

# atissue

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

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## Q&A with Robyn M. McKibbin

**Partner Robyn M. McKibbin is a skilled attorney with a variety of interests. In this Q&A article, Robyn shares details about her hobbies and her path to a legal career.**

**Of all of the fictional lawyers you've seen in film or television, who do you identify with the most? The least?**

I can't say that I identify with one in particular. There are characteristics of several I identify with. Growing up in the eighties, Joyce Davenport on Hill Street Blues was aggressive yet feminine. Jeff Winger on Community is sarcastic and vain. Katharine Hepburn's competitiveness in Adam's Rib. The least: Ally McBeal. She casually drank at the bar for hours the night before her trials and she never sat in a document depository painstakingly reviewing a mountain of musty client documents.

**What "typical" lawyer characteristics did you have growing up?**

I was always up for a good debate (still am).

**When you were a kid, what did you want to be when you grew up?**

Batgirl. She had the best of both worlds: a librarian by day (I love the Dewey Decimal System) and a motorcycle riding crime fighter in an amazing purple costume by night!

**If you could pursue any other career path, what would it be?**

Bestselling author. I've always loved creative writing. I enjoy my legal writing but it is not as rewarding as creating a character or storyline from scratch. I've taken some classes at UCLA's Writer's Extension to keep me motivated.

**What was the worst job you ever had?**

Candy stripper. My mom wanted me to boost my college applications with volunteer work so she signed me up at the local hospital. The uniform was amazing and a big selling point, especially the white wedges! However, I didn't feel that my job duties helped them in a meaningful way. I didn't last a month.

**What is your favorite aspect of working at SCD and practicing law?**

Honestly, I enjoy coming to work every day. We have a great staff who help make the practice easier. And we actually have fun together!

**What are your favorite hobbies/interests outside of work?**

I enjoy wine tasting, cooking (in that order), and sewing.

**What is a unique element of employment law that you enjoy above other practice areas?**

It's a study in human behavior and personal interactions. Always interesting.

**What do you do to unwind after stressful days in court?**

Yoga.

**Do you have a lucky charm you use when going to trial?**

Pearls my parents gave me when I graduated law school.

**What is the most important thing you have learned over the course of your career?**

You have to own your mistakes. Learn from the experience, apologize if needed and move on.

**Using only three words, how would you describe yourself to a potential client?**

Aggressive but reasonable.

**What is your favorite furniture/office supply/etc. item in your office?**

A handmade vase a former mentor gave me. I was a trial team member in a multimillion dollar product liability lawsuit against Shell Oil Company, in what was then the longest civil jury trial in San Luis Obispo County history. I was a second-year lawyer and she had the confidence in me to give me witnesses to cross-examine. It was a tremendous opportunity and we defended it.

**What are clients often surprised to learn about you?**

My age (no, I'm not telling you).

**According to U.S. census data, one-third of lawyers and judges are now women (compared to 4.8% in 1970). What are your thoughts on the increasing leadership roles of women in the legal industry as attorneys and as business owners?**

It makes a huge difference when half of the overall population is represented in any industry but there is still room for advancement. For example, a few years ago I attended a seminar where a female Federal District Court judge said that her male colleagues agreed with the idea that women should not wear pant suits in court. Some yahoo just published an article entitled "The Importance of a Woman's Image in the Workplace" in Legal Ink Magazine. Some of his amazing insights include: women "cannot sport hair that is longer than shoulder-length if [they] wish to be taken seriously as an attorney;" women should wear "heels no more than two and a half inches.;" and "You want to look like an attorney, not Lady Gaga." I think there's some wiggle room between those extremes. Also, there are still some stereotypes concerning "typically" male and female characteristics such as assertiveness and competitiveness. Men usually are not viewed as being "too soft" or "too aggressive" while many women still have to address these antiquated gender traits.

**What are the top 3 tips you have for new business owners regarding employment law?**

(1) State and federal laws are complicated. Accept that you don't know, what you don't know; (2) Seek legal counsel sooner rather than later – it really will save you money; and (3) Don't delay terminating a problem employee. The situation usually gets worse, not better.



