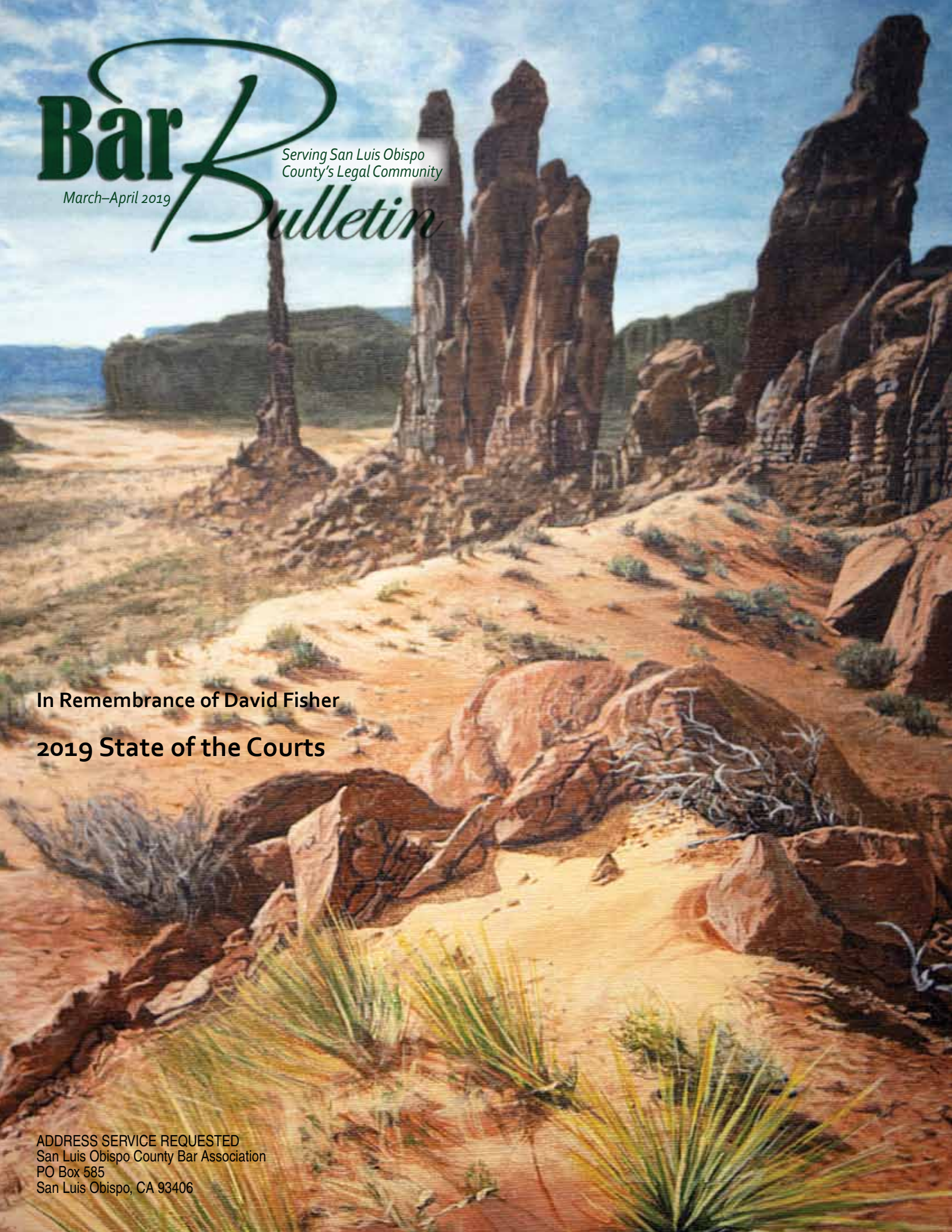
Bar Bulletin
Serving San Luis Obispo County's Legal Community
March–April 2019



In Remembrance of David Fisher

2019 State of the Courts

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San Luis Obispo County
Bar Bulletin

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President's MESSAGE

by Michael R. Pick Jr.

What's on the Agenda for 2019?

2019 is off to a great start! We have had some rain and our bench is full.

As for the San Luis Obispo County Bar Association (SLOBAR), we are off to a great start as well, and we are looking forward to another stellar year. The SLOBAR Board of Directors' sincere hope and goal is that in 2019 the SLOBAR continues to provide the same excellent level of service to our community since its formation in 1963.

Over the next six months, we have upcoming MCLE events that cover a wide array of topics and include the following:

- **March 21**: a presentation on fertility and surrogacy law by Molly O'Brien;
- **April 18**: immigration law by Madeline Behr, an attorney who has an office in Mexico and the United States;
- **May 16**: a panel of our "newer" bench officers—Judge Coates, Judge Guerrero, Judge Baltodano, Judge Marino and Commissioner Childs);
- **June 20**: an overview of marketing law by Joe Benson.

These all are interesting topics with really good presenters, so please mark your calendars.

*

In order to be able to keep the SLOBAR running smoothly, membership in the SLOBAR is needed.

It is difficult to pin down the exact number of attorneys that practice in San Luis Obispo County as a result of out of town lawyers, satellite offices, and the ebb and flow of practices and cases. A reasonable estimate, however, is that there are approximately 600 lawyers that practice regularly in San Luis Obispo County. Out of those lawyers, fewer than 350 are members of the SLOBAR. We can do better.

Along with supporting the SLOBAR, membership benefits in the SLOBAR include the following:

- Continued professional development by way of MCLE and relationship building;
- Opportunities to expand your practice by networking with other professionals;
- Increase your expertise and broaden your knowledge through a variety of educational opportunities;
- Stay informed by way of updates blasted out by the SLOBAR email;
- Subscription to the *Bar Bulletin*;
- Listing in the *Bar Directory*; and
- Discounts to SLOBAR events.

Membership in the SLOBAR is very inexpensive. Membership applications can be found on the SLOBAR website, or please contact Nicole Johnson at slobar@slobar.org.

Thank you for your continued support of the SLOBAR. Please feel free to reach out with any questions. ■

Have you met…?

Desi Lance

A contract attorney, Lance focuses her practice on business immigration. Prior to undertaking contract work, she worked as an immigration attorney at two firms in London, England. She earned a bachelor's degree in broadcast journalism from Azusa Pacific University in 2008 and a Juris Doctor degree from the John Marshall Law School, Chicago, in 2014. She is admitted to practice law in Illinois and California.

In spring 2018, Lance, her husband, Alec, one-year-old son, Copeland, and basset hound, Bailey, moved from Chicago to Grover Beach. Lance grew up in San Luis Obispo and Paso Robles and is happy to be back on the Central Coast. She loves the beach, Pilates, traveling and simply being outdoors with her family. ■

Curtis Abram

An associate attorney with Attala Law, Abram focuses his practice on Business Law, Estate Planning and related Litigation. Before joining Attala Law, he worked at a large law firm in Long Beach, where he practiced employment and securities litigation.

Abram earned his bachelor's degree in Communications and Business Management from Emmanuel College, where he achieved All-American honors as a member of the volleyball team. In 2015, he earned his Juris Doctor degree from the University of San Diego, graduating magna cum laude.

Abram, a graduate of San Luis Obispo High School, returned to SLO in June 2018 and is excited to be back on the Central Coast. When not in the office, he coaches a local beach volleyball club team, and you can find him playing volleyball, golf, pickleball, guest-hosting the Sports Bite on ESPN Radio, or walking his young puppy, Banner. ■

Tim Brown

Following his move to Morro Bay in January 2018, Brown specializes in patent and trademark prosecution as a sole practitioner. Prior to his move, he worked as an in-house patent attorney at a number of biotech companies in San Diego.

Brown also spent several years in Washington D.C., where he served as a patent examiner at the United States Patent and Trademark Office. As an alumnus of Cal Poly, Brown knew a return to the Central Coast was inevitable.

In his spare time, Brown enjoys surfing, fishing and walking his dogs on the beach in Morro Bay. He looks forward to becoming more involved with the Bar Association and the SLO community. ■

Note

If you are a new member of the San Luis Obispo County Bar Association and would like to be introduced to others in the organization, please contact the *Bar Bulletin* editor for inclusion in an upcoming issue.

Image courtesy of Creative Commons

There is a lot I wish I had known about grief before having to learn the hard way. Everyone has experienced different degrees of loss in their lives, whether it is a significant relationship that ended via divorce/break-up/death, a dream job that turned out to be not so dreamy, or having to sell the house you always wanted because of a personal financial downturn.

One of the most significant lessons I have learned in my life is that every change is a loss, and every loss brings grief. Grief is not an experience reserved for the loss of human life, though this is of course what society normally associates with grief. This also seems to be the only experience that we are given some latitude to grieve, and even then, we place arbitrary timelines and "stages" on the experience so that we can wrap it all in a nice little bow and put it away when we decide that the boxes have been checked.

Before losing my husband, Patrick, to brain cancer in 2015, I had gone through various losses in my life, like we all do—grandparents, family friends, etc. Based on those experiences, I believed in the American model of grieving, namely that you go through five distinct stages (denial, anger, bargaining, depression and acceptance) for about a year, after which you move on with your life.

