private location if necessary. Mute your microphone whenever you are not speaking and advise your client to do the same.
6. **Take advantage of the benefits of virtual mediations.** When the mediator is in another breakout room, stand up, stretch, take a short walk, or eat your lunch. Remain available, but this does not mean you have to be glued to your chair for 8 hours. Avoid “Zoom Fatigue” by taking breaks. If you want to speak to a codefendant’s counsel or opposing counsel, ask the mediator to move you to a separate breakout room to do that. If you want to speak to your client privately without worrying about the mediator coming back into your breakout room too soon, tell the mediator you will text her when you are ready for her to return.
7. **Prepare a draft settlement agreement in advance of the mediation.** Include all the terms that your client would like, but leave the settlement amount blank. This will save a lot of time once the parties reach a settlement, and it

will also avoid disagreements over the terms of the settlement after the mediation. Ideally the parties can finalize and sign the complete settlement agreement during the mediation.

8. **If a settlement is reached and the parties are unable to finalize a complete settlement agreement, the parties must sign a document setting forth the basic terms of the settlement before leaving the mediation so that the settlement will be enforceable.** This document can be prepared by counsel with input from the mediator, and it can then be signed by the parties and scanned and emailed to the mediator. If a party is unable to scan the document, they can sign it and take a picture of the signature page with their phone and email that to the mediator. The mediator should provide copies to all counsel. This document can specify that a particular party will prepare a more detailed release or settlement agreement, but if one or both parties have prepared a draft settlement agreement in advance of the mediation, that may not be necessary, as all of the terms can be finalized before concluding the mediation.

If you use these tips, you will see that virtual mediations can be a very effective means of resolving cases.



Maggie Levy is a mediator and arbitrator with ADR Services, Inc. in Century City and downtown Los Angeles. Her areas of expertise include first-party insurance bad faith, breach of contract, third-party insurance coverage, and ERISA, including class actions.

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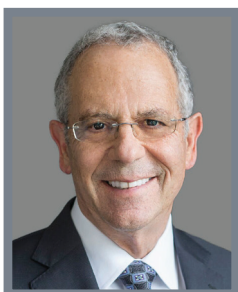
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Is the Cal Savers Plan Preempted by ERISA?

By Hon. Victor B. Kenton (Ret.)

Even before the pandemic struck in early 2020, approximately 10,000 Americans retired each day. By 2030, 20% of the U.S. population will be of retirement age. Since the pandemic began, workers have lost their jobs in record numbers. 55% of Americans now have insufficient savings to retire. Close to half of California workers are projected to retire with incomes below 200% of the poverty level. 62% of employees depend on Social Security for more than half of their income.

California created the California Secure Choice Retirement Program, now called Cal Savers. The program was implemented in July 2017. Cal Savers set up a program of individual IRA's allowing enrollment by eligible employees based on a formula primarily correlated to the number of employees in an organization. As of October 2020, approximately 4,324 employers had registered, and 90,000 workers had enrolled.

Employers' participation is limited to registering with the program; providing statistical employee information to an outside administrator; and remitting employees' contributions to the plan administrator. The administrator sends each eligible employee an information packet, which includes opt out information. Employees can opt out before enrollment, or at any time thereafter.

Cal Savers is available only to employees whose employers do not provide a tax qualified retirement savings program. The individual IRA's are funded entirely through employee contributions. Registration is mandatory for employers that do not provide employees with a tax qualified retirement program. The Act (see Cal. Gov't Code Section 100034(b)) provides that employers are not fiduciaries, and have no authority or control over the design, investment,

administration, or operation of the program. If an employer does establish a qualified plan, it becomes exempt from participation in Cal Savers. (See Cal. Gov't Code Section 100000(d)(1)(3).)

Whether Cal Savers is preempted by ERISA is the central issue in a case now pending before the Ninth Circuit: *Howard Jarvis Taxpayers Assn. et. al., Plaintiffs-Appellants v. California Secure Choice Retirement Savings Program Defendants-Appellees*, Case No. 20-15591, on appeal from a District Court decision dismissing the case (443 F. Supp 3d. 1152 (E.D. Ca. 2020)).