## Caution: Summer Interns Are Not Necessarily Free Labor

By Robyn M. McKibbin, Esq.

Interns can be a great resource for a small company: they're enthusiastic, relatively inexpensive and sometimes they even work for free. But employers have to be careful when offering unpaid internships. True interns are not protected under state and federal labor laws such as minimum wage and overtime laws. The federal Department of Labor and the California Division of Labor Standards Enforcement consider six factors to determine whether a worker is exempt:

- (1) the training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school;
- (2) the training is for the benefit of the trainees or students;
- (3) the trainees or students do not displace regular employees, but work under their close observation;
- (4) the employer derives no immediate advantage from the activities of

trainees or students, and on occasion the employer's operations may be actually impeded;

- (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- (6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

If you are considering offering an unpaid internship, ensure to obtain workers from a formal internship program operated by an educational institution. While this is no longer one of the factors, practically, unless the internship is part of an organized program, how can an employer prove that the work provided is similar to that given by a vocational institution?

Also, remember that employers cannot contract away wage & hour rights. Even if the worker voluntarily agrees to waive his/

her right to be paid for all work performed in exchange for gaining valuable experience, he/she may still file a claim against the employer for wages owed.

If it is unclear whether your intern program satisfies all six criteria, it is safer to simply pay interns minimum wage for all hours worked.

**Reminder: Effective July 1, California's minimum wage increases to \$9.00/hour. This increase also impacts the minimum salary requirements for exempt employees (from \$33,280/year to \$37,440/year). Employers should review their payroll to ensure they are in compliance.**



## Party Time with Caution

By Leslie A. Blozan, Esq.

Summer is upon us again, with vacations and parties. As vacationers leave their homes for well-earned time away, young family members left behind occasionally take the opportunity to have their own parties. Depending on what happens next, the vacationing homeowners may return to a nasty surprise in the form of liability for injuries caused by drunken party guests.

The media is full of reports of parties gone wild. Word of an event gets out through social media, and uncontrollable crowds of strangers appear to join the fun. Sometimes parties are fundraising events for charities, organizations and clubs. Sometimes someone guards the door to control entry and a small entry fee is charged. Party hosts beware: any entry fee may result in the host becoming an unlicensed "seller" of alcohol.

Generally, California social hosts are immune from liability for the harmful behavior of intoxicated guests. Immunity applies even if the host

knowingly serves liquor to an obviously intoxicated person, or allows the guest to drive away in an impaired condition. However, this immunity is lost if the host "sells" alcohol. The simple act of charging admission to a party and allowing guests access to alcohol, is a sale. Once there is a "sale", the same liquor liability rules apply to an individual as apply to a bar or restaurant. Sale to an obviously intoxicated person, and especially sale to an obviously intoxicated minor, has dire consequences for all involved.

The California Supreme Court recently examined this issue in *Ennabe v. Manosa*. In *Ennabe*, an underage intoxicated party guest was run over and killed by another underage intoxicated party guest. The party was hosted by the daughter of the property owners, at a vacant family rental home, without the knowledge or consent of the parents.

Alcohol was provided at the party although most guests were under 21 years of age. A small admission fee was

charged to uninvited guests. That money was used during the party to buy more alcohol. The property owners and their daughter, the hostess, were held liable for the guest's wrongful death. Liability was based upon the sale of alcohol in what the court described as the operation of a pop-up nightclub with a cover charge. Thus the host and her parents were liable for the consequences of the drunken minor's acts.

There are several messages in this unfortunate case:

- It is never a good idea to serve alcohol to any obviously intoxicated person, under any circumstances
- It is always illegal to serve alcohol to minors
- Parents, discuss this potential danger with your adolescent and young adult children
- Property owners: never let the kids party while you are away.



# "Trust me, I'm your lawyer." SCD Obtains Binding, Punitive Damages Against Family Law Attorney

By Gregory E. Stone, Esq.



