



NEWMAYER & DILLION LLP  
ATTORNEYS AT LAW

# LEGAL BRIEFING

## Sarbanes-Oxley Act Whistle Blowing Rules Apply to Attorneys for Public Companies

by Marisa B. Iasenza

**R**ecently enacted federal legislation outlines the obligation of attorneys who represent publicly traded companies to report to management evidence of the company's "material violations" of federal and state securities laws and the manner in which the company must respond.

The legislation applies to attorneys, whether in-house or outside counsel, who represent a public company before the SEC. An attorney is "appearing and practicing" before the SEC if the attorney represents a company in connection with an SEC proceeding or prepares any statement or opinion which is submitted to the SEC.

The SEC has indicated that an objective standard of conduct is to be used in determining what constitutes evidence of a material violation. If credible evidence is uncovered which would cause a prudent and capable attorney to conclude that it is reasonably likely that the material violation has occurred, is ongoing, or is about to occur, the duty to report is triggered.

### Attorney's Obligations

The attorney must report the suspected violation to the chief legal counsel or chief executive officer. The CLC/CEO must then undertake an investigation of the alleged violation and determine what, if any, remedial actions must be taken and what necessary disclosures must be made. The CLC/CEO must then provide his or her conclusions to the reporting attorney. If the reporting attorney believes that he or she did not receive an appropriate response, then the attorney is required to report the violation directly to the public company's audit committee, another committee of independent directors, or to the full board of directors.

A proposed amendment to the statute dictates that if the attorney is not satisfied with the conclusions drawn or the steps taken to remedy the violation, the attorney has an obligation to disaffirm a document or filing in which a violation is ongoing or prospective. If the attorney is an outside counsel, he or she would also be required to withdraw from the client representation and notify the SEC of such withdrawal. This constitutes a "noisy withdrawal." However, many commentators believe that "noisy withdrawal" could amount to a violation of the attorney-client privilege as it may require the reporting attorney to disclose the public company's confidential information.

One step that a public company may take to protect itself from

the noisy withdrawal problem is to establish a "qualified legal compliance committee" comprised of at least one audit committee member and two independent board members. Instead of reporting a material violation "up the ladder," the reporting attorney may disclose the violation to the QLCC, which would then undertake the investigation and recommend a response. If the company fails to act as directed by the QLCC, then it would be the committee and not the reporting attorney that would have to notify the SEC of the violation, thereby preserving the attorney-client privilege.

Should you have any questions regarding this new law, please contact Timothy F. Silvestre or Marisa B. Iasenza of Newmeyer & Dillion LLP.

*Marisa B. Iasenza is a corporate securities associate at Newmeyer & Dillion LLP with over six years of experience in representing clients in mergers and acquisitions, securities law and general corporate matters.*



## Newmeyer & Dillion Expands Real Estate and Corporate Departments

**N**ewmeyer & Dillion LLP is pleased to announce the addition of two more highly qualified attorneys to our firm.

**Thomas L. Powell** has joined our real estate development practice. Tom has extensive experience in representing owners and developers in the creation of master planned communities, especially those involving golf courses. He specializes in mapping and processing of subdivisions, drafting of CC&R's and related documents, and dealing with regulatory agencies such as the Department of Real Estate. Tom's clients include The Irvine Company, Taylor Woodrow, Lennar Communities, California Pacific Homes and William Lyon Homes.

**Robert R. Burge** has joined the firm's corporate practice following seventeen years in the Orange County office of Paul, Hastings, Janofsky & Walker. Bob specializes in corporate and corporate tax matters, especially public and private financing and merger and acquisition transactions. He has served on the Executive Committees of the Los Angeles County Bar Business Law Section, the State Bar Corporation Section and State Bar Partnership Section. Bob was co-author of the Merger Chapter in the California Continuing Education of the Bar book on California corporations, and has lectured extensively to lawyers and business executives in the area of corporate finance and mergers.



## Trial Victories Update

**L**ast year, the firm was involved in two trials in which juries provided firm clients with multi-million dollar awards. Both awards have since been substantially enhanced by the trial judges in post-jury proceedings. In one case, a jury awarded \$1,000,000 in compensatory damages and \$25,000,000

in punitive damages in favor of our client and against a major insurance company. The trial court recently awarded that client an additional \$530,000 on defense reimbursement claims assigned to it by its direct insurers. In another case, the jury awarded our client \$10,600,000 on its claims against a city. This year, the trial court awarded the client an additional \$1,300,000 in attorneys fees and costs.