Amicus briefs have been filed by the DOL in support of Plaintiffs' position, and by the program administrator and several public interest law firms and organizations supporting the underlying decision in favor of Cal Savers.

Under ERISA, a state law is preempted if it "relates to" an employee benefit plan (see 29 U.S.C. Section 1144(a)). In their brief, appellees argue that ERISA only preempts state laws that bear upon employee benefit plans, to the extent that such plans are established or maintained by an employer (see 29 U.S.C. Section 1003(a)). Further, appellees argue that while Cal Savers does impose some administrative responsibilities on employers, it does not trigger preemption because those administrative duties do not involve more than a modicum of discretion (citing *Golden Gate Restaurant Assn. vs. City & County of San Francisco*, 546 F3d. 639 (9th 2008)).

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Is the Cal Savers Plan Preempted by ERISA?

(Continued from page 13)

Appellants assert that employers are required to make difficult, discretionary decisions as to management and participation, while appellees argue that employers under the program perform strictly ministerial duties.

In the underlying USDC opinion, the Court held that Cal Savers does not create an employee benefit plan under ERISA; that employers have no discretion in the administration of the program; and that the program does not contain an impermissible connection with ERISA because it does not interfere with existing ERISA or retirement plans provided by employers. The District Court declined to find that the 1975 Safe Harbor provisions enacted by the DOL apply (*See* 29 C.F.R. Section 2510.3-2(d)), because Cal Savers is not an ERISA program. Appellees' argument to the Circuit is that if the program is considered to be preempted by ERISA, the Safe Harbor provisions apply.

Under Safe Harbor, IRA's offered by employers do not constitute ERISA employee benefit plans if four factors apply: (1) the employer makes no contributions to the account; (2) employee participation is completely voluntary; (3) the employer does not endorse the program; and

(4) any compensation received by the employer is limited to reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs. (*Id.*)

The pending case has great significance for the future and viability of the Cal Savers program, and potentially other, similar programs operating in Oregon and Illinois, and four other states (Maryland, Connecticut, New Jersey, and Colorado) which have enacted similar programs and are preparing to enact them. ERISA practitioners will be keeping a close watch on the progress of this case.



Victor Kenton was a United States Magistrate Judge in the Central District of California from 2001-2015. Since leaving the bench, he has worked as a mediator, arbitrator, discovery referee and special master through Judicate West.

17th Annual FBA-LA Bankruptcy Ethics Symposium

By Servando Martinez and Brenna Irving, William S. Boyd School of Law, Class of 2023

This past November, the Los Angeles Chapter of the Federal Bar Association hosted its 17th Annual Bankruptcy Ethics Symposium. The Symposium carried its usual informative and amusing spirit, but with the now-quotidian Covid influence. Though refreshments were not conducive to the online format, the speakers compensated with abundant entertainment. Audience members enjoyed a Dilbert comic, humorous commercials from Sprint and Postbank, a movie scene from "Repo Man," and more.

Nancy B. Rapoport, a distinguished professor at William S. Boyd School of Law and a bankruptcy fee examiner, enthusiastically kicked off the event by engaging the virtual audience with her keynote speech, "Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals." Professor Rapoport began with the fee examiner's essential role of helping courts determine reasonableness. This often means fee examiners are not merely looking at numbers, but analyzing attorney behavior through timesheets. The first large issue with attorney behavior is overstuffed meetings, where firms bill for meetings with unnecessary attorneys who do not contribute to the flow of work. A second major issue is improper apportionment of work, where senior associates bill their hourly rate for work that could be done by junior associates. Professor Rapoport also forewarns attorneys of common billing mistakes such as expensive meals, liquor, business class flights, and the like. These expenses, which she humorously labels "bad hygiene," trigger fee examiners to review timesheets more closely.