## **While the practice of law is a business, it is a profession first.**

The California Supreme Court regulates the practice of law. The Supreme Court delegated the power to act on its behalf in admission, disciplinary and other matters to the State Bar, subject to the Supreme Court's review. The California Rules of Professional Conduct ("CRPC") are the Supreme Court's rules regulating attorney conduct. Bar members are also bound by the State Bar Act and California case law.

The State Bar of California investigates attorney misconduct complaints. If the bar finds evidence of probable misconduct, formal charges are filed with the State Bar Court by the Office of Chief Trial Counsel. The State Bar Court hears the charges and has the power to recommend that the California Supreme Court suspend or disbar attorneys.

In divorces, the parties are often forced to liquidate community assets, usually the family residence. The proceeds are put into one of the attorney's trust accounts while the case progresses. Thereafter the divorce lawyers will use some of those proceeds as a basis for payment of their fees.

When a prospective client approached me with allegations of unprofessional and unethical conduct by her family law attorney, I was very much interested in hearing her story. The client received regular monthly invoices from her prior attorney but felt something was

not right and asked for an accounting. Unbeknownst to her, the attorney filed a document with the court allowing the attorney to pay himself \$30,000 in fees from the trust account. When she confronted the attorney, he modified his prior billings (some as old as two years) and sent her amended bills purportedly justifying the \$30,000.

Prior to retaining SCD, the client successfully obtained an award against her attorney in a nonbinding arbitration in the amount of \$29,713. The attorney moved to nullify the award and actually sued her for breach of contract, suggesting he was still owed money.

At this point, the client asked for SCD's assistance. Leslie Blozan and I were able to consolidate all of the claims into one binding arbitration.

Through discovery, we found numerous discrepancies in the billing practices of the attorney. These included, but were not limited to: failure to credit certain payments, unauthorized late charges, and the unauthorized \$30,000 transfer.

The binding arbitration lasted a full day and involved opening statements, direct and cross examination of witnesses, closing arguments and post arbitration briefing. In essence, it was a mini trial. The former attorney appeared and diligently defended himself with voluminous exhibits and witness testimony.

The arbitrator was not convinced with the attorney's explanations and

awarded our client \$38,746.69, in unauthorized fees and overpayments and then hit the attorney with \$40,000 in punitive damages for a total award of \$78,746.69. Punitive damages are designed to punish the party and send a message. They are rarely awarded in these types of cases.

The award is now binding and cannot be appealed. The attorney will now have to face potential State Bar disciplinary action. Under the CRPC, attorneys must report themselves to the State Bar for an entry of judgment in a civil action for fraud, misrepresentation, breach of fiduciary duty or gross negligence committed in a professional capacity. Notice of Disciplinary Charges filed by the State Bar against the attorney and any disciplinary action taken are public records.

While this might not be the biggest award ever obtained, in my opinion, it is nonetheless newsworthy and important and very significant to SCD's client. It should serve as a message to all lawyers to ensure that their respective clients' interests are paramount.



## What is a Limited Liability Company?

By John S. Cha, Esq.

Simply, a limited liability company is a type of business entity that combines the personal liability protection of a corporation with the tax benefits and simplicity of a partnership.

Like a sole proprietorship or a partnership, the salaries and profits of an LLC are subject to self-employment taxes, unless the LLC opts to be taxed as a corporation. With a corporation, only salaries (not profits) are subject to such taxes.

Since limited liability companies are still relatively new, not every business or bank is familiar with them. Although they continue to grow in popularity, still, in some cases, banks or vendors may be reluctant to extend credit to limited liability companies. In one instance, my client changed the title holder on an income property to a newly-formed LLC to gain the personal liability protection. During a re-fi, the bank insisted that the property's title be changed back to the individual. Some states also restrict the type of businesses a LLC may conduct. For example, if you are a licensed professional, a LLC form of business for you is prohibited in California.

Corporations offer a greater variety of fringe benefit plans than any other business

entity. Various retirement, stock option and employee stock purchase plans are available only for corporations. Plus, sole proprietors, partners and employees owning more than 2% of an S-corporation must pay taxes on fringe benefits (such as group-term life insurance, medical reimbursement plans, medical insurance premiums and parking). Although C-corporations are subject to double taxation, a C-corporation can use income shifting to take advantage of lower income tax brackets.

