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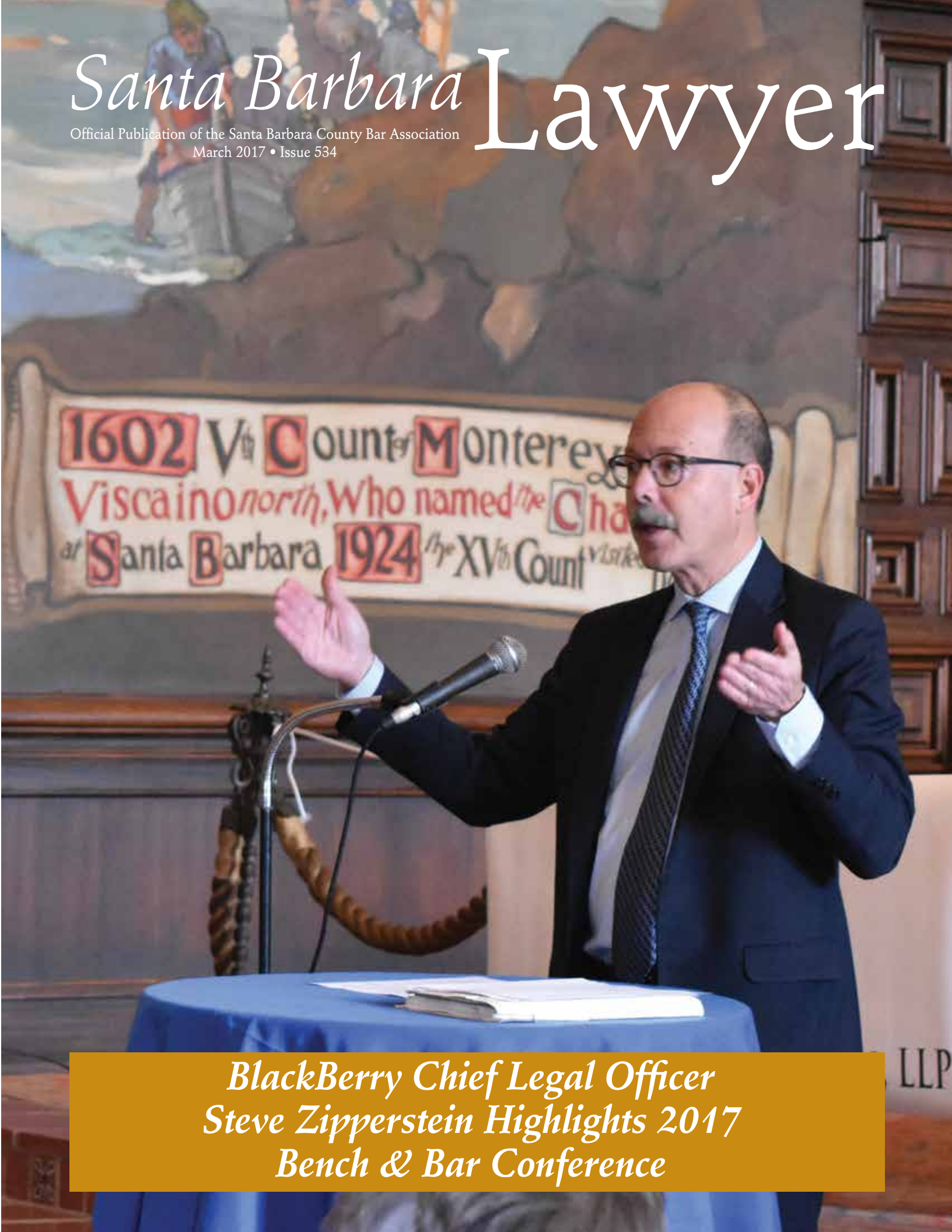

BlackBerry Chief Legal Officer Steve Zipperstein Highlights 2017 Bench & Bar Conference

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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.

Santa Barbara Lawyer

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On the Cover

Keynote Speaker Steve Zipperstein Highlights 2017 Bench & Bar Conference

Guests celebrate Commissioner Denise Motter's service at her retirement party. For more coverage, see page 7.

Santa Barbara County Bar Association

Bench and Bar Conference 2017

By Larry Conlan

In the digital age, how will our country balance national security with individual privacy rights and other personal freedoms? Can Congress realistically keep up with advancing technology in a way that adequately maintains this balance? What is the best way to protect electronic information from hackers? How secure is your client data?

These were some of the timely questions raised before a standing-room only crowd at the annual Bench and Bar Conference on Saturday, January 21, 2017. Juxtaposed against the quaint setting of the Mural Room at the Santa Barbara County Courthouse, we were reminded that there are no easy answers. In an era when threats of terror attacks are constant, governmental and commercial data breaches have become routine, and the recent presidential transition has cast long shadows of uncertainty, the critical balance of cybersecurity and individual privacy will continue to have profound effects on business, politics and the practice of law.

In an era when threats of terror attacks are constant . . . the critical balance of cybersecurity and individual privacy will continue to have profound effects on business, politics and the practice of law.

Sharing some remarkable insight and experience with these issues, keynote speaker Steve Zipperstein, Chief Legal Officer and General Counsel of BlackBerry Ltd. presented "Individual Privacy vs. Collective Security: The Encryption Wars and Corporate America." Following his presentation, in which we learned that many people around the world actually still use the highly secure BlackBerry devices, Mr. Zipperstein joined a panel with Nate Cardozo, Senior Staff Attorney at the Electronic Frontier Foundation, and former Assistant US Attorney Melissa Meister, for a lively debate that was deftly moderated by Lauren Wideman of Reicker, Pfau, Pyle & McRoy LLP.

The debate began with a cogent analysis of the strategies and motivations at play in the federal government's lawsuit to unlock an Apple iPhone recovered after the San Bernardino terrorist attack. The panelists expanded to a wide-ranging discussion of the tension between privacy and security and the competing perspectives and interests that drive the national dialogue. The audience was fully-engaged, and attendees offered some of their own perspectives: philosophical (do we really expect privacy in the digital age?); ethical (are we lawyers maintaining our duty of confidentiality with our office email servers?); and practical (do you know you can purchase cyberinsurance for data breach?).

Not to be upstaged by the main event, the Conference also included informative and useful presentations on substance abuse in the legal profession by Dr. Leslie Lundt, eDiscovery strategies in Family Law by Greg Herring, helpful land use tips for real estate attorneys by Beth Collins-Burgard, and tax issues in estate planning and property ownership by Brooke C. McDermott of Ambrecht & Associates and Brad Lundgren of Allen & Kimbell, LLP.

