

FIRST MONDAY

Appellate Lawyers' Roundtable

The Daily Journal hosted two roundtable discussions with leading appellate lawyers in September — one in Los Angeles and one in San Francisco — to discuss the coming U.S. Supreme Court term and the recent appointment of Justice Elena Kagan. The resulting conversations have been edited and condensed into the following dialogue.

MODERATED BY LAWRENCE HURLEY, Daily Journal Staff Writer

In September, some of California's leading appellate and U.S. Supreme Court practitioners came together to discuss what cases are likely to have the most impact among those the high court hears this term, along with how the court may change with the addition of Justice Elena Kagan.

Daily Journal: This term sees the arrival of a new justice, Elena Kagan, who replaces the retiring John Paul Stevens. What can we expect of her as a justice and how will she change the court?

Haddad: Everything we know about Justice Kagan suggests she will be a worthy successor [to Justice Stevens]. She seems to be very smart, very pragmatic. But we don't have a track record of her reaching judicial decisions.

Small: I worked with Justice Kagan in the Clinton administration. It has been said that those who know her and work with her don't know how she will vote on the court. I can attest to that. One suspects she will be left of center because of her background and the justice [Thurgood Marshall] for whom she clerked as a young lawyer.

Sungaila: There's a wonderful, fresh opportunity when a justice joins the court. They have independence and a job for life so whatever they had said beforehand may change with that weight and mantle of responsibility. Another factor I find interesting as a woman is that there are now three women on the court. There are studies in the business world that indicate there is a tipping point for the presence of women in an organization. When you hit 33 percent, things start to change. We have hit that on the court. It will be interesting to see whether it makes a difference.

Myles: It's fascinating to have a time in history where we now have three women on the court. It's never happened before. There's been a lot of talk whether, if at all, her arrival will change the jurisprudence of the court. My personal opinion is that it won't.



Susan McRae / Daily Journal

Falk: A more significant change is that Justice Kagan is perhaps the first justice to come from a primarily academic background without either judicial experience or senior executive experience. I think it could be very interesting how she approaches cases.

Bromberg: The most immediate effect will be the assignment of opinions. With Stevens retiring, when we have the 5-4 block with Justice Kennedy joining the liberals, Kennedy will be the one assigning opinions. That may change significantly how broad those cases are.

Small: Her vote record is fairly easy to predict. She was aligned in the vast majority of cases with Justices [Stephen G.] Breyer and [Ruth Bader] Ginsburg. In some of the more ideological cases with a 5-4 divide, she was with the liberals.

Coates: One of the comments that came up during confirmation was whether she was abrasive on the bench, but listening to several of the arguments last term, that didn't come out. She fit right in.

Bromberg: I don't think we learned much about her last term. She filed fewer dissents and concurrences than anyone else and she also got assigned primarily pretty technical cases. The only thing you did learn is that she is not a knee-jerk vote in favor of the prosecution in criminal cases.

Chhabria: There was a lot of talk on her first day of argument about how she just jumped right in and asked lots of questions and did so aggressively. I couldn't help but wonder, would people have made such a big deal about that if she were a man?

Daily Journal: Before we move on to this term, are there any rulings from last term that didn't get too much attention and could be described as "sleepier cases"?

Coates: *Mohawk [Mohawk v. Carpenter]*, 2010 DJDAR 17115, in which the court held that waivers of attorney-client privilege are not appealable pre-judgment]. It put to rest the debate between the circuits as to whether a district court order finding or not finding attorney-client privilege was immediately appealable. That's the kind of nuts and bolts issue that the court does decide. It affects everyone who practices in federal court.

Small: *Stolt Nielson [Stolt Nielson v. AnimalFeeds]*, 2010 DJDAR 6107, an arbitration case that definitively resolved the question as to what happens when an arbitration agreement is silent as to whether the parties contemplated class action arbitration. The Supreme Court said if it's silent there's no



Daily Journal: One immediate impact Kagan's arrival has is that she will be recused from a significant number of cases in which she was involved in her prior role as solicitor general. How much of an impact will the recusals have?

Haddad: One of the areas in which it is significant is preemption. That's an area where Justice Stevens had strong views, very cautious about finding state laws preempted by federal law. You could get 4-4s in some of these.

Small: It could have great significance in some cases, in other cases, in a large number of cases, it will not.

Falk: There's nothing worse than an affirmance by an equally divided court in an important matter.

Daily Journal: Looking back, last term was the first with Justice Sonia Sotomayor on the court. What have we learned about her?



