

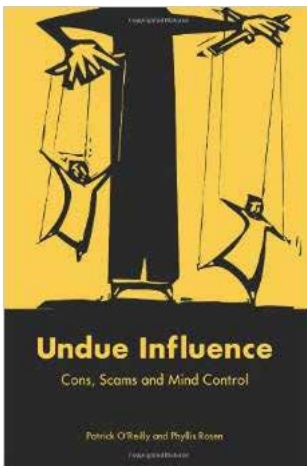


# The Marin Lawyer

An Official Publication of the Marin County Bar Association

## JULY MEMBERS LUNCH

**WED, JULY 22** | 12:00 – 1:30 pm  
 San Rafael Joe's  
 \$40, MCBA members / \$45, nonmembers  
[Details & Registration](#)



## Undue Influence in Criminal Law

Co-sponsored by MCBA Criminal Law Section  
 Speaker: Dr. Patrick O'Reilly

Commonwealth Club speaker and co-author of *Undue Influence: Cons, Scams and Mind Control*, Dr. Patrick O'Reilly has presented to sold-out audiences and is a frequent speaker to numerous County Bar Associations, the California Appellate Project, and Federal Defender Office. He will speak about undue influence in criminal law. *1 credit, General CLE*

**Dr. Patrick O'Reilly** is an Assistant Clinical Professor of Psychiatry at UCSF and an associate member of California Attorneys for Criminal Justice. He has testified in capital cases and has served as expert witness in jury trials on undue influence.

## MCBA AFTER-WORK MIXER

**WED, JULY 29** | 6:00 – 8:00 pm  
 Elks Lodge, Downtown San Rafael  
 \$25, MCBA members / \$35, nonmembers  
[Details & Registration](#)



## First Annual MCBA & CalCPA Summer Mixer

Join your MCBA colleagues and meet members of CalCPA and the banking community over wine and appetizers on the beautiful Magnolia Terrace of the Elks Lodge. Mingle, connect, and renew friendships under an exquisite summer canopy.

**CalCPA** has over 750 members in Marin and Sonoma.

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## Calendar of Events

**Wednesday, July 15: 12–1:00 pm**  
 Probate & Estate Planning Section Meeting

**Thursday, July 16, 12:00-1:30 pm**  
 Construction Law Section

**Tuesday, July 21: 12-1:30 pm**  
 Labor & Employment Section Brown Bag Lunch Meeting

**Tuesday, July 21: 12:00-1:30 PM**  
 Probate & Estate Planning Section Mentor's Meeting

**JULY MEMBERS MEETING**  
 Wednesday, July 22: 12-1:30 pm  
 Undue Influence in Criminal Law  
 Speaker: Dr. Patrick O'Reilly

**MCBA AFTER-WORK MIXER**  
**Wednesday, July 29: 6:00-8:00 pm**  
 First Annual MCBA & CalCPA Summer Mixer

**Wednesday, August 19: 12–1:30 pm**  
 Probate & Estate Planning Section Meeting

*See page 14 for details & more events.*



## Contractor’s License – Obtain or Refrain

By Scott D. Rogers © 2015

To protect the public from unscrupulous or unskilled contractors, every person or entity acting as a contractor in California must be properly licensed throughout the term of the project pursuant to Contractors’ State License Law (CSLL). (*Business & Professions Code*, Section 7000 et seq.) Under the CSLL, protection of the public is of the “highest priority” and “shall be paramount.” Accordingly, the CSLL is strictly enforced.

The consequences for failing to comply with the CSLL are deliberately harsh to motivate compliance. Among other things, an unlicensed contractor is subject to both civil and criminal penalties (including both fines and imprisonment), does not enjoy any lien rights, is not entitled to collect any compensation, and may be liable for disgorgement of all sums paid for unlicensed work.

In any action by the contractor relating to the project or any other action where the existence of the contractor’s license is contested, the burden of proof is on the contractor to demonstrate proper licensure throughout the term of the project. The requirement that the contractor be licensed cannot be waived by the owner. The fact that the owner knew that the contractor was unlicensed will not create an estoppel for the contractor’s benefit.

While the above framework is generally clear and widely known, more ambiguous and less broadly understood is what constitutes contracting within the meaning of the CSLL. The licensing requirement applies not only to formal agreements, but governs any act or contract for which a license is required. It applies whether or not a party is operating under an executed contract when performing tasks that require licensure.

The term “contractor” is broadly defined to include any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct any building, project, development or improvement, or to do any part thereof. The California courts have long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract, as otherwise the requirement that general contractors be licensed would be easily avoided and completely superfluous.