For example, a company with one principal that earns \$100,000 can shift the income between \$50,000 in salary and leave \$50,000 in the corporation as corporate profit. The federal corporate tax rate is 15% on the first \$50,000. Furthermore, the business owner is now in the 15% tax bracket (vs. 25%) for his/her personal income tax. This can reduce the overall tax liability on the \$100,000.

Advantages of a limited liability company versus a corporation include:

- LLCs have fewer corporate formalities. To avoid the "alter ego" claim, corporations must hold regular meetings of the board of directors and shareholders and keep written

corporate minutes. Members and managers of an LLC need not hold regular meetings, which reduces complications and paperwork.

- LLCs have no ownership restrictions. S-corporations (also known as "close corporations") cannot have more than 100 shareholders. Each shareholder must be an individual who is a U.S. resident or citizen. Also, it is difficult to place shares of an S-corporation into a living trust. These restrictions do not apply to LLCs (or C-corporations).
- LLCs have the ability to deduct operating losses. Members who are active participants in an LLC's business can deduct operating losses against their regular income to the extent permitted by law. While S-corporation shareholders can also deduct operating losses, C-corporation shareholders cannot.
- LLCs have tax flexibility. By default, LLCs are treated as "pass-through" entities for tax purposes, much like a sole proprietorship or partnership. However, an LLC can also elect to be treated like a corporation for tax purposes.



# Latest Legalities

By Kristi W. Dean, Esq.

**Pro Hac Vice Attorney Gets Stung by Court after Delivering a “Shocking” Cross-Examination.** Last month, a Los Angeles attorney was fined \$3,000 after he tried to impeach the opposing counsel’s expert with a (literally) shocking courtroom stunt. The sanctioned trial attorney represented several Utah-based dairy farms in a lawsuit against the Los Angeles Department of Water and Power and a local power plant. The DWP buys electricity from the plant for Los Angeles residents and transports the acquired power through underground cables. Dairy cow owners complained that stray currents were passing through the ground on dairy farm properties and killed their livestock, allegedly amounting to over \$250 million in cow deaths and lost milk production. An expert for the defendant testified in trial and opined that the volts emitted by the power plant (allegedly 1.5 volts) could not be felt by a person, yet alone by a cow. Attempting to impeach that opinion during cross-examination, the dairy farmers’ counsel handed the witness an electronic device disguised as a retractable pen. The “joke” pen used a 1.5 volt AAA battery which delivered a “funny” shock to the user. The questioning counsel represented it to be a pen and when the expert took the pen, he got more than anyone had expected. The pen contained a transformer that converted the battery’s DC current to AC current, and transformed the 1.5 volts supplied by the battery up to several hundred volts. The expert received a strong electric shock which caused his body to jerk, and he dropped the pen.

The defendants asked that the pen-brandishing counsel be banned from the case. While the court didn’t go that far, the court pointed out in his ruling that the pen’s instructions warned against use by

people over 60, and people with heart problems or epilepsy. Before handing the expert the shock pen, the attorney didn’t inquire whether the witness was over 60, or whether he had any medical problems. The court held that the attorney’s examination exceeded the bounds of aggressive cross examination and constituted a lack of candor to the court in violation of the Rules of Professional Conduct.

This case was controversial even before the shocking pen examination. About a month before the jury was seated, over 500 employees were told by the power company’s management that if the company lost the trial, the plant would go out of business. After a month of being in trial, a juror informed the trial judge that family members had pressured her to vote against the dairies. The judge declared a mistrial and the parties are now arguing over a change in venue. This case has been going on since 2003.

