


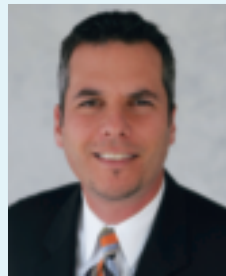
At Issue

A STONE, ROSENBLATT & CHA PUBLICATION

Spring 2009

Six SRC Lawyers Earn Super Lawyers Recognition

We are pleased to announce that Ira Rosenblatt, Greg Stone, John Cha, Adam Soibelman, Gregg Garfinkel and Kristi Dean were recently named Southern California Super Lawyers. Super Lawyers is a joint project of Law & Politics and the publishers of Los Angeles Magazine. Super Lawyers are nominated by members of the bar and selected by a blue ribbon panel after applying a multi-step process including careful scrutiny of each nominee's credentials, practice areas, and capabilities. **Although less than five percent of admitted lawyers are selected for this honor, Stone, Rosenblatt & Cha is proud to have 6 attorneys named Southern California Super Lawyers.** 



Living in a Digital World – The Challenge of Electronically Stored Information in Litigation



By Kristi W. Dean, Esq.

The rapid and permanent change from an analog world to a digital world has had a far reaching impact and there is no question that it has changed the way we communicate and operate our businesses. Emails have replaced the telephone, postal service, and private conversations. UC Berkeley School of Information Management and Systems conducted a study of the digital world and measured the growth of electronically stored information ("ESI"). The report estimated that each person creates about

800 megabytes of data per year, which is the equivalent of 40,000 typed pages of information. A survey by Osterman Research revealed that email users spend two to three hours per day using email and in 2006, over 171 billion emails were sent daily worldwide. The amount of ESI is expected to grow 30% per year.

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Legally Speaking



By Ira H. Rosenblatt, Esq.

Ira Rosenblatt authors a recurring column called "Legally Speaking," which regularly appears in the San Fernando Valley Business Journal.

Q: How do you recommend we, as a company, determine if we should trademark our name?

A: A simple yet effective process is for the executive team to ask themselves, "Do we want to be able to stop another competing business from using our name or something confusingly similar?" If the answer is "yes," you want to obtain a registered trademark. A trademark is a limited monopoly in the right to use a word, phrase, or logo in connection with particular goods or services. Although you will develop common law rights to your business name by virtue of using it in the marketplace (even if you never register it), if you want *nationwide* protection, and for other good reasons (some of which I touch on below), you will want to register your trademark with the USPTO.

Federal registration provides benefits, both strategic and legal, beyond those afforded common law owners, such as putting the public on notice of the registrant's claim of ownership of the mark; creating a legal presumption of the registrant's ownership of the mark and the registrant's exclusive right to use the mark nationwide on or in connection with the goods and/or services listed in the registration; allowing registrants the right to bring an action concerning the mark in federal court; providing a basis to obtain registration in foreign countries; and the ability to file the U.S. registration with the U.S.

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"At Issue" is the newsletter of Stone, Rosenblatt & Cha, A Professional Law Corporation. "At Issue," which is published quarterly, is designed to keep our clients, colleagues, and friends apprised of recent decisions and legal trends which affect our mutual areas of interest. The articles and case briefs contained herein are of a general nature and are not intended to be interpreted as advice on specific legal issues. Also, the mere receipt of this newsletter does not create an attorney-client relationship. Questions or comments regarding "At Issue" should be directed to:

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Editor's Notes



We are pleased to provide you with the Spring 2009 Edition of "At Issue." Our quarterly publication remains comprised of all original material composed by SRC's own attorneys and law clerks.

This edition also provides, courtesy of Kristi W. Dean, solid advice to business owners regarding their obligation to preserve electronically stored information for use in potential litigation. During these trying economic times, some companies are attempting to save advertising expenses by "doing it themselves." Heidi S. Feldman's article provides advice for those do-it-yourselfers to ensure that such advertising does not infringe on the intellectual property rights of others. Finally, we feature another installment of Ira Rosenblatt's "Legally Speaking," which provides clients, colleagues and friends with an opportunity to have their general legal questions addressed by one of SRC's founding directors.

