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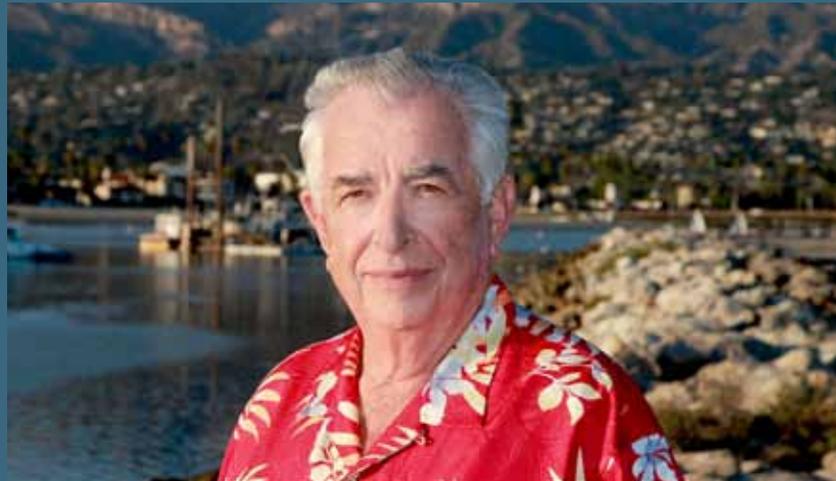


High School Mock Trial – 2016 County Competition



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Mission Statement

Santa Barbara County Bar Association

The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.

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About the Cover

Judge Brian Hill presides over the trial in *People vs. Hayes*.



*Dos Pueblos varsity team
poses with Judge Brian Hill.
The team won the county
competition and moved on to
compete at the State level.*

*Student attorneys ready
to argue their case.*



Harry Loberg

BY JUDGE JAMES E. HERMAN



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In 1980, I arrived in Santa Barbara County as a Deputy Public Defender, an obnoxious one at that. I am still making amends. No matter how hard I tried to embroil Deputy District Attorney Harry Loberg in my shenanigans, he would just give me that 1,000 watt grin of his and go on about the People's business. No doubt he was a gentleman of the old school. He and I became friends over our mutual interests in sailing and bicycling. (He was also an accomplished pianist.) He was a regular at Wet Wednesdays down at the harbor. During one of those

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L-R SBCBA Past Presidents: Naomi Dewey (2015 President), Scott Campbell, William Brace, Catherine Swysen, Joe Howell, Tom Hinshaw, Donna Lewis, Michael Colton (back), Jamie Raney (front), Sue McCollum (back), Betty L. Jeppesen, Tim Metzinger, Brian Gough, Melissa Fassett, Hon. Jim Herman, Gerald Parent, Don Boden, Hon. Tom Anderle, Hon. Harry Loberg (Courtesy of the June, 2015 edition of Santa Barbara Lawyer)

Remembering Judge Harry J. Loberg

BY JUDGE FRANK J. OCHOA, RETIRED

Judge Harry Johnson Loberg, who retired from the Santa Barbara Superior Court in May 2003 after 20 years as a bench officer, passed away on March 3, 2016 at the age of 80. He had previously served on the Santa Barbara Municipal Court as a Judge and a Court Commissioner. He first assumed judicial duties on March 28, 1983. One of my first acts as a Judge was to be a part of the unanimous bench that selected Harry for the Municipal Court's Commissioner position. It remains among the most important acts I was ever part of as a judicial officer. After four years as a Commissioner, Loberg was appointed as a judge by Governor George Deukmejian, and was subsequently elected to succeeding terms of office and elevated to the Superior Court at the time of court consolidation in 1998. Judge Loberg had a lengthy and auspicious career as a public servant in the judicial branch of government.

Judge Loberg was born in Ithaca, New York, the son of a Norwegian immigrant who became a Cornell University Professor of Mechanical Engineering. Loberg was raised in Jacksonville, a small town near the campus, which had a population of 200. He graduated from Cornell where he excelled in academics and was a member of the university's lacrosse team. He moved to Santa Barbara in 1960, driving his family across the country in his Volkswagen Bug. He worked for a time in Personnel at the University of California at Santa Barbara. He decided to go to law school and was admitted to the UCLA School of Law from which he graduated in 1966. After passing the bar exam he worked in Santa Barbara as a sole practitioner and was then in a shared office practice with some well known, local legal community names: Brelsford, McMahon (Tim), Butcher & Loberg, from 1974-76. Judge Loberg also served as a Hearing Officer for the Santa Barbara Housing Authority resolving landlord/tenant disputes.

In 1976 he became a Deputy DA for the Santa Barbara County District Attorney's Office. He was known as an even-handed, fair, and considerate prosecutor by all involved in the criminal courts, including the defense bar and judicial officers. In 1974 he served as the President of the

Barristers' Club of Santa Barbara, an organization for young lawyers. He was also President of the Santa Barbara County Bar Association in 1982, perhaps the only attorney to hold that post while serving as a Deputy D.A. He was awarded the Santa Barbara County Bar Association's "Judicial Service Award" in 1992 for his leadership in organizing trial court coordination in the County and restructuring the Municipal Court's criminal case calendaring system.

Those who had the good fortune to know Harry Loberg well can still envision being the recipient of his sparkling, blue-eyed, piercing, direct-connect stare and accompanying smile while sharing a problem with Harry. He was among the best of listeners one could ever encounter. I was fortunate to occupy adjoining chambers with Harry for a number of years. We were both criminal trial court judges and would often spend time commiserating about difficult cases. We also related about life on the bench, as well as prior personal and professional experiences. His vast and varied background enabled him to "read between the lines" when it came to reading police reports or expert opinion letters. His wisdom was ever helpful in regard to advising about conducting the next stage of a heated courtroom battle in a complex criminal trial proceeding. I relied greatly upon his sage advice and thoughtful perspective on innumerable occasions. All court staff admired, respected, and cared deeply about Harry Loberg, because he always exhibited those qualities in his dealings with them.

