LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, SEPTEMBER 14, 2018
PERSPECTIVE

Law risk: past is prologue

By Howard B. Miller

There is a new kind of risk in California law that affects the way cases should be analyzed, on appeal, in trial, through settlement considerations and mediation, and in their early evaluation.

In the last six months several decisions of the California Supreme Court have modified existing precedents and expectations. Though these cases are usually reported and analyzed within their own area, their greater significance is what they indicate about the approach to decision making of the court. We are amid a change impacting rights, opportunities, risks and expanding liabilities throughout the entire California legal culture.

Regents of the University of California v. Superior Court, 2018 DJDAR 2629 (March 22), imposed new duties on universities to protect students from harm caused by other students. *Dynamex Operations West, Inc. v. Superior Court*, 2018 DJDAR 3856 (April 30), announced a new bright-line rule that presumes workers to be employees rather than independent contractors. *Lopez v. Sony Electronics, Inc.*, 2018 DJDAR 6658 (July 5), applied an extended tolling period for claims of prenatal toxic tort injuries. *Troester v. Starbucks Corporation*, 2018 DJDAR 736 (July 26), determined the California de minimus rule did not apply to worker wage claims. *De La Torre v. Cash- Call, Inc.*, 2018 DJDAR 8022 (Aug. 13), permitted a claim by debtors that an interest rate could be unconscionable on loans over $2,500. There was no dissent from the decision in any of these cases, consistent with the remarkable cohesion the court has shown generally in its decisions.

Though each case, of course, is subject to argument on its own facts and terms, the opinions have followed a general method of decision making that included less weight to the stare decisis effect of previous California cases than for out-of-state authorities the Supreme Court agreed with, especially American Law Institute Restatements. The opinions seem to have responded to a changed generational sense of what Justice Oliver Wendell Holmes described as the dominant force in judicial decision making: "the felt necessities of the times."

All of which raises a critical question about the legal culture, judging and stare decisis: The past may be prologue, as is often said, but for us today, *which* past? The true prologue to the developing present culture is not the more recent quarter century period before 2010 of the courts of Chief Justice Malcom Lucas and Chief Justice Ronald George, but a more distant past, of which I have a poignant memory.

My introduction to California legal culture occurred with a yearlong daily commute. I was beginning a one-year clerkship with Justice Roger J. Traynor. It was before he was chief justice with its public and administrative responsibilities. We both lived in Berkeley, and Justice Traynor invited me to drive across the Bay Bridge with him to the court, then as now in the San Francisco Civic Center. And so every work day of the year morning and evening we commuted together. There were

Justice Roger J. Traynor

no cellphones, and we did not listen to the radio. For hundreds of hours, in an environment more relaxed than his chambers but no less intellectually electric, we talked about the law. On argument days it was case specific, evaluating the briefs and arguments and the lawyers who had argued cases, with advice on appellate advocacy. Other days it was reviewing the thought and court process that had gone into cases he had previously decided.

The discussion was often a mutual Socratic dialogue, in turn questioning and answering, on a subject Justice Traynor had spent his whole judicial life considering: In the context of analyzing history, precedent and current values, when was it appropriate for a supreme court to change or modify existing legal doctrine? His opinions had done so many times, notably his concurring opinion in *Escola v. Coca-Cola Bottling Company*, 26 Cal. 2d 453 (1944), that began the product liability revolution and culminated in his opinion in *Greenman v. Yuba Power Products*, 59 Cal. 2d 57 (1963); his opinion in *Perez v. Sharp*, 32 Cal. 2d 711 (1948), which to widespread criticism of the time held a ban on interracial marriage unconstitutional, 19 years before *Loving v. Virginia*, 388 U.S. 1 (1967); in *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942), which by ending the requirement of mutuality for res judicata began the creation of the modern law of claim preclusion; and in *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211 (1961),which abolished the doctrine of sovereign immunity in California. All those cases were subject to criticism, some intense when they were issued. All have stood the test of time.

Governor Jerry Brown clerked for Justice Mathew Tobriner when Traynor was chief justice. Before making his initial appointment, the governor was reported by the Los Angeles Times, on February 14, 2011, to have told people he wanted his Supreme Court appointment "to be in the mold of such historic state high court justices as Roger J. Traynor and Mathew Tobriner, legally creative jurists who left strong marks on the law nationally."

Pendulums do not stop in the middle. We are in era that will seem new only to those whose experience may not have gone beyond the quarter century before 2010 and the appointment of Chief Justice Tani Cantil-Sakauye, followed by the more recent appointments by Gov. Brown. More important than each individual case, present or past, is the culture of the law in which the decision is made.

The Supreme Court, in another opinion within the last six months, has been transparent about its decision- making culture. The chief justice, writing for a unanimous court, set forth its views on stare decisis:

"'[T]he doctrine of stare decisis' is 'a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices.' (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.) But the policy is just that — a policy — and it admits of exceptions in rare and appropriate cases. Factors that have contributed to our reconsideration of precedent include: 'a ... tide of critical or contrary authority from other jurisdictions' (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 100); our precedent's 'divergence from the path followed by the Restatements' (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1179); and our concern that no 'satisfactory rationalization has been advanced' for the decision at issue (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 812 [overruling mutuality requirement for issue preclusion])." *Samara v. Matar*, 2018 DJDAR 6181 (June 25).

The chief justice's statement is a gift to California lawyers. It is a road map for understanding the Supreme Court, for appellate briefs and advocacy, and for amicus briefs as well.

Counsel need to consider more than existing California case authority. Research must be done on other jurisdictions. If a majority, or a significant number, or respected courts, disagree with the California rule then those cases should be analyzed, and if they help a position, argued.

The relevant ALI Restatements need to be consulted. This court has shown great respect for the Restatements as a source of guidance. If the Restatement rule, though contrary to California law, helps a position, it should be argued. If a position is contrary to existing California cases, counsel must analyze whether there has been a "satisfactory rationalization" advanced for the California rule. The citation by the chief justice to the *Bernhard* opinion for this is a clear connection to the Traynor court culture.

The chief justice also wrote in *Samara*, "We are reluctant to overrule precedent when '[d]oubtless many people' have entered into transactions in reliance upon that precedent." How that concern will be otherwise applied, however, needs to be considered in the context of the court's analyses in *Dynamex* decided eight weeks earlier, and *CashCall* decided seven weeks later. Though the court does reexamine previous conduct and holdings, what is decisive are its consideration of first principles and the "felt necessities of the times."

For the California Supreme Court, the last six months of decisions are a culmination, not an aberration. California legal culture is changing. The change will affect all areas of the law, all analysis of law risk, and all stages of litigation from early evaluation through trial and appellate argument. We need to understand the new culture, and bring to the task thoughtfulness, discipline, and a constant search for fairness, reason and justice.

Howard B. Miller *is a JAMS mediator and arbitrator. He is a past president of the State Bar of California and a former professor of law at the USC Gould School of Law. He began his career as law clerk to Justice Roger J. Traynor of the California Supreme Court. He can be reached at hmiller@jamsadr.com.*