We would like to thank our clients and friends for their comments regarding our newsletter. As our newsletter is comprised entirely of original material researched and written by SRC attorneys, we can address any topic that you, the reader, desire. Please do not hesitate to contact me with any topics that you would like addressed in future editions of "At Issue."

We truly hope you enjoy our publication. If you are tired of sharing your "At Issue" with your colleagues or know of someone who would like to be placed on our mailing list, please drop me a line at ggarfinkel@srclaw.com and we will make sure that they receive all future editions. Also, should you ever need additional copies of our newsletter, or back editions, please let us know. If you wish to speak with us directly, call (818) 999-2232. Once again, we truly hope you enjoy "At Issue." [SRC](#)

Gregg S. Garfinkel, Editor

Attorney Profile: Paul Smith, Esq.



Paul Smith was born and raised in St. Louis, Missouri. He moved to Southern California to attend Occidental College, where he received a BA in Kinesiology. During college, Paul was an active participant on the Occidental football team. Paul was also a three-time All-American and team captain on Occidental's track and field team.

Paul went on to attend Pepperdine University School of Law in Malibu. As a Palmer Center fellow, Paul focused his legal studies on business law including business transactions, entrepreneurship, and real estate. Paul was also a member of two Thurgood Marshall Mock Trial Teams, which competed on the national level.

Paul provides representation and legal counsel in matters pertaining to business litigation, transportation & logistics, and construction defect litigation. Prior to joining Stone Rosenblatt & Cha, Paul represented architects and engineers in professional malpractice actions. Paul handles cases in both federal and state court from inception through discovery, pre-trial proceedings, and mediation.

Outside of work, Paul enjoys exercising and watching football, while experimenting with new barbeque recipes. [\[SRC\]](#)

Do It Yourself Advertising – Saving Costs While Avoiding the Pitfalls

By Heidi S. Feldman, Esq.



Times are getting tougher, budgets are shrinking and companies are looking for ways to reduce costs as they move forward in this uncertain climate. In support of such effort, some may decide to forego use of an advertising agency or graphic designer

and create their own advertising materials and update their own website. This can be an effective way to cut costs, but there are pitfalls every company should know before beginning such a project.

When designing advertising/promotional materials that will be distributed to the public, one must be mindful of two major intellectual property issues: copyright and trademark rights. Any expressible form of a substantive idea that becomes fixed in a tangible medium, for example, a drawing, photograph, video footage, written copy, a script, an artistic design or the unique look and feel of a website layout is protected by copyright law. No copyright registration or notification is required to obtain such protection. From the moment the idea or concept is fixed in a tangible form, the author immediately has protection under Federal Copyright Laws, including the sole rights of publication, replication, distribution and adaptation. Therefore, when creating marketing and advertising materials, a company must not use any designs, patterns, photographs or written copy found on the internet or contained in the materials of others without the owner's consent. Other than in cases where a user license has been granted or the item being

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SRC Obtains Yet Another Significant Published Decision for Our Nation's Transportation Industry!

In a matter having a significant impact on the nation's transportation industry, Gregg S. Garfinkel and Brent M. Finch recently obtained



a published decision from the United States District Court for Central District of California in the matter of *Allstate Ins. Co. v. Mayflower Transit LLC*. At issue was whether a shipper's letter contained information sufficient for the shipper to satisfy the written claim requirement of the bill of lading ("shipping contract"). The Court found that a shipper's failure to provide information regarding the origin, destination, or bill of lading number for a particular shipment would be fatal to its claim for damages.

Should you wish a copy of this published decision, contact Gregg at ggarfinkel@srclaw.com. [\[SRC\]](#)

Do It Yourself Advertising *continued from page 3*

used has conspicuously been made available to the public for use (which is called being placed in the public domain), for example by being placed online for download by anyone desiring to use it or if it is obvious that numerous parties are using it, the use of such items will likely constitute copyright infringement for which significant damages are available. Many companies may think that because they are small and only do business in a limited area that these issues are less likely to arise. Beware of falling into this trap. More and more companies are now monitoring the internet, advertisements, etc., looking for incidents of copyright infringement, as it can be a source of additional income, especially in these difficult times.

