

atissue

A **STONE | DEAN** PUBLICATION

*Connecting you to trending and relevant
legal developments in California*



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**TAKEAWAYS
FOR EMPLOYERS
AFTER THE
ASHLEY MADISON
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A Message from the Partners

This year has gone by quickly and has been filled with steady growth and positive developments for our law practice. We welcomed two new associates who lend further diversity and experience to our practice groups, and were fortunate to gain new support staff to add to our already experienced and talented staff. We thank our clients for their loyalty and support through this year, and look forward to continuing our relationships in the New Year.

From all of us at Stone | Dean, we wish everyone a vibrant and Happy Holiday season and a safe and healthy 2016!

- Greg Stone and Kristi Dean



Q&A with Lisa Lee

We are pleased to welcome Lisa Lee, an experienced trial and business litigation attorney with a diverse background in many areas of law. We sat down for an interview with Lisa so that our clients can come to know and value her as much as we do!

What has been the most memorable moment of your career as an attorney?

I was prosecuting a sexual assault case in which the victim suffered through a series of horrific physical attacks and abuse. Right before trial, the victim gave me a card that said “no matter what the outcome of the trial, I will always be thankful that you believed in me and stood by my side.” We prevailed at trial, and I still have the card today.

Were you inspired by someone to become an attorney, or did you decide a different way? My mother has been the biggest inspiration of my life. Although I didn't know it when I was younger, I see now that my mother taught me to promote my strengths, overcome my weaknesses, and give meaning to my life in the pursuit of helping others. She is deceased now, but I know she is with me as I experience all important things in my life.

Do you have any pretrial rituals that you like to engage in? I can't divulge my trade secrets. Sorry!

How do you unwind after a trial? I go home and watch senseless reality television to bring some levity back into my life.

In your opinion, what is the most interesting legal development of 2015? Drone Legislation. The use of UAVs (Unmanned Aerial Vehicles), commonly known as “drones,” is on the rise for both and consumers. As a result, drone legislation is one of the fastest growing areas of law.

If you could go back in time and argue any case in history, which would it be and why? *Hustler Magazine, Inc. v. Falwell*. It would have been an honor to advocate in favor of Free Speech, which is critical to the foundation of our country. “*At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The freedom to speak one's mind is not only an aspect of individual liberty — and thus a good unto itself — but also is essential to the common quest for truth and the vitality of society as a whole.*” These ideals are particularly crucial in today's social media age.

Working in law requires plenty of memorization. Do you have a special trick that you use to retain information? I fortunately and thankfully have a natural ability to memorize text.

If you could practice law in any other country, which one would it be, and why? China. It's the country of my ancestors and has such a colorful history of extraordinary events that have shaped a very unique mindset of the nation. It would be incredible to be a part of that history and affect positive change.

You have a very diverse legal background. What is your favorite area of law to practice? I love it all. The advantage of having such a diverse

background is that it has enabled me to be an excellent “global” attorney, in that I can see beyond the issue in the case before me, which provides a tremendous benefit to the client. For example, a probate litigation case may have components in other areas of law such as breach of contract, fraud and criminal abuse. I can “issue spot” it all, and give the client the benefit of having one attorney who can handle everything.

What is your opinion on law firms deciding to go paperless? I am an “old school” textbook person. I like the feel of paper and I like to open books. But for expediency and organization, you can't beat the new systems.

Why did you choose to join Stone | Dean? I like the practice philosophy of the firm. All of the attorneys have very diverse backgrounds and practice areas, and everyone is very practical and no nonsense. This is a full service law firm that allows each attorney to shine individually in their practice areas, but also provides the support of the team's wide ranging knowledge.

What values matter most to you when it comes to practicing law? Integrity. It's as simple as that.

If you were to choose any other career path besides law, which would it be, and why? Medicine, because my passion lies in helping people. However, my personality and skill set are better suited in the courtroom than the operating room.

What have your experiences working as an attorney taught you that law school didn't? Law school teaches you how to think like a lawyer, but it doesn't teach you how to be a lawyer. Like all other things in life, experience is the best teacher. With 18 years under my belt, I'm able to use that experience to solve the problems of my clients.

Lisa practices in the area of business litigation, probate litigation, family law and criminal law.



Takeaways for Employers After the Ashley Madison Hack

By Robyn M. McKibbin, Esq.

As tempted as you may be to search the pool of naked photos, sexual predilections, and elicited chats for people you know amongst the 39 million adultery seeking members of Ashley Madison, pause. What if one (or more) of your employees is a member? How would that information impact the work environment or employment relationship?