Timothy Coates is a partner at Los Angeles-based Greines, Martin, Stein & Richland. In over 25 years, he has briefed and argued more than 250 matters in the state and federal appellate courts, ranging from the California Court of Appeal and California Supreme Court to the U.S. Supreme Court. On Oct. 5, he will argue before the Supreme Court on behalf of Los Angeles County in *Los Angeles County v. Humphries*, 09-350.



Michael Small serves as senior counsel at Akin Gump Strauss Hauer & Feld in Los Angeles. With the firm since 2002, he has represented major corporations in commercial disputes, class actions, and constitutional matters. Small focuses his practice in the area of appellate litigation and has authored numerous briefs in cases before the U.S. Supreme Court and federal and state appellate courts.



Mark E. Haddad chairs the appellate practice in Sidley Austin's Los Angeles office and co-chairs the firm's global appellate practice. He joined the firm's Washington office in 1987 after serving as a law clerk to Justice William J. Brennan, Jr., of the U.S. Supreme Court, and to Judge Louis H. Pollak of the Eastern District of Pennsylvania. He has been resident in the Los Angeles office since 1999.



Mary-Christine Sungaila joined Encino-based Horvitz Levy in 1997 and became a partner in 2003. Her appellate work, which focuses on complex tort cases raising cutting-edge issues, has helped define the scope of the duty to warn sophisticated users of product hazards, set the guidelines for admitting expert testimony at trial, and overturned multimillion dollar judgments.



Dan Bromberg is a partner in the Silicon Valley office of Quinn Emanuel Urquhart & Sullivan and a founding member of the firm's appellate practice. He has practiced before the U.S. Supreme Court for more than 15 years and has filed more than three dozen briefs in the court, including seven successful petitions for certiorari.



Donald Falk, a partner in Mayer Brown's Palo Alto office, has an extensive appellate practice in which he presents oral arguments, briefs, and motions in the U.S. Supreme Court, and many other federal and state appellate and trial courts. His work involves a wide range of constitutional, statutory, patent, securities, administrative, criminal and common law issues.



Vince Chhabria is a member of the government litigation team in the San Francisco city attorney's office. He represents the city in cases involving constitutional and policy issues. Prior to joining the city attorney's office, Vince spent two years in the San Francisco office of Covington & Burling. He served as a law clerk to Justice Stephen Breyer, during the October 2001 term.



Kristin Myles is a partner in the San Francisco office of Munger, Tolles & Olson. She served as law clerk for Justice Antonin Scalia in 1989-90 and for Judge Douglas H. Ginsburg of the D.C. Circuit in 1988-89. Myles joined the firm in 1990 and was made a partner in 1994. Her practice has focused upon complex business litigation in a wide spectrum of matters affecting the firm's corporate clients.

class action. And *Shady Grove* [*Shady Grove Orthopedic Associates v. Allstate Insurance Company*, 2010 DJDAR 4835, in which the court held that federal law preempts regulations imposed by some states that bar federal courts from hearing certain class action claims]. A funny case. It involves class actions in federal court. It seems like the court may have opened up a new avenue of litigation as to what are state procedural rules versus state substantive rules and how they interplay with the federal rules of civil procedure.

Bromberg: As far as a case that will have a lot of practical impact, I think the Hertz case will [*Hertz v. Friend*, 2010 DJDAR 2667]. That's the case in which the Supreme Court changed the standard for determining corporate citizenship and adopted the 'nerve center test' and basically said you look to where the decisions are made. That's going to have significant consequences, particularly in California. There was a concern that there were companies that didn't want to put plants and offices in California because they were worried about being hauled into state court.

Myles: That's a good thing for the economy, any-way.

Chhabria: The most significant Supreme Court event in San Francisco was the denial of cert in *Golden Gate Restaurant Association v. San Francisco* [08-1515]. It was the end of a four-year battle over the validity of San Francisco's universal health care program and specifically the portion of that program that required employers to spend a minimum amount of money per employee on health care. The 9th Circuit upheld the program so the denial of cert stood for the proposition that the program can remain in effect.

Daily Journal: This term, probably the most high-profile case from a California standpoint is *Schwarzenegger v. Entertainment Merchants Association*, 08-1448, a First Amendment case over the constitutionality of a state law that bans minors from buying certain video games depicting violence. The 9th U.S. Circuit Court of Appeals struck the law down.