The day concluded with a panel presentation by local Superior Court Judges Hon. James Herman, Hon. Donna D. Geck, Hon. Raimundo J. Montes De Oca, Hon. Kay Kuns, Hon. Rogelio Flores and Federal Magistrate Judge Louise LaMothe, who eloquently shared their views from the Bench regarding bias in the legal profession.

Thanks to the tremendous efforts of Bar Board members and Conference Chairs Eric Berg and Joe Billings, the Conference truly exceeded expectations. The Bar Association appreciates the commitment and participation of all the presenters and attendees. Special thanks for generous sponsorship by Foley, Bezek, Behle & Curtis LLP, Goodwin & Thyne Properties, Law Offices of John J. Thyne III, Herring Law Group, Fell, Marking, Abkin, Montgomery, Granet & Raney LLP, Reicker, Pfau, Pyle & McRoy LLP, and vendors Lawcopy, MyCase, CIO Solutions, and One to One Treatment Santa Barbara. Last, but not least, thanks to Jill's Place for a delicious Santa Barbara-style barbeque lunch!

Stay tuned in the coming months for news about next year's Bench and Bar Conference 2018. ■

See pages 16 and 17 for additional photos.

The Motter Retirement Soirée

By Cynthia Valenzuela

On January 18, 2017, the legal community bade bon voyage to two long-serving members, Santa Barbara County Commissioner Denise Motter and District Attorney Investigator Gerald Motter. Hosted at the Elks Club in Santa Maria, and emceed by the inimitable Mr. Darrel Parker, the attendees were treated to a trip down memory lane of the Motters' personal and professional lives in northern Santa Barbara County.

With about 200 guests in attendance, the atmosphere was festive with cheerful greetings and warm hellos among the Motters' long-time friends and colleagues. The evening started with Hon. Jed Beebe and his string quartet providing an outstanding performance as guests arrived, checking in and signing the guest books at the direction of members of the Legal Professionals Association. The tables were beautifully decorated with centerpieces handmade by Research Attorney Tracy Splitgerber, Family Law Facilitator Tracy Kalata, Departments 1 and 2 Secretary Patti Nelson, and Comm. Motter's clerk Mireya Cuevas.

After the traditional Elks Lodge supper, the guests enjoyed a photo montage, including many pictures of the Motters in their youth, with their family and their work families, and enjoying good times together. With his opening remarks, Darrel Parker put together a mini photo history, tracing their professional lives and many achievements.

Continued on page 9

Photo collage on this page and page 5 courtesy of June Austin.

Room at the Inn: New Attorneys Eligible for Scholarships

By Sue McCollum

The Santa Barbara County Bar has made a generous contribution to the William L. Gordon Inn of Court for the purpose of assisting new attorneys to become a member of the Inn. The Inn is extremely grateful to the SBCBA for the opportunity to offer a limited number of scholarships.

If you are an attorney with less than five years of experience, you may receive a scholarship of $250 toward their membership fee of $440 per year for the 2017 year. There are ten such scholarships to be granted on a first-come, first-served basis.

There are also some openings for attorneys with more than five years of experience. It is an excellent way to mingle with our local attorneys and judges while enjoying an excellent meal and earning MCLE hours.

Since 1995, The William L. Gordon Inn of Court has been a Santa Barbara Chapter of the American Inns of Court. Its mission is to foster civility, professionalism and excellence in the legal profession.

The monthly meetings are generally entertaining, educational and a great way for the more experienced professionals to mentor the less experienced attorneys and students.

Benefits of membership in the Inn include all of the following:

1. Ten excellent dinners currently at the University Club (one each month November through October - excepting December and January);
2. At least nine hours of participatory MCLE credit (based on attendance - plus extra credit for being a presenter);
3. The opportunity to work as a team with local judges and other judicial officers and attorneys at all levels of experience to give one MCLE presentation during the year;
4. Social hour prior to dinner meetings to meet and become acquainted with the other members of the Inn; and,
5. Membership in the American Inns of Court.

If you are interested in becoming a member of our Inn of Court, please contact Cheryl Johnson at 963-6711 or at cjohnson@hbsb.com. ■

Motter, *continued from page 7*

Mr. Parker was followed by several speakers, all extolling the profoundly positive impacts of both Commissioner and Mr. Motter's work, including Hon. Art Garcia, District Attorney Supervising Investigator Christopher Clement, and Department of Child Support Services heads Carrie Topliffe, Joni Maiden, and Kelly McLaughlin. The recurring theme through the night was appreciation and respect for the Motters as models of service to the legal community as well as to the larger community of Northern Santa Barbara County, in which they have lived and worked for over 40 years.

The Motters expressed special thanks for the party invitations to Presiding Judge Patricia Kelly and Administrative Assistant Carrie Taylor, as well as to photographer June Austin and DJ Scott Muir.

To Commissioner and Mr. Motter, we congratulate you on your successful careers, and on your new chapter on Catalina Island! ■

Making Critical Decisions: Traps We Fall Into

By David Peterson

David C. Peterson

Daniel Kahneman (Awarded Nobel Prize) participated in providing valuable instruction relative to human judgment and decision-making in the midst of uncertainty in the book, *Choices, Values and Frames* (Cambridge, 2005). He notes that our biases and state of mind often so cloud our judgment that we make decisions against our interest. On the other hand, one who is uninvolved or has no stake in the matter, acts with a clearer mind. The very comprehensive books co-authored by Kahneman (including *Heuristrics & Biases, The Psychology of Intuitive Judgment,* Cambridge 2002) are worth reading to better understand how humans make decisions. To a mediator, they are invaluable.

In a work out of the Harvard Business School Press (*Making Smart Decisions,* 2006), the over-arching message is that smart people make bad decisions because of human nature and thinking. It's common for lawyers to make bold statements about their case which will then cause them to downplay negative facts and evidence, and overvalue those factors supporting the lawyer's assessment. For example, if you ask a plaintiff attorney and defense attorney, about to commence trial, what percentage of chance they believe weighs in their client's favor, the combined number many times would far exceed 100%. One or both will surely find their assessment to have been faulty. It happens every day in trials. This folds nicely into an observation made by social psychologist Michael Ross: "(I)f you ask a husband and wife independently to tell you what percentage of household work they do, the combined number is 130%." (p.124).

This is also similar to the casual (average person) bettor's mental process. Prior to making a bet, this prospective gambler may be relatively neutral as to the chance of a particular horse coming in first. However, once money is invested, the mind begins to bolster the thinking that the horse has an excellent chance of winning. This occurs not only because of the commitment made but also as the gambler looks at the horse to evaluate its physical characteristics. (Harvard, p.126). Once a choice is made, "we tend to see that choice as more worthwhile than we did immediately before we made the decision. As a result, we close ourselves off from information that suggests our choice may not be the best." (Harvard, p.13).

