



## OVERTIME PAY UPDATE

Under the federal Fair Labor Standards Act (FLSA), employers must pay an employee an overtime rate of at least one and one half times the regular pay rate for any hours in excess of 40 hours a week. There are exemptions from this requirement for several types of employees, including employees in executive, administrative, or professional capacities.

Two recent decisions by federal appellate courts illustrate the fine distinctions that are sometimes made between employees who are deemed entitled to overtime and those who are not because they are employed in an "administrative" capacity.

Under the FLSA and its regulations, an employee earning at least a threshold amount per week is an administrative employee if his or her primary duties consist of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer or the employer's customers and if the work requires the exercise of discretion and independent judgment.

### Insurance Adjusters Exempt

In the first case, the primary duty of an insurance company's automobile damage adjusters consisted of the assessment, negotiation, and settlement of automobile damage claims, making the adjusters exempt from the FLSA overtime pay provision. The fact that the adjusters engaged in total loss negotiations 20 times per year demonstrated that their duty included the exercise of discretion and independent judgment.

The adjusters also worked in the absence of immediate supervision the majority of the time and made decisions that were reviewed only after the estimate had been written and the claim had been paid. They had full authority to settle claims within their limits of \$10,000 or \$15,000, as long as they could justify their decision on the facts of each claim, thereby binding their employer financially.

### Saleswoman Entitled to OT

By contrast, in the second case, an advertising saleswoman for a magazine publisher, who was also compensated weekly above the threshold amount, was not an "administrative employee" for the purposes of the FLSA, and thus was entitled to overtime pay.

The employer pointed out that the employee's responsibilities included developing new clients, with the goal of increasing sales generally, and that this task concerned general management and business operations. That was true as far as it went, but the fact remained that the employee's primary duty, meaning the duty that consumed a major part, or over 50%, of her time, was simply to sell specific advertising space to clients. Since, in the court's view, the employee was "plainly a salesperson," she had to receive overtime pay whenever it was earned. ■

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Hutchison & Steffen Accomplishments



Patricia Lee Appointed to Chair Governor's Crime Commission



Overtime Pay Update

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# Legal Matters

Fall 2010

## HUTCHISON & STEFFEN LAUNCHES MULTIPLE FIRM BLOGS

Hutchison & Steffen has launched four new blogs. "These blogs are part of our effort to educate and communicate with our clients and other interested parties," explained Mark Connot, a partner of the Firm.



### FIRM BLOG:

Provides an overview of Firm news, activities, attorney updates, and a listing of upcoming events. Visit: <http://hutchlegal.blogspot.com>.

### SMALL BUSINESS LEGAL SOLUTIONS BLOG:

Overviews Hutchison & Steffen's commitment to serving the unique legal needs of small business owners. Visit: <http://hutchlegalsmallbusiness.blogspot.com>.

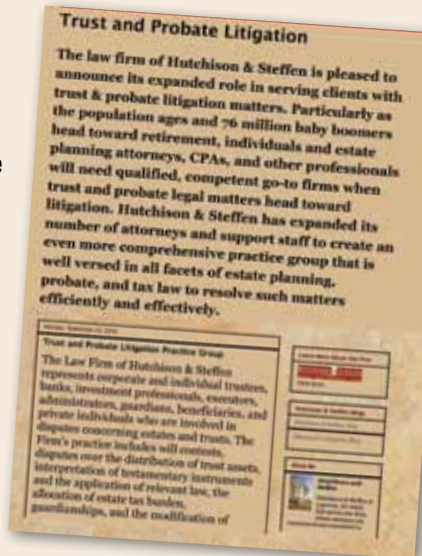
### TRUST & PROBATE

#### LITIGATION BLOG:

Outlines the Firm's commitment to providing litigation services and support for trust and probate disputes. Visit: <http://hutchlegaltrustprobatelit.blogspot.com>.

### HEALTHCARE LITIGATION BLOG:

Provides updates and information regarding the Firm's representation of the State of Nevada in the lawsuit involving 20 states challenging the constitutionality of the health care legislation known as Obamacare. Visit: <http://obamacarelitigation.blogspot.com>.