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# Supreme Court to Have the Final Word on the Fate of the California Coastal Commission

by Paul L. Starita

**A** California Appellate Court recently held that the California Coastal Commission is unconstitutional because the majority of its members could be removed by the Legislature in violation of the “separation of powers” doctrine. In response, the California Legislature quickly enacted legislation to fix the terms of the Commission members appointed by the legislature at four years, thereby presumably curing the constitutional problem. The California Supreme Court has now indicated that it will be the final arbiter of the fate of the California Coastal Commission. The Supreme Court has not only agreed to review the Appellate Court decision but has also asked for argument on the constitutionality of the hastily enacted legislation. An expedited decision is expected but no timetable has been set. (*Forests Society v. California Coastal Commission* (2002) 104 Cal.App.4<sup>th</sup> 1232 [128 Cal.Rptr.2d869], mod. 105 Cal.App.4<sup>th</sup> 773A.)

*Paul L. Starita joined Newmeyer & Dillion LLP after eight years of practice as a Judge Advocate and Regional Environmental Counsel for the U.S. Marine Corps. Mr. Starita has extensive experience in environmental, land use, and criminal law matters.*

# U.S. Supreme Court Severely Limits Punitive Damage Awards

by Gregory L. Dillion

In no less than five cases over the last ten years, the U.S. Supreme Court has limited the size of a punitive damage award. In *State Farm Mutual Insurance Company v. Campbell*, 122 S.Ct. 2326, 153 L.Ed.2d 158, (2002), the U.S. Supreme Court addressed the issue of whether a \$145 million punitive damage award entered by the Utah Supreme Court against an insurer is an excessive amount, such that it violates the Due Process Clause of the 14th Amendment of the U.S. Constitution.

The *Campbell* case arose out of a 1981 automobile accident involving Curtis Campbell, a State Farm insured. Campbell foolishly attempted to pass six vans traveling in front of him, killing one person and severely injuring another. A lawsuit commenced. Representatives of the injured parties offered to settle with Campbell for the limits on his insurance policy, however, State Farm refused to settle. The case went to trial and an adverse judgment in excess of his insurance policy limits was entered against Campbell. State Farm initially refused to pay the excess judgment.

Campbell instituted a bad faith action against State Farm. The bad faith case resulted in a jury verdict of \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million respectively. The Utah Supreme Court affirmed the \$1 million compensatory damage award and reinstated the \$145 million punitive damage award, holding that the punitive damage jury award was not constitutionally excessive.

The Supreme Court disagreed and reversed. Looking to statutory civil and criminal penalties for guidance, the Court held that the 14<sup>th</sup> Amendment may prohibit punitive awards more than nine times a compensatory award. More specifically, it suggested that the punitive award in a large damage case (e.g. a million dollars) should not exceed one times the compensatory award. Similarly, it suggested that the punitive award in a small damage case (e.g. \$40,000) should not exceed four times the compensatory award. It remains to be seen whether state court jurors, trial judges and appellate courts will follow these suggestions.

*Gregory L. Dillion is a founding partner of Newmeyer & Dillion LLP and has extensive experience in general business, lender liability, construction, and insurance coverage disputes.*

## About Newmeyer & Dillion LLP

Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

### Litigation

- *Business*
  - Unfair Competition/Trade Secret
  - Business & Profession Code § 17200
  - Partnership Dissolution
  - Lender Liability
  - General Business Disputes
- *Real Estate*
  - Construction
  - Real Estate Finance
  - Environmental Warranty
  - Title
- *Labor*
  - Wrongful Termination
  - Employment Discrimination
  - Sexual Harassment
- *Insurance*
  - First and Third Party Coverage
  - First and Third Party Bad Faith
- *Products Liability*
- *Appellate Practice*
- *Eminent Domain/Insurance Condemnation*

### Real Estate Transactions

- Acquisition, Development, Option, Sale and Lease of Real Property (Residential, Retail, Multifamily, Office, Industrial, Agricultural)
- 1031 Like-Kind Exchanges
- Master Planned Community Developments and Community Associations
- Department of Real Estate and Other Regulatory Filings
- Construction Related Matters
- Military Base Reuse

### Business Arrangements

- Formation, Structuring, Maintenance and Evaluation of Business Entities (Corporations, Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Ventures)
- Shareholder, Partnership and Stock Option Plan Agreements
- Purchase and Sale of Businesses
- Business Dissolutions
- Employment and Independent Contractor Matters
- Licensing and Franchising Arrangements

### Corporate Finance, Securities and Mergers & Acquisitions

- Venture Capital Financings
- Mergers, Acquisitions, and Leveraged Buyouts
- Public and Private Securities Offerings
- Federal Securities Law

### Lending & Finance

- Documentation of Real Estate, Personal Property and Unsecured Loans
- Coordination of Loan Transactions for Borrowers

### Land Use/Environmental

- Development Agreements
- Mitigation Agreements
- Subdivision Map Act
- Clean Air Act Issues
- Coastal Zone Management
- CEQA and NEPA
- Initiatives and Referendums
- Municipal Incorporations and Annexations