

## THE 2016 CLAY AWARDS

*The 20th Annual California Lawyer Attorneys of the Year*

### Appellate Practice



### Knocking down a barrier to the courthouse



Photo by Alex Drecun | Special to the Daily Journal

Jeremy Rosen, Horvitz & Levy LLP

If you're broke, it's hard to get your case to federal court. Jeremy B. Rosen of Horvitz & Levy LLP won published guidance from a 9th U.S. Circuit Court of Appeals panel on the outer income limits for those petitioning for waiver of filing fees.

The case was significant because individual district judges have taken widely divergent views regarding who qualifies for a waiver.

Until Rosen and students and faculty at Pepperdine Law School got involved, there had been no published opinion from any appellate court concerning the qualifications for litigants representing themselves to proceed as indigents in the status known as in forma pauperis.

The case arose in a labor law dispute between a prep cook at an Applebee's restaurant in Las Vegas and her employer. Maria Escobedo, representing herself, sued in district court, claiming sexual

harassment, gender discrimination and retaliation.

Senior U.S. District Judge Philip M. Pro denied her application for a waiver of the \$350 filing fee, based on Escobedo's unemployment benefits and her husband's modest social security income. Escobedo came up with the cash, but Pro then dismissed the case as untimely filed because of the delay while Escobedo collected the funds.

When Escobedo appealed, Rosen and the Pepperdine 9th Circuit Appellate Clinic took up her case pro bono.

"I'm mystified why Applebee's pushed this in the district court and then followed it to the circuit," Rosen said. "It was also unclear why the district court found the case untimely, because Mrs. Escobedo filed it within the 90-day limit."

Rosen said the defendants took an unreasonable hard line. "This

#### *Escobedo v. Applebee's*

**Jeremy B. Rosen**, Partner, Horvitz & Levy LLP, Encino

**Sarah E. Gerdes**, Pepperdine Law School student, now Associate, Gibson, Dunn & Crutcher LLP, Los Angeles

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whole fight was over the defense trying to exclude someone from court because she was poor," he said. "That struck me as wrong."

"In my day job, I represent corporate defendants. I would have advised Applebee's from the get-go they were only going to make themselves look bad to pursue this, just from an optics standard," he added. "Yet they took the position that an indigent litigant shouldn't have access to the district court at all. And they tried to smear our client, saying she was lying about her income."

Sure enough, at oral argument, Circuit Judge Kim McLane Wardlaw hammered the defense. "Why are you arguing this?" she asked, in Rosen's paraphrase. "How is it even your business? It's an issue between the plaintiff and the court."

The panel reversed the dismissal, ruling that Escobedo filed her case in time despite the delay. And the panel found that Pro abused his discretion in denying Escobedo's indigence claims. *Escobedo v. Applebee's*, 787 F.3d 1226 (9th Circuit, June 4, 2015; D. of Nevada case filed June 2, 2011).

Rosen is glad the case took the course it did. "Because they pushed so hard, we were able to achieve this opinion," he said. The panel questioned whether it was appropriate to look to a spouse's income in deciding whether to

waive filing fees. If it was appropriate, then the court should also look to a couple's expenses, the panel said.

"In this case, Mrs. Escobedo's husband was dying and had huge medical expenses," Rosen said. "The filing fee amounted to more than 10 percent of the couple's combined monthly income."

The case is now back in district court on Escobedo's underlying claims. This time she is represented by counsel, Rosen said. He credits work by two Pepperdine law students, Sarah E. Gerdes and Katelin J. Eastman, who argued for Escobedo before the circuit panel. Both are now lawyers, Gerdes at Gibson, Dunn & Crutcher LLP and Eastman at Johnson & Krol LLC.

"Those are extremely talented young women," Rosen said. "They did a better job at oral argument than the experienced lawyer on the other side."

Also helpful were their professor, Jeffrey R. Baker, Pepperdine's director of clinical education, and Pepperdine's dean, Deanne R. Tacha. Rosen said Tacha, a former chief judge of the Denver, Colo.-based 10th Circuit, prepped Gerdes and Katelin for oral argument in extensive moot court sessions.

"She really gave us all an insight into how a federal appellate judge thinks," Rosen said.

— John Roemer