Bar Bulletin
Serving San Luis Obispo County's Legal Community
November–December 2019

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'GURNEYS A-BLAZING' *at* MOOT COURT

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San Luis Obispo County Bar Bulletin

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President's MESSAGE

by Michael R. Pick Jr.

Ask "*Why*" to Broaden Understanding

Serving on the San Luis Obispo County Bar Association Board of Directors this year has been a remarkable experience for a number of reasons. Out of those reasons, one of the best has been the opportunity to meet and get "shoulder to shoulder" with some attorneys that I otherwise would not likely have met since we work in different practice areas.

The San Luis Obispo County Bar Association Board of Directors this year has been a great assortment of lawyers from different practice areas, which include criminal law (prosecution and defense), business and transactional law, civil litigation, in-house counsel, public legal services as well as a superior court judge. The Board is a great mélange of backgrounds, philosophies and experiences that assists in different viewpoints and approaches to serving our legal community and beyond.

That list above does not include the great backgrounds that others assisting the San Luis Obispo County Bar Association bring to the table as well.

What is always interesting to me is to learn about why someone became a lawyer or into the practice of law. Everyone has a "story." As in most things in life, the *why* is usually much more interesting than the *what*.

According to United Kingdom Supreme Court Justice Lord Sumption, "Most of it [law] is common sense with knobs on…. One reason why the prime requirements for a successful lawyer are an outstanding ability to understand facts often in relatively arcane areas of human life. The number one qualification for doing this, is therefore to have the largest possible personal fund of experience, most of which will in the nature of things be vicarious."

This curiosity of backgrounds I believe has been captured in the 2019 editions of the *Bar Bulletin* and has provided all members of the SLO Bar Association with the "largest possible personal fund of experience" that Sumption is talking about.

It has been great to learn about different attorneys' backgrounds, interests, hobbies, etc. The credit for that belongs to our editor, Raymond Allen, who has done a tremendous job in updating the look, feel and content of the *Bar Bulletin*. He does a lot of work that should not be taken for granted. Thank you Raymond!

In closing, when with another attorney or someone in the practice of law, I challenge you to ask them *why* they do what they do and not just what they do. The answers and explanations may be gratifying and provide a deeper appreciation of your colleagues. In expanding your knowledge of individuals in the legal community, you are also broadening your scope and understanding of the human condition. ■

Save the Date

SLO Bar Holiday Party
5:30 p.m. December 5
SLO Country Club

Family Law Court Staff Award Presented to Denise Subia

by Stephen D. Hamilton, CFLS

Photo courtesy of Nicole Johnson

Judge Rita Federman, Denise Subia, Stephen D. Hamilton, Chair of the CLA Family Law Executive Committee.

The Family Law Section of the California Lawyers Association was pleased to present San Luis Obispo County Superior Court Clerk Denise Subia with its Court Staff Award during the August San Luis Obispo County Bar Association meeting. Recipients of the award are selected by the Family Law Executive Committee (FLEXCOM).

The Court Staff Award honors and recognizes sustained superior performance or extraordinary efforts in the recipient's performance of his or her work with the Family Law courts. Recipients must be nominated by Family Law bench officers. Subia was nominated by the Honorable Rita Federman, whose excerpt from her nomination letter follows.

"Denise is knowledgeable, dedicated and hard working. She understands the court procedures as well as the substantive issues that arise in family law. She is detail oriented and is very adept at setting forth complex orders accurately in the minutes of the court proceedings.

In addition to being extremely competent in her work, Denise is friendly, positive and helpful. She is equally responsive to the needs of the judge, court staff, the lawyers, and self-represented litigants. Her calm and cheerful presence greatly helps to reduce the tensions that undergird the Family Court proceedings every day. Working with Denise has been a great privilege for me, and is one of the reasons I choose to remain in this challenging and rewarding assignment." ■

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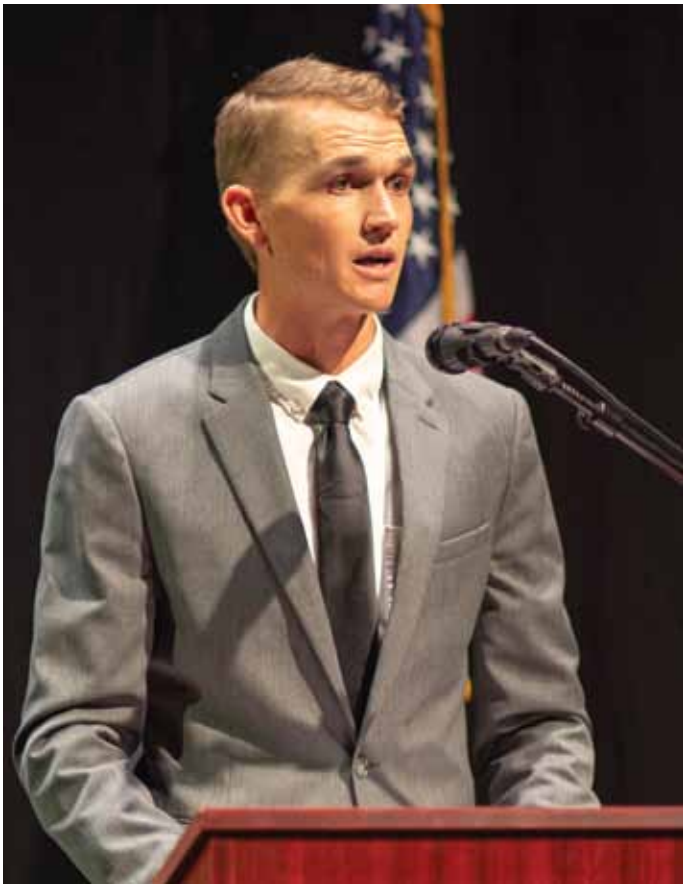
Second Annual Andreen Moot Court

The Finalists Arrive 'Gurneys A-blazing'

Alison Herson



Ben Bourgault

by Alison Herson

Photos courtesy of Christine Joo

There are no slurpies, sandals or sunshine for San Luis Obispo College of Law 4L students. These lucky folks spend summer evenings basking under fluorescent lights while digging deep into Constitutional issues. Welcome to Moot Court. Ground rules: (1) It's good to be busy; (2) No whining; (3) Have fun.

Professor Stephen Wagner and Professor Steven Rice host this academic summer gala. For you "Paper Chase" fans, try 'Professor Kingsfield' times two. No pressure. Game on. I put on my purple rimmed glasses for the classic law student nerd look and the fun starts. "But what *does* that mean Ms. Herson? Did Mr. Dawson consent to give away his privacy?" Meet Mr. Dawson. I am both his advocate and adversary for the next 18 weeks. It's OK. It's good to be busy.

The Kingsfield twins fire up training season with a vigorous review of the Fourth and Fifth Amendments. We receive a twisty fact pattern where a Mr. Dawson alleges the government violated his privacy rights. Dawson signed up for a health benefits program and consented to monitoring in exchange for a health care discount. He connects himself to gadgets that transmit his health information to the government. Tiring of the intrusion, he unplugs so he can enjoy a night with friends. Instead, EMTs bust through his door 'gurneys a-blazing' to save his life. Mr. Dawson is fine. And the gurney pushers roll to court.

Our heads are 'full of mush' as we recite legal terms learned three years ago. After a few weeks, the fog clears and class gains momentum. We delve into case law. I spend my not-so-spare time listening online to those same cases argued to the Supreme Court. In class, we practice plugging these case rationales into our arguments. We soon experience the difference between failed and flawless transitions while the professors pepper us with questions. As a police officer, I revel in confrontation. But the police mindset was going nowhere fast.

Dorothy Grant

Robert Lomeli

Imperfections start rising to the surface. Pen flicking, eye rolling, chattering, scratching, smirking and podium gripping fill the room. The professors quash our quirks with pithy retorts. Qualifying rounds take place in the ninth week. On this day, we bolster our arguments with concise blurbs that sound as smart as my purple glasses look. The lucky four finalists then receive invitations to compete. And just like that, our pre-season ends. Finalists Ben Bourgault, Dorothy Grant, Robert Lomeli and I celebrate another eight weeks with Mr. Dawson. It's OK. It's good to be busy.

My friends and family are baffled by the news. "You're going to argue a fake case in front of real judges?" Yep. One of my co-workers thinks "mute court" is where lawyers go to practice legal sign language. After a good laugh, I explain Moot Court is a community event where law students have an opportunity to debate today's pressing Constitutional issues. And the best part—admission is free.

At our first team meeting, we select positions and start 'flight-testing' arguments challenging both sides. I choose the uphill Fifth Amendment government argument and rebuttal. Professor Wagner takes feverish notes while Professor Rice strokes his beard. The nights get intense as we discover the fact pattern has intentional black holes for us to swirl in. We present our arguments over and over. Polishing and preparing for the unknown.

The big day nears and the four of us exchange nightmares like showing up to the event half naked, talking to the back of judge's heads, and speaking with no words coming out.

But the nightmares did not manifest. On the night of the event, Saturday, September 7, nearly 100 people pack inside the studio theater at the Clark Center. I watch the room fill and quickly check my lip gloss status with Grant, who is also wearing a black power suit. Go Team Government!

Judge Timothy Covello, Judge Matthew Guerrero and Judge Patricia Kelly take their seats at the bench. The smiles during the backstage photo shoot disappear. This is serious business. Court is in session.

Continued on page 8

Gurneys A-blazing continued

I am the first batter in the lineup. My nerves recite my name twice. Presiding Judge Kelly raises an eyebrow. The lights are in my eyes. The black robes are three feet away. The questions start and we all take turns entering the black hole. We argue about door-busting gurneys, privacy penumbras and hamburger-eating habits. The audience responds with intermittent laughter and applause.

The Moot Court event closes with comments from the bench. Judge Covello stated, "My very first jury trial was easier than performing in my school's Moot Court." He said performing in front of your professors, future colleagues, friends and family is a huge challenge. Judge Kelly said she was "in awe," of our performance and professionalism. Judge Guerrero was impressed with everyone's ability to hold their position. He said we presented with "poise" and all demonstrated the ability to "think like lawyers." The judges praised our team for marshalling the facts and presenting solid case law.

Each of us earned a home run. And our stats are memorialized on the Andreen Moot Court perpetual plaque at San Luis Obispo College of Law (SLOCL). Our Moot Court is named to honor Justice Kenneth Andreen (1924-2017). During the early part of his career Andreen was a civil rights activist who proudly marched with Dr. Martin Luther King, Jr. He was a champion of civil liberties with a heck of a reputation for seeking justice.