## HUTCHISON & STEFFEN ACCOMPLISHMENTS

### Hutchison & Steffen Attorney Erin Lee Truman Appointed Pro Tempore Judge For Nevada Eighth Judicial Court

Hutchison & Steffen attorney Erin Lee Truman has been appointed to the Nevada panel of pro tempore judges and will preside over cases in the Short Trial Program in the Eighth Judicial District Court. She was recently sworn in by the Honorable Tim Williams.



Truman is of counsel at Hutchison & Steffen, and is a seasoned trial lawyer. She heads the Firm's Alternative Dispute Resolution Department, which includes both mediation and arbitration. She recently attended the 2010 Dispute Resolution Summer Institute at the Saltman Center for Conflict Resolution at the William S. Boyd School of Law. Truman earned a bachelor's of science degree in accounting from Brigham Young University and her J.D. degree from its J. Reuben Clark Law School. ■

### Hutchison & Steffen Partner Joseph Ganley Addresses Legal-Fees Issues at the Nevada Judicial Conference



Hutchison & Steffen partner Joseph R. Ganley was appointed as a faculty member for the annual Nevada Judicial Conference in Mesquite, Nevada.

Ganley co-presented a seminar on Nevada law concerning attorneys' fees. The conference is held exclusively for Nevada judges and Nevada Supreme Court justices. Ganley's presentation addressed, among other things, how the Nevada judiciary determines when an award of attorneys' fees is appropriate and the factors considered in determining the amount of such an award.

"We tried to make the presentation as comprehensive as possible," Ganley commented. "Motions for fees and costs are ubiquitous at the district court level and throughout the state, so it is a keen topic for the judges. There are actually quite a few esoteric aspects of Nevada law on attorneys' fees, so there was a lot of ground to cover. I was honored to address this elite audience."

Ganley is well qualified to speak on the topic. He is a senior litigation partner at Hutchison & Steffen, and a Martindale-Hubbell® AV-rated attorney. He practices in virtually every aspect of business and commercial litigation, including real estate, construction, employment, intellectual property, insurance, casino markers, reverse mergers, healthcare, probate, corporate and transactional, mechanic's lien, and contract litigation. As a litigator, he has achieved significant victories in a variety of legal matters. Ganley earned his undergraduate degree at Middlebury College and is a graduate of Boston University School of Law. ■

### Hutchison & Steffen Partner Michael Wall Presents Argument Before U.S. Ninth Circuit Court of Appeals

Hutchison & Steffen partner Michael K. Wall appeared before the U.S. Ninth Circuit Court of Appeals to argue a case with important implications for Medicare law. The case was heard in San Francisco in October.



"It's very significant that the court decided to hear arguments in the appeal of this case," comments Wall. "I enjoyed the opportunity to advance our client's case at this important appellate level."

At Hutchison & Steffen, Wall heads the Firm's Appellate Law Department. He practices primarily in the areas of business and commercial litigation, appellate law, landlord/tenant law, and

insurance law. He earned his law degree at the University of Utah in 1981, graduating magna cum laude and in the top 15% of his class. He then served as a staff attorney to the Nevada Supreme Court, and was promoted to supervising staff attorney. While at the Court, Wall served as Chairman of the Committee on the Intermediate Appellate Court, and as a member of various other Supreme Court Committees. He has participated as a lecturer and panel member in CLE seminars, and has spoken before numerous groups on the subject of appellate practice. ■

### Hutchison & Steffen Partner James Randall Prevails in Negligence Trial

Hutchison & Steffen partner James H. Randall recently won a defense jury verdict in a negligence case involving his client, a large apartment complex. The jury deliberated for only one hour before returning a no-liability decision in favor of the client. The plaintiff had alleged that faulty maintenance of a balcony railing was responsible for severe injuries he sustained in a fall from the second floor of the apartment complex.