(Continued on the next page)

Seventeenth Annual FBA-LA Bankruptcy Ethics Symposium

(Continued from page 14)

The presentation continued to address common billing mistakes, such as billing entries that describe too much or too little, the round hour phenomenon, and reckless overworking, which unnecessarily racks up billing hours.

One audience member asked about the delicate balance between client confidentiality and providing enough information in timesheets. Professor Rapoport reminded the audience that fee examiners can receive unredacted timesheets without jeopardizing confidentiality. The presentation concluded with a piece of valuable insight: her favorite lawyers are the ones who show what they choose not to put on the bill.

The program featured an engaging panel consisting of the Honorable Whitman L. Holt, J. Scott Bovitz, and Robert C. Furr, who addressed the latest scams and technical dangers for lawyers. The three panelists were able to offer insight from various regional perspectives, sharing stories from locations such as Yakima, WA, and Boca Raton, FL - an unforeseen benefit of holding the symposium virtually this year!

For example, Judge Holt began the panel discussion by providing insight from his “rookie season” on the bench. Mr. Furr followed with anecdotes from his time working in Florida to emphasize the range of legal ethics issues in Florida. The panelists then discussed best practices to use when handling legal matters in a virtual landscape. They suggested that the same amount of preparation should go into a virtually-held hearing as one conducted in person. Indeed, an attorney should adapt to this virtual environment with the proper tools, such as a quality microphone, a webcam, an appropriate background, and, if necessary, proper lighting. With more communication happening electronically, the panelists emphasized the need for extra precaution regarding viruses, faux emails, and other phishing scams. Many attorneys have experienced scammers claiming to be from a “State Bar Referral Service,” (while innocuous sounding, no such service exists in California for example), neighboring law firm or corporation, or even masquerading as a client.

Brian Chase, Director of Digital Forensics at ArcherHall, rounded out the Symposium with a third

program on attorneys’ ethical duties regarding eDiscovery and electronically stored information (ESI). His presentation began with a look into the growing number of ESI device sources, like the Amazon Echo and Google Nest, as well as more remote sources like urinalysis machines. Cloud storage, an ESI media device, has become increasingly prevalent this past year with more remote business operations. The presentation emphasized the importance of securing electronic evidence in its native format to preserve the metadata, which provides important information about the data. For example, an iPhone picture’s metadata can inform about the photo’s GPS coordinates, date, and time. Mr. Chase advised attorneys to walk through a client’s day and be attentive to any electronic device the client mentions, like time clock systems or work phones. This process may reveal where critical data is and who might have it. The presentation culminated in analyzing a California Ethics Opinion article that details the nine skills of a competent attorney dealing with eDiscovery. The analysis included practical advice, like the dangers of letting IT staff collect evidence and the potential cost savings from employing eDiscovery or digital forensic experts at critical litigation stages. Alarming stories about lost evidence and hidden data typically accompanied the practical advice to compel a close listening from the audience. Mr. Chase concluded his program by raising a few issues, like the uncertainty surrounding who actually uses the electronic device versus who owns the device.



Servando Martinez and Brenna Irving are law students (Class of 2023) at the William S. Boyd School of Law.

Thanks also to Joseph Boufadel, Esq. of the Salvato Law Offices for organizing the program.



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FBA-LA's Policing and Racial Justice In Los Angeles Series

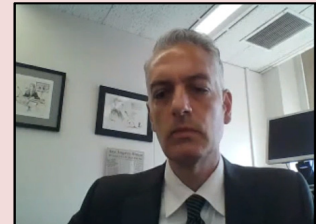
In August and September, FBA-LA organized a timely and insightful series on policing and racial justice in Los Angeles and beyond. The programs were free to the public, and recorded webcasts are available on the FBA-LA website at www.fbala.org.