Not only do companies have to be concerned with the artwork they are creating, but they also have to be concerned about using certain domain names, tag lines, logos and product and business names, which are called trademarks. A trademark is a distinctive name, logo, phrase, symbol, image or word, referred to as a “mark,” which is used by an individual or business to identify the products and/or services it offers to consumers. These marks are used to identify the creator as the unique source of the goods/services advertised under the mark and to distinguish the company’s products/services from those of another. Trademark rights begin when the owner of the mark uses it in commerce in connection with its business. For example, the moment a company begins to sell its products under a certain name or logo, the company begins to accrue trademark rights in such name and logo; provided, however,

such name is not a generic term, a mark that someone else is already using for similar goods or is descriptive of the goods or services provided. For example, “wrinkle reducing crème” for skin cream or “International Electronics” for a business that sells electronics would not have trademark rights attached since these marks are generic words and describe the products offered.

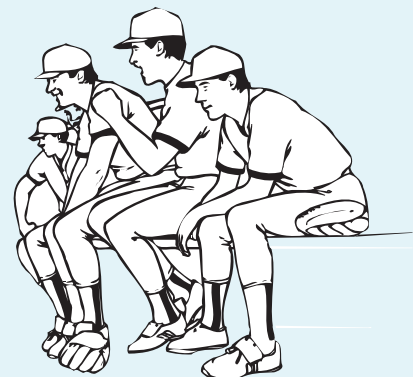
Even the domain name utilized by a company for its website on which its products/services are advertised for sale is protected under trademark law. This has become quite a point of contention across all markets, as there are several individuals and companies that intentionally select a domain name similar to that of a competitor to drive consumers to their website. Using a domain name, or any mark for that matter, that is substantially similar in sound or appearance to another company’s name, product name, logo or domain name constitutes trademark infringement for which significant damages are available, especially if the mark being used was intentionally selected for its similarity to another mark. Further, the company whose mark is being infringed upon can pursue a less expensive means to gain ownership of the infringing domain name by filing a claim with the World Intellectual Property Organization (WIPO). This is an expedited process whereby the claimant can request that the infringing domain name be transferred directly to them (no damages available), which transfer will be completed within thirty days of the WIPO’s finding of infringement. This doesn’t leave much time for the company losing its domain name to re-brand its website and

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10 Best Umpire Heckles

What is a baseball game without some good natured “criticism” of the umpire? The following list should get you started:

1. Hey ump, it’s against the law to make prank calls...
2. Hey ump, is this your cell phone? (hold up phone) Because it has three missed calls!
3. I didn’t pay 35 bucks to watch you call strikes!
4. If you’re just gonna watch the game, buy a ticket!
5. Hey ump, you are missing a good game !
6. Hey ump, you keep calling ’em like that and you’ll be bagging groceries by September.
7. Hey ump, did you lose your strike zone in the lights?
8. Now I know why there’s only one eye (i) in umpire!
9. Hey ump, we know you’re blind, we’ve seen your wife!
10. Hey ump, don’t worry, I was confused the first time I saw a game too. SRC



Do It Yourself Advertising *continued from page 4*

inform consumers where to find them on the web. Unfortunately, this type of action seems to be occurring more and more frequently as the economy continues to decline.

As can be seen from above, there are many factors a company must consider when designing its own marketing and advertising materials. Nevertheless, it can still be done at a cost savings, both in the short run and the long run, if preliminary searches (such as the internet and www.uspto.gov) are conducted and careful measures are taken when designing the materials.

If you have any questions regarding copyright and trademark rights, please contact Heidi Feldman at 818-999-2232.

SRC

Living in a Digital World *continued from page 1*

Digital data, unlike paper-based data, are easily stored in great volume. Off site storage of mounds of paper in stacks of bankers' boxes have been replaced by back-up tapes. This is a blessing for reducing storage costs, but when it comes to litigation and the process of electronic discovery in the business litigation context, it can be a nightmare. Seasoned litigants know full well that a well-meaning but misinterpreted email can mean the difference between a win and a loss in court. A casual communiqué is sent with little thought, then deleted, and forgotten; later through litigation the sender (or recipient) discovers that the office network backup system has preserved it for posterity. Or often more damaging, a block of important information is mistakenly erased, and the information becomes irretrievable because backup tapes were not rotated.