That caring remained until the end. The day before he passed, Harry's wife, Suzi, made calls because Harry had been repeatedly asking about his former courtroom bailiffs. He wanted to contact his courtroom team members to reaffirm those decades old relationships. Investigative wheels were set in motion by several of his friends and we contacted Sheriff's Deputy Paul Sierra, who had been Harry's bailiff for 14 years. I don't know if the two of them were able to speak directly, but the fact that Harry was making such an effort on the final day of his life exemplifies the depth of caring he maintained for others.

Harry was one of four brothers. The oldest is Paul (wife Lynda), then Harry, next is Peter (predeceased, wife Jeanne) and Eric (wife Mary). Collectively, he leaves his two daughters, Jan (husband Howard) and Michele (husband Jay), four grandchildren, six nieces and nephews, five great nieces and nephews, and most recently, his first great granddaughter.

Again, on the personal front, Judge Loberg would expressively recount the details of lacrosse matches he played against Ivy League, or other major universities. One, in particular, was a match against Syracuse University. He

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Farewell and Welcome Message

BY ANGELA ROACH

Dear members,

I never anticipated writing a message of this kind, but I will be passing the Presidential reins to Vice President James Griffith earlier than expected. I have been offered and accepted a position in Silicon Valley and sadly will be leaving Santa Barbara. It is a wonderful opportunity that I could not pass up. It was an honor and privilege to serve as your SBCBA President.

The organization will be in good hands moving forward. Jim Griffith has served on the Board for many years and is ready to step in as President. And, the SBCBA is strong and

stable. For many years, the SBCBA has worked hard to establish strong processes and financial stability. We have hard working Committees and Sections, a thriving Magazine, diverse MCLE offerings, well-attended and fun events, a strong Fee Arbitration service, a busy Lawyer Referral Service, strong Bench & Bar relations and Legislative Liaison activities, and new outreach efforts to



Angela D. Roach

in-house counsel and newer lawyers. Also, we continue to benefit from an exceptional Executive Director, Lida Sideris.

Wonderful things lie ahead for the SBCBA! I wish the SBCBA and its members the very best.

With many thanks,
Angela D. Roach



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Objection Your Honor – Creation Of A Material Fact!

By JAMES M. SWEENEY

On February 20th and 27th, courtrooms in the Anacapa and Figueroa Divisions were alive with rare Saturday trials. The Santa Barbara County High School Mock Trial competition spanned these two weekends, featuring teams from Cabrillo, Carpinteria, Dos Pueblos, Pioneer Valley, San Marcos, Santa Barbara and Santa Ynez Valley Union High Schools.

The Mock Trial Program is organized through the Constitutional Rights Foundation, which states that “36 counties in California [are] currently participating in the competition. The program was created to help students acquire a working knowledge of our judicial system, and develop analytical abilities and communication skills. The winners of the county competitions go on to the State Finals in March. In May, the winner of the state competition represents California at the annual National High School Mock Trial Competition, involving teams from 54 states and territories.”

Roles for the students on each team include an attorney who argues a pre-trial motion, trial counsel who give opening statements and closing arguments and conduct witness examinations, a bailiff or clerk, and witnesses.

The teams present a criminal trial. This year, the fact pattern involved a group of college student-athletes on the bad side of a campus security guard. The track team at this college hosted frequent parties, which sometimes got out of control. Campus security was often called, and one guard in particular came down hard on the revelers. Incidents of excessive physical force were reported.

Then one night, a confrontation between the guard and the students turned deadly. After responding to a report of a series of car break-ins, the guard reportedly trailed a suspect back to the house where the track team members lived. In detaining the suspect, the guard pinned the student to the ground and used a baton to establish a choke hold.

The defendant was nearby. She recognized the guard from the prior violent incidents, and claimed that she feared for her friend’s life. The defendant testified that she thought the guard was choking her friend to death. She therefore



Students toured Department 3’s Chambers following their trial. Tyrone Maho and Will Beall served as attorney-coaches.

grabbed the closest defensive weapon at hand, which happened to be a baseball bat lying on the house’s porch. She rushed up and took one swing, connecting with the guard’s head and putting him into a coma. Whether due to an eggshell skull, or perhaps a well-placed blow, the guard died in the hospital a few days later.

Before the guard died, however, the defendant was arrested and interrogated throughout the night and into the early morning at the police station. Although initially Mirandized, the defendant consented to the interrogation. After more than 15 hours of questioning, without sleep or any substantial food, the student wore down. In an emotional outburst, she asserted that the guard had gotten what he deserved.

The prosecution wanted to use this statement to show that the defendant did not genuinely believe her friend was in mortal danger when she swung the bat. Instead, the prosecution argued that the defendant saw an opportunity for pay back, because of the guard’s prior violence toward the track team. The trial turned on the defendant’s state of mind. Did she strike the guard due to a reasonable belief that a dangerous and unstable security officer was going too far and was likely to kill a student, or was the defendant seeking revenge because of what she perceived as the guard’s prior harassment?

Each round of the competition began with a pre-trial motion to suppress the defendant’s statement that the guard had gotten what he deserved. The motion was based on the Fifth Amendment, with the defense arguing that the circumstances of the police interrogation were too coercive to pass Constitutional muster. Each side reviewed the applicable case law, and compared and contrasted the facts

from the published opinions with the facts of their case. Each pre-trial attorney gave prepared remarks, and also responded to sometimes extensive questioning from the bench. If the motion was granted, no further mention of the defendant's statement could be made during the course of the trial.

The case was tried to a jury. Parents, coaches and whoever else happened to be in the courtroom were recruited to fill the jury box. After opening statements, each side called four witnesses. During the examinations, the student-attorneys had opportunities to distinguish themselves through rapport with their own witnesses, pointed questions during cross-examination, and considered arguments for and against evidentiary objections. The teams were well-prepared for these exchanges, and the highest scores were earned when students were able to spontaneously offer reasoned, responsive arguments.

All of the teams had invested many hours in preparation and practice. Their hard work was rewarded in learning about the law, the court system, and the process of constructing and presenting a case through a live trial.

Every team participated in two rounds on February 20th. The Santa Barbara H.S. Varsity Team, the San Marcos H.S. Team, the Dos Pueblos H.S. Varsity Team, and the Dos Pueblos H.S. Junior Varsity Team then moved on to a semi-final round on the morning of the 27th. San Marcos and the Dos Pueblos Varsity Team advanced to a final round, and Dos Pueblos won that round to earn the opportunity to represent Santa Barbara County at the state competition.