Andreen was appointed by Governor Edmund Gerald "Pat" Brown to the Fresno County Municipal Court. In 1980, Andreen was appointed by Governor Edmund "Jerry" Brown to the Fifth District Court of Appeal, where he served until his retirement. He then served as an appointed judge in various counties including San Luis Obispo. Andreen lived in our community for more than 25 years.

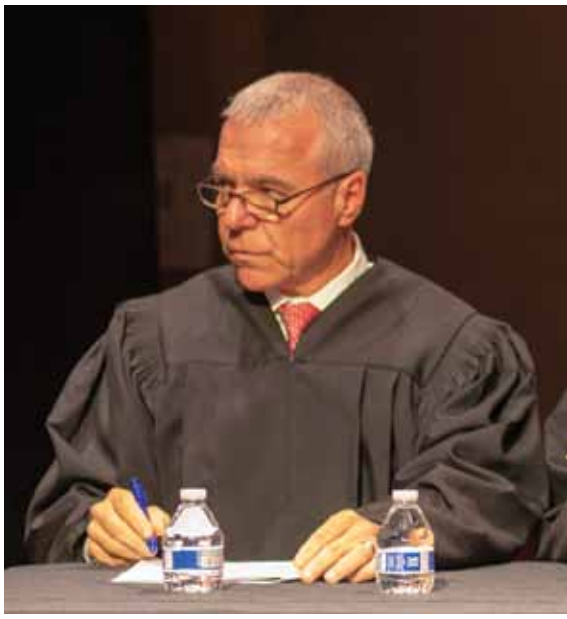
Our professors had feedback too. Professor Rice said, "I enjoyed coaching the students for the competition because I find that SLOCL students are bright and motivated to learn. This combination makes it easy to coach. It's a pleasure watching their confidence grow as public speakers. The students handled the interaction with the judges with poise and grace."

Professor Wagner said he was proud to serve as co-director of our Moot Court program. He described our class sessions as "vibrant," and called it a "true pleasure" to witness our progress as we gained momentum and confidence. He added, "The practice sessions were a perfect blend of intense review of the law and the operative facts and thoughtful collaboration. The fact pattern we created for this year's course presented some very intriguing and complex issues. The students rose to the occasion by demonstrating solid oral advocacy skills under challenging conditions."

SLOCL Dean Mitch Winick added, "I was exceptionally proud of the performance of our four Andreen Moot Court finalists and would like to think that Justice Andreen would be pleased to know that such a competent next generation of lawyers are preparing for practice."

Spectators flood the lobby during the reception. We enjoy hugs, handshakes and relevant jabs. Our classmate Kizzy Garcia said, "I felt a great sense of pride as I observed Alison, Dorothy, Ben and Rob triumph as they engaged the justice's questions with the utmost professionalism."

After the reception, I chatted with our team in the bullpen. We all pitched our best arguments and achieved different goals. Robert Lomeli shared he was eager to participate in Moot Court to test his oratory skills that were not previously tested in law school. He said, "I expected to get a better understanding of my oratory strengths and weaknesses. This experience will benefit me in the future by preparing me for the rigors of oral presentation in court."



Judging Moot Court presentations are San Luis Obispo Obispo Superior Court Judge Matthew Guerrero.

The 'Kingsfield twins' aka Moot Court professors Stephen Wagner and Steve Rice.

Dorothy Grant said Moot Court rounded out her legal education. For starters, she liked the class because it had no traditional reading assignments or expensive textbooks. She described the course as, "putting the bow on a present we've been putting together for the last three years of law school. We already learned how to do legal research and analysis, but putting it together in an oral presentation was useful and really fun. I woke up a new part of my brain that I hadn't yet flexed in other classes." She laughed and added, "I never believed the maxim that lawyers love to hear themselves talk, but I believe it now and count myself in that group."

Ben Bourgault was originally hesitant about Moot Court. He shared the hesitation subsided after weeks of practice and encouragement from our team. He stated, "I began to understand the difficult process of arguing an appellate brief. I was nervous as I stood before the three judges, and not sure if I prepared for the questions they would ask. But we got through it! I am very appreciative of the professors, judges, audience and my classmates for making it a memorable experience."

Yep. Moot Court was a defining contribution to our law school experience. The four of us summed it up in three words: Proud, relieved and grateful. So, I didn't build any sandcastles this summer, but I did build my speaking skills and love for oral advocacy. Mr. Dawson and I had a good run. It took 18 weeks to clear our brains of mush, and the Kingsfield twins are proud. Our next hurdle is the bar exam. It's OK. It's good to be busy. ■

Editor's Note: Alison Herson will graduate in June. She works as a police officer for the Cuesta College Police Department. Upon passing the bar examination, she plans to practice employment law and is currently interning under Susan Waag of Light Gabler. She is often seen cruising around the Central Coast on a vintage motorcycle with her sidecar stuffed with a furry four-pawed passenger. She welcomes other legal beagles to contact her at aherson@outlook.com.

Superior Court Judge Timothy Covello, Santa Barbara Superior Court Judge Patricia Kelly, San Luis

My Dogged Pursuit of Fairness

by Dean Mitch Winick, San Luis Obispo College of Law

Photo courtesy of San Luis Obispo College of Law

I know that some of you may be wondering why I continue to doggedly pursue the adjustment of the California bar exam minimum passing score to the national mean of 1350 versus the arbitrary and unvalidated 1440 cut score currently in place. I believe that the answer can be found in a review of our most recent bar exam results for the February 2019 exam.

These results provide the best response for the second most common question that I get—"Why am I arguing for dumbing down the bar exam?" I'll let the following data speak for itself.

February 2019—MBE Scores

1340	National mean score
1371	California mean score first-time takers
1374	MCL/SLOCL mean score first-time takers

The results show California examinees outscored the nation, and our Monterey College of Law (MCL)/San Luis Obispo College of Law (SLOCL) examinees outscored California.

Despite these high-performance results, because California uses an artificially inflated minimum passing score of 1440, the California first-time pass rate in February 2019 was 41 percent and our MCL/SLOCL first-time pass rate was 40 percent (the 1 percent statistical difference is due to the MCL/SLOCL small cohort size). In comparison, based on a national mean passing score of 1350, the national first-time passing rate was more than 60 percent.

California and MCL/SLOCL examinees do not have a 20 percent lower bar pass rate because they performed poorly. As the results indicate, California and MCL/SLOCL examinees outperformed national examinees by more than 30 points. The pass rates are 20 percent lower because the California minimum passing score is artificially set 110 points higher than New York and 80-90 points higher than the other top five jurisdictions.

As currently structured, the minimum passing score in California, requires the California examinee to score in the top 26 percent in the nation to get licensed in California. Comparatively, the national mean passing score of 1350 requires scoring better than 50 percent of all examinees.

Under what legal or public policy rationale can anyone argue that requiring a minimum passing score in the top 26 percent of all examinees is a fair measure of "the minimum competency for the first-year practice of law," the legal standard that is supposed to be used for scoring the bar exam.

Finally, let me address the first most common response that I get from currently licensed California lawyers and judges—"I passed at 1440, so why shouldn't everyone else have to as well?"

I'll again let the data speak for itself. The California bar is 85 percent white, 65 percent male with an average age of 51. The diversity of the bar has changed very little over the past 20 years. It does not reflect the communities that we serve as officers of the court or the demographic and socio-economic richness of California. The majority of California bar examinees are now minorities (52 percent in February 2019), so the problem is not in the diversity of successful law school graduates.

The problem is that using a standardized test, along with an unvalidated artificially high passing score, has a disparate impact on minorities, as indicated by the State Bar's own bar exam statistics. It also has a disproportionately negative effect on schools like MCL/SLOCL/Kern County College of Law (KCCL) that have intentionally and successfully increased our diversity. The current exam scoring perpetuates the same type of barriers to entry into the legal profession that have been repeatedly struck down as unconstitutional in most other licensed professions. If the diversity of the bench and bar is a priority, we must challenge the continued use of an arbitrary and unvalidated scoring system that

systematically bars competent minority candidates from licensure.

At the end of July, another cohort of law school graduates sat for the California bar exam. Before we unjustly deny licensure to another 1,000 qualified law school graduates in California, it is time for (all of) us to encourage the California Supreme Court to take the necessary steps to adjust the minimum passing score from 1440 to the national mean passing score of 1350. ■

Mitchel Winick serves as President and Dean of Monterey College of Law, a private, nonprofit, California Accredited Law School system that also includes San Luis Obispo College of Law and Kern County College of Law. Winick is the former chair of both the State Bar of California's Law School Council and the Committee of Bar Examiners Rules Advisory Committee.

Editor's Note: In full disclosure, I teach Torts at the San Luis Obispo College of Law. However, the views expressed by Dean Winick do not necessarily reflect the views of the Bar Bulletin, *the San Luis Obispo County Bar Association or its Board of Directors. Obviously, not all attorneys agree with the arguments of Dean Winick. For an opposing viewpoint, I refer readers to articles written by attorney Steven Chung at https://lawyerist.com/california-bar-examination-score/ or https://abovethelaw.com/2019/01/the-california-bar-exam-pass-score-should-remain-the-second-highest-in-the-land/.*

If you disagree and would like to submit an article regarding the cut score, please send the article to raymondinsf@yahoo.com.

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What Trusts and Estates Lawyers Should Know

by Warren A. Sinsheimer, McCormick Barstow, LLP

Warren Sinsheimer is of counsel in the San Luis Obispo office of McCormick Barstow, LLP. The bulk of his practice focuses on trusts and estates, taxes and related matters. This article is adapted from materials originally prepared for a presentation in May 2019 at the UCLA/CEB Estate Planning Institute in Marina del Rey, California.

I. Introduction

This article is intended to alert estate planners to opportunities and pitfalls related to creation and preservation of evidence that will be essential in assuring that the client's plan is implemented as prepared. The approach will be to look at evidence that is used in common types of disputes that arise involving a client and his or her estate plan.

A range of disputes is familiar in the trusts and estates practice. This article will focus on issues when a will or trust is challenged because the testator or grantor lacked capacity or was the victim of undue influence.