Knowing of the risks of skewed thinking when not being on guard, it serves clients best to keep a mindful eye on those factors which would tend to steer a lawyer away from more rational assessments. It can be difficult to overcome the filters of our minds that "govern which data lands on the active agenda of our consciousness and which gets shuffled off to the mind's dark corners." (Harvard, p.72).

> Decisions unhinged from biases and wishful thinking are best for ourselves and those we are assisting.

In mediation, tremendous difficulty is faced when participating individuals are under the influence of those factors treading upon their ability to avoid unconscious powers leading to poor decisions. No one is perfect in making assessments when certainty of future events is lacking but everyone is able to improve. Decisions unhinged from biases and wishful thinking are best for ourselves and those we are assisting. "The alternative is that people and organizations (will continue to) expose themselves to risk because they misjudge the odds." (Kahneman, p.404). ■

David Peterson is a local mediator and ADR Section head. He obtained a Master's degree and then LLM degree from Pepperdine University School of Law, Straus Institute for Dispute Resolution, where he has also been adjunct professor of "Mediation Theory & Practice", from 2009 to present. His mediation practice spans more than 20 years on the Central Coast, with more than 2,500 mediations completed. He received the McLafferty award for his pro bono contributions to the CADRe program. For questions or comments, you may reach David Peterson directly at (805) 441-5884, or davidcpeterson@charter.net.

ESI Is Everywhere- Go Get It!

By John R. Troxel

John R. Troxel

"In this world nothing can be said to be certain, except death and everything you do on a computer is saved." Not Ben Franklin

The good old days of ESI (electronically stored information) analysis are done. When we were first starting out, the average hard drive was 40GB, which is smaller than a lot of USB flash drives. The computer cached nearly everything seen by the browser, the programs and file structures were simpler, and those doing e-Discovery (anyone with a scanner) could charge a boatload of money for fairly easy assignments.

> The good old days of electronically stored information analysis are done.

Now, we got stuff to deal with.

Like not being able to get into the deleted area of an iPhone unless it is iOS version 4 or earlier, or even crack it open if we don't have the password. Remember San Bernardino? Recently, some folks close to Apple said that the issues regarding access to the iPhone in that San Bernardino terrorist case appears to be headed for Macs in general. Instant encryption. The deleted area is locked down and not retrievable. No password? No joy.

This is all in the rumors stage, but what does this mean? Business owners need to make sure they have all passwords, or otherwise administrative access, to all Macs. And iPhones. Regardless of opinions if Uncle Sam should have been given access by Apple, it seems likely that this is the direction we are headed. Forewarned is forearmed!

Ever looked inside a computer and see wires going to all different types of parts? Or taken a laptop apart to see the removable hard drive, slots for RAM, motherboard, etc.?

The guts of an Apple notebook are, in a word, condensed. The inside of a Macbook looks like the folks in Cupertino just slapped a cell phone into a laptop frame. There is no easy way to swap out a hard drive, add RAM, or do anything, as they are soldered in. This may sound like a bummer to those of us who like things to be flexible, such as adding RAM, or swapping out a hard drive; but really, how much do we miss having a spare battery for our cell phone?

The take away here is that we are seeing crossover in the mobile and computer devices, which is great, and which also produces difficulties. It is great from a user's standpoint in terms of increased privacy, security, and more seamless integration of devices. But from the perspective of a business owner (and forensic examiner!), this creates some challenges when needing to recover important evidence.

Microsoft and Google are not so locked down, thank goodness, so Windows and Android devices are still open season for us.

But if I was going to buy a new computer, it would be a Mac. If I was going to buy my employee a new computer, it would definitely be a Windows system!

Speaking of phones . . .

The Numbers (ALM Study)

- 57% of law firms are analyzing cell phones (2014 was 41%)
- 40% of law firms have a process for collecting mobile data
- 49% of analyzed devices are iOS, 17% Android

And . . .

- 68% of Americans own a smartphone (35% in 2011)
- 57% use a smartphone for online banking
- 51% access media vs 42% on a desktop computer

The phone is an obvious place to look. We've analyzed a BUNCH of mobile devices, and they are a treasure trove. In a few examples, we found:

- A client's underage daughter received a Snapchat of her naked college aged boyfriend
- Inappropriate video texted from a male manager to a female employee
- Evidence of infidelity, with communications detailing planned indiscretions

- Sexual harassment comments from one employee to another
- Employee plans to terminate and start a competing business, using proprietary data
- Mapping/GPS info showing subject locations
- The formula for Coca-cola

Just kidding on the Coke formula, but you get the drift. Employees are more likely to be stupid on a cell phone.

Some things to consider . . .

If something doesn't pass the smell test, or if there is some potential for litigation, then get in there and lock down the data. Best is to immediately make a forensic copy of the device. If it turns out that the collected ESI will not be used, then think of the effort as a small insurance payment. The element of time is important to keep in mind, as continued operation will result in data being overwritten, with potential spoliation of evidence.

It is critical that ESI is handled correctly, so make sure your clients DO NOT seek advice from their IT professionals. They are good at what they do, but we have found that the "average" IT guys will profess to be good at what they don't do. They will say they can do what is required, but dollars to donuts they won't have training specific to forensic protocols. Dragging a folder from one drive to another does not constitute a forensic copy, and if opposing counsel's people have done that, then you can make some hay. Metadata has potentially changed, deleted files have not come with the folder, proper techniques were not employed . . . the list goes on. It is almost like sending opposing counsel a copy of a PST from Outlook and believing that all the email has been produced. ■

An investigator since 1997, John manages cases requiring technological expertise, including computer forensics, online research and construction of project databases. He has directed cases all over the country as well as several overseas, with proficiency in developing evidence from computers and associated media, finding people, interviewing, corporate investigations, background searches and pollution liability disputes. He can be reached at jt@verdict.net.

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Uncertainty About Uncertainty?

A Review of Prejudgment Interest Under Civil Code Section 3287(a)

By Bruce Hogan

A claim for prejudgment interest is often available in contract actions and may contribute a substantial component to a plaintiff's damage award. Such a claim should not be overlooked or taken for granted. This article will review prejudgment interest claims and discuss the certainty requirement contained in Civil Code § 3287(a) as well as the proper procedure for requesting prejudgment interest.

1. CIVIL CODE § 3287(a)

Prejudgment interest is an element of damages rather than costs, and compensates the plaintiff for the loss of the use of property or money during the period before the judgment is entered. *North Oakland Medical Clinic v. Rogers* (1998) 65 C.A.4th 824, 828.