Under the CSLL, however, a “construction manager” need not be licensed for private works of improvement. Thus, the distinction between “contractor” and “construc-

tion manager” is of critical importance. The challenge is that few arrangements between an owner and a third party with respect to private construction will pass scrutiny as construction management rather than contracting.

The leading case on this distinction is *The Fifth Day, LLC v. Bolotin* (2009) 172 Cal.App.4th 939 (Fifth Day). In *Fifth Day*, a payment dispute arose between the owner and the construction manager. The owner asserted that the construction manager was required to be licensed under the CSLL, did not possess a valid license and thus was barred from seeking compensation. The court rejected the owner’s defense to payment finding that the construction manager’s contract and activities did not fall within the definition of contracting within the CSLL. Of critical importance were the following facts:

- The owner entered into a construction contract with a third party, which was a licensed contractor.
- The third party licensed contractor in turn hired and supervised all of the subcontractors working on the project.

While the construction manager coordinated work, maintained project financial records, and acted as the on-site point person/agent for the owner, the construction manager did no actual construction work and had no responsibility or authority to perform any construction work or to enter into any contract for construction work.

(Continued on page 8)



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*(Crisis, continued from page 6)*

During the initial crisis triage period the attorney should identify what arenas the situation will involve. Does the client have a professional license at stake requiring a referral to a professional licensing specialist? Is this a case that will be litigated in the court of public opinion in addition to criminal or civil court? Most importantly, the goal of representation must be identified at this early stage because in a multifaceted crisis best advice for one arena might cause problems in a competing arena. For instance if you represent a lawyer, nurse, pilot, or other licensed professional their primary goal might be to preserve their ability to earn a living and preserve that license. Identifying your true goal early in the case will help you avoid focusing on collateral issues or taking steps to win in an arena of lesser importance that will ultimately damage your chance of reaching the primary goal.

Once the primary goal of representation is identified, the attorney must be prepared to quickly take control of the situation. If multiple attorneys or individuals are involved in the representation, the attorney must be prepared to be a leader and take charge. This means delegating tasks to the experts in each arena but retaining ultimate control of strategy and the course of the case. If media issues are involved, the attorney must identify one point of contact who is the only person authorized to speak to the press. If that point of contact is someone other than the lead attorney, all statements should be in writing and approved by the lead before they are disseminated.

The key to effectively managing a legal crisis is identifying the resources necessary to address each arena, taking control, and applying the resources to the situation. Once triage is done, the attorney can focus on getting their client the best possible result.

*Charlie Dresow is a partner at Raghianti Freitas LLP. His practice focuses on representing those accused of crimes.*

*(Contractor's License, continued from page 7)*

In short, the construction manager in Fifth Day was not in control of the methods and means of any part of the construction. As a consequence, licensing under the CSLL was not required.

Contrast the situation in Fifth Day to a case currently being handled by the author. In this case, the ostensible "construction manager" was unlicensed when the private construction project began pursuant to an oral agreement with the owner. Part way through the project, the "construction manager" obtained its license under the CSLL. The "construction manager," among other things, contracted in its own name with the numerous trades and suppliers for the project, participated materially in the project design by both hiring and directing the architect, directed changes in the field, and wrote checks on the owner's construction account to the trades and suppliers. When the "construction manager" sued for payment of its fee for services, the owner sought to avoid payment and for disgorgement of the total cost of constructing the project alleging a lack of proper licensure.

While the final outcome remains unknown, it certainly seems clear that the ostensible "construction manager" was in control of the methods and means of construction and was thereby acting as a contractor within the meaning of the CSLL. Perhaps the most interesting nuance of this case is whether disgorgement applies to the amount paid by the "construction manager" to the trades and suppliers in discharge of the "construction manager's" contractual obligations. If disgorgement is not required in these circumstances, it would seem that any unlicensed contractor could readily avoid the disgorgement penalty (which is the greatest motivator of compliance with the CSLL) by simply being a co-signatory on the owner's construction account or having the owner pay all of the trades and suppliers directly.

The bottom line: the licensure requirement of the CSLL should be taken very seriously. Any arrangement with an owner that gives a third party control over the methods and means of construction is very likely to be construed as "contracting" within the scope of the CSLL. As the downside of non-compliance is so severe, all doubt should be resolved in favor of obtaining and maintaining the appropriate license under the CSLL.

*Scott Rogers is a partner in the Palo Alto office of Rutan & Tucker, LLP where he specializes in real estate finance, equity and lease transactions, title insurance and real estate litigation. He is the former Chair of the Real Property Section of the State Bar of California. Scott obtained both a J.D. and M.B.A. from UCLA.*

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