

THE BKGG BULLETIN



BKGG Ranked As One of OC's Top Law Firms

BKGG is now ranked among the top 50 law firms in Orange County according to the annual survey by the *Orange County Business Journal* published in its annual legal issue on Jan. 12, 2009. Based on size, BKGG ranked 48th on the list and was among 23 locally-based firms named.

Managing partner Alton Burkhalter was quoted in a story, "Ask the Experts," about law firms and the economic recession. Speaking with partners at the largest law firms in Orange County, reporter Jessica Lee asked them how the recession would impact their firms and their clients. Burkhalter said, "Our firm represents a wide variety of California-based businesses. Our real estate and consumer-based clients are really struggling, but most other businesses seem to be holding up pretty well. For example, our firm had its best year ever in 2008, and heading into 2009 all but one of our practice groups are up. I think businesses like ours, who are diversified and not highly leveraged, will do OK in 2009. For others, they will need to adapt or face another very tough year."

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New Faces

BKGG welcomes experienced Intellectual Property attorney **Marguerite L. Gunn**. Ms. Gunn adds significant depth to the firm's Intellectual Property practice group, which is focused on trademark, copyright and unfair competition issues. Previously a partner at Knobbe, Martens, Olson & Bear LLP, "Peg" has been ranked among the World's Leading Trademark Law Practitioners by Euromoney's Legal Media Group in association with *Managing Intellectual Property* magazine.



"I was attracted to BKGG because it is an entrepreneurial firm with great litigators and a well-respected intellectual property practice focused on helping companies protect their most valuable asset – their brand," Gunn said. "I am looking forward to once again helping companies in California and across the nation with their IP matters."

At Knobbe, one of the nation's leading intellectual property law firms with one of the strongest trademark practices in the United States, Ms. Gunn's clients included Oakley, Gotcha Sportswear, Yamaha Motor, Fetish Sportswear, Loma Linda University, Quintana Roo, Shimano, Simulation Sciences, Conexant and Atari Games. She joined Knobbe, Martens, Olson & Bear in 1989 and became a partner in 1994. In 2002, she took maternity leave to have twins.

At Knobbe, she prosecuted thousands of trademark, copyright and design patent applications worldwide, including the three-dimensional shape of OAKLEY's sunglasses, movie theater trade dress and unique advertising programs.

Gunn has extensive skill at designing and implementing worldwide trademark strategies for large, medium and small companies including selection, searching, prosecution, licensing, infringement and maintenance issues. She advises clients on all aspects of copyright law, including ownership, notice, attribution, licensing, infringement and registration issues. She has also crafted and implemented strategies to protect trade dress, trade secrets and rights of publicity and has prevented and defended against dilution, unfair competition and weakening of rights.

"We are delighted to have Peg join the office," said Alton Burkhalter, managing partner. "She adds significant breadth and depth to the Intellectual Property practice group, particularly in the trademark and copyright areas which form the core of our practice."

Eric Goodman, head of the Intellectual Property practice group, adds "As a former Knobbe partner, Peg brings a wealth of experience and talent to the table. She will be a great asset to our clients."

Gunn earned her Bachelor of Science in accounting at the University of Illinois, Urbana-Champaign. She ranked in the top 3% of her class at the Illinois Institute of Technology, Chicago-Kent College of Law and was Order of the Coif. While earning her J.D., she was President of the Women in Law Society. She is admitted to practice in California and Illinois.

BKGG Awarded Nearly \$1 Million in Attorneys' Fees After Defensive Knockout Against Rite Aid in Trial

In January 2009, BKGG was awarded nearly \$1 million in attorneys' fees and costs in the *Thrifty Payless, Inc. v. Mariners Miles Gateway LLC* matter which was dismissed in September after Orange County Superior Court Judge David T. McEachen granted BKGG's nonsuit motion. BKGG's nonsuit motion came in the seventh week of the jury trial.

This was an important commercial real estate development trial involving a high-end retail center on Pacific Coast Highway near the Balboa Bay Club. Rite Aid initially sought over \$30 million in damages. Not only did BKGG deliver a defense judgment, but the firm also persuaded the Court to reimburse the developer \$1 million in fees and costs. There is a strong likelihood that BKGG will also recover damages for the developer sustained as a result of Rite Aid's wrongful preliminary injunction. This outstanding result was reported in the Orange County Register, the Daily Pilot and the Los Angeles Daily Journal.