"We are committed to providing our clients with rigorous and thorough legal representation, which is critical in negligence and liability matters," commented Randall. "I am pleased that the jury returned a favorable verdict." ■

## SCULPTOR SLAYS GOVERNMENT GOLIATH

Some 20 years ago, a World War II veteran and prominent sculptor won a government competition to sculpt a memorial to Korean War veterans in Washington, D.C. His creation depicts a platoon of stainless steel, larger than life foot soldiers arranged in what has come to be called "The Column." Five years later, another veteran, an amateur photographer, took photographs of the memorial. One of these photographs eventually was used by the federal government on a widely distributed postage stamp, for which the government paid the photographer \$1,500.

As for the sculptor, he had not been informed of the stamp in advance, nor had anyone sought his permission for it or paid him anything for it. He sued the government for copyright infringement. Certainly, there were principles at stake, but there was also potentially a lot of money in play. The Postal Service received more than \$17 million from sales of the stamp, not to mention additional income from the use of the stamp on retail goods such as commemorative panels and framed art. The sculptor wanted a share of that money.

At a trial before the Court of Federal Claims, the court determined that the sculptor was the sole copyright owner of "The Column," rather than a joint owner with the government, and that "The Column" did not qualify for an exclusion from copyright infringement liability as an architectural work under the Architectural Works Copyright Protection Act. However, the court also determined that the government was not liable for copyright infringement because the government's use of "The Column" was a fair use. The fair use doctrine requires courts to avoid rigid application of the copyright statute when it would stifle the very creativity that the law is designed to foster.

On appeal, a federal appellate court reversed on the pivotal issue of fair use, and sent the case back to the court below for consideration of the sculptor's damages. The Postal Service's stamp containing an image of the soldier sculptures did not "transform" the character of the sculptures so as to support a finding of fair use under established copyright law. Rather, both the stamp and the sculptures shared the common purpose of honoring veterans of the Korean War.

While the stamp altered the appearance of the sculptures by adding snow and muting the color, those alterations did not impart a different character to the work. In addition, although the stamp did not harm the market for derivative works, which is another consideration in fair use analysis, the appellate court concluded that allowing the government to commercially exploit a creative and expressive work would not have advanced the purposes of copyright in this particular case. ■



## HUTCHISON & STEFFEN PARTNER PATRICIA LEE APPOINTED TO CHAIR GOVERNOR'S CRIME COMMISSION

Nevada Governor Jim Gibbons appointed Hutchison & Steffen partner Patricia Lee as the Chair of the newly formed Nevada Crime Commission. Gibbons established the Commission to examine existing and emerging crime problems statewide and to seek innovative methods and solutions to combat those crimes. The Commission will act as an advisory body to the Governor. It will also promote communication among law enforcement agencies to formulate solutions to crime problems and bring together community and government leadership to research, evaluate, develop, and recommend ways to build public awareness of the impact of crime on our communities.

"I am honored to be appointed to the Governor's Crime Commission," comments Lee. "The level of talent and experience that Governor Gibbons has assembled is impressive. I share his belief that a comprehensive and multi-disciplinary approach to the problems of crime in our communities is most effective, and I'm looking forward to making a contribution."

Lee's background makes her uniquely qualified to serve as a community representative and to chair the Commission. As

an undergraduate student at the University of Southern California, she received several awards for community involvement, including the Thurgood Marshall Leadership Award. After graduation, Lee worked for the California Science Center in Los Angeles and helped to establish the Rosa Parks Community Computer and Learning Center for inner city youth. She attended law school at George Washington University in Washington, D.C., where she continued her involvement in the community. Lee was elected the community service director for the Student Bar Association and served as the student director of the Small Business Clinic, which provided her valuable experience assisting small businesses with their legal needs in economically distressed communities. Currently, she serves as a volunteer attorney for the Clark County Child Advocacy Program. Throughout her professional career, she has received numerous awards for her pro bono contributions.

Lee joined Hutchison & Steffen in 2002 and became its first female partner in 2009. She practices primarily in the areas of business and commercial litigation, trademark registration/litigation, medical billing and collections, and liens and foreclosures. ■

*Actual resolution of legal issues depends upon many factors, including variations of fact and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking any action on matters covered by this newsletter. Nothing herein should be construed to create or offer the existence of an attorney-client relationship.*