Policing and Racial Justice in Los Angeles: Where We Have Been

Panelists:

- The Honorable André Birotte Jr. – United States District Court Judge for the CDCA; Former United States Attorney for the CDCA; Former Inspector General of the LAPD
- The Honorable Gary Allen Feess – United States District Court Judge for the CDCA (Ret.); Deputy General Counsel for the Christopher Commission; Mediator with Phillips ADR
- Lawrence Middleton – Former Chief of the Criminal Division; USAO for the CDCA; Prosecutor, United States v. Stacy Koon

Moderator: Brandon Fox – Chief of the Criminal Division for the United States Attorney's Office (CDCA)

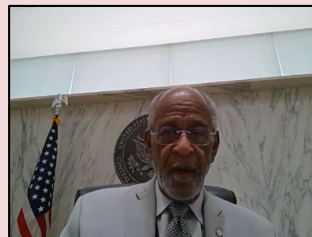


Policing and Racial Justice in Los Angeles: Where Are We Going?

Panelists:

- Jim McDonnell – Former Los Angeles County Sheriff; Former Chief, Long Beach Police Department
Former First Assistant Chief, Los Angeles Police Department
- Professor Jody Armour – USC Law Professor; Author of “N*gga Theory: Race, Language, Unequal Justice, and the Law”
- The Honorable Otis D. Wright II – United States District Judge for the Central District of California

Moderator: Lana Choi, Deputy County Counsel, Sheriff's Services Team



FBA-LA's Policing and Racial Justice In Los Angeles Series

In August and September, FBA-LA organized a timely and insightful series on policing and racial justice in Los Angeles and beyond. The programs were free to the public, and recorded webcasts are available on the FBA-LA website at www.fbala.org.

Nuts and Bolts of 1983 Civil Rights Litigation: What Lawyers Need to Know

Panelists:

- George Cardona – Santa Monica City Attorney/Former Acting U.S. Attorney for the CDCA
- Professor Joanna Schwartz – UCLA Law Professor
- Dale Galipo – The Law Offices of Dale Galipo
- Brian Dunn – The Cochran Firm

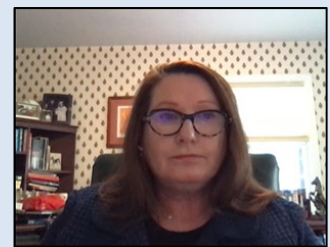
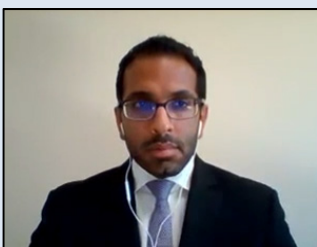
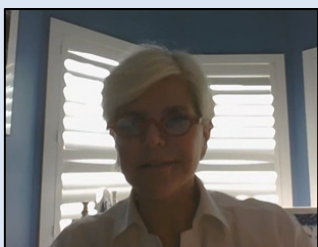
Moderator: The Honorable Karen L. Stevenson, United States Magistrate Judge for the Central District of California



FBA-LA's Emerging Issues in Blockchain and Cryptocurrency Webinar

Moderated by Alan Cohn of Steptoe & Johnson LLP, this event provided perspectives of regulators, prosecutors, advisors, in-house and outside counsel about cutting edge issues impacting blockchain and cryptocurrency technologies. The panelists included:

- Elizabeth Baird, Deputy Director, Trading and Markets, Securities and Exchange Commission
- Puneet Kakkar, Assistant United States Attorney / Deputy Chief, International Narcotics, Money Laundering, and Racketeering Section
- John Beccia, Co-Founder and CEO of Fintech Advisory Firm FS Vector
- Mary Beth Buchanan, Chief Legal Officer, Bitstamp
- Brian Klein, Partner, Baker Marquart LLP



2021 NINTH CIRCUIT CIVICS CONTEST

What Does Our American Community Ask of Us?



*Cash
Prizes!†*
1st **\$2,000***
2nd **\$1,000**
3rd **\$500**



An essay and video contest for high school students
in the western United States and Pacific Islands.
Contest rules and entry instructions available at
<https://www.ca9.uscourts.gov/civicscontest>

Entries accepted beginning **February 1, 2021**. Deadline for entries is
March 17, 2021. Sponsored by the United States Courts for the Ninth Circuit.