II. Client Capacity

A. A Will

1. California Probate Code Section 6100(a): An individual 18 or more years of age who is of sound mind may make a will.

2. California Probate Code Section 6100.5: (a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:
(1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse and parents, and those whose interests are affected by the will.
(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

These longstanding standards of testamentary capacity have been supplemented by the Due Process in Competence Determinations Act (DPCDA) at Sections 810-813 of the California Probate Code. DPCDA attempted to modernize a loose collection of hoary terms to describe mental condition. The Legislature's purpose as set forth in Section 810(c) was to require that any judicial determination that a person lacks the legal capacity to perform a specific act should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

For example, it is not adequate to say a person is afflicted with Alzheimer's disease and therefore lacks capacity. There must be evidence that some mental deficit resulting from the disease affects one of the listed mental functions and evidence of a correlation between the deficit or deficits in question and the decision or act to be performed.

B. A Trust

1. California does not have a trust-specific statute describing the standard for capacity for executing a trust.

2. If a trust in its content and complexity is "simple" and like a will substitute, the required capacity is the same as for a will. *Anderson v. Hunt,* 196 Cal App 4th, 722 (2d Dist 2011).

3. However, if a trust is more complex than the trust which the court considered in *Anderson v. Hunt* (which only reallocated the percentage of the trust estate among the beneficiaries), then the "sliding scale" contractual standard of capacity created by DPCDA applies. *Lintz v. Lintz,* 222 Cal App 4th 1346 (6th Dist 2014).

4. We are left with scant guidance as to which trusts are truly simple and which are more complex.

C. Evidence of Capacity

1. There is a common law presumption of competence to make a will. *Estate of Fritschi,* 60 Cal 2d. 367 (1963).

2. Section 810 creates a rebuttable presumption that every person has capacity to make decisions and be responsible for his or her acts.

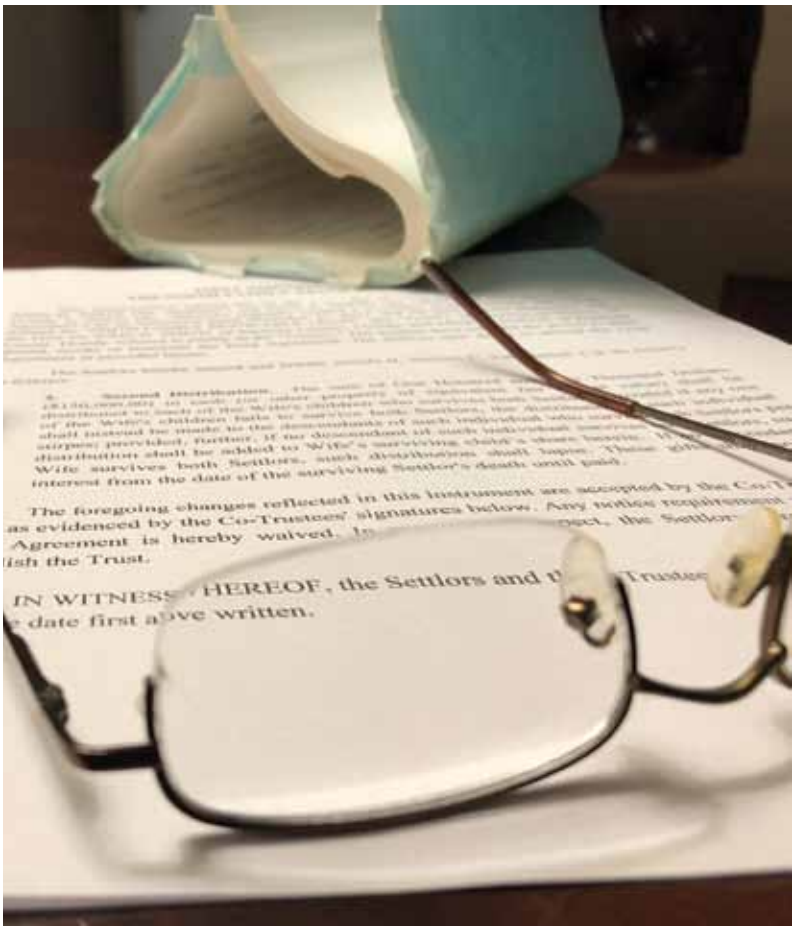
3. Section 870 of the Evidence Code allows

a subscribing witness to a writing to state his or her opinion as to the "sanity" of the signer of the writing if the validity of the writing is in question.

4. An attorney who drafts a will and is also a subscribing witness can testify about the capacity of the testator. *Estate of Goetz*, 253 Cal App 2d 107 (1st Dist. 1967).

The *Goetz* court said that "The attorney's testimony, although not conclusive, is entitled to much weight, particularly when, as here, he is a subscribing witness." In *Goetz*, the drafting attorney had not had a long relationship with the testator. When he met with the testator for the first time, she came to his office requesting that he prepare a will. She knew that she had a husband and two children, a son and a daughter. She was able to describe her assets, knew what was in joint tenancy with her husband and what was her separate property.

The testator said that because her husband and daughter were already well off, they were to be omitted from the will. She told the attorney that there were problems in the marriage, and that her husband had attempted to "have her committed."



She was also concerned that her husband might contest the will.

As a result, the attorney spent considerably more time with her than he otherwise would have for a simple will. The attorney took an abundance of precaution to satisfy himself that she had adequate testamentary capacity. The husband did in fact contest the will, and there was testimony from three treating doctors about the testator's mental infirmity. Nevertheless, the jury found in favor of the proponent of the will.

Jury trials are no longer available in probate proceedings. The Court of Appeal affirmed the judgment. The Court of Appeal found the testimony of the attorney compelling, and even more compelling were letters from testator to her daughter at about the time of the execution of the will. The Court described the letters as "intelligent, chatty and well put together. They exhibit orientation as to time and place."

5. Medical Testimony. A testator's treating physician or a medical professional can testify as to his or her opinion of testator's capacity. The opinion should be based on an actual examination, if possible. However, even if the testator is deceased, an opinion may be based on medical records or other information regarding the testator. It is of paramount importance that the physician or other qualified professional know and apply the standards for capacity. Some practitioners like to use the Capacity Declaration (Judicial Council Form GC-335) as a guide for physicians who may not be familiar with evaluating people for capacity. The form is not perfectly designed for a capacity determination, but it is a tool to consider.

In *Key v. Tyler*, below, an examining physician's opinion on ability to resist undue influence was considered not useful because the physician had not been provided enough information about what was going on in a trust amendment. It is up to the attorney soliciting a medical evaluation to be sure that the medical expert knows what is needed.

6. Filming. It is difficult to find a capable trusts and estates attorney who believes that filming a document execution ceremony is a good idea. There are too many ways it can turn out poorly. A detailed discussion of the pitfalls of filming is beyond the scope of this article, but it should be approached, if at all, with great caution.

Continued on page 14

III. Undue Influence

A. A trust, will or other donative document that is procured through undue influence is invalid and may be set aside. *Rice v. Clark*, 28 Cal 4th 89 (2002).

Section 86 of the California Probate Code reads as follows: "Undue influence" has the same meaning as defined in Section 15610.70 of the Welfare and Institutions Code. It's the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law."

W&I Section 15610.70 is a part of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), and it reads as follows:

15610.70 (a) "Undue Influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information or sleep.

(B) Use of affection, intimidation or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct of dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

B. Burden and Evidence

Ordinarily the burden of challenging a document based on an undue influence falls on the contestant. California Probate Code section 8252(a). However, a presumption of undue influence, shifting the burden of proof and requiring the proponent of the document to establish that there was no undue influence, arises upon a showing by a contestant that:

(1) the person alleged to have exerted undue influence had a confidential relationship with the testator;

(2) the person actively participated in procuring the instrument's preparation or execution; and

(3) the person would benefit unduly by the donative instrument. See, *Rice v. Clark,* at pp 96-97.

This burden shifting is often a critical element in a case which successfully challenges a will or trust on the grounds of undue influence.

A recent Court of Appeal case is illustrative of an undue influence case. The case generated two Court of Appeal opinions, one which was ordered not published and one which is published. In *Key v. Tyler,* 34 Cal App 5th 505 (2d Dist, 2019), the Court of Appeal dealt with the portion of the case which followed an earlier adjudication that one of three sisters had exerted undue influence on her mother to adopt a trust amendment for one daughter's benefit and to the detriment of one of her sisters.

In this second portion of the case, the Court found that the sister exerting undue influence had violated the trust's No Contest provision by defending against her sister's petition to set aside the flawed amendment. In the first phase of the case which resulted in an unpublished opinion, *Key v. Tyler* (WL 3587505)(2016) the Court of Appeal found that this same sister had in fact exerted undue influence over her mother in obtaining a trust amendment that virtually disinherited another daughter. The unpublished opinion is where the important facts are found regarding the undue influence claim.

The sister who was found to be the undue influencer was the attorney for her mother's business and also controlled many aspects of the business. Mother was elderly, and her husband had died recently. The parents' trust had directed distribution in equal shares on the second death among their three daughters. The amendment in question which was adopted by mother changed that pattern to give a token gift to one daughter, a larger gift to another daughter and the lion's share, including the interest in both the family business and the family home, to the influencer daughter.

Mother's attorney testified that he had met alone with mother only once, in connection with allocating trust assets following death of her husband. He took almost all guidance from the influencer daughter or other attorneys in daughter's law firm. Influencer daughter was a powerful figure who appears to have dominated her mother, her mother's attorney and employees in the family business. The drafting attorney was sensitive enough to the potential problems related to the amendment that he contemplated a contest. He had a contemporaneous psychiatric exam of mother on the day she signed the amendment.

When mother died, the daughter who was disadvantaged contested the amendment.

The probate court upheld the contest and set aside the amendment. The court found that neither the influencer nor the other attorney in her office who worked on the amendment was credible. The court did not find the examining doctor credible on the issue of whether mother was susceptible to undue influence. The court found the testimony of the drafting attorney unhelpful, in part because he had spent almost no time alone with mother.

IV. The Attorney's Role in Establishing Capacity and Insuring Against Undue Influence

A. Duty

An attorney engaged to prepare or modify a client's testamentary or dispositive documents may owe the client a duty of loyalty, which at a minimum requires the attorney to consider whether the client has the requisite capacity to execute the documents in question. However, the attorney does not have a duty to heirs or beneficiaries to determine capacity and refrain from helping a client execute documents when the client lacks capacity. *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.*, 109 Cal App 4th 1287 (1st Dist. 2003). "The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will." Presumably, the attorney's duty to identify and guard the client against undue influence is a duty only to the client, not to heirs and beneficiaries.

There is no case which elaborates on how an attorney should articulate and preserve the basis on which the attorney was "persuaded of the client's testamentary capacity by his or her own observations and experience." The attorney should keep in mind the *Goetz* case and the potential important testimony of the attorney in the event of a will contest. It is also well to treat *Key v. Tyler* as a cautionary tale. With those cases and considerable experience in mind, here are some suggestions.