Small: That the court took the case was somewhat surprising. There was no real circuit split. The lower courts that dealt with these types of laws around the country had no trouble striking them down as infringing First Amendment rights. I have done an amicus brief on the side of the video game industry. I think it's a very interesting case given the prevalence of video games in our lives.

Falk: We are filing an amicus brief on behalf of some First Amendment specialists supporting the industry. The case is of interest I think because it seeks to adapt the long-standing obscenity standard, which arises out of a tradition of restriction of sex-oriented speech. Similar statutes have been struck down by several other circuits. This is one of a series of split-less or nearly split-less grants, which is an interesting reflection on the court's view of the 9th Circuit, perhaps.

Chhabria: Here's what I don't understand about this case: This is a case where California asked the 9th Circuit to treat violent video games the same way that sexually explicit material is treated. The 9th Circuit said 'no.' I would think the Supreme Court, fundamentally, would agree with that. There is no split among the circuits on this issue. Why did the court grant cert in this case?

Myles: It isn't totally clear what the court's response to this will be. Why would the Supreme Court agree with the [9th Circuit] standard? And then, just to point out, there's obviously only four votes need to grant cert.

Daily Journal: Another First Amendment case is probably getting the most attention from the media. That is *Snyder v. Phelps*, 09-751, which concerns Fred W. Phelps Sr., who runs the West-boro Baptist Church in Topeka, Kan. He and his family, seeking to spread their anti-homosexuality message, organize protests at military funerals. At issue is whether his First Amendment right of freedom of speech trumps the right of the family of a dead soldier to assemble peace-

fully to practice their religion. The 4th U.S. Circuit Court of Appeals reversed a jury verdict against Phelps.

Coates: That's just an amazing case.

Sungaila: It's a bar exam question.

Bromberg: If there's any justice who would have been able to figure out a way to rule in favor of the plaintiff without making it a broad ruling, it would have been Justice Stevens.

Falk: That's going to be a very interesting case to see how that unfolds. It could lead to the ability of all sorts of lawsuits for hurt feelings, for want of a better word, if the lines aren't drawn in a way that are quite concrete.

Daily Journal: On the business docket, aside from the video game case there is also a lot of interest in *Costco v. Omega*, 08-1423, a dispute between Costco Wholesale Corp. and Omega Watches over whether the "first-sale doctrine" of the Copyright Act allows manufacturers to retain control over the sale of its products in the United

in discount stores.

Haddad: My guess is the reason you're seeing all these amici coming in is because there are a lot of manufacturers that would view their markets in foreign countries to be different from their market in the United States. That's a case to keep an eye on.

Bromberg: The [solicitor general] recommended against a grant but the court nevertheless took it. It's like a heavyweight prizefight. There are some very powerful arguments the petitioners have made but also some very good arguments on the other side. There are a ton of lawyers involved. It pits retail against content providers. I think it's just a fascinating case.

Daily Journal: There are three major preemption cases: The first is *Bruesewitz v. Wyeth*, 09-152, on whether the National Childhood Vaccine Injury Act of 1986 preempts design defect claims against vaccine manufacturers. The second, out of the 9th Circuit, is *Chamber of Commerce v. Whiting*, 09-115, is on whether federal immigration law preempts an Arizona law requiring employers to check on the immigration status of their workers. The third, coming from the California Court of Appeal, is *Williamson v. Mazda*, 08-1314, on whether federal law prevents a plaintiff from suing Mazda Motor Corp. under California law over the death of his wife in a car accident.

Myles: Preemption is not the court's favorite topic but it does lend itself to splits in the circuits. A lot of preemption cases come out of state courts.

Haddad: The state of Arizona has made ... aspects of federal law [more rigorous]. The question is whether Arizona is allowed to do that. This is a core question of federal preemption. Arizona has really tipped the scales here.

Myles: It's interesting with all the controversy now with the new Arizona immigration law how this one

sets the stage for it.

Sungaila: *Williamson v. Mazda* is interesting because it comes from California Court of Appeal. It's one in which the solicitor general supports the plaintiff in saying there's no preemption.

Coates: A lot of plaintiffs' lawyers waiting for that. I suspect it will resolve an awful lot of cases if they find preemption here.

Falk: There's an interesting dynamic going on with the federal government and the preemption cases. It will be very interesting to see what kind of line they walk in favoring preemption in the immigration cases. The federal government will be in an interesting position. The solicitor general came out in favor of the manufacturers in the vaccine case and in favor of the plaintiffs in the traffic safety case.

Daily Journal: Isn't it ultimately a political decision?

