

# Bar Bulletin



*Serving the San Luis Obispo County Legal Community*

**April – June 2018**

## The Gold Standard

**WLA Honors Two Who Help Empower Women**



From left: Presenter, Hon. Judge Dodie Harman; Patricia Ashbaugh – Outstanding Women Lawyer Award; WLA President, Ellen Drews; Kara Stein-Conaway – Rising Star Award; Presenter, Lisa Sperow

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**CONTENTS**

President's Message: A Time to Recognize and Appreciate	4
Welcome Justices of the Second Appellate District, Division Six	5
The Gold Standard: WLA Honorees	6
When a Community Embraces Mediation	8
Arbitration Agreement as Unknowing Waivers and Uninformed "Consent"	12
Second Appellate District Considers Finality of Arbitration Awards	14
2018 Employment Laws Favor Employees	16
Have You Met Evan Spano and Jimmy Paulding?	20
CCTLA Honors Ilan Funke-Bilu	23
Brian Jeffrey Offers a Motion for Change	24
Bar Bulletin Editorial and Advertisement Policy	30

*Cover photo by Tara Jacobi*

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The *Bar Bulletin*, ©2018, is published quarterly by The San Luis Obispo County Bar Association, P.O. Box 585, San Luis Obispo, CA 93406, (805) 541-5930, and subscription is included in the membership dues. The *Bar Bulletin* welcomes and encourages articles and letters from readers. Please send them to Collette Hillier at the above e-mail address. The San Luis Obispo County Bar Association reserves the right to edit articles and letters for publication. All material herein represents the views of the respective authors and does not necessarily carry the endorsement of the San Luis Obispo County Bar Association, its Board of Directors, its committees, and/or its sponsors and advertisers, unless specifically stated.

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# President's MESSAGE

by Sheryl Wolcott



## A Time to Recognize & Appreciate

Administrative Professionals Day is Wednesday, April 25.  
In fact, it is *Administrative Professionals Week*, the week of April 23rd.

This week of recognition of administrative support professionals has been in existence since 1952. It was then that Mary Barrett, the president of the National Secretaries Association, served on a committee with C. King Woodbridge, the president of the Dictaphone Corporation. Their committee was tasked with finding a solution to the shortage of skilled office workers. They joined forces with a public relations account executive, and National Secretaries Week was created with the goals of both recognizing the essential contributions of administrative professionals, and supporting interest in such careers.

Now, this week of recognition has had its critics, including those who question the appropriateness of its name. It took until 1981 to update the name of the

recognition to Professional Secretaries Week, and not until 2000 was it modernized to Administrative Professionals Week. It is sometimes difficult for an office to determine which of its job descriptions come under the umbrella of Administrative Professionals. It has even been accused of having been created by card companies and florists in order to have another spring holiday to boost business.

Nevertheless, I encourage you to take this opportunity to recognize and appreciate anyone who supports your practice of law. Our legal community would not function without all of the professionals who organize, prepare, filter, predict and remind. They are the front line, they catch our mistakes, get us out the door with what we need, and weather the egos and eccentricities of attorneys.

To the fantastic professionals at the District Attorney's Office, where I work, thank you for your endless patience, adaptability, approachability, dependability and sense of humor. You have all taken on extra duties while we've been understaffed, you have shepherded our technological transformation over the last several years, and you are the backbone of the office. Thank you for your dedication and for choosing to share your talents with us. ■



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## SLO County Bar Association Welcomes

# Justices of the Second Appellate District, Division Six

5:30–8 p.m. Tuesday, May 22, at Gardens of Avila, Sycamore Mineral Springs Resort

by Collette Hillier, *Bar Bulletin* Editor

**T**he SLO County Bar Association will once again welcome the Justices of California's Second District Court of Appeal, Sixth Division, to a reception on May 22, 2018. The Justices will hear oral arguments the following day in the San Luis Obispo City Council Chamber at City Hall.

California's legal landscape has been shaped by the Second Appellate District, and many important decisions come out of California that shape our country. From a historical perspective, in 1904 the California Constitution was adopted and three District Courts of Appeal were created: First District in San Francisco; Second District in Los Angeles and Third District in Sacramento. The Second District held its first session on April 24, 1905.

Over the years, the Courts of Appeal has expanded. Now, the Second District, which includes Los Angeles, Santa Barbara, Ventura and San Luis Obispo Superior Courts, files more than 5,000 appellate opinions each year. There are a total of 32 Justices in the Second District and only four of those are permanently assigned to Division Six: Presiding Justice Arthur Gilbert; Associate Justice Kenneth Yegan; Associate Justice Steven Perren; and Associate Justice Martin Tangeman.

This year, the SLO County Bar Association has invited the students and faculty of SLO College of Law to be our guests at the reception, hoping to encourage the students to stay current on the many legal issues facing California. Whether you practice in appellate courts or not, many of the issues that the Justices will discuss touch your practice and your everyday life.

The Justices are always entertaining and their candid banter is hard to predict, but it might provide insight on some of the hot issues in California—such as the lowering of the maximum sentencing for juveniles for non-homicide cases;

immigration issues; regulation of the “growing” industry; potential appellate review of large arbitration awards; and not to be forgotten, or most certainly ignored if you are filing in the Appellate Court, the recent changes to the Rules of Court requiring text- searchable electronic formatting, electronic bookmarks and measuring the size of a brief in terms of megabytes instead of pages.

Don't miss this rare opportunity to meet four of the greatest legal minds living in the United States today and hear their candid comments on these issues and others. ■



*The courthouse of Division Six of the California Court of Appeal for the Second Appellate District in Ventura. Courtesy Creative Commons.*

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# The Gold Standard

## WLA Honors Two Who Help Empower Women

*Patricia Ashbaugh—Outstanding Women Lawyer Award*  
*Kara Stein-Conaway—Rising Star Award*

by Tara Jacobi, for the WLA



*Kara Stein-Conaway—  
Rising Star Award*

In 2012, the Women Lawyers Association (WLA) created the Outstanding Women Lawyer Award, known as the OWL Award, to honor a female attorney in San Luis Obispo County who promotes the advancement of women within our community. The OWL Award is presented annually, in March, in honor of Women's History Month.

Two years later, we created the Rising Star Award that allows us to also recognize younger

lawyers who have practiced 10 years or less, but who are no less in their actions promoting the advancement of women.

This year, the WLA presented Patricia Ashbaugh with the OWL Award for her many firsts—first female law partner in the county, first female public defender in the county—and her efforts founding our organization. The WLA also presented Kara Stein-Conaway the Rising Star Award for her example of leadership in the management of her criminal defense firm. Remarkably, both recipients are criminal defense attorneys, lending us the opportunity to inquire more about what it is like to be a female, criminal defense attorney here in San Luis Obispo County.

Both recipients seem to have criminal defense in their DNA. As an undergraduate at UC Davis, Patricia Ashbaugh worked at the Solana County Public Defender's Office, the Department of Corrections and the Sacramento Municipal Court. She said she soon realized from those experiences that social justice and criminal law were a perfect fit.