B. Evidentiary Tips

1. Be alert. Attorneys encounter people of all sorts, and we develop instincts about people who may be a bit "off" or people whose acts are possibly subject to challenge after death. Don't ignore those instincts. They inform your judgment. If the attorney senses that there are issues, other people may as well, including family and close associates.

2. Time. Spend enough time with the client to be sure that you will be a credible witness about the client's condition and the possibility of undue influence.

The economics of the practice and client cost are constraints, but this is important. We see both sides of that coin in *Goetz* and in *Key v. Tyler*. There is no one rule, but determining what is "enough" is part of an attorney's judgment. If there is a will contest, one of the items of evidence will be any business records (Evidence Code Sections 1270-1272) of the attorney showing time spent with the client. Even if some of the time is deemed non-billable, it may be useful to have a record of it in the system. If a client has questions after a meeting, the attorney may want to consider answering them directly

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and not delegating all contacts to staff. If staff are talking with the client, make sure they know the importance of documenting those conversations.

Undue influence is harder sometimes to detect than lack of capacity. Again, the planning attorney's judgment and experience are important. Here, especially, meeting alone with the client and communicating directly with the client are of paramount importance. It is also important to be keenly alert to signs that the client is feeling pressed to take or not to take a certain action. Similarly, a client can be irrationally exuberant about a new beneficiary or other advisor or confidant. If something seems a little off, probe.

3. Time Alone. The attorney must control his or her interactions with the client. If a client wants to bring another person into a discussion with the attorney, the attorney should get the client's informed consent in writing. If the attorney has reservations about whether the client truly understands the issues about bringing others into the conversation, then the attorney should spend more time with the client, alone, before the non-client joins the conversation. That is true whether the non-client is a potential beneficiary, CPA, insurance advisor or other advisor. Different participants will cause different levels of concern.

4. Humanize the client. Spend some of the time with the client talking about things that may seem extraneous. What does the client do? What was the client's career? Does the client have grandchildren? How often does the client get to visit with children or grandchildren? If a client has no close family, talk about how the client spends her time.

What can seem like idle chatter can be very useful when a client's capacity is at issue. Remember Mrs. Goetz's letters to her daughter. Even though the case is often cited for the proposition that the attorney is qualified to testify about the client's capacity, the court said, "But perhaps the most persuasive of all the evidence are the letters written in her own hand by Mrs. Goetz to her daughter…."

5. Understand what is happening with the client's health. If the client is taking medications or in pain or has other issues which to some people might suggest lack of capacity, find out more about those things. Be prepared to have discussions with the client about how she feels when she is taking her medication.

6. Revisit your form documents. Are your wills and trusts understandable by the clients? Will they be understandable by the judge who may pass judgment on them some day? Keep in mind the distinction drawn by the courts between "simple" documents like wills and complex trusts that do more than just adjust percentages. Try having someone who does not do what we do read sample wills and trusts that your office prepares and see if that person considers the documents accessible. We attorneys have a tendency to use terms of art or jargon that is potentially confusing, even to attorneys who do not regularly deal with such documents.

7. Other witnesses. Think of having someone involved with a signing who is truly credible and independent. That may even be required. For example, if the client is also updating a health care directive and the client is living in a skilled nursing facility, a patient advocate or ombudsman is required (Probate Code Section 4675). That independent person typically is knowledgeable about the mental states of people in compromised health situations and can be invaluable. The patient advocate may not be willing to witness a will, but he or she can be present if an Advance Health Care Directive is being signed at the same time and can someday be a valuable witness as to the circumstances of the signing and the condition of the testator.

An attorney's staff can frequently be called on as witnesses for documents. Consider having a standard office protocol for what staff members do during a signing and the kind of notes they take.

It is almost always a good idea to exclude people who may benefit or suffer from the document in question from the signing process. ■

San Luis Obispo Legal Assistance Foundation Fundraiser

A DAY *at the* DERBY COMES IN *a* WINNER

by Erica Flores Baltodano, SLOLAF Board President

Cover & interior photos courtesy of Renoda Campbell Photography

Equestrian Taylor Olcott, riding Spiderman, greeted guests Carole and Jose Luis Flores.

The "Toke Racetrack" event echoed the Kentucky Derby in stylish attire. Danya Nunley won the Triple Crown for most amazing hat (top). Arpad and Adela Soo won the Daily Double for best stylin' couple (above).

San Luis Obispo Legal Assistance Foundation's Sixth Annual Fundraiser was a winner by all accounts! The Derby-themed event took place on September 21, 2019, at the "Toke Racetrack," with attorneys Lisa and Michael Toke graciously welcoming 265 guests into their home again for another evening of food, music, auctions, and too many fabulous hats to count. A Day at the Derby raised $150,000 to support San Luis Obispo Legal Assistance Foundation (SLOLAF) and the legal services it provides to local seniors, veterans, and families in need.

The 2019 Access to Justice Advocate award was presented to Frederick Law Firm for its community engagement and proven commitment to access to justice. Jacqueline del Valle Vitti Frederick accepted her firm's award, reminding an audience

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▶ *Bradley Liggett, Kyra Liggett, Aubree Hall, Justin Hall, Jared Salter, Kelli Salter, Leanne Harris, Ryan Harris*

▲ *Danny Danbom*

▼ *Maggie Papka, Megan Judge, Calder Zarkos*

▲ *Ken Sperow, Lisa Sperow*

▲ *Steven Marx, Jan Marx*

▲ *Charmaine and Brian Peterson*

▲ *Teri Ernst, given the "Hat-i-tude"award for best handcrafted hat, with tux-rocker Don Ernst.*

full of attorneys, elected officials, professionals, and community members that "injustice of any kind is a form of evil. . . . There are those who do not have the financial or mental capacity to stand up to injustice, and there is much injustice that goes unchallenged."

SLOLAF is honored to have the support of advocates like Jacqueline Frederick and the many attorney volunteers who make it possible for SLOLAF to serve 1,000 residents each year in the pursuit of justice.

A Day at the Derby guests were greeted with wine tasting by Jeff Branco Cellars and photographed with two gorgeous race horses. After receiving mint juleps, guests placed their silent auction bids while enjoying a jazzy three-piece band, reserve wine tasting by Tolosa Winery, and a cigar bar sponsored by Radovich Mediation. Passed hors d'oeuvres and a Derby-inspired meal were prepared by Farmhouse Corner Market and then we were off to the races with a live auction and paddle raise.

▼ *Guests*

▲ *Roy Ogden, Leanne Nettertrom, Jonas Bailey*

▲ *Gregory Devitt, Sheryl Wolcott, Doug Federman*

▲ *Derby guests*

As President of the SLOLAF Board of Directors, I want to personally express my gratitude to the legal community and others for generously supporting SLOLAF programs, including Senior Legal Services Project, which handles a variety of legal matters for SLO County seniors in need, and our veterans' program, which provides legal services to veterans who are homeless or at imminent risk of becoming homeless. During the evening's festivities, SLOLAF Legal Director Stephanie Barclay announced plans to expand our housing advocacy work in 2020 because housing insecurity is a growing problem for the most vulnerable members of our community.

SLOLAF's new Executive Director Donna Jones' nonprofit management experience and background as a certified public accountant, coupled with her passion for SLOLAF's mission, has been instrumental to the organization's growth in the last year. She did an excellent job to spearhead our event planning and make our event look gorgeous again this year. The addition of Jones to the SLOLAF team has allowed Barclay to expand the reach of our legal services.

At A Day at the Derby we said farewell to Office Administrator Lennon Bancroft, who is completing her legal studies and will be sitting for the bar exam and pursuing her own legal career. She will be missed by everyone who has had the opportunity to work with her, but she has left SLOLAF in excellent hands.

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▲ *Judge Matthew Guerrero (left) won the "Dapper Dan" award for best gent's ensemble, Taylor Ernst, Ashley Ernst.*

▲ *Michelle Gearhart, Kyle Gearhart*

▲ *Doren Curtze, Tim Selna, Pam Selna, Dawna Davies, Ivan Garrastazu*

▲ *John Franklin, Kathy Devaney*

◀ *Lisa Toke, Rowan Toke*

▲ *Joe Benson, Erin De Natale*

▲ *Jodie Steele, Jim Dor*

Our new bilingual Office Administrator is Annette Lares, a spitfire of energy who also deserves to be recognized for all of her behind-the-scenes efforts to make A Day at the Derby a smashing success.

A derby party would not have been complete without costumes—and this years' attendees outdid themselves! The "Hat-i-Tude" award for best hand-crafted hat went to Teri Ernst. Trudy O'Brian won the "Ride 'Em" award for best horse-themed hat. "Dapper Dan" was awarded to the Honorable Matthew Guerrero for best gent's ensemble, with Access to Justice Advocate honoree Jacqueline Frederick receiving the "Too Hot to Trot" award for best lady's ensemble. The best stylin' couple, Arpad and Adela Soo, won the "Daily Double," and the "Triple Crown" for the most amazing hat was awarded to Danya Nunley.

SLOLAF's reputation as a competent, capable, and well-run legal services organization has given funders the confidence to continue funding us, but nearly one-third of our budget is funded by our annual fundraiser. As such, we are immensely grateful to our local attorneys and friends for their ongoing support, especially those who made significant contributions to the success of A Day at the Derby, such as our Access to Justice Sponsor Frederick Law Firm.

◀ ▲ ▼ *Derby guests*

▲ *Auction winner Dennis Meffert*

▲ *William Frederick, Angela Sandoval*

▶ *Emcee Wendy Thies Sell, Michael Sell*

This year, other major sponsors included Adamski Moroski Madden Cumberland & Green LLP; Andre, Morris & Buttery; The Baltodano Firm, A Professional Corporation; Carmel & Naccasha LLP; e-Legal Services, Inc.; Ernst Law Group; Federman Law Firm; Glenn Burdette; Haines Law Group Employment Attorneys; Harris Personal Injury Lawyers; Merit Court Reporting & Video; Pacific Western Bank; and Ray Mattison, Professional Mediation.

The Kentucky Derby's "Run for the Roses" is often considered the best two minutes in sports. At the end of the race, a blanket of roses is draped over the winner. SLOLAF is the only place many local residents can turn to for free legal services. Thank you to everyone who helped make A Day at the Derby, SLOLAF's Sixth Annual Fundraiser, a race to remember. You have blanketed us in your generosity so that we can, in turn, offer the blankets—in the form of advice counsel and legal representation—to those in our community who need them the most.

