

The Shallow End

Some staff at Pillsbury Winthrop don't like the size of this year's bonus pool. Pillsbury says it's justified. See Bar Talk.

Page



Arbitration & Mediation

A group of practitioners and mediators discusses the benefits — and risks — of using ADR to settle insurance-related disputes.



THE RECORDER

129TH YEAR NO. 44

www.callaw.com

\$2.00

MONDAY, MARCH 7, 2005

ALM

TAKING A SIDE: San Francisco Deputy City Attorney Sean Connolly says he is passionate about defending police officers. "No matter who you are, you're entitled to the same rights."

JASON DOY



Cops and Wobblers

San Francisco city attorneys weigh reputations, culpability, financial risk in defending police

By Pam Smith
RECORDER STAFF WRITER

Blessed Herve's story was stomach-turning.

Early last month, a federal jury listened as his lawyer described how a San Francisco police officer allegedly led a handcuffed Herve into a holding cell and forced him — by punching him

in the stomach, slamming his head into the wall, and grabbing his testicles — to take a seat on a bench "covered in human feces." The civil rights lawsuit accused another officer of looking on, laughing.

In the officers' defense, Deputy City Attorney David Newdorf was the picture of incredulity. Depicting Herve's witnesses as untrustworthy and his sto-

ry preposterous, Newdorf challenged the credibility of one plaintiff witness who had described encountering Herve after the incident. "When's the last time you walked up to someone who smelled like feces and said hi?" he asked. "Real people don't behave like that."

When the jury sided with the defense two days later, it fit into a pattern that has emerged in civil rights cases against San Francisco police: The city attorney's office is either settling the cases or winning them at trial.

The city has paid plaintiffs a total of \$3.3 million in 31 civil rights suits filed against San Francisco police since the beginning of 2000, according to a Recorder analysis of data provided by

See POLICE LAWYERS page 7

Wal-Mart said to be in talks to settle suit

By Justin Scheck
RECORDER STAFF WRITER

In public, Wal-Mart Stores has aggressively defended itself from the biggest discrimination class action in U.S. history.

In fact, it's appealing certification of the class before the Ninth Circuit U.S. Court of Appeals.

But behind the scenes, the company is engaged in settlement negotiations with lawyers for a class estimated to contain 1.6 million female employees, say attorneys familiar with the talks. *Dukes v. Wal-Mart Stores* alleges that the nation's largest retailer paid women less and promoted them less



HUGHES

frequently than men.

The settlement talks, which began some months ago, are gaining momentum, say the sources. Lawyers for both sides reportedly met in mid-February to discuss settling.

None of the lawyers involved in the litigation would comment on settlement talks. But other members of the class action bar say Wal-Mart's willingness to settle is signaled by its choice of counsel for the discussions and by the mediator facilitating the talks.

Reportedly, the parties have hired Hunter Hughes III — a famously effective class action mediator — to handle the negotiations.

And sources say Wal-Mart has hired Meyer Koplow — engineer of a nationwide \$200 billion tobacco settlement in 1998 — to represent it at the table.

Koplow, a partner at Wachtell, Lipton, Rosen & Katz, is known for settling difficult claims for high-profile clients.

In recent years, he has represented CNA

See WAL-MART page

Orrick snatches four more from VLG



RECORDER FILE (2000)

EXODUS: Donald Keller Jr. and three other partners form the second group in two weeks to jump from VLG to Orrick.

By Marie-Anne Hogarth
RECORDER STAFF WRITER

Just two weeks after grabbing five partners from Heller Ehrman's Venture Law Group, Orrick Herrington & Sutcliffe has nabbed four more.

This time the group includes one of VLG's most senior partners, Donald Keller Jr., as well as Thomas Tobiason, Mark Windfeld-Hansen and Mitchell Zuklie.

Orrick Chairman Ralph Baxter Jr. said the four resigned Friday and will join Orrick's emerging companies practice as soon as Heller releases them from their notice period.

"This is an extraordinary development for Orrick," Baxter said. "It makes dramatically more significant the advance of our practice."

