

*Holiday Party Honors Seitz
and Pentangelo Award Winners*

*Uncharted Territory—When
an Expired Product Is a Ripe Case*

Bar *B*ulletin

Serving San Luis Obispo
County's Legal Community

January–
February 2020



ADDRESS SERVICE REQUESTED
San Luis Obispo County Bar Association
PO Box 585, San Luis Obispo, CA 93406

JUST RESOLUTIONS

Alternative Dispute Resolution Neutral Services



Craig R. McCollum
Mediator/Arbitrator



"Our Mission is Your Success at Mediation"



Cheryl McCollum
Administrator

Serving the Central Coast since 1999

Over 2,200 successful mediations in
San Luis Obispo, Santa Maria,
Monterey, Santa Barbara and
Ventura

- CONSTRUCTION
- REAL ESTATE
- EMPLOYMENT/LABOR ISSUES
- BUSINESS/COMMERCIAL
- TRUST & PROBATE
- MALPRACTICE
- PERSONAL INJURY
- INSURANCE ISSUES
- ELDER ABUSE
- LANDLORD/TENANT

www.justresolutions.org

JUST RESOLUTIONS
960 Toro Street
San Luis Obispo, CA 93401
Phone: (805) 543-4648
E-mail: justresolutions@aol.com



TRIAL CONSULTS

- ✓ Member Inner Circle of Advocates limited to 100 of the best Trial Lawyers in America
- ✓ Recognized 14 times by peers as Outstanding Trial Lawyer
- ✓ 5 times Central Coast Trial Lawyer of the Year
- ✓ 100 million dollars in verdicts and settlements



"Jude is one of America's finest! If I needed help, I would search out Jude Basille." Gerry Spence, Legendary Trial Lawyer

Jude Basille
of Counsel Gomez Trial Attorneys

Available for select cases as referral or cocounsel
Referral Fees paid pursuant to State Bar Rules

PHONE 805.909.8113
www.basilelaw.com



**SAN LUIS OBISPO
COUNTY
BAR ASSOCIATION**

2020
Board of Directors

President

Stephanie Barclay

Vice President

Joe Benson

Secretary/Treasurer

Trevor Creel

Immediate Past President

Michael Pick

Directors

Ryan Andrews

Kevin Elder

Michelle Gearhart

James Graff-Radford

Matthew Guerrero

Kara Stein-Conaway

Lisa Toke

Bulletin Editor

Raymond Allen

Ex-Officio

Sheryl Wolcott

Sections

Alternative Dispute Resolution

Ray Mattison (805) 544-1232

Civil Litigation

Gordon Bosserman (805) 543-4171

Criminal Defense

Joseph Parker (805) 369-1413

Estates and Trusts

Herb Stroh (805) 541-2800

Family Law

Greg Gillett (805) 980-9002

Labor & Employment Law

Jane Heath (805) 225-1773

Real Property Law

Kevin D. Elder (805) 541-2800

Emerging Lawyers

Michael Chaloupka (805) 544-0100

San Luis Obispo County



CONTENTS

| | |
|---|----|
| President's Message—We Welcome a New Board and New Opportunities | 4 |
| Meet Our New President | 5 |
| 2019 Holiday Party | 6 |
| Mastermind Magic—Finding the Sisterhood I Needed | 10 |
| Our New SLO Bar Website Launches | 12 |
| Have You Met? | 13 |
| Clara Foltz, Barbara Babcock & Me | 14 |
| Patsy Takeoto Mink Leaves an Enduring Legacy | 18 |
| Secret Lives of Lawyers — Sunny Hawks Is Not the Retiring Kind | 22 |
| The Juror Who Knew Too Much | 24 |
| Uncharted Territory—When an Expired Product Is a Ripe Case | 26 |
| Leveraging Private Loans to Preserve Inherited Property | 30 |
| John L. Seitz Award Recipients Through the Years | 33 |
| Bar Bulletin Editorial and Advertisement Policy | 34 |

Cover – Gregory Gillett (right) receives the Seitz Award from Michael Seitz. Photo by Christine Joo.

BAR BULLETIN COMMITTEE

Editor: Raymond Allen — (805) 541-1920
raymondinsf@yahoo.com

Photographer: Christine Joo—
christineherajoo@gmail.com

Publisher: Joni Hunt — jonihunt@att.net

Advertising: Nicole Johnson — (805) 541-5930
slobar@slobar.org

The *Bar Bulletin*, ©2020, is published six times a year by The San Luis Obispo County Bar Association, P.O. Box 585, San Luis Obispo, CA 93406, (805) 541-5930, and subscription is included in the membership dues. The *Bar Bulletin* welcomes and encourages articles and letters from readers. Please send them to Raymond Allen at the above e-mail address. The San Luis Obispo County Bar Association reserves the right to edit articles and letters for publication. All material herein represents the views of the respective authors and does not necessarily carry the endorsement of the San Luis Obispo County Bar Association, its Board of Directors, its committees, and/or its sponsors and advertisers, unless specifically stated.

President's MESSAGE

by Stephanie Barclay



We Welcome a New Board & New Opportunities

Happy new year! I am honored to lead the San Luis Obispo County Bar Association this year as President of the Board of Directors. We have an excellent board this year.

- Michael Pick, *Ex-Officio*
- Joe Benson, Vice President
- Trevor Creel, Secretary / Treasurer
- Raymond Allen, *Bar Bulletin* Editor
- Ryan Andrews
- Kevin Elder
- Michelle Gearhart
- James Graff-Radford
- Honorable Matthew Guerrero
- Kara Stein-Conaway
- Lisa Toke

We say goodbye and thank you to board members Sheryl Wolcott, Martha Spalding and Chelsea Olson Murphy. We will miss them and are very grateful for the countless hours they volunteered so that we could all enjoy the benefits of participating in an active bar association.

If any of you are interested in getting more involved in the SLO Bar Association, please contact me. It is a fun and rewarding

way to meet attorneys who practice different areas of law, give back to the community, and learn the inner workings of the organization.

I am sorry I will miss seeing you at the State of the Courts address January 16. I am kicking off my 50th birthday year with a Thailand paddle boarding trip!

We have some interesting out-of-town speakers coming to present to us in 2020 starting in February. On February 20, Jared Gordon is coming from Fresno to talk to us about the thousands of website accessibility lawsuits filed against businesses and other public accommodations across the country in the last few years.

Did you know that small businesses (including law firms) are facing lawsuits because their websites do not comply with the Americans with Disabilities Act? This presentation will provide basic guidance on solo and small firms' obligations under the ADA, and what they can do to update their websites to improve accessibility for potential clients.

Gordon is an attorney in the Business Practice Group of

McCormick Barstow, LLP. Prior to private practice, he served as General Counsel to several online industry companies. I hope to see you all there.

The Bar Association plans to start a mentorship program this year. If you are interested in getting involved, please email me: Stephanie@slolaf.org. Oprah Winfrey said, "A mentor is someone who allows you to see the hope inside yourself."

It doesn't matter if you are a new attorney, trying a new area of law or new to the Central Coast—everyone can benefit from some mentoring. I encourage everyone to think about what you would like to give and get out of a mentorship relationship and look around you for those opportunities.

The best mentoring occurs from the relationships you seek out and create yourself. That said, not everyone has the time or the access to create those opportunities, so the Bar Association wants to help. Stay tuned. ■

Meet Our New President

by Michael Pick

With great pleasure, I would like to introduce the San Luis Obispo Bar Association's President for 2020, Stephanie Barclay. She should not be a stranger to anyone as she already has a great impact on our community. That said, here are some details you may or may not know about her.

Barclay's family moved to San Luis Obispo when she was 9 years old when (no surprise) she immediately became local social chair by organizing dances for her peers. She was encouraged early by her parents to become a lawyer as a result of her argumentative, oops, I mean inquisitive nature. Barclay has always been drawn to working in a position where she advocates for others.

As such, Barclay graduated from University of California Davis in 1992 with a psychology degree. In 1996, she graduated from Santa Clara University School of Law. During college and law school, she did several internships, all in the public space, trying to figure out her spot.

Since becoming an attorney, Barclay has worked at a number of different law offices including a top-shelf law firm in Silicon Valley, the Attorney General's office prosecuting fraud, a medium-size local litigation firm and, finally, working with San Luis Obispo Legal Assistance Foundation (SLOLAF), which provides free legal assistance to SLO County residents in need. According to Barclay, it has been a privilege to be a part of SLOLAF's growth. With growth has come the ability to serve more people in need every year.


Barclay remembers one of her first SLOLAF clients. He was an extremely kind and intelligent senior who was homeless because he had been wrongfully evicted from a room he was renting in a mobile home. The woman who owned the mobile home lived somewhere else and rented different rooms to different people. The client came to SLOLAF just wanting his \$400 security deposit back, but Barclay was outraged by this landlord. The woman had showed up with a truck and moved the client out with no notice and nowhere for him to go.

Barclay was told that SLOLAF did not litigate for their clients because they lacked the resources;

she found this unacceptable and went after the landlord. Barclay ultimately secured \$4,000 for her client. At that time, it was the smallest award she had been involved with, but it was the most meaningful. The client ultimately used the money to buy a mobile home and get himself out of homelessness.

When not at SLOLAF, Barclay enjoys being with her 11- and 14-year-old daughters who are busy in soccer, basketball, shopping and marching band. She has a seven-pound dog, Lexy, and two cats. She also enjoys running and hiking, traveling to warm places, wine tasting and trying new restaurants. She has recently tried paddle boarding and goes on a paddle boarding trip in Thailand in January!

The San Luis Obispo community is lucky to have Stephanie Barclay. The San Luis Obispo County Bar Association is even luckier to have her serve as our next President. ■



BABU LAW FIRM
A PROFESSIONAL CORPORATION

Concentrating in:
Business Transactions
Intellectual Property
Technology Law

Melissa McGann Babu
1037 Mill Street
San Luis Obispo, CA 93401
(805) 439-3006
(805) 439-3007 fax
mbabu@BabuLawFirm.com

www.BabuLawFirm.com

2019 Holiday Party...

Photos courtesy of Christine Joo



2020 San Luis Obispo County Bar Association Board of Directors (from left): Vice President Joe Benson, Director Kevin Elder, Director Honorable Matthew Guerrero, Director Michelle Gearhart, President Stephanie Barclay, Director Kara Stein-Conaway, Director James Graff-Radford, Bar Bulletin Editor Raymond Allen, Director Ryan Andrews and Ex-Officio Michael Pick. Not pictured are Secretary/Treasurer Trevor Creel, Lisa Toke.



Brent Peterson (left), Michael Boyajian, James Duenow



Andrew Dibbern (left), Angela Manuele, Jan Howell Marx



Alan Hutkin (center) talks with other attendees



Continued on page 8



Honorable Hernaldo Baltodano (left), Erica Flores Baltodano, Honorable Erin Childs, John Pratt, Honorable Gayle Peron, Jeffrey R. Stein, Donna Jones, Annette Lares.

Congratulations to the Winners

The San Luis Obispo County Bar Association presented the John L. Seitz Award to Gregory Gillett and the Frank T. Pentangelo Award to Kathryn M. Eppright at its annual holiday party, December 5, 2019.

The Seitz Award recognizes those lawyers whose community contributions exemplify the best attributes of the legal profession. The award is generously funded by the Seitz family, and it is named for John L. Seitz, a long time San Luis Obispo County attorney.

Presented annually since 1989, the award went to Gregory Gillett, a partner at Gillett Green, LLP. His practice areas include family law, criminal law, probate, education law, and civil disputes. He was nominated for the Seitz because of his untiring and unwavering commitment to others.

Gillett serves the community and the country by being a Judge Advocate General (JAG) Officer. He serves soldiers, sailors, airmen and guardsmen with their legal issues related to their deployment. He then donates all of his earnings from this work to charities.

In addition, Gillett participates in many local community service organizations. He is a board member of California Rural Legal Assistance; the Rotary Club of San Luis Obispo; United Way of San Luis Obispo; Housing Authority, San Luis Obispo (HASLO); and the San Luis Obispo Symphony.



**GREGORY GILLET
PRESENTED WITH SEITZ
AWARD BY MICHAEL SEITZ**

His participation in these organizations impressed the Board. As the Youth Chair for the local Rotary Club, for example, Gillett started a reading program. Rotary members purchased books for the Hawthorne Elementary School library. Perhaps more importantly, at the time the books were donated, Gillett sat with the students and read to them.

Moreover, along with Stephen Hamilton and Commissioner Erin Childs, Gillett has donated untold hours organizing and teaching the annual Minor's Counsel training session held in Pismo Beach. This local training seminar, born of the necessity and logistics, has become *the* seminar to attend for all California lawyers who practice in the area of juvenile justice.

A \$1,000 donation will be given in the name of Gregory Gillett to a charity, community nonprofit organization or law school scholarship fund that he selects. His name will also be placed on a permanent plaque.

The Pentangelo Award is named in honor of Frank J. Pentangelo, who was a long time contributor to the *Bar Bulletin*. Pentangelo was a local lawyer and personality whose "Hot Franks" column often appeared. This award, established by the Board of Directors in 2007, recognizes the creative contributions of writers who have had their work published in the *Bar Bulletin*.

Kathryn Eppright is a partner at Andre, Morris and Buttery, whose practice includes employment law, civil litigation, business and real estate transactions, hospitality law, and wine and agribusiness. In addition to her incredible legal work, community service and family commitments, she generously gave her time to the *Bar Bulletin*.

Among her articles of note was "*Epic System Corporation v. Lewis*," co-written with Dennis Law. That article explored the impact of a United States Supreme Court decision on arbitration clauses that preclude class action suits by employees. The case resolved the competing interests of the Federal Arbitration Act and the National Labor Relations Act.

She also contributed source information for the article "The Present and the Future of Sexual Harassment Claims in the Era of #MeToo and #TimesUp." Eppright provided necessary context pertaining to the impact of SB1300 on the settlement of workplace harassment claims.

of Seitz & Pentangelo Awards!



Editor's Message

The 19th Amendment, which gave women the right to vote, was ratified in August 1920, bringing us to its 100th anniversary. So many strong and courageous people made women's suffrage possible. This year the *Bar Bulletin* celebrates this historically significant political and social event by focusing on women and the role they play in law, the body politic, business and society in general.

For instance, Dean Jan Marx has agreed to write a series of articles that focus on important women in history, including Clara Foltz and Judge Teresa Estrada-Mullaney. Her series also looks at the suffrage movement and takes a fresh look at the long-proposed Equal Rights Amendment.

In addition, Kara Stein-Conaway has agreed to write a column regarding the crosscurrents women navigate as they pursue their legal careers, businesses and motherhood. This exploration is personal to Stein-Conaway, but will resonate with us all.

In San Luis Obispo we are fortunate to have so many women in prominent positions in our legal, business and political community. Our mayor and chief of police are women. Our civic and business leaders are often women. Our bench is proportionally represented with women. Our Bar President is once again a dynamic woman.

I encourage all lawyers, paralegals and other members of the legal community to consider the contributions women have made in our justice system and consider writing an article on a person or topic that holds interest for you.

Please send all entries to raymondinsf@yahoo.com. Thank you in advance. ■

For a list of previous Seitz Award Winners, see page 33.



**KATHRYN M. EPPRIGHT
PRESENTED WITH PENTANGELO AWARD
BY RAYMOND ALLEN**

Finally, her impressive two-part article "The Uber Effect: How Tech Companies Jumped on the Independent Contractor Track But Now Find it Going in Another Direction," co-written with Lisa Sperow, was a *tour de force* regarding the changing landscape of the independent contractor-employee dichotomy. The article likely sent cold shivers through employers who had been mistakenly categorizing their employees as "independent contractors."

As the 15th Pentangelo Award recipient, Eppright was selected from a number of outstanding writers who also contributed to the *Bar Bulletin* last year. In addition to having her name appear on the Pentangelo Award's legacy plaque, Eppright received a gift certificate to Buona Tavola.



LRIS Director Kerrin Hovarter (left) and SLO Bar Executive Director Nicole Johnson provide the SLO Bar with professional expertise.

Mastermind Magic— *Finding the Tribe I Needed in My Life*

by Kara Stein-Conaway

In July 2018, I was one-and-a-half years into owning and managing the Stein-Conaway Law Firm. I was proud that I had created a heart-centered business, focused on helping adults accused of crimes in San Luis Obispo County protect themselves and their futures. Being with people in the hardest times of their lives, seeing them fully, and providing them with strong, committed and compassionate legal representation felt deeply satisfying and meaningful.

During this time, I read Lori Harder's *A Tribe Called Bliss: Break Through Superficial Friendships, Create Real Connections, Reach Your Highest Potential*. I realized that despite having a deeply satisfying career and a wonderful family, there was something missing in my life of which I had not previously been aware.

I longed for a safe place where I could be seen, where I could be heard, where I could be completely myself, where I could open up freely and where I could connect deeply. I spent a great deal of time in my professional life supporting my clients, being there for them, advocating for them and problem-solving with them. I realized that satisfying connections with clients were not an adequate substitute for being in deep and meaningful relationships with my peers.

I found that over the course of the past seven years, since I became a mother, I had deep and meaningful relationships

with friends, but most of my friends were in the same stage of life as me, with demanding careers and small children. On the occasions that we spent time with each other—and that there was miraculously enough quiet to get to talk with one another—it was wonderful. But, those occasions were few and far between, and they were certainly not something that I felt like I could count on.

Not knowing when I would have another opportunity to connect deeply with a friend left me feeling lonely. So, when I read *A Tribe Called Bliss*, I realized this loneliness was a longing for a group of like-minded women I could count on and who could count on me. I knew I wanted to be part of a group that was committed to supporting one another on a regular basis. That consistency was important so that each of us could count on that time together, so we could form strong bonds with one another in a mutually beneficial, giving relationship. I held this new knowing in my heart and started thinking about the ways I could create this in my life.

As a lawyer, as a business owner, as a mother, as a wife, as a daughter, and as a human who also needs my own downtime to recharge, where was I going to find the time to build a tribe? I realized I needed to do it for myself, because without creating this space where I could both give and receive support with other women who were my peers, I



wasn't going to be the best lawyer, the best business owner, the best mother, the best wife, the best daughter or the best version of myself. I decided that building a tribe was going to be a priority in my life.

One big step I took on my journey to create a tribe was to join a local chapter of the National Association of Women Business Owners (NAWBO). When the Central Coast NAWBO Chapter announced that it was offering an opportunity to join a mastermind group, I signed up right away. The mastermind coordinators asked us to fill out a questionnaire about our businesses, our interests, and in what areas we were looking to grow. I was matched with four other business owners whose interests and goals were similar to my own.

I facilitated our first meeting and asked everyone to share the reasons why they wanted to be in the group and what they hoped to gain from participating. At that meeting, I learned that other members' desires were much the same as mine.

Collectively, we expressed a desire to have connection with other women and to create a safe place where we can share our knowledge, insights, and resources with one another so that we

can create the businesses and lives that we really want. We all wanted to elevate our lives and our businesses, and we wanted to rise together. This sharing of our intentions set the tone for our group and the meetings that would follow.

Although our mastermind group is still newly formed, having started our meetings in March 2019, the reward of being in supportive relationships with these women is something truly amazing. Often, I leave our meetings feeling like I am floating on a magical energy, an energy generated by having a safe place and a sounding board and by connecting deeply with these women who are now my sisters.

I get to spend two hours, twice a month, with these amazing women because we have chosen to dedicate this time to supporting ourselves and supporting one another.

At our most recent meeting, I was inspired by the bravery I saw as my sister gave words to a vision for her life that fully aligned with her core values and with her soul's essence. I was in awe of the beauty of giving and receiving that unfolded as one sister shared an idea that she knew would deliver another sister into a new level of peace and abundance. I was invigorated by a sister who boldly declared her goals with such specificity that I could see what she had spoken coming to fruition even sooner than the dates she was setting for herself.

Her clarity and commitment inspired me to become clearer with my own goals. In voicing my goals for the end of 2019 and into 2020, I was reminded by my sisters just how far I have already

come. I was acknowledged, seen, love, and encouraged to keep trusting myself and my inner knowing. They saw my dreams and were dreaming right along with me.

I am so grateful that I said yes to this opportunity when it presented itself and that I went all in. I am living a more beautiful life today because I know I can count on these women and this dedicated time we spend in service to ourselves and in support of one another. With my whole heart, I want these women to experience success in business and in their lives beyond even what *they* have dreamed of. I am honored to share this precious life with them, and I am grateful to be a part of supporting them as they bring their gifts into the world.

I believe that we are here on this earth together because we are meant to be here for one another. If you do not already have this kind of support in your life and you want it, I encourage you to seek it out. Create it for yourself. My sisters were waiting for me. I know your sisters or brothers are waiting for you, too.

Are you ready to create your tribe?

If you feel like you could use some help with how to go about creating a tribe for yourself, or

if you are just curious to learn whether this is something you're interested in, Lori Harder's book is a great place to start. For me, reading *A Tribe Called Bliss* opened up my mind and my heart to the possibility that this was something I wanted. Once I recognized what I was looking for, it was easy to say yes to the opportunities that unfolded before me. I'm not paid to promote NAWBO, and I'm not paid to promote Lori Harder. When a person or an organization has created valuable resources, I want to share what has been meaningful for me, because perhaps it will be valuable for you, too.

I fully believe that as lawyers, when we are taking care of ourselves, our families, and those we love, it's from that space that we contribute most meaningfully to the world and to the lives of our clients. It's a win-win. ■

Editor's Note: Kara Stein-Conaway and Jeff Stein practice criminal defense together at the Stein-Conaway Law Firm, P.C. in San Luis Obispo. Stein-Conaway will be a featured columnist this year. Her columns will explore the interesting intersection of law, business, motherhood and current cultural dynamics.



Our New SLO Bar Website Launches at www.slobar.org

by Joe Benson

All good things must come to an end... and be replaced with something much better!

The San Luis Obispo County Bar Association (SLOCBA) is pleased to announce the launch of our new website, www.slobar.org. The new website features a new look, easier access to information, and a fully responsive layout for all platforms. We hope you'll find it easier to navigate and a better experience.

To say the prior website was just fine and no update was needed is analogous to saying the Ford Pinto was a great car and should still be in production today. The prior website was launched in 2012 and utilized a content management system known as Joomla, which is only utilized in 4.8 percent of websites. As the SLOCBA Executive Director, Nicole Johnson, will tell you, incredible amounts of time and energy have been expended keeping the old website marginally functional—duct tape and chicken wire don't begin to provide an accurate picture of her heroism.

The two main goals with SLOCBA's new website are to: (1) properly serve our membership with efficient access to the resources they need; and (2) provide the general public with a way to easily locate the legal resources (attorneys or otherwise) that they are in need of while also providing an appropriate image of the great legal community we have in San Luis Obispo County.

The new website is a technologically current platform that will allow the SLOCBA to better serve its membership and the general public by providing a better experience as well as some new offerings. Some of the updates include these items:

- seamless event registration and checkout;
- an easy-to-navigate event calendar;
- a membership directory with advanced search functionality;
- intuitive site navigation;
- streamlined vendor engagement;
- enablement of new product offerings; and
- increased ad space opportunities, and member only content.



A portion of the new SLO Bar website home page shows its modern, easy-to-use design.

The new website also provides advanced backend analytics and CRM functionality enabling SLOCBA to better serve our membership and continuously improve the website content and layout.

Special thanks to Ericka Swift who graciously provided her time and expertise in designing and launching the new website. When I first showed Swift the now replaced SLOCBA website, she looked at me with bemusement at the design and layout used. It was as if the Wright Flyer was being used for commercial flights out of the SLO County Airport—everyone would be amazed watching it happen but also terrified for those on board. The new website uses WordPress, which is aligned with current technology and easily supportable for the foreseeable future.

As with everything in life, the website will evolve continuously. We welcome any feedback you may have on how the website can be better.

Additionally, the new website will feature a rotating set of pictures of San Luis Obispo County submitted by our members. If you would like to have your photos considered for usage on the website, please contact Nicole Johnson at slobar@slobar.org or (805) 541-5930. ■

Have you met...?



Shaun P. McGrady

An associate with Hall, Hieatt & Connely, LLP, Shaun P. McGrady focuses his practice on medical malpractice and insurance defense. Before moving to the Central Coast, he worked at the nonprofit Elder Law & Advocacy in San

Diego, where he spearheaded a program to combat financial and physical elder abuse, in addition to operating his own offices in San Diego and Pasadena.

McGrady earned his bachelor's degree in history from University of California Santa Barbara and his Juris Doctor degree from Thomas Jefferson School of Law.

Whenever possible, McGrady, an avid golfer, spends his free time on the local golf courses—his current favorite being Cypress Ridge. When not working or golfing, he is a voracious reader and regularly stays up well past his bedtime engrossed in a novel.

Megan K. Crosbie

An attorney with McCormick Barstow LLP, Megan K. Crosbie focuses primarily in the areas of business, real estate, and trust and estate litigation. Prior to joining McCormick Barstow, she worked for a prominent civil litigation firm in Fresno.

Crosbie was admitted to the California State Bar in 2012. She received her bachelor's degree from Cal Poly San Luis Obispo in 2009, where she majored in journalism/public relations and minored in pre-law. She



received her Juris Doctor degree from Santa Clara University School of Law in 2012.

After 10 years away, Crosbie and her family returned to San Luis Obispo in September 2019 and hope to make it their "forever home." Her husband Paul, who is also a Cal Poly graduate, works for MindBody.

In her free time, Crosbie enjoys spending time with her two sons, Carson (2 years old) and Tyler (1 year old). She also enjoys the outdoor activities on the Central Coast and participates in all forms of fitness—hiking, cycling, running, pilates and more. She looks forward to becoming more involved in the Bar Association and the SLO Community. ■

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

SLOLAF
SLO LEGAL ASSISTANCE FOUNDATION
— Providing access to justice since 1992 —
To better meet the growing demand
for SLOLAF's services,
WE'VE MOVED!
COME VISIT US IN OUR NEW LOCATION!
3232 South Higuera Street, Suite 101D
in San Luis Obispo
Save the Date!
You won't want to miss our
2020 Fundraising Event!
October 3, 2020

CLARA FOLTZ, BARBARA BABCOCK & ME

A BOOK REVIEW

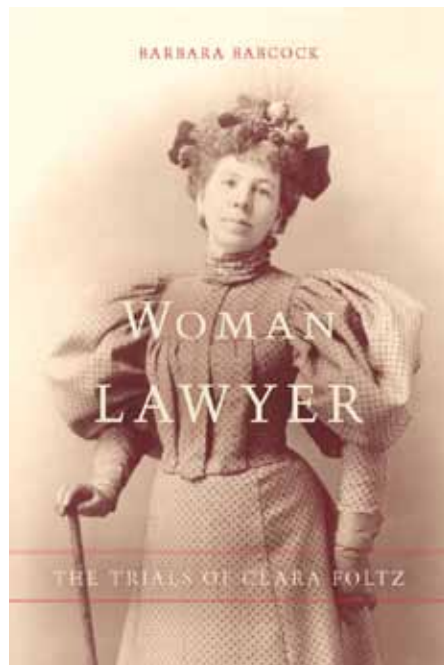
by Dean Jan Howell Marx

If you are looking for a brilliantly written and researched book about the evolution of our time-honored profession toward equal opportunities for men and women, I recommend Stanford Law Professor Emeritus Barbara Babcock's *Woman Lawyer: The Trials of Clara Foltz*,¹ published in 2011. It recounts the amazing saga of the first woman lawyer in California, women's rights advocate, visionary, legal reformer and single parent of five, Clara Shortridge Foltz.

Foltz (1849-1934) was a groundbreaking legal celebrity in her own time; however, as the decades passed, her achievements were forgotten. Rescuing her trailblazing career and contributions to the cause of gender equity became Professor Babcock's passion and ultimate success.

I met Professor Barbara Babcock in 1987 during my last year at Santa Clara University School of Law when, between classes, I chanced to hear her lecture about her research on this inspirational, but virtually unknown woman. I was amazed to learn about her incredible achievements.

She wrote the 1878 California legislation allowing women and people of color to practice law, wrote the legislation outlawing discrimination in employment on the basis of sex, became the first woman to be admitted to the California Bar, sued Hastings at the California Supreme Court



Courtesy of Barbara Babcock, Professor of Law, Emerita Stanford Law School

and won the right for women to attend law school,² invented the public defender's system and became the first woman lawyer to serve in that capacity, created the first parole system, served as the first female deputy district attorney in the nation, wrote the 1911 California Constitutional amendment giving women the right to vote—and also, at the age of 81, was the first woman to run for governor.

I was fascinated as Babcock told the story of how she first learned about Foltz's existence. In the early 1980s—before she was hired as the first woman law professor at Stanford and before she served as U.S. Assistant Attorney General—Babcock was the first Director of the newly

created Public Defender Service (PDS) for the District of Columbia. She got a call from the Santa Clara County Public Defender's office. The caller wanted to know if Babcock knew anyone who could write something about the woman who had founded the public defender's movement. She responded as saying, "What?? The woman?!...I'll find out."³ And that's how she got started tracking down Foltz's achievements and life story.

Babcock explained how she was devastated to discover that Foltz's pleadings, papers and memorabilia had been irretrievably lost. She explained how she had been trying everything to track her "faint but trailblazing footprints."⁴ At the end of her talk, she mentioned that Clara Shortridge Foltz had written about keeping a trunk to store all her documents, but it seemed to have completely disappeared. She made a plea for help and asked if anyone knew a Shortridge family in Indiana.

Electrified, I realized that I did! My best friend from college had married a man named Shortridge and was living in Indiana on the family farm he had inherited. So, after her talk, I approached her and told her I might be able to help. Her eyes lit up as she asked if I would contact the family and see if, in some dusty attic or basement, the missing trunk could be found. So, I contacted my friend's husband's Indiana relatives, and

worked through his family tree for months, but sadly nothing turned up. Nonetheless, I was honored to have played a minor role in helping Barbara Babcock research this great woman's life.

To learn the details of Foltz's incredible life and career, one must read Babcock's meticulously researched book. But, to give you an idea of what Foltz experienced and accomplished, despite the legalized sexism of her time and her troubled personal life, I offer a brief overview. Against the wishes of her lawyer father, she eloped at 15 with Jeremiah Foltz, a Union soldier who, as it turned out, could never hold a job. While she was pregnant with their fourth child, her husband travelled to Oregon chasing after an "Other Woman." Foltz followed him there and was described in a Portland newspaper as "a forlorn housewife with three small children tugging at her skirts and a babe in arms." Foltz placed an ad in the paper to locate her fickle husband, found him, and they reunited.

Foltz ran a boarding house and worked as a seamstress, but could never earn enough to keep up with her husband's debts. When the sheriff seized her sewing machine to pay her husband's creditors, she represented herself in court. She successfully argued that the machine was exempt from seizure, as a tool of her trade which she needed to support herself and children. Thus, at the age of 22, she had her first taste of victory in the courtroom.

When her father had an offer to form a law partnership in California, Foltz, her children, parents, brothers and husband moved to San Jose. Soon after she gave birth to their fifth child. Her mother looked after the children so Foltz could work as a seamstress and take in boarders, but these traditionally female jobs never brought in enough money. She was humiliated by being financially dependent on her father but, confined to low-paying work, with no financial support from her husband, she had no choice. She was so

determined to find a way to earn a decent income that, at the invitation of her father and his partner, she started reading the law with them, even though they all knew it was against the law for women to become attorneys.

Foltz concluded that the law was unfair to women and needed to be changed. So, during the California Constitutional Convention of 1878 she wrote and lobbied State Senate and Assembly members to pass the "Woman Lawyers Bill." [1878 Cal.Stat, ch 600 section 1-3 at 99]. She cleverly substituted only a few words in the existing statute to give women and people of any ethnicity or citizenship the right to practice law.

It read: "Any **white male citizen or person** of this state who has bona fide declared his **or her** intention to become a citizen in the manner required by law, of the age of twenty-one, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the Courts of this state."

While the bill was pending the Governor's signature, Foltz's husband returned to Oregon and that Other Woman. Despite her anxiety about her bill, Clara left Sacramento and followed him in a vain attempt to get him back. But, upon arriving in Oregon, she got word that the Governor might veto the Woman Lawyers' Bill, so she hitched a ride on a cattle train back to Sacramento. She successfully persuaded the Governor to sign the bill.⁵

Foltz, no longer prohibited from becoming an attorney, passed the bar examination. She was the first woman admitted to

Continued on page 16



Jan Marx (left), Barbara Babcock, Angie King.
Photo by Vivian Krug; used by permission of Jan Marx.

CLARA FOLTZ, BARBARA BABCOCK & ME continued

the California bar, and the first female lawyer on the entire west coast. She moved to San Francisco and established her solo law practice, doing mostly criminal defense work.

In 1878, the same year the U.S. Congress enacted a law allowing qualified female attorneys to practice in any Federal court in the country, Hastings Law School opened. A branch of the University of California that admitted both men and women, Hastings was the first and only law school in the state. Foltz and fellow feminist Laura Gordon registered, paid tuition and attended three days, then were informed that women were not allowed admission. In response, Foltz devised a brilliant two-prong strategy, submitting an amendment during the Constitutional Convention and bringing a lawsuit against Hastings.

First, she wrote and successfully lobbied for the Women's Employment Law that prohibited discrimination on the basis of sex in the workplace. [1878 Cal.Stat, ch 600 section 1-3 at 99]. Second, she sued Hastings for admission. Clara won at Superior Court, arguing: 1) she had passed the state bar; 2) the University of California of which Hastings was part admitted both men and women; and 3) women could practice in any court in the state and nation. Thus, it was not reasonable for them to be excluded from the state's only law school.

The Trustees of Hastings appealed the ruling, so Foltz studied for and passed the California State Supreme Court bar exam in order to argue her case. At the Supreme Court, she

prevailed, as the Judge concluded, "(T)he the same general policy which admitted females as students of the University, opened to them as well the doors of the College of the Law. Judgment affirmed." [(*Foltz v Hoge, et al.* No. 6,581 Supreme Court of California 54 Cal. 28;1879)]

Having accomplished all this by the age of 30, Foltz sued her husband for divorce on the basis of desertion and widely proclaimed herself a widow. Two weeks later, Jeremiah married the Other Woman.

For the next few years, Clara practiced criminal defense, which inspired her determination to make the system more just and humane. She had to walk a tight-rope between being an aggressive, successful lawyer and also a respectable lady. As she wrote in one of her columns, "They called me the lady lawyer, a dainty soubriquet that enabled me to maintain a dainty manner as I browbeat my way through the marshes of ignorance and prejudice."⁶

In 1893 she attended the Chicago World's Fair's World Congress of Jurisprudence and Law Reform, where she first espoused her then radical idea of the right to a free public defender. As was reported at the time,⁷ "She spoke of the right to counsel enacted in the Federal Constitution, re-enacted in almost every State, which guarantees to the accused certain rights. He may have a speedy trial; he may have a trial by jury; he may meet the witnesses; he may have witnesses in his behalf; and he may have counsel for his defense. It is a grave question whether Congress or the Legislature may add to any



Lawyer Clara Foltz circa 1878. Courtesy of Barbara Babcock, Professor of Law, Emerita Stanford Law School

of these rights a condition—if the accused can pay—a condition that renders the guaranty inoperative." Her argument, that financially burdening a constitutional right could virtually obliterate it, had at the time never before been heard. Foltz's vision of the Constitutional right to a public defender wherever there was a public prosecutor in every courthouse was upheld 29 years after her death by *Gideon v Wainwright* 372 US 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 1963.

A long time suffragist, Foltz wrote the text of the constitutional amendment legalizing women's right to vote in California. She used her previously successful technique of keeping the statutory wording essentially the same, simply removing the word "male" as a qualification and substituting "person." It passed in 1911 without the support of urban male voters,

who were outvoted by men in rural counties including San Luis Obispo. One hundred years later, it was my honor to invite Barbara Babcock here to give the keynote speech about Clara Foltz's pivotal role at our SLO County centennial celebration of California women earning the right to vote.

In 1912 the first public defender office was officially established in the City of Los Angeles by vote of the people, and Foltz was hired as the first woman public defender. In 1921, the "Foltz Defender Bill" establishing the public defender system was adopted by California, and by all the other states subsequently. In 2002 U.S. Supreme Court Justice Sandra Day O'Connor credited Professor Babcock's diligent research documenting Foltz as the inventor of the public defender system with being the reason the

central criminal court building in Los Angeles was renamed the Clara Shortridge Foltz Criminal Justice Center.⁸

I conclude with the words of Barbara Babcock from the preface of her book, "With confidence in her abilities and belief in her destiny, she was a true Western character: larger than life.... Unwilling to relinquish any possibility, she was determined to be an inspiring movement leader, a successful lawyer and legal reformer, a glamorous socialite, an influential public thinker and a good single mother to her five children... Foltz' determination to 'have it all' makes her biography particularly relevant for women in the 21st century."

And, I would add, relevant as well for today's men, as the genders continue to co-evolve toward equal rights under the law. ■

FOOTNOTES

¹ Barbara Babcock, *Woman Lawyer: the Trials of Clara Foltz* 2011 Stanford University Press. Unless otherwise stated, Babcock's book is the source of all the facts in this article.

² *Foltz v Hoge, et al.* No. 6,581 Supreme Court of California 54 Cal. 28;1879

³ Stanford Magazine *Winning Ways*, March/April 2003 issue

⁴ Ibid.

⁵ For details of the legislative process, see Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 28 Val. U. L. Rev. 1231 (1994). <https://scholar.valpo.edu/vultr/vol28/iss4/4>.

⁶ Clara Foltz, "The Struggles and Triumphs of a Woman Lawyer" *The New American Woman* October 1916

⁷ "Women at the Bar," *The Law Student's Helper* 1, no. 10 (October 1893): 263-64.

⁸ Stanford Magazine *Winning Ways*, supra.



WARREN

MEDIATION • ARBITRATION • INVESTIGATION

www.WarrenArb.com
Phone: (805) 773-0312 or (805) 709-2854
Email: DPWarren@WarrenArb.com

David P. Warren, Esq., brings thirty-nine years of experience and dedication as an experienced trial attorney, advocate and negotiator, to his full time Mediation, Arbitration and Investigation practice.

Mediation • Arbitration • Workplace Investigation

Matters Mediated and Arbitrated Include:

BUSINESS DISPUTES
COMMERCIAL LEASING AND AGREEMENT MATTERS
REAL ESTATE AND BROKERAGE DISPUTES
CONSUMER ACTIONS
PERSONAL INJURY/TORTS
EMPLOYMENT MATTERS OF ALL KINDS
INSURANCE
PROFESSIONAL LIABILITY

We look forward to working with you to professionally address and resolve disputes, conduct investigations, and provide periodic training.

No administrative fees. No travel time fees. Conference rooms provided at no cost.



Patsy Takemoto Mink Leaves an Enduring Legacy

by Nicole Mullikin

What you endure is who you are. And if you just accept it and do nothing, then life goes on. But if you see it as a way for change, life doesn't have to be this unfair. It can be better, maybe not for me because I can't change the past, but I can certainly help somebody else in the future, so that they don't have to go through what I did. [...] I've run many, many times, and I've lost many times. But I've never given up the feeling that I as an individual and you as an individual can make the difference.

—Patsy Takemoto Mink¹

Patsy Takemoto Mink was a trailblazer. Just a few of her accomplishments were summarized in Senate Resolution 219 in 2019: Mink was “the first Japanese-American woman to practice law in Hawaii... served in the Hawaii territorial House... Senate... [and] State Senate... first woman of color to be elected to Congress... twelve terms... first Democratic woman to deliver a State of the Union response.”²

Not least amongst her titles were mother and wife.³ As a feminist, she worked to promote many issues including women’s rights, educational rights and environmental rights. She was known in particular for her authorship of the *Women’s Education Equity Act* and Title IX, both of which advanced gender equity, addressing issues she herself faced. The adversity she endured led her to become a tireless champion for a more equal future.

Though she did not know it at the time, Mink was set on a path from a young age to fight against gender and racial discrimination. Born on December 6, 1927, Mink was third generation Japanese-American.⁴ Her grandparents worked in sugar plantation

fields in Hawaii, her father was an engineer and her mother was a homemaker (having only completed eighth grade).

When her parents made her transfer to a mostly all-white elementary school, she felt like an intruder. In high school, the intolerance only increased after Pearl Harbor. Even though her family was not sent to internment camps, they were looked down upon.⁵ It was a testament to Mink’s diligence and charisma that she ended up graduating at 16 and was both valedictorian and student body president.⁶ This was one of her first political experiences, setting the stage for those to come.

Mink had dreamed from a young age of becoming a doctor—a male dominated profession. She started her college career at the University of Hawaii and then transferred to the University of Nebraska where she was told that the dorms were for whites only and was placed in the international housing. Upon admittance, she successfully campaigned to end the housing segregation.

After earning degrees in zoology and chemistry from the University of Hawaii (she returned due to needing thyroid

surgery), Mink applied to 20 medical schools, only to be told that none were accepting women.⁷

As a woman of many talents, she then decided to instead apply to law school. She was accepted to the University of Chicago under the “foreign quota.”⁸ They had overlooked that Hawaii had been annexed in 1898, showing a taste of how Mink was treated as an outsider for being Hawai’ian in addition to being Japanese-American. Not being accepted to medical school was the end of a dream for Mink, and it was not the last time she would face gender and racial discrimination.

Even with all that she had experienced, Mink likely would not have entered politics had she been able to find work as a lawyer upon graduation. At first, she was not even allowed to take the bar in Hawaii because, due to a sexist statute, upon marriage her residency was changed to her husband’s state of Pennsylvania, instead of Hawaii. She fought this and was allowed to be considered a resident of Hawaii, where she had spent all but the college years of her life, since she had not actually lived in Pennsylvania.⁹

In a 1974 interview with U.S. Information Services on the status of women, Mink said “It was

very difficult getting into school and getting into the profession. I couldn't find a job...that drove me into politics. If you'd given me a job when I came home from law school, I would have been very happy."¹⁰

After failing to find work in two states as a result of being a woman, a mother, a wife and a Japanese-American, she opened her own law office. However, hardly any clients sought her out and she was stuck with cases that others would not take.¹¹ Finally, she had enough and decided that she needed to make a change, thus starting her long career in politics.

One of Mink's most notable accomplishments toward gender equity was her co-authoring of the Title IX legislation, recognized now as the *Patsy Takemoto Mink Equal Opportunity in Education Act*. It reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹²

This was included in the Education Amendments of 1972 and came about in part due to the rejection of the Equal Rights Amendment (ERA).¹³ The Equal Rights Amendment would have explicitly guaranteed equal civil rights for men and women, making piecemeal protections, such as Title IX, unnecessary. While Title IX is brief in length, it has had a wide impact in opening educational, and thus career, opportunities for women. Specifically related to law, Representative Schakowsky attributed Title IX as the reason why "in 1994,

women earned 43 percent of law degrees, compared with 7 percent in 1972."¹⁴ This went along with increases in other fields.

It is also well known for its impact on college sports. This legislation was almost curtailed in 1975 when, right before a vote to exempt sports from the act, Mink heard that her daughter had been in a car accident. By leaving to attend to her daughter, the amendment passed by one vote. Luckily, a revote was allowed, which reversed the original vote, thereby securing women's access to college sports.¹⁵

In reference to this, Mink humorously commented "Title IX lived on forever with no one ever being able to challenge it ever again."¹⁶ If anything, this close vote should inspire people to continue fighting for equal rights because once won, they can just as easily be lost—as almost happened here.

Another major success for gender equity was the *Women's Educational Equity Act (WEEA)* of 1974. This created funding for implementing Title IX, changing curriculum and supporting programs for women at all levels (from education to career programs).¹⁷ In an interview regarding this act, Mink expressed her belief that "so long as any part of our society adheres to a sexist notion that men should do certain things and women should do certain things, and then begin to inculcate our babies with these notions through curriculum development...then we'll never be rid of the basic cause of sex discrimination."¹⁸

She realized that even if opportunities for women were allowed through Title IX, that women would not often enter



Trailblazer Patsy Takemoto Mink used her education and personal experiences to counter gender and racial discrimination.

Photo courtesy Hawaii News Now.

traditionally male fields if their early education consistently showed women as homemakers and nurses, and men as lawyers and doctors. Not only does this act show her dedication, but also a keen perceptiveness of what would actually make a difference.

On the Congressional Record, Representative Mike Honda attributed WEEA and Title IX as having increased the number of female high school students who went on to college from 43 percent in 1973 to 63 percent in 2004.¹⁹ As of October 2018, it was 73 percent.²⁰ The combination of these acts changed the paths of women across the nation.

Mink's influence expanded beyond women's and educational rights. For example, her scientific background gave her a strong basis for promoting environmental policies, leading to her becoming the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs under President Jimmy

Continued on page 20

Patsy Takemoto Mink's Legacy *continued*

Carter.²¹ Two of her notable environmental successes were winning a pro bono case to prevent the construction of a power plant in her community in Honolulu and winning an FCC fairness doctrine case regarding representation of anti-strip mining.²²

One Supreme Court case in particular, *Environmental Protection Agency v. Mink*, was brought by Mink and more than 30 additional members of Congress. This was done in response to nuclear testing that was planned for an earthquake-prone area of Alaska, potentially leading to a tsunami hitting Hawaii. They requested full release, or an *in camera* review to determine the non-classified portions, of the

governmental recommendations related to this project under the *Freedom of Information Act of 1966* (FOIA). As implied by the name, this act allows information from government agencies to be available to the public upon request, with exceptions for matters related to national defense or foreign policy.

The case did not conclude until after the test in Alaska. The court found that while not appropriate here, "in some situations, *in camera* inspection will be necessary... the District Court may order such inspection."²³ Even though this case did not turn out how Mink had hoped, it created a clear precedent that was relied upon the next year in *Nixon v. Sirica*, better known as the case

which allowed review of the Watergate tapes.²⁴ The district judge, based on *Mink*, undertook an *in camera* review, releasing the Watergate tapes, leading to President Nixon's resignation.²⁵ By questioning the unregulated power to classify and conceal documents, Mink changed the history of our nation.

Mink's entire career was inspirational, from sweeping legislation to smaller corrections of injustices, from her myriad of firsts, to even her defeats. A common theme throughout it all was that she always followed her moral compass even when she knew she'd face criticism. It takes true strength to do this.

One example of this was her strong anti-Vietnam War stance.

TARDIFF LAW OFFICES

APPELLATE ADVOCACY GROUP



NEIL S. TARDIFF
ATTORNEY

Certified Specialist in Appellate Law,
State Bar of California

- Specializing in Civil, Criminal and Administrative Appeals and Writs - State and Federal
- Offering Trial Consultations, Settlement Evaluations and Drafting of Pre-trial and Post-trial Motions
- Providing Attorneys, Corporate, Government and Individual Clients with Excellent Litigation and Appellate Advice
- Over 25 Years of Extensive Trial and Appellate Experience in State and Federal Courts



P.O. BOX 1446 • SAN LUIS OBISPO, CA 93406
PHONE: 805-544-8100 • FAX: 805-544-4381 • E-MAIL: Neil@TardiffLaw.com

She knew when she ran for president in 1972 that she was not going to win. Her goal was to use that platform to promote ending the Vietnam War and to prop the door open just a bit wider for future female presidential candidates.²⁶ To Mink, winning mattered less than advancing peace and opportunities for women in politics. Later that year, when Vietnam peace treaty discussions were at a standstill, she took action and went to France to try to persuade them to continue. This earned her the unflattering nickname “Patsy Pink,” but she knew that what was right needed to take precedence over appearances.²⁷

I take inspiration from not only what she did during her career, but how and why she did it. The modern fight for peace and women’s equality should follow her examples of continuing to march forward even amongst adversity.

Overall, what I found most inspiring about Patsy Takemoto Mink was her insistence that any one person, no matter their situation in life, can change the world. In considering my own legal career, this quote of hers struck me, “to whatever degree each of you here today acknowledge a sense of individual responsibility for the common good and for the welfare of others less fortunate than you, I urge you not to lose it, to cherish it and to make that sense of purpose your higher goal for life.”²⁸

She overcame racial discrimination, gender discrimination, and personal hardships. She believed that candidates who supported

what was right would win out, no matter their station in life. She never stopped when doors slammed in her face, never allowed injustice to stand—she never gave up. Her perseverance to uplifting the lives of women and minorities, protecting the environment, ensuring government transparency, and more, led to many honors after her death in 2002, including being awarded the Presidential Medal of Freedom by President Obama.

However, I believe the truest monument to her legacy would be for each one of us to walk with courage through the doors she opened and to be inspired to take action upon our individual responsibility to make a more equitable future for all. ■

FOOTNOTES

¹ Kimberlee Bassford, Patsy Mink: Ahead of the Majority, 2008 <https://www.wmm.com/catalog/film/patsy-mink-ahead-of-the-majority/>

² Sen.Res. No. 219, 116th Cong. 1st Sess. (2019)

³ Janice E. Ruth, Patsy T. Mink Papers at the Library of Congress (2007) <https://www.loc.gov/rr/mss/mink/mink-about.html>

⁴ Esther K. Arinaga, et al., Patsy Takemoto Mink, 4 Asian-Pacific L. & Pol’y J. 495 (2003)

⁵ Patsy Mink, “A Mother’s Story.” The Conversation Begins: Mothers and Daughters Talk About Living Feminism, edited by Christina Looper Baker and Christina Baker Kline. Bantam Books, 1996, pp. 49-55

⁶ Arinaga

⁷ Mink; Arinaga

⁸ C-SPAN, “Interview with Congresswomen Martha Griffiths and Patsy Mink” 26 Nov. 1974, <https://www.c-span.org/video/?455213-1/conversation-womens-rights>

⁹ Arinaga

¹⁰ C-SPAN

¹¹ Mink

¹² 20 U.S.C. § 1681

¹³ 145 Cong. Rec. H6399-6401 (1999)

¹⁴ Ibid.

¹⁵ Bassford

¹⁶ 145 Cong. Rec.

¹⁷ H.R. No. 12344, 93rd Cong. (1974)

¹⁸ C-SPAN

¹⁹ 150 Cong. Rec. E1609

²⁰ Bureau of Labor Statistics, “College Enrollment and Work Activity of Recent High School and College Graduates Summary” 25 Apr. 2019. <https://www.bls.gov/news.release/hsgsec.nr0.htm> Accessed 8 June 2019.

²¹ Sen.Res. No. 219

²² Arinaga; In re Patsy Mink, 59 F.C.C.2d 987 (1976)

²³ Environmental Protection Agency v. Mink, 410 U.S. 73 (1973)

²⁴ Nixon v. Sirica, 159 U.S. App. D.C. 58 (1973)

²⁵ Patsy T. Mink, The Mink Case: Restoring the Freedom Of Information Act, 2 Pepp. L. Rev. 1 (1975) <http://digitalcommons.pepperdine.edu/plr/vol2/iss1/2>

²⁶ Ruth

²⁷ Ibid

²⁸ ‘Patsy Mink’ (2018) Monument inscriptions of her quotes, Hawaii State Public Library, Honolulu, HI.

Editor’s Note: Nicole Mullikin is a second-year student at San Luis Obispo College of Law. She graduated from Cal Poly magna cum laude with a degree in Modern Languages and Literatures (Spanish and Mandarin Chinese) and was the recipient of the College of Liberal Arts Outstanding Senior Award for Modern Languages and Literatures. Growing up on the Central Coast, she is the niece of local attorneys Daniel and George O’Neill and hopes to practice locally. This article was originally written for Dean Jan Marx’s Women and the Law class.



Sunny Hawks Is Not the Retiring Kind

by Raymond Allen

Photos courtesy of Sunny Hawks

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

The Snowboarding Career

When Sunny Hawks was 16, she drove to Mount Hood with a friend and tried to snowboard. She spent the entire day on her butt. Although cold and wet, she was in love with the sport. Growing up in Agoura Hills, Hawks was surrounded by skaters and surfers. She had been skiing since she was four. Snowboarding was a natural progression.

At 18, she dropped out of college and moved to Big Bear to pursue the relatively new sport of snowboarding. During her time in the sport, she competed in Snowboard Racing, Boardercross, Big Air and Half Pipe. Big Air was her specialty.

Big Air consists of riders launching themselves off a man-made jump built specifically for the event. While in the air, the snowboarder rotates and spins. At the end of the jump, the snowboarder is supposed to stick the landing like a gymnast. Although it would not be deemed a significant trick now, says Hawks, "In the day, my 540-degree back side rotation was an elite level move."

She was sponsored by Lamar, Bamboo Curtain and Fiend. They provided her with all the snowboards, snowboard clothes and street clothes she needed. As a professional snowboarder, Hawks

traveled and competed around the world.

Injuries, however, began to take a toll. "I seriously sprained my ankle and foot doing a rail slide with a 360-degree rotation."

As she was healing from that injury, she traveled to Whangamata, New Zealand for another competition. Hawks did well in early events, but her Half Pipe ride was the beginning of the end of her snowboarding career. "I was doing a backside air," Hawks said, "when I fell backward. My arm got caught in the Half Pipe ramp and I dislocated my left elbow.

"I tried to continue [in the sport], but I had become timid." Thinking led to hesitation. Hesitation led to retirement.

"As a side note, let me make a plug for socialized medicine," said Hawks. "When I dislocated my elbow, I was a 20-year-old foreigner in New Zealand. I needed medications and I needed surgery to reconnect the dislocated parts of my arm. They also requested that I stay three nights in a hospital to avoid post-op problems. When I was done, the hospital gave me a bill for \$7USD."

Despite the injuries, she had fun snowboarding. "Then, there were so few people that you knew



Hawks demonstrates "Big Air."

everyone. If a pro came to town, you would get together with the local snowboarders and there would be like 25 people, and maybe 5 would be women.

"I still have contact with many of them, like Dave England. He was a crazy professional snowboarder before his *Jackass* movies. He was snowboarding and tumbled over a ravine. He lost his spleen and a testicle. Crazy."

The Acting Career

"In high school I wanted to be either an actress or a lawyer."

In 1994, Hawks began the actress part. Her first film was *Exit to Eden*. The movie starred Dana Delaney, Dan Ackroyd and Rosie O'Donnell. It was bad. The late Roger Ebert wrote, "There is a scene in *Exit to Eden* in which the hero butters Dana Delaney's breast, sprinkles it with cinnamon and licks it before taking bites from a croissant. I'm thinking: The breast or the croissant, make up your mind." Luckily for Hawks, her part was cut by director Garry Marshall.

"Garry liked me though, so he would call me back to play parts in all his movies. I was usually in the first 20 minutes of a movie. That was the section of the movie that Garry would call 'laying the pipe.'"

In 1996, Hawks was in *Dear God*, starring Greg Kinnear. She played the Greek Daughter. "Greg Kinnear scammed me and my father and takes our money."

In 1999 she played a mean student that yells at the mentally challenged Giovanni Ribisi in *Other Sister*. "It was actually a great movie about two mentally challenged adults falling in love. And Juliet Lewis was wonderful. Giovanni was a method actor so he would stay in character all day. He wouldn't even drive to the set. He would have someone drive him so he could stay in character. Juliet would go in and out of character all day. Somehow though, when the camera was on her she would just shine."

In 2001, Hawks was Ann Hathaway's friend in *The Princess Diaries*. "I was a rock climbing instructor. My scene is right before Ann finds out she is a princess."



Likewise, in 2004, she is Kate Hudson's friend in *Raising Helen* right before Kate becomes the guardian of her dead sister's three children. Laying the pipe again. "I actually had a major scene in that movie that you can see on the DVD extras. It was cut from the theater version."

In between movies, Hawks did commercials. Once her agent called and said Miller Lite is looking for actresses to be runway models for a commercial. "They want to see your legs," she says. So I get all made up and put on shorts and a tank top and I go down to the set. I do the audition. I answer their questions. Then the director says, 'Ok, put on the bottle.' I'm like, what? Then I realize he wants me to walk on the catwalk with a Miller Lite bottle costume on. They weren't looking for runway models; they were looking for runway bottles.

"When I had my daughter, my focus changed." In Hollywood, Hawks said, she needed to stay out late and network. With the birth of her daughter, she could no longer do so. Getting to auditions with a baby also became difficult. She had to retire from acting.

The Lawyering Career

"Having retired from snowboarding and acting, I joke that I retired first."

In 2010, Hawks started commuting from San Luis Obispo to Santa Barbara College of Law with fellow students Jonas Bailey and David Bodney. "If not for my mother, I could not have finished law school."

She concedes that she had a difficult time getting traction in San Luis Obispo. No one wanted to hire her because she did not attend a prestigious law school. Eventually, however, she began to work with Stephanie Barclay at the Senior Legal Services Project through a grant in which San Luis Obispo Legal Assistance Foundation (SLOLAF) provides legal services to senior citizens.

She then worked briefly with Roger Fredrickson and Michael Pick. When that firm dissolved, she shadowed then-attorney Matthew Guerrero. Guerrero helped her meet other attorneys. "He is a very generous man," she says of Judge Guerrero.

Eventually, Hawks began working for Jacquelyn Frederick. She started as an independent contractor, but Frederick's case-load, charities and boards led her to hire Hawks full-time.

"Jackie is all about learning by doing. She gives me free reign to figure things out." Hawks recently had a six week-long trial that ended in a successful verdict. "Jackie is good at guiding and pushing, but she is also good at fostering balance. I am fortunate to have a boss who understands that I am not only a lawyer, but a wife, a mother and my own person."

Not to mention an actress and a professional snowboarder. "I am certain I could still beat anyone in SLO down a slope," she quips with a smile. ■



The Juror Who Knew Too Much

by Herb Fox

Jury deliberations are sacrosanct—until they are not. While jurors are free to bring common sense and common life experience into the deliberations, they cannot interject specialized knowledge or other evidence that was not presented to them at trial.

Such is the lesson provided in a recent published opinion authored by Justice Kenneth Yegan reversing a defense verdict after a five-week personal injury trial held in San Luis Obispo. The Court found that the misconduct by a “rogue juror” who wandered “apart from fellow jurors, [did] not follow the court’s instructions, and violate[d] the juror’s oath,” was a prejudicial miscarriage of justice.

In that case, Plaintiff claimed that a steel nipple was improperly screwed into a plastic bushing on a vineyard irrigation system. The bushing failed, causing a 20-pound valve assembly to blow off a pump station pipe and strike Plaintiff in the head. Plaintiff sued on a theory of negligent design and construction. The jury returned a 9-3 special verdict that the Defendant that designed and installed the irrigation system was not negligent.

After the jury returned a 9-3 special verdict for the defense, Plaintiff moved for a new trial on the grounds of juror misconduct. The trial court (Judge Donald G. Umhofer) found that juror misconduct occurred but was not prejudicial.

As the Court of Appeal summarized, the motion for a new trial focused on a juror who had been a pipefitter for 35 years who farmed in the Central Valley. He had designed and built an irrigation system for his almond ranch.

Plaintiff submitted four juror declarations stating that, on the first day of deliberations, the jury vote “was split between yes, no and undecided.” During deliberations, the juror said he had “‘been doing this for years,’” that “‘[a]nybody would have put [the system] together the exact same way,’” and that “‘[the Defendant] installed the system like everybody in the industry does.’” “[T]hey installed the system the way the AG industry does it, that’s just how it’s done.” “‘Everybody does it this way and this is industry standard.’” “[O]nce the system was put together, and [Defendant] had done their testing, the ownership of the system transferred to the owner of the vineyard, and then anything that happened was the vineyard’s responsibility.”

In opposition to the Motion for New Trial, the Defendant submitted two juror declarations stating that the juror offered opinions, just as the other jurors did. In a separate declaration, the subject juror denied that he was biased or told the other jurors how he was going to vote before the jury commenced deliberations. He did not, however, refute the precise allegations of the other jurors’ declarations, two of whom voted for a defense verdict.

Citing law previously set down by our Supreme Court, Justice Yegan wrote that there is a “fine line...between using one’s background in analyzing the evidence, which is appropriate, even inevitable, and injecting ‘an opinion explicitly based on specialized information obtained from outside sources,’ which we have described as [juror] misconduct.”

Here, the trial court found

that the juror crossed that line because his remarks “introduced a fact, not in evidence, that is, how others design and use materials. No witness...gave evidence that he/she/it actually designed and used materials the way that [Defendant]...did in this case. This adds the fact that others routinely construct [irrigation] systems [the way] that [Defendant]...did here.”

The trial court found this was juror misconduct, but that Plaintiff was not prejudiced because the jurors were free to draw different inferences from Reed’s remarks. The Court of Appeal disagreed, concluding that the juror misconduct raised a presumption of prejudice, which was not rebutted.

Jurors are not permitted to inject extraneous evidence, standards of care, or defense theories into the deliberations. Here the juror said the Defendant’s design and construction met the “industry standard” and that “[a]nybody would have put [the system] together the exact same way...”

But there was no evidence of that. The juror vouched for the design and construction based on his expertise as a pipefitter and farmer and said that anything that happened after the system was put together and tested was not the Defendant’s responsibility. That was contrary to the evidence and instructions. The case was tried on a negligent design and construction theory. It mattered not whether ownership of the irrigation system transferred to the vineyard owner after Cal-West built the system.

A juror may not “discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of

external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct. [Citations.]”

The Court of Appeal concluded that the rogue juror here “told the jury about the industry standard, causation, and how the vineyard owner was responsible for anything that happened. It can be fairly assumed that the opinions held by this juror certainly influenced his vote on the crucial question of whether the Defendant was negligent. The juror affidavits further reflect that his statements potentially influenced the votes of as many as four other jurors. This raised a presumption of prejudice that was not rebutted.”

The case is *Nodal v. Cal-West Rain Inc.*, 37 Cal.App.5th 607, published on July 17, 2019. The successful Plaintiff/Appellant was represented by Jacqueline Frederick and Sunny Hawks in Nipomo, and appellate specialist

Neil Tardiff in San Luis Obispo. The Defendant was represented by Lora Hemphill and Thomas Dowling of Hager and Dowling. ■



Herb Fox is a certified appellate law specialist with offices in Santa Barbara and Los Angeles. He can be reached at hfox@foxappeals.com and at 805-899-4777.

Editor's Note: This article was reprinted with permission from the Santa Barbara County Bar Association (SBCBA). It was originally published in the October 2019 issue of the Santa Barbara Lawyer magazine, a publication of the SBCBA.

As an aside, Jacqueline Frederick was always concerned about the juror in question. “For the first time in my career, I elected to retain the services of a professional jury consultant who was paid a significant amount of money. We had a strong dispute with regard to the rogue juror. I wanted to exclude him and she insisted he remain on the jury. I ultimately deferred to her given her expertise.

“The lesson learned is to have confidence in your own gut feelings when picking a juror.”

HARRIS PERSONAL INJURY LAWYERS, INC.

INJURED IN AN ACCIDENT?
FREE CASE CONSULTATIONS
NO FEES UNLESS WE WIN
RISK-FREE

1025 Farmhouse Lane#2F
San Luis Obispo, CA 93401
harrispersonalinjury.com


HARRIS
PERSONAL INJURY LAWYERS, INC.

(805) 544-0100

Uncharted Territory— When an Expired Product Is a Ripe Case

by Nicholas Barthel

Images courtesy Creative Commons

It is estimated that 40 percent of food in the United States goes uneaten, and according to even the most conservative estimates, Americans waste 160 billion pounds of food each year.¹ A large part of this waste is contributed to the fact that 91 percent of the general public believes that food is no longer consumable after the product's expiration date.²

Similarly, approximately \$765 billion worth of medicine a year is thrown away due solely to the medicine being past the date of expiration that is listed on the label.³ That is as much as a quarter of all the country's health care spending.

Over several decades Congress has enacted several legislative measures to expand the power of the Food and Drug Administration (FDA) to regulate emerging products as well as different aspects of current markets. Through legislation like the Food, Drug and Cosmetic Act (FDCA) and the Dietary Supplement Health and Education Act (DSHEA), Congress has allowed the FDA to provide guidelines for manufacturers to follow in implementing expiration dates. Unfortunately, the FDA has placed too much discretion in the manufacturers' hands, which has created a labeling system based on profit instead of accurate conveyance of information to the consumer. Often this leads to expiration dates that are confusing and misleading, resulting in great waste.

FDA's Regulatory Scheme

The laws governing consumable products varies depending on what the product is. For example, unlike food and dietary supplements, drugs have detailed regulations pertaining to the inclusion and calculation of an expiration date. Understanding each of these regulations helps immensely

in understanding when a cause of action may be destroyed on the basis of preemption.

Drugs

Before any drug can be introduced to the general public for consumption, the drug must first be approved by the FDA's Center for Drug Evaluation and Research (CDER). During this process, the company seeking approval sends CDER the evidence from the tests the company has performed to prove the drug is safe and effective for its intended use. Surprisingly, the FDA doesn't actually test drugs itself; instead, a team of physicians, statisticians, chemists, pharmacologists and other scientists review the data that the company seeking approval sends to the FDA.

One of the data points required before approval can be granted is stability testing data and a proposed expiration date and storage conditions.⁴ Under these regulations, a manufacturer is allowed to pick any arbitrary date (typically two or three years after manufacturing), and then test whether the drug's standards of strength, quality and purity remain stable up to this arbitrarily chosen date. Therefore, companies are testing whether the drug can last until a certain date, not testing when a drug loses its potency.

This method of testing leads to expiration dates that are often much sooner than the drug's actual stability point. Some drugs have even been found to remain stable and 100 percent potent 30 years after the labeled expiration date.⁵ It may be surprising to note that the FDA and the Department of Defense (DoD) are not only aware of this fact, but have actually scientifically demonstrated it.

In the early 1980s the DoD stockpiled a variety of drugs to be used in



case of catastrophic emergencies. Fortunately, by 1985 no such catastrophic event had occurred, but unfortunately, the stockpiled drugs were now either expired or rapidly approaching their expiration date. Instead of spending billions of dollars replacing the expired drugs that would be destroyed, the DoD decided to have the FDA begin the laborious task of testing a sample from each lot to establish the lots' potency.

During this process, the DoD discovered that approximately 80 percent of these drugs were still stable despite surpassing the expiration date that was provided.⁶ Titled the Shelf-Life Extension Program (SLEP), the DoD continues to do this testing, and it has been projected that this program has saved the Federal Government \$2.1 billion that would have been spent on replacing expired drugs.⁷

Despite SLEP's proof that certain drugs' expiration dates could be extended by as much as 15 years, drug manufacturers still provided expiration dates ranging from two to three years. Manufacturers explain that they are hesitant to extend expiration dates because the conditions in which a consumer stores a product could vary dramatically; and therefore, a manufacturer would rather err on the side of caution than to represent a potentially toxic or ineffective drug as being appropriate to consume.

Although drug manufacturers deny being motivated by profits, it cannot be ignored that an early expiration date creates a guaranteed turnover of products. Consequently, that allows the manufacturer to ensure a steady stream of revenue.

This suspicious motivation is further supported by the fact that hospitals and pharmacies are required by law to throw away any drugs that are expired. In fact, the American Medical Association in 2000 urged for the extension of expiration dates of many products to prevent the “unnecessary waste, higher pharmaceutical costs, and possibly reduced access to necessary drugs for some patients,” stemming from the current expiration date system.⁸ Despite this, drug manufacturers continue to set expiration dates much sooner than the product expires.

Food

Unlike drugs, which have explicit requirements for determining expiration dates, the FDA has provided close to no laws requiring any expiration dates on food. Until the 1940s, a great majority of consumers in the United States either grew their own food or purchased their food from local distributors. With the urbanization of America also came the disassociation of Americans from the food they ate. As cities grew, more consumers were dependent on supermarkets that shipped in from distant farms.

As a consequence of this disassociation with food’s manufacturing, Americans began relying on a date of freshness to decide which food at the market to purchase. Accordingly, retailers and manufacturers began using open dating showing a legible month, day, year, as opposed to the old system, which was closed dating consisting of just symbols and codes that were for the manufacturers and distributors to understand.

By 1975, a nationwide survey of shoppers showed 95 percent of respondents considered date labels to be the most useful consumer service for addressing freshness.⁹ This widespread concern prompted over 10 congressional bills to be introduced

between 1973-1975 alone, to establish requirements for food dating. However, none of these bills passed.

Since the mid-70s and early 80s there have been periodic pushes to enact national standards for labeling. But, as of today, there is no federal law controlling the method or placement of an expiration date on a food product. Therefore, all the expiration dates that appear on food are either self-imposed from the manufacturers or are imposed by state legislatures.

There are two exceptions to this general rule. First, the FDA mandates that manufacturers of baby formula put on an expiration date. This expiration date demonstrates a month and year that, up to that point, the formula is guaranteed to “contain not less than the quantity of each nutrient” listed on the Nutrition Facts panel.¹⁰

Second, the U.S. Department of Agriculture (USDA) co-regulates the labeling of meats, dairy and eggs with the FDA. Through its power to co-regulate, the USDA has created an optional guidance for labeling of meat or meat byproducts, or poultry products with an expiration date.¹¹ These regulations simply state that if an expiration date is included on these products, the manufacturer must include the month and year of expiration, as well as the phrase “packing,” “sell by” or “use before.”¹² Manufacturers and retailers also have the option to include a further qualifying phrase such as “For Maximum Freshness” or “For Best Quality.”

By and large, the placement of expiration dates on foods is completely in the manufacturer’s discretion. Currently, and often unknown, the expiration date on food is solely a reference point for consumers to identify the date which the quality of the product begins to deteriorate. The expiration date does not signify the microbial safety of the product.



Although expiration dates are not directly regulated, Congress provided the FDA with a catch-all. Specifically, 21 U.S.C. § 343(a) provides that a food’s label is misbranded if the label is false or misleading in any particular. The introduction of any misbranded food into interstate commerce is forbidden under federal regulations.¹³ Consequently, if an expiration date on a product is misleading or false, the FDA has the authority to take action against the manufacturer. Often food’s expiration dates meet this misleading and false standard.

Several groups of food can be eaten after the date of expiration. For example, although the texture and color of canned foods may change after the date of expiration, canned foods remain nutritional and safe to eat almost indefinitely. Therefore, a manufacturers’ placement of “expired” or “use by” before the date of expiration misleads the consumer into believing that the food is no longer safe to eat on a microbial level. The misleading quality is not the date listed, but how it is listed.

Recently, the California legislature took initiative based on this exact principle. In June 2017, the California legislature passed a bill encouraging, but not requiring, manufacturers to use specific language so that these expiration dates were more apparent to consumers.¹⁴ It encourages the use of “BEST if Used by” or “BEST if Used or Frozen by” to indicate the quality date of a product, and “USE by” or “USE by or Freeze by” to indicate the safety date of a product.¹⁵ While this is a good step in the right direction, it is completely optional and has no teeth to force any change.

Dietary Supplements

A dietary supplement is defined as a product (other than tobacco) intended to supplement the diet that bears or contains one or more of a vitamin; a mineral; an herb or other botanical; an amino acid; or a dietary substance for use by man to supplement the diet by increasing the total dietary intake.¹⁶

Continued on page 28

Uncharted Territory *continued*

The FDA's development of regulations specific to dietary supplements is a relatively new concept. Until the mid-1990s, the FDA regulated dietary supplements under the category of food. The FDA decided that specific regulations were needed because of the ever-growing supplement market. In 1994 Congress enacted the Dietary Supplement Health and Education Act, which provided the FDA with power to regulate dietary supplements.

Similar to food, the FDA has decided that expiration dates are not mandatory for dietary supplements. The FDA reasoned that because methods for determining the stability and purity of these supplements may be undeterminable, it would be unfair to require manufacturers to provide a date which the dietary supplement loses its potency.¹⁷

Although expiration dates are not required, if an expiration date is included on a dietary supplement, the manufacturer should have data that supports that date.¹⁸ This data should be determined and supported by a written testing program designed to assess the stability characteristics of the dietary supplement.¹⁹ But, the FDA has decided that it will not advise on what kinds of testing are required to support the expiration that is ultimately included on the dietary supplement.²⁰ This *laissez-faire* approach to expiration dates has created a charlatan's paradise.

Dietary supplements first began to enter U.S. markets in the 1970s, but it was not until the 1990s that dietary supplement use gained national attention.²¹ This market has continued to grow in the time since. The impetus to join the "gold rush" of the supplement fad, has encouraged many manufacturers to rush products to market not knowing the stability and/or the potency of their dietary supplements. Despite this, some manufacturers place an expiration date on their supplements without any factual data to support it whatsoever.

It follows then that there are supplements on the market which bear an expiration date that is in fact much

later than the dietary supplement can actually last. For example, there are several vitamins on the market that, due to their chemistry, are unstable and easily erode if exposed to light, water and/or oxygen. These products begin eroding at inception, and continue to erode once in the consumer's possession. This makes the expiration date not only unsupported by data, but patently false and misleading.

Though drug, food and dietary supplement manufacturers have portrayed misleading expiration dates, this conduct may not always be actionable.

Viability of a Lawsuit

As detailed above, manufacturers' expiration dates often mislead consumers. The viability cause of action under the Consumer Legal Remedies Act (CLRA) or the California's Unfair Competition Law (UCL) within this subject matter will likely depend on whether the claim is preempted.

Drugs, food and dietary supplements are all governed by preemption clauses that allow a state to regulate these substances so long as the state's laws are identical to the federal regulations.²² In other words, preemption exists if the state's requirements are directly or indirectly imposing obligations that are more stringent than the federal regulations.²³ However, one exception to this is when the FDA has been silent on a topic.²⁴

As a practical matter this makes sense. It would be unfair to require a manufacturer to abide by federal regulations on the one hand, while simultaneously subjecting it to the potential checkerboard of regulations that could be quilted across America. Therefore, Congress wanted to ensure that a manufacturer had some kind of uniform standard it could adhere to when making its products.

A Cause of Action for Drug's Expiration Dating is Preempted

Although the FDA prohibits a drug's label from containing any information that is "misleading or false in any particular,"²⁵ the FDA's framework for determining expiration

dates of drugs is completely within the manufacturer's discretion. As mentioned above, this framework allows for the manufacturer to choose the date of reference to which a drug must stay potent as well as the language that precedes the expiration date. Anything beyond that is within the manufacturer's discretion.

A lawsuit under the CLRA or UCL creating liability for premature expiration dates would indirectly require a drug manufacturer to elongate its testing procedures. In essence, it would require manufacturers to test the drug for a longer duration, and, consequently, be subjecting the manufacturer to a standard of dating that is more demanding than the FDA requires.

Therefore, any cause of action for misleading expiration dates on drugs would likely be preempted.

A Cause of Action for Food's Expiration Dating is Not Preempted, But Still May Not Be Viable

Unlike drugs, the FDA has no requirements for creating expiration dates on food. This inattentiveness, paired with the fact that the FDA prohibits any misleading statements on food's label, can create a viable cause of action free from preemption.

Despite likely avoiding preemption, judicial bias may create a barrier here. Imagine a situation where a product, such as a canned food, has an expiration date listed as "Use Before 11/06/18." A reasonable consumer likely believes that the product is no longer safe to consume after November 6, 2018. Therefore, the consumer throws the product away and buys another, fresher replica. However, unbeknownst to the consumer, this canned food was still safe to eat.

There is a good argument that this is passing off goods as those of another in violation of Cal. Civ. Code § 1770(a)(1), and likely violates several other sections of the CLRA. It is not the existence of the expiration date itself that creates liability, but instead it is the method in which it is

conveyed. A manufacturer could clarify that the product was “Best Before 11/06/18” to allow the consumer to know the date is in reference to freshness, not safety.

However, all manufacturers can likely produce a laundry list of reasons for the dates that it provided, most relating to how the quality of the product diminishes after the date presented. Due to the importance of food safety and the deep-rooted belief that expiration dates represent the safety of food, most judges may be hesitant to penalize a manufacturer for setting this expiration date. A judge would likely find the manufacturers reasoning very persuasive.

Therefore, the facts and the law may fit, but a case under this theory may not be factually compelling enough to be a viable suit.

There is a Viable Suit for Dietary Supplements

As mentioned above, often dietary supplements are unstable and erode to the point of having negligible effect on its consumer before the declared expiration date. Although the FDA does not regulate expiration dates on dietary supplements, the FDA subjects dietary supplements to a rigorous testing procedure to determine the quantity of the contents declared within the supplement facts panel of dietary supplements’ label.²⁶ Before a manufacturer can place a quantified amount of a nutrient (such as Vitamin C) within the supplement facts panel, the manufacturer must test 12 subsamples of the product from 12 randomly selected shipping cases, to be representative of a lot.²⁷ Once the contents of each of these 12 subsamples are quantified, the average amongst them is the amount that is declared in the supplement facts panel.

Defense attorneys often use these testing procedures as a defense under preemption. Stating that unless a plaintiff’s evidence conforms to these testing procedures, the plaintiff’s claim must be dismissed on the grounds of preemption.

However, not only is the use

of preemption under these testing standards not required at the pleading stage,²⁸ it is also not the standard used to determine expiration dates. As the FDA notes, testing for dietary supplements’ rate of degradation can be difficult or even unknown. Thus, all that is required to determine an expiration date is some kind of data, but what this data is or the standards required to meet it, are not provided.²⁹

Once past preemption, liability appears to be uncontestable, assuming there is some kind of data showing that the supplement does not make it to the declared expiration date. If a product is rapidly eroding such that it could not make it to the manufacturer’s declared expiration date, then the manufacturer is misrepresenting the standards and quality of its product in violation of several provisions of the CLRA. Additionally, it seems likely that a judge would find these acts inherently untruthful and conclude that a remedy is warranted.

Therefore, there is a viable claim for the misrepresentations on dietary supplements’ expiration dates.

Conclusion

Although manufacturers within the food, drug and dietary supplement fields often have misleading and untruthful expiration dates on their products, most lawsuits would not be viable. However, for those daring enough to bring a suit in these uncharted territories, there is likely a ripe class action stemming out of a manufacturer’s expired dietary supplements.

FOOTNOTES

¹ New Report: Food Expiration Date Confusion, *WORLD FOOD REGULATION REVIEW*, Vol. 23, Iss. 5, (published Oct 2013).

² *Id.*

³ Marshall Allen, *The Myth of Drug Expiration Dates*, *PROPUBLICA* (published July 18, 2017).

⁴ 21 C.F.R. § 211.166

⁵ See *The Myth of Expiration Dates*, supra.

⁶ Laurie P. Cohen, *Safe and Effective: Many Medicines Prove Potent for Years Past Their Expiration Dates*, *WALL STREET JOURNAL* (published 28 Mar 2000).

⁷ See *The Myth of Expiration Dates*, supra.

⁸ See *The Myth of Expiration Dates*, supra.

⁹ New Report: Food Expiration Date Confusion, *WORLD FOOD REGULATION REVIEW*, Vol. 23, Iss. 5, (published Oct 2013).

0 21 C.F.R. § 107.20(c).

1 9 C.F.R. 317.8(b)(32) and 381.129(c).

2 *Id.*

3 21 U.S.C. 331(a).

4 2017 Bill Text CA A.B. 954.

5 *Id.*

6 21 U.S. Code § 321(ff).

7 72 FR 34752, 34855-34856.

8 *Id.* at 34856

9 *Id.*

²⁰ *Id.*

2 Dietary Supplements: A Framework for Evaluating Safety, *NATIONAL ACADEMY OF SCIENCES* (Published 2005).

²² See 21 U.S. Code § 343-1 and 21 USCS § 360k

²³ For a good explanation of preemption in the context of dietary supplements, see *Hawkins v. Kroger Co.*, 2018 U.S. App. LEXIS 28116, *9-10 (9th Cir. Oct. 4, 2018).

²⁴ See *Sciortino v. PepsiCo, Inc.*, 108 F. Supp. 3d 780, 799-801 (court holds California law requiring the disclosure of carcinogens for caramel ingredient is not preempted because FDA only regulates how this ingredient can be labeled, not how to adequately provide health warnings).

²⁵ 21 USCS § 352.

²⁶ See 21 C.F.R. § 101.9(g)

²⁷ See 21 C.F.R. § 101.9(g)(2).

²⁸ *Durnford v. MusclePharm Corp.*, 2018 U.S. App. LEXIS 28771, at *17, fn. 8 (9th Cir. Oct. 12, 2018).

²⁹ 72 FR 34752, 34856.



Nicholas Barthel is an Associate with the Kazerouni Law Group, APC and is located in Costa Mesa, California. In practice, 100 percent

of the cases handled by the Kazerouni Law Group, APC are consumer related. Said cases range from defending consumers that have been sued by creditors or debt collectors to large Multi-District Class Actions. Specifically, a majority of Barthel’s practice focuses on Consumer Legal Remedies Act, California’s Unfair Competition Law, the Telephone Consumer Protection Act, and false advertising claims.

Leveraging Private Loans to Preserve Inherited Real Property

by Mara M. Erlach, Esq.

Trustees, executors, private fiduciaries, and estate and trust attorneys routinely encounter common problems when administering cash-poor trusts or probate estates after someone passes away. These problems include how to equalize the trust distribution between children so that everyone gets an equal share; how to pay expenses when there is little or no cash in the estate; how to pay off a reverse mortgage that a parent or grandparent has taken out on the home; or how to structure the trust or estate administration so that one beneficiary receives real property while ensuring that the other beneficiaries receive an equal share. Often, there is too little cash in the estate to achieve these goals, and the trustee or executor is forced to sell real property assets in the course of the trust or estate administration in order to raise the money needed.

Banks and credit unions offer little help in this regard, whether out of risk-averse policies or simple lack of knowledge regarding trust or estate administration. And wealthier beneficiaries cannot lend the trust or estate money because valuable property tax savings would be lost. Private loans provide trusts and estates with the cash needed to achieve the family's goals without having to resort to selling the family's real estate assets.

This advantage becomes even more important when considering the property tax advantages of retaining family real estate. Proposition 58, adopted in 1986, and codified in California Revenue and Taxation Code Section 63.1, provides that a transfer between parents and children of a principal residence, as well as an additional \$1 million of the full cash value of all additional real property, is excluded from the definition of a "change in ownership," which would ordinarily necessitate property tax reassessment.

Proposition 193, adopted in 1996, and included in California Revenue and Taxation Code Section 63.1 by an amendment, further expanded this definition to include certain transfers between grandparents and grandchildren, but only if the grandchild's

parent is deceased. This law saves heirs thousands of dollars in property taxes each year.

Note that these exemptions are not automatic, and must be claimed by filing a "Claim For Reassessment Exclusion" and a "Preliminary Change of Ownership Report" with the applicable County Assessor's office. These forms may be found on each County Assessor's website.

Estates and trusts with limited liquidity may forfeit these important advantages if the estate or trust has no resources available which would allow the heirs to keep the family home. The California Board of Equalization has specifically sanctioned third-party loans to trusts to equalize the value of beneficiaries' interests in the trust assets while retaining the applicable property tax exemptions. (See Board of Equalization Letter to Assessor No. 2008/018, Q. 36.)

California Probate Code Section 16246 provides that a trustee may distribute property and money in divided or undivided interests, and to adjust resulting differences in valuation, with in-kind distributions being either pro rata or non-pro rata pursuant to a written agreement. By leveraging cash from a private loan in conjunction with an agreement between the heirs, executors and trustees can provide a valuable service to families who otherwise would have to forfeit their valuable real estate in the course of trust or estate administration.

The Board of Equalization has specified that when a trustee has the power to distribute trust assets on a pro rata or non-pro rata basis, the distribution of real property to one child qualifies for the parent-child exclusion if the value of the property does not exceed that child's interest in the total trust estate. (Board of Equalization Letter to Assessor No. 2008/018, Q.35.) A trustee who elects to make a non-pro rata distribution may equalize the value of the other beneficiaries' interests in the trust assets by encumbering the real property with a loan and distributing the loan proceeds to the other beneficiaries. (Property Tax Annotation 625.0235.005.)

However, a private loan cannot be made by any of the beneficiaries of the real property to the trust in order to equalize the trust interests. Such loan would be considered payment for the other beneficiaries' interests in the real property resulting in a transfer between beneficiaries rather than a transfer from parent to child, which would disqualify the transfer from the parent-child exclusion. (Board of Equalization Letter to Assessor No. 2008/018, Q.36.)

Since many banks will not make loans to trusts or estates, or make them so prohibitive that they are not worth the hassle, private loans by HCS Equity provide a convenient (and often more affordable) solution, offering swift review and approval, no prepayment penalties, flexible terms, and availability of funds within a short time.

In order to take advantage of property tax exemptions and avoid problems caused by cash-poor estates or beneficiaries' needs, trustees and executors should consider HCS Equity as a valuable resource in ensuring a smooth transfer of assets from one generation to the next. Additionally, we have an extensive network of conventional lenders to help secure take-out financing for beneficiaries retaining the property if necessary, providing an end-to-end solution for estates or trusts.

Editor's Note: Mara M. Erlach is a Senior Counsel at Greene Radosky Maloney Share & Hennigh, LLP in San Francisco, where she is a member of the firm's Trusts and Estates practice group. She was contracted by HCS Equity, a private real estate lending firm, to write this article. To contact HCS Equity call (415.205.8251).

Your Expertise Needed for These Areas—

- EDUCATION LAW
- WORKERS' COMPENSATION
- SSI APPEALS
- NORTH COUNTY FAMILY LAW

The Lawyer Referral & Information Service (LRIS) has an urgent need for attorneys who practice in the areas of education law, SSI appeals, workers' compensation and North County family law.

We receive many calls from potential (paying) clients but have no one to refer them to.

If you are interested in receiving prescreened, quality referrals, please call Kerrin at (805) 541-5505.

THE OTHER BAR



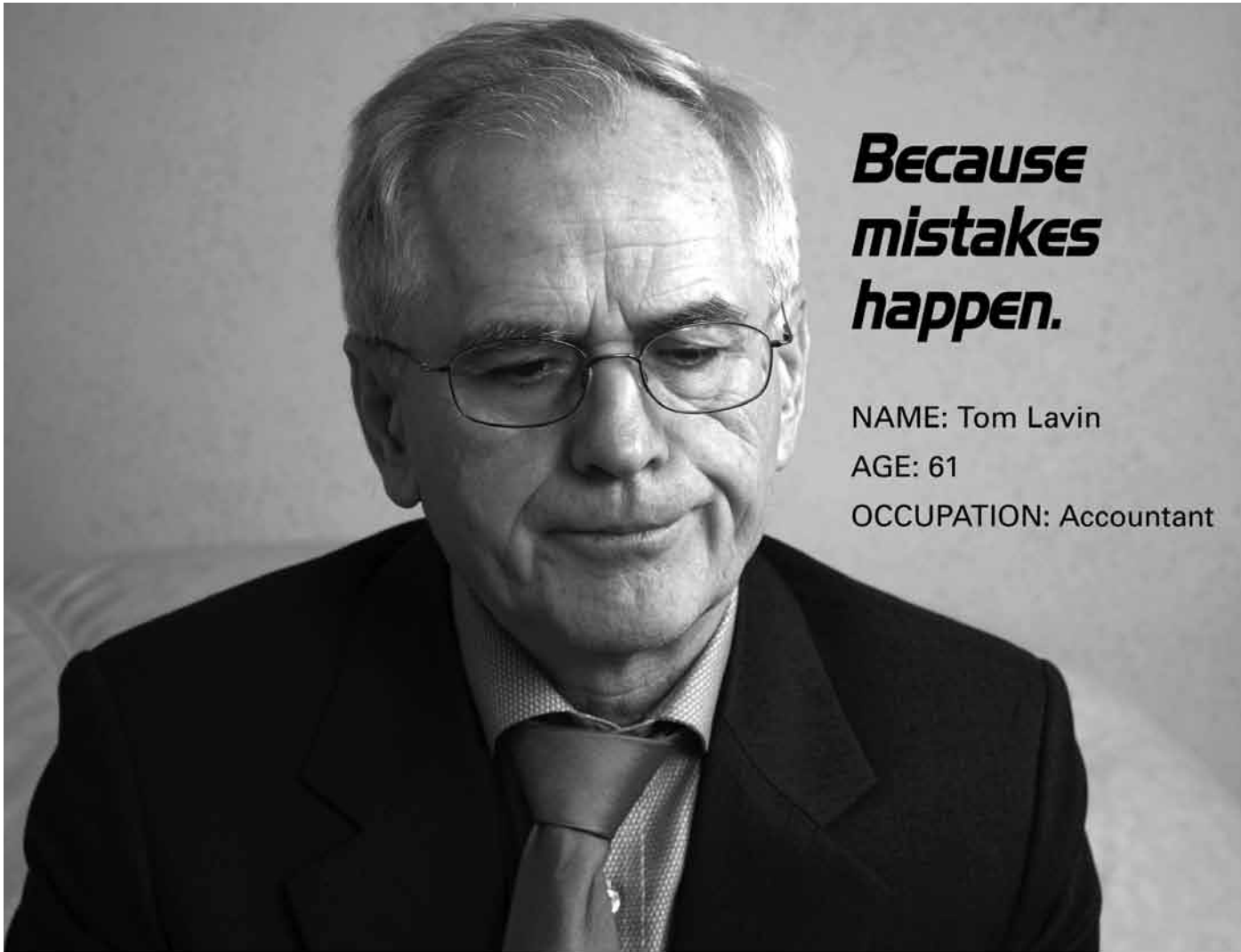
Free confidential assistance to lawyers, judges, paralegals and law students with substance abuse problems.

Weekly Other Bar 12-Step Meetings are held in many areas, and others are being established. For times and locations, or to start a meeting in your area, contact the number or website below.

Provider of Certified MCLE Instructors

Confidential Hotline 24 Hours a Day: (800) 222-0767

www.otherbar.org



***Because
mistakes
happen.***

NAME: Tom Lavin

AGE: 61

OCCUPATION: Accountant

Sometimes bad things happen to good people. If your client needs to post bond, give us a call. We offer the most professional, confidential and honest service on the Central Coast. And we even give attorneys an 8% rate on referrals.*

Gregory L. Sullivan, Owner

Insurance Bail Lic. #BA1674186

Cell (805) 441-0762

948 Santa Rosa St., San Luis Obispo, California

Across from the courthouse

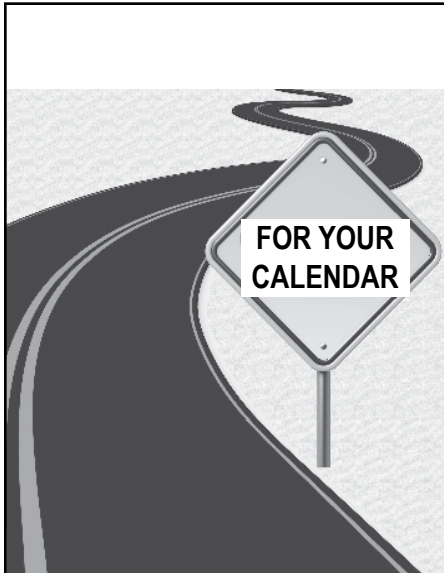
*Conditions apply.



(805) 544-1000

www.bailbondsabc.com





**The BAR BULLETIN
DEADLINES
for accepting
advertisements,
payments and articles
are as follows.**

**January/February 2020
November 25**

**March/April Issue
January 25**

**May/June Issue
March 25**

**July/August Issue
May 25**

**September/October Issue
July 25**

**November/December Issue
September 25**

**November–December 2019
Bar Bulletin Correction:**
Sheryl Wolcott, please accept our
apologies for misspelling your name.

John L. Seitz Award Recipients Through the Years

Joel Diringer
Michael Morris
Patricia Gomez 1991
Clifford Clark 1992
Scott Juretic 1993
Mary A. Harris 1994
Michael Blank 1995
Warren A. Sinsheimer 1996
Robert H. (Hank) Mott 1997
Jeffrey C. Radding 1998
Hon. Christopher Money 1999
Dennis D. Law 2000
Anne M. Russell 2001
Angie King 2002
Lee Broshears 2003
Allen G. Minker 2004
Gayle L. Peron 2005
Jeffrey R. Stein 2006
Paul and Bridget Ready 2007
James B. Lindholm, Jr (1944-2008) 2008
Hon. Douglas Hilton 2009
Teresa Tardiff 2010
John W. Fricks 2011
John M. Carsel 2012
Daniel L. Dow 2013
Raymond E. Mattison 2014
Don A. Ernst 2015
Hon. Michael Duffy 2016
Jacqueline Frederick 2017
Stephanie Barclay 2018



Please Save the Date...

State of the Courts

Noon Thursday, January 16, 2020
Venetian Room, Madonna Inn

Please RSVP to Nicole Johnson
slobar@slobar.org

Bar Bulletin Editorial Policy

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

raymondinsf@yahoo.com

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

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

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

To ensure consideration for inclusion in the next scheduled edition, articles, advertisements and payments must be received by the deadlines 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.

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

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

Bar Bulletin Advertisement Policy

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

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

| | |
|----------------------------------|-------|
| January–February issue deadline | 11/25 |
| March–April issue deadline | 1/25 |
| May–June issue deadline | 3/25 |
| July–August issue deadline | 5/25 |
| September–October issue deadline | 7/25 |
| November–December issue deadline | 9/25 |

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

2019 Bar Bulletin
Raymond Allen, Editor
Telephone: (805) 541-1920
raymondinsf@yahoo.com



HAVE AN ARTICLE FOR THE COUNTY BAR ASSOCIATION'S BULLETIN?

Do you know that writing an article for the *Bar Bulletin* counts toward CLE credits?
Please e-mail article ideas or articles for consideration in Word format to Raymond Allen at **raymondinsf@yahoo.com**.



SERVICE OF PROCESS

- Skip-Trace
- Stake-Out
- Rush/Immediate Service

COURT SERVICES

- One Stop e-Filing
- Case Research
- Document Retrieval

PHOTOCOPY SERVICES

- Court of Appeals Filings
- Bankruptcy Mailings
- Exhibit Binder Preparation

RECORDS RETRIEVAL

- Subpoena Preparation
- Patient Authorizations
- Mobile Scanning

NEW MEETING SPACE

- Three Conference Rooms
- Upgraded Technology
- Courthouse Parking

CERTIFIED TRIAL TECHNICIAN

- Courtroom Presentations
- Hot Seat Operator
- Equipment Rental

NEW LOCATION!

444 Higuera, Suite 100 • San Luis Obispo, CA

Phone:(805)439-1800 • Fax:(805)439-1802

www.eLegalServicesInc.com

BONGIOVI MEDIATION

Mediating Solutions since 1998

“There is no better ambassador for the value of mediation than Henry Bongiovi”



HENRY J. BONGIOVI

Mediator • Arbitrator • Discovery Referee

AV Preeminent Rating (5 out of 5)

AWO Rated ‘Superb’ (10 out of 10)

Conducting Mediations
throughout California

805.564.2115

www.henrybongiovi.com

PROUDLY SERVING SAN LUIS OBISPO COUNTY & BEYOND



M c C O R M I C K
B A R S T O W L L P
A T T O R N E Y S A T L A W



SAN LUIS OBISPO OFFICE

656 Santa Rosa St #2a, San Luis Obispo, CA 93401

805.541.2800 • www.McCormickBarstow.com