I had very little else to base my knowledge of grief on. I don't know about you, but growing up no one talked about grief, except in those hushed conversations next to the tuna casserole at a memorial service where people speculated about how the immediate family was doing. The idea of actually discussing grief with those family members was considered taboo and inappropriate. I learned that talking about it would just make it worse for them, and I didn't want to be the jerk who was causing someone even more pain. So, when in those situations, I would just awkwardly hug the grieving person, spout platitudes like, "I'm sorry for your loss," and hurry back to my paper plate of hors d'oeuvres.

Naturally, when Patrick died, I expected to go through approximately one year of hell before emerging and getting "back to normal." As anticipated, every event of that first year was painful and draining, but it was survivable based on my belief that all the firsts would be the hardest and then I would be okay. I was able to continue working as a litigator because my big city law firm was tolerant of my inability to hit my billable hour quota. People looked at me with concern, squeezed my arm, and told me, "Everything happened for a reason." I knew that it was okay to feel terrible, that this was "normal," and that it would all be over soon.

I mentally approached the one-year anniversary of Patrick's death with both dread and hope, almost like I was about to graduate from grieving school. I had done everything that had been asked of me in therapy. I was convinced that fearlessly facing my pain would be the price of admission back to my life before everything went so horribly wrong. It was as bad as I had ever felt in my life, but the relief I was praying for would come soon, right?

Wrong. So, so wrong.

That first anniversary came and went. The anticipation of a respite from the agonizing emotional and spiritual pain was almost palpable at times. I waited for it to come. And waited. And waited some more. About a month later, I finally learned the truth: *grief looks nothing like what I thought it would*. It is not linear. There are not distinct stages. Even if we do experience each "stage," which I did, passing through them once does not mean we can simply check them off our

Lisa and Patrick

list and move on to the next. And we definitely do not graduate from the experience because a year, or any other made-up time frame, has passed.

Finding out that my outline for grieving was completely false was terrifying. I began to fear that since I missed my self-imposed deadline for getting better, I would simply live in that pain forever. I would never be okay. As a result, that second year was, in a lot of ways, even worse than the first. In addition to the feelings of depression, angst, fury and every other negative emotion you can imagine, I no longer had hope that it would change.

As a result, this was when my behavior became really self-destructive. I tried to anesthetize myself in any way I could, including spending a ton of money I didn't have, alternating between eating *ALL. THE. THINGS*. and strict "discipline" (read: deprivation), which ignited my long history of disordered eating, and numbing-out by binge-watching terrible reality shows instead of interacting with other human beings. It was bad.

It wasn't just me, though, who thought I should be "better" after a year. My bosses lost patience with my inability to keep up with the minimum billable hour requirements, evidenced by the passive-aggressive, sad-faced emoji that began to regularly appear on my monthly billing report. I started feeling like the people in my life were done hearing about my grief, which may or may not have been the case, but it was enough that I started answering "I'm fine" when people asked if I was okay rather than telling the truth. I could not stand feeling like I was being inauthentic, so I withdrew more and more from my relationships rather than lying about what was really going on. I thought I was protecting myself from getting hurt, or hurting the people I loved, by closing off my heart. I did not want to make anyone uncomfortable with the fact that I was not okay.

No one told me that once I had worked through the initial grief of losing Patrick, there would be a separate, equally painful grieving process for the life I thought I was going to have. I had to say goodbye to the idea of me and Patrick as a power couple, buying a great house, starting a family and taking on the world together. We will never go on that trip we planned to tour his family's roots in Ireland and where I lived in Italy. We will not walk hand-in-hand down Cannery Row in Monterey each year on our anniversary. I had to acknowledge the reality that not only is Patrick gone but so, too, is each of these plans for our lives. Sometimes I will go for weeks feeling okay until some previously repressed memory, or plan, or whatever will pop up that feels like I've just been punched in the stomach. Every time this happens, I have to allow more space to grieve.

One of the most shocking lessons I have learned about grief is that feeling good can be just as difficult as feeling bad. There was a part of me that felt extremely guilty when I started feeling better. I kept hearing that the pain of grief was the price paid for love, so it seemed like a betrayal of that love to feel anything other than agony. I watched myself take steps forward only to sabotage my own efforts because it felt wrong to be happy. I didn't know that was "normal," too. I just thought I was going crazy.

The experience I have with grief has repeatedly led me back to this question: Why is it so hard for us to talk about death and grieving when it is literally one of the only human experiences that we all have in common? The facts of our lives will vary person to person, but we will all deal with death and dying. Why do we pretend like we are

Continued on page 8

somehow going to be immune? Do we ostracize people who are grieving, either intentionally or unintentionally, for no better reason than to deny our own mortality?

I have concluded that, in general, our culture sucks at dealing with death and dying. I don't see the point in trying to make it sound more elegant than that. As a result, we cause problems in all kinds of ways.

We don't get wills or trusts drawn up because we think we are too young, or we don't have any money to worry about. We don't talk about our wishes should something happen, so *when* (not if) something does, the burden of difficult decisions is placed on the shoulders of our loved ones. This often leads to fighting among the decision-makers, who cannot separate what they would want for themselves from what they think we would want. It can lead to nasty arguments about who the decision-maker should actually be, which can, and in our case did, increase the trauma of an already painful situation.

I am not naive. I know it would require a major cultural shift to start talking about death and dying openly. That does not mean, however, that I have to perpetuate the custom of silence on this issue. I believe the process of grieving Patrick, while it would have always been terrible, would have been less frightening if someone had told me that the journey would be entirely unique to me, and that no one could accurately predict its course or duration.

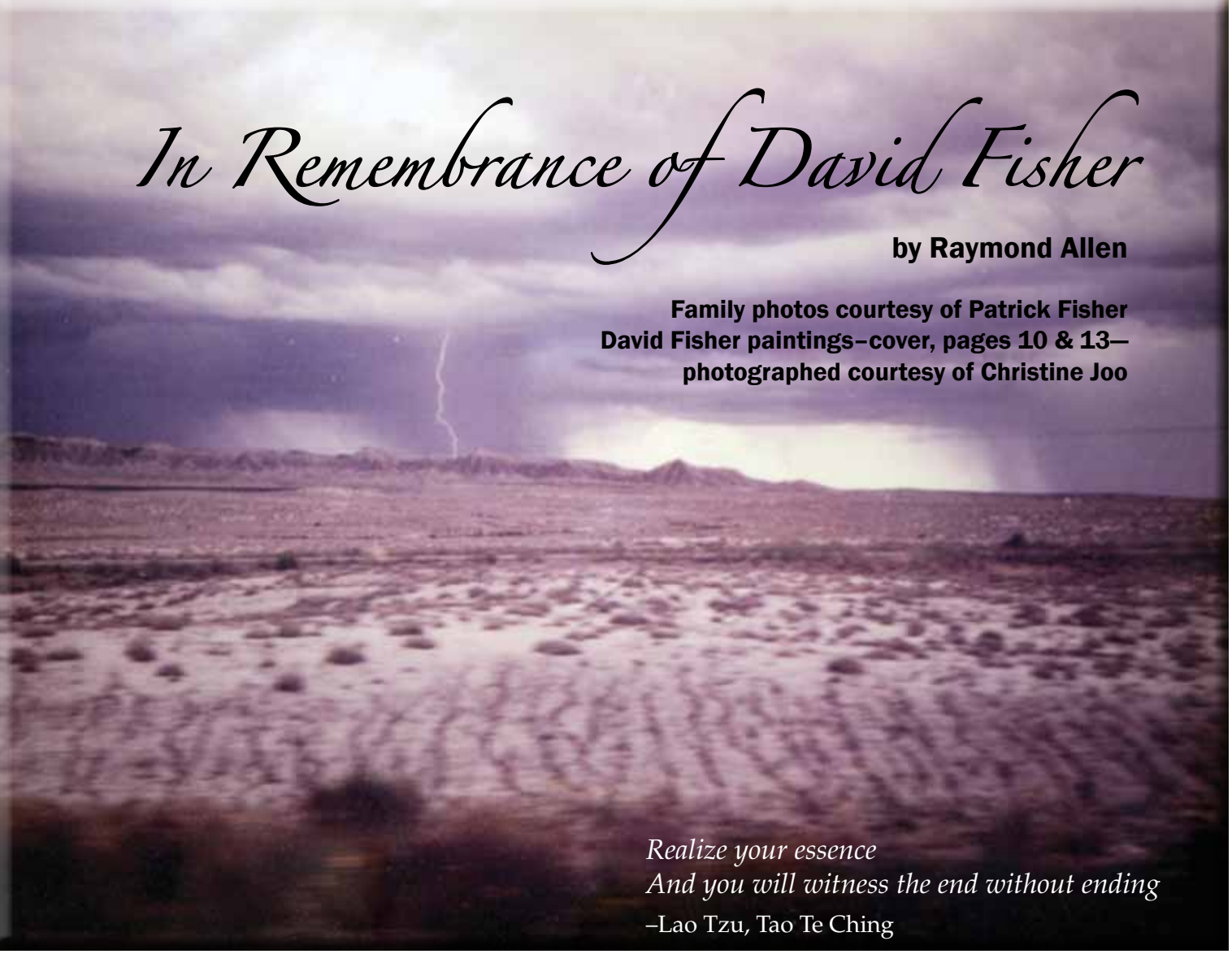
It should be noted, too, that it might be the case that a year actually *is* what you need to grieve a loss in your life. Or maybe it's less. That doesn't mean you're not doing it right, or that something is wrong with you. *The point is that grief is so deeply personal that no one can tell you what it's going to look like.*

The best thing that we can do is allow ourselves to feel exactly how we feel. We can give ourselves permission to completely ignore the well-intentioned people in our lives who tell us how to "feel better." We don't have to feel guilty and compare our situation to others, qualifying every one of our feelings with, "Yeah, but it could be worse." It can always be worse—that does not mean that our feelings aren't valid and worthy of giving them the time to process.

