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Five LGC Partners Selected to the *Super Lawyers* List

LGC is pleased to announce that five of its partners, [Tom Lincoln](#), [Ted Cercos](#), [Katie Brach](#), [Jordan Nager](#), and [Rich Reese](#), were all included in Super Lawyers' 2020 list of top San Diego lawyers.

Super Lawyers selects the top lawyers throughout the country. All nominees then go through a vetting process by Super Lawyers staff, who use 12 indicators of peer recognition and professional achievement, including awards, honors, verdicts, and experience. Nominees are also

evaluated and rated by other attorneys in their particular practice areas. Nominees with the highest point totals from each category are selected for inclusion in the Super Lawyers list. Only 5% of lawyers in any given state are selected.

Tom Lincoln and Ted Cercos were both selected to this year's list of top civil litigation attorneys in San Diego. This is the thirteenth straight year Tom has been selected, and the fourth straight year Ted has been selected.

Katie Brach, Jordan Nager, and Rich Reese meanwhile, were selected by Super Lawyers to its list of Rising Stars. The annual Rising Stars list is a distinction given to the top 2.5% of lawyers under 40 years old. Honorees are selected through the same Super Lawyers selection process, including peer nominations, evaluation, and peer review by a panel of lawyers.

Tom, Ted, Katie, Jordan, and Rich are all partners in LGC's San Diego office. LGC congratulates them for being honored.

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LGC Wins Motion for Summary Judgment

Partner [Loren Young](#) and associate [Brittini Bailus](#) recently prevailed on a Motion for Summary Judgment on behalf of their client Aria Resort & Casino. In *Alan Britz v. Aria Resort & Casino, LLC*, the plaintiff claimed to sustain injuries when falling in a guest room shower. At deposition, Ms. Bailus was able to confirm that the plaintiff did not remember the fall and could not explain what might have caused it. The plaintiff argued that the shower floor itself was a hazardous condition. He conducted testing of the shower floor, but was unable to present any admissible evidence that it was unreasonably slippery.

In Nevada, a plaintiff must prove not only that a dangerous condition existed, but that a defendant knew about the dangerous condition. LGC moved for Summary Judgment, arguing that Aria provided the plaintiff with a safe shower and there were no genuine issues of material fact in dispute. The court granted LGC's motion, marking LGC's third recent Summary Judgment victory in a slip-and-fall case. Congratulations to Loren and Brittini on their victory.



LGC Prevails on Motion to Dismiss

Partner [Shannon Splaine](#) and associate [Brittini Bailus](#) recently prevailed on a Motion to Dismiss on behalf of their client Las Vegas Arena Management, LLC in *Gregory Hilty v. Black Knights Sports Entertainment, LLC, et al.* The plaintiff, an off-ice referee for the NHL, alleged that he sustained personal injuries after falling while working an exhibition game at the T-Mobile Arena in Las Vegas.

NRCP 16.1(e)(2) requires a plaintiff to file and serve a Joint Case Conference Report (JCCR) 30 days after the Early Case Conference, or within 240 days after service of an

answer by a defendant. After LGC's client granted the plaintiff an extension, the plaintiff still failed to timely file the JCCR or produce the required initial disclosures.

LGC moved for a dismissal based on the plaintiff's failure to comply with the Nevada Rules of Civil Procedure. In his opposition, the plaintiff argued that his attorney was suspended from the practice of law for six months, and the applicable deadlines should therefore have been tolled. However, the Discovery Commissioner agreed with LGC that an attorney suspension does not stay or toll the 240-day deadline to file the JCCR and initial

disclosures. The Court also agreed with LGC's argument that the plaintiff's failure to follow the Nevada Rules of Civil Procedure should result in dismissal.

After the Discovery Commissioner issued his report, Ms. Splaine and Ms. Bailus continued to defend the ruling against the plaintiff's subsequent objections and Motion for Reconsideration. In the end, they were successful in getting the plaintiff's complaint against their client dismissed with prejudice. Congratulations to Shannon and Brittini on the win.