Such interest is available under Civil Code § 3287(a) which authorizes prejudgment interest when damages can be determined with certainty prior to trial:

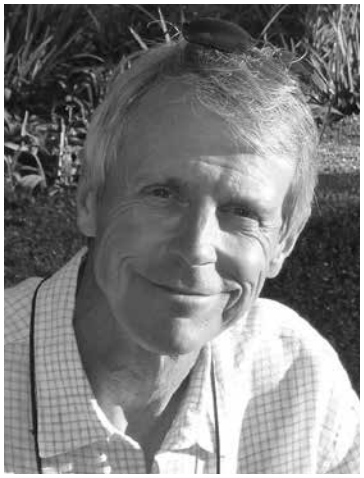
A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person on a particular day, is entitled also to recover interest thereon from that day except when the debtor is prevented by law, or by the act of the creditor from paying the debt.[1]

2. THE CERTAINTY REQUIRED BY CIVIL CODE SECTION 3287(a) IS DETERMINED BY THE DEFENDANT'S KNOWLEDGE.

The cases construing Civil Code § 3287(a) balance the need to compensate plaintiffs for "the loss of the use of their money during the period between the assertion of a claim and the rendition of judgment," against the "general equitable principle that a person who does not know what sum is owed cannot be in default for failure to pay." *Chesapeake Industries v. Togova Enterprises* (1983) 149 C.A.3d 901, 906.

As stated in *Chesapeake*:

These competing policy considerations have led the courts to focus on the defendant's knowledge about the amount of the plaintiff's claim. The fact that the plaintiff or some omniscient third party knew or could calculate the amount is not sufficient. The test we glean from prior decisions is: did the defendant actually know the amount owed or from reasonably available information could the defendant have computed that amount. Only if one of those two conditions is met should the court award prejudgment interest. (149 C.A.3d 907).



Bruce Hogan

In other words, "the liability for prejudgment interest occurs only when the defendant knows or can calculate the amount owed and does not pay." *Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 C.A.5th 279. The test is "whether a party actually knows the amount of damages owed the other party, or could have computed that amount from reasonably available information." *KGM Harvesting Corp. v. Fresh Network* (1995) 36 C.A.4th 376, 42.

This requirement may prevent the plaintiff from collecting prejudgment interest unless proper pre-litigation steps are taken. A prudent potential plaintiff should be careful to timely provide a prospective defendant with whatever documentation is necessary to determine the amount of damages due, including detailed invoices, statements and general industry pricing information if necessary. As explained in *KGM, supra*, at 391, 392, if the party does not know or cannot readily compute the damages, the claimant must supply a statement and supporting data so that the other party can ascertain the damages. The date from which prejudgment interest is calculated will be determined by when the contract debtor receives this information.

Furthermore, as stated in *Watson, supra,* at 294, "...the manner in which a case is litigated can affect the ultimate resolution of the certainty question." The plaintiff must present proof in a manner which will demonstrate to the trier of fact that the defendant either was, or should have been, able to calculate the damages owed on a particular date.

Since the defendant must generally be able to calculate potential damages, plaintiff should include a specific damage claim in the pleadings and present evidence at trial that will support that claim. The Supreme Court, in *Leff v. Gunter* (1983) 33 C.3d 508, 520, awarded prejudgment interest on

an earthquake damage claim "where the amount of recovery closely approximated plaintiff's claims." Similarly, in *Wisper Corp. v. California Commerce Bank* (1996) 49 C.A.4th 948, 961, the court of appeals found that plaintiff was not entitled to prejudgment interest where the defendant was found liable for only 25% of the claimed damages. See also, *Stein v. Southern Calif. Edison Co.* (1992) 7 C.A.4th 565, 573.

3. THE CONTRACT DEBT MUST BE CAPABLE OF CALCULATION.

The certainty requirement arises in a variety of contexts, usually involving breach of contract damages.[2]

In construction litigation, for example, a cost-plus formula provides the necessary certainty to award prejudgment interest. When there is no specific contract terms, however, and the contractor/plaintiff is entitled to reasonable value, the amount owed is normally determined by the trier of fact based upon conflicting evidence, and no prejudgment is available. *Watson, supra, at 295.* In other cases, prejudgment interest was proper when the amount of the damages could be determined by reference to market value [*Bare v. Richman & Samuels of New York* (1943) 60 C.A.2d 413, 419], and prejudgment interest could be determined and was awarded on wrongfully withheld salaries and pensions. *Olson v. Cory* (1983) 35 C.3d 390, 402.

An important principle discussed in several cases is that "... a dispute or denial of liability does not make the amount of damages uncertain. (*Wisper Corp. v. California Commercial Bank* (1966) 49 C.A.4th 948, 958.) As stated by our Supreme Court: 'Generally, the certainty required of Civil Code section 3287, subdivision (a) *is absent when the amounts due turn on disputed facts,* but not when the dispute is confined to the rules governing liability.' (Olson v. Cory (1983) 35 Cal.3d 390, 402, italics added.)" *Watson, supra,* at 294.

On the other hand, debts are uncertain, and not subject to prejudgment interest, when the amount of the debt cannot be calculated. "Interest is not allowable where the damages depend upon no fixed standard and cannot be made certain except by accord, verdict or decree." *Lineman v. Schmid* (1948) 32 C.2d 204, 211 [unable to determine market value of flour; conflicting evidence]. In another case, prejudgment interest was denied where the trial court was required to allocate a settlement payment based upon the defendant's responsibility. *St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mut. Ins. Co.* (2012) 210 C.A.4th 645, 665-666.

It should be noted, however, that an unliquidated offset does not create uncertainty if the plaintiff's damages are capable of calculation. "Ordinarily, where the amount of a demand is sufficiently certain to justify the allowance of interest thereon, the existence of a set-off, counterclaim, or cross claim which is unliquidated will not prevent the recovery of interest on the balance of the demand found due from the time it became due." *Worthington Corp. v. El Chicote Ranch Properties, Ltd.* (1967) 255 C.A.2d 316, 325. See *Chesapeake, supra*, at 907.

4. HOW TO REQUEST LIQUIDATED DAMAGES

A claim for prejudgment interest, if potentially available, should be requested in the pleadings. The claim can be asserted in the body of the complaint or in the prayer by a specific request for prejudgment interest. In the alternative, a prayer for "such other and further relief as may be proper," is sufficient. *North Oakland, supra,* at 829. Since the judge rather than a jury must determine prejudgment interest, the request should be repeated at trial by motion to the court. The motion must be made before entry of judgment or by way of a motion under CCP § 657 based on a claim for inadequate damages and filed within the time limits for a motion for new trial. *North Oakland, supra,* at 830.

Prejudgment interest cannot be requested by cost bill since it is an element of damages and not a cost. See *First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 C.A.4th 871, 874-875.

The interest rate on contract claims if the contract was entered into after 1985 is 10% per annum unless specified otherwise in the contract. Civil Code § 3289. On tort and other non-contractual claims, the rate is 7% per annum under article 15, section 1 of the California Constitution. ■

Bruce W. Hogan is a partner in the firm of Kingston, Martinez & Hogan. He specializes in commercial collection matters.