If you have suffered a loss, I hereby give you permission to take whatever time you need, by whatever means necessary, to grieve. Be angry. Allow yourself to feel pain and joy simultaneously. Scream. Eat the sheet cake. Just please, keep going, because it will change. I cannot promise that life will ever look like it used to before your loss—mine doesn't. But it won't always be so dark.

If someone in your life is grieving, tell them you love them instead of telling them what to do. ■

Lisa O'Leary is a senior associate with Federman Law Firm, where she practices subrogation, personal injury and workers' compensation. She is in her ninth year practicing law, and also has specialized in medical malpractice, toxic tort, insurance coverage, and landlord-tenant disputes. O'Leary is a zealous advocate for the brain tumor community and works with numerous organizations including the National Brain Tumor Society, the American Association for Cancer Research and the End Well Project. She blogs about her experience as a young widow at surrendertolive.com.



In Remembrance of David Fisher

by Raymond Allen

Family photos courtesy of Patrick Fisher
David Fisher paintings–cover, pages 10 & 13–
photographed courtesy of Christine Joo

Realize your essence
And you will witness the end without ending
–Lao Tzu, Tao Te Ching

Attorney David Fisher has died. On November 11, 2018, Fisher died of pancreatic cancer. Cancer does not define; it simply provides the inevitable punctuation at the end.

Fisher was an ever-evolving, complex man.

A physically active man, he grew up in Southern California and started surfing in high school. Thereafter, he developed an intense connection with the water. Fisher was game to try anything. He tried fly fishing and wind-surfing and hunting and roller hockey. He remained active his entire life. He worked out. He ran 21 miles a week. He rowed. He was a hunter who evolved into a morally based vegetarian.

He loved camping and music. He played a mean harmonica and often played with blues groups throughout the area. There were spontaneous jam sessions at his house. Music was always played over the speaker system, with his favorite being reggae. In 1987, when reggae legend Peter Tosh was killed, Fisher deeply mourned the loss. "In our house, it was like JFK died," recalled son Patrick Fisher.

When almost everyone in his generation was trying to avoid the draft, Fisher joined the United States Army. He was stationed in Maryland as a counter-intelligence agent. The current Army website explains that a successful candidate for this rank "must be a proven high performing soldier (E-4) [and] you must be able to blend into environments and not look like you are in the military." Mission accomplished.

An attorney for 42 years, his professional career began as an attorney for insurance carriers in Orange County. It is reported by old friends that Fisher conducted 50 jury trials in his first four years of practice and won his first 30 jury trials before suffering a defeat. It is verifiably true that he was one of the youngest attorneys ever nominated to

the American Board of Trial Advocates (ABOTA).

From insurance defense, he evolved. He left the firm in Southern California and re-established himself in San Luis Obispo. His longtime law partner, retired attorney Gerald Carrasco, thought that Fisher's defining characteristic was generosity. In 1997, Fisher and Carrasco formed a law partnership. Fisher introduced Carrasco to civil rights advocacy and Carrasco introduced Fisher to criminal defense.

A few years into the partnership, Carrasco had a heart attack that kept him from working for three months. Carrasco recalls, "David would visit me on occasion. He would bring me books and plants. Amazingly, though I could not contribute anything for three months, he made sure I never missed a pay check."

A lengthy and inspiring article could be written on how Fisher loved being a lawyer, how he relished advocacy, and how he felt deeply the wounds of the injured and the oppressed.

Fisher was a painter and poet. He loved to talk about *en plein air*. His battles with light and wind were points of pride. He could paint so realistically that his work looked like a photograph. Again, there was growth and evolution. In later periods, he painted with a loose Impressionistic style and, still later, he painted in the style of a Surrealist. He also wrote deep and introspective poems. The words reflect a man who sought truth from himself and for himself.

Fisher was a model. "You could do worse than go through life with David Fisher's face," said a chuckling Carrasco. Even as he matured, Fisher would get calls to do photo shoots for men's clothes or fragrances.

As a motorcycle enthusiast, he rode his Harleys with a group of local men. Once, in 2001, Fisher offered to loan his motorcycle to Judge Roger Picquet for a week. Judge Picquet refused the generous offer because of the ethical

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David Fisher continued

with Paul, Patrick, Nathan 1996

Snoqualmie Falls 2000

on a ferry to Canada with Hanna, Patrick, Lil' David & Bella 2001

implications. He paid Fisher the fair market value of leasing a Harley. "I could tell," remembered Picquet, "from the way his motorcycle ran that week that it had been meticulously taken care of, something that motorcyclists pay attention to."

Years ago, around the early 2000s, Fisher had a terrible motorcycle accident and broke his tibia and fibula. That injury affected his gait and ultimately his hip. On October 3, 2018, he had a hip replacement surgery. Likely, some of the pain he attributed to the hip was the metastasizing cancer in his pancreas. On October 6, Fisher had a stroke. He recovered quickly, but only to realize he was once again under attack from his mortal enemy, pancreatic cancer.

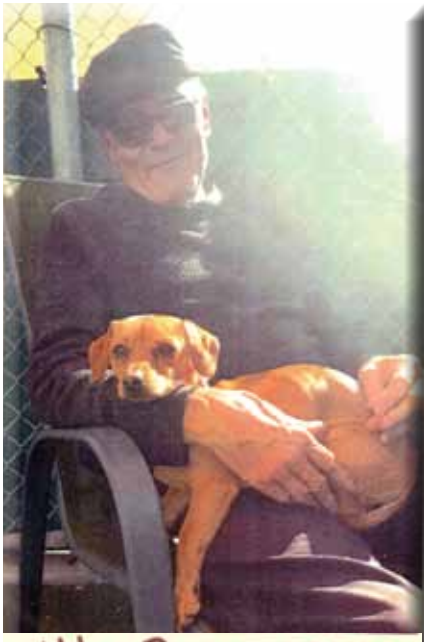
Fisher was a husband, father and grandfather. He loved his family. His house was where the fun happened. There the music played, the camping trips were planned, and the activities were organized. The kids and grandkids were always happy to see Fisher. Being with him was easy. He was devoted to all of them.

His son Patrick Fisher had been the office manager for Fisher and Carrasco. Later, Patrick Fisher decided to go to law school. When he passed the bar examination, Fisher immediately made Patrick a partner at Fisher Law Office. When asked once what it was like to have his son be his partner, Fisher teared up and said, "It's amazing."

Fisher was brave. The truth about life is we all die. What we do with our time between the conception and the rapture defines us. I was surprised to learn that Fisher had often struggled with bouts of cancer. I did not know that he almost died a few years back.

Gerald Carrasco said, "We walk through the halls of the courthouse and we cheer each other on in victory; we pat each other on the back in support after a loss. But then we go home to our private lives."

When we pass each other in the court's hall, we do not know the trial the other bears. Nor do we know the depth of the other's soul. But we should try. ■



with Sunny - puppy
Oct. 2018

1993

2019 State of the Courts

photographs courtesy of Christine Joo

The Venetian Room of the Madonna Inn was overflowing as the Presiding Judge, the Honorable Ginger Garrett, provided the San Luis Obispo County Bar Association with a snapshot of the State of the Courts at the January meeting.

Judge Garrett told attorneys that every single judge received his or her first choice regarding assignments. That means, said Judge Garrett, each judge has chosen *you*, like an ugly adopted child.

Judge Garret also explained who will be the team leaders for the court. Judge Jacquelyn Duffy will be the Assistant Presiding Judge. Judge Craig Van Rooyen will be the Criminal Team Leader. The Criminal Team will be comprised of Judge Van Rooyen, Judge Duffy, Judge Jesse Marino, Judge Matt Guerrero, Judge Tim Covello, Judge Hernaldo Baltodano and Judge Dodie Harman.

Judge Linda Hurst will be the Civil Team Leader. The Civil Team will be comprised of Judge Hurst, Judge Tana Coates and Judge Garrett. Judge Gayle Peron will be the Family Law Team Leader. The Family Law Team will be comprised of Judge Peron, Judge Rita Federman and Commissioner Erin Childs.