Dan Kessler, lead trial counsel and head of BKGG's litigation practice group, can be reached at dkessler@bkgglaw.com and 949.975.7500.

Breach of Fiduciary Duty Trial Leads to Separate Action Against Client's CPA Firm

Alton Burkhalter's impressive \$12.2 million verdict for Ramsell Holding Corporation and Sylester Flowers following a nine-week jury trial in Oakland continues to resonate as the case has spawned a separate action against the client's CPA firm that provided audit, management consulting and tax services during the time period in which Ramsell's CFO, Ranni Hillyer, embezzled millions from Ramsell and its owners.

"We had never been in court before, much less through a trial," said Syl, "but Alton made us comfortable with the process and he thoroughly prepared us for what would take place in the court room.

*Sylester Flowers
Chairman of the Board
Ramsell Holding Corporation*

The jury verdict set a firm record for longest trial, most exhibits and longest special verdict form. Syl Flowers credits Alton for getting him through the process in one piece. "We had never been in court before, much less through a trial," said Syl, "but Alton made us comfortable with the process and he thoroughly prepared us for what would take place in the court room."

Shortly after Ramsell terminated its trusted CFO and financial advisor, the Flowers discovered that she had embezzled over \$5 million. The challenge was making the convoluted web of deception and theft understandable to the jury. "We found more than 70 different thefts, each involving a complex web of deceit," Flowers said. "We had a room full of banker's boxes with all manner of evidence, and it had proven unwieldy for our current lawyers."

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When the family brought in BKGGLaw to take over for two other law firms, the first thing Alton did was insist upon systematically organizing the evidence using litigation management software. More than 40,000 documents and 65 depositions were pared down to 1,162 trial exhibits and about 25 trial witnesses. "That knack for data management allowed Alton and his team to repeatedly find needles in the haystack throughout the trial and the result was devastating to the other side," said Flowers.

Adding complexity to the case was the defendant's cross complaint for sexual harassment brought against Mr. Flowers. Alton successfully argued that instead of sexual harassment what actually happened was elder abuse by a younger female executive seeking to defraud an older executive and his company. The judge agreed that the sexual harassment claim was a cynical smokescreen by a woman who was a thief, not a victim. In the matter of *Sylester Flowers, et al.* (plaintiffs) vs. *Ranni Hillyer, et al.* (defendants) Superior Court Judge Stephen Dombink wrote, "Ranni Hillyer was not a victim at all. She was the seductress, Sylester Flowers the victim. Her reason for preying on Sylester Flowers was a set-up."

The Court went on to award attorney's fees and costs to Ramsell and Mr. Flowers. As the Hillyer case proceeded to trial, it became apparent that Ms. Hillyer could not have accomplished her massive \$5 million embezzlement scheme alone. She had family and friends who accepted interest-free loans and other capital infusions that served to 'launder' the money, and she took advantage of the poor quality of accounting and auditing work being done by the certified public accountants employed by Ramsell Corp. and the Flowers. As a result, Ramsell filed a separate lawsuit against their CPAs for accounting malpractice and breach of their fiduciary duties. According to the complaint, had the CPAs properly performed their audits and other accounting tasks, they would have detected the frauds and properly advised Mr. Flowers and Ramsell about the lack of supervision, oversight and internal controls over Hillyer, and they would have likely prevented much of the fraud from taking place. Alton Burkhalter, who is a CPA with "Big 8" audit experience, has led the prosecution of this case. At press time, it appears that Ramsell's "policy limits" demand has been accepted, bringing them one step closer to realizing a complete recovery.

Alton Burkhalter can be reached at aburkhalter@bkgglaw.com and 949.975.7500.

Protecting Businesses from Former Employee Competition

One issue that frequently arises for many of our clients is how best to protect their business from competition, especially from former employees. During these uncertain economic times with increased employee turnover, now is a good time to consider this issue.