Is it Cause for Termination?

Marital fidelity may be an “essential job function” if your company has a code of conduct or written employment contracts with morals clauses, which permit employers to discharge an employee for conduct that breaches the employer’s specified ethical standards and expectations. Morals clauses tend to be limited to actors, professional athletes, religious institutions, or employees who are the “face” of the company or its brand.

Without a morals clause, California is an at-will employment state and employees can be terminated for any reason or no reason. However, that’s easier said than done. Employers usually have, and should have, a reason for terminating employees to avoid potential discrimination or wrongful termination claims as there are so many protected categories under state and federal anti-discrimination laws. Arguably, marital infidelity could qualify as a sexual preference which is becoming a more protected category.

Does Being an AM Member Constitute Unlawful Conduct?

Adultery is a crime in the military and carries grave consequences including imprisonment and dishonorable discharge. It is not an express offense in the Uniform Code of Military Justice, but is prosecuted through a general “code of conduct” provision that

prohibits conduct which is “of a nature to bring discredit upon the armed forces, or conduct which is prejudicial to good order and discipline.” More than 15,000 users had an email address with a .mil or .gov domain.

Roughly half of the U.S. states still have adultery laws punishable by fine or even jail time. California is not one of those states. Violent or sexual felonies may be grounds for termination but adopting the motto, “Life is Short. Have an Affair,” is not quite comparable.

California expressly prohibits employers from taking adverse employment actions based on an employee’s lawful off-duty conduct. Even if marital infidelity is not protected by this statute, do you want your company to be the litigation test case?

Practically, many members probably never even consummated an affair. Among other reasons, the ratio of men to women was about 6:1. Firing someone for simply being an AM member could trigger constitutional freedom of association issues.

Does it Violate Company Policies?

If the employee used a company computer or work email address to join or peruse the cheating website, and you have a clear policy that advises that company equipment and Internet access should only be used for business purposes, and the company can access and monitor their use, there are grounds for disciplinary action. However, depending upon the extent of the personal use during work hours, it probably does not warrant termination.

Moreover, just because an employee’s work email is in the database doesn’t mean the employee had an affair or even visited the site. AM’s sign-up process did not require verification of an email address to set up an account. Members could use another person’s email address to sign up and log on.

Bottom Line

Salacious scandals are very enticing and stir sanctimonious emotions in all of us. However, the workplace is not the appropriate place to pry and judge. Keep the focus on the necessary job duties and employee performance and leave people’s personal life choices personal.

The first morals clause with a professional athlete

reportedly involved Babe Ruth in 1922 in an effort to curtail his womanizing. The contract required that Ruth go to bed before 1:00 a.m. during the baseball season and completely abstain from alcohol for the duration of the contractual relationship. Ruth replied, *“I’ll promise to go easier on drinking and to get to bed earlier, but not for you, fifty thousand dollars, or two-hundred and fifty thousand dollars will I give up women. They’re too much fun.”*

Announcement from Stone | Dean



Congratulations to Angie Jones for passing the California Bar Exam and becoming our firm's newest Associate Attorney. Angie is a veteran member of the Stone | Dean team, transitioning from her nearly four year tenure as law clerk and staff member. Angie's familiarity with the firm's values and goals coupled with her experience and training will allow her to hit the ground running.

Angie will join the insurance law practice group and focus on general civil litigation with an emphasis on personal injury, premises liability, and insurance law. During her internship with the San Diego

County District Attorney's Office, she handled criminal law and motion, trial and post-trial issues, and preliminary hearings, and looks forward to expanding her experience into the civil field.

Angie received a bachelor's degree in Business Administration with an Option in Business Law from California State University Northridge and her Juris Doctor from Loyola Law School, Los Angeles. She passed the bar when California's pass rate hit a 30 year low and only 46.6% of July 2015 examinees received good news.



Employee's Cell Phone Records: Are They Subject to Employer Monitoring?

By Marleigh Green

In recent years, using cell phones, especially smartphones, has become commonplace. According to the Pew Research Center, 64% of American adults own a smartphone. With almost unlimited access to the internet, social media accounts, and personal applications, it's not surprising that the smartphone trend is catching on, and employers have adapted accordingly.