Judge Crandall will be the Juvenile Court Supervising Judge. He will supervise all judicial officers at that remote facility. The Appellate Panel will be comprised of Judge Coates, Judge Federman and Judge Hurst. Commissioner Leslie Kraut will oversee the Traffic Court and the Small Claims Court.

For the court's several Specialty Courts, Judge Harman will oversee the Drug Court; Judge Baltodano will oversee the Behavioral Health Court; Judge Guerrero will oversee the Veteran's Treatment Court; and Judge Marino will oversee the Qawi Hearings. When hospitals seek to administer non-emergency interim involuntary antipsychotic medication to a patient committed as a Mentally Disordered Offender, an Insane Offender, a Sexually Violent Predator or a Mentally Disordered Sex Offender, the courts are asked to affirm the administrative decision.

Court Administrator Michael Powell addressed the state of the courts from his perspective. He explained that annual Court funding is determined by our county's increase or decrease in filings relative to other counties over a three-year period. Thus, the state allocation of funds to San Luis Obispo County is not known until that math equation is completed by the state.

Even more disturbing is that the county is not permitted to save funds for a "rainy day." So, the state requires every county to work on the edges of economic disaster. Although some safeguards are in place, each year brings new stress and anxiety related to the court budget.

This year, however, funds are available for several improvements within the courthouse. The court,

for instance, will replace bench seating outside the courtrooms. Staff will re-establish Friday phone hours. Maintenance will complete the re-carpeting inside the building. The Veteran's Hall will have its heating and air conditioning units replaced.

Powell also gave some statistics regarding the caseload annually processed through our courts. Of note, there were approximately 58,000 total cases: 3,566 Civil cases; 50,566 Criminal cases; 1,900 Family Law cases and 411 Juvenile cases; 375 Probate cases; 924 Mental Health cases; and 165 Habeas Corpus cases. Of all those cases, 2,253 ended with a court trial and 35 ended with a jury trial. Criminal defense attorney Ilan Funke-Bilu had four of those jury trials.

In case of questions or additional comments, Michael Powell assured the assembled attorneys and guests, "My phone works every day. I just don't answer it." From his smile, we assume he was kidding. ■

Presiding Judge, the Honorable Ginger Garrett, reports on the State of the Courts.

Court Administrator Michael Powell spoke about funding, statistics and expected infrastructure improvements.

Sheryl Wolcott, San Luis Obispo County Bar Association President in 2018, receives a thank you plaque from 2019 President Michael Pick.

Tack

Carpenter v.

During the 2018 Senate confirmation hearings of Justice Brett Kavanaugh, the nominee emoted that the Fourth Amendment was a balance between privacy and liberty on one end and security and law enforcement on the other end. When Kavanaugh discussed this balance, he specifically referenced *Carpenter v. United States* (2018) 582 U.S. _____, 138 S. Ct. 2206.

If Justice Kavanaugh was on the bench when *Carpenter* was decided, he may have persuaded Chief Justice Roberts not to destroy this balance by focusing on the special needs of the government to prevent public harm.

To glean the magnitude of this case, it is helpful to weigh the facts and the arguments.

Carpenter v. United States

There were multiple armed robberies at Radio Shack and T-Mobile stores in Ohio and Michigan. The robbers entered the stores, brandished firearms and herded customers, then stole various items. In April 2011, law enforcement arrested four co-conspirators.

One co-conspirator cooperated and confessed that the group had robbed nine stores in Michigan and Ohio during December 2010 through March 2011. He named Timothy Carpenter as the organizer and lookout for the group.

The co-conspirator gave Carpenter's cellphone number as well as the cellphone numbers of the other co-conspirators to FBI agents. The FBI reviewed the cellphone records and identified who the confessed co-conspirator called during the time of the robberies.

During May to June 2011, under the Stored Communications Act, 18 U.S.C. section 2703(d), the FBI applied for and **received judicial authorization** to seize Carpenter's cellphone records. Those records included Carpenter's subscriber information, toll records, call records and historic cell site records. Cell site records show which cell tower a cellphone has connected with while in use. The data sought related to past calls, **not** the monitoring of connections to Carpenter's cellphone in real time.

Using the cell site location records of Carpenter's cellphone, the FBI established the proximity of Carpenter during the robberies. Carpenter was arrested and charged with six counts of robbery and additional counts for carrying a firearm during the robberies.

At the jury trial, the confederates testified that Carpenter was the leader of the group. FBI Agent Hess testified as an expert regarding cell site location information (CSLI). Part of the testimony was an explanation that each time a cellphone taps into a wireless network, the carrier logs a time stamped record of the cell site and sector used. Hess produced maps that placed Carpenter's cellphone near four of the charged robberies.

During Carpenter's motion to suppress the CSLI, he argued that the search and seizure of the records violated his Fourth Amendment rights because it was obtained without a search warrant supported by probable cause. The district court denied the motion.

The Sixth Circuit affirmed, noting that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he shared that information with his wireless carriers. The United States Supreme Court granted certiorari.

The Majority Opinion

Chief Justice Roberts' majority opinion concluded that the acquisition of Carpenter's CSLI records was a search and the government must obtain a search warrant supported by probable cause. Although the FBI did get judicial authorization through the SCA, which required the showing of reasonable grounds for believing the records were relevant to an ongoing investigation, the showing fell short of the probable cause needed for a search warrant.

The majority declined to extend the third-party doctrine to this case. The third-party doctrine holds that a citizen usually has no Fourth Amendment interest in the business records held by a third party, like your phone company or your bank. Roberts called CSLI an **entirely different species.** The

t l i n g United States

by Sharon Lizardo

Government will need a search warrant to access CSLI, except for case-specific exceptions that may support a warrantless search of an individual's cell site records under certain situations.

Chief Justice Roberts did note a few exigencies, such as a fleeing felon, to protect an individual who is threatened with harm and bomb threats. However, this cursory list is laced with problems because it leaves law enforcement in "no man's land."

The Minority Opinion

Justice Anthony Kennedy, whom Justice Kavanaugh replaced, tackled Roberts' rationale by arguing that the Court was formulating a new rule that puts reasonable, accepted, lawful and congressionally authorized criminal investigations at risk in serious cases. He pointed out that the Court has **twice ruled** that an individual has no Fourth Amendment interest in the business records that are in the control of a third party. (See *United States v. Miller* (1976) 425 U.S. 435, bank records were not considered confidential communications; *Smith v. Maryland* (1979) 442 U.S. 735 pen register case.)

The FBI acquired the CSLI through an investigative process enacted by Congress. Upon approval by a neutral magistrate and demonstrating reasonable necessity, the CSLI was properly obtained. CSLI records are no different than any other kind of business records; customers do not own or possess CSLI records, so there is no reasonable expectation of privacy.

The Property-Based Trespass Test

Traditionally, the Court has been concerned with trespassory intrusions of property. The trespass test developed in *Katz v. United States* (1967) 389 U.S. 347, where the FBI used an electronic eavesdropping device attached to the exterior of a public phone booth. The test poses these questions to determine whether a suspect has a reasonable expectation of privacy: 1) Did the person actually expect some degree of privacy? 2) Is the person's expectation of privacy objectively reasonable—that is, one society is willing to recognize?

In *United States v. Antonine Jones* (2012) 565 U.S. 400, the Court unanimously held to restrict law enforcement's ability to attach a Global Positioning System (GPS) to an individual's vehicle. Justice Antonin Scalia's majority opinion held that the physical attachment of the GPS tracking device on Jones's car, coupled with the intent to obtain information about his movements, amounted to a Fourth Amendment search.

Subsequently, in *Riley v. California* (2014) 573 U.S. ___, 134 S.Ct. 2473, the Court limited law enforcement's ability to use the search-incident-to-arrest exception regarding cellphone searches.

My Perspective

The decision will have a significant impact on the ability of law enforcement to combat crime. The case does not preclude police from seeking CSLI records as evidence, but it does bar warrantless searches absent fact-specific, exigent circumstances/ongoing emergencies.

In *Carpenter,* the majority walked around the "ongoing emergency" term and left the property-based search and seizure doctrine in peril. Does an active shooter or child abduction suffice? How about terrorist threats or attacks? How about the prevention of a serial murder? Can we have a more expanded list on just what is deemed as an "ongoing emergency"?

The gist of the majority opinion is that the Court declined to extend the third-party doctrine to a wireless carrier's database of physical location information. Instead of embracing an extension of the third-party doctrine, the majority curtailed it. If the information is in the control of a wireless carrier, why is that not akin to business records that can be garnered through a subpoena duces tecum?

What is most striking about the conduct of the FBI is that the agents did get judicial authorization through the SCA and provided specific and articulable facts. The significant distinction is between communications held in electronic communications services that require a search warrant and those remote

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Tackling *Carpenter v. U.S.* continued

computing services that require a subpoena or court order. The legislative history of the SCA provides that Congress wanted to bolster the Fourth Amendment because it was considered lacking with regard to the Internet cases.