Many thanks to the students, their teachers and coaches, and the volunteers who helped run the County competition. The Mock Trial team members all learned valuable skills, and perhaps gained inspiration for their future educational and professional success. ■

In Memoriam

Herman, *continued from page 6*

early 80s winters, El Nino storms triggered landslides in Big Sur shutting down a good portion of Highway 1 to through traffic. Harry and some buddies took advantage of the situation to take a bike ride, largely unhindered by traffic, from Monterey to San Luis Obispo. Part of Harry's skillset was the ability to build a relationship through learning about the other person's interests. He made it just so hard to be adversarial. And then he went on the bench which made it even harder.

His statistics are straight forward. A native of Ithaca, New York, Judge Loberg graduated from Cornell University in 1959 and moved to Santa Barbara in 1960. He received his J.D. degree from U.C.L.A. in 1966 and returned to Santa Barbara to begin his law practice.

From 1976 to 1983 he served as a Deputy District Attorney, after which he became the Municipal Court Commissioner. He was appointed to the Municipal Court bench by Governor Deukmejian in 1987 and he was elevated to the Superior Court in August 1998.

He was a past President (1982) of the Santa Barbara County Bar Association and also served as President of the Barristers Club. He was well loved and respected by the bar and was a recipient of the County Bar's "Judicial Service Award."

About Judge Loberg, his bench colleague Judge Anderson wrote:

"He went to college on the 8 year plan – he took off a

couple of times to play in a band. He used to raise rabbits as a kid, for dinner. I always thought of him as a benign Norwegian Bhudda, with a shiny bald dome, a twinkle in his eye, impish smile and hands crossed atop that ample belly. He enjoyed life."

He will be missed by all and is a special loss to those of us who have known him as a colleague. I last saw him at the meeting of past presidents of the Santa Barbara County Bar Association pictured above. Little did I know. If you have stories about Judge Loberg, please let me know. He is survived by his wife Susan and his daughters Jan, a lawyer in Ojai, and Michelle. With Angela Braun's help, we sent a spray of flowers to the family with the following message:

"On behalf of the judges and staff of the Santa Barbara Superior Court, I want to express our condolences to the Loberg family. We at the court who were colleagues and friends of Judge Loberg have lost a lion of the bar and pillar of the bench. Always ready with a kind word and a smile, he will be missed by all and will not be forgotten." ■

Passing of the Bar—Lord Alfred Tennyson

Twilight and evening bell,
And after that the dark!
And may there be no sadness of farewell,
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For though from out our bourne of Time and Place
The flood may bear me far,
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Offshore Fracking and Polluted Storm Water: Two Local Settlements with National Implications

BY MAGGIE HALL

In my first year at the Environmental Defense Center (“EDC”), I jumped into a flurry of lawsuits against federal agencies. Just over one year later, we have reached several major settlements. Two cases in particular—one addressing fracking offshore California, and the other improving storm water regulation at the national level—reach well beyond our Santa Barbara region. These settlements demonstrate the power of citizen enforcement in ensuring that agencies comply with environmental laws when it comes to practices and pollution sources that threaten the environment.

A “Hard Look” at Offshore Fracking

The first settlement exposes offshore fracking and acidizing to environmental review and public transparency, for the first time.

In 2011, EDC’s Senior Attorney, Brian Segee, caught wind of the fact that a company might be fracking from an offshore oil platform in the Santa Barbara Channel. That launched an investigation under the Freedom of Information Act (“FOIA”), in which EDC requested oil drilling permits from the two federal agencies that oversee offshore oil and gas development, the Bureau of Safety and Environmental Enforcement (“BSEE”) and the Bureau of Ocean Energy Management (“BOEM”), within the Department of the Interior. The records we received revealed that fracking and acidizing had been occurring off the California coast with little or no environmental review, let alone any public process.¹ That gave rise to our lawsuit under the National Environmental Policy Act (“NEPA”).

Legal Framework: OCSLA and NEPA

Under the Outer Continental Shelf Lands Act (“OCSLA”), offshore oil and gas exploration and development involves four stages: 1) development of a five-year leasing program²; 2) lease sales³; 3) exploration⁴; and 4) development and production⁵. The final stage of this process involves both

1) approval of a development and production plan (“DPP”) and 2) issuance of drilling permits or modification to drilling permits (“APDs” or “APMs”) that are consistent with the DPP.⁶ Each stage is subject to NEPA.⁷

Under NEPA, federal agencies must ensure that “environmental information is available to public officials and citizens before decisions are made and before actions are taken.”⁸ To that end, public participation in the environmental review process is essential.⁹ The level of NEPA review depends on the action. NEPA requires the preparation of an Environmental Impact Statement (“EIS”) for major federal actions significantly affecting the quality of the human environment; this is the most robust form of NEPA documentation.¹⁰ If an agency is unsure whether this standard is met, it must prepare an Environmental Assessment (“EA”) to determine whether a project may have significant impacts.¹¹

Categorical exclusions are an exception to the requirement to prepare an EIS or EA because certain categories of activities have already been determined to be insignificant through agency rulemaking.¹² However, even if a proposed action falls within a previously-defined category, an agency cannot rely on a categorical exclusion if “extraordinary circumstances” may be present.¹³ These include, for example, whether an action may have “[h]ighly controversial environmental effects” or “[h]ighly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.”¹⁴

Settlement in EDC v. BSEE

The drilling permits that EDC uncovered explicitly allowed fracking and acidizing in the Santa Barbara Channel. However, the most recent DPPs and environmental review documents underlying those permits were severely outdated; they were prepared in the 1970s and 1980s.¹⁵ The only accompanying NEPA documents were check-list type “Categorical Exclusion Reviews.”¹⁶

Categorical exclusions are only appropriate for actions that truly have no significant impacts. However, offshore fracking is a far cry from that. It is the perfect example of “extraordinary,” given the uncertain nature of risks. Offshore fracking raises a lot of the same concerns that the



Maggie Hall

practice does onshore, but adds the new risks associated with the context of the marine environment. Threats include impacts to water quality, air quality, climate change, threatened and endangered species, and more. Yet, BSEE and BOEM never analyzed these impacts. Accordingly, EDC filed a lawsuit in December 2014 challenging the federal agencies' failure to conduct environmental review with respect to the approval of fifty-one specific drilling permits.