ENDNOTES

1 Where the right to prejudgment interest is set forth in a contract, however, the certainty of damages requirement contained in this section does not apply. *Roodenburg v. Pavestone Company, L.P.* (2009) 171 C.A.4th 185, 191-192.

2 Absent a CCP Sec. 998 offer, which is another, separate topic, prejudgment interest is generally not available in personal injury actions, at least on claims for emotional distress and personal injury damage, because those claims are unliquidated. It can be awarded in other tort actions for property damage, however, "where the value of the property destroyed can be readily calculated by reference to market value or expert testimony" [*Levy-Zentner Co. v. Southern Pac. Transp. Co.* (1977) 74 C.A.3d 762,798], and on proper statutory damage claims, even if not authorized by the statute [See *County of Solano v. Lionsgate Corp.* (2005) 126 C.A.4th 741,753].

Hon. Raimundo Montes De Oca, Hon. Donna Geck, Hon Louise LaMothe, Hon. James Herman, Hon. Kay Kuns and Hon. Rogelio Flores

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Brad Lundgren discussing "Ownership of Real Property in Business Entities and Tax Implications"

Brooke McDermott on "Recent Changes to IRS Code Regulations and Estate Planning"

Greg Herring on "Discovery Including ESI/E-Discovery in Family Law"

Pathology, the Emergency Room Doctor and the Courtroom

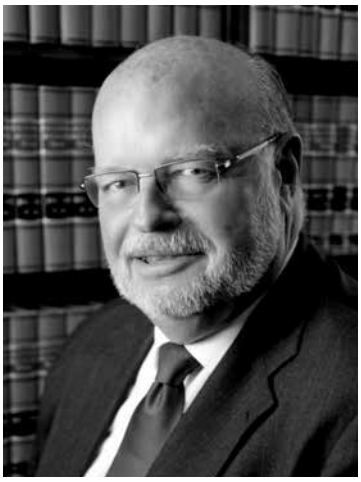
By Robert Sanger[1]

Medical opinions are often offered in the courtroom, including the opinions of pathologists and emergency room doctors. In criminal cases, particularly homicides, but also in civil litigation, the testimony of the pathologist or emergency room doctor may be relevant with regard to the nature of blunt force trauma, the characterization of wounds inflicted by sharp objects, the nature and direction of travel of gunshot wounds and, among other things, time of death and whether injuries were inflicted ante-mortem, peri-mortem or post-mortem.

Jurors, and for that matter judges, give considerable deference to the opinions of doctors and sometimes do not apply the independent critical thinking that the system seeks to require of a trier of fact. In this month's *Criminal Justice* column, we will look at some interesting aspects of the roles of the pathologist and emergency room doctor that may affect their testimony.

Pathologists and Emergency Room Doctors

Pathologists, of course, come into the picture for forensic purposes. If there is a death, the pathologist, often the County Medical Examiner, will perform an autopsy to look for information about how, why and when the person died. There will be a thorough examination of any abnormalities visible from inspection of the body, a careful examination and weighing of various organs and the ordering of various laboratory tests. Evidence, such as clothing, bullets and any other possible extrinsic evidence, are retrieved and generally given to the coroner who, in California, generally is a deputy sheriff cross-designated as coroner. The deputy sheriff, or other law enforcement officer present, preserves, packages and books the items into evidence at the law enforcement agency. The coroner writes a report describing the protocols followed and provides an evidence log. The pathologist dictates a report, usually simultaneously while performing the autopsy, describing the protocols followed, the observations and findings. All of this is done with keen awareness that whatever is observed may well be the subject of some sort of forensic review and may result in testimony in court.



Robert Sanger

On the other hand, the emergency room doctor and the staff, including nurses, orderlies, anesthesiologists, med techs, radiologists, and other professionals in the room are generally are not thinking about forensic issues. They are trying to save a life. The staff who come in after the event, whether the patient lives or dies, are there to contain biohazardous material—for instance, anything contaminated with blood—and to prepare the room as quickly as possible for the next emergency patient. All of this is done, usually, with minimal concern for forensic review or for the possibility that they may have to provide testimony in court.

Medical examiners in California are typically pathologists employed by the county sheriff and the sheriff is also the coroner. California is in the minority of states which employ such a "mixed" system.[2] Other states have a separate coroner and medical examiner system with the medical examiner sometimes being a state held position independent of law enforcement. In addition, understandably, medical examiners are often involved in the early investigative stages of cases where homicide is suspected. In California, both because of their employment and due to being part of the investigative process, medical examiners are not approaching the subject merely as academic observers but, willingly or unwillingly, as a part of the law enforcement system.

In actual court cases, where forensics analysis is important, either or both professionals—the pathologist or the emergency room doctor—may be critical witnesses to what they observed or findings they may have made. The circumstances under which they made these observations and the way they arrived at their findings will be significant. In addition, they each have their own role in preserving or possibly destroying or altering items of evidentiary value. Nevertheless, all too often, a pathologist's report or an emergency room doctor's report ends up in the file and is taken to be gospel by the lawyers, civil or criminal, without further review.

This does not mean that emergency room doctors do not provide useful forensic information nor that pathologists are

always implicitly biased, but the rules of evidence apply. Medical testimony has not generally been reviewed under the standards of *Kelly/Frye*.[3] However, such testimony is governed by Evidence Code Section 702(a)[4] and 801[5] which is also be covered by the second and third prong of *Kelly*.[6] And, now, medical and all expert testimony is covered by the general principles of admissibility under *Daubert/Kumho Tire/Sargon*.[7] Therefore, when evaluating a case or preparing to put on evidence by way of direct or cross-examine of a medical expert, it is important to do some critical thinking about the nature and circumstances of the observations they made and the basis for the forming of their opinions.

Pathologists

The first issue regarding the opinion of a pathologist—who, in California, if a medical examiner is likely to be employed by the Coroner who is also the Sheriff—is that there is a possibility of allegiance bias.[8] The studies have shown that this is a subtle form of bias that may be completely subconscious and unintentional. The National Academy of Sciences in its 2009 report concluded that, "All previous studies have recommended that the Medical Examiner be independent of other agencies, or if they are under the umbrella of a central agency that the reporting chain should be through a health department."[9] Medical examiners are supposed to be "first and foremost a physician" whose opinions are formed by the practice of medicine and not allegiance to any government agency.

> Lawyers must be the first line of critical thinking when it comes to forensic opinions.