Kara Stein-Conaway's mother is a therapist and psychologist, and her father, Jeff Stein, is a criminal defense attorney. She admires

both of them—and the work that they do for others—immensely. After finishing her undergraduate degree, she was a case manager for homeless families transitioning to permanent housing. Although she felt the work was meaningful, she wanted to be able to advocate with more tools, and so she went to law school. She began working as a criminal defense attorney in 2008.

When asked what motivates these two women, Patricia Ashbaugh said that it is the life stories of her clients that motivate her. She said that she realizes the challenges they face resulting from poverty, substance abuse, mental illness, lack of education and homelessness. Often, one or more of these factors leads them into the criminal justice system. Ashbaugh said, "Whatever assistance I can give to extract them and bring justice, causes me to keep going. I realize how lucky I am."

Stein-Conaway said, "Having the skills and training to stand up for what I believe is right in the face of injustice is a power I am so grateful to cultivate, develop and use to benefit my clients and to use to improve the criminal justice system as a whole."

Both Ashbaugh and Stein-

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Conaway shared a glimpse of what it is like to work in the difficult field of criminal defense.

"I think it is a calling and you either love it and it is your career, or you hate it and get out quickly," said Ashbaugh. "As a public defender, you can't really look to see who 'wins.' Quite honestly, no one really comes out of the process without some scars. The goal is to make sure that everyone does their job and the system remains balanced and honest."

Stein-Conaway said that she meets her clients at a time when they are struggling, and many times they are experiencing shame, embarrassment, anger and fear. "I get to be present with them in that very difficult time. For me to develop a plan that addresses their short-term crisis, and sometimes more long-term challenges, requires immense vulnerability on their part. I get to be there for that. They open up to me. I am so honored to be allowed into that space. Having that connection and offering help in what is sometimes the darkest moment in their lives is immensely rewarding."

Because the WLA presents these awards to outstanding women in our legal community, both women described some of

the struggles shared by many females in leadership. Ashbaugh said, "I believe that culturally there still exists a belief that men are, or should be, the head of the household. I think that attitude carries over to the work environment. As we see more women on the judicial bench and holding public offices, I believe that it makes it easier for each woman who comes along to serve in a leadership role."

Stein-Conaway gracefully expressed the difficulties of female leaders by saying, "One barrier is the fact that many women are striving to fit into a workforce model or leadership framework that was not created with us in mind. It was defined for men and with the terrible idea that men didn't need to dedicate much time to their families!"

In order to rectify this unsuitable workforce model, she said, "First, we must recognize ourselves as fully worthy human beings. Second, we must honor and celebrate our unique contributions, perspectives and abilities. Third, we must demand the flexibility and creativity to design environments where we realize our unbounded dreams, never apologizing for dancing a beautiful dance that includes investing



*Patricia Ashbaugh—  
Outstanding Women Lawyer Award*

time and love into our families, friends and communities."

Both of these amazing women are richly deserving of the awards presented by the WLA. And it is certain that both of these exceptional women will continue to inspire others to achieve their dreams.

The WLA accepts applications for both the OWL Award and the Rising Star Award throughout the year. Look for an application at the WLA website, [www.wlaslo.org](http://www.wlaslo.org). ■



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# When a Community Embraces Mediation

by Kelly Donohue, Public Relations Wilshire Health and Community Services

*Editor's note: In the next few issues we plan to spotlight some of our bright legal community services. This issue provides a look at the "Creative Mediation" services offered by Wilshire Health and Community Services. If you would like to shine the spotlight on a particular legal services organization in the future, please contact the editor.*

**A**cross the nation, hundreds of community mediation centers were born of the idea that communities should be able to navigate conflict without overburdening their local judicial systems. What was once handled in town halls and churches was now ending up in court, with no alternatives in place.

According to the National Association for Community Mediation, "Community mediation offers constructive processes for resolving differences and conflicts between individuals, groups, and organizations. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute, and control of the outcome. Community mediation is designed to preserve individual interests while strengthening relationships and building connections between people and groups."

San Luis Obispo is one of many counties to welcome a community mediation center. Creative Mediation is San Luis Obispo County's only local community mediation center. Part of Wilshire Community Services, a not-for-profit agency, Creative Mediation has been serving the Central Coast for

more than 25 years. Their roots began with Small Claims mediation, a program funded through the Dispute Resolution Programs Act of 1986. This program allows for Creative Mediation staff to train volunteer mediators who provide free mediation as an alternative to having a case heard in small claims court.

Community mediation centers are characterized by accessibility to all, inclusivity in service delivery and service providing, and representation of its broad and diverse community. Creative Mediation practices these standards, by opening registration for trainings to the public, providing several scholarships for trainings, and managing a group of volunteers with wide and diverse backgrounds.

Creative Mediation also follows community mediation standards by practicing facilitative mediation. Facilitative mediations are voluntary, neutral, client-centered and confidential for all participants. This style allows for participants to feel safe communicating their underlying interests, while empowering parties to choose their own outcomes through a guided and facilitated process with a neutral third party. Facilitative mediators do not offer subject matter, or legal, expertise.

Their focus is to create an environment where parties can communicate more effectively and have a productive conversation.

Since its beginnings at small claims court, Creative Mediation has grown to include several programs funded by alternative grants, contracts and/or fee-for-service options, as well as charitable donations from individuals and organizations. As the community has continued to embrace community mediation, programs continue to evolve and change with community need and funding. Currently Creative Mediation has five areas of service ranging from business disputes to familial conflicts.

## Community Mediation

A variety of mediation services help San Luis Obispo County residents resolve landlord/tenant, neighbor/neighbor, roommate and small business disputes.

## Family Services

A variety of family dispute resolution services help families move forward:

- **Juvenile Dependency Mediation**

In partnership with San Luis Obispo County's Department of Social Services, this program



offers a safe, neutral and effective forum for parents, social workers, and attorneys to work together toward the best interests of the children involved in the Juvenile Dependency system.

- **Parent Teen Mediation**

Parents and teens focus on specific areas of conflict within the home and come up with a plan to address these issues.

- **Elder Family Mediation**

Both conflict coaching and conflict resolution services help families grapple with decisions surrounding the care of an elder family member.

### **Youth Services**

These services focus on youth, through preventive and restorative practices:

- **Peer Mediation and Peace**

#### **Helping Programs**

In-school programming, provides customized conflict resolution programs for local elementary, middle and high school students.

- **Restorative Dialogue Program**

In partnership with San Luis Obispo County's Probation Department, the program helps reduce recidivism, encourage accountability of youth offenders, and restore relationships.

### **Specialized Mediation and Facilitation**

Mediations for workplace conflict, multi-party or complex issues, and co-parenting.

### **SLO Solutions**

This free conflict resolution service for all City of San Luis Obispo residents, Cuesta and Cal Poly students includes conflict coaching, mediation, and communication and conflict resolution workshops.

Creative Mediation's mission is to give people a chance to talk about what matters most. Mediation services are

complemented with preventive communication and conflict resolution trainings. Creative Mediation provides customized trainings for businesses and organizations, with topics varying from group dynamics and psychology of conflict to conflict styles and mediation best practices.