In January 2016, we reached a settlement agreement that requires the agencies to analyze the potential impacts of offshore fracking and acidizing, and halts these practices in the meantime.¹⁷ The settlement also establishes an online system where drilling permits will be posted for public review.

The process is well underway, as the agencies released the draft environmental review document on February 22, 2016.¹⁸ EDC is participating in this process to ensure impacts are properly reviewed and disclosed. And just a small spoiler alert: we have already found major flaws, such as the conclusion that allowing offshore fracking is actually better for the environment than not. While our settlement marked a major victory, we certainly have work ahead to ensure the agencies take the true "hard look" at impacts that NEPA requires.

Regulating Runoff

EDC also reached a recent settlement with the Environmental Protection Agency ("EPA") requiring it to update its storm water regulations, and address an important source of water pollution—forest road runoff.

Background: The Clean Water Act and EDC's 2003 Case

In 1999, EPA released a "Phase II" storm water rule, the second phase of Clean Water Act-required regulations addressing storm water. Storm water "is one of the most significant sources of water pollution in the nation, at times comparable to, if not greater than, contamination from industrial and sewage sources."¹⁹ In urban areas, rain washes pollution from city streets, parking lots, roofs, and other sources into our waterways. Throughout forested lands, storm water on dirt and gravel roads washes sediment into waterways, harming fish and contaminating drinking water supplies.

Under Phase I, Congress required EPA to address specific sources of storm water including industrial sources and large municipalities.²⁰ Under Phase II, EPA was tasked with identifying and regulating all other problematic storm water sources.²¹ The agency's Phase II rule set forth requirements for small municipalities.²² However, it lacked important



EPA is now updating its storm water run-off rules.

public participation requirements, and entirely failed to mention a significant source of pollution: forest roads.²³

EDC and our partner, Natural Resources Defense Council ("NRDC"), filed a lawsuit challenging the rule in the Ninth Circuit, as the Clean Water Act provides for judicial review of certain rules directly in the court of appeals.²⁴ The Court held, in *Environmental Defense Center v. EPA*, that the Phase II Rule improperly allowed municipalities to essentially self-regulate and failed to provide for adequate public participation in the permitting process.²⁵ Second, the Court held that despite evidence demonstrating water quality impacts of forest roads, EPA failed to explain why that source of pollution should not be regulated.²⁶ The Court remanded the rule back to EPA to correct these problems.²⁷ That was in 2003.

Settlement in EDC v. EPA

More than a decade later, EPA had failed to comply with the Court's order, and storm water has continued to be a major source of pollution across the country. Locally, we are especially concerned about forest roads throughout the Los Padres National Forest, many of which cross creeks and are in a state of disrepair, discharging sediment that harms species like the endangered southern California steelhead. In fact, one road of concern is used to access oil fields in the Sespe, where additional truck traffic may exacerbate erosion and sedimentation.

In 2014, EDC and NRDC filed a petition for writ of man-

damus under the All Writs Act²⁸ in the Ninth Circuit, seeking an order compelling the agency to take action on the Court's 2003 order. Late last year we reached a settlement with the agency that holds it to specific deadlines for addressing both issues.²⁹ The new court order requires EPA to update its storm water permitting rules with a proposed rule by Dec. 17, 2015, and a final rule by Nov. 17, 2016. The order also required EPA to decide by May 2016 whether the Clean Water Act requires the regulation of forest road runoff as necessary to protect water quality.³⁰

As in the offshore fracking case, the agency's process is well underway. EPA released a draft regulation regarding urban runoff³¹ and solicited comments on the need to



Fracking permits for offshore platforms are now under National Environmental Policy Act review.



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regulate forest road runoff.³² EDC is participating in both processes.

Conclusion

Both settlements may have ripple effects beyond our region. While the offshore fracking settlement is limited to analysis in the Pacific Outer Continental Shelf region, it may raise questions for well stimulation practices in other regions, like the Gulf of Mexico. And while we hope to see improvements for forest roads in the Los Padres National Forest in Santa Barbara, Ventura and San Luis Obispo Counties, this settlement could help curb pollution from logging roads in the Pacific Northwest as well.

In both cases, we were fortunate to have strong environmental laws on the books. Untangling the complex framework that often underlies certain agency action, and taking advantage of our ability to enforce these laws as citizen watchdogs, has proven fruitful in protecting our local air, water and more. ■

Maggie Hall is a Staff Attorney at the Environmental Defense Center. Her work includes litigation and advocacy related to clean water, climate and energy, and open space and wildlife. Maggie received her J.D. from Lewis & Clark Law School with a certificate in Environmental and Natural Resources Law. She also co-teaches a course at Antioch University on Environmental Justice and Advocacy. Before joining EDC, Maggie was a legal fellow at Los Angeles Waterkeeper.

EDC is the only non-profit public interest environmental law firm between Los Angeles and San Francisco, and serves to represent community organizations dedicated to environmental protection. Learn more at www.environmentaldefensecenter.org.

ENDNOTES

- 1 Brian Segee & Elise O’Dea, *Dirty Water: Fracking Offshore California*, (2013), <http://www.environmentaldefensecenter.org/wp-content/uploads/2015/03/DirtyWater.pdf>.
- 2 43 U.S.C. § 1344.
- 3 *Id.* § 1337.
- 4 *Id.* § 1340.
- 5 *Id.* § 1351.
- 6 *See id.*; 30 C.F.R. §§ 250.410–418.
- 7 *See Village of False Pass v. Clark*, 733 F.2d 605, 616 (9th Cir. 1984).
- 8 40 C.F.R. § 1500.1(b).
- 9 *Id.* § 1506.6(a) (requiring agencies to “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures”); *id.* § 1500.2(d) (stating that agencies “shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment”).
- 10 42 U.S.C. § 4332(C).
- 11 40 C.F.R. § 1508.9.
- 12 *Id.* § 1501.4(a)(2).
- 13 *Id.* § 1508.4.
- 14 43 C.F.R. § 46.215(c),(d).