If you would like more information about sponsorship opportunities for our event next year or would like to be an event volunteer, please contact SLOLAF Executive Director Donna Jones at donna@slolaf.org or (805) 548-0796. If you would like to volunteer legal services, please contact Legal Director Stephanie Barclay at stephanie@slolaf.org. ■

Monsanto Litigation Spurs An Ongoing Debate Over Punitive Damages

by Raymond Allen

I. Background

It is axiomatic that compensatory damages compensate the plaintiff for past and future loss, but punitive damages punish and deter the tortfeasor. In American jurisprudence, these concepts pre-date the Civil War. The application of punishment upon the bad actor was initially accomplished without regard to due process concerns. Thus, in 1849, when Mr. Day sued his upstream neighbor, the Berkshire Woolen Company, for removing more of his mill than necessary, the court instructed the jury that they could "give exemplary or vindictive damages."

On appeal, the Supreme Court upheld the award of punitive damages, stating: "In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff that he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example…."[1]

From the 1970s onward, the public has heard the gnashing and wailing from big business. They scream, often through their ill-informed political shills, that punitive damages are the ruination of American manufacturing. The outlandish awards increase costs of doing business and prevent them from successfully competing in the global market. However, controlling for the asbestos litigation, punitive damages actually decreased during the latter half of the 1980s.[2]

During the George Herbert Walker Bush presidency, the Supreme Court held that punitive damages do not violate due process as long as the award did not cross the line into the realm of "constitutional impropriety."[3]

In *State Farm Mutual Automobile Insurance Company v. Campbell* (2003) 538 US 408, Justice Kennedy fleshed out the three-part rule the Court had provided in *Gore:*

The trial court was to measure the punitive award with these guide posts: [1] the degree of reprehensibility of the defendant's misconduct; [2] the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and [3] the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[4]

"We have instructed courts to determine the reprehensibility of a defendant by considering whether…the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others;…the conduct involved repeated actions or was an isolated incident;…." The high court ultimately determined that the Utah punitive damages verdict in *State Farm* had to be reversed and remanded for a redetermination of the award.

The conservative justices, Scalia and Thomas, wrote in dissent that there was no reason for the trial judge to reduce punitive damages based on these guideposts. The 14th Amendment guarantees due process, which the defendant received, not a fair or even reasonable outcome.

In California, a civil jury is instructed that "There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount."

The jury is then instructed to consider the reprehensibility of the defendant's conduct, the relationship between the caused harm and the punitive award; and the wealth of the defendant. (CACI 3940). The jury is instructed that the granting or withholding of punitive damages is wholly within their discretion. But it's not.

II. The *Monsanto* Cases

A. Johnson

So far, there have been four successful trials against Monsanto, the manufacturer of the herbicide Roundup. Plaintiffs uniformly allege that they used or came into contact with Roundup, which contains the carcinogen glyphosate, and later developed non-Hodgkin Lymphoma (NHL). Juries have heard, and will continue to hear, that Monsanto never conducted epidemiology studies for Roundup to determine its cancer risk to users. Monsanto spent millions of dollars to fund

ghostwritten studies and articles aimed at discrediting the scientists who were finding dangers with the herbicide. Monsanto took advantage of its cozy relationship with the Environmental Protection Agency and had the EPA delay an independent evaluation by the United States Agency for Toxic Substances and Disease Registry. And internally, Monsanto recommended that their employees use a full range of protective gear when applying glyphosate, but did not warn the public to do the same.

As a result of this evidence, in July 2018, a school groundskeeper named Dwayne "Lee" Johnson was awarded $289 million by a jury: $39 million in compensatory damages and $250 million in punitive damages.

In August of that year, San Francisco Superior Court Judge Suzanne Bolanos indicated that she would find the punitive award unconstitutional. Judge Bolanos used a 1:1 ratio between compensatory and punitive damages. The one-to-one ratio was approved in *Exxon Shipping Co. v. Baker* (2008) 554 US 471. In *Baker*, the Supreme Court held that 1:1 "is a fair upper limit in maritime cases." In a footnote, the Court further suggested that 1:1 might be the "constitutional outer limit."

Judge Bolanos gave plaintiff Johnson the option of accepting her dramatic reduction in punitive damages or having a new trial to determine an appropriate punitive damages award. Plaintiff, fearing his eminent demise, accepted the reduced total judgment of $78 million. Defendants, nevertheless, have appealed.

B. Hardeman

Later, in March 2019, a jury awarded plaintiff Edwin Hardeman $80 million; only $5 million of that award was for compensatory damages.

In the *Hardeman* case, the trial court applied the three-part *Gore* test to reduce the punitive damages award. In *Hardeman*, Judge Vince Chhabria concluded that the first guidepost, reprehensibility, was present. Evidence at trial showed that Monsanto's approach to the safety of its product was indeed reprehensible. The company was recklessly indifferent to the growing concern linking its product to cancer. Instead of investigating the possibility, they began a campaign of obfuscation. On the other hand, wrote the judge, there was no evidence that Monsanto knew that their product caused cancer, hid evidence, or manipulated the EPA approval process.

Judge Chhabria, however, concluded that there was great disparity between the compensatory damage award of $5 million and the punitive award of $75 million. The judge wrote that "the Supreme Court has suggested that a four-to-one ratio between punitive and compensatory damages "might be close to the line of constitutional impropriety." He then strictly applied the 4:1 ratio and reduced the punitive award to $20 million.

C. Pilliod

More recently, in May 2019, a jury awarded gardeners Alva and Alberta Pilliod close to $1 billion each in damages. Plaintiff's counsel argued that the jury should consider that evidence showed the company had covered up the health risks

of the herbicide for decades. He further explained that his punitive damages request was roughly based on the gross profit of $892 million recorded in 2017 by Monsanto's agricultural-chemicals division. The wealth of the bad actor should be considered so that they can be divested of ill-gotten gains. The jury verdict awarded compensatory damages in the amount of $55 million. Punitive damages exceeded $1.95 billion. This is approximately a 35:1 ratio. The jury used its discretion to punish and disgorge. In doing so, it blew way past the ratios suggested by the Supreme Court.

On July 18, the trial court judge signaled that she would dramatically reduce the size of the award so that it is more in line with precedent. A week later, Judge Winifred Smith reduced the punitive, noneconomic and future medical damages in the case brought by the Pilliods. Smith cut Alva Pilliod's noneconomic damages from $18 million to $6.1 million and his punitive damages from $1 billion to $24.5 million. Alberta Pilliod's future medical damage award dropped

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from $2.9 million to $50,000; her noneconomic damages from $34 million to $11 million; and her punitive damages from $1 billion to $44.8 million. Like Judge Chhabria, Judge Smith applied *State Farm*, and ordered punitive damages to be awarded in a 4:1 ratio with compensatory damages.

III. Conclusion

As we await the appeals and final determinations on these initial cases, 13,000 additional plaintiffs march toward their multi-million dollar judgements against Monsanto.

Monsanto's parent company, Bayer AG will struggle to remain solvent as it absorbs these hits. The truth is that manufacturers must weigh the costs and benefits of their manufacturing decisions, design decisions and labeling decisions. They must also be ready to explain those decisions to a generous trier-of-fact. For the practitioner, there is no way to know what a jury will award when it learns the details of a manufacturer's cost-benefit analysis.

Surely, all we know is that plaintiffs will continue to argue for punishment and defendants will continue to argue against vindictive awards. Juries, until they are provided clear instructions on how to award punitive damages, will continue to react compassionately, or over-react passionately, when they learn that a manufacturer has placed concern for profits above concern for public health. ■

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[1] *Day v. Woodworth* (1852) 54 US 363, 371.
[2] Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts, P. 38, 1991, The Roscoe Pound Foundation.
[3] *Pacific Mutual Life Insurance v. Haslip* (1991) 111 S.Ct. 1032, 1043.
[4] Citing *BMW of North America v. Gore* (1996) 517 US 559.
[5] He cited *State Farm Automobile Insurance Company v. Campbell*, 538 US 408, 426, and *BMW of North America v. Gore* 517 US 559, 580-581.
[6] https://www.bloomberg.com/news/articles/2019-07-19/bayer-judge-cuts-2-billion-roundup-verdict-in-tentative-ruling

Editor's Note: I teach Torts at San Luis Obispo College of Law, a state-accredited law school serving our local community. These cases were reviewed in Week 11 of the Fall Semester, October 30, 2019.

Conflict of Interests—You Could Lose It All!
(Conflict Issues and Other Odds 'n' Ends)

by Michael Farley

A conflict of interest can cost you your entire fee as well as any interest you may have in a business dealing with a current client, even if the business venture is fair and profitable. Following the simple rules set out in the Rules of Professional Responsibility can help you avoid these financial consequences and ethical lapses. This article explores those issues as well as some "good to know" odds 'n ends discussed hereafter.

Let's start by remembering that "A conflict cannot survive without your participation…." –*Wayne Dyer*

Most attorneys know about Professional Rule of Responsibility 1.7, which discusses conflict of interest: Current Clients. The following Rules should also be consulted when appropriate:

- Rule 1.9: Duties to Former Clients
- Rule 1.10: Imputation of Conflicts
- Rule 1.18: Duties to Prospective Clients

Rule 1.7 forbids lawyers from representing a client in a matter (a) that is directly adverse to or (b) that would present a significant risk that the lawyer's representation would be "materially limited" due to the lawyer's responsibility to another client, a former client, a third party or the lawyer's own interest.

As the Sheppard Mullins' firm learned in *Sheppard Mullins v. J-M Manufacturing* (2018, 6 Cal.5th 58), the fact that the consent obtained an "advance waiver of future conflicts" is not the most relevant aspect of dealing with a conflict of interest (potential or real). The most important issue is not obtaining the consent but, rather, the scope ("quality") of the disclosure in obtaining the consent. That is, the effectiveness of such a waiver requires that the client understand the conflict and is informed of the risks. Remember, if the clients that are causing the conflict are current clients, both clients must consent and waive the conflict.

Sheppard Mullins built into their retainer agreement the client's consent to future conflicts, but the firm failed to disclose information about known conflicts. A motion to recuse Shepard Mullins was filed and granted. Once Sheppard Mullins was disqualified, its client not only felt it need not pay the outstanding balance of $1.1 million; but the client also argued it was entitled to a refund of the $2.7 million it previously paid. The trial court disagreed. The Court of Appeals reversed and held that Sheppard Mullins not only must forfeit its outstanding bill but also ruled it must refund the entire $2.7 million previously paid. That is, it must refund all fees paid and fees earned but not yet paid.