Most business owners may simply decide to have their employees sign a non-competition agreement to handle the problem, and in many states this would be an excellent solution. For businesses in California however, this seemingly easy solution is not available. In fact, employee non-competition agreements, whether just a section in an employment agreement or a stand alone agreement, are prohibited in California. Specifically, California Business and Professions Code § 16600 provides that **"every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void."**

So what can owners do to protect their businesses?

Business owners are permitted to protect their trade secrets. A good example of a trade secret is a business' customer list. Generally speaking, a business is not barred from preventing a former employee from using a customer list to compete with the business. The business may enforce an agreement with that employee that requires that employee not to disclose the business' trade secrets. For example, an employee can be required not to use a confidential list of preferred customers for one year after leaving employment. But be aware that while a former employee can be prevented from soliciting his or her former employer's customers, merely informing those customers of a change of employment, without more, is not solicitation. Neither is discussing business after first being invited by those customers to do so.

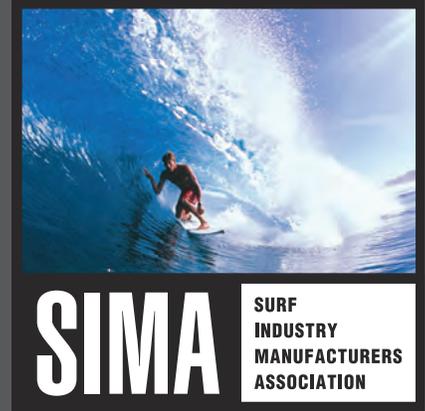
Frequently, we have found that a quick and inexpensive way to take advantage of the protections afforded to businesses of their confidential information is to simply have the employees sign a confidentiality agreement, which may also include provisions prohibiting the employee from soliciting the employer's customers and employees for a specified time after the employment ends, typically one or two years, and making explicit the fact that all intellectual property created by the employee during employment belongs to the employer. If such an agreement could be beneficial to your company we would be happy to discuss with you the specifics of your particular situation in a cost effective way.

Please contact Greg Clement at 949.975.7500 or by e-mail at gclement@bkgglaw.com.

BKGG Now a Proud Sponsor of SIMA

BKGG is now a proud sponsor of the Surf Industry Manufacturers Association (SIMA). As a law firm that specializes in intellectual property and protecting valuable brands and trademarks, BKGG will offer SIMA members a free initial consultation on legal issues affecting the surf and action sports industries.

For information contact BKGG Partner Eric Goodman at egoodman@bkgglaw.com or 949.975.7500.



Seizure of Fake Designer Jeans a Result of BKGG Action

A massive seizure of counterfeit jeans of a highly sought-after brand occurred because BKGG attorneys had registered the brand with Custom and Border Protection (CBP). When U.S. Customs agents in San Francisco inspected shipping containers arriving from China, they discovered a treasure trove of what appeared to be genuine product. But because BKGG attorneys had previously registered the brand's trademarks with CBP, the agents knew to verify whether the goods were authentic before letting them into the country. "This particular shipment was huge," said Intellectual Property Partner Eric Goodman.

BKGG regularly registers clients' brands with the CBP so that agents will be on the lookout for fake goods trying to make their way into U.S. ports. "Although the system is relatively new, registering one's trademark with the CBP is proving to be a valuable tool in combating the flow of counterfeit goods," said Goodman.

"Protecting consumers from being duped into buying cheap knockoffs instead of authentic goods is the cornerstone of trademark law," said Goodman, who is also an Adjunct Professor at Chapman University School of Law. "This seizure of counterfeit goods is a reminder that brand owners need to be proactive in protecting their valuable trademarks."



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Burkhalter Kessler Goodman & George LLP (BKGG) is a Southern California law firm with a reputation for aggressively protecting its clients' interests. The firm specializes in providing legal services to businesses and high net worth individuals. BKGG litigators have a proven record of winning in court and the Intellectual Property practice group has years of experience assisting firms and artists in protecting their brands. Core practice areas include: Business Litigation, Trademarks and Copyright, Corporate and Transactional, Employment and Estate Planning. BKGG provides comprehensive estate planning services through their State Bar certified Estate Planning specialist.

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