Here, the FBI was **not** accessing any communications by Carpenter, nor was he being monitored in real time. Instead, the FBI was using remote computing services to map out where Carpenter had been during the robberies. So, there was compliance with the SCA provisions.

Finally, the majority did not pay homage to the Good Faith exception as per *United States v. Leon* (1984) 468 U.S. 897. If a mistake is judicial in nature, the evidence is not to be suppressed.

Here, a neutral magistrate gave judicial authorization to the collection of CSLI records. If the magistrate made an error in the authorization, why penalize the FBI agents who were trying to shut down a duo-county massive conspiracy to conduct takeover armed robberies?

The vital role of the criminal justice system is to ensure the safety of the people. The ruling in *Carpenter* alluded to exceptions, but the Court declined to define just what is an "ongoing emergency." This misstep is unfortunate and creates confusion where it need not be.

One of the crown jewels of the Constitution is the Fourth Amendment's search and seizure protections. Deeply rooted in our jurisprudence is a sense of fairness and equal justice for all. The quote, "The safety of the people shall be the highest law," has been attributed to Cicero and was fundamental in the minds of the framers of the Constitution. My fear is that the *Carpenter* decision ignited substantial threats to life, health or property by weakening property-based principles that have governed search and seizure for so long. ■

Sharon Lizardo is a former prosecutor in Stanislaus County. Currently, she is the Academic Dean of the San Luis Obispo College of Law, where she teaches Evidence.

Right Where I Am Supposed to Be

by The Honorable Rita Federman

Surprised. That's the most common reaction I get when someone asks me if I like the family law assignment. People always ask cautiously, as if they're apologizing that I've been subjected to some odious task. It's as much a surprise to me as it is to others to find that the Family Law Court is such a dynamic and rewarding place to be.

Lawyers and non-lawyers alike seem to have common misconceptions about what happens in a family law courtroom. So I'd like to pull back the curtain and give you an idea of what it's like to be at the center of some of the most personal and important issues that are litigated in our courtrooms every day.

Let's start with the questions I hear most often.

Q: Don't you just hate listening to people bicker and fight about commonplace problems and treat each other so deplorably?

Maybe it's a matter of perspective. I spent 23 years in the field of criminal law as a judge and research attorney. Over time, I reviewed hundreds of trials and drafted post-conviction opinions involving violent and serious felonies. Most of the convictions were for murder; many were special circumstance murders; some were terrible and heinous cases of rape, sexual molestation and torture. Those were the cases where the worst possible cruelty and depravity was on display.

I think you can understand why I don't mind hearing cases involving ordinary, hardworking people who have hurt one another at the end of a relationship gone awry, but who are trying to find a way to move forward and get their lives back on track.

Q: But family law litigants fight over the most ridiculous things. Why can't they just agree?

I don't have a firm statistic, but the vast majority of family law cases in our county are resolved without a trial or even a single hearing. Our Family Court Services department runs a robust mediation program to assist families with child custody and visitation issues. The dedicated staff in the Family Law Facilitator's office helps people navigate the intricacies of the family law procedures and rules. Between the assistance that is available, and the general preference of most people to work things out and avoid confrontation, I estimate that well over 60 percent of our cases settle without any appearances in court.

Q: But don't the lawyers just want to fight?

No! The lawyers are the best part of this assignment. Don't forget the Family Bar is small. The lawyers are cordial to one another. They have to get along if they want to be effective. They might be the last of the old-school "general practitioners," knowledgeable about family law, civil litigation, real property, criminal law, tax law and bankruptcy law. They also have to be nimble enough to evaluate and litigate both sides of an issue, because they may find themselves on the opposite end of an argument in any given case. They display a deep allegiance and dedication to their clients that underscores the important contribution they make to helping members of our community work through some of the most emotionally challenging issues any of us can face.

Q: I hear the rules of evidence don't apply in family court. How do you manage that?

Another myth. Lawyers who practice in the Family Courts have to be proficient in the rules of evidence to be effective. We address evidentiary objections at every hearing, and they sometimes can be quite complex.

Q: But aren't the litigants unruly and disrespectful?

It has been hugely satisfying to me to go into the courtroom day after day and find that people respect the Court and believe in its mission to administer justice fairly. By and large, the parties are polite, calm and courteous. When tensions boil over, they respond to reminders about courtroom decorum and rules of civility. They recognize that disruptive or disparaging behavior will not get them the result they want.

Q: Don't you hate the math?

That one makes me chuckle. I love math. It's always been one of my favorite subjects.

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Right Where I Am Supposed to Be continued

The Honorable Rita Federman

I worked in the foreign exchange department of a large Boston bank after college and started my legal career as a business lawyer in a small firm in San Francisco. By a circuitous route, the family law assignment brings me back to the intersection of law and business, right where I started.

One final thought is worth mentioning. I went to law school in part to help people solve their legal problems. It has been said many times that the Family Courts perform important and critical work, but I didn't appreciate it until I started hearing family law cases. This is where the course of people's lives is changed—where decisions are made about where they will live, where their children will go to school, and how they will pay for basic needs. This assignment provides an opportunity to breach impasses and move the parties forward so they can rebuild their lives.

All of these factors make the family law assignment attractive. There are hundreds of decisions to make each week, and sometimes in a single day. There is a balance of time for court hearings and for writing opinions. The Family Bar provides an important service to our community, and I am honored to serve those needs along with them. So much so that I have signed up for another year in Department P1 for an assignment that brings surprises every day. ■

COURTSIDE MINISTRIES

by Raymond Allen
photograph courtesy of Christine Joo

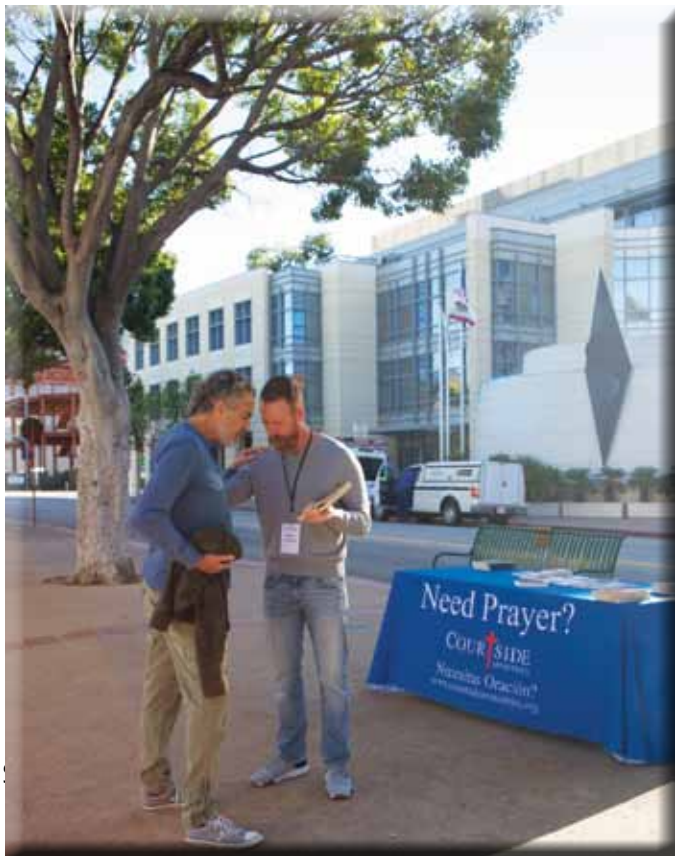
Justin Hodges is an alcoholic. He says that through the grace of God he has been clean and sober for 18 years. He believes he has been called to give to our legal community. Recently, women associated with the Courtside Ministries of Santa Maria asked him to consider setting up a ministry at our courthouse.

"I recall coming to the corner of Monterey and Osos and thinking this is a powerful message because San Luis Obispo was the last city to have an official lamplighter."

Although that fact is not true—official lamplighters remain extant in several California cities—the truth of the metaphor remains: the message of faith is about shining light into darkness.

"I was broken spiritually right over there." Hodges pointed to the corner of Santa Rosa and Monterey. "I stepped out in faith."

Hodges currently works for San Luis Obispo County. He had been called to the Courthouse Ministries, but he felt awkward and apprehensive about expressing his faith so openly. He knew co-workers would walk by his table on their way to work. He wondered what they would think. Those thoughts, he recalled, were the weakness of the flesh. "I had to deny the self and do what I was being called to do."



He was called to set up a prayer table under a tree in front of the Courthouse. He was called to reach out to the people who work in the building and those that seek justice within the building. He was called to pray with us, so we could find the strength required to do justice within the walls of the courthouse. Every Monday morning you will find him ready to pray and support whoever seeks comfort. As they walk in and as they walk out, Hodges calls them to prayer.

Courtside Ministries was founded in Colorado Springs by J. Tyler Makepeace, an attorney who practiced in the areas of family, criminal, juvenile and adoption law. He believed that the operation of law worked best through the spiritual guidance of Jesus Christ.