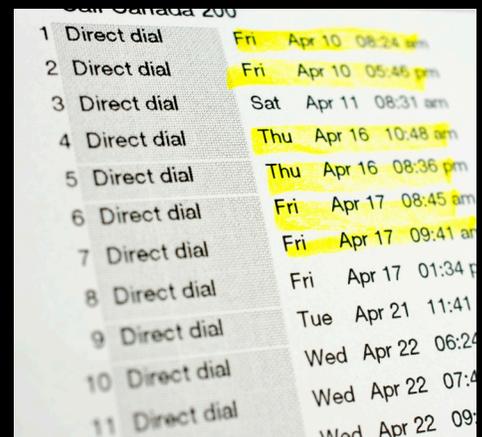
Since personal devices can distract employees and negatively affect employee performance and production, many employers have drafted policies about cell phone usage in the workplace. Some employers, such as retailers, enforce strict rules about their sales representatives having their phones on the floor. Other, more hands-on jobs that require complete focus at the risk of employee injury have enacted bans for the safety of their workers. For businesses that operate from an office, the gray area widens on what can be enforced and what is acceptable.

Employers are not at liberty to search or seize the personal cell phones of

their employees for any reason, even if they suspect that the content of the text messages, emails, or social media posts they send and receive are inappropriate. These rights are expanded, however, for the use of company cell phones.

If an employer issues an employee a cell phone, and maintains a policy about keeping the messages and information exchanges strictly work-related, they may read transcripts of text messages and emails. In the case of *City of Ontario v. Quon*, the plaintiff had been issued a company cell phone, and the company's policy dictated that the device was subject to monitoring for all network activity. Quon frequently went over the allowable limit for text message use, and would reimburse his supervisor each time this occurred. Eventually, the employer read the text messages Quon had been sending and receiving, and discovered that over two thirds of them were not work-related.

Quon was disciplined by his supervisor for violating the policy, and took his employer to court. A defense verdict



was reached even though the policy did not specifically include text message monitoring, because the employer had informed Quon that all network activity was subject to monitoring without notice.

For companies who issue company cell phones, implement a clear policy about the appropriate use of the device. Employers must ensure that their workers understand there are limits.



Greg Stone and Leslie Blozan Obtain Unanimous Defense Verdict in Wrongful Death Case Forcing Dismissal of Felony Hit and Run Charges Against Truck Driver

By Greg Stone, Esq.

On July 28th, Greg Stone and Leslie Blozan obtained an outright defense verdict on a wrongful death case on behalf of a semi-truck driver, in the matter of *Yarborough v. Dixon, INC 1200688*. The jury took only 15 minutes to return a 12-0 verdict in favor of Stone | Dean's client. After the civil verdict, as reported in the *Desert Sun*, the District Attorney's office promptly dismissed the pending felony charges filed against Stone | Dean's client.

"Although rarely ever done, this was a unique situation and the plan all along was to try the civil case first and then put pressure on the prosecutor to dismiss the criminal charges. The plan worked to perfection" said Greg. "The criminal case smelled like a set-up and the prosecutors and investigating officers refused to review the evidence with an open mind as they were admittedly under a lot of pressure to solve this hit and run fatality. Dixon was their scapegoat. It was only until the civil jury spoke and returned a verdict that the prosecutors saw the light." Greg added.

The Criminal Investigation/Arrest

During the discovery phase in the civil case, the prosecutors and investigating officers clandestinely worked hand in hand with the civil plaintiff's attorney (a former police officer) for over a year; providing, among other things, discovery responses and depositions of Dixon. "It was a back door 5th amendment violation" said Greg. "All the while, Dixon had no idea he was a suspect or even a person of interest. We thought it was only a civil case."

Then, on the eve of the running of statute of limitations on the criminal charges, and without any notice, Mr. Dixon was arrested at his home in Victorville by San Diego CHP officers with SWAT type tactics. His home was surrounded by a dozen officers and

he was arrested at gun point. His booking photo was published on the internet and the local evening news declared "man responsible for killing Mr. Yarborough, caught."

To this day it is not clear why San Diego CHP was involved in Dixon's arrest in Victorville. It should be noted that the civil plaintiffs' attorney was a former San Diego police officer.

Facts of the Case

Mr. Dixon, a big rig driver from Victorville was working in the Palm Springs area on January 11, 2011. He stopped for lunch at about 8:30 pm on a dark desert road – a road frequented by truck drivers. He made a few U-turns until he found a place to park. Once parked, he locked his truck and walked across the road to Del Taco. He purchased a to-go order and as he was walking back to his truck he saw a commotion about 100 yards behind his truck.

CHP was on the scene and it then became clear there was a motorcyclist down and deceased. Witnesses at the scene stated the cause of death was due to a big rig making a U-Turn in front of the motorcyclist. Dixon admitted later to making a U-Turn in that precise area. Big rigs make U-turns in that area regularly. The identity and description of the big rig involved was somewhat conflicting. The consensus was an "all-white truck with no markings". Dixon was driving a grocery store truck with logos and graphics, essentially a rolling billboard.