Falk: It's not exclusively a political decision. There are substantial differences in the statutes. They are different types of action. The immigration statute says particular things that may be optional. Very technical, specific.

Myles: I've always thought, with preemption cases, there's always been a steady stream, but they don't always lend themselves to clean ideological differences among the justices.

Bromberg: The intensity of the government's interest makes a big difference. So which side it supports is significant.

Chhabria: There's all this talk about the solicitor general being the "10th justice." But people forget the solicitor general has clients. Generally lawyers should take very seriously the desire of their clients. The solicitor general has a degree of independence that virtually no other lawyer enjoys but still the solicitor general receives input from his clients and often listens to his clients. I'm not so sure it's a bad thing if the solicitor general is listening to the input of his clients.

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S. Todd Rogers / Daily Journal



States even after they have been sold abroad and then re-imported to the United States by a third party.

Sungaila: There's a lot of money in that, from the standpoint of foreign-made products being sold here



U.S. Supreme Court To Hone in on 9th Circuit Cases This Term

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her previous role as solicitor general, which will make it even tougher for the plaintiffs, experts say. Kagan has so far recused herself in 25 of the cases the court has decided to hear.

Doug Kendall, president of the liberal-

leaning Constitutional Accountability Center, who has filed an amicus brief on the side of the plaintiffs, conceded that Stevens' departure was a boon for Mazda, but he noted that in preemption cases, "the court's lineup does not split along ideological grounds." He also noted that recently the

court has been more favorable to plaintiffs in preemption cases than it had in previous years.

One of the other preemption cases looks to many experts like another 9th Circuit reversal. The court will examine a challenge to an Arizona law requiring employers to

check on the immigration status of their workers. The 9th Circuit upheld the law in a March 2008 opinion. An alliance of business and civil rights groups argue that the law is preempted by federal immigration law. *Chamber of Commerce v. Whiting*, 09-115.

Roy T. Englert Jr., a partner at Robbins,

Russell, Englert, Orseck, Untereiner & Sauer in Washington, described it as "an easy case" for the Supreme Court, which will view it through the prism of "federal power versus state power," and likely find in favor of the federal government.

It may well be, however, that the biggest cases of the term haven't yet reached the justices.

Whether the cases that receive most of the attention from court experts and the media at the beginning of the term remain at the center of attention next June when the court hands down its final opinions depends on what petitions the justices look favorably on in the coming months in time for them to be argued before next term.

Many lawyers expect the court to take up the huge gender discrimination class action filed by female employees against Wal-Mart, *Wal-Mart v. Dukes*, 10-277. In April, the 9th Circuit approved class certification on a 6-5 en banc vote. If that case is argued this term, many court-watchers think it could end up as one of the major rulings. "It's the 800-pound gorilla," Englert said.

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Other cases of note coming from the 9th Circuit and California courts:

• *Stern v. Marshall*, 10-179

On whether the late celebrity Anna Nicole Smith was entitled to any of her husband's fortune. The legal question is whether a bankruptcy court ruling in favor of Smith trumps the Texas ruling that went against her.

• *Los Angeles County v. Humphries*, 09-350

The court will decide under what circumstances a couple could sue Los Angeles County for not taking them off a state-wide list of child abusers after the criminal case against them was dropped.

• *Astra v. Santa Clara County*, 09-1273

The question is whether there was a private right of action for Santa Clara County to file a class action against numerous drug manufacturers for failing to provide required discounts under Medicaid.

• *NASA v. Nelson*, 09-530

The court will look at the question of whether the constitutional rights of employees at Pasadena's Jet Propulsion Laboratory were violated when the federal government required them to undergo rigorous new background checks.

• *Costco v. Omega*, 08-1423

The question is whether the "first-sale doctrine" of the Copyright Act allows manufacturers to exert control over the sale of their products in the United States even after they have been sold abroad and then re-imported to the United States by a third party.

• *Arizona Christian School v. Winn*, 09-987

The court will review whether an Arizona tax credit that can help children attend religious schools violates the Establishment Clause of the First Amendment.

• *Schwarzenegger v. Plata*, 09-1233

The court will decide whether a specially convened court had jurisdiction to order the release of up to 46,000 prisoners from California state prisons. The principal legal question is whether the three-judge U.S. district court panel could issue a prisoner release order under the 1996 Prison Litigation Reform Act.

• *AT&T Mobility v. Concepcion*, 09-893

A preemption case on the question of whether a state law that requires class-wide arbitration in consumer disputes is preempted by federal law.