Makepeace died in 2013, but left an amazing legacy. There are now more than 110 Courthouse Ministries located in 19 states**.** According to their Website, "Courthouse Ministries wants to see people encouraged through hope, strengthened through prayer, guided by the Bible, helped by the community, reconciled to each other and forgiven through Christ."

I thanked Hodges for his time and his beautiful message and tried to leave.

"Let me show you something," he insisted. He opened up his Bible and read 1 Kings 5:7. "When Hiram heard Solomon's message, he was greatly pleased and said, 'Praise be to the Lord today, for he has given David a wise son to rule over this great nation.'"

"You see," Hodges said, "Hiram was a follower of Ba'al, a pagan god, but he knew God was the true Lord."

Hodges thought the story illustrated that man is sinful by nature. I agreed but added, "It shows, too, that man walks perpetually with one foot in chaos and one foot in order." We do the expedient and we do the transcendent. Each of us is the dualistic archetype of good and evil. Like yin and yang. Like Jesus walking through the desert with the Devil.

Hodges wasn't convinced, but we prayed together and I felt better for having stayed and listened. Act as if you have faith and faith shall be given. ■

Local Firm Sinsheimer Juhnke McIvor & Stroh Merges With Central Valley Giant McCormick Barstow

photograph courtesy of Duane Hall

At the beginning of 2019, a local legal fixture combined with a Central Valley leader and took a new name while honoring the legacy of its past.

When Sinsheimer Juhnke McIvor & Stroh (SJMS) announced its intent to merge with McCormick Barstow of Fresno late last year, many asked "Why?" Both firms are respected and both firms are financially robust. Mergers are risky. Both firms, however, put their clients first and determined that the strategic and cultural benefits of merger were too great to deny.

The merger, which became effective January 2, 2019, came just as the former SJMS celebrated a significant milestone—40 years of providing legal expertise to the Central Coast in areas such as commercial litigation, intellectual property, trusts and estates, land use and real estate law. Partners Warren Sinsheimer, David Juhnke, Herb Stroh and Kevin Elder all remain with the firm.

"It's important for our local community to understand that we are the same local lawyers and staff, but with expanded resources and a national reach," said SJMS Managing Partner David Juhnke. "With this agreement, our clients will continue to have the same representation, but with a broader range of expertise to meet the legal needs of the growing regional business community." The firm also retained its entire staff.

McCormick Barstow had long thought of expanding into the Central Coast legal market. The two regions are similar in community values and business concentrations. McCormick Barstow was aware of the reputation of SJMS and its founding partner Warren Sinsheimer. Leadership at McCormick Barstow was interested in expansion to the Central Coast at the same time SJMS was seeking additional resources to help service clients. Recently, SJMS has had difficulty retaining legal talent as a result of the shortage of housing and the high cost of living in the region.

SJMS's David Juhnke and McCormick Barstow's Todd Wynkoop led the merger discussions. Both men found they have a similar approach to the law, office management, and work ethic. What began as a conversation about possibly sharing work quickly evolved into a conversation about merging the firms. Ironically, although their offices are more than 100 miles apart, Wynkoop's Fresno office and Juhnke's SLO office both overlook rolling green farmland and open space. This is emblematic of the clientele they serve and the lives they live.

The two firms were also simpatico in terms of practice strengths, culture and values. "Both firms view their lawyers and staff as a family that works together to assist and advance the best interests of their clients," said Juhnke. Leadership at both firms emphasizes a positive, constructive approach to problem solving. Both firms also share a significant percentage of dedicated, long-term employees. They place an emphasis on professional development and the recognition of employee success. For example, McCormick Barstow recognizes employee milestones at its annual "Lifers' Lunch" event. This is a tradition that the combined firm will continue.

The merged firm, now conducting business as McCormick Barstow, will provide its clients with deeper levels of expertise in existing practice areas and an expanded range of services.

"McCormick has expertise in family law, which is one area that SJMS has never handled," said Juhnke. "In addition, McCormick has an extensive insurance practice, which will be helpful for our clients who have coverage issues or need insurance defense counsel who have a connection to their trusted outside lawyers." Clients can also expect to benefit from McCormick Barstow's appellate practice.

SJMS Founding Partner Warren Sinsheimer said, "I am proud of the legacy that we've created on the Central Coast. I look forward to continuing that legacy into the future. San Luis Obispo is our home and we are here to stay." Longtime clients of SJMS gain access to additional expertise while maintaining the same trusted relationships they have cultivated with the firm for years.

In 1933, McCormick Barstow

was founded in Fresno. It quickly grew and today has more than 90 attorneys. It provides legal services to clients in many different industries, with a footprint in four states (California, Nevada, Colorado and Ohio). Expansion into the Central Coast was the result of deliberate consideration and a desire to find a partner with shared values. McCormick Barstow is respected for their results-driven approach. Moreover, they place a great value on community service. Many of their attorneys and staff support local nonprofit organizations and serve their community both inside and outside the courtroom.

Opening its doors as Sinsheimer & Schiebelhut, Inc. in 1978, SJMS was a pioneer on the Central Coast and the first in the region to offer a broad business practice. Their attorneys focused on specific areas of law, from trusts and estates to environmental law. Like McCormick Barstow, SJMS's community service ethos is part of its reputation.

All SJMS attorneys participate in professional organizations or serve in leadership roles with local nonprofits; for instance, the Cal Poly Foundation, French Hospital Medical Center Foundation, Rotary Club of San Luis Obispo de Tolosa, the San Luis Obispo Chamber of Commerce, Community Action Partnership of SLO County and Woods Humane Society. The strong tradition of service is one the firm will continue into the future.

As McCormick Barstow enters 2019, it is in a more competitive position. The merger gives

Partners Warren Sinsheimer, David Juhnke, Herb Stroh and Kevin Elder all remain with the firm.

McCormick Barstow expanded geographical reach. The San Luis Obispo office will increase its full-service practice. "As McCormick has grown, we have maintained the relationship-based ethos from when we were a solo practice more than 80 years ago," said Wynkoop.

In the world of mergers and acquisitions, it is uncommon to find a pair of firms with such a highly complementary relationship, and the process of integrating all aspects of the business can be delicate. In the case of McCormick Barstow and SJMS, care has been taken to ensure that the essence of both firms is preserved through the transition. As they usher in an exciting new era of partnership, the combined practice looks forward to greater resilience, longevity and growth in the Central Coast community.

The endeavor is an ambitious one, but Juhnke and Wynkoop are optimistic. "We are looking forward to the process of growing into and with the SLO community," Wynkoop said. ■

The Effect of Criminal Pleas on Mentally Disordered Offenders

by Joseph Parker

Introduction

For prisoners with mental illness, parole and release might not mean freedom from custody. Instead, these prisoners are at risk for an indefinite stay with the Department of State Hospitals. California Penal Code § 2962 establishes the civil commitment procedure for prisoners when they are discharged from custody. It authorizes the Department of State Hospitals (DSH) and the Board of Parole Hearings (BPH) to evaluate prisoners and determine if they meet the criteria for retention as a Mentally Disordered Offender (MDO). A prisoner who is certified as an MDO is paroled into the custody of the department of state hospitals until they are in remission or no longer dangerous. The determination of the BPH can be, and often is, challenged at a trial in which the court reviews de novo the BPH decision to certify the prisoner as an MDO.

An inmate must meet six criteria in Penal Code § 2962 in order to be certified as an MDO, summarized as follows:

1. The person must have a severe mental disorder, which is defined as a condition that substantially impairs the person's thought, perception of reality, emotional process, or judgement. PC 2962(a).
2. The crime for which the prisoner has been sentenced to prison must meet certain specific requirements for force or violence. PC 2962(e)
3. The person's severe mental disorder must have been either a cause or an aggravating factor in the commission of the crime. PC 2962(b).
4. The person is either not in remission, or they cannot be kept in remission without treatment. PC 2962(a).
5. The person must have received at least 90 days of treatment for the severe mental disorder in the year prior to their parole or release date. PC 2962(c).
6. The person, as a result of their severe mental disorder, represents a substantial danger of harm to others. PC 2962(d)(1).

If the inmate meets all six criteria, he is paroled into the custody of the Department of State Hospitals as an MDO, instead of being released into the community. Thereafter, the MDO can request yearly reviews to determine if he or she still meets Criteria 1, 4 and 6. PC 2966(c) and PC 2970(b). Like the original MDO determination, the recertification can be challenged at the next BPH hearing and at trial. Regardless of the original gravity of the crime or the length of the sentence, an MDO will stay in the state hospital for treatment as long as they continue to meet all three recertification criteria.

It is worth noting that the initial certification trial is the only chance to litigate three of the criteria. Criteria 2, 3 and 5 are precluded from re-litigation at subsequent recertifications by the doctrine of res judicata, because they concern immutable facts that have been fully litigated at the time of the original PC 2962 certification. *People v. Hannibal,* 143 Cal.App. 4th 1087, 1094 (2006). Criteria 2, the qualifying offense, is particularly difficult to litigate, because several important facts of the crime are established during the criminal process, not the PC 2962 trial. As such, a defendant's attorney should be aware of the potential for far-reaching consequences when negotiating pleas.