For anyone who has been involved in litigation, the definition of "discovery" is well known. "Discovery" is a process

by which attorneys investigate and reveal facts. It is the tool which we use to develop evidence in preparation for a trial. Traditionally, lawyers sent discovery requests to obtain business records such as correspondence and reports. Now attorneys struggle to find, protect, analyze and produce data from email files and backup tapes to meet electronic document production deadlines. The federal rules include e-discovery policies and procedures which focus on ESI; California will likely see a similar law in the near future. The rules codify a long-existing principle that companies have a duty to preserve records once they know or should have known of potential litigation. Attorneys and their clients know full well that "missing" evidence can often destroy a party's credibility in the minds of the judge and juror.

Federal Rules of Civil Procedure require that litigants must provide a copy of ESI to opposing counsel which describes and categorizes the ESI that supports their claims and/or defenses. Companies are at great risk in litigation if they cannot demonstrate the accuracy of electronic records management systems for identification and preservation purposes. Some data (like emails and word processing) are traditionally accessible, but other sources (like back-up storage media and "deleted" files, system data, legacy data and backup data) can be much more difficult to access and protect. Information stored in electronic form also creates ancillary electronic information needed to manage the primary electronic information. This second level of electronic information is commonly referred to as "metadata." Updating software, moving data, and even accessing data can alter or destroy the "metadata" which could affect the ability to authenticate evidence and prove facts necessary to defend a client's position.

The seminal case demonstrating the anguish and consequences of electronic discovery is *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co.* The litigation involved the sale of the Coleman outdoor camping equipment company to

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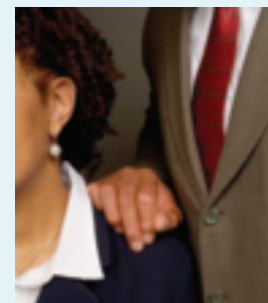
Harassment Training

DO YOU EMPLOY 50 OR MORE PERSONS? IF SO, ARE YOU COMPLIANT WITH CALIFORNIA LAW?

California Law AB 1825 requires employers who employ 50 or more persons to provide two hours of sexual harassment training every two years to all persons who supervise California-based employees.

Stone, Rosenblatt & Cha offers training either at our offices, or on-site at client facilities, for a flat-fee. Though our presentations are designed to educate, they are laced with entertaining clips and other tidbits to ensure that we keep everyone's attention.

For more information or to schedule your next supervisor training seminar, please contact Diane Marioni at dmarioni@srclaw.com or call 818-999-2232. **SRC**



Legally Speaking *continued from page 2*

Customs Service to prevent importation of infringing foreign goods.

In order to file for federal registration, your company must conduct business in interstate commerce. Generally speaking, if your company uses the mark on the web, this requirement is deemed satisfied. If you have not yet actually begun using the trademark in commerce, you can file a trademark application based on your intent to use the mark, provided you, in fact, have a bona fide intent to use the mark in interstate commerce.

The nature and scope of the protection afforded your mark is determined by the originality compared to the class(es) of goods and/or services your filing covers. Each class triggers additional fees and costs.

There are other good reasons to register a company or product name, phrase, or logo. You'll be best served to have experienced counsel in this area assist you with this process.

Q: What is all the fuss I hear from business/management over meal and rest periods in the workplace?

A: You may be picking up on the fall-out from a decision that came down from the California Supreme Court captioned "Murphy v. Kenneth Cole Productions, Inc." Under California law, subject to just a couple of limited exceptions, non-exempt employees must be afforded the opportunity to take a ten-minute paid rest break for every four hours of work and must take at least a thirty-minute, uninterrupted,

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The Quotable Lawyer

"Avoid lawsuits beyond all things; they pervert your conscience, impair your health, and dissipate your property." — *Jean de la Bruyère*

"The court is like a palace of marble; it's composed of people very hard and very polished." — *Jean de la Bruyère*

"A jury too often has at least one member more ready to hang the panel than to hang the traitor." — *Abraham Lincoln*

"Common looking people are the best in the world: that is the reason the Lord makes so many of them." — *Abraham Lincoln*

"All progress has resulted from people who took unpopular positions." — *Adlai Stevenson*