- 15 Complaint at 26–31, *Envtl. Def. Ctr. v. Bureau of Safety & Envtl. Enf.*, No. 2:14-cv-09281 (C.D. Cal. Dec. 3, 2014).
- 16 *Id.*
- 17 Settlement Agreement, *Envtl. Def. Ctr. v. Bureau of Safety & Envtl. Enf.*, No. 2:14-cv-0928 (Jan. 29, 2016) available at http://www.environmentaldefensecenter.org/wp-content/uploads/2016/01/EDC-CvBSEE_Settlement-agreement-FILED-2016_01_29.pdf.
- 18 Notice of Availability of Draft Programmatic Environmental Assessment to Evaluate Potential Environmental Effects of Well Stimulated Treatments on the Pacific Outer Continental Shelf, 81 Fed. Reg. 8,743 (Feb. 22, 2016).
- 19 *Envtl. Def. Ctr. v. U.S. EPA* (“EDC”), 344 F.3d 832, 840 (9th Cir. 2003).
- 20 33 U.S.C. § 1342(p)(4).
- 21 *See*, 33 U.S.C. § 1342(p)(5)–(6).
- 22 Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharge, 64 Fed. Reg. at 68,722 (Dec. 8, 1999).
- 23 *EDC*, 344 F.3d at 854–58, 861–62.
- 24 33 U.S.C. § 1369.
- 25 *EDC*, 344 F.3d at 854–58.
- 26 *Id.* at 860-61, 863.
- 27 *Id.* at 858, 868.
- 28 28 U.S.C. § 1651(a).
- 29 Settlement Agreement, *Envtl. Def. Ctr. v. U.S. EPA*, No. 14-80184 (Aug. 26, 2015) available at <http://stormwater.wef.org/wp-content/uploads/2015/09/Ninthcircuitpetition.pdf>.
- 30 *Id.*
- 31 National Pollution Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand, 81 Fed. Reg. 415 (Jan. 6, 2016) (to be codified at 40 C.F.R. pt. 122).
- 32 Notice of Opportunity to Provide Information on Existing Programs that Protect Water Quality from Forest Road Discharges, 80 Fed. Reg. 69,653 (Nov. 10, 2015).



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Ochoa, *continued from page 7*

played against a person who he opined was the best lacrosse player he had ever encountered. The man's name was Jim Brown. Harry was matched up against Brown in a memorable physical contest and could recall the struggle in minute detail. Harry had played against a person who became a renowned NFL Hall of Fame football player, and who became known as a human steamroller as a running back for the Cleveland Browns. And Harry had the fortitude to play against him without layered pads or a strong protective helmet.

Harry was also an accomplished professional pianist. But he couldn't read a note of music. He slung hash and played piano in bars to earn his way through school, but he played without a score on the music stand. He played by ear. If he heard it, he could play it. In addition to music, Judge Loberg was fond of reading, cycling, and sailing, at times competitively, his entire life. Those experiences and qualities were reflected in his judicial demeanor.

Judge Loberg was an exemplary judge and spent many years conducting the most difficult calendar in the courthouse, the criminal arraignment calendar. In his four years as a Court Commissioner, before his appointment as a Judge, he had already sentenced more than 40,000 cases according to a *Daily Journal* "Judicial Profile" published on October 13, 1987. The arraignment calendar is the first appearance for anyone charged with a misdemeanor or felony crime. On a daily calendar with sometimes 100 to 125 cases, the need to move cases is inexorable and pressure-packed. And yet, each person must be heard. Each case must be considered individually and on its own merits. For many who have contact with our criminal justice system, the arraignment court is their only experience. And many of those persons enter pleas of guilt at this first hearing without the assistance of counsel. It's just the person charged with a criminal offense and the judge up on the bench. And justice must be done in that case just as it is in the lengthy jury trial with both sides represented by counsel. Harry could do each, the front-line trench work in arraignments, or the complex lengthy jury trial, with equal skill, alacrity and professionalism.

That *Daily Journal* profile said, "Criminal defense lawyers describe him as fairly tough, but fair." One local defense attorney, Joseph A. Martinez, said, "The judge is a fair sentencer even if he is harsher than expected. I always come away with the feeling he thought about it." Another, Steve Balash said, "Loberg is not a harsh sentencer but he is strict. He is not a push-over. I would label him conservative but also consistent and fair. You always know what to expect with him." Assistant Public Defender Michael McMahon

found Loberg "easygoing" as a deputy D.A., and thinks the judge brings the same trait to the bench. McMahon said of Loberg, "He is always pleasant to disagree with, yet is not disagreeable. He has been in the trenches and has his own ideas about dispositions. He is certainly not a rubber stamp for the D.A."

Upon his retirement, McMahon wrote of Judge Loberg: "For the past two decades, winners and losers left Loberg's courtroom knowing they had been heard. Not just heard, but understood by a patient, thoughtful judge. Harry always maintained good eye-contact and an affable, unpretentious manner. Even those who disagreed with a ruling came away with the feeling they had participated in a fair and cordial process. Loberg understood that, sometimes, the only thing you can do for a person is to take a moment to listen to their story." McMahon also noted that Judge Loberg was meticulous regarding case details and was an habitual early morning person. He was often the first to arrive for work at the courthouse so he could review the pile of cases on calendar that day. On occasion, he arrived at the court on his bicycle as the sun began to rise.

In his *Daily Journal* Profile, Judge Loberg was quoted, saying: "After spending years pounding out music on the keyboard, I developed the ability to know what sound the piano will produce before I hit the key....People think it's all talent, but talent only accounts for 10 percent of it. The rest is from hard work and learned skill." The profile author noted that Loberg likened playing the piano to the practice of law. "You just don't start out practicing flawlessly. There is 10 percent innate ability and the rest is attributable to hard work and experience."