The California Supreme Court, in an opinion by Justice Leondra Kruger, found that at the

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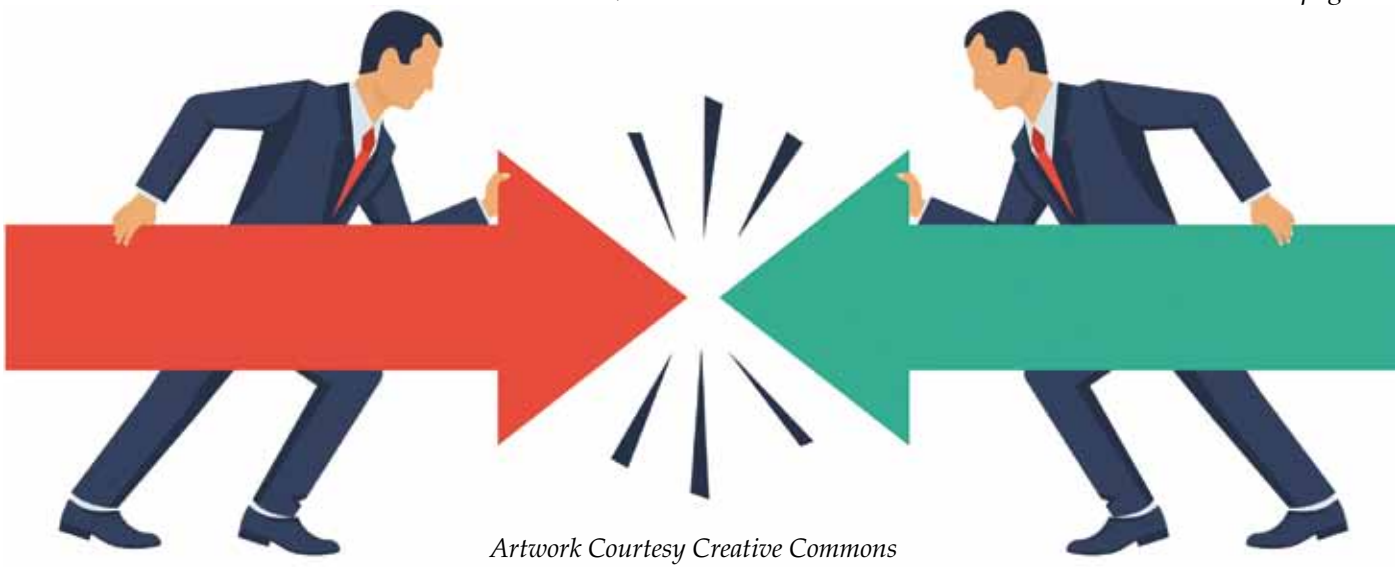


Artwork Courtesy Creative Commons

time J-M hired Sheppard Mullins to defend the pipe maker in a qui tam action back in 2010, the law firm was already representing one of the qui tam plaintiffs, the South Tahoe Public Utility District, *in unrelated employment matters*. Sheppard Mullins did not tell J-M about its relationship with South Tahoe, which subsequently got the firm bounced from the qui tam case. The court said, "We conclude…that without full disclosure of existing conflicts known to the attorney the client's consent is not informed for purposes of our ethics rules."

The Court went on to note that the potential of losing the entire fee isn't automatic. The Court stated that Sheppard Mullins didn't have a right to contractual fees, because its disclosure failure voided its engagement agreement with J-M. However, under the equitable doctrine of quantum meruit, Sheppard Mullins could offer proof as to the value of its services, if any. *The burden is now on Sheppard Mullins to prove it is owed anything*. This is a significant shift in who has the burden.

Thus, the prevailing thought is that if you have a conflict, you could lose all your fees from the moment the conflict arises. Why? The attorney-client relationship requires that the attorney maintain an ***undivided*** loyalty to his/her client. [Rule 1.7, CACI 4100]

When a conflict exists, the attorney has a "divided loyalty," thereby potentially rendering his/her entire fee void. Quantum meruit may assist in "saving" some of the attorney's fees depending on the gravity of the conflict. Remember, the burden is now on the attorney to establish the value of his/her services and why the conflict does not impact that value.

So, *Sheppard Mullins* potentially takes away your fees. What if you do not have a conflict with another client, but you decide to enter into a business transaction with your client? You better read *Fair v. Bakhtiari* (1st District, (2011) 195 Cal.App 4th, 1135).

Background—Lawyer represented client for six months and then went into business with him. In this new business, the lawyer and the client made real estate investments together and shared the profits. The lawyer continued his law practice for four years before working in the new business full-time.

The lawyer and client entered into business transactions without first agreeing on many essential terms, including their respective rights to compensation, shareholder rights, division of profits, and other monetary benefits to be derived from their joint efforts. The lawyer did not, per Rule 3-300 (now Rule 1.8.1), advise the client to seek the advice of an outside counsel regarding the fairness of the arrangement.

For the business, the client provided the money and the lawyer negotiated and drafted documents. The business was very successful. After 10 years, the business relationship soured, and the client terminated the business arrangement. The lawyer sued the client for the value of the lawyer's interest in the business. The client countersued for breach of fiduciary duty.

Issue—Could the lawyer seek the value of his interest in the business having violated rules and laws governing attorney and client business relationships?

Analysis—The Court ruled that the lawyer had violated Probate Code §16004(c), and that a lawyer must prove that the transaction with a client (or beneficiary, as stated in the Probate Code) is fair and reasonable. [Probate Code §16004(c) is a statutory complement to Rule 3-300 (now 1.8.1); Section 16004(c) applies to attorney-client relationships; *Ramirez v. Sturdevant* (1994) 21 CA4th 904, 917. That is, §16004 applies to the fiduciary relationship between attorney and client.]

Because the lawyer had violated Rule 3-300 (now Rule 1.1.8) and none of the terms were put into writing, the lawyer could not carry this burden. The client did not need to prove harm because the damages awarded for breach of fiduciary damages are not to make the client whole but are designed to deter attorney misconduct. As the Court stated, "It compensates clients for harm they have suffered, but it reflects not the harms the clients suffer from the tainted representation, but the decreased value of the representation itself." *Fair*, supra, at 1153.

Conclusion—The lawyer was denied monetary recovery from all the years of work he had performed on behalf of the business. The lawyer was denied any compensation from the client relating to their joint business.

Moving on….

Quick Take #1

Question—Can a client sue an attorney for damages arising from improper representation under breach of contract claims and apply the four-year statute of limitations for such claims?

For example, a client alleges that an attorney provided poor advice that led to reduced recovery. Upon receipt of such recovery, attorney paid themselves before transferring the balance to client. Client alleges breach of contract for wrongful payments by the attorney. Client files suit beyond the one-year statute of limitations for attorney malpractice, but within the four-year statute of limitations for breach of contract.

Analysis—California Civil Procedure Code §340.6: An action against an attorney for a wrongful act or omission…shall be commenced within one year….

Foxen v. Carpenter, 6 Cal. App.5th 284 (2nd Dist. 2016): Plaintiff discovered an alleged wrongful transfer of funds by their lawyer. Plaintiff waited more than three years to file their lawsuit. Plaintiff alleged that their claim was not for malpractice, because it was not related to the quality of legal services, "but on [the lawyer's] breach of nonprofessional obligations generally owed by all persons who enter into contracts." The Court did not agree with Plaintiff, stating "the attorney-client relationship often requires attorneys to provide nonlegal professional series such as accounting, bookkeeping and holding property in trust."

Conclusion—The Court concluded that the Plaintiff's breach of contract claims was based on incorrectly calculated litigation costs and breach of fiduciary duties. The Court concluded that "Plaintiff will not be able to establish her contract claims against [the lawyer] without demonstrating they breached professional duties owed to her, or nonlegal services closely associated with the performance of their professional duties as lawyers." *Id*. At 292. Thus, the one-year statute applied.

Quick Take #2

Question—If an attorney received unsolicited information from a prospective client that affects an existing client, is the attorney prevented from disclosing the prospective client's possible claim to the existing client?

For example, a prospective client leaves an unsolicited voicemail seeking representation in a matter against an existing client.

Analysis—California Evidence Code §952 defines a "confidential communication between client and lawyer" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted…."

A "client" for purposes of Evidence Code §952 is defined in §951 as "a person who…consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity…."

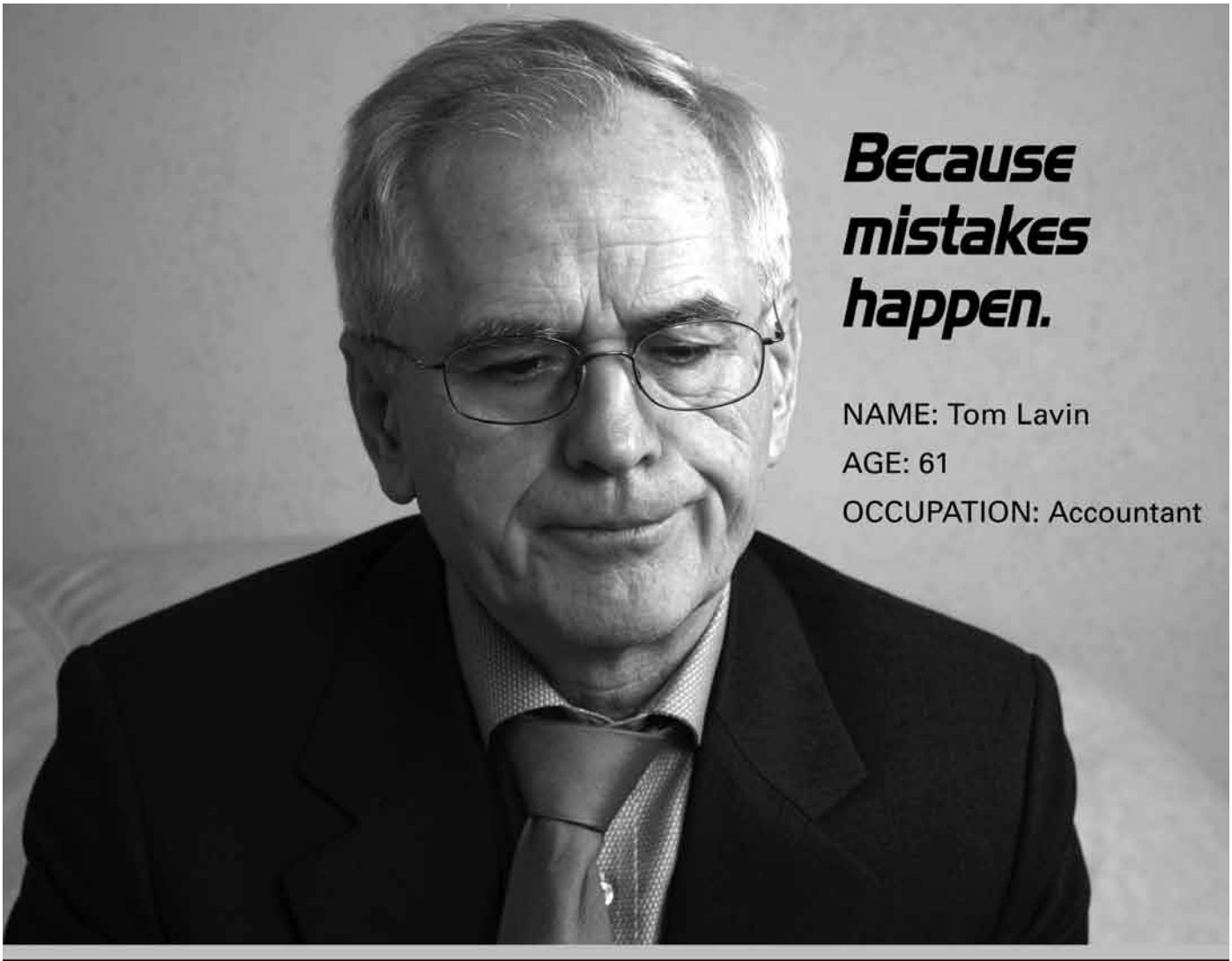
People v. Gionis, 9 Cal.4th 1196, at 1211-12 (1995): "…It is firmly established that the [attorney-client] privilege protects confidential communications made during initial consultations with an attorney" and while the prospective client has a reasonable expectation that the attorney will provide representation.

People v. Gardner, 106 Cal.App. 3d 882, 887, (Ct App. 1980): Wherein an indigent prospective client unilaterally drafted a letter for the public defender for the purpose of requesting representation and admitted guilt. The letter was never delivered, but was found by the police and used as proof of an admission of guilt: "The lawyer-client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, and information acquired by the attorney is privileged whether or not actual employment results…. It is thus apparent that if the contents of the letter…had been communicated in person to a representative of the defender's office, the communication would have been protected by the privilege."

Conclusion—Case law suggests that any communication between a prospective client and an attorney, even if unilateral, will be deemed privileged if the client had the reasonable expectation that the attorney would accept employment. Accordingly, providing this unsolicited information to an existing client may be prohibited.

Do not invite unknown third parties to send or email (or

Continued on page 29



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voicemail) if they have a case they want you to consider. Your website should state: "Unsolicited emails or communications will not be reviewed prior to an office visit with one of our attorneys."

Quick Take #3

Question—During an ongoing fee dispute with a client, can an attorney disclose privileged information relevant to the fee dispute in an unrelated lawsuit involving the client and a third party?

For example, an attorney is suing a client for unpaid fees and the attorney has information about the client's total wealth. At the same time, the client is arguing in a separate dispute that he/she has no money and cannot pay a potential judgment against him/her. Can the attorney disclose the same information about the client's net worth in the third-party lawsuit?

Analysis—California Evidence Code §958: There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or the client, of a duty arising out of the lawyer-client relationship.

Dietz v. Meisenheimer & Herron, 177 Cal.App 4th 771, 786 (2009): "An attorney 'can reveal confidences to defend against a malpractice claim or in a fee dispute….' However, Evidence Code §958 has been construed to apply only when 'either the attorney or client charges the other with a breach of duty arising from their professional relationship.' …'Privileged communications do not become discoverable because they are related to issues raised in the litigation.' Thus…we assume for purposes of this decision that there is no exception to the duty to preserve client confidences in a case brought against an attorney by a third party." (Internal Citation Omitted).

Conclusion—An attorney can use privileged information in order to recover from a client in a fee dispute. However, an attorney cannot make the same disclosure in an unrelated matter to assist a third party.

Quick Odds 'n Ends

- Effective January 1, 2020, in lieu of a separate statement, the court may in its discretion allow the moving party to submit a concise outline of the discovery request and each response in dispute. [CCP §2030.300(b)(2).
- Sanctions on appeal: [*Workman v. Colichman* (2019) 33 CA5th 1039, 1062-1064] where court found appeal of denial of anti-SLAPP motion to be frivolous and solely for delay, court issued sanctions of more than $35,000 to Plaintiff for attorney fees on appeal and $8,500 to court for costs of processing the appeal.
- Hybrid actions—exception requiring jury trial first: If a given claim permits both legal and equitable remedies and both kinds of remedies are based on claims as to which there is a right to a jury, then jury trial must precede court trial. [*Nationwide Biweekly Admin., Inc. v. Sup.Ct.* (People) (2018) 24 CA5th 438, 456]
- Successive demurrers: [*Goncharov v. Uber Technologies, Inc.* (2018) 19 CA5th 1157, 1167: permissible to raise same arguments on second demurrer without seeking reconsideration of first demurrer under CCP §1008]

I hope you find this material helpful. Follow the Rules, it's pretty easy and remember, as Jim Rohn said, "Success is nothing more that a few simple disciplines, practiced every day."

Cheers! ■

Editor's Note: Michael L. Farley is a California Certified Legal Specialist in Legal Malpractice Law and represents plaintiffs and insured and uninsured lawyers and defendant lawyers before the State Bar Court.

Farley acts as a mediator in professional negligence cases as well as other civil matters. He also testifies as an expert before all state courts and the State Bar.

Farley Law Firm has offices in Visalia and San Luis Obispo, California. The San Luis Obispo office is located at 987 Osos Street; (805) 439-2244.

A Look at Immigration in the Trump Era

by Raymond Allen

"I have watched with dismay and increasing horror as my nephew, an educated man who is well aware of his heritage, has become the architect of immigration policies that repudiate the very foundation of our family's life in this country."
—Dr. David S. Glosser, uncle of Stephen Miller

Immigration is an interesting topic. Most people appreciate that immigrants have made the United States a strong and vital nation. Some, however, hold the view that the nation is "full" and should not accept more immigrants.

Usually, people who are in opposition to immigration are in opposition to illegal immigration from Mexico and other Latin American countries. Rarely, if ever, do people think about illegal immigration from Canada, China or India. This is an interesting bit of racism.

On April 18, 2019, Madelaine Behr, Esq., presented an Introduction to Bond Hearings in Immigration. The thrust of the talk was that it is difficult to get a detained immigrant out on bond. The detained immigrant, who is most likely in the United States illegally, must show he or she is not a risk to the community, is not a flight risk and is not a threat to national security.

To determine whether the immigrant is a danger to the community, the court will review the immigrant's criminal record, proof of rehabilitation and proof of compliance with past sentences. To determine if the immigrant is a flight risk, the court will consider whether the person has a fixed address in the United States, length of residence in the U.S., family ties, employment history, record of appearance in court, criminal history, history of immigration violations, attempts to flee prosecution, manner of entry into the U.S., and the available avenues of relief. Behr concluded that, with rare exceptions, detainees remain detained without bond.

Prior to her presentation, she graciously sat down with the *Bar Bulletin* to discuss a broad range of immigration issues.

Asylum Seekers

According to Behr, during the tenure of Attorney General Jeff Sessions, the Department of Justice conducted a strategic and targeted attack on the ability of Hispanic asylum seekers to enter the U.S. A person may seek asylum in the U.S. based on credible fear of governmental persecution for race, religion, political participation or other social group.

Prior to the Trump Administration, women fleeing domestic violence or a person fleeing gang-related terrorism could seek asylum under the "social group" category. Under Sessions those categories were effectively shut down for asylum seekers. The difficult became impossible.

There is irony and cruelty in the law pertaining to asylum seekers. Obviously, when we think of illegal immigration, we think of our southern border. Those immigrants have been characterized as dirty rapists and gang-related killers. This, of course, is a disgusting and racist stereotype.

Immigrants at Ellis Island, 1902. Courtesy Wikipedia.

"In the eight years I have practiced Immigration Law," said Behr, "I have had only two clients with a gang connection: one was forced to get a gang-related tattoo by older men in his village; the other was recruited into a gang after entry into the U.S.

"When I listen to the President discuss immigration issues, I hear a man who is ignorant and unconcerned with his ignorance."

Most asylum seekers from Mexico and Central or South America are impoverished and come from rural areas. They are fleeing violence born of corruption and social decay. They walk to the border. They present themselves to the agents and seek help. As a result, no assistance will ever be provided. They will immediately be detained. There is no discretion and there is no due process.

On April 16, 2019, Attorney General Barr issued an edict that requires asylum seekers who are under expedited removal consideration to be detained indefinitely pending final determination of their credible fear assertion. The groups affected are arriving from our southern border. The federal immigration rule defines the groups as follows.

"The designated group at issue here encompasses aliens who (i) 'are physically present in the U.S. without having been admitted or paroled,' (ii) 'are encountered by an immigration officer within 100 air miles of any U.S. international land border,' and (iii) cannot establish 'that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter.'"[1]

In July, the administration announced that no asylum would be considered for any individual who had failed to apply for asylum in at least one country they passed through on the way to the U.S.

Later, the Trump administration required asylum seekers from Mexico, Central America and South America to wait in Mexico and seek asylum from that location. Opponents pointed out that waiting in Mexico for asylum in the U.S. could pose serious risks to the asylum seeker. It is likely that the Ninth Circuit will enjoin operation of this rule without some safeguards.

The goal of the administration appears to be to prevent nearly every person from Mexico, Central America and South America from walking into the U.S. to seek asylum.

On the other hand, asylum seekers from China or India are more sophisticated. They may enter with a visa. They are instructed that bond-pending asylum can only be granted to those already in the U.S. Thus, they wisely enter, remain quietly in the country for a period of time, and then announce their desire to seek asylum. The time and location of their credible threat assertion is important. As a result, they are often released on bond.

Moreover, Chinese and Indian illegal immigrants often are wealthier and pay up to $30,000 for good directions from smugglers. Their basis for asylum is religious or political rather than domestic violence and gang terrorism. They fit neatly into an asylum category. Also, there is no political bile aimed at asylum-seeking immigrants from China or India.

Racism

There is a power inequity at the border between the poor Hispanic immigrants and the Immigration and Customs Enforcement (ICE) agents. In March 2019, for example, it was reported by CNN that a former ICE officer at the Little Rock, Arkansas, ICE office had often forged arrest warrants. When he suspected a house contained illegal immigrants, Officer Brent Oxley forged his supervisor's signatures on blank arrest warrants.[2] Others in the federal office would either sign the arrest warrant or be given pre-signed arrest warrants. The problem for the illegal immigrant is that there is no recourse to such blatant abuse of power. Their status alone means that they are destined to deportation, regardless of the tactics used to apprehend them.

The politics behind the policy clarifies the intent of the policy. The policy intent is to establish perpetual fear of the Hispanic immigrant community and perpetual fear from within the Hispanic immigrant community.

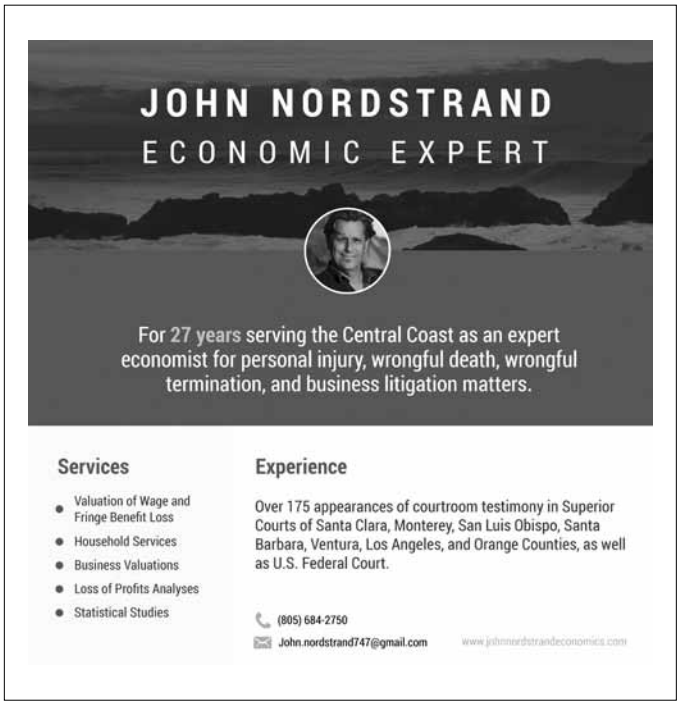
This past spring President Trump threatened to remove immigrants captured at the border to "sanctuary cities." The stated goal was to punish jurisdictions that seek a more compassionate approach toward illegal immigrants. Again, Behr is incredulous regarding the outcome. If the illegal immigrant is seeking asylum or is simply illegal in the country, there are no federal facilities for these immigrants to be housed. Many local jurisdictions are closing the facilities that once housed immigrants.

The Orange County Sheriff's Department, for example, who has leased space to ICE, is closing its facilities. After July 2020, ICE will no longer be able to hold detainees at the Orange County jail.

In July 2019, President Trump deployed ICE agents to arrest and deport illegal immigrants from 10 urban areas. Although there are logistical issues surrounding detention, due process and deportation, the policy is operational. The raids are aimed at 2,000 targets. There are approximately 11.5 million illegal immigrants in the U.S. Who is being targeted and why is an "operational detail" not revealed by ICE? Behr thinks newer arrivals are likely targets.

As recently as July 22, 2019, the administration changed the policy again for expedited removal. Now, any illegal immigrant who is stopped and unable to prove he or she has resided in the U.S. for the prior two years can be removed without due process back to their country of origin.

Continued on page 32



A Look at Immigration continued

I am not sure what document one would need to possess to prove two years of continuous residence in the U.S. to a cynical ICE agent.[3] Again, it is impossible to say if this policy would impact the gross number of illegal immigrants in our country, but it certainly fulfills the policy goal. To reiterate, the goal is fear.

The Wall

According to Behr, border walls are ineffectual. Most of her clients have burrowed under or walked around border walls. At low tide, for example, it is easy to walk around the wall at Tijuana Beach. Walls do not work. Worse, they reflect the ethos of the people who have built them.

Some, like Stephen Miller, a White House advisor, argue that a nation that does not protect its borders cannot remain an independent nation. The inverse is more true. America cannot remain America if it is not a beacon for the tired, the poor, the huddled masses yearning to breathe free. Lady Liberty sought the homeless tempest-tossed to her. She lifted her lamp beside the golden door.

The bromide that "they should just enter legally" is a faulty concept. According to Behr, currently there is no way for a citizen of Mexico or Central America to legally enter the U.S. unless they have a relative or a job already in the country. If they do, the process to legally enter and remain in the U.S. will still take decades. Faced with unimaginable poverty, corruption and violence, families walk thousands of miles for the chance to be safe and breathe free. Who among us would not? ■

Statue of Liberty. Courtesy Wikipedia.

[1] Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877-48.880 (Aug. 11, 2004)

[2] Arkansas Blog, March 13, 2019.

[3] *New York Times*, July 23, 2019. "Trump Administration to Expand Fast-Tracked Deportations in US," by Zulan Karno-Youngs and Caitlin Dickerson.

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Editor's Note: Madelaine Behr obtained her undergraduate degree in Political Science at Pepperdine University in July 2006. She went on to graduate Summa Cum Laude from Whittier College School of Law in December 2010. She worked at the Center for Human Rights and Constitutional Law, providing assistance to other nonprofit legal organizations. In 2017, she opened her own law firm, Behr Legal, which concentrates on representing detained immigrants in their immigration and criminal cases.

Editor's Note: The opinions interlaced within this article do not reflect the opinions of the San Luis Obispo County Bar Association or its Board of Directors. Any attorneys who hold opposing positions on immigration are encouraged to write to the editor and articulate those positions.

Further Reflections on Law School

by R. Michael Devitt

I used to regularly write "Further Reflections" for the *Bar Bulletin.* It has been a while, however. The last issue that contained "Further Reflections" [before Sept.–Oct. 2019] also contained an article on the retirement of Judge John Trice. That issue also contained an article called "Candor and Advice: A Night with the Court of Appeal." Apart from the judiciary, I recognized probably only one-half of the attendees at the event.

While reading, I came across an article in the September 5, 2017, installment of the *Los Angeles Daily Journal*. What really caught my eye was the headline: "Assembly approves bar overhaul." The article summarized some recent legislation concerning the fingerprinting of active attorneys, which was estimated at 190,000 individuals. To briefly summarize the legislation, I quote from the *Daily Journal* article as follows.

"The bill passed Friday would also eliminate the six elected attorney members of the bar's Board of Trustees and give the agency authority to re-fingerprint the more than 190,000 active licensees in order to receive alerts about attorney arrests and convictions.

"'Never in the state of California has this level of reform been done,' said Assemblyman Mark Stone, chair of his chamber's Judiciary Committee.

"The funding and overhaul bill, SB 36, would also allow the bar to collect a basic membership fee next year of $315, an uptick from the $297 lawyers paid this year as required by the Supreme Court. The $315 fee would be the same as the last time a bar funding bill was enacted.

"The Assembly also on Friday unanimously approved a separate bill, SB 690, which would allow the bar to again make public the list of those who pass the bar exam."

This piece of legislation brought back fond and not so fond memories for me. In May 1965, I graduated from Loyola Law School. That summer I studied to take the bar exam.

While I was in law school, I had worked for some attorneys in an office complex. Among them were my father, Robert M. Devitt, and Sam Block. Block was a ferocious fighter. His primary office was in Compton. He wanted me to work a number of cases regarding contempt and failure to pay child support. Not knowing it at the time, this work for Block prepared me for my years with Lloyd E. Somogyi. Somogyi was also a ferocious fighter.

Back in 1965, most of the judges in Los Angeles County had attended the University of Southern California Law School. I found most of the students from USC to be arrogant. I suppose that makes some sense. They were on the fast track to becoming bench officers.

Getting back to the issue of publicizing the graduates of the bar, I will never forget the competition I had with this fellow from USC. He worked in the same office complex and he was somewhat arrogant. That changed, however, after the results from the bar. At that time, you could find out if you had passed the bar by calling the Oakland *Tribune*. The person at the Oakland *Tribune* would give the names of successful applicants.

I recall this was early December 1965. I was talking to my colleague from USC and I noticed that his right hand was bandaged. He said he had called the Oakland *Tribune* ***to confirm*** he had passed the bar. He then told me that the individual at the Oakland *Tribune* told him that his name was not on the list. He told the person to "Look again. It has to be there!" After several fruitless attempts, he finally got the message.

He told me that he was so angry he put his fist through a door, breaking several bones. His biggest complaint was that he would have trouble writing with his left hand when he took the bar review course again.

The summer of 1965 was also a time of great unrest in Southern California. The Watts riots began as a result of a road-side altercation. The riots lasted from August 11 through August 16, 1965. I would come home from the bar review course and turn on the television set. There was mass rioting. Watts was the first major battle in the war for civil rights.*

During these events, and in addition to our bar review course during the day, our professors at Loyola were somewhat concerned with the class of 1965 and had us attend a three-hour night class covering torts, contracts, evidence, and other topics for the bar exam. It was not uncommon to see my fearful classmates with guns.

We could not have been too scared or distracted though. The Loyola Law School class of 1965 had a 90 percent bar pass rate. ■

***Author's Note:** *The Watts riots were a time of upheaval in the Los Angeles area. Buildings were burned and looted, and violence was rampant. By the end, the final damages of the riots were as follows: 272 buildings damaged or burned; 192 buildings looted; 288 buildings damaged* and *looted; 268 buildings destroyed; 3,438 arrested; 1,032 injured; and 34 dead. It is estimated that up to 35,000 individuals took part in the riots, eventually causing over $40 million in property damage.*

Editor's Note: *In 2006, R. Michael Devitt was awarded the first* Frank J. Pentangelo Award *for his contributions to the San Luis Obispo County Bar Association* Bar Bulletin. *His contributions have continued throughout the years. Currently, Devitt has the honor of possessing the lowest California State Bar number (37872) of anyone actively practicing law in San Luis Obispo County. His breadth and depth of local Bar knowledge is unprecedented. He remains a valuable resource for attorneys in our county.*

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

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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 deadines noted 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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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.

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

January–February issue deadline	11/24
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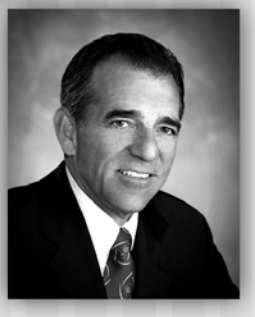

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