Two associates from Heller VLG will also join Orrick, Baxter said, adding that it would not be a surprise if more associates made the transfer.

Baxter said Orrick knew the four lawyers well and that they were a "perfect cultural fit."

See ORRICK page 15

Today's C.D.O.S.

Banking

WOLSKI v. FREMONT INVESTMENT & LOAN: Yield spread premium were not part of "points and fees" payable by borrower for purposes of predatory lending law. C.A. 4th

Business Law

ROY v. SUPERIOR COURT (LUCKY STAR INDUSTRIES, INC.): Party that raised affirmative defense of lack of personal jurisdiction in answer but then actively participates in litigation waived jurisdictional defect. C.A. 4th

Civil Litigation and Procedure

OBREY v. JOHNSON: Harmless error

See page 2

Continued from page 1

the city attorney's office. Nearly all of those payments, which ranged from \$300 to \$925,000, resulted from settlements.

Though City Attorney Dennis Herrera's office doesn't formally track its trial record in these cases, Chief Trial Deputy Joanne Hoepfer said the city has successfully defended almost all that have gone to trial in the last five years. (She estimates that about two dozen suits against police officers have reached trial since 2001.)

Deputy city attorneys say they are passionate about protecting good cops' reputations. Sometimes the office's police clients express frustration when their cases are settled and they don't get a chance at vindication before a jury, but the attorneys say they must consider possible culpability and protect the city against financial risk.

In any event, the city seems to be doing a good job of risk management. The city of Los Angeles paid \$4.1 million to settle police misconduct litigation stemming from a single event - protests at the 2000 Democratic National Convention, according to the Los Angeles Times. And the city of Oakland paid out \$10.9 million just to settle the litigation involving the four "Riders" police officers.

SPECIAL RISKS

Civil rights cases against the city's police usually fall to one of about 10 lawyers on the office's trial team who specialize in such cases.

"These are among the most important defense cases that are handled by the office," Hoepfer said.

The damages sought can be sizeable, and cop trials typically carry two other risks. Unlike a bus driver in a routine traffic accident, police officers accused of violating someone's civil rights may face punitive damages, which they usually have to pay out of their own pockets. And plaintiffs suing police for civil rights violations usually do so under laws that allow them to collect attorneys fees from the city, on top of damages, if they win.

"There's a huge downside risk of attorneys fees," Hoepfer said. "That's a major reason why the city settles these cases."

Deputy City Attorney Blake Loeb, who began sitting first chair on police cases about seven years ago, says he was "a little hesitant" to take on the cases at first.

"You make a mistake in those cases, it can be more serious than a \$20,000 slip-and-fall case," said Loeb, whose caseload is now almost exclusively police and sheriff's deputy cases. "Even the small cases with the small damages can be very large."

More than money is at stake.

"There are very emotional, political, high-profile issues that ... witnesses and city officials and the parties have very strong feelings about, apart from whatever did or didn't happen with the incident," said Newdorf, the deputy city attorney who tried the Herve case. "It makes [these cases] interesting, and it also makes them difficult."

The cases rely more on events than on documents, said Deputy City Attorney Evan Ackiron, contrasting it with his former associate's job at Morrison & Foerster. "Ninety-nine percent of [these] cases focus on two minutes or less of time."

The cases may involve reconstructions of shootings or high-speed chases, Loeb said. "It's the same reason cop shows are popular. It's interesting stuff."

It's not unusual for the city to stand on principle in police cases, he said, adding that he recently tried (and won) a case in which the city didn't offer a penny. "As someone who likes to try cases and likes to [believe] in what they do, that's a good position."

Like Ackiron and Loeb, some of the other lawyers who defend cops started off doing civil litigation at big law firms. Some, including Newdorf and Deputy City Attorney Scott Wiener, also got exposure to civil rights or criminal law by clerking for a judge. And a couple, like Deputy City Attorney Sean Connolly, started their trial careers facing off against police as public defenders.



JASON DOIY

HIGHLY CHARGED: Police cases are loaded with emotional and political issues that witnesses, city officials and the parties have very strong feelings about, said Deputy City Attorney David Newdorf. "It makes them interesting, and it also makes them difficult."