Estate Planning During the COVID-19 Pandemic

The reality of COVID-19 has forced many individuals to address many "what-if" scenarios that were previously unthinkable. Thus, many are turning to estate planning, and rightfully so, to provide some comfort in these uncertain times. With stay-at-home orders and strict social distancing mandates, though, many are wondering how to get their estate planning needs met.

Why Have An Estate Plan?

If you do not have an estate plan, state inheritance laws will determine who receives your property. Those laws may not distribute your property to the individuals to whom you wish it to go. Additionally, without an estate plan and revocable living trust, your estate may be subject to probate, which will cause your heirs to incur additional legal fees, which could have otherwise been avoided. Probate is the legal process which

involves the institution of a proceeding in court in order to transfer the property of a deceased person to that person's heirs.

COVID-19 Challenges

The current challenge, however, can be getting your estate planning documents properly executed during the pandemic. In California, these important documents require adult (18 or older) witnesses and notarization, a procedure that generally must take place in person and with signatures in front of a notary to be valid.

Some states already offered remote online notarization of documents. Others have made their laws more flexible during the pandemic to allow online notarizations and witnesses. For example, online notarizations are allowed in Arizona and Nevada as long as specific procedural

requirements are met. Although the issue is currently being considered by lawmakers, California does not yet allow remote online notarization.

There have been proposals for clients to use out-of-state online notaries to execute their documents, but this is not recommended. Civil Code section 1189(b) provides that "any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the law of the place where the acknowledgment is made." Although the certificate of acknowledgement itself may be valid, applicable law generally requires original signatures on documents submitted for recording. (Gov't Code 27201, subd. (b).) Documents notarized remotely by out-of-state notaries will not contain original signatures. (Continued on Page 3.)

Estate Planning During the COVID-19 Pandemic

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Thus, except under limited circumstances outside of the trusts and estates context, county Recorders' Offices do not currently possess the authority to record documents notarized by remote notaries in other states. Therefore, Californians who utilize the services of remote Notaries in other states to obtain notarization of estate planning documents (such as trust instruments, powers of attorney and advance health care directives) will find that they are largely unable to record the notarized documents.

There are potential solutions however. We are preparing, finalizing and executing estate plans during the pandemic by using procedures that were already in place and new social distancing protocols in compliance with CDC guidelines. We will look at each individual client's situation and find the safest most effective way to ensure that they can complete their estate plan.

It starts with a remote estate consultation. This can be over the phone or via videoconferencing. The estate plan and drafts for signature can be completed through this remote process. When the client is ready to

sign the documents there are still many safe options available. Our office is open for in-person signing of documents. We also have a notary on staff who can notarize documents in a manner that follows CDC guidelines. Some banks and financial services offices offer in person notaries with social distancing guidelines in place as well.

Especially in these uncertain times, it is important to ensure that your estate plan is in order. For more information about these, or any other estate planning issues, contact [Darcie Colihan](#) in LGC's San Diego office.

Appellate Court Clarifies Limitations on Pay-When-Paid Clauses in Construction Contracts

A recent decision by California's Fourth District Court of Appeal clarified the limitations on "pay-when-paid" clauses in construction subcontracts. Pay-when-paid clauses state that a general contractor will pay a subcontractor when the general contractor receives payment from the project owner. Such clauses can lead to disputes between subcontractors and general contractors or their payment bond sureties when an owner fails to pay the general contractor.

In [Crosno Construction, Inc. v. Travelers Casualty and Surety Company of America](#), a water district hired a general contractor for a public works project. The general contractor then hired a subcontractor to perform work on the project. The subcontract contained a pay-when-paid provision that stated the general contractor

would pay the subcontractor within a reasonable time of receiving payments from the water district, but that this reasonable time "in no event shall be less than the time Contractor and Subcontractor require to pursue to conclusion their legal remedies against Owner or other responsible party to obtain payment." After the subcontractor completed most of its work, a dispute arose between the water district and the general contractor, halting the project. As the general contractor sued the water district, the subcontractor sued the payment bond surety to recover money the general contractor owed to the subcontractor.