Creative Mediation also relies on the service of their dedicated volunteer base. Volunteers are trained for a minimum of six months, beginning with the Elements of Mediation training that is hosted twice a year. Once completed, volunteers take the Advanced Mediation Seminars, observe mediations, and complete practical hours before mediating with parties and litigants. Creative Mediation's volunteers dedicate more than 1,600 hours annually to help provide conflict resolution to the San Luis Obispo County community.

Many volunteers go above and beyond direct service. Wendy Waldron is one of those outstanding volunteers. In 2017, Waldron was recognized by the National Association for Community Mediation as NAFCM's Outstanding Volunteer. This award is given to one volunteer mediator nationally, each quarter. After years in the corporate world, she became a volunteer mediator as a way to stay involved and give back.

"I value my volunteer work with Creative Mediation. The staff offers tremendous education in the skills and art of mediation and provides supported opportunities to perform in real-life situations. I have grown personally as I've undertaken challenges under

*Continued on page 10*

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## Embracing Mediation continued

their tutelage. I feel proud to have an avenue to help my community reach peaceful solutions to their disputes.”

A volunteer for more than five years, Waldron provides direct service delivery to community members, fosters for-profit and nonprofit relationships for Creative Mediation, and is an integral part of new program development as a volunteer council member. She is a shining example of the reciprocity that develops when a community is brought into supporting their local mediation center, as much as it serves them. ■



*For more information about Creative Mediation services or trainings, call (805) 549-0442 or go to [www.creativemediation.net](http://www.creativemediation.net).*

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# *Annual Appellate Court Justices Reception*

*The San Luis Obispo County Bar Association  
cordially invites you to attend a reception  
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Justices of the California Appellate Court  
Second District, Division 6*



## *SAVE THE DATE!*

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*Online registration will be available soon!*

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*Annual Appellate Court Justices Reception – Tuesday, May 22, 2018*

*Name(s)* \_\_\_\_\_

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*Reservations must be received by the Bar Association no later than Noon on Wednesday, May 16th.*

*Mail to: San Luis Obispo County Bar Assn, PO Box 585, San Luis Obispo, CA 93406*

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*The San Luis Obispo County Bar Association is a State-Bar approved MCLE provider. This program qualifies for one (1) hour MCLE credit; the speakers' presentation will be one hour in length.*

*NOTE: The required substantive written materials for this meeting will be available soon on our website, <http://www.slobar.org/member-center/member-documents>. Please download the documents at your convenience. Copies will not be available at the meeting.*

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# Arbitration Agreements as Unknowing Waivers & Uninformed “Consent”

by Anthony Chicotel,

Staff Attorney for California Advocates for Nursing Home Reform, [www.canhr.org](http://www.canhr.org)

In a recent NPR story about the Trump administration’s proposed rule to make it harder for nursing home residents to sue for abuse, a senior vice-president of the Chamber of Commerce’s Institute for Legal Reform, Matt Welch, was quoted defending arbitration as “a system that is simpler, faster, and fairer for all parties concerned.”

Hmm, sounds nice doesn’t it? But then Mr. Welch went on to explain the importance of coaxing residents to commit to arbitration when they are admitted and before a dispute arises:

*“Studies basically show that if the arbitration agreement’s not done prior to a dispute arising, very few, if any, ever really agree to go into arbitration at that point.”*

In other words, when a nursing home resident or any other consumer actually knows what arbitration means, they don’t want it. They don’t conclude that it is “simpler, faster, and fairer.” Taken together, Welch’s statements tell you all you need to know about arbitration agreements in nursing homes—something the industry refuses to acknowledge: Arbitration agreements are good for nursing homes and bad for residents. The only time nursing

homes can coax residents to sign arbitration agreements is when the residents don’t know what they mean.

## **Arbitration as a Waiver of a Fundamental Right: Knowing, Voluntary and Intelligent?**

Nursing home residents who sign pre-dispute arbitration agreements effectively waive multiple constitutional rights, including due process and trial by jury. Waivers of fundamental rights are supposed to require knowing, voluntary, and intelligent consent. Case law is unavailing on whether arbitration agreements, as waivers of fundamental rights, require a knowing, voluntary, and intelligent consent but the argument is appealing.

If arbitration agreements do require knowing, voluntary, and intelligent consent, then very few such agreements signed in nursing homes are valid. As Welch explained, if residents actually knew they were giving up their rights for no return benefit, none of them would sign arbitration agreements.

The circumstances under which residents sign arbitration agreements virtually guarantees they will be signed without basic understanding—newly admitted nursing homes residents have

just had a significant health care crisis, the arbitration agreement is typically buried in a 70-80 page contract, and arbitration clauses fail to explain downside risk. As the Centers for Medicare and Medicaid Services (CMS) said in 2016, it “is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen.”

## **Arbitration as a Health Care Decision Requiring Informed Consent.**

Informed consent is a foundational concept in health care. Health care providers must explain all important risks, benefits, and alternatives to proposed treatments before seeking the consent of their patients.

California courts have predominantly equated arbitration agreements between health care providers and patients as “health decisions.” These courts have held that, since arbitration agreements are part of the selection process for certain health care providers (e.g., in the admission agreement for nursing homes), they are themselves a health care decision.<sup>1</sup>

As a health care decision, nursing home arbitration agreements clearly require





the informed consent of the resident, meaning the resident must be told, and understand, the risks, benefits, and alternatives regarding arbitration. Nearly every arbitration agreement fails to do so.

Most arbitration agreements include some discussion of purported benefits to arbitration. For example, one nursing home's arbitration agreement states that arbitration resolves disputes "quickly and inexpensively." Another facility's agreement has a section labeled "Benefits of Arbitration" that not only touts alleged cost and time-savings but openly claims that agreeing to arbitration enables the facility to charge more affordable rates.

When it comes to explaining risks and alternatives, however, almost all arbitration agreements fall flat. Residents are not told that arbitration awards to abuse and neglect victims are often significantly less than court awards, that they will have no meaningful appeal process, and that the proceedings will be hidden from the public and

future residents will know nothing of the abuse or neglect they suffered. Alternatives to arbitration, like waiting until a dispute arises before considering dispute resolution options, are never mentioned in the agreements.

Without an explanation of risks and alternatives, a signed arbitration agreement with a nursing home is invalid because it does not represent an informed health care decision. Consider the following two scenarios.

- A patient meets with a physician who recommends a medication. The physician states "This medication is great. It is faster-acting, cheaper and effective. The physician does not disclose the medication generally leads to worse health, has painful side effects and financially benefits the physician. The patient takes the medication. Is that, in any way, informed consent?
- A police officer arrests a crime suspect. Instead of reading the suspect their Miranda rights, the officer states "You have the

right to remain silent, but talking now, without a lawyer present, is faster, leads to better outcomes, and makes everyone happier." The suspect talks. Is that, in any way, a valid waiver?

Attorneys who represent nursing home residents or other health care consumers, should aggressively fight any arbitration agreement that does not fully disclose the likely risks and available alternatives. Such an agreement fails as a waiver of fundamental rights and as a health care decision.

Once attorneys start aggressively asserting their clients' rights, health care providers will be in a tough position. They will have to finally tell their patients that they want to screw them over before trying to screw them over. ■

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<sup>1</sup>Cases in favor of arbitration as a health decision include *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253; *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259; and *Hutcheson v. Eskaton Fountainwood Lodge* (2017) 17 Cal.App.5th 937. A case against arbitration as a health decision is *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581.