Connolly also stands out, though, for representing the police before he joined the city attorney's office. After six years as a deputy public defender, Connolly spent two as general counsel for the local police union, a job that included representing cops in criminal court and administrative hearings, as well as in labor negotiations.

While he acknowledges some might view his career path as "odd," Connolly doesn't see it that way. "I was as passionate about defending the rights of my criminal defense clients as I am about police officers," he said. "No matter who you are, you're entitled to the same rights."

'There's a huge downside risk of attorneys fees. That's a major reason why the city settles these cases.'

—**JOANNE HOEPFER**
chief trial deputy

And the police cases are "imbued with lots of idealism," he said.

"There's always this clash ... [where] people measure police conduct against people who act outside the rules."

Newdorf, who describes himself as "a pretty liberal person, pro-civil rights," says he came to the assignment with "a certain skepticism about how candid and forthright the officers may be when they were accused." But at the same time, he said, many civilians don't understand the authority police have and the danger inherent

in their job. (Disclosure: Newdorf was a reporter with The Recorder during the early 1990s.)

BALANCING ACT

The city doesn't want to settle for a nuisance amount just to avoid the expense of a trial, Hoepfer said, because that's "not sending the right message to the officers, and it's encouraging people to make false claims."

But there are times when the city decides to negotiate rather than risk paying the other sides' legal bills.

If there are big attorneys fees on the line and "we think that reasonable minds can differ" at trial, Hoepfer said, "that might tip the balance in terms of resolving it."

Sometimes, "there are errors in judgment," Hoepfer said. "And in that case people should be compensated."

For the city's police clients, some settlements can be discouraging.

Some officers have been dismayed when the city attorney's office settled, even when the officers believe they've done "absolutely nothing wrong," said Kevin Martin, a patrol officer and vice president of the San Francisco Police Officers Association.

"It's sometimes easier to pay people off," said Martin, a 23-year veteran officer. "But that certainly doesn't make it any more palatable for the officer." He speaks from experience - the city settled a civil rights suit against him in 1994.

"A lot of officers do get frustrated," Hoepfer acknowledged.

But her office has to balance the interests of the city as a whole, she said. "Once we have conversations with the officers, I think everyone understands and is on board," she added. "But there's a tension there."

Among the officers the city has gone to bat for is Alex Fagan Jr., who has been making headlines on and off since 2002, when he and two other off-duty officers were involved in a fight with two civilians. The publicity only increased with the brief but ultimately unsuccessful indictments of seven of the department's higher-ups - including Fagan's father, then assistant chief of police. The younger Fagan is now on trial for assault charges over the incident.

Connolly is the lead defense lawyer for a civil lawsuit against police command staff in the wake of that fight, plus three unrelated civil suits against Fagan Jr.

When one of those cases went to trial last summer, publicity surrounding the criminal case made it difficult to find jurors who hadn't heard of Fagan Jr., Connolly said. "We could only get a jury that said they could put aside what they'd heard about [him]." The defendant's notoriety wasn't fatal, though. The city got a defense verdict.

Eric Safire, who represented the plaintiff in that suit and has been litigating police cases against the city for 20 years, is critical of the way the city attorney's office handles police cases. He accuses the office of joining an "unholy alliance" with the local police officers' union. "Instead of disciplining the officers for any kind of malfeasance, they spend time, effort and money to point out that the victim is unworthy of compensation," said Safire, a civil and criminal trial lawyer in San Francisco.

Hoepfer pointed out that administrative discipline is under the purview of the city's Police Commission and Office of Citizen Complaints, which can launch investigations in response to civilian complaints. The city attorney's job is to present an officer's case to a neutral fact-finder, she added.

"In every organization and profession, whether it's police or lawyers or teachers or anything else, there are good apples and bad apples," said Deputy City Attorney Wiener. "A lot of time with the politics surrounding police, they don't get judged as individuals. They get tarred. And that's unfortunate."

Reporter Pam Smith's e-mail address is psmith@therecorder.com.