***Plus! Travel and accommodations to attend the 2021 Ninth Circuit Judicial Conference
in Big Sky, Montana, if current COVID-19 pandemic is under control.**

† May be subject to federal, state or local taxes unless exemptions apply.

What Does Our American Community Ask of Us?

Our Constitution both confers rights and establishes responsibilities. The Preamble that begins the Constitution speaks of the people's commitment to "secure the blessings of liberty," while also recognizing the need to "promote the general welfare." Among the many rights enshrined in the Constitution, for example, are the right to peaceably assemble, the right to free exercise of religion, and the right to a speedy and public jury trial in criminal cases.

Over the course of our country's history, global events have challenged us to find a balance between critical rights like these and our responsibilities to each other. The shelter-in-place orders implemented during the coronavirus pandemic, the rationing orders imposed during World War II and the Great Depression, and the mandatory smallpox vaccination programs instituted in the early 1900s are just some examples of times when we have been asked to curtail our normal freedoms for the benefit of our entire community. At the same time, each of us has a civic responsibility to participate in and contribute to our democracy. How should we as a society strike the appropriate balance within the framework of our Constitution between safeguarding our rights and fulfilling our responsibilities to each other?

"What Does Our American Community Ask of Us?" is the theme of a civics contest focusing on these important issues. Students are encouraged to discuss these themes with reference to the Constitution, and to consider the historical examples identified above, or other relevant events in American history, in their entries. In preparing an essay or video submission addressing the theme, students are encouraged to explain what part they believe each of us plays in working toward the "more perfect Union" described in the Constitution.

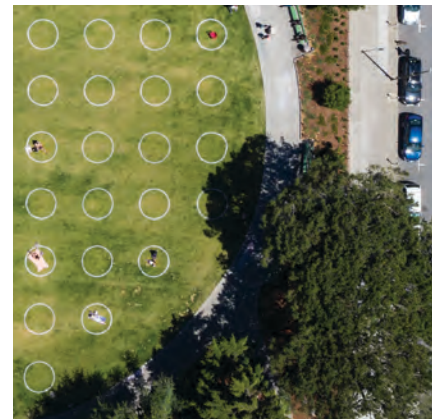
Individual students can express their thoughts and ideas on the theme in an essay of between 500 and 1,000 words. Individuals and teams of up to three students can produce a 3-5 minute video on the theme. A student may submit both an essay and video, and may submit only one essay and be involved in the production of only one video.

The contest is open to high school students in the Ninth Circuit (made up of nine western states and two Pacific Island jurisdictions). Students from public, private, parochial and charter schools and home-schooled students of equivalent grade status may enter. Children of federal judges, chambers staff, and employees of federal court offices are not eligible to participate.

In addition to cash prizes, student winners will be invited to the opening session of the 2021 Ninth Circuit Judicial Conference, scheduled for July 12-15, 2021 in Big Sky, Montana. The winning essays will be distributed and videos shown at the conference, which draws some 800 judges and lawyers working in the federal courts of the western states.

The contest is sponsored by the Ninth Circuit Public Information and Community Outreach Committee (PICO). Contest rules will be available at <http://www.ca9.uscourts.gov/civicscontest>. Both essays and videos can be submitted electronically starting February 1, 2021. Deadline for entries is 11:59 p.m. Pacific Time, March 17, 2021.

For more information, contact the Office of the Circuit Executive, (415) 355-8873 / civicscontest@ce9.uscourts.gov.



Top: Empty supermarket shelves in Everett, Washington. Photo taken on March 14, 2020 by [Cindy Shelby](#).

Above: Social distancing circles marked out in Washington Square Park in San Francisco. Photo taken on May 27, 2020 by [Christopher Michel](#).

Front image: Students learning about war rationing at school in Washington, D.C. Photograph by Roger Smith in 1943 for the U.S. Office of War Information. Source: Library of Congress.

<https://www.ca9.uscourts.gov/civicscontest>