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# Recent Second Appellate District Case Considers the Finality of Arbitration Awards

(*Harshad & Nasir Corp v. Global Sign Systems* (2017) 14 CalApp.5th 523)

by Dennis Law, Mediator at Andre, Morris & Buttery

As most of us know, generally an arbitrator's decision is final in contract arbitration cases, meaning the decision cannot be overturned by a trial court or court of appeal even if it is wrong. This principle is commonly stated and generally accepted. It is frequently the basis upon which decisions are made to agree, or to not agree, to arbitrate a dispute.

Yet, a case decided this last year, *Harshad & Nasir Corp v. Global Sign Systems, Inc.*<sup>1</sup>, set aside an approximately \$3 million arbitrator's award on the basis it was not supported by substantial evidence. This might cause you to pause and wonder just how final is an arbitrator's decision. The case law discussed in *Harshad* is not new or ground breaking, but it does highlight the need to look at arbitration deeper than is often done.

Before reviewing the *Harshad* decision, let me briefly review the issue of arbitration finality as reflected in modern case law and statutes. The California Supreme Court's 1992 decision in *Moncharsh v. Heily & Blase*<sup>2</sup> is a good place to start. The *Moncharsh* decision held that an arbitrator's decision cannot be reviewed for errors of fact or law, whether or not such error appears

on the face of the award and causes substantial injustice to the parties (at p. 6). The *Moncharsh* decision received a lot of attention, and perhaps some scrutiny, because to some practitioners, the notion that an arbitrator's award could be allowed to stand when it was conspicuously in error was somewhat unsettling. The *Moncharsh* decision changed a line of case law that had previously applied a judicial exception to arbitration finality where an error in law or fact plainly appeared on the face of the decision and the error caused an injustice.

*Moncharsh* is a lengthy, detailed decision that reviews contract arbitration principles as they evolved in statutes and case law since the mid-1800s. It concludes that modern contract arbitration is controlled by statute; specifically Code of Civil Procedure section 1280 et seq., and notably section 1286.2, which states the sole grounds for vacating an arbitration award.

Judicially created exceptions may no longer be applicable. The grounds listed in the current version of section 1286.2 include corruption, fraud or undue influence, misconduct of the arbitrator, arbitrators exceeded their powers, failure of the arbitrator to postpone a hearing or admit evidence

that is substantially prejudicial and/or that the arbitrator failed to disclose a ground for disqualification. These grounds do not allow an arbitration award to be vacated simply because it is unsupported by the evidence or is contrary to law.

In 2008 the California Supreme Court issued its decision in *Cable Connection, Inc. v. DIRECTV, Inc.*<sup>3</sup> The *Cable Connection* decision addresses the issue of whether the parties' arbitration agreement may address finality and judicial review (at p. 1339). In addressing this issue, the decision focuses less on the statutory proscriptions and more on the parties' contractual agreement. The arbitration agreement in question was included in a dealer agreement between DIRECTV and a regional dealer of DIRECTV products and broadcasts. An arbitration award was in favor of the dealers.

The trial court vacated the award on several grounds, including DIRECTV'S argument that the arbitrator's award included errors in law. The Court of Appeal, on its own, raised the question whether a contract provision that limited judicial review was enforceable, and following two other Court of Appeal decisions it concluded that such a contract provision

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is unenforceable (at p. 1343). The Supreme Court reversed.

In discussing its prior decision in *Moncharsh*, the *Cable Connection* decision found that the parties' arbitration contract can and will control the scope of judicial review where it is expressly called for. In *Cable Connection* the Supreme Court explained that while its decision in *Moncharsh* established dominance of the statutory finality imposed on an arbitrator's decision, it also confirmed that the underlying foundation for contract arbitration is the arbitration contract itself.

The *Harshad* decision is based in large part on *Cable Connection*. The arbitration agreement in *Harshad* was entered into after a lawsuit was filed and only a few weeks before the case was set to commence trial. The dispute involved commercial dealings between the owner of several Carl's Jr. franchises and a provider of signage. The arbitration agreement expressly stated that the arbitrator's decision shall be reviewed on appeal to the trial court and to the court of appeal (at p. 536). The trial court concluded that this language was not sufficiently clear to provide for the court's review of the arbitrator's decision for errors at law.

The Court of Appeal in *Harshad* disagreed and held that "what matters is that the parties make plain their intention that the award is reviewable for legal

error" citing *Cable Connection* (at p. 536).

The Court of Appeal reviewed the arbitrator's decision applying the substantial evidence test. It found insufficient evidence to support the arbitrator's findings.<sup>4</sup>

*Harshad* is significant because of its focus on the language of the parties' arbitration contract. While it is not creating new law, it is shining a bright light on the significance of the arbitration contract in view of *Cable Connection* and related decisions. One cannot, should not, merely assume that an arbitrator's decision is final, subject only to the limited judicial review set forth in CCP section 1286.2. The contract language may, in fact, allow for judicial review.

In drafting an arbitration agreement (pre- or post-controversy), one can see that there is an opportunity to craft the scope of review suitable to the parties. Perhaps they want a high level of judicial review, but perhaps they do not. Either way, the language of the agreement can be used to reflect the parties' intentions.

Likewise, if an arbitration agreement has already been executed, and a controversy arisen, it is very important to look at the language in the agreement to understand from the outset the nature and extent of judicial review. And, one should not look merely to the contract itself, one should also consider the language of "rules" promulgated



by providers, such as AAA, that are frequently referred to, and perhaps incorporated, in the contract.

Given the length and complexity of the decisions discussed above, it is apparent that the issue of judicial review is complicated and nuanced. In some circumstances, such as arbitration clauses in consumer contracts, it may be unlikely that the contracting parties have a reasonable opportunity to understand what they are getting into. The courts may view these situations differently. But for the situations where the parties are knowledgeable and of equal bargaining strength, the contract language is critical to defining finality and the possibility of judicial review. ■

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<sup>1</sup> *Harshad & Nasir Corp v. Global Sign Systems, Inc.*, 14 Cal.App.5th 523; August 15, 2017, Second Appellate District, Division One.

<sup>2</sup> *Moncharsh v. Heily & Blase*, 3 Cal.4th 1 (1992).

<sup>3</sup> *Cable Connection, Inc. v. DIREC-TV, Inc.*, 44 Cal.4th 1334 (2008)

<sup>4</sup> In a somewhat related issue, *Harshad* addressed the scope of the arbitrator's decision. The arbitrator concluded that the issue of lost profits was within the issues to be decided by the arbitrator. This issue was reviewed de novo.

# In 2018, California Expands Its Reputation as the Most Employee-Friendly U.S. Workplace

by Jane E. Heath and Christopher E. Cobey

**Y**ou may counsel employers or employees. You may have employees or even be an employee.

Whatever your specialty or status, it helps to stay current on what Sacramento has produced from its legislative sausage plant. Here are the biggest new laws from last year, and what's on deck right now.