One witness at the scene told other bystanders it was Dixon's truck that caused the accident. The following day that witness called CHP and accused Dixon of the crime. That witness did not mention it to the officers at the scene when interviewed at the scene but rather contacted the CHP the next day with the information.

CHP officers initially questioned Dixon at the scene and cleared him of involvement. The CHP continued to investigate the incident until ultimately Mr. Dixon was arrested almost two years later.

The Civil Trial

The civil jury trial lasted 7 court days. Conflicting statements and evidence were elicited. The key to the defense case was an eye witness, also a truck driver, who did not believe Dixon's truck was involved.

The plaintiffs relied on the eye witness who came forward the next day and the CHP officer investigating the crime on the night of the incident. During cross examination at trial and using the CHP dash camera footage, it became clear that the plaintiffs' key witness did not have a clear vantage point to view the incident. It was also pointed out there were several trucks in the area at the time (some "all-white") that were never fully investigated. Some of these trucks could also be seen on the dash camera footage.

During closing argument, the plaintiffs, the decedent's sons, requested \$2,000,000 in damages; the jury awarded \$0.

With a unanimous verdict in favor of Dixon, some persuasion convinced Riverside County prosecutors to agree to dismiss all criminal charges against Dixon, citing "the interests of justice," thus ending Dixon's five year ordeal.

Greg Stone and Leslie Blozan are both veteran civil trial attorneys with impeccable records in both State and Federal Court. A special thanks to John Patrick Dolan, Esq. for all his assistance in the criminal matter.



Governor Brown Extends Digital Privacy Protections

By Angie Jones, Esq.

On October 8, 2015, Governor Jerry Brown signed a digital privacy bill requiring law enforcement agencies in California to obtain a warrant for online data.

S.B. 178, the “California Electronic Communications Privacy Act” (CalECPA), covers a massive range of data from emails and texts to geographical location and photographs as well as the online services that store this data, such as “the cloud.”

Prior to the enactment of S.B. 178, digital records were unprotected and subject to warrantless searches. The rationale behind the legislation is that information stored on one’s smartphone is no different than information stored in a home file cabinet and should be afforded the same protection. Supporters such as Google and the ACLU shared this view and consider the bill a victory. Many large law enforcement agencies remained neutral while the California Correctional Peace Officers Association and other smaller groups stood in opposition.

There is a similar federal law pending, but as of now the law remains unchanged. Thus, while California has joined Utah, Virginia and a minority of other states in protecting digital privacy, federal law enforcement still does not need a warrant – even if operating in California.

What does this mean for Californians? If state and local law enforcement agencies want to rifle through your email (and other digital unmentionables) they will need to get a warrant first.

(www.eff.org; www.cnet.com)



Protect Your Family Estate Against Overtime Claims by Caretakers

By Leslie Blozan, Esq.

The silver tsunami of an aging population is creating new challenges for family members of the elderly who want to live at home and “age in place.” Elders usually want to remain in familiar settings, but require assistance. This help is often supplied by in-home caregivers. Without careful attention to the requirements of wage and hour laws, an elder-caregiver relationship can turn into a litigation nightmare.

Home care workers are entitled to all of the protections of the minimum wage law, overtime and double time compensation, and rest and meal breaks. Some exceptions may exist for “personal attendants,” who serve as companions. However, personal attendants cannot spend more than 20% of their time doing non-companion work such as cooking and housekeeping or they no longer qualify as exempt from standard overtime rules.

Imagine a scenario where an elder requires in-home care 24 hours a day. Family members are not nearby, so they depend on the caregivers to take whatever steps are needed for the elder, without particular thought about labor law protections for the workers. Time records are not kept. Overtime is never paid. (While cash and gifts are common from family members to show their appreciation, they do not comply with overtime rules and rarely are documented.) The elder dies and the worker files claims for unpaid wages and overtime against the elder’s estate.

This places the estate at an enormous disadvantage. Without time records, the estate cannot confirm proper wage payment. It cannot prove extra hours were or were not worked and cannot prove

that required breaks were provided and taken. The worker benefits from this lack of record-keeping, making the employee claim impossible to effectively challenge. For long-term caregivers, wage and hour claims spanning the multi-year statute of limitations can total hundreds of thousands of dollars, often wiping out an estate.