Most pathologists working as medical examiners will acknowledge that they strive to be independent medical scientists and that they are not beholden to one party or another. Some, one would hope most, will agree to meet with the lawyers for both sides of a case, civil or criminal, and answer questions. Most will discuss the matter with experts who are assisting the lawyers. The willingness to do so is a sign of an independent expert. On the other hand, some agencies discourage this because there are pitfalls if one side or the other seeks to misquote the expert out of context or to unduly influence the expert.

The second issue regarding independence is that pathologists often are consulted early on by law enforcement, perhaps while the investigation is still pending. This is a proper and useful aspect of forensic pathology, that is, contributing medical knowledge to the investigative and prosecutorial effort. This role must be separated—at least conceptually to start with—from the role of a testifying neutral expert. This may be difficult or even impossible because investigators may be providing highly prejudicial information to the pathologist that may give them investigative leads but ultimately has no evidentiary value. For instance, rumors of a motive might lead investigators to focus on a suspect and a theory of the way the homicide was committed. The pathologist, of course, can consider alternative hypotheses but may be unduly influenced by what turns out to be unsubstantiated information or by what the investigating officer's theory may be.

For instance, pathologists may be involved in discussions as to whether there was one assailant or two or whether the cause of death was an accident or a homicide. To an extent, the pathologist, to be helpful, may need to know that there are competing hypotheses and it may be appropriate to assist investigators in exploring whether the physical evidence from the autopsy supports one theory over another. Rumors of or even admissible evidence of motive, has no place in a medical opinion. And being exposed to such rumors or evidence could be a source of confirmation bias, say, regarding whether it appears from the medical evidence that one or more than one weapon was used or whether it appears from the medical evidence that the decedent fell down the stairs rather than being pushed.

This is not easily resolved in this area of forensics. There will probably be only one autopsy in a case and the pathologist doing it will be the medical examiner throughout the case. The best remedy is for lawyers on all sides to have a healthy skepticism and to independently review and cross-examine on any issues that seem to have been affected by confirmation bias arising during the investigation. The pathologist serving a medical examiner should be forthcoming and document all interactions with law enforcement and others disclosing all information provided and any effect it might have had on the ultimate forensic opinion. And, of course, counsel should consult with other independent experts.

Emergency Room Doctors

By comparison, emergency room (ER) doctors[10] would seem to be the source of unbiased medical information. In civil cases regarding the nature and extent of trauma, it is often the case that a good description of injuries as treated in the ER will be more impactful on the jury than a specialist who has seen the patient for a forensic evaluation. If the patient dies, it is true that an ER doctor might have information that is not available to the pathologist.

However, many of the issues relating to forensic issues may not be the focus of the ER doctor's attention. In addition, the emergency room system is not generally set up to accommodate documentation and preservation of forensically significant evidence for the obvious reason that the physician and allied staff are trying to save a life.

It is important for lawyers to know that reports by doctors and staff in the ER get things quite wrong. Sometimes this is because testing or other procedures are done on an expedited basis to provide urgent treatment.[11] But many times it is because of a lack of training and, perhaps, a lack of concern for the forensic issues. For instance, determining the direction of travel of bullets is not the *forte* of ER doctors nor, sometimes is determining the number of bullet strikes or even if they are bullet wounds. "It has been pointed out in several publications that the ability of emergency physicians and trauma surgeons to identify entrance and exit gunshot wounds is significantly lacking. According to Collins and Lantz, in more than half of cases, clinicians either confuse entrance and exit wounds or do not indicate the correct number of hits."[12]

In addition, evidence is often discarded, defaced or otherwise destroyed. For instance, a pant leg may be cut off the patient to attend to the gunshot injury to the leg. That pant leg may have valuable evidence of powder burns or other information that could establish the barrel distance when the shot was fired. All too often, that remnant of clothing would be thrown on the ER floor and then treated as a biohazard due to blood staining and discarded as medical waste. Another example may be bullet removed from the patient, where the ER doctor uses stainless steel forceps scratching the surface and then drops the bullet on the table or floor. It may even be worse, if the doctor preserves the bullet because, for some reason, even if it is properly packaged and marked as evidence, a procedure developed whereby doctors would scratch their initials on a non-distorted portion of the bullet for later identification. This, of course, is unnecessary and compromises the evidentiary value of the item.

There is a nascent effort to incorporate some mechanisms in to the ER protocol and the physical ER to encourage the preservation of evidence while maintaining the primary goal of saving the life of the patient. To the extent that such procedures are in place, part of the protocol would be to turn all the evidence that might have forensic value over to police immediately and not to store the materials at the hospital. However, if the opinion of an ER doctor is being proffered, it is fair to ask about whether protocols were in place, if they were followed and whether there is any residual evidence still available from the hospital.

Conclusion

We are only able to scratch the surface here about the interpretation of medical opinions and the possible biases or inaccuracies in pathologist's or emergency room doctor's reports. This is not intended to be insulting to any of the professionals who do their jobs conscientiously, however, lawyers must be the first line of critical thinking when it comes to forensic opinions to assure that the trier of fact takes a similarly critical look. ■

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 & Dunkle. 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 and 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 teaching law and forensic science at the Santa Barbara and Ventura Colleges of Law.

ENDNOTES

1 ©Robert M. Sanger.

2 *Bureau of Justice Statistics Special Report,* June 2007, NCJ 216756

3 See, *People v. McDonald,* 37 Cal.3d 351 (1984), (*overruled on other grounds, People v. Mendoza,* 23 Cal.4th 896 (2000)).

4 "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert."

5 "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

6 See, ***People v. Stoll***, 49 Cal.3d 1136 (1989). As a second requirement, "[t]he proponent also must establish that 'the witness furnishing such testimony' is 'properly qualified as an expert to give [such] an opinion.' . . . The third and final requirement, . . . is for the proponent to show that 'correct scientific procedures were used in the particular case.'" (Citing, *People v. Kelly,* 17 Cal.3d 24 (1976)).

7 *Daubert v Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), *Kumho Tire Co., Ltd. v Carmichael,* 526 U.S. 137 (1999***)*** and *Sargon*

Continued on page 23

Motions

Price, Postel & Parma LLP is pleased to announce **Shannon DeNatale Boyd** has joined the firm as an associate attorney. Her practice involves public entity representation and civil litigation from pre-litigation consultation to resolution, including discovery, law and motion, mediation, trial, and writs and appeals. Prior to joining PP&P, Ms. Boyd was an associate attorney at Buynak, Fauver, Archbald & Spray, LLP. Her practice focused on civil litigation and employment law.

Ms. Boyd graduated magna cum laude from University of California, Santa Barbara, with a B.A. in Psychology and Italian Studies. Ms. Boyd received her J.D. in 2010 from Santa Clara University School of Law, where she graduated cum laude. Ms. Boyd is a member of Phi Beta Kappa and the Order of the Coif.