## Prohibition on Interviewing Employer's Request for Applicant's Salary History

Do your clients ask for an applicant's salary history in the employer's employment application forms or in job interviews? Tell 'em to cut it out stat. As of the first of this year, employers may not use salary history as a factor in determining whether to offer an applicant employment, or in determining what salary to offer an applicant. The new law also prohibits an employer from seeking salary history information about an applicant for employment.

Upon reasonable request by an applicant for employment, an employer must provide the pay scale for a position. The new statute does not prohibit

an applicant from voluntarily, and without prompting, disclosing salary history information, and it does not prohibit an employer from considering or relying on voluntarily disclosed salary history information in determining salary. (*New Labor Code § 432.3; AB 168; all bills and reports available at [leginfo.legislature.ca.gov](http://leginfo.legislature.ca.gov).*)

## Employer's Use Of Criminal History In Hiring Decisions

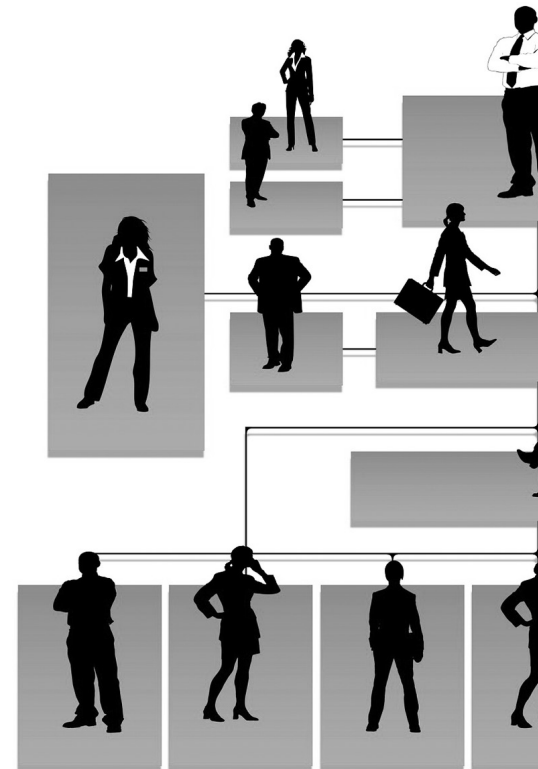
Heard of "ban the box"? This reference isn't to the permitting of "big-box" stores in a community, but to the box on employment applications asking if the applicant has been convicted of a felony or other crimes.

This new law requires an employer of five or more employees who intends to deny any applicant a position of employment, solely or in part because of the applicant's prior conviction history, to make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job, and to consider certain topics when

making that assessment. Those topics include the following.

- The nature and gravity of the offense or conduct.
- The time that has passed since the offense or conduct and completion of the sentence.
- The nature of the job held or sought.

The statute requires an employer who makes a preliminary decision to deny employment based on an individualized





assessment to provide the applicant written notification of the decision. An applicant has five business days to respond to that notification before the employer may make a final decision. If the applicant notifies the employer in writing that he or she disputes the accuracy of the conviction history, and is obtaining evidence to support that assertion, the new law grants the applicant an additional five business days to respond to the notice. An employer must consider information submitted by the applicant before making a final decision. An employer who has made a final decision to deny employment to the applicant must notify the applicant in writing of specified topics. (*New Gov't Code § 12952; repealed Labor Code § 432.9; AB 1008.*)

### **Parental Leave For Bonding With a New Baby**

Former law applied protected leaves of absence for employees with a newly born, adopted or foster child to employers with 50 or more employees. With SB 63, that provision is now applicable to employers with 20 or more employees within a 75-mile radius. Thus, the expanded statute now implicates many small employers, especially in service businesses. Note that this provision is expressed in the negative: failing to grant such a leave or protect a job where applicable, is an "unlawful employment practice" and may be subject to private action. This provision also adds a pilot mediation program when a "right to sue" letter is received. (*Amended Gov't Code § 12945.6.*)

### **California v. Immigration and Customs Enforcement (ICE)**

It would be fair to say that the California legislature and governor are not fans of current federal immigration policy. Unable to have a direct effect due to federal supremacy in these issues, California is expressing its disagreement in the places over which the state does have jurisdiction: California workplaces and law enforcement. Two laws which took effect January 1, 2018, are examples.

The first, AB 450, has the most direct effect on California workplaces. Lest there be any doubt about its intent, the bill is called the "Immigrant Worker Protection Act." California employers are now specifically prohibited from voluntarily complying with

an ICE audit. Employers may not allow ICE personnel past the public areas of a workplace without a warrant, cannot voluntarily provide employment records to an immigration agency and must notify employees within 72 hours if ICE requests their records.

The Act is administered by the Attorney General's office—and it has teeth. Violations trigger civil penalties of \$2,000 to \$5,000 for a first violation, and \$5,000 to \$10,000 for each subsequent violation. (*New Gov't Code §§ 7285.1, 7285.2, and 7285.3; new Labor Code §§ 90.2 and 1019.2.*)

The second new law, SB 54, only indirectly affecting the workplace, repealed provisions of state law that required local law enforcement agencies to notify ICE upon arrest of an undocumented person. It also specifically prohibited detention of anyone based on suspicion of immigration status.

Note that this applies not only to police and sheriffs but also to anyone qualifying as a "peace officer," which may include school safety and special district officers. (*Amends Gov't §§ 7282 and 7282.5 of, and adds Ch. 17.25 (commencing with § 7284); repeals Health & Safety Code § 11369.*)

### **Thinking About Retaliating Against A Whistleblower? Don't.**

SB 306:

- Provides for immediate injunctive relief reinstating an employee to a position if the employee was terminated after whistleblowing;

*continued on page 19*



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## 2018 Employment Law continued

- Permits the Labor Commissioner to initiate investigation of an employer without receiving a complaint if it suspects that retaliation has taken place in the course of adjudicating a wage claim, during a field inspection, or in instances of immigration-related threats; and
- Adds a provision for civil penalties against any employer who willfully refuses to comply with a court order issued pursuant to the terms of the bill. (*New Labor Code §§98.74, 1102.61, and 1102.62; amends Labor Code §98.7.*)

### Know Any Barbers, Hair Stylists, Estheticians or Nail Technicians?

The Division of Labor Standards Enforcement (DLSE) of the state Department of Industrial Relations (DIR) continues its interest in this industry, targeting the sector as a place where the state's wage and hour laws are frequently ignored. After making piece rate compensation very difficult to use two years ago, the passage of SB 490 now places specific prohibitions on payment of individual licensees by commission.

Payment by commission is not allowed unless the employee's regular base hourly rate is at least two times the minimum wage, in addition to commissions. Rest and recovery periods must be paid at the base hourly rate. This is a game-changer for many salons and spas, but few affected seem to be aware of it. (*New Labor Code §204.11.*)

### Posting to Reach Victims of Human Trafficking

Attention hotels, motels, and B&Bs! Current law requires certain businesses (train and bus stations, others) to post an official notice regarding slavery and human trafficking. AB 260 adds hotels, motels and bed and breakfast inns to the list of places that must post the notice. It also changes and adds some provisions.

So, newly added businesses, get a poster; if you're already covered, get (or create) a new poster. A downloadable poster is available at [https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/HumanTraffickMandate\\_ENG.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/HumanTraffickMandate_ENG.pdf).