[Source: *Gunn Hill Dairy et.al. v. LADWP, et.al., Juab County, Utah, Case No. 120600029*]

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**The Battle of Water Rights Rages On.** Water rights are at issue in a case filed in the U.S. District Court in Fresno, California, relating to San Joaquin Valley farmers. The lawsuit sought a temporary restraining order against the U.S. Bureau of Reclamation for releasing Millerton Lake water to a group of west Valley farmers who hold water rights to the San Joaquin River dating back to the 1800s, and which predate the Bureau’s building of the Friant Dam on the upper San Joaquin River. The west Valley farmers normally get their water from the Sacramento river and the Delta, but the Bureau determined it

couldn’t meet its obligation to the farmers, so it determined it needed to divert the water from Millerton. The east Valley farmers argued that the Bureau should not deliver water to the wildlife refuges until the farmer’s rights are satisfied; and if they do so, the farmers face losses likely in the hundreds of millions of dollars, and the likely collapse of the agriculture-dependent economy. The grassland refuges fought back, arguing harm to wildlife if deliveries to the refuges were curtailed. In denying the temporary restraining order, the court concluded: “Contrary to the popular synopsis that this case is about overzealous government regulators prioritizing the needs of fish and wildlife over farmers and the economy, this decision is a direct result of the law as Congress has chosen to write it. It is the duty of the Court to uphold the law, regardless of the presence or absence of popularity.”

Meanwhile, the Ninth Circuit Court of Appeals recently overturned a lower court ruling from Fresno which held that protections for Delta smelt in the Sacramento-San Joaquin River Delta were unsupported in science. The west Valley farm leaders have long questioned the science used to justify cutting back water for farmers to protect the endangered fish, and have battled for decades with environmentalists who claim that water pumping from the Delta can be harmful to the smelt.

[Sources: *Friant Water Authority, et.al. v. Sally Jewell, et. al., USDC Case No. 1:14-CV-000765-LJO-BAM, decision filed May 27, 2014; Natural Resources Defense Council, et. al. v. Sally Jewell, et.al., U.S. Court of Appeals for the Ninth Circuit, No. 09-1761, April 16, 2014.*]



21600 Oxnard Street  
Upper Lobby – Suite 200  
Woodland Hills, CA 91367

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## NEWS & ANNOUNCEMENTS

→ Congratulations to Kristi Dean and Robyn McKibbin for negotiating a severance agreement on behalf of a laid off employee. They secured almost 20 times more severance pay than the company's initial offer.

→ Greg Stone and Leslie Blozan obtained a favorable result in a binding arbitration award involving an attorney who engaged in unethical behavior. The award included compensatory and punitive damages.

→ SCD participated in the Independent Insurance Agents and Brokers of Orange County's Education Day by presenting a three hour continuing education course in mock trial format. The presentation offered Ed Day attendees an opportunity to see, first hand, an abbreviated sexual harassment trial and took roles as counsel, parties, witnesses, judge, jury and bailiff. Kristi Dean, a CDI approved presenter, wrote the script and moderated the trial. Robyn McKibbin and Leslie Blozan attended and participated as lead trial counsel.

→ Robyn McKibbin settled a prelitigation employment dispute on behalf of an employee with potential disability discrimination and wrongful termination claims. Robyn increased the client's severance pay from two weeks to 28 weeks.

→ Leslie Blozan was successful in having a client's case dismissed by successfully bringing a motion for judgment on the pleadings.

→ Congratulations to Robyn McKibbin, who was a finalist at the San Fernando Valley Business Journal's 2014 Women in Business Awards.

→ Greg Stone and Robyn McKibbin settled an employment lawsuit on behalf of a national manufacturer. The suit, which alleged breach of contract and fraudulent inducement claims, was settled for a fraction of the seven-figure demand before any significant legal fees were incurred.

### **STONE CHA & DEAN LLP**

21600 Oxnard Street  
Upper Lobby – Suite 200  
Woodland Hills, CA 91367  
T: (818) 999-2232  
F: (818) 999-2269

**Questions or Comments:**  
Michelle Macias – Editor  
mmacias@scdlawllp.com

**Contributions By:**  
Marleigh Green

**VISIT US ONLINE:**  
[www.scdlawllp.com](http://www.scdlawllp.com)

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