His basic foundational abilities, honed by dedication to hard work and experience over time created an extraordinary Judge. Judge Loberg was known as the "master" by those who followed him in the arraignment calendar assignment, as well as in other endeavors. Former Commissioner Edward DeCaro worked with Harry as a Deputy District Attorney, and then later as a bench officer. He considered Harry to be a mentor to be emulated in each workplace. Before computers were available in courtrooms, Judge Loberg and his staff knew the histories of most all who came through his courtroom. He remembered details of their lives and experiences, and, while meting out appropriate punishments, endeavored to guide the offender to a proper future path. He supported and worked in Drug Courts, which offered treatment opportunities to substance abuse offenders as well as utilizing other treatment modalities for criminal wrongdoers. Judge Loberg affected the lives of members of our community beyond count, and in ways beyond measure. ■

The American Academy of Forensic Sciences – The State of Forensics, Part I

BY ROBERT SANGER

I have had the opportunity to again attend and participate in the week long American Academy of Forensic Sciences Annual Meeting. This year it was held in Las Vegas at the end of February. It was an incredible opportunity to hear about cutting edge technology in forensics throughout the world. And, it was also the opportunity to hear about the standards that are urged upon the forensics professions by some of the foremost experts in the various areas of practice.

One session, which I was privileged to co-moderate with Michele Vaira, a distinguished Italian criminal defense lawyer, offered a panel including: the Traffic Safety Resource Prosecutor for the State of Florida who spoke on the recent conversion of Florida by legislation to the *Daubert* standard; Dr. Maria Ciruzzi, a Professor and Researcher at the Law School of the University of Buenos Aires investigating political homicides from Argentina; Dr. Abdulah Usman, Advocate before the High Court of Pakistan and President of the Research Council of Law, Science and Technology, urging the expansion of the high tech forensics employed by the U.S. Army to combat terrorism throughout the world; and Dr. Jayne Batts, Professor of Emergency Medicine in Charlotte, North Carolina, and developer of forensic protocols for emergency medicine.

You come away from a session like this and from the conference in general humbled by how little you know. However, there was a consistent theme throughout the entire weeklong conference which I would like to address in this month's *Criminal Justice* column. The theme is that of continuing to raise the level of professionalism in forensic science and to make the contributions of forensic science more, well, scientific.

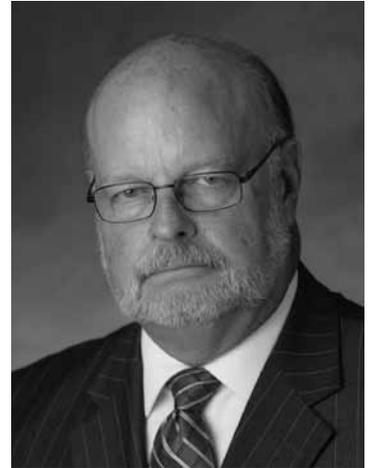
Increased Professionalism in Forensics

Forensic science is not limited to testimony in court. Forensics are critical in the early stages of a criminal or civil investigation. Leads are developed, hypotheses are tested and guidance is given to the law enforcement or civil litigators during development of potential cases. This complicates matters. Consulting experts have to work with the "parties" to the potential litigation and have to obtain and contribute information that might be of use in developing the course of the investigation.

It is generally accepted by forensic practitioners that there is a great deal of danger in allowing forensic experts to become too close to other aspects of the investigation. The allegiance effect – that is, a proven tendency for experts to attempt to please the people hiring them – is a worrying factor in getting to the truth. In addition, confirmation bias – that is, the tendency to allow information about the course of an investigation to affect scientific conclusions – is also a disturbing reality. While the experts all agree that the effects of both the allegiance effect and confirmation bias have to be controlled, it may not always be possible to protect against them at

all stages by such typical laboratory methods as double blind testing.

The theme, however, throughout the conference was to the effect that laboratory techniques, protocols and best practices should be used to the extent possible. As I previously reported in this column, the forensic community – at least at this high level – disparages anyone who would testify to "look" science (i.e., "I can see it based on my training and experience") or who would phrase an opinion in terms of "identity," "positive match," or "to a high degree of medical (or scientific) certainty." They are disdainful of qualifying experts based on how many times they have testified or allowing "experts" to make *ad hominem* arguments for their conclusions. They agree that a true expert offering a true



Robert Sanger

....a true expert offering a true expert opinion will be able to point the jury to the empirical evidence and propose hypotheses in response to that evidence.

expert opinion will be able to point the jury to the empirical evidence and propose hypotheses in response to that evidence. And, critically, that they will be able to admit to the possibility of alternative hypotheses in their final

testimony.

The process endorsed by the speakers and participants at the conference involves the continuing evolution of the standards for forensic practice. The AAFS has a system of encouragement

for young scientists, including scholarships and competitions. Through the Forensic Science Education Programs Accreditation Commission (FEPAC), AAFS provides goals and standards for forensic science programs at the undergraduate and graduate levels. It further provides accreditation for programs at major colleges and universities around the country.

In addition, the AAFS encourages professionalism in actual forensic laboratories by supporting the accreditation of laboratories, through ASCLAD and pursuant to the ISO Standard 17025. They also have supported the work of the Scientific Working Groups (SWGs) and Technical Working Groups (TWGs) as well as the various industry groups within specializations. They now have been working carefully with the National Institute of Technology Standards (NIST) and the Organization of Scientific Area Committees (OSACs) to gather and reformulate the various existing standards. The AAFS has just now formed its own Academy Standards Board (ASB) to help develop these standards and is supported in this by the ANSI Standards Development Organization. The bottom line is that forensics, from undergraduate education, through graduate school and into the laboratories is being pressed to be as professional as possible.

What is Missing

What has been striking, and no less so this year, is that there has been little emphasis on the improvement of education among the ultimate users of the forensic expert testimony – the lawyers and judges. AAFS does have a Jurisprudence Section and there are very knowledgeable lawyers and judges who are members. Out of the 4,000 plus attendees at the AAFS conference this year, however, there were

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maybe thirty or forty lawyers and judges in attendance. More importantly, the hard fact is that most lawyers and judges simply do not have forensic science training.

The Honorable Jed Rakoff, a United States District Judge on senior status for the Southern District of New York, has been outspoken on a number of topics and has written for the New York Review of Books. He has been critical of the Department of Justice and has urged more professional standards for prosecutors. At the conference, he spoke on the lack of training that lawyers and judges have in scientific evidence. Judge Rakoff made the point that the significance and prevalence of forensic evidence has grown exponentially. He said that prior to 1990, there was very little litigation regarding forensic evidence outside of the polygraph and some other limited areas. Certainly, moving from ABO typing to DNA and DNA to rapid sequencing and mitochondrial DNA alone has accounted for tremendous strides and challenges. Nevertheless, legal and judicial training has lagged behind.