Enumerated crimes

In regard to Criteria 2, the qualifying offense, Penal Code § 2962(e)(A-O) lists specific crimes that qualify for MDO status. These enumerated crimes closely mirror the list of violent felonies in Penal Code § 667.5(c). In general, the distinctions between these two lists involve the requirement in Penal Code § 2962 that crimes involve the use or threat of force or violence likely to produce substantial physical harm.

The use or threat of force or violence

Along with the enumerated crimes, Penal Code § 2962(e) also includes the following two catch-all provisions:

(P) A crime not enumerated in subparagraphs (A) to (O), inclusive, in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (4) of subdivision (f) of Section 243.

(Q) A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury.

The two catch-all provisions are applied by the trier of fact in two ways. First, if the use or threat of force or violence likely to produce substantial bodily injury

are included in the elements of a crime, then the crime automatically qualifies as an offense for the purposes of Penal Code § 2962. *People v. Woods,* 3 Cal. App. 5th 457, 461-462 (2016). Second, extrinsic evidence can be used to prove the existence of the use or threat of force or violence in otherwise nonviolent crimes. PC 2962(f). This evidence can be trial and preliminary hearing transcripts, probation and sentencing reports, evaluations by the Department of State Hospitals, or other items of similar trustworthiness. *Id.* The courts have traditionally allowed the use of police and incident reports, though counsel for the prisoner traditionally objects to such items as untrustworthy and unreliable hearsay.

The threshold level of force required by the statute is generally found in cases where a defendant struggled with another individual or law enforcement. See *People v. Clark,* 82 Cal. App. 4th 1072 (2000) (defendant struggled with victim who fought to retain money in hand). Robbery, for example, is a violent felony under § 667.5(c), even though it can be committed through the application of no more force than is required to overcome the resistance of the victim. *People v. Pretzer,* 9 Cal. App. 4th 1079, 1083 (1992) [disproved on other grounds in *People v. Anzalone,* 19 Cal. 4th 1074 (1999)]. Penal Code § 2962(e), on the other hand, only recognizes a robbery if it involves the use of a deadly or dangerous weapon, or otherwise involves the use or threat of force or violence.

It is important to remember that only the qualifying offense matters. Any charge that is dismissed as a result of plea negotiations cannot apply. *People v. Kortesmaki,*156 Cal. App. 4th 922, 926-927 (2007). In *Kortesmaki,* the specifically enumerated crime of arson was dropped as a result of plea negotiations, and thus could not be used as a qualifying offense. Furthermore, the use or threat of force or violence does not pertain to inanimate objects. *People v. Green,* 142 Cal. App. 4th 907, 912 (2006). In *Green,* the defendant was in custody on a vandalism charge, having kicked out the window of a police car. Even though Mr. Green had been struggling with police, all charges except vandalism were dropped, and the struggle with police was not a crime for which the defendant had been imprisoned.

If an injury does occur, it will generally qualify under MDO law if the injury was incurred as part of the charged offense. In our *Green* example, kicking out a window in a police car was a separate act from struggling with officers. Conversely, if the defendant kicked out the window of the police car, and an officer was struck by flying glass, then the vandalism would qualify under Penal Code § 2962, because the defendant's use of force to break the window also caused the injury. See *People v. Labelle,* 190 Cal. App. 4th 149 (2010).

One exception to the above rule is the case where force against an inanimate object invites resistance or escape. *People v. Macauley,* 68 Cal. App. 4th 1120, 1124 (1998). In *Macauley,* the defendant used gasoline to set fire to his wife's automobile after she filed for divorce. The court ruled that a car fire would draw the attention of bystanders and emergency responders, which, combined with the inherent risk of explosion in a car fire, created a situation that was particularly dangerous to people. *Id.*

Also, the court has held that harm to animals does qualify under MDO law. See *People v. Dyer,* 95 Cal. App. 4th 448 (2002) (defendant killed a dog by cutting its throat, intending to cook and eat the animal). The Court in *Dyer* held that certifying an individual who uses force to harm a living, breathing creature was consistent with the Legislature's intent to protect the public from violent and dangerous felons. *Id.* at 456.

When to be mindful of potential MDO consequences

Most clients are not at risk for MDO certification. However, it is important to recognize the warning signs and be mindful of the long-term effect of defense strategies when a client is at risk.

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First, MDO law only applies to individuals in prison and on parole. Misdemeanor defendants and those felony defendants who remain in county jail are not subject to MDO law. However, if your client is facing state prison or parole, then your client may be subject to MDO law upon release.

Second, MDO law only affects those individuals who used or threatened force or violence, or who committed one of the enumerated offenses. Clients whose crimes involved no threat or use of force will not be certified as an MDO. Even if the elements of the crime do not include force or violence, a defendant is at risk if force or violence was used in the commission of the offense, such as the *Labelle* example above. If an individual is charged with vandalism, and the individual injures a bystander while vandalizing property, then the defendant may be subject to MDO law, even if he or she is never charged with any offense relating to the bystander's injuries.

Third, MDO law only applies to individuals who suffer from a severe mental disorder at the time of the commission of the crime. Penal Code § 2962 defines a severe mental disorder as "an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process or judgement…." Symptoms that may indicate a severe mental disorder include paranoia, delusional thinking, manic or psychotic episodes, bizarre or illogical behavior, disorganized speech and thought patterns, and auditory or visual hallucinations. In preparation for the certification trial, MDO prosecutors and psychological evaluators will look to the following items for evidence of mental illness: a documented mental illness that predates the crime, symptoms of mental illness or bizarre behavior described in witness statements and police reports, a defendant's own statements admitting symptoms of mental illness, and questioned capacity pursuant to Penal Code § 1368.

Why is it important for defense counsel to consider MDO consequences?

While it may be easy to dismiss MDO law as something that a client need not worry about until after the completion of their sentence, a defense attorney should be aware that some trial strategies carry potential MDO consequences. Criteria 2, the qualifying offense, is often conceded through plea bargaining. A criminal trial often settles the issue beyond the control of defense counsel, but when defense counsel negotiates a plea deal, he or she can concede the issue and prevent the client from fighting the issue at the DMO trial.

A defense attorney who negotiates pleas to qualifying offenses is in the same position as a defense attorney who has failed to raise an objection. In the same way that failing to object prevents a particular issue from being litigated on appeal, the defense attorney who negotiates a plea to PC § 422, Criminal Threat, or PC § 69, Resisting Executive Officers, for example, may be conceding a matter that could have been litigated during the MDO trial. As with preserving objections for appeal, accepting a plea may have strategic benefits for the client, but defense counsel needs to remember that a plea for less time in prison may be counterproductive if it helps ensure the client's indefinite stay in the custody of the Department of State Hospitals.

Also, defense counsel needs to be aware of potential Ineffective Assistance of Counsel (IAC) claims. A parallel can be drawn to IAC claims involving pleas with immigration consequences. The Supreme Court described immigration consequences as civil in nature, but "intimately related to the criminal process." *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010). Similarly, MDO trials are civil, but are granted several of the same protections as criminal proceedings, including a statutory right to counsel. *People v. Williams*, 110 Cal. App. 4th 1577, 1588 (2003). Furthermore, MDO proceedings carry the risk of an indefinite loss of liberty, a situation analogous to the potentially permanent removal of a noncitizen from the United States. In both situations, a defendant's criminal

plea leads to civil consequences that can forever alter the person's life.

Even though this matter has not yet reached the attention of the courts, it is conceivable that a Supreme Court decision would confirm that defense counsel has an affirmative duty to warn of the potential civil commitment consequences. In this situation, it may be wise to avoid being immortalized in the next landmark IAC case.

Finally, the limited resources of the Department of State Hospitals demand that only those individuals who cannot be treated in the community be admitted as MDOs. Most individuals with mental illness live their lives outside the confines of a state hospital. If an individual is mentally ill, and their crime did not qualify for MDO status, but defense counsel plea bargained for less prison time under a qualifying offense, then that person is utilizing resources that would best serve others. The public's interest in enacting MDO legislation was to protect the community from people who are dangerous as a result of their mental illness. Otherwise, mental illness should be viewed a condition separate from an individual's criminal actions. A person whose mental illness is not contributing to their criminal behavior should be treated in the community, not in a locked facility.

What can defense counsel do?

Defense counsel can make a significant difference in their clients' futures with even minimal knowledge of MDO proceedings. An understanding of the basics of MDO law helps defense counsel negotiate MDO-friendly pleas and advise their clients of potential MDO commitment issues prior to entering pleas.

An attorney can consider pleas to alternative charges that do not violate Penal Code § 2962. If a client is at risk of an indefinite civil commitment, it may be preferable to negotiate a plea to a longer prison term, in exchange for dropping any charges that might later be used to certify a client as an MDO. Just as an attorney should recognize the aggravated felonies and other offenses that result in automatic removal or deportation, an attorney can use their understanding of Penal Code § 2962 to avoid negotiating a plea to an offense with automatic MDO consequences.