Living in a Digital World *continued from page 5*

Sunbeam in 1998. A dispute arose between financier Ronald Perelman and investment banking house Morgan Stanley. During discovery, Morgan Stanley produced incomplete and untimely document production and came under investigation by the Securities and Exchange Commission for failing to retain email files in violation of SEC regulations. The judge sanctioned Morgan Stanley by issuing adverse jury instructions, reversing the burden of proof on plaintiff's fraud charges and revoking the defense lawyers *pro hac vice* status (a discretionary means by which out-of-state counsel are permitted to represent a party, under certain conditions, though not a member of that state's bar) two weeks before trial. The punitive nature of the verdict was devastating: \$600 million in compensatory damages and \$850 million in punitive damages.

Courts have also imposed sanctions on businesses for "unintentional" spoliation. In *Keithley v. The Home Store.Com, Inc.*, a California court in 2008 awarded the plaintiff monetary sanctions for attorney and expert fees when backup tapes were overwritten due to a "catastrophic failure" of a newly-installed source code system. The court acknowledged that there was no evidence that defendants intentionally destroyed the tapes, but the defendants were obligated to preserve the information, and they failed to enforce a litigation hold on the data.

The dilemma of ESI preservation requires predicting the sources of information which may be discoverable before the factual disputes even arise. Full disclosure includes setting forth what is accessible and inaccessible. That requires opposing counsel to actually talk to each other, which is often a challenging and remarkably difficult process. The contentious nature of litigation can often taint the parties' genuine "good faith" efforts to produce information. However, it is incumbent that litigants and their counsel take the appropriate steps to first ascertain what exists, then protect and preserve the accessible data. The federal rules state that a party need not provide discovery of ESI from sources that the party identifies as "not reasonably accessible because of undue burden or cost." However, defining "accessible" is often the subject of heated debate.

Fortunately, to provide guidance on ESI discovery, a group of lawyers and judges founded the nonprofit educational research institute known as the Sedona Conference®, which in July 2008 published a Commentary on "Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible." The Conference provides guidelines for counsel and courts alike. It recommends an open and cooperative discussion, and an early determination of the

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Legally Speaking *continued from page 6*

unpaid meal break for every five hours of work. Employees are entitled to receive one hour of pay for every day they miss rest or meal periods.

The issue presented in the Murphy case was whether the “one hour of pay” constitutes a “wage” or a “penalty”. What’s the big deal you ask? If you’re a non-compliant employer in California, the answer is “a lot”! “Wages” are subject to a three-year statute of limitations. “Penalties” are subject to a one-year statute of limitation. The Murphy court, much to the joy of class-action lawyers and the chagrin of California employers, determined that the “one hour of pay” remedy provided under Labor Code Section 226.7 constitutes a “wage,” thus allowing employees to seek damages going back in time for a period of up to three-years, in addition to waiting time penalties and attorney fees.

Employers should consider new policies to ensure non-exempt employees are afforded the meal and break opportunity the Labor Code provides. One option is to have your employees certify, under the penalty of perjury, in their time records that their entries are accurate, including those reflecting their meal and rest periods.

Q: We’re in negotiations to sell our business. I hear terms such as “preemptive rights,” “drag-along rights,” “tag-along rights,” and the like. What language is this?

A: These are industry terms in the mergers and acquisition world. They describe various rights afforded shareholders. In your world, these terms are relevant if you roll over some of your sales proceeds into equity in “Newco” (verbiage to describe the new company the buyer may contemplate forming to operate your business on a go-forward basis). A thorough discussion of the definition and impact of these terms, and numerous others, is beyond the scope of this column. However, the three you mention can be explained as follows: “Preemptive Rights” ~ the right of certain stockholders to maintain ownership of a constant percentage of a company’s stock. Such stockholders have the first opportunity to purchase new stock in the company proportionate to the percentage of shares already held; “Drag-Along Rights” ~ A right that enables a majority shareholder to force a minority shareholder to join in the sale of a company. The majority owner doing the dragging must give the minority shareholder the same price, terms, and conditions as any other seller; “Tag-Along Rights” ~ A contractual obligation used to protect a minority shareholder (usually in a venture capital deal). Basically, if a majority shareholder sells its stake, then the minority shareholder has the right to join the transaction and sell their minority stake in the company. This concept is also sometimes referred to as “co-sale rights.” [\[SRC\]](#)

Living in a Digital World *continued from page 6*

type and nature of information that would be relevant to the dispute. An organization should make reasonable efforts to identify the data sources that potentially contain that information, and assess the burdens involved in viewing, extracting, preserving and searching the source.