Judge Rakoff has taught a class at Columbia University Law School on Science and the Law for the last twenty years. He believes that law schools have to do more to educate law students and eventual lawyers, and judges have to step up to the plate in dealing with scientific evidence. While he considers his class useful, he recognizes that it only goes so far. He feels that he is able to help “translate” some of the scientific jargon and get students to think about problems in a somewhat scientific fashion. He believes that his students will be able to better interact with forensic scientists but, he acknowledged, that is only the beginning.

Deputy Attorney General Sally Yates addressed the conference. She acknowledged that forensic evidence and forensic witnesses can have a disproportionate effect on juries. As a result, she spoke of the need for her lawyers to neither overstate nor understate the significance of forensic evidence. She understood that to do so would require much better education and training on the part of lawyers dealing with forensic evidence.

I was also greatly impressed by the Cook County Public Defender’s Office that had created a forensic unit within the office. I have had the pleasure to meet a number of the unit lawyers including their Chief, Brendan Max. They have brought the understanding among actual practicing lawyers to an extremely high level, handling cases themselves but also being available to assist fellow Cook County Public Defenders in all cases where forensics are involved. They also acknowledge that they did not get much, if any, training in forensics by the end of law school and that they are often dealing with lawyers who have no forensic training at all.

Conclusion

In next Month’s *Criminal Justice* column, we will take up where we left off here. The forensic sciences are policing themselves and making great strides in professional education, professionalism and accreditation of laboratories. Significant in-roads are being made into the morass of junk science and pseudo-scientists who are willing to be advocates in the courtroom. Nevertheless, the junk science, pseudo-scientists and exaggerated claims will continue to plague individual cases unless and until lawyers and judges accept the serious job of understanding scientific evidence. Only then will there be real gatekeeping. What to do? Well, I do have a modest suggestion. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 40 years. He is a partner in the firm of Sanger Swysen & Dunke. Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers’ organization. He is a Director of Death Penalty Focus. Mr. Sanger is a Member of the ABA Criminal Justice Sentencing Committee and the NACDL Death Penalty Committee. He is a Member of the American Association for the Advancement of Science (AAAS). Mr. Sanger is also a member of the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS) and an Adjunct Professor at the Santa Barbara College of Law.

ENDNOTES

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Notice Of Proposed Rule Changes

The Santa Barbara County Superior Court hereby publishes and solicits public comment on the following proposed revisions to the Santa Barbara County Local Court Rules, scheduled to take effect on April 1, 2017:

- The recent amendment to CCP § 430.41 requires parties to engage in detailed meet and confer efforts prior to the filing of a demurrer. The Court presumes that such efforts will be successful, at least as to special demurrers for uncertainty, and

will no longer entertain such special demurrers.

- The Court shall establish a pilot program under which third year students at local law schools will be recruited to serve as discovery referees. The Court intends to refer all possible discovery disputes to this program, and to freely accept recommendations from the referees that all parties to the dispute be sanctioned.
- *Santa Barbara Lawyer* magazine is adjudicated the only local periodical of general circulation likely to give actual notice under CCP § 415.50(b). All summons and other notices must henceforth be published only in *SBL*, which may charge such publication fees as the magazine may in its sole discretion deem reasonable.
- The transportation of persons in custody between the Figueroa and Anacapa Divisions is deemed impractical. The old jail in the historic courthouse will therefore be recommissioned. All records currently stored in the old jail facilities will be scanned, then burned.
- With the successful implementation of an electronic filing system for law and motion matters, and the attendant ease of submitting papers, the Court has determined that any further argument on such matters is unnecessarily cumulative. All argument shall therefore be contained in the papers, and all law and motion calendars are cancelled. Case Management calendars are also cancelled. Any case management issues shall be concisely described in the statements filed 15 days prior to scheduled CMC dates. Case management and trial setting orders shall be issued electronically.
- A supplemental filing fee shall be assessed for all law and motion matters, of \$1 per word. The supplemental fee is waived for *pro se* litigants.
- Given the historic landmark status of the Anacapa courthouse, the installation of modern security screening systems is not deemed feasible. In the interest of public safety, therefore, all future civil trials shall be conducted only in the Solvang Division. Anacapa Departments 3 through 6 may be used for the staging of weddings or other public events.

Please feel free to attempt to send comments to:
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Motions

Kingston, Martinez & Hogan LLP is proud to announce that **Tanya A. De Vos** has become a Junior Partner of the firm as of January 2016. She will continue her practice in immigration law, specializing in representing employers and employees in employment-based immigrant and non-immigrant visas.

Tanya joined Kingston, Martinez & Hogan in January 2013. Prior to joining Kingston, Martinez & Hogan, Tanya practiced international corporate and tax law in New York City. Tanya received her B.A. in German and History from the University of Southern Maine in 2007, and received her J.D. from Georgetown University Law Center in 2010. Tanya is admitted to the bar and currently practicing law in California, New Jersey, and New York. She is an inactive member of the bar in the U.S. Virgin Islands. She is a member of the American Immigration Lawyers Association and the Santa Barbara County Bar Association.

To better accommodate their growing law practices, **The Law Office of J' Aimée L. Oxton, Prof. Corp.** and **The Law Office of Charles Oxton, Georgia Staab & Eric Gans** are excited to announce that as of February 1, 2016, they have moved to a larger office space located just two buildings up from their former "home" at the Granada Tower. The entrance to their new office is on State Street just two doors up from Tupelo Junction restaurant on the other side of Celadon Furniture store at 1220 State Street, 2nd Floor Santa Barbara, CA 93101.

The firms' respective office phone numbers, fax numbers and email addresses will remain UNCHANGED. The firms and their attorneys and staff hope readers will take the time to come by and check out the new office location the next time they are in the neighborhood and, in the meantime, extend their thanks for everyone's patience during this exciting transition. As always, thanks also for the ongoing support, referrals and patronage.