Mullen & Henzell LLP is pleased to announce that **Deborah K. Boswell** became a partner of the firm in January. Deborah joined the firm in 2008. She received her B.A. in Environmental Studies from the University of California, Santa Barbara, her J.D., with distinction, from the University of the Pacific McGeorge School of Law, and her L.L.M. in Taxation from the University of Florida College of Law. Deborah is a Certified Specialist in Estate Planning, Probate, and Trust law. The firm proudly recognizes her achievements and is thrilled she will continue to provide the highest level of service to its clients.

Santa Barbara attorney **Renee M. Fairbanks**, a Certified Family Law Specialist, has opened a new firm: **Law Office of Renee M. Fairbanks**. Formerly a principal of Ehlers & Fairbanks, Ms. Fairbanks represents clients in divorce, custody, support, and domestic partnerships proceedings on the Central Coast.

Ms. Fairbanks also sits on the State Bar of California's Family Law Executive Committee and focuses on Education, which includes Self-Study and other continuing legal education programs.

She is a past Board Member of Santa Barbara Women Lawyers and served as President of the Board of Directors of the Santa Barbara County Bar Foundation from 2014 through 2015.

Her community volunteer activities include having served as a Director for the Board of Old Spanish Days, Inc. and supporting various local charities, such as The Legal Aid Foundation of Santa Barbara, Animal Shelter Assistance Program, The Fund for Santa Barbara, and Environmental Defense Center.

Ventura County-based **Whalen Bryan Inc.** has opened an additional office in downtown Santa Barbara, according to **Kathi Whalen**, principal. The executive recruiting and staffing agency's new space is located at 925 W. Anapamu St., near the Santa Barbara County Courthouse.

Placements include attorney, paralegal, legal secretary, and legal administrator. The agency also places executive assistants and personal assistants for high net

worth individuals.

Whalen Bryan Inc. began over 30 years ago and now serves San Luis Obispo, Santa Barbara, Ventura, and Los Angeles counties. Ms. Whalen holds memberships in NALS (National Association of Legal Staffing) and the California Association of Personnel Consultants.

The **Santa Barbara Young Professionals Club** (SBYPC) celebrated its 20th annual Holiday Gala on December 2, 2016. SBYPC is a local non-nonprofit organization that provides networking opportunities to the Santa Barbara business community through monthly mixers, speaker engagements, fundraisers and other special events throughout the year. Additionally, SBYPC supports many non-profit organizations serving our local community by providing financial assistance as well as encouraging our members to volunteer and give back.

Each year at the Gala, SBYPC names its Nonprofit of the Year and presents the nonprofit with a donation. For 2016, SBYPC was happy to present over $5,000 to the Teddy Bear Cancer Foundation (TBCF), who provide resources and support to families in our community who have a child with cancer.

Also at the Gala, SBYPC presents an award for Young Professional of the Year. This year, the award went to local attorney, **Brian Cota**. Mr. Cota is the head of the White Collar Fraud/Financial Elder Abuse Unit at the **Santa Barbara District Attorney's Office**, and a 9th generation Santa Barbaran. Mr. Cota is known for being an ethical and exceptional attorney, who also volunteers his time with many other charitable organizations, such as Girls Inc. and the Santa Barbara County Bar Association. Mr. Cota was truly deserving of this award as he performs a job every day that gives back to the community and strives to make our community a better place to reside.

If you have news to report - e.g. a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc… - The Santa Barbara Lawyer editorial board invites you to "Make a Motion!". Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com. If you submit an accompanying photograph, please ensure that the JPEG or TIFF file has a minimum resolution of 300 dpi. Please note that the Santa Barbara Lawyer editorial board retains discretion to publish or not publish any submission as well as to edit submissions for content, length, and/or clarity.

Sanger, *continued from page 21*

Enterprises, Inc. v. University of Southern California, 55 Cal. 4th 747 (2012).

8 Daniel C. Murrie, Marcus T. Boccaccini, Lucy A. Guarnera, and Katrina A. Rufino, *"Are Forensic Experts Biased by the Side That Retained Them?"* Psychological Science, (2013) 24: 1889.

9 Committee on Identifying the Needs of the Forensic Sciences Community, Strengthening Forensic Science in the United States: A Path Forward, National Research Council (2009) 252.

10 A preferred title these days is Emergency Department (ED) Doctor, however, for the purpose of this article we are talking about ED doctors who are actually in the ER at the time of the treatment of patients.

11 For instance, the emergency room testing protocol for ethanol is not as accurate as the "legal" test used for forensic purposes even though the ER test is used for diagnosis and treatment purposes in the ER. The ER tests, while quick, separate the solids from the liquids and the tests' results can read up to 30% higher than the actual blood alcohol level of the patient. Jones, A.W., *"Hospital alcohol test not completely easy to use for legal purposes. Conversion of ethanol levels in plasma or serum to permillage level in blood,"* Lakartidningen, (2008) 105(6):367–368 (in Sweedish but referred to as a seminal study, e.g., Annika Kaisdotter Andersson, Josefine Kron, Maaret Castren, Asa Muntlin Athlin, *"Assessment of the breath alcohol concentration in emergency care patients with different level of consciousness,"* Scand J Trauma Resusc Emerg Med. (2015) 23: 11.

12 Annette Thierauf & Matthieu Glardon & Stefan Axmann & Beat P. Kneubuehl & Jan Kromeier & Rebecca Pircher & Stefan Pollak & Markus Große Perdekamp, *"The varying size of exit wounds from center-fire rifles as a consequence of the temporary cavity,"* Int J Legal Med DOI 10.1007/s00414-013-0869-9, (2013) *(Internal citation omitted).*

March Digressions

By Doug Hayes

Back in the seventies I had the great privilege of sharing space with Frank Crandall at 1010 State Street. Elsie was his secretary. I was sitting at my desk wondering what to do (this is before I found the wonders of crossword puzzles.) My phone rang. I picked it up and, to quote Frank, stated, "How may I help you?" The lady asked, "Is this Saint Paul's Cleaners?" Without thinking, I replied, "No, I am a lawyer and would be pleased to take you to the cleaners." She hung up indignantly.

Another time, sitting at the same desk at 1010 State Street, the phone rang. Thinking this might be the big one, I answered, "How may I help you?" The gentleman on the line asked, "Do you handle suitcases?" I replied, "Not anymore. Since I passed the bar I no longer work as a red cap at the airport." He hung up.

Moving along to the ever interesting conversations with clients, I was interviewing a Hispanic client in the holding cell behind Department 9 (Judge Joe Lodge). Looking for background I asked about such things as family, education and possible prior criminal record. Then I asked the important question of whether he was legally in the United States or not. He replied, "Well, I was born in Oxnard!" He wasn't sure if Oxnard was in the U.S. or Mexico.