Elderly persons in need of care often do not comply with legal requirements regarding in-home employees. Someone associated with the family must assume responsibility for making certain there is compliance with wage and hour laws. That person must supervise the workers and perform the record keeping. A written job description confirming job duties, hours and compensation should be given to the worker and a signed acknowledgement of receipt should be obtained.

More and more of these claims are being made against the estates of deceased elders. For more guidance, visit the California Department of Industrial Relations at www.dir.ca.gov. This website provides further explanation regarding compensation of household workers and what records are required. Also, visit www.domesticworkers.org for a good explanation of homecare worker rights. Trusted homecare workers are worth their weight in gold. The best way to insure a mutually satisfying experience between employer and worker is to know the law, follow the law and document compliance. This guarantees a good working relationship and no unpleasant future surprises.



“Go with your heart and don’t think so much.” – Arthur Stone (1937-2015)

A Tribute To My Father by Greg Stone, Esq.

My father, best friend, client, and overall inspiration will be missed like nobody’s business.

There is a certain magic that exists for a kid fortunate to have a relationship with a hands-on dad. For some, that magic fades. For me, that magic never waned.

Artie Stone, born in New York, moved to Culver City where as a teen, he cruised the streets of Culver City with his “club” donning leather jackets with his sketched Johnny Walker logo on back. After his service in the Air Force, he became a hairdresser/businessman and married his high school sweetheart, my mom, and remained married for over 56 years. He is survived by his wife, three kids (I am the middle), and five grandchildren.

Heavily leveraged, he purchased his first health club in the early 1960s, creating a niche in the industry; a high end health club and spa exclusively for women, ultimately branded: “Total Woman Gym & Spa”. He had highs and lows throughout his career but never looked back; never asked “what if” or dwelled on mistakes. He just moved forward and enjoyed terrific success working together for over 40 years with his partner, my mother in the business. They had their own distinct style that complimented the other.

The day after I was sworn in up until his passing, he was my client, encompassing a variety of litigation: contracts; real estate; civil rights; personal injury; employment; etc. We literally prevailed on everything,

often through trial. We worked as a team and his confidence in me handling these various situations enabled me to develop my fix it type skills as well as my ability recognize the human factor associated with litigation.

Artie had a “go for it,” big picture attitude. He was artistic, had vision and great imagination. Sure he thought through consequences and made informed decisions but ultimately he would go with his heart. “Don’t over analyze everything, Gregory,” he would say, “just go for it and by all means don’t think so much.”



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NEWS & ANNOUNCEMENTS

→ Gregory Stone participated in the Valley Community Legal Association's Columbus Day Veteran's Golf Tournament on October 12th, sponsoring two military members and a firm client to join in the event.

→ Stone | Dean sponsored a police officer in the "Adopt-a-Cop" FABA Annual Golf Tournament, which took place at the Angeles National Golf Club on October 17th. Proceeds from the event went to the Los Angeles Protective Police League, which benefits local police officers.

→ Robyn McKibbin co-presented for the San Fernando Valley Bar Association on November 4th on the topic of, "When Intellectual Property Creates Employment Issues; How to Avoid Getting Sued While Keeping What Your Employees Have Created."

→ In October, Greg Stone obtained a defense verdict in a premises liability matter tried before a San Bernardino jury. The favorable verdict is especially noteworthy considering the defense chose to utilize no experts while plaintiff presented two. See *case in-focus in the next issue*.

→ In its effort to remain cutting edge, Stone | Dean is taking part in the new Ubiq Pilot for its "Hive-technology" which will allow us to broadcast wirelessly from any laptop to our beautiful conference room HDTV.

→ In October, Leslie Blozan successfully argued against an appeal brought by an insured against a carrier before the California Court of Appeal. The case involved a breach of contract and bad faith claim against the firm's client, a national insurance carrier, after successfully obtaining a summary judgment based upon judicial estoppel. The plaintiff appealed after the case was dismissed by the trial court at the pleading stage. In their unanimous opinion, the justices criticized plaintiff's attempt to manipulate the legal system by filing inconsistent and irreconcilable pleadings in Bankruptcy Court and in Superior Court. Due to the inconsistencies and blatant misrepresentations, the insured was barred from recovering insurance benefits for property damage after he failed to disclose the existence of that damage in his verified bankruptcy schedules.

→ In November, Kristi Dean presented a continuing education seminar for insurance professionals at the annual business meeting for the Los Angeles CPCU Society Chapter held at the Los Angeles Athletic Club. The topic was "Playing the Litigation Game: Documentation & Successful Defense of E&O Claims." Kristi is an authorized continuing education provider for the California Department of Insurance and focuses on insurance law relating to insurance agents and brokers.

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