It may be the case that the client's actions, though not on the enumerated list, involved the use or threat of force or violence. In that instance, defense counsel at least gives the client a fighting chance to litigate the issue at the MDO trial by avoiding a plea to an enumerated offense or to a charge whose elements match the statute.

Finally, the easiest change an attorney can make is to advise the client of the possibility of civil commitment when there is reason to believe the client may qualify. Even if the client chooses to plead to a qualifying offense for less time in prison, the attorney has at least allowed the client to more accurately weigh the pros and cons of their decision. A client may still choose to take a lesser term and roll the dice on civil commitment. Even if that occurs, defense counsel has preserved their client's independence and dignity more fully than if they had elicited a plea from a client with no knowledge of what might be looming just over the horizon.

Ultimately, defense counsel is the first attorney in a position to help prevent indefinite civil commitments. While many clients might benefit from psychological services, most of them do not need the level of restriction and supervision provided by the Department of State Hospitals. A combination of community treatment programs, the support of family and friends, and the psychological benefits of fresh air and a walk on the beach may be enough for most clients. ■

SECRET LIVES OF LAWYERS

Linda Somers Smith, Olympian

by Raymond Allen

Editor's Note: "Secret Lives of Lawyers" is a recurring column. The goal is to highlight interesting things lawyers do to find balance or achieve fulfillment. If you would like to be included, or know of a lawyer that has an interesting side, please contact the Bar Bulletin *editor.*

To be or not to be—that is the question:
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles
And, by opposing, end them.
-—Hamlet, Act 3, Scene 1

Through Hamlet, Shakespeare is not simply talking about physical death. He makes the point that metaphysical deaths are suffered by those who fail to explore and live to their potential. Who are you? Are you the weak pampered prince hiding behind your mother's dress and becoming a misogynist as a result, or are you the valiant warrior prince avenging your father's murder?

How much can we do? How much can we read and learn? How much can we see and experience before we, too, shuffle off this mortal coil? Can we run a half-marathon? Can we run a marathon? Perchance can we be an Olympian?

It is as it was. We fight against ourselves daily. There are few that can look back and truly say they gave all that they could to their human existence. I believe that Linda Somers Smith is on that short list.

She is a local attorney, but she has led a Secret Life for years. She is a world-class runner and an Olympian.

Because 26.3 Would Just Be Crazy

In 490 B.C., the soldier Pheidippides ran from a battlefield near the town of Marathon, Greece, to Athens. According to legend, Pheidippides ran the approximately 25 miles to announce the defeat of the Persians to the anxious Athenians. Not quite in mid-season shape, he delivered the message "Niki!" (Victory!), then promptly died. The Marathon, however, was born.

The International Olympic Committee held the first modern Olympics in 1896. In homage to the ancient Greek athletes, a marathon race was re-enacted. Eight years later, in 1908, the London Olympics marathon course was laid out from Windsor Castle to White City stadium, about 26 miles. However, to locate the finish line in front of the royal family's viewing box, an extra 385 yards was added inside the stadium. "God save the Queen."

More than a decade later, the running distance (26.2 miles) was made uniform by the International Amateur Athletic Federation.

An Athlete and an Attorney

San Luis Obispo attorney Linda Somers Smith is recognized as one of the premier long-distance runners in the history of female competitive running.

Somers Smith was always driven. She had been active in high school. She swam and played tennis. When she started college at the University of California Davis, she walked onto the cross-country team. "It was easy because it was a Division II school."

In 1984, just before she entered law school, she ran her first marathon. She did not run during law school because she had a damaged knee. After law school, however, she had the knee surgically repaired. That began three decades of elite competitive running.

In 1986, Somers Smith passed the bar examination and became an attorney. She practiced law in Sacramento and the Bay Area. While she was honing her lawyering skills, she was also becoming a world-class athlete.

In 1992 Somers Smith won the Chicago Marathon with a time of 2:37:41. She is a two-time United States national champion in the marathon. In 1993 she won the California International Marathon in Sacramento, with a time of 2:34:11. Six months later, she won Grandma's at Duluth, Minnesota, with a time of 2:33:42. In 1995, she set a personal best of 2:30:06 at age 34.

The summer before the 1996 Olympics, Somers Smith moved to San Luis Obispo to train in the cooler climate. While here, she met her future husband. She became the majority owner and managing principal of the San Luis Obispo firm Duggan Smith & Heath LLP. Currently, she is a partner at Adamski Moroski Madden Cumberland & Green LLP in Avila Beach. Her legal work has focused on business formation and transaction law, real property, health care law, regulatory compliance, contracting, strategic alliances, and mergers and acquisitions.

At the 1996 Summer Olympics in Atlanta, 86 competitors from 51 countries ran the women's marathon. Somers Smith finished 31st with a time of 2:36:58. After that, she returned to work full time as a partner at Duggan Smith & Heath LLP. She also continued to compete at an elite level. In 2008, she set the United States 45-49 age group record with a time of 2:38:49, and placed 17th. In 2009, she placed sixth in the Open US Club Nationals Cross Country meet at Lexington, Kentucky. She also set age group records in the 5K, 10K, 10 miles and half-marathon.

Amazingly, on January 14, 2012, at age 50, she finished in 28th place at the USA Olympic Trials Marathon in Houston with a time of 2:37:36. Her time set another American Age Group Record.

Somers Smith was inducted into the Road Runners Club of America (RRCA) Hall of Fame on March 17, 2012. Later in 2012, she was inducted into the United States of America Track and Field (USATF) Masters Hall of Fame.

The Finish Line Does Not Define Success

That year, Somers Smith retired from competitive running. After 30 years of competition, she decided she'd had enough. "I wanted to be able to continue to run, and I knew if I continued to train and run competitively I would eventually not be able to run at all."

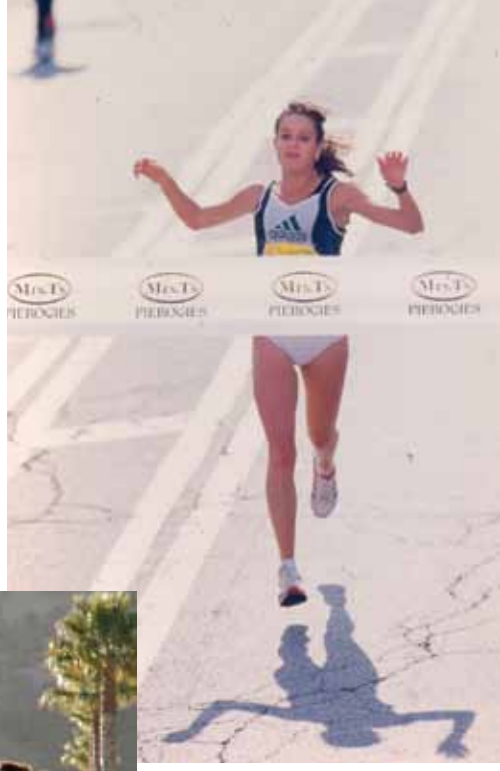
Recently, Somers Smith was featured with many other great female athletes in Margaret Webb's book, "Older, Faster, Stronger: What Women Runners Can Teach Us All About Living Younger Longer."

She still runs and swims. After sitting at a desk all day and working out other people's problems, she needs to get out and do something active. "It helps me think things through." Exercise releases stress and non-productive aggression. Plus, she says, "I enjoy it!" In addition to a great exercise routine, she eats "lots of salads, vegetables, chicken and fish."

Josh George, her colleague and fellow partner at Adamski Moroski Madden Cumberland & Green, LLP, said Linda is a very busy person. "She works a lot." When I tried to suggest he also worked hard, he stopped me and said, "No, she *really* works a lot." At the same time, however, she makes sure she gets seven hours of sleep. She also strives to keep exercise and running fun. She likes to run with friends through the beautiful scenery of the Central Coast. Exercise continues to be an essential part of her life. She suggests that everyone should find an activity that works for their body type, ability and interest.

Somers Smith believes that there has been a big shift in the way young attorneys approach their legal careers. The Baby Boomers worked to exhaustion. They gave it their all because the competition was so intense. Now, however, the younger professionals are starting to set a different tone in the workplace. New attorneys see the importance of a balanced life that includes family and healthy choices.

More and more, attorneys can define who they are and what they want to be. Hamlet did not struggle with suicidal ideation as much as he struggled with identity. Shakespeare and Linda Somers Smith inform us of these universal truths: only we can define who we are and only we can define our success. ■



San Luis Obispo attorney Linda Somers Smith is recognized as one of the premier long-distance runners in the history of female competitive running. She is an Olympian and in two runners Halls of Fame.

Bar Bulletin Editorial Policy

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

raymondinsf@yahoo.com

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 six times per year:

- January–February
- March–April
- May–June
- July–August
- September–October
- November–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.

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All advertisements in the *Bar Bulletin* must be submitted in .jpg, tif 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–February issue deadline	11/24
March–April issue deadline	1/24
May–June issue deadline	3/24
July–August issue deadline	5/23
September–October issue deadline	7/25
November–December issue deadline	9/23

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