Another time, a client came into my office on Victoria Street in the 1990's. He asked me to represent him in a public intoxication case (647 PC). I gave a brief statutory definition of public intoxication and added that he may not have been, since it was a subjective standard that was often used by police as a substitute for the vagrancy laws that were ruled unconstitutional several years earlier. So I asked him, with that background in mind, "How drunk were you?" He replied, "Mr. Haynes, I was so drunk I was in Bolivia." There was our defense--we are going to move for a change of vengeance and then take it to the International Court at the Hague.

Finally, I think my all-time favorite story was when Bill Duval was working for the Los Angeles Public Defender's Office and was asked to go visit a client in custody downstairs in the holding cells in the old Criminal Court building. The ever sensitive Mr. Duval asked, "What can I do for you?" The client responded, "Mr. Duval, I need to get out of here. Mr. Duval, I can be released on my own rhinoceros."

Enough for this month... ■

Santa Barbara courthouse bas-relief sculptures celebrate the sea.

Santa Barbara Women Lawyers Foundation is pleased to invite you to our

ANNUAL SCHOLARSHIP AWARDS LUNCHEON WITH MCLE PRESENTATION

Date: *March 22, 2017*
Location: *University Club, 1332 Santa Barbara Street*
Time: *Noon to 2 p.m.*

Awarding of 2017 Scholarships
Followed by presentation on "Dealing with Implicit Bias"
by
Edwina Barvosa, Associate Professor at UCSB

State Bar Members $40 SBWL Members $35
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If you wish to support SBWL but cannot attend, please consider sponsoring a student.

Please **RSVP:** to Diana Lytel at dlytel@lytellaw.com by March 17, 2017
*Please indicate if you would like a vegetarian dish

Thank you to all who attended our annual Bench & Bar Conference and a BIG thank you to our Bench and Bar Conference Sponsors!

Foley Bezek Behle & Curtis, LLP - Keynote Sponsor

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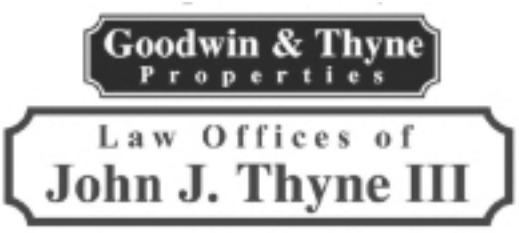

The Litigation Section of the Santa Barbara County Bar Association presents:

THE CLOSING ARGUMENT:
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Learn how to integrate the evidence and the law in an entertaining, informative multi-media presentation.

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Matthew Haffner of HAFFNER LAW GROUP

Mr. Haffner, with twenty five years civil litigation experience, has over thirty jury trials to verdict, all as a defense lawyer, with 29 defense verdicts, including for wrongful death; catastrophic injury; significant construction defect damage; contractual disputes; and, employment law. Haffner Law Group's practice has recently expanded to include plaintiff's matters, so all trial practitioners may gather critical trial practice information from this seminar.

Date and Time

Thursday, March 2rd, Noon to 1:00 pm

Location

Santa Barbara College of Law, Room 1, 20 East Victoria Street, Santa Barbara

Reservations

Reserve via email to Mark Coffin,
Chair of Litigation Section, by Thursday, February 23, 2017, mtc@markcoffinlaw.com

Cost and Payment

$40 to members, $45.00 to nonmembers – includes lunch
Mail checks by Thursday, February 23rd, payable to:
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The Litigation Section of the Santa Barbara County Bar Association presents:

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Searching For Needles In A Needlestack

The production, storage and transmission of data requires that computers and cell phones be an obvious starting point for identifying evidence. Whether it is a computer forensics analysis as an element of an investigation, or production of electronically-stored information for review in an eDiscovery platform, knowing the tools and methodologies is not just important, but critical.

Speaker:

John R. Troxel of Verdict Resources

John manages cases requiring technological expertise, including electronic discovery, computer forensics, online research and construction of project databases. An investigator since 1997, he has directed cases all over the country as well as several overseas, with proficiency in developing evidence from computers and associated media, finding people, interviewing, corporate investigations, background searches and pollution liability disputes. John is frequently engaged to identify, collect, analyze and produce electronic evidence on storage media such as hard drives, cell phones, etc. He is often asked to speak on issues relating to electronic evidence.

Date and Time

Thursday, March 30th, Noon to 1:00 pm

Location

Santa Barbara College of Law, Room 1, 20 East Victoria Street, Santa Barbara

Reservations

Reserve via email to Mark Coffin,
Chair of Litigation Section, by Thursday, March 23, 2017, mtc@markcoffinlaw.com

Cost and Payment

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Save the Date:

The State Bar of CA Family Law Section Presents: Family Law Essentials 2017

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Substantive law is only one component of your family law case. An esteemed panel of six (which will include the Hon. Thomas Anderle) will share practical pointers on how to navigate your case, and bridge the well between the bench and bar in this changing landscape of family law today.

Date and Location:

Monday, June 26, 2017
Santa Barbara School of Law
20 E. Victoria St,
Santa Barbara, CA 93101

Price:

$200 Family Law Section members
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(includes enrollment in the Family Law Section for 2017)

Onsite registration fees are $250 for Section Members and $345 for Non-Section Members.

Registration Information

Program package includes 6 hours of MCLE, 1.5 hours of ethics, .5 hours of elimination of bias in the legal profession and society, 6 hours of legal specialization in Family Law, program materials, continental breakfast, and lunch.

Register online at: **http://familylaw.calbar.ca.gov**

In order to pre-register, your form and check (payable to the State Bar of CA) or credit card information must be received at least 5 working days prior to the program.
On-site registration opens at 8:00 a.m. and is subject to space availability.

QUESTIONS: For registration information, please call 415-538-2508. Telephone registrations will not be accepted. For program content and section information, please call 415-538-2238.

The SBCBA Real Estate/Land Use Section Presents:

"Sharing Space – Legal Issues Regarding Short-Term Vacation Rentals"

When: March 23, 2017, 12:00 p.m.

Where: 118 E. Carrillo Street, Santa Barbara

MCLE: 1.0 Hour (General)

Speaker: Ashley M. Peterson, Law Office of Ashley M. Peterson

About the Event: This program will provide an in depth discussion of Airbnb/VRBO/short term vacation rentals and the unanticipated legal issues facing homeowners, homeowner associations, and landlords. Content will cover overview of city laws affecting Santa Barbara, Los Angeles, San Francisco, San Diego, Palm Springs, landlord/tenant issues, and homeowner association enforcement concerns.

Price: $25.00 for SBCBA members- $30.00 for Non-members
Lunch will be provided

Make checks payable to:

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For information on upcoming MCLE events, visit SBCBA at http://www.sblaw.org//

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