Don't dilly-dally: there's a \$500 civil penalty (or \$1,000 for a subsequent offense) for noncompliance following a 30-day period to fix the violation. (*Amended Civil Code §52.6.*)

### Bills to Watch

**AB 1099:** The number of this bill is no coincidence. While it did not make it past the Assembly initially, this is an Uber-inspired bill with an agenda to bring more worker protections to the gig economy. The bill sought to add non-employees (IRS Form 1099, used for payments to independent contractors) to existing Labor Code section 351 protections to all folks who accept tips.

It would require "entities"—specifically does not limit to "employers"—to extend to "workers"—does not limit to "employees"—all the same protections presently limited to employees of employers concerning how tipping is handled.

Prediction: this is an evolving area of the law, and we can expect more efforts like this in coming years as more workers elect non-traditional employment arrangements.

**SB 820:** This bill provides that a provision in a settlement agreement that would prevent the disclosure of factual information relating to the action, is prohibited if the pleadings state a cause of action relating to claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, unless a claimant requests the inclusion of such a provision. The bill would make a provision in a settlement agreement that prevents such disclosure entered into on or after January 1, 2019, void as a matter of law and against public policy.

### Other Practice and Informational Aids

Twelve California Civil Jury Instructions (CACI) on wrongful termination, FEHA, the Family Rights Act, and Labor Code claims were revised in 2017. Consider using those updated instructions as a quick summary for your clients of the elements of claims and defenses—and even as a plain-language refresher of the legal principles for you. (<http://www.courts.ca.gov/partners/317.htm>.)

Also, look at the DFEH's employment-related posters and brochures—all but one of them were updated last year. (<https://www.dfeh.ca.gov/resources/posters-and-brochures-and-fact-sheets/>.) ■



# Have you met...?



**Evan Spano, with Harris  
Personal Injury Lawyers, Inc.**

**E**van is no stranger to San Luis Obispo. He attended Los Ranchos Elementary School, Laguna Middle School, SLO High and Cal Poly, where he graduated summa cum laude, was a graduation commencement speaker, and received the Orfalea College of Business Scholastic Achievement Award for graduating with the

highest GPA in Business Entrepreneurship.

He ventured from SLO for law school, attending University of San Diego, graduating magna cum laude. When he wasn't hitting the books, while growing up, he raced motocross at spots like Hollister, Hanford, Madera, Fresno and Santa Maria.

It was "tons of fun," he said. "We had a sweet track out on my dad's property in Santa Margarita, but it's leveled and gone now. Now I just have a 125 out there. I also have a vintage bike in my mom's garage and a broken moped."

When asked about his goals, Evan said, "For a long time I knew I wanted to be an attorney. The summer after my senior year

in high school, Judge Harman referred me to an internship with Raymond Allen and Jennifer Alton. I worked for them on and off throughout college."

During law school Evan worked for Harris Personal Injury and was offered a job by Harris in Santa Barbara. By delivery of this issue, he hopes to be in his new location with Harris in SLO. He really enjoys the work he does for Harris and especially enjoys representing people against insurance companies. "My number one goal is to have happy clients, and I continue to work on doing that both inside and out of the courtroom."

As far as personal goals, he said he might get another motorcycle sometime.

*In the next few issues, we will be introducing and welcoming new members of the SLO Bar Association. If you are, or know of, a new member who wishes an introduction, please contact the Editor of the Bar Bulletin. Please help us welcome....*

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## Jimmy Paulding, candidate for County Supervisor, 4th District

Jimmy Paulding, resident of Arroyo Grande, Cal Poly grad, and Santa Barbara College of law grad, was sworn in to the California State Bar by Judge Peron on May 19, 2017. Formerly a land use planner and construction project manager, Jimmy currently works as a construction claims analyst and legal researcher for Arcadis North America.

But his work at Arcadis is not what demands most of his time. Last August, Jimmy decided to run for county supervisor in the fourth district. He says his decision was largely motivated by a growing frustration with the

board of supervisors by many constituents because of the apparent partisan divide and lack of civil discourse.

Jimmy, 32, says he represents a new generation that is devoted to local civic-mindedness and a desire to preserve our quality of life on the Central Coast that many feel is being threatened by the current board.

When asked if he has the experience necessary for the job, Jimmy's says he's worked on public facilities and infrastructure projects for SLO, Butte, Kings and Del Norte counties, the City of Santa Monica, and the State of California. He says he understands how county government operates, and can't wait to put his knowledge and experience as



a planner, project manager and attorney to use for the citizens of SLO County. The election is coming up in June. More information about his campaign can be found at [jimmypaulding.org](http://jimmypaulding.org).

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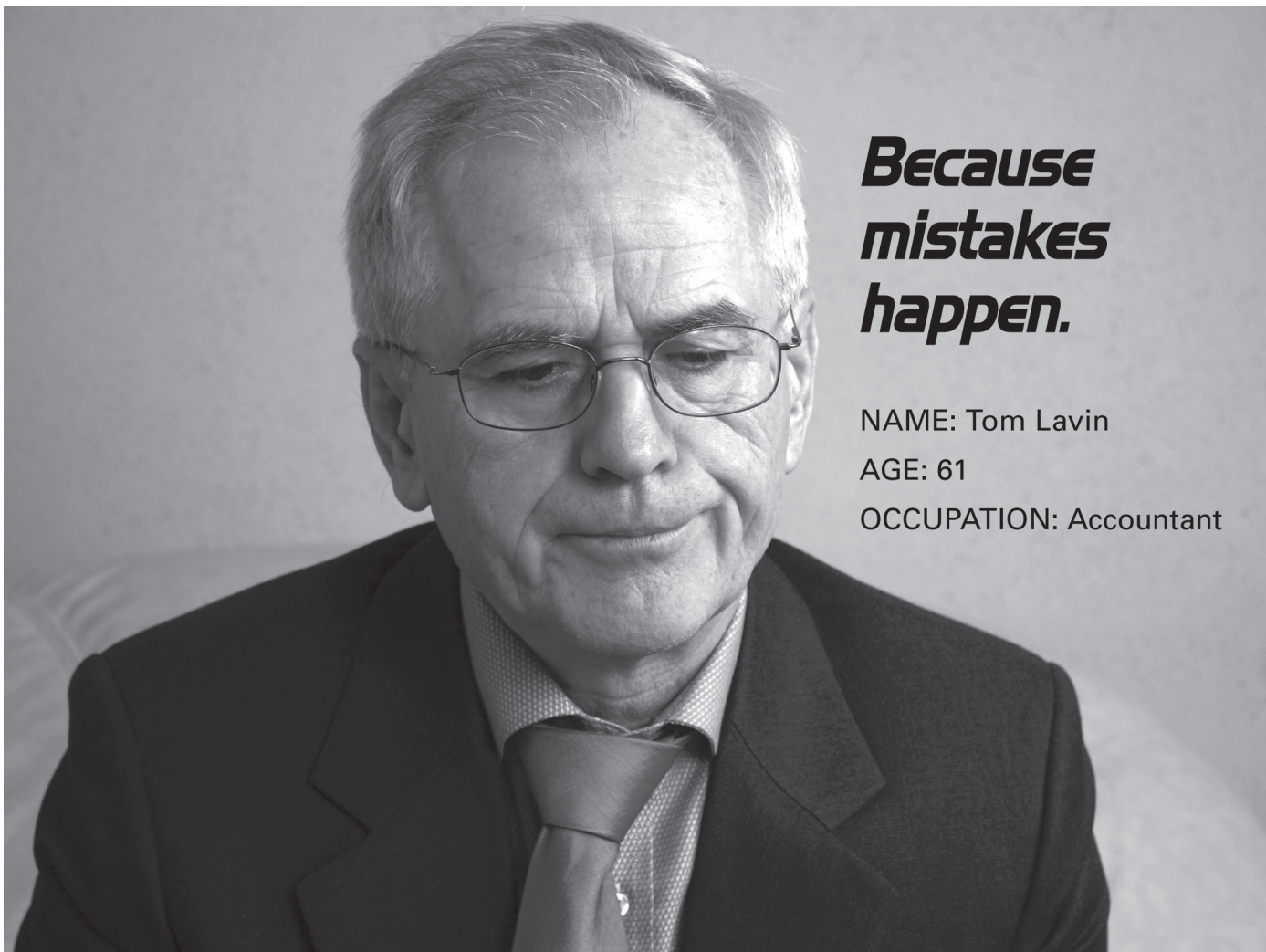
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## Central Coast Trial Lawyers Association (CCTLA)