The court concluded the "pay-when-paid" provision was unenforceable because it did not legitimately provide for payment to the

subcontractor within a reasonable time. Instead, it postponed payment to an undefined point in time when the general contractor's litigation with the water district concluded. The clause therefore infringed upon the subcontractors unconditional right to payment within a reasonable time.

The *Crosno* decision represents a major win for subcontractors seeking timely payment from general contractors. It was reached in the context of a lawsuit by the subcontractor against the surety, but the ruling arguably applies to subcontractors' enforcement of payment obligations against general contractors as well.

For more information about the issue addressed in this article, contact [Rich Reese](#) in LGC's San Diego office.

Appellate Court Contradicts *Branches* Holding

In August of 2018, California's Fourth appellate district published [*Branches Neighborhood Corp. v. CalAtlantic Group, Inc.*](#) In that decision, the Court held that a condominium home owners association (HOA) could not unilaterally pursue claims against the developer of the condominium if the HOA's governing documents required member approval prior to filing suit. Pursuant to *Branches*, an HOA's claims against a developer could be summarily adjudicated if prior consent was not obtained from the HOA members, *even when the HOA members retroactively consented to the lawsuit after the filing of the action.*

However, the California legislature subsequently enacted Senate Bill No. 326 which took effect on January 1, 2020. The Bill added Civil Code Section 5986, subdivision (b) as part

of the Davis-Stirling Act. Section 5986(b) mandates that the governing documents shall not impose any preconditions on an HOA board's authority to commence and pursue a lawsuit. Under the new law, any such preconditions or similar restrictions on the board's authority to file a lawsuit are null and void. Therefore, Civil Code Section 5986 arguably conflicts with the *Branches* decision.

California's Second District Court of Appeal recently published a decision that is critical of the *Branches* ruling, particularly in light of Civil Code Section 5986. In [*Aldea Dos Vientos v. CalAtlantic Group, Inc.*](#), the court expressly rejected the holding in *Branches*, citing to Section 5986(b) as evidence of a legislative determination that such restrictions in governing documents are unconscionable. The Court reasoned that the subject restriction, although

apparently designed to benefit members of the HOA, in effect primarily benefited the developers by amounting "to a trap for the unwary set by the Developer to bar claims against it."

While *Branches* has not been officially overturned, the tide appears to have turned in favor of the conflicting holding in *Aldea Dos Vientos* since the codification of Section 5986(b). As a result, the courts are likely to decline to dismiss HOA lawsuits on the grounds that member approval was not obtained prior to filing, even where the governing documents include such a restriction.

For more information about the issue addressed in this article, contact [Alex Getman](#) in LGC's San Diego office.

LGC Welcomes Its Newest California Associate

LGC is proud to welcome Alexander Getman as the newest associate in LGC's San Diego office. Alex received his J.D., *cum laude*, from the University of San Diego School of Law in 2019. During law school, he was a member of the *San Diego Law Review*, and completed externships with District Court Judge Sammartino and the Civil Division of the U.S. Attorney's Office. He also competed in USD's first year Mock Trial competition, where his team achieved first place.

Prior to law school, Alex received his B.A. in Political Science from California State University, Channel Islands in 2014. While at Channel Islands, he was a member of the student body lobbying organization and competed in CSUCI's Speech and Debate Tournament, earning first place and the Outstanding Speaker Award.

At LGC, Alex's practice will focus on civil litigation, including construction defect and personal injury matters. Founded over 32 years ago, LGC has offices in California, Nevada, and Arizona. LGC now has 26 attorneys in its three offices, supporting a diverse practice.

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