"Make a Motion!" Send one to two paragraphs to Motions editor, Mike Pasternak at pasterna@gmail.com.

The Intellectual Property/Technology Business Section and In-House Counsel & Corporate Law Section of the Santa Barbara County Bar Association present:

Intellectual Property Primer for Tech Startups

Santa Barbara County has a rapidly growing startup community. As startup companies begin their work, they need protection for their innovations. Recent Supreme Court cases have eroded the ability of technology companies, especially those in the "app" economy, to protect their inventions. We will discuss those cases and the intellectual property tools still available to protect new technology. Some of those tools are excellent for the intended task, others less so. Join us to examine the benefits and drawbacks of each available legal strategy, along with practical considerations for intellectual property protection on a startup budget.

Speaker:

Jonathan Pearce, SoCal IP Law Group

Jonathan Pearce is a partner with SoCal IP Law Group LLP, where he practices in the areas of patent, trademark, copyright, and trade secrets, and represents clients in litigation, patent and trademark prosecution, technology transactions, licensing, and adversarial proceedings before the U. S. Patent and Trademark Office. Mr. Pearce has broad experience in entertainment, mobile gaming, social networking, digital video systems, satellite systems, multi-function printing devices, and consumer products. He has counseled industry-leading interactive entertainment and virtual reality companies as well as industry-disrupting startups.

Date and Time

Tuesday, April 19, noon

Location

Santa Barbara College of Law, Room 1, 20 E. Victoria St.

Reservations

Reserve via email to Chris Kopitzke, Chair of Intellectual Property/Technology Business Section, by Thursday, April 14, ckopitzke@socalip.com

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This course addresses the immigration consequences of criminal convictions and the legal obligation of defense counsel to advise clients of such consequences. Among the topics considered are statutory grounds for inadmissibility and removal (formerly exclusion and deportation), definitions of crimes for immigration purposes, strategies for mitigating adverse immigration consequences, grounds for relief in Immigration Court, and deportation defense practice.
Instructor: Michael Hanley, J.D. (Deputy Public Defender, Santa Barbara)

PSYCHOLOGY FOR LAWYERS FEE: \$295*
Tuesdays, June 28-July 26 [5 sessions] 6:30-9:30 p.m.
This course will outline the civil, criminal, probate and family law cases where psychological or psychiatric evidence is often presented, and review the common principles and concepts necessary to understand, offer and challenge this evidence.
Instructor: Penny Clemmons, Ph.D., J.D., Certified Family Law Specialist/Special Master (Private Practice, Santa Barbara)

FORENSIC SCIENCE FEE: \$590*
Thursdays [10 sessions] 6:30-9:30 p.m.
(via GTM primarily from SB campus to students at both campuses)
The goals of this course are to explore various types of forensic evidence used in criminal and civil cases, and to master the legal basis for admissibility and limitation of such evidence. The course will also provide a basis for interaction with forensic scientists and experts in the practice of law. Students will study applicable standards in numerous forensic subfields (e.g., DNA, documents, firearms, digital evidence, fire science/explosives, pathology/serology/toxicology, fingerprints, and accident reconstruction).
Instructor: Robert Sanger, J.D. (Private Practice, Santa Barbara)

INTELLECTUAL PROPERTY FEE: \$590*
Saturdays, May 28-July 30 [10 sessions] 9:00 a.m.-12:00 p.m.
This course provides a general introduction to the law of copyright, trademarks, patents, and trade secrets. The areas covered include how the law applies to different types of intellectual property; the legal rights of the creators and owners of such property; the competing rights of others to use such property; and an overview of intellectual property litigation.
Instructor: Erica Bristol, J.D. (Private Practice, Encino)

VENTURA CAMPUS

EMPLOYMENT LAW FEE: \$590*
Tuesdays [10 sessions] 6:30-9:30 p.m.
A study of the legal rules surrounding the hiring, treatment, and termination of employees. The course includes Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, and other federal and state laws concerning employment discrimination and wrongful discharge.
Instructor: Gary Rattet, J.D. (Private practice, Los Angeles)

RESTORATIVE JUSTICE FEE: NO CHARGE*
Tuesdays, May 24-June 21 [5 sessions] 6:30-9:30 p.m.
Our current legal system has great strengths, but there are limits as well. Frequently, victims and offenders and their supporters in the community feel the legal process does not meet their needs. Justice professionals often agree. This class will offer an introduction into the field of restorative justice, which involves including all the stakeholders (victims, offenders, family and community members) in the legal process in order to collectively address the needs and determine how to make things as right as possible. The class covers the various historical and current restorative practices being offered in our local communities and the world.
Instructor: Christiane Hips, J.D. (Deputy Public Defender, Ventura County)

ELDER LAW FEE: \$590*
Thursdays [10 sessions] 6:30-9:30 p.m.
This course surveys the law on issues facing the elderly, such as age discrimination, elder abuse, entitlement to government benefits, guardianship, alternatives to guardianship, and health care decisions, including end-of-life decisions.
Instructor: Jeanne Kvale, J.D. (Private practice, Ventura)

FORENSIC SCIENCE FEE: \$590*
Thursdays [10 sessions] 6:30-9:30 p.m.
(via GTM primarily from SB campus to students at both campuses)
The goals of this course are to explore various types of forensic evidence used in criminal and civil cases, and to master the legal basis for admissibility and limitation of such evidence. The course will also provide a basis for interaction with forensic scientists and experts in the practice of law. Students will study applicable standards in numerous forensic subfields (e.g., DNA, documents, firearms, digital evidence, fire science/explosives, pathology/serology/toxicology, fingerprints, and accident reconstruction).
Instructor: Robert Sanger, J.D. (Private Practice, Santa Barbara)

10 sessions: up to 26.5 MCLE credits
5 sessions: up to 13.25 MCLE credits
For more information or to enroll, please contact Barbara Doyle at Ventura College of Law (805) 765-9302 or email bdoyle@collegesoflaw.edu. Space is limited.
* Each MCLE auditor is charged a non-refundable application fee of \$50 per Summer session, plus applicable fees for courses taken.
State Bar members may claim MCLE credit for attending a MCLE activity, such as a lecture, panel discussion, or law school class, in person or by technological means.
(MCLE Rules and Regulations, Section 2.80)

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