The Sedona Conference® offers guidance as to what is “accessible” and “inaccessible.” “Accessible media types” include active on-line data (hard drives), near-line data (typically, robotic storage devices such as optical disks), and offline storage/archives (such as magnetic tape media). “Inaccessible” categories of media types included backup tapes (devices like tape recorders that read data from and write it on a tape in a manner not typically organized for retrieval of individual documents or files), and erased, fragmented or damaged data. However, the determination of accessibility depends on many factors.

Progressive and smart risk management should include a written record retention policy, as well as a plan regarding how records will be preserved once there is a dispute. Effort should be made to identify likely problems in preserving electronic evidence, and possible solutions to protect evidence. These plans should be monitored and updated along with changes in personnel and system updates. Once a company becomes aware of a dispute, counsel and client must take steps to protect against inadvertent spoliation. Compliance with electronic discovery obligations requires early analysis, clarity of purpose, thorough and open communication between counsel and client, and detailed dialogue with opposing counsel. Company employees should understand the challenges of electronic discovery *before* litigation. [\[SRC\]](#)

Did You Know?

- All porcupines float in water
- A hummingbird weighs less than a penny
- A jellyfish is 95% water
- Children grow faster in the spring
- A duck’s quack doesn’t echo
- A snail breathes through its foot
- Fish cough
- It is possible to lead a cow up stairs but not down
- Shrimp can only swim backward [\[SRC\]](#)



Client Corner: A Survey of Results for, and by, the Clients and Attorneys of SRC

Stone, Rosenblatt & Cha is a business law firm specializing in business transactions and litigation. We represent businesses and their owners in the areas of Litigation, Business Transactions, Entertainment, IP, Employment, and Transportation & Logistics.

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Ira H. Rosenblatt, with support from **Heidi Feldman** and **Diane Marioni**, representing a court appointed Trustee, successfully put two real estate purchase and sale transactions totally approximately \$58,000,000 in purchase price consideration, under contract and in escrow. SRC represents the Seller. Although deals are relatively scarce in this market, the Transactional practice group managed to stay busy this past quarter successfully forming approximately 10 new entities, substantially completing multiple corporate reorganizations, as well as tending to garden variety contract drafting needs of our clients. Kudos to **Greg Stone** and **Venessa Martinez** for obtaining an outright defense verdict on a federal civil rights jury trial in united states district court for one of SRC’s law enforcement clients. The allegations involved federal civil rights violations for excessive force by one of SRC’s clients. The jury unanimously agreed that there was no such violation(s) and the officer involved used only reasonable and necessary force.

Gregg S. Garfinkel was recently asked to speak regarding the impact that his published decisions in *Hall v. North American Van Lines* and *White v. Mayflower Transit* have had on household goods carriers conducting business in California. Congratulations are also in order to the entire Transportation and Logistics Practice group whose hard work and expertise has resulted in 15 published decisions over the last 5 years. Kudos to **Kristi Dean** who had a very busy quarter. She was nominated and selected to become a Member of the Council on Litigation Management, a select group of respected counsel who are recommended by their clients for their commitment to excellence and integrity within the legal profession. **Kristi** also spoke at the 21st Annual Combined Claims Conference in Long Beach, California, where she gave a presentation to claims professionals on handling major litigation claims. Then, **Kristi** gave a presentation to E&S Claims Management in Washington DC which provided California Department of Insurance certification pursuant to California’s Fair Claims Settlement Practices Regulations and California’s Anti-Fraud Special Investigations Unit Regulations. Kudos to **Robin McConnell** who just completed her 5th 10k race. Finally, Congratulations to **Julie Garfinkel**, who is currently leading all Dodger Fans in voting for her submission in the “Going to Bat Against Cancer” contest sponsored by Major League Baseball. [\[SRC\]](#)

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