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Santa Barbara Lawyer

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Articles

Sections

On the Cover

Harvest time!

Thank You to Our Fee Arbitration Panel!

The SBCBA would like to thank the following Mandatory Fee Arbitration attorneys and arbitrators for their service in 2016. The program, which operates under the auspices of the State Bar of California, provides services to resolve fee disputes between clients and attorneys.

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An exceptionally large thank you to the Chairs of the program, the tireless and highly capable Scott Campbell, and the long-time, legendary, treasure chest of Fee Arbitration knowledge, Tom Hinshaw.

A Well-Deserved Honor to Marilyn Metzner

By Judge Thomas P. Anderle

Judge Tom Anderle and Marilyn Metzner

The Santa Barbara County Bar Foundation recently announced the presentation of "The 2016 Legal Community Appreciation Award" to Marilyn Metzner, "who has provided an outstanding contribution to the local court system over a significant time." The award was presented on September 22, 2016.

Marilyn has been my secretary for 45 years. She was born at St. Francis Hospital, Santa Barbara, in 1938. When just a youngster she moved to Indiana. She was hired in April 1956 as a secretary to a senior partner at a law firm in Indiana. In April 2016 she celebrated 60 years working as a legal secretary. At one time she worked as a secretary to the Trust Investment Officer at Crocker Bank in Santa Barbara, and was offered the position as Trust Officer but declined as she was pregnant with her second born.

When she returned to work, it was not at the bank but as legal secretary to the prominent Santa Barbara probate attorney Mr. Clarence Rogers. She would attend many of the Probate Continuing Education Classes over the following years. When he closed his practice, she went to work for Goux, Romasanta and Anderle in 1971. She has worked with me ever since. Over the years she attended many CEB classes in Family and Civil Law. We opened our own office in July 1977, and closed it in February 1998 when we came to the Superior Court.

Marilyn has been an extraordinarily conscientious and dedicated servant to the legal profession for over 60 years. She is meticulous, dedicated and a pleasure to work with. She has two brothers, two sisters, four children, six grandchildren and three great grandchildren. Believe it or not, she calls her mother, who lives in Northern California, every night before she goes to bed. One of her sisters is married to Bill Cook who was, for a long time, the Santa Barbara County Assessor, now retired. Her daughter Pamela is the secretary to Judge Geck and Judge Herman.

Congratulations Marilyn; well-deserved. You are a credit to all the hard working and dedicated men and women within the Santa Barbara Superior Court family. ■

Ethical Billing of Attorneys' Fees

By Carole J. Buckner

If a client complains about your bill, and the dispute makes its way into mandatory fee arbitration, how is the arbitrator likely to view your billings? According to a recent Advisory from the California State Bar's Committee on Mandatory Fee Arbitration, the arbitrator will scrutinize any block billing, evaluate patterns and descriptions in time entries, analyze the staffing on the matter, examine the process of preparation of the bill, and compare the work performed to what was billed.[1]

Bills rendered by an attorney to a client must "clearly state the basis" for the billