

Bar *Bulletin*

Serving San Luis Obispo
County's Legal Community

November–
December 2022



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Cover: LRIS celebrates 20 years of community service with a fundraising barbecue (story on page 18). Photo courtesy of Tara Jacobi.

BAR BULLETIN COMMITTEE

Editor: Tara Jacobi — tarajacobi@icloud.com

Photographer:

Publisher: Joni Hunt — jonihunt@att.net

Advertising: Kerrin Hovarter — (805) 541-5930
slobar@slobar.org

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President's MESSAGE



Practicing Gratitude: Do you regularly celebrate the wins in your practice and in your life?

by Kara Stein-Conaway

"Appreciation can make a day—even change a life. Your willingness to put it into words is all that is necessary." —Margaret Cousins

As lawyers, we get to counsel people who are experiencing personal tragedies, and we have the opportunity to be present with those people, to let them know that we are there, and to let them know that we are listening. As their trusted advisors, we get to formulate plans to help them experience better days in the future.

What an incredible gift it is that this is the life we get to lead.

As lawyers, we get to interact with people who are supporting us so that we can do the work we do. Sometimes those who are supporting us are our own staff. Sometimes those who are supporting us are the court staff. Sometimes those who are supporting us are expert witnesses or investigators. Sometimes those supporting us are our law partners or our life partners. There are so many people whose diligent work makes the work we do possible.

What an incredible gift it is that we get to witness how the dedication of those who support us not only makes the work

we do possible, but also makes our work so much more enjoyable.

As lawyers, we get to carve out new paths to achieve just outcomes. Sometimes we are carving a path that no one else has ever taken before by applying a legal theory in a way that has never been done before.

What an incredible gift it is that our career rewards us for allowing our minds to be creative.

When I first began working as a deputy public defender in Los Angeles County in 2008 after graduating from law school, I remember preparing for a preliminary hearing, which is a probable cause hearing in a criminal felony case, and I remember leaning on the more experienced lawyers in my office to help me understand how to design my questions in a way that would best accomplish the goals I had for the hearing.

I felt so incredibly grateful that this meaningful, interesting work—where I was learning so much so quickly—was something I was getting paid to do. I remember

realizing that I could support myself, and that someday I knew that I could support the family I wanted to have, while doing fascinating work, where everyday I did something that mattered.

What an incredible gift it is that we get to do fascinating work that matters, and that we get to support ourselves and our families while doing this work.

There are challenging moments, and there are challenging days, in the work we do as lawyers. In the September/October 2022 issue of the *Bar Bulletin*, Scott Taylor's article, "Vicarious Trauma & the Practice of Law," courageously highlighted what it can feel like to be in some of those very hard moments. If we lean in and give ourselves permission to fully feel our feelings when we are experiencing those hard moments in our practices and in our lives, there's something very powerful that happens. By giving ourselves compassion, kindness and permission to feel, the tension and worry lessen and eventually that tension lifts.

Sometimes we can experience the tension lifting on our own through our own intentional practices like meditation or exercising. Sometimes we need the support of another person or a therapist to help us feel and allow our feelings. By allowing ourselves to feel these challenging feelings, we make space in our hearts to feel free, to feel light and to then be able to experience immense gratitude and appreciation for the incredible work that we get to do as lawyers.

I am going to share a practice with you that is a gift you get to give yourself.

One practice that I do at the end of every week with my law firm team members is that we share our wins for the week. A win can be something challenging that we overcame. It can be completing an advocacy letter. It can be that a client entered mental health treatment or substance abuse treatment. It can be that we figured out a better system to correct a challenge we had been experiencing in our business operations. It can be how we navigated handling a client who was in an escalated state in a way that both respected ourselves

and supported someone in crisis. It can be an outcome in a client's case.

By pausing each week and truly celebrating these wins together, our hearts and our minds shift our focus to what is possible. By celebrating our wins and feeling gratitude for ourselves and one another, we become more resilient, and that resilience helps us when we go through challenging times that are an inevitable part of the practice of law and of life. Celebrating in this way also makes space for greater and greater wins to unfold before our eyes.

Would you like to feel more gratitude for the work you get to do and the life you get to lead?

If so, and if you don't already have a regular practice of celebrating the wins in your practice and in your life, I would encourage you to start doing that on a monthly or even weekly basis.

As your SLO Bar Association President this year, it's been an honor for me to serve with an amazing SLO Bar Board of Directors who dived headfirst with me into challenges and

who treated one another with respect. I'm grateful for the tireless efforts of our organization's dedicated Executive Director, Kerrin Hovarter, whose flexibility and versatility benefit this organization profoundly. I am grateful that you gave me the privilege of bringing my whole self to this role.

As this year comes to an end, I hold all the best hopes in my heart for you with your practice and your life, and I hope that some of the ideas I've been sharing in my President's Messages in this year's *Bar Bulletin* remind you that you are enough, you matter and your well-being matters. Please know that I'm always rooting for you! ■

This President's Message was written by attorney Kara Stein-Conaway, owner and managing attorney of the Stein-Conaway Law Firm, P.C. For more information about the Stein-Conaway Law Firm, P.C., where attorneys Kara Stein-Conaway and Jeff Stein help adults accused of crimes in SLO County protect themselves and their futures with their criminal defense practice, please visit www.steinconawaylaw.com.



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Editor's Note

by Tara Jacobi

Fall always feels like the start of a new year to me, more so than New Year's Day. Those parents among us might feel the same, as school is a significant presence. This year my son and I start school on the same day. He begins fifth grade, as I embark on an online publishing program at The George Washington University in DC. After the pandemic, both school and work have been redefined, in a good way, for those of us that sometimes need to reach beyond our immediate surroundings.

We kicked the season off right with our annual barbecue. Hopefully you were able to join us at the Drive-Through BBQ Tri-Tip Fundraiser at the end of September. The photographs in the pages ahead showed a great time. Thank you to our volunteers for making this event happen

and for raising money for the Lawyer Referral and Information Service.

When Krista Sabin's article came across my desk, it instantaneously brought me back to my childhood surroundings. As a kid, I worked at a place, similar to Avila Valley Barn but on Long Island, called Olish Farms.

Mr. Olish used to come into the store late each afternoon looking haggard and worn. His wife and son, Donny, managed the store while I was selling produce to people like Ed Koch, the former mayor of New York City, as he joined the Manhattan elite on their way to the Hamptons for the weekend. Donny, at the time, was dating my best friend's older sister's best friend, Kim.

A few years ago now, while back on Long Island for a funeral, I stopped into Olish Farms where Donny had taken the helm. He wasn't there, but his wife, Kim, was working at the store and waited on me. I had a front row seat to the next generation succeeding with a farm, as Krista accurately describes, with that fierce independence of American farmers.

The San Luis Obispo College of Law shared with us their mentorship program in another article. Seasoned lawyers should consider giving back to our legal community and mentoring a local law student. Readers can find out more about the mentorship program and contact information in the article.

Lester Paredes is new to our legal community and our Board of Directors. Hearing him speak about emotional intelligence at our retreat at the beginning of the year sparked an interest for me to learn more. Our conversation is in the pages ahead.

Thank you to Jane Heath for keeping us updated with news about employment law and to Jeffry Stein for keeping us updated with aspects of criminal law. I appreciate the county bar sections contributing content. If your section has not submitted an article recently, I would greatly encourage section chairs and members to consider contributing an article. Without diverse and varied contributions, our *Bar Bulletin* cannot present robust, substantive material.

Please forward your contributions to me at tarajacobi@icloud.com. Thank you. ■

The San Luis Obispo County Bar Association Endowment to Assist Persons of Color in Pursuit of a Career in the Legal Profession

As of September 27, 2022 — Endowment totals \$60,913.74

Scholarship eligibility criteria and donation details are posted at www.slobar.org.

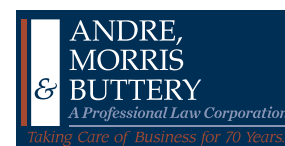
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San Luis Obispo College of Law Offers an Opportunity to Join Their Mentorship Program

by Tara Jacobi

San Luis Obispo College of Law staff, students and mentors share with us how the mentorship program works, what it means for students to receive guidance from practicing attorneys, and why assisting the next generation of lawyers is important to the profession.

To find out more about the Mentorship Program, contact Jeanine Kraybill, Ph.D., First-Generation Law School Student Program Coordinator at jkraybill@montereylaw.edu.

MEET JEANINE E. KRAYBILL, PH.D., FIRST-GENERATION LAW SCHOOL STUDENT PROGRAM COORDINATOR

How does the Mentorship Program at our law school work?

Interested students respond to “call” (email blast or notification) about the program, letting us know they are wanting to participate. Some students specify a type of law they want to practice, while others are more open.

We work with the local Bar Association to pair the student with an attorney who is willing to mentor them. We ask that mentors and mentees try to meet in-person, virtually or via phone two to three times a semester. The idea is that during these meet-ups students can ask their mentor questions about the legal profession, how to navigate the job market, perhaps even attend a networking event, etc.

Who participates?

Interested students as mentees and attorneys and/or judicial officers as mentors.

How are students able to engage in internships during regular business hours when most already have fulltime careers?

Well, this is not an internship program, but a mentorship program.

The times and days mentors and mentees meet are decided by them, etc.

How do local lawyers benefit from having a law student in their office?

For mentors, the idea is that they get to help cultivate the next generation of attorneys and hopefully those who will work in their communities. By being mentors, attorneys get to help the future of the legal profession.

Our legal community is largely focused on certain areas of law such as criminal, family, employment, real estate or housing, business and estate planning. What if you have a student that has an interest in something outside a practice area that local attorneys’ practice? What might be possible in this instance?

We ask both students and attorneys to keep an open mind. Regardless of the area of law a student may be interested in, having professional mentorship is invaluable as they navigate the profession overall. Also, it is good for aspiring attorneys to get general exposure to attorneys and learn about various areas of practice as they discern their own path.

What do you consider a success for this program? What do you hope for your students? What do you hope for local lawyers participating?

Having students exposed to attorneys and helping them grow professionally and in confidence. Many of our students do not have an attorney in their family, so being able to connect with a mentor helps them demystify the law and shows the students that they, too, can become lawyers and make an impact in their respective communities.

I hope that the students engage in rewarding professional relationships with their mentor that enhance their legal education and help them cultivate a passion for the law. I hope this experience will inspire our students to pay it forward by being mentors to others when they become attorneys.

I hope local lawyers feel they are contributing both expertise and experience with clients and to the future of the profession. I hope attorneys who received mentorship see this as an opportunity to pay that forward, and those who did not see this program to provide the mentorship they wish they had received in their own law school journey.

MEET LAW STUDENT MARIA E. HERNANDEZ MAHADEV

Why law school?

I want to advocate and support underrepresented communities to the best of my ability and up to the capacity that the law allows. As a

first-generation student, daughter of immigrants, and former workers compensation paralegal, I have worked along with the disadvantages and the lack of aid that unfortunately marginalizes our minority groups in our society today. I want to ease this barrier as best I can to make legal aid accessible and welcoming to communities of all ethnic backgrounds.

What are you learning as you participate in the mentorship program? What do you find the most challenging? What do you find the most enjoyable?

I have been so fortunate to have been paired with the California Applicants Attorneys Association Central Coast Chapter President, and I recently had the opportunity to sit in a Central Coast Chapter meeting. During the commencement of the program, I believe the most challenging aspect is learning about all the different organizations and entities that are associated with Worker’s Compensation Law. The most enjoyable regard would be the subjects and information discussed, considering it all pertains to injured workers and their recovery.

San Luis Obispo College of Law is not a traditional law school since most, if not all, students are already engaged in full-time careers, as are the instructors. How do you balance it all?

I wouldn’t be able to proceed with my studies in the manner that I am if it weren’t for my support system that stands as my foundation. My employer has been beyond supportive and is very flexible with my work hours; I am so grateful. My husband and family have been exceptional as well. Their love and encouragement are great motivations for me when I need it the most.

What motivates you?

My parent’s unconditional love throughout my life has molded me into who I am today, and they are always in my thoughts when I help a client. My care for clients is majorly influenced by the manner I wish my parents would be treated by society.

Where do you hope to be after graduation and why?

I intend to practice Workers Compensation Law as Applicant Attorney and advocate for injured workers. As a former Workers Compensation paralegal of almost three years, I learned of the high demand for representation of injured workers and the urgent need for bilingual attorneys. During my former employment, I was very fortunate to also experience the fulfilling gratitude a Workers Compensation firm receives from their clients. The feeling of knowing you helped someone in need is phenomenal.



I plan to establish myself in the northern Santa Barbara County (Santa Maria)/San Luis Obispo area, to ultimately create a breakthrough and provide legal assistant to communities of all ethnic backgrounds.

What might you share with someone wishing to go to law school?

Where there’s a will there’s a way! It’s crucial to be kind to yourself throughout your law school career. Something I learned is that it’s not good to compare yourself to others, rather its important to embrace the fact that you are your biggest competitor as well as your greatest fan.

MEET LAW STUDENT HEATHER BAGDWAL-JONES

Why law school?

I have wanted to advance my education for many years and finally, at almost 50, my life aligned in a way to allow me to do so. I chose law school because I wanted to actively participate in making changes in the community I worked in for the last 20 years. I have spent a significant portion of my career speaking up for those who do not have a voice or were not being heard. I was able to help, but there were limits to what I could do. Then four years ago, my daughter was born with Down syndrome and the passion I felt for my work became personal. I want to participate in making changes to laws surrounding people with differences in their abilities.

What are you learning as you participate in the mentorship program?

What do you find the most challenging? What do you find the most enjoyable?

When I heard that there was a mentorship program being offered, I was excited to participate. As Fred Rogers is often quoted as saying, “Look for the helpers.” There are times we are the helpers and times where we should look for the help. Law school is a humbling experience

Continued on page 10

SLO College of Law Mentorship Program continued

at any stage of life, so looking for guidance from the people who have gone before me made sense.

I was lucky enough to be linked with Judge Matthew Guerrero. He has offered a great deal of support and knowledge. He has pushed me to look at the cases at a deeper level and to pay attention to my own biases. I know without a doubt that having a mentor has only enhanced my experience in law school.

San Luis Obispo College of Law is not a traditional law school since most if not all students are already engaged in full-time careers, as are the instructors. How do you balance it all?

The Law College’s nontraditional format allowed for me to consider a career change later in life. The schedules and supportive staff offer the opportunity to find a life balance. I cannot say that I have a balance, but what I have found that helps is to plan out my study schedule each week. I look at the reading schedule, assignments due and my family’s needs. I personally need at least 25 hours a week of studying outside of class, but I think this can vary from person to person.

What motivates you?

I am most motivated by the sacrifice my family is making for me to go to school. I cannot do this alone, and my family has been a huge part of my success. I am also motivated by the learning process. Learning how and why laws were created. Some of the laws that decide cases today were created in the 1800s. This is mind-blowing to me.

Where do you hope to be after graduation and why? What might you share with someone wishing to go to law school?

When I graduate, I will need to learn how to be a lawyer, and I hope to find a position that gives me the opportunity to do so. I have enough life experience to know that what I have set out to do may not be where I land, so I don’t want to limit myself now. If I could share words of wisdom with someone starting this journey, I would tell them to trust the process, read all the reading, do your outlines and show up anyway.

MEET MENTOR CRYSTAL C. FORSHER, MANAGING ATTORNEY, NORTH COUNTY OFFICE, EDWIN K. STONE, ATTORNEY AT LAW, APC, AND CAAA CENTRAL COAST CHAPTER PRESIDENT

Tell us about yourself and why you decided to participate in the law school’s mentorship program?

My mother was born in Mexico and came to the United States, with her mother, as a young child. My grandmother (abuelita) had a large role in raising me so that my mother could work to help provide for our family. Upon graduating from high school at St. Joseph’s in Santa Maria, I attended Loyola Marymount University (LMU) in Los Angeles, where I earned a bachelor’s degree in Business Law and a minor in Spanish.

While attending LMU, I began my legal career working as a legal secretary for a law firm that specialized in workers compensation. After working there for a few years, I decided to return home to Santa Barbara County and attend law school. Once I graduated and passed the bar, I decided to return to the field of workers compensation as an attorney, and I have been practicing in that field of law since. I currently work at Edwin K. Stone, APLC. I am

the managing attorney for the Santa Maria office. In 2022, I passed the California State Bar Specialist exam in workers compensation.

My passion in the law remains in helping injured workers to get the rightful benefits that are owed to them. I also enjoy volunteering and am currently the President of the Central Coast Chapter of the California Applicants’ Attorneys Association (CAAA). I am on the executive board for the Northern Santa Barbara County Bar Association and the Legal Aid Foundation of Santa Barbara County. In addition to the above, I am a board member of the Teachers Advisory Committee for the Center for Employment Training in Santa Maria, and the Advisory Board for the San Luis Obispo College of Law.

It is through my work for the SLO College of Law that I first heard about the mentorship program. Dena Dowsett, the assistant Dean of Admissions, and Dr. Jeanine Kraybill approached me about the mentorship program for first-generation law school students. Reflecting on my time as a first-generation law student, I was excited to be a part of this program and to be able to be a mentor to other first-generation law students.

What does it entail to be a mentor for a law student?

For my first mentoring partnership I was lucky enough to be paired with a law student who is interested in workers compensation. In our first meeting we had a long conversation so I could learn about her and to provide her with my background. She has attended a few CAAA MCLE meetings with me and I was able to help her get a job interview at a top workers compensation defense firm in our area.

We are also working together to put together a workers compensation presentation in Spanish for the Mixteco Indigena Community Organizing Project (MICOP), the organization she is currently interning for. We communicate regularly about her law school experiences, among other topics, and I look forward to continuing to work with her to introduce her to other attorneys who work in our industry.

What is most rewarding about participating in the program and why might you suggest others participate?

I remember how difficult it was to get through law school. I enjoy helping my mentee through the process and answering any questions or concerns she may have. I feel fortunate to be able to practice as an attorney in this field of law. I hope to give back to our community and inspire others to do so as well.

MEET HONORABLE MATTHEW G. GUERRERO, SUPERIOR COURT JUDGE OF SAN LUIS OBISPO COUNTY

Tell us about yourself and why you decided to participate in the law school’s Mentorship Program?

It is important to give back to the community. Mentorship is the best and safest way for professionals to learn and discover outside their formal classroom experience. Every question is a good question whether they make us laugh or think about an issue. The mentee doesn’t feel alone on their journey and has a safe place to wonder outloud.

What does it entail to be a mentor for a law student?

We review cases and law school material together and explore why cases are decided the way they are, and where and how policy is applied in the judicial decision-making process. Together we worked on

what it means to IRAC (spot issues, identify a rule, apply the rule and reach a conclusion) and how to use that in developing an outline to study from.

We go to lunch about once a month. I have been able to introduce Heather to court staff, other judges and attorneys.

What is most rewarding about participating in the program and why might you suggest others participate?

We are social creatures who learn in different ways. Being a mentor or mentee creates a nonjudgmental space to talk through ideas and make discoveries (or laugh at yourself). This complements the classroom learning experience by creating more opportunity to think through classroom materials and to analyze those materials outside of the classroom setting, which is more organic for some students. ■

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A Conversation with Les Paredes— “There is a Gaping Hole in Our Legal Educational System”

by Tara Jacobi

At the SLO Bar Retreat earlier this year, Lester Paredes, one of our newest board members, talked about psychological concepts and the lack of our education and insight into these concepts. We might call them one’s emotional intelligence or something else. People put different labels on it. I was intrigued, and we began a conversation.

Tara: You said a few things that really resonated with me at the Retreat. One thing you acknowledged is that we all have pain. As the wife of a forensic psychiatrist for 20-plus years, I found this very insightful. Sometimes people may look at another and dismiss that there is any pain in someone’s life. Other times people may look at another and assume there is a certain type of pain inaccurately. Assumptions are dangerous.

Lester: Everyone you see, rich and poor, has something in their past that has caused them pain, which they may or may not have dealt with. One might not recognize another person’s pain because pain is equated with weakness, so people hide it, but it is still there. This pain can be minor or can be debilitating.

My own path has taught me something years of education failed to—pain is a result of my ego rejecting reality. Accept reality and be pain free. The book, “The Power of Now” by Eckhart Tolle, opened my eyes to how pain works in that people in pain inflict pain on themselves and others in a vicious cycle. This relates to the legal profession in so many ways because of the necessity for self-care in our profession in order to be able to really help clients, but more broadly, improving your own emotional intelligence to better understand ourselves, clients, witnesses and colleagues.

Tara: Another thing you said in so many words is that not all people grow past their perspectives. And our educational system fails us with the education of one’s own emotional intelligence. It fails us with regard to becoming aware of why we may hold a certain perspective at a certain place and time in our lives. This is not a good thing. I think we both agree.

Lester: My concern is that the legal educational system actually diminishes emotional intelligence by hyper-focusing on analytical and logical reasoning. Why don’t we learn about emotions, feelings and pain? By ignoring feelings and emotions, we are not only stagnating the ability to perceive them but also denying an essential function of a non-sociopathic person.

Consider this—even after all of the societal progress, there are still people who are committed to treating others differently based on their sex, gender, race or other protected attribute. Why? I believe it is because when someone looks differently, it is easier to deny their humanity and harder to feel empathy for them. The first barrier to empathy is that stranger looks different. Our job is to get justice for everyone, including the strange looking stranger, so we must look closer at how to bridge the gap and create empathy where none may exist. That creation has to start with us and improving our emotional intelligence as a matter of personal professional development.

Tara: I heard you feel strongly about how this lack of education about one’s psyche, unfortunately when called upon to serve on a jury, can play a factor in one’s role on that jury. Another insightful realization. Perceptions and emotions are powerful. Decisions and behavior stems from both. This fact alone is why there is a career called a jury consultant. That may be one reason why some might argue justice is the luck of the draw, but I digress.

Lester: The jury can be a frustrating finder of fact for lawyers. The educational system has conditioned lawyers to rationalize anything and everything. They can argue for both sides and this is considered a virtue. However, with regular people, the kind that will be on a jury, that’s exactly why lawyers shouldn’t be trusted. To regular people, lawyers are not real, they are fake and are willing to do or say anything to help them make money. Law schools fail to teach the simple truth about how to be a good lawyer—be real, be authentic, do the right thing rather.

You have a client with a desired outcome, but getting there will require a level of authenticity and trustworthiness that comes with an understanding of the emotions that drive and guide decisions for the people involved. Years of academic education have a way of stripping lawyers of their ability to feel and instead replace feeling with analysis

and logic. We should address that and attempt to change it.

Tara: Where might the root cause lie in terms of what is lacking in our educational system or society at large?

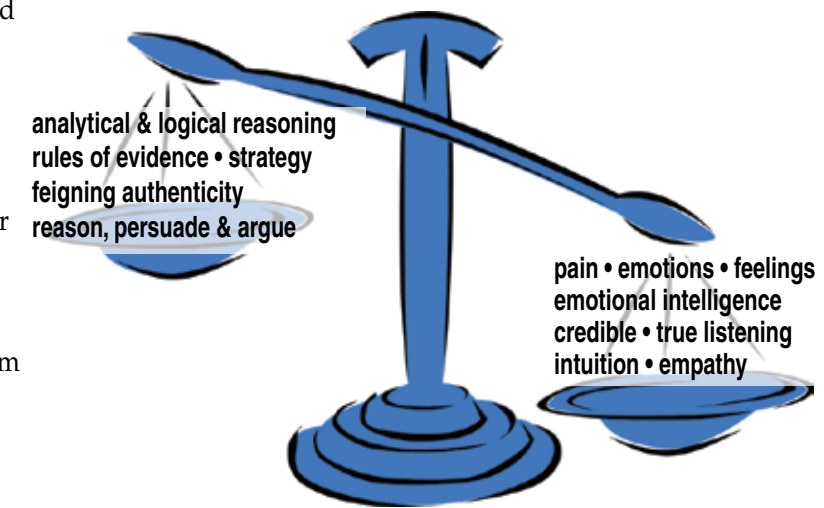
Lester: Based on my experience and observations, there is a gaping hole in our legal educational system. At every level from pre-K through law school, students are taught and rewarded based on their ability to memorize facts, use logical reasoning and analytical and critical thinking. Students who are good at taking tests move on to the highest ranked institutions and continue to hone their ability to dissect problems, offer solutions and predict consequences.

By the time a student graduates from law school, he or she has the ability to read the text of a law and apply any set of facts to that text to reach a conclusion. Of course, this is one of the quintessential functions of a lawyer, along with time management and ethical considerations. Lawyers can reason, persuade and argue using logic all day long, but is that really how decisions are made?

Our society and educational system places a premium on intellectual analytical abilities but totally neglects the real foundation of decision-making—emotions. It is easy to see why. Gut feelings are powerful, and confirmation bias makes us feel like they’re usually right. But we don’t talk about emotions because they are scary and can feel out of control. Calling someone intellectual is a compliment, but calling them

emotional is an insult, as if being “in your feelings” is for children and the antithesis of adulthood.

Tara: Yes, I agree that being called emotional is insulting. Back in 2001, when representing survivors of domestic violence, there was a certain bias as to my role as a nonprofit attorney and domestic violence in itself. An opposing attorney once said I was a “tree hugger,” although nothing I was advocating had anything to do with the environment, and “overly emotional” for representing my client’s story of abuse.



What about those with exceptional emotional intelligence? In other words, people who have this awareness or who have studied behaviors and emotions to learn more about behavior—isn’t that an intelligence in itself?

Lester: Yes, this ability to understand how one feels, others feel, one makes others feel and how others make me feel is an essential part of being a lawyer. With that in mind, one can navigate difficult situations, be spontaneous, authentic and credible only if one knows how they feel and others feel. To be called such things by a professional speaks to the urgency of filling the gaping hole in our profession.

Tara: How might we as a society better identify the issues and work toward filling that gaping hole?

Lester: Our community should attempt to recognize the need to understand the role emotions play, good and bad, and work to improve everyone’s emotional intelligence. We really have no other option in my opinion. The hole in our educational system is being filled with tropes from movies, popular culture and social media that sometimes reinforce toxic masculinity. What happens if boys learn that the only appropriate

emotion for men is anger and for women fear or sadness? The gaping hole in our collective understanding of emotions has profound implications for legal education.

My question for the psychologists, psychoanalysts and psychosociologists is whether an educational system that focuses solely on logic to the

exclusion of emotions and empathy can produce well-rounded graduates or, more likely, sociopaths. I am not a psychologist, but it seems plain that a system that focuses exclusively on logic and analysis to the exclusion of emotions, will develop people who have little feeling for others, little empathy for those they do not understand or those who do not look like them.

For a lawyer, the first time they might realize they have an educational deficiency is in a jury trial. They know the law, the facts and the logical arguments that lead to a favorable conclusion, and it all seems so simple and easy. Why doesn’t a jury see it that way?

Continued on page 14

Conversation with Les Paredes continued

The answer is that the lawyer may not have gained the trust of the jury. Why? It could be the facts, law, luck of the draw, or it could be the lawyer. Does the lawyer understand the emotions his case stirs up inside the witnesses, jurors and attorneys? Is the lawyer listening to the jurors or waiting to lecture them? Is the lawyer being authentic about the witnesses and case or just feigning authenticity? It should go without saying that you cannot fool 12 jurors or about 400 years of combined life experience.

What do we do about it? After we see, acknowledge and appreciate the problem, we can take concrete steps to filling the gap. For example, I could tell that I was effective in trial, but that there was something missing. I could feel the emotions of a room fluctuate, but I lacked the vocabulary to describe them, much less react or harness them.

To address that, the first step I took toward being more in tune with myself and my feelings was going to the Trial Lawyers College in 2014. One of the most important exercises involves reflective listening. Person A says X while Person B listens and then reflects or repeats back to Person A what they heard Person A say. Person A then validates the reflection or corrects it, and Person B tries again until they get it right. The listener listens without judgment or offering advice. The effect is that Person A understands how they sound to others, how they are perceived, and what emotions they are intentionally or unintentionally displaying. Person B builds listening and empathy skills. In other words, they both build their own emotional intelligence. True listening is more than creating a mental transcript of what was said and responding. It is absorbing the literal message as well as the emotional content without judgment.

Tara: I completely agree. True listening is a skill and hard to come by as many, including some lawyers at times, decide not to do it.

In the middle of a trial, I had an unfortunate experience and epiphany, although not about education. I was representing a survivor of domestic violence, but before we got started that day, court staff came out with a birthday cake, noisemakers and celebratory happy birthdays all around for the petitioner's attorney. Years later the judge was investigated. My idealistic, naïve, green self became a darker shade of jade.

Deficiencies don't start and stop with jurors. I didn't think about people's education as you have, but I've wondered about society's role concerning the subject of emotional intelligence.

Why did you go to law school?

Lester: I went to law school to become a public defender. It was a baffling choice for some people because I was dismissing the opportunity to make real money at a big law firm in order to take on crushing debt. I didn't care because I could not stomach the idea that people go to prison for lack of good representation. To prepare myself, I was a mock trial student in college and law school, learning and teaching as I went, focusing on how to be a trial lawyer so I could help my future clients. I read and memorized the federal rules of evidence, watched videos of opening and closing statements and would talk about trial strategy with any willing partner. I felt fully prepared to start my career when I left law school—and could not have been more wrong.

In my first trials, I relied on applying law to facts, exactly the way they teach it. But the juries did not seem to really care or listen. I con-

ducted voir dire by the book, but the juries did not seem to get how important their work was to protecting against government tyranny. I worked on telling the story, but too often the stories did not land and I became frustrated. I was doing everything the way it was taught and, yet, the jury was unmoved. Why?

Tara: Why was the jury unmoved? What happened? As I too suffered a similar fate when representing survivors of domestic violence there was a certain bias as to my role and domestic violence in itself.

Lester: I haven't been able to corner a former juror and ask them what happened or why they didn't connect with my version, and I'm not sure they could tell me if they wanted. Looking back, I was following a formula learned in mock trial and trial practice classes that was not applicable to real life. Yes, learning to enter evidence, make and respond to objections is invaluable; the way we present to a jury is something that requires self-work first.

I think the answer is that I was too formulaic and not authentic enough. I was the lawyer, not the person. I understood my case on an intellectual level, but not on an emotional level. The gaping hole in my education was swallowing my client's story. The reasons and solutions are deep, but they come back to whether or not I understand the emotional energy running through my case and how it affects everyone involved.

Tara: Interesting. I think I suffered the exact opposite fate. At that time, in my late 20s, I was a person not viewed seriously enough as a lawyer. I was trying to educate judges and lawyers about domestic violence

when many didn't want to hear it. Each had to draw their own line in the sand. Otherwise it might have been too overwhelming to believe this many women in their family courts were survivors of emotional and physical abuse.

Tell us more about how a juror's level of emotional intelligence can play into the justice received for a defendant?

Lester: Many would attribute my early struggles to having guilty clients and maybe that was part of the problem. One of my strengths, however, is that I am always striving to improve. I could sense something deeper going on, but did not have the vocabulary to describe it.

I continued to learn about being a lawyer and stumbled upon a new path at the Trial Lawyers College that opened my eyes to the gaping hole in our educational system. The path was to acknowledge the role emotions play in decisions, both for jurors and witnesses. The path includes discovering the story or the "emotional thrust" behind each witness's observations. Get to know the witnesses intimately, reverse roles with them, see the world from their eyes, feel their feelings and find the emotions that drive the story. That "emotional thrust" is what pushes the action and explains the sequence. It is congruent with our common living experience and makes intuitive sense, rather than logical sense, necessarily.

Witnesses do illogical things all the time, but rarely act outside of their emotional condition. But to do that, one has to develop a strong sense of empathy, ability to communicate, connect and deconstruct the logical and analytical tendencies a lawyer has been conditioned to apply. This is the issue I see as a clear threat to our legal system—the lack

of empathy for our fellow human beings. No one is at fault for this; the students and teachers are simply reacting to the incentives. However, it is a problem that has to be addressed if we are to have lawyers that can really help people.

The jury wants to do the right thing. The Trial Lawyers College teaches that jurors are like a group of lost travelers and each lawyer is telling them a different way out of the wilderness. If you can be trusted, you can be followed; if not, then not.

Tara: You talk about empathy but what about bias? With my experience, I was shocked how little empathy my clients received, but I guess I was horrified by how little the players involved cared to know about domestic violence.

How may a juror, a lawyer, or a judge's bias play in a trial? And what might a juror, a lawyer or a judge do to recognize and counter-act that bias?

“I understood my case on an intellectual level, but not on an emotional level. The gaping hole in my education was swallowing my client's story.”

Lester: Bias is something we all bring to the table. There is no way around it. Just sitting at the defendant's table creates the bias that the defendant is guilty because we've been conditioned to believe that law enforcement always gets it right. It is easier to believe in good and evil than shades of grey. These attitudes pervade our society and may be part of human nature. However, that bias, if allowed to be unchecked, will be the reason innocent people go to jail or are executed.

Jury selection is the chance to identify and neutralize the biases

we all bring to the table. But what do we do? Most lawyers just ask the jurors or even cross-examine them. Of course, they're shocked to learn that the jurors don't want to talk about their biases or believe they don't have any worth mentioning. The Trial Lawyers College makes the point that with a kernel of emotional intelligence we can see why—how does it feel to admit a bias or hypocrisy, to be vulnerable in front of the group and then have a lawyer slice and dice you in open court? Maybe the first brave juror will, but no more after that.

The answer is we look at ourselves for our own biases and how they may operate to influence our decisions and get the conversation started. The Trial Lawyers College teaches that if you can't talk about it, it is out of control. We talk to jurors without judgment about the biases they may have in an open and authentic way, respectful for their views, listening to them to understand, rather than rebut. They have to know it is okay, human and safe to be flawed.

We can never eliminate all of our biases all at once, but with some work we can identify them and observe how they may operate without judgment. We can treat our bias like a hidden blaring speaker that can override our ability to hear anything else and the idea is that if we know where it is, we can turn it off or at least turn it down.

Tara: Maybe without that awareness or self-work as you've described, our peers that judge us at trial may never be fully fair?

Lester: Bias is a direct threat to fairness. If you believe everyone arrested is guilty, that will make it impossible to be a fair juror if that bias is left unchecked.

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Conversation with Les Paredes continued

What can we do about this? I can only say what has helped me. It all starts with you. Can you look at yourself honestly, see your own pain in others and work to strengthen your emotional intelligence? Can you see and feel the emotional content of dialogue rather than only the text? Are you willing to take a deep dive into yourself to fish out your own insecurities and expose your vulnerabilities to yourself? If not, then how can you ask someone to do the same for you and a room full of harshly judging strangers?

In 2014, I went to the Trial Lawyers College. The method they use is called psychodrama to bring out the ability to be real, vulnerable, connect you with yourself and root out the blockages to your empathy for others by allowing you to have empathy for yourself. It was an amazing experience: a room full of strangers, re-enacting the most traumatic moments of their lives, crying without a care for appearances, catharsis and a new-found sense of self.

That experience helped me feel how I felt, feel how others felt, how I made them feel and how a group of people feel. I no longer just hear the literal content of what people are saying, I can hear their emotions and subtext. This sixth sense takes energy

and effort to develop and employ, it will exhaust me after a day of trial, but it has proven invaluable for my clients and me.

Tara: Very interesting work. Not all, especially the profession you are addressing, are willing to take this deep dive and do the type of self-work and grow in this manner. What is your hope for the future?

Lester: My hope for the bar and legal community is that we will collectively acknowledge the hole in our educational system and take steps to explore and develop our own emotional intelligence and empathy for others, from clients to opposing counsel to the bench. Let's audit our own ability to listen, communicate, reverse roles with others, make sure we know how we feel at all times, be in tune with how others feel and shed the façade of invincibility in favor of being more real and vulnerable.

Tara: Well said. Maybe one day it will be a requirement in law school to learn and understand emotional intelligence. It is a missing piece in legal education, akin to not teaching nutrition in medical schools. Thank you, Lester, for sharing your insight. And welcome to San Luis Obispo. ■

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LRIS Celebrates the 20th Anniversary of Service to the Community While Volunteers Prep for September 22 Barbecue Fundraiser

by Kerrin Hovarter, Executive Director LRIS and SLO Bar Association

Photos courtesy of Tara Jacobi

The San Luis Obispo County Bar Association Lawyer Referral and Information Service (LRIS) is a nonprofit organization (501c6), certified through the California State Bar. We assist *thousands* of callers every year to connect them with *free and/or low-cost* legal resources *or* attorneys who specialize in the area of law needed.

Callers to LRIS often are desperate to be heard and to receive direction. Most people do not know how to locate an attorney or where to find legal resources. The LRIS is a valuable resource, connecting our community with free resources and top-quality attorneys.

The barbecue fundraiser began in 2017 to assist with funds and also to further unite the San Luis Obispo community with our legal community. It is an opportunity to get together, have some fun, spread awareness about this program and further discuss how it helps the community.

The program has amazingly dedicated attorneys. Every year they volunteer hours of their time to collect wood, sell tickets and take an entire day out of their busy schedules to barbecue in sometimes 90-degree weather to make this event possible. We are grateful for the additional volunteers from the LRIS panel attorneys, as well as from SLOLAF. Thank you!

This year, we again partnered with Jack's Helping Hand, offering an option to donate meals to that program's families. Jack's Helping Hand, a SLO County nonprofit, offers assistance to families of children (to age 21) with cancer or special needs, helping with transportation, food and housing, high-tech wheelchairs, prosthetic limbs, appointments with specialists, custom-designed eyeglasses or hearing devices, etc.

_____ and _____ (top right); Don Ernst and Lisa Sperrow (middle right and right); Stephanie Barclay (lower far right).

LRIS team/volunteers barbecued more than 200 tri-tips, sold 185 meals, donated 40 meals to Jack's Helping Hand *and* delivered a load of tri-tips, beans and bread to ECHO Homeless shelter in Atascadero.

A special thank you to... **LRIS Committee:** Michael Pick, Ed Attala, Josh George, Don Ernst, John Hosford, Joe Benson, Trevor Creel, Dennis Law.

Volunteers: Brad Hill, Stephanie Barclay, Carmen Ortiz, Rick Long. **Sponsors:** Ernst Law Group, Federman Law, The Baltodano Firm, Jeffrey Stulberg, Andre, Morris & Buttery, and Morris & Garritano Insurance Services. ■



_____ (above); _____ and _____ (left) cook Tri-Tips a T. Joe Benson (below left) handles garlic bread duties, while the Santa Maria-style beans are ladled by _____ and Lisa Sperrow (below). _____ and Kerrin Hovarter (lower right) pack the hearty meals.



7 Hazards of California Employment Law

by Jane Heath

California's employment laws are among the most employee-friendly in the nation. That does not mean that all California employers observe all the laws all the time. There may well be some employers who ignore the law to exploit their workers, however the vast majority of claims arise because businesses are ignorant of the laws that they are required to follow. Both legislative action and case law must be regularly consulted as requirements can change quickly and dramatically.

Many California employers are not aware that California's Private Attorney General Act allows Labor Code regulatory violations to be administered by private attorneys, with the ability to recover not only civil penalties, but also attorney's fees from an employer or former employer.¹ Prudent employers, including law firms of all sizes, should review their employment practices constantly to minimize the risk of employment claims.

These seven areas of the law are the most frequent sources of claims:

1. Minimum Wage
2. Overtime
3. Meal and Rest Breaks
4. Paychecks
5. Misclassification
6. Expense Reimbursement
7. Workplace Conflict

Addressing the most common errors made in each of these areas can help law businesses and their clients avoid the most likely employment-related claims.

1. Minimum Wage

California minimum wage was raised to \$15 per hour in 2017, phased in over the next five years, so that by 2023, all California businesses must pay that wage. What California employers may not realize is that the legislation that raised the minimum wage in 2017 also included a provision for additional increases if inflation is more than 7 percent. Accordingly, in 2023, the minimum wage will go to \$15.50/hour.

A proposed initiative to raise the minimum wage to \$18/hour just failed to qualify for the November 2022 ballot in spite of reportedly garnering more than one million signatures. It will likely be back.

If a business has employees who work outside San Luis Obispo County, it is important to make sure that the city or county where they work does not have its own, higher, minimum wage. Each municipality's rules are different, but in many cases remote workers are covered by the higher wage in the municipality in which they reside and/or perform their work. That may or may not be true if the workers are residing outside the state of California and work remotely for a California-based business. While companies operating in multiple states require particularized analysis, California employers should be prepared to pay California minimum wage for remote work employees.

Every year, claims are filed because employers forget to review the minimum wage rules annually and adjust their payroll accordingly. It is an expensive error. Liquidated damages penalties are double the amount owed in unpaid minimum wage.

2. Overtime

A frequent mistake by California employers is applying the federal overtime requirement instead of the state. The general rule is that the employment law that is more favorable to the employee will be applied. In most cases, that is California law. In California, overtime must be paid on all hours over 40 in a week and for any day when the employee works more than eight hours, as well as on the seventh day worked. If daily OT is paid, though, weekly OT is not also paid for the same hours.

Overtime is calculated based on the "regular wage," which may or may not be the hourly wage. California Labor Code §510(a). Non-discretionary bonuses, commissions and other incentive compensation must be included in the calculation before applying "time and a half" or "double time." *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858.

3. Meal and Rest Breaks

Failure to provide meal and/or rest breaks is the most common wage and hour allegation. Frequently, the error is not in preventing the breaks, but in failure to document that they were taken or waived.

Hourly employees are entitled to one half-hour break within the first five hours of the workday, completely free

of any work whatsoever. It is an unpaid break, and the employer should require the employee to clock out and clock back in. Because the half hour is a minimum, it is critically important that the employee not clock back in even a minute early, as the employer is not allowed to round the time to meet the half hour requirement. See, *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58.

Though the law requires that the employer make the break available and do nothing to discourage or prevent it (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004), if there is no documentation, the lack of proof will inure against the employer. Even if the employer decides to pay for the time taken in the break, it still must be documented. Otherwise, it may be presumed the break was not taken. The wage premium for missed (or short) meal breaks is an hour of regular pay, which must be paid anytime it occurs. Failure to pay the premium wage when incurred also subjects the employer to waiting time penalties for unpaid wages. *Naranjo v. Spectrum Security Services* (2022) 13 Cal.5th 93.

Meal break waivers, where available (i.e., working less than six hours, second break for work over 10 hours), should be in writing and maintained in the personnel file.

Rest breaks, a 10-minute release from all duty for each four hours worked, are paid breaks. As such, they are not clocked in or out. The prudent employer will have a clear, written policy that all breaks be taken and managers should monitor employees' breaks, reminding them to take them and arranging for coverage. Employee acknowledgment on the timecard that all breaks were made available and either taken or waived is also a good idea.

4. Paychecks

Hourly employees are required to be paid twice per month, and furnished a statement (frequently, the paystub) containing 10 different requirements (sometimes referred to as nine requirements, but sick time available is a 10th). Labor Code §226. Failure to furnish an accurate statement meeting all those requirements exposes the employer to a PAGA claim for penalties that can go as high as \$4,000 per employee.

While it is technically permissible to pay employees in cash, as long as all legally required taxes are paid, cash employees must also be furnished with the wage statement containing the same information that would be found on a paystub. Cash payments are not a way to avoid taxes or other deductions. They just make it more difficult to prove the employer paid what was required, so cash payment to employees should generally be avoided.

5. Misclassification

Misclassifying employees can be an expensive mistake. California law prefers that all workers are hourly, non-exempt employees, subject to payroll taxes and all wage and hour laws. The burden is therefore on the employer to demonstrate that workers are either exempt under the Wage Orders or independent contractors.

Every business in California is subject to the Industrial Welfare Commission Wage Orders. There are currently 17 different ones, organized by industry. They are similar to each other, but not identical, so the first step is always to determine what order applies to the business. (See, "Which IWC Order?" www.dir.ca.gov/dlse/whichiwcorderclassifications.pdf). All employers must follow the rules set forth in the Wage Orders to the letter. The only workers whose employment terms are not subject to the Wage Orders are those who are exempt under the applicable order itself and true independent contractors. NOTE: the law requires employers to post applicable wage orders, and failure to post these and other required information can result in a hefty fine.

Exempt employees are salaried, usually managerial employees (also includes some—but not all—professionals). In addition to qualifying as exempt employees under the particular duties test in the Order (for example, exercising independent judgment and spending the majority of work time on policy level decision-making under only general supervision), to be truly exempt, all such employees must be paid at least twice minimum wage. In 2023, that will be at least \$64,480 per year. A frequent error is not increasing compensation to those salaried, exempt employees who are being paid at that minimum level when minimum wage goes up.

Independent contractor status requires even greater scrutiny since the Supreme Court adopted a new test in 2018 (*Dynamex Operations W. v. Superior Court and Charles Lee, Real Party in Interest* (2018) 4 Cal.5th 903.). That test was then codified in 2020 as Labor Code §2750.3. Unless exempted by the statute, or qualifying under prior case law, workers who are doing the work that is the usual course of the hiring entity's business will be deemed to be employees, regardless of the arrangement between the worker and the business.

Misclassification creates considerable risk for a business. An employer of workers treated as exempt, who do not qualify for that designation, rarely has sufficient documentation of overtime hours or meal and rest breaks to defend against a claim. Workers who should have been paid overtime compensation can establish thousands of dollars of unpaid overtime claims over the three-year

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7 Hazards of California Employment Law continued

look-back. Independent contractors that the law considers are actually employees have similar claims, and in addition the employer is liable for unpaid payroll taxes on all compensation paid to the worker.

6. Expense Reimbursement

Most employers understand that they are required to pay for what their employees need to do their work. Labor Code §2802.2 Some may not realize, however, that an employees' use of their personal devices, equipment or resources must also be reimbursed. If the employee uses a personal cell phone to communicate with the business or its customers, the employer must reimburse at least a portion of that expense. *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137. With many employees now working remotely, that requirement can extend to Internet service, laptops, furniture, utilities and even, potentially, the loss of income from the dedicated space for work. (See, e.g., *Williams v. Amazon.com Services LLC et al.*, Action No. 3:22-cv-01892, Northern District of California). Employers must take proactive steps to determine and exercise control over costs their employees are incurring working at home and devise a reasonable measure of compensation for those expenses. Again, documentation and communication with employees are key to avoiding claims.

7. Workplace Conflict

Many employers understand the legal requirement to have policies against unlawful discrimination or harassment, and for employers with five or more employees to train employees to prevent abusive conduct. Labor Code section 12950.² Many employers, however, do not know what to do when someone complains. Employers must be prepared to act quickly and to seek out assistance to investigate and to respond to issues that arise. Prompt action and proper documentation not only make employees feel more secure and the workplace more harmonious; they also help protect the employer from liability.

Human Resources best practices suggest that no employee conflict, whether arising from unlawful conduct or not, should be ignored. California law requires that employers investigate misconduct and take steps to prevent discrimination or harassment. Government Code §12940(j)(1)(k). However, California law also provides some protection for employers who act promptly to conduct a thorough and impartial investigation into claims. If conducted properly, a workplace investigation may provide a complete defense to an action by the employee. *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal.4th

93; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256; *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal.App.4th 101.

The investigation may be conducted by qualified company employees (internal) or by experienced third parties (external). California law further requires, however, that external investigations can be conducted only by either a licensed private investigator or a licensed California attorney. Bus. & Prof. Code §§7520, et seq.

The Department of Fair Employment and Housing Workplace Harassment Guide provides a comprehensive description of the employer's duties and responsibilities in the event of an employee complaint: www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide-1.pdf.

Since 2009, the Association of Workplace Investigators (www.awi.org) has provided Guiding Principles and trained attorneys, human resources professionals and private investigators to conduct workplace investigations: https://www.awi.org/page/Guiding_Principles. AWI certificate holders may provide employers and their counsel with a measure of confidence that the workplace investigation conducted will withstand scrutiny.

Conclusion

While navigating the employment arena in California remains challenging, attention to these seven areas will go a long way to providing a legally compliant workplace.

Proactive attention to compliance issues and prompt action when conflict arises are the most effective strategies to avoid employment claims. Clear and lawful employer policies and employees who have a path to resolving concerns are the most reliable ways to maintain harmony in the California workplace, while also mitigating employer liability for employee claims. ■

Footnotes

¹ Labor Code §2699, et seq.

² Employers are required to reimburse workers for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."

Jane Heath, AWI-CH, has a solo law practice in Morro Bay. In addition to handling business and real property issues, Jane represents, counsels and trains employers in all aspects of employment law, including agency actions. She holds a certificate from the Association of Workplace Investigators and conducts workplace investigations for businesses, nonprofits and public agencies. She is the current president of the Labor & Employment section of the SLO Bar.

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Cal Poly Collegiate Mock Trial Looking for Judges and Attorneys to Participate January 28–29, 2023



by Todd A. Porter and the Mock Trial Board of Directors

When John W. Fricks, the godfather of Mock Trial in San Luis Obispo County suggests to you that you might write an article on Cal Poly collegiate Mock Trial, well then that's what you do.

I've had the privilege of being an instructor for Cal Poly's Political Science Department for the past few years. This 2022-23 season will be my third year as Cal Poly Mock Trial Club's ("CPMT") faculty advisor. In that capacity, I instruct POLS 295 (Foundations of Mock Trial) and POLS 395 (Advanced Mock Trial). I also assist the CPMT board in the organization of their home invitational mock trial tournament. This year CPMT will host its first annual SLO-Town Hoedown Tournament January 28–29, 2023. As part of the preparation, we are looking for local judges and attorneys to act as Presiding Judges and Scoring Attorneys for our tournament. If you would be interested in helping, please read on to learn more!

CPMT is a Cal Poly sanctioned, student-driven Instructionally Related Activity ("IRA"). Each year CPMT assembles a new Board of Directors that organizes the club's activity. Last year CPMT had about 80 students from a variety of majors participate and compete on four different mock trial teams at American Mock Trial Association's ("AMTA") Regional Tournament(s). Many of our CPMT members also coach local high school and middle school mock trial teams.

What is AMTA Mock Trial? AMTA is a national collegiate mock trial organization (<https://www.collegemocktrial.org/>). Last year, approximately 300 universities fielded roughly 650 teams to compete through AMTA. Last year, CPMT qualified the maximum of two teams to the Opening Round Championship Series (ORCS) and sent one team to the National Championship Tournament.

Our 2022-23 season began August 15, 2022, when AMTA released their "closed universe" set of materials for this year's competition. AMTA case materials alternate year-to-year from criminal to civil. Last year in a felony arson case a first responder lost their life. This year we have a wrongful death case, *Felder vs. KC Air LLC*.

Two lawyers go up in a single-engine plane in bad weather on the 4th of July...what could go wrong?

AMTA Mock Trial is similar to but different from high school mock trial. AMTA Mock Trial is a simulation of a jury trial where students portray attorneys and witnesses. The trial takes place in the fictional jurisdiction of Midlands, which has its own case law, statutes, rules of evidence (derived from Federal Rules of Evidence), special institutions, stipulations and pre-trial rulings from the Court.

Within the "closed universe" of materials, there are a wide variety of different cases to be tried. Each side gets to select three witnesses to present their case (six total witnesses). But there are

more than six witnesses to choose from in the AMTA materials! There is a witness selection order. Some of the witnesses are constrained and can only be called by one side. Other witnesses are up for grabs in the pre-trial selection process. Thus, there is a good deal of strategy in witness selection. As a result, presiding judges and scoring attorneys will hear a wide variety of cases and theories within those cases in the same tournament.

AMTA Mock Trial is also different in that AMTA promotes the use of theater with respect to their lay witnesses. This results in a good deal of humor and fun! AMTA interjects a great deal of science into each year's problem. Last year it was the science of arson; this year it's the science of aviation. The technical science comes in through the direct and cross-examination of expert witnesses.

There are effectively two seasons in AMTA Mock Trial. The first half (Fall Quarter) is the invitational season where universities host tournaments for other schools. In this first half of the season, CPMT will have their more experienced members operate as team captains. As a result, the talent and experience are spread across the entire program. Our structure encourages the art and practice of student leadership; experienced CPMT members work with and teach less-experienced team members to create amazingly dynamic teams.

Then we have a mid-season pause. For the second half of the season (Winter Quarter), AMTA will modify the materials considering analytics from the invitational season. Facts change, witness testimony changes and there may be new witnesses added; it's **Felder vs. KC Air LLC, the 2.0 version!**

With this pause, all universities will "stack" their teams starting with an "A" team. Last year, CPMT fielded an A, B, C and D team. Thus, new teams are formed, now working with a highly modified set of materials. All the designated teams will have the opportunity to compete at Regionals. Nationally, approximately 30 percent of teams will advance from Regionals to ORCS and from there 7 percent to the National Tournament.

CPMT will host its SLO-Town Hoedown the weekend of January 28–29, 2023. To put on the best tournament possible, CPMT needs local judges and attorneys to act as presiding judges and scoring attorneys. The tournament will take place on Cal Poly's campus! Volunteers will preside over and/or score at least one of the four trials that will take place on Saturday and Sunday of that weekend.

If you are interested in participating, please contact CPMT Vice President Jessica Smith at cpmocktrial@gmail.com for more information.

Thank you in advance for your support of CPMT! ■

Why I Love Yellowstone: Preserving the Family Farm Through Proper Succession Planning

by Krista Sabin

Have you ever seen the television series Yellowstone? Admittedly, it is a favorite of mine. While it is fraught with harrowing scenes of physical violence and some “indelicate” language, I focus on Kevin Costner’s character, John Dutton, through my own lens as an estate and succession planning attorney. You see, Dutton’s deep and overriding desire—one that many of us feel—is to protect his land, his family and his legacy.

As I was raised in a cattle ranching family, I can attest that Yellowstone is not a completely accurate portrayal of modern-day ranching and is an exaggeration of the struggles most ranching families face. There are, however, elements of the storyline that resonate with those in agriculture who realize constant pressure and challenges, including familial challenges, to keep their farm and ranch viable for future generations.

Like John Dutton, many of the challenges faced by American farmers and ranchers are not within their control. Agriculture is subject to the vagaries of weather, pests, drought, labor shortages, market conditions, government regulations and the encroachment of urban sprawl. With all the other challenges facing production agriculture, generational transfer and succession planning are not often highlighted as challenges, however, it truly is at the core of the economic stability, viability and continuity of agriculture.

According to the USDA’s National Institute of Food and Agriculture, an estimated 70 percent of U.S. farmland will change hands in the next 20 years, and most family farm operations do not have an adequate succession plan. Without a plan, the operation is likely to go out of business, be absorbed into a larger farming conglomerate or be converted to non-farm uses. The USDA 2012 Census of Agriculture showed that only 1 percent (!) of family-owned farms and ranches are transferred to a third generation. The average age of the U.S. farmer continues to increase and is currently 58 years old. The fastest growing group of agricultural operators is over 65. Thirty percent of all family-owned farms do not have a successor in place and, despite all of the uncontrollable challenges farmers and ranchers face, 60 percent of agricultural operators believe that inadequate succession planning is the biggest threat facing their operation.

Why is this significant? It is critical for many reasons. Proper estate and succession planning is well within

their control, however it is often such a complex web of economic, legal, family and social decisions that many families avoid planning because of the conflicts, or potential conflicts, that arise because of different goals, values, expectations and/or perceptions of fairness. To be sure, farmers and ranchers are known to resist change and have difficulty transferring control and management to the next generation. The words “retirement” and “disability” are not easily accepted.

Agricultural operations are often land-rich and cash-poor, which results in the inability to sustain future and/or multi generations on the farm and/or leaves the patriarch with inadequate retirement funds. In addition, high land values often exceed federal estate tax exemption limits, which results in forced sales or division of the land. Without proper succession planning, many farms and ranches are taken out of production each year. American farmers feed the world and produce its safest and most abundant food supply. Fewer farms and ranches both compromise our ability to feed our nation and compromises our water and air quality, environmental protections, climate change and land conservation.

As mentioned, I grew up in a ranching family and witnessed firsthand the challenges the ranching community faced. It was then that I knew my place in this world, my passion, would be to advocate and protect agriculture and the families who work tirelessly every single day to feed us and care for our lands. When I discovered that proper estate and succession planning is the most effective way to protect production agriculture, family farms and legacies, my journey to become an estate and succession planning attorney began. Today, as suggested from a line in the country music song “Buy Dirt” by Jordan Davis, “I do what I love and call it work.” There is a real sense of purpose and pride to sit at a kitchen table surrounded by a family eager to create a plan to transfer knowledge, management and ownership to the next generation.

So where do we start? I have learned that there is no other group of people who want to perpetuate a legacy more than farmers and ranchers. I also have learned they are fiercely independent and private and must fully trust me with their true, innermost thoughts if we are going to be successful in creating a plan for them. Accordingly, I like to begin with a clear understanding of their operation. I always start with “describe your operation in

detail now and where do you want it be?” We walk through questions like these. What is the current ownership structure? Who are the key players, including key non-family employees? What skills or knowledge do they bring? What are their ages? Who is dependent on the income? Who are the decision makers? What are the operation’s assets and liabilities? In discussing their future operational hopes, we consider short-term and long-term goals. Who will succeed the current operator? Do they currently have the knowledge to do so? Does the operation need to grow, be divided or diversify to sustain multiple generations or multiple families? Will the departing generation continue to rely on farm income or are there other retirement assets? When will the transition occur? Does the next generation bring the necessary value, knowledge and skills to the operation? If not, can they be taught, or what other value do they bring?

This information is usually gathered over the course of several meetings and even more family meetings where I may not be present. For some, they have called me before having an open dialogue with the next generation. If that is the case, one of the first items on the agenda is to have them (with or without me) speak first with the next generation to gain an understanding of their interest in returning to the farm. This can be a difficult conversation, and succeeding generations may be reluctant to speak to their true desires to family (though they may do so with me). The operating generation is often very surprised by what they learn when the right questions are asked.

I provide them with a short of list questions that generally result in a positive and often inspiring conversation. Some questions may seem simple. What does the farm mean to you? You can extract a lot about how a child perceives their family heritage by asking, “What does it mean to be a [insert last name]?” or “How has growing up on the ranch shaped your perspective on life?” Some questions may be more difficult. For instance, “What does legacy mean to you?” Legacy is a powerful word and can mean different things to different people. It can be seen as an opportunity or an obligation. It can be inspiring or daunting. Another perhaps difficult question is, “How do you feel about sharing ownership with a sibling?” The answer to the simple and more difficult questions truly help to shape the succession plan, and it is important to take as much time as necessary during this phase of the planning process to fully understand the familial goals, values and dynamics. Succession planning is only successful if all parties are true to themselves

and their family members and, at least generally, have a common goal and vision.

Once there is a clear objective, it is time to create the plan and thereafter implement the succession plan. Of course, the plan must then be integrated into the overall estate plan. While a family should be congratulated on getting to that point, the work does not stop there. After implementation, I recommend scheduling regular family



via public domain

meetings to review the plan, finances, goals, relationships and expectations. In a recent episode of Yellowstone, as tensions rose, the question asked was, “Does the family recognize your value?” Without regular communication and review of the plan, we may not recognize issues and/or what may need to be adjusted. The earlier it is discovered that something is not working or that relationships are strained, the quicker we can readjust the plan and continue down the path of a smooth and successful transition.

John Dutton’s succession plan may not yet be in the implementation phase, but for a succession planning attorney with a love for agriculture and passion for helping families perpetuate their legacy, there is entertainment value in watching him go through that process as the story unfolds. Like many of the families I work with, Yellowstone has a protagonist, who is making key decisions that affect the plot and propel the story forward, and who is facing the most significant obstacles, coupled with a host of other characters trying to prove their value to the story.

Maybe someday, the Yellowstone story line will include a succession planning attorney and I’ll get cast in that role—a woman can dream! Until then, I am pleased to work with SLO County agricultural families to ensure their legacy continues, and their land and families are protected. ■

Transition Planning for the Family Business

by Curtis Abram

Lawyers who advise family-owned businesses have been getting a lot of calls lately about transition planning, i.e., the process by which management and ownership of a family business are transferred to the children of the people who started it or other, next-generation, family members. This article will highlight and discuss a few of the key issues that usually arise in connection with such planning and touch upon the business law, estate planning and tax implications of a transition plan.

The call for help generally comes when the parents who started the business want to retire and need advice on the arrangements that should be made with the family members who will own and run the business. Counseling on such matters should begin with interviewing the parents and identifying their goals for the transition. Goal number one is typically getting enough cash flow from continued business operations to support their retirement, which may be important because as small business owners they may not have substantial 401(k) plans or other corporate retirement plans.

Another goal of the transition plan will be to transfer ownership of the business in a way that provides an incentive for the next generation to grow the business, both for their own benefit and to generate cash flow for the parents.

A third goal typically is to integrate the transition plan with the parents' estate planning in a way that is fair to family members who will not be involved in the business. This may be challenging in cases where the business accounts for most of the parents' net worth and where some, but not all, of the children will be involved in future business operations.

Planning the transition will also raise important tax issues, because payments to the parents from the business after the transition will have different tax consequences depending on how they are structured.

Legal Organization of the Business

One matter that needs to be addressed early is the legal organization of the business—is it a sole proprietorship, an LLC or a corporation, and what is the best structure to facilitate transition planning and get the best tax results for future operations?

Under current tax law, the best structure is usually a corporation that elects to be taxed under subchapter S of the Internal Revenue Code, so that there are no

corporate-level Federal income taxes and the earnings are taxed directly to the owners.

The corporate structure allows partial ownership transfers, separation of voting control and equity interests if desired,¹ and is more tax efficient than the proprietorship or LLC options because earnings above reasonable salaries are not subject to self-employment tax.² Note that a business organized as an LLC can usually *elect* to be taxed as an S corporation for future years, even if it is currently taxed as a partnership or as a disregarded entity (sole proprietorship).³

Balancing Financial Interests with Family Relationships

The transfer of ownership of the business typically utilizes a combination of financial tools to generate the desired cash flow to the seller-parents while retaining the desired amount of control in the business (if any). These tools typically include:

1. Installment Note(s);
2. Ongoing Consulting/Employment Agreement(s);
3. Real Property Lease(s); and
4. Distributions from retained equity interest.

The most common step is for the seller-parents to sell some or all of the shares/membership interests of the company to the children on an installment note payable over a substantial period of time. The note will be secured by a security agreement, under which payment of the purchase price is secured by a pledge of the shares/membership interests that gives the seller-parents the right to reclaim the business if the children fail to make the note payments for any reason. The security agreement may also define events of default to include failure to make salary, lease or other payments that are required under the transition plan.

The purchase price of the shares needs to be set at some reasonable estimate of fair market value to avoid having the transfer treated as a gift.⁴ Since formal business appraisals tend to be expensive and time-consuming, an informal estimate prepared by an accountant or a business broker is often used. Further, businesses may qualify for valuation discounts attributed to minority interest, lack of control, and/or lack of marketability.

Another element of the plan usually is an agreement to pay the seller-parents consulting fees or salaries on some basis—particularly if they continue to be active in the business. Such payments are tax deductible by the business and are both income and employment taxable to

the parents. Despite this, such payments are often needed to give the parents an adequate retirement income.

If the business is conducted using family-owned real estate or equipment, another source of revenue for the parent-sellers may be lease payments. While lease payments should not exceed the fair rental value of the leased real estate or equipment, they provide better tax treatment than salaries because they are deductible by the business and are subject only to income (not employment) taxes when received by the parents.

One further element of some transition plans may involve having the parents retain some of the equity of the business. This gives the parents additional cash flow in the form of profit distributions, and it may be useful for other reasons, e.g., to retain some level of control over key business decisions and to give the parents the right to repurchase the children's stock in certain events such as death, divorce, bankruptcy, etc.⁵

Estate Planning Considerations

The other important matter that a transition plan should cover is the way in which any business interests retained by the parents will be distributed at the time of their deaths.

As a general rule, the estate plan should provide that any equity interests in the business be allocated only to the shares of the family members who are going to be active in the business. Distributing equity interests in a business to family members who are not involved in the management is usually a recipe for trouble due to substantial and continuing conflicts of interest that exist between owners and management—decisions on salary levels and capital improvement budgets are two examples and there are many others. If non-active family members need to have some interests to make the estate planning work, these should be set up either as debt or as fixed-payment obligations, e.g., leases or installment notes.

However, this can pose problems where the value of the retained interests is significant and where the parents want to provide for distribution of their estates to their children in equal shares.

A simple approach to this problem is to provide a specific bequest of the business interests to the active family members and provide that only the residue of the estate is to be distributed in equal shares. Another alternative is to require the active family members to purchase all, or some portion, of the retained interests from the estate, usually the portion of those interests that exceeds their respective estate shares.

A third approach to balancing estate shares involves using special rules to value the parents' retained interests

in a way that excludes value added to those interests through the efforts of the active family members.

For example, the estate plan may provide that the business interests are to be valued for distribution purposes at whatever the value was at the time the children took over the management, adjusted for changes in the cost of living that have occurred since that time. The family members running the business may feel that such provisions are needed to be fair to them, since they are only getting value that they generated in the first place.

While the parents may be reluctant to discuss their estate planning with family for obvious reasons, the fairness issues raised by transition planning may, and in fact usually do warrant a full and frank discussion of the plan. This discussion is best done with the whole family, including particularly the family members who are not active in the business. While absolute fairness is never possible, it is important the entire family understands the thought process involved in designing the plan.

Conclusion

There is currently a substantial demand for transition planning, which arises from the desire of small business owners to retire and transfer ownership of the business to other family members.

The key goals of most transition plans are (1) to provide retirement income for the parents, (2) to transfer ownership of the business to the family members who will manage the business after the parents' retirement, and (3) to integrate the transition planning with the parents' estate planning so that the final disposition of their interests is fair to all concerned. ■

Footnotes

¹ Although an S corporation may only have one class of stock, differences in voting rights are not considered to create a different class of stock—so long as all outstanding shares confer identical rights of distribution and liquidation proceeds. I.R.C. §§1361(b)(1)(D), 1361(c)(4), and Reg. §1.1361-1(l)(1).

² Rev. Rul. 59-221, 1959-1 CB 225; *Ding v. Comm'r* (9th Cir. 1999) 200 F3d 587, affirming Tax Court, 74 TCM 708

³ Treas. Reg. §301.7701-3. The election is made on Form 8832 and, once made, can be changed only every five years.

⁴ While gifts are generally not considered income for tax purposes, gifts to employees—including employee-children—are considered taxable income. See I.R.C. § 102(c).

⁵ These items are usually documented in a shareholders' agreement which may, for example, give all parties purchase options on the shares of other parties in certain events (death, bankruptcy, insolvency, etc.) and which may require a supermajority vote on specified key decisions.

Curtis Abrams is a practicing attorney at Toews Law Group, Inc.

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The *Bar Bulletin* is published six times per year. The deadlines for accepting articles, photographs/art, advertisements and ad payments follow.

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• January–February	11/25
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• May–June	3/25
• July–August	5/25
• September–October	7/25
• November–December	9/25

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