# Ilan Funke-Bilu Named Trial Lawyer of the Year

**T**anner Mengore was charged with killing two people, and injuring two others in a horrific automobile accident on Highway 1 between Cayucos and Cambria. Mengore's vehicle was traveling southbound when he was observed to cross the northbound lane almost in a perfect perpendicular route. His vehicle rolled over, struck a tree and finally landed off the road in a ravine.

One of the decedents was a toddler, who the authorities believe was ejected from the interior and landed at the resting site. The authorities arrested and prosecuted Mengore on the theory that he was under the influence of "spice," a synthetic compound designed to mimic the effects of very potent marijuana.

Prior to trial the District Attorney offered the defendant eight years in prison, suffer two "strikes" and the remaining counts would be dismissed. The defendant rejected the offered settlement and proceeded to trial recognizing that his exposure, should he be convicted, was in the high teens. The prosecution presented evidence that Mengore willingly smoked "spice," but was unable to provide scientific evidence that he

was actually under its influence at the time of the accident.

The defense offered no expert in its case. Mengore testified and denied being under the influence of "spice" at the time of the accident. The jury acquitted the defendant of all charged offenses and all lesser included offenses except one, misdemeanor manslaughter. In that lesser charged offense, the jury was unable to reach a verdict and the court declared a mistrial. Eventually, the defendant pleaded no contest to the "hung" misdemeanor count. The court placed Mengore on misdemeanor probation requiring him to comply with various terms including 180 days in county jail. With credits, Mengore will shortly be released. He will actually serve no more than 88 days.

Tanner Mengore was represented by Ilan Funke-Bilu, who was presented with this year's Trial Lawyer of the Year Award by the Central Coast Trial Lawyers Association for his work on the Mengore case.

Funke-Bilu earned his law degree from Western State University College of Law in Orange County and moved to San Luis Obispo in the late 1970s, where he has worked as a criminal defense attorney for nearly 40 years. ■



*Ilan Funke-Bilu, Trial Lawyer of the Year*

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# **Brian Jeffrey~**

## ***Declaration in Support of His Motion for Change***

**by Raymond Allen**

*Photos by Tobin Davidson and Justin Yu*

*All lyrics written by Brian Jeffrey Goldfaden and are used in this article with permission from **Brian Jeffrey Music***

**T**here is a place where neighbors actually know each other's names. They look at each other. They talk to each other. They recognize the other's humanity. And when the sun sets, the people of this neighborhood walk west with wine glasses in hand. From their church-like cliff, they watch the show: the setting sun, the clouds catching reflected color, and the blue-green-orange ocean waves crashing against jagged rocks.

On a bench nearby sits a man with long brown curly hair. He quietly plays an acoustic guitar. His intended audience is the Universe. He looks toward the setting sun. The neighbors gather around. If you walk close enough, you will hear him gently singing. He sings his original songs about life and the world. If you stay long enough, and listen closely enough, the simple songs of his kind, optimistic soul will seep into yours. This is Brian Jeffrey.

Inside of every society is culture. Culture is never uniform. There are going to be some that refuse to bend to the current trends of social norms and thought. These are the dreamers, the artists, the poets.

The perspective of the law is pessimistic. The law presumes Man will fail, often miserably. The law tells Man what not to do and warns him of the consequences of his misbehavior. There are penal, civil and social penalties to be paid.

The dreamer, the artist and the poet tend toward the optimistic. To the dreamer, there is no good reason why we cannot all just get along. To the visionary poet, the existence of the rule of law does not symbolize advanced civilization, but underscores a failure of society to move past its brutish, selfish roots. An advanced people, with respect for all, would need less law not more. From this point of view, the poet looks to a world that has never been and, like Robert Kennedy, asks, "Why not?"

Brian Jeffrey came to his music career later in life. According to Jeffrey, from 1995 to 2010 he and his wife, Nicole, ran a very successful employment agency. The business grew until the economic down-turn. In 2008, the financial crisis that affected so many Americans ravaged their thriving business.

In response, Jeffrey returned to his music. He had not picked up a guitar since he was 14. As he played with chords, he wrote a song about the cyclical nature of life. The song, later entitled "The Best," told the story of how a blue sky can turn cloudy, but inevitably returns to a beautiful blue again.

Instead of languishing in lassitude, in July 2010, Bryan and Nicole made a list of the places they would like to visit in the next year. They called it the "Fuck It" List. With guitar in hand, the couple traveled to the Jersey shore, New York, Rhode Island, Maine, Vermont, Guatemala, Costa Rica, Honduras, Panama and Belize.

When they were done with their extensive travels, they moved to Shell Beach, California. From the cliffs of Shell Beach, Jeffrey sings his incredibly accessible and oddly bouncy lamentations. He sings about relevant social issues, like the economics of our bulging prison system. In his song "The Modern Slaves," he shares the following.

---

*Sold a dime  
Now he's doing the time  
Third strike got him 20 years to life  
What a price  
Daddy was the same as him  
Got sent away for minor things  
Didn't have a lawyer on his side  
What a crime*

*He'll spend his life incarcerated  
And his soul and his time and mind won't be his own  
He'll waste his life humiliated  
And he will not be alone*

*Profit on the prisoners  
Construction, guards, superiors  
Wardens, corporations stake their claims  
To the modern slaves*

*Moved around three times this year  
Wife has no way of getting here*

*Locked away and caged for a victimless crime  
Primm County line*

"I never intended to be a songwriter," Jeffrey says. As a songwriter, however, he tries "to examine the ties that bind us together, the challenges that make us stronger." Importantly, he shares his belief that "we are more alike than we are different."

The song "Don't Look Away" is a clear challenge. It starts with homage to the riots that followed the verdicts in the Rodney King beating case. It ends with several references to modern police shootings.

*1992 set the world on fire  
Can't we all just get along  
There was a time  
when I saw the poor, the innocent  
I saw their hunger then I looked away  
...*

*continued on page 26*





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## Brian Jeffrey continued

*Just the other week I heard a man was shot dead  
on the street  
Wish I could say it hasn't happened here before  
It happened once again, in a town called Ferguson  
Baltimore and Charleston  
History is no mystery  
We can move beyond the past  
When everyone is free at last*

The cynic will surely laugh at the implausible naiveté. But the poet is not called upon to provide the solution, he is called upon to show us who we are now and who we could be if change truly mattered to us. Jeffrey sings universal songs about universal fears, desires and hopes. "My songs," he says, "visualize a better world and speak to the challenges of today."

Jeffrey's music presents an interesting contrast. The words are often deep and meaningful, but the music is light and bouncy. "I purposefully enlist the contrast," he says, "because of my undying belief of optimism." As a result, the up-beat music is the central aspect of the message.

Jeffrey explores the depth of his ability to empathize. Although he acknowledges that we each have a duty to take care of ourselves, sometimes events and conditions make that impossible. Sometimes the choices become unmanageable. At that point, we must be there for our neighbors.

"I know you feel a certain way about something until it happens to you," he says. If you can simply acknowledge that you have no idea how you would deal with violence, poverty, an unwanted pregnancy, poor education for your children—if you can stop judging from the safety of your distance—then you step closer to your humanity.

"Moment" is a song about Jeffrey. The lyrics do not completely capture his boyish enthusiasm for life. When you meet him you meet joy incarnate. His eyes twinkle, his mouth smiles, and his soul sings. The song is also about living in the moment. Shakespeare, Donne and Coleridge have not met their match, but there is no better example of how simple the profound can be and how profound the simple can be.



Met a music man by the sea  
 Played his music gently  
 Sun set over the ocean  
 What a sight to see  
 Soul said hello  
 Eyes could see endlessly  
 Colors light up the sky for this moment  
 Say goodbye

The point is this: as lawyers we have become enamored with the process of civil or criminal regulation. We think that we are part of a vanguard because we encourage a non-violent way of ending disputes, and perhaps, in the end, our prescription is as good as it gets. But let's reflect in this moment upon the dreamer's dream: a world without hunger, war or want.

Jeffrey's dream is that a simple song could make another person's day better. The goal is to have the unbridled optimism of his songs inspire us and rekindle our energy. With a renewed spirit, we can reset the focus of our basic human-kindness. ■

*Raymond Allen is a partner at the law firm of Alton & Allen, Inc. He is also a contracted public defender with the San Luis Obispo Defenders Office and a Torts professor at San Luis Obispo College of Law.*



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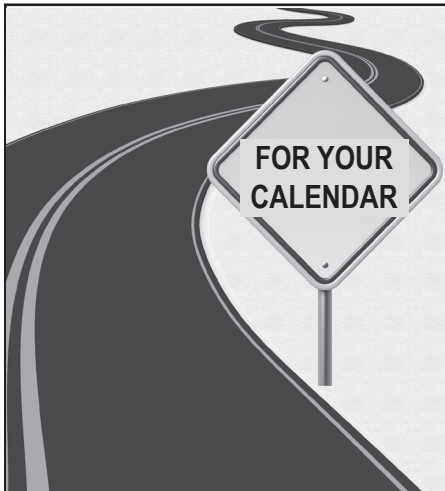


## Congratulations

Sinsheimer Juhnke McIvor & Stroh, LLP, is pleased to announce that associate Kevin D. Elder became a partner in the firm effective January 1, 2018. Kevin joined the firm in February 2008 as a legal advisor on business and real estate matters, and worked alongside partner June McIvor for seven years.

Kevin has expertise in a variety of areas, including business and real estate transactions, entity formation, land use, and trademarks. Kevin has counseled clients in the purchase and sale of commercial and multi-family residential properties, and in complex business transactions including due diligence reviews and securities compliance. Kevin also advises individuals on issues relating to the formation and operation of small businesses.

Kevin obtained his undergraduate degree from USC, and his law degree from Loyola of Los Angeles Law School in 1998. While living in Los Angeles, Kevin served as in-house counsel with Toyota Financial Services and as an owner and general counsel of a construction company which contracted with residential builders in San Diego and Riverside counties.



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**DEADLINES**  
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**January/February/March**  
**November 23**

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**February 23**

**July/August/September Issue**  
**May 25**

**October/November/December Issue**  
**August 24**

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# Bar Bulletin Editorial Policy

Contributions to the *Bar Bulletin* must be submitted electronically in Microsoft Word format directly to the Editor at:

**Collette@slolaf.org**

Footnotes will not be published; any essential notes or citations should be incorporated into the body of the article. Contributors are encouraged to limit the length of their submitted articles to 2,500 words or less, unless the article can be published in two parts in successive issues.

The *Bar Bulletin* is published four times per year:

- January–March      • April–June
- July–September    • October–December.

**To ensure consideration for inclusion in the next scheduled edition, articles, advertisements and payments must be received by the 25th of the month, as stated at right.**

The *Bar Bulletin* reserves the right to reject or edit any contributions. By submitting contributions for publication, contributors consent under this policy to the editing of their work, the publication of their work and the posting of their work online. Contributors must include an e-mail address and/or telephone number, as they may be contacted during the editorial process.

Your submission of photographs to the *Bar Bulletin* authorizes their publication and posting online. All photographs must be submitted in .jpg or .pdf format with a resolution of not less than 300 dpi via e-mail or, for large files, WeTransfer. Please include the photographer’s name and that you have permission to use the photograph.

The San Luis Obispo County Bar Association does not pay contributors for their submissions.

Opinions expressed in the *Bar Bulletin* do not necessarily reflect those of the San Luis Obispo County Bar Association or its editorial staff. The *Bar Bulletin* does not constitute legal advice or a legal resource and must not be used or relied upon as a substitute for legal counsel that may be required from an attorney.

## Bar Bulletin Advertisement Policy

All advertisements in the *Bar Bulletin* must be submitted in .jpg or .pdf format with a resolution of not less than 300 dpi. Flyers or announcements for the opening, closing or moving of law practices, upcoming MCLE programs or other events put on or sponsored by organizations other than the San Luis Obispo County Bar Association are considered advertisements, and therefore subject to this policy and to all applicable advertising rates.

**The cutoff dates for accepting advertisements, payments and articles are as follows:**

January–March issue deadline	11/23
April–June issue deadline	2/23
July–September issue deadline	5/25
October–December issue deadline	8/24

Information on advertisement sizes and rates can be found online at **www.slobar.org**. All advertisements must be prepared prior to publication. Contact Nicole Johnson at (805) 541-5930 regarding methods of payment accepted.

**2018 Bar Bulletin**  
*Collette Hillier, Editor*  
Telephone: (805) 548-0793  
Collette@slolaf.org



## HAVE AN ARTICLE FOR THE COUNTY BAR ASSOCIATION’S WEBSITE?

We are looking for content for the County Bar Association’s website located at **www.slobar.org**. Please e-mail website articles for consideration in Word format to Nicole Johnson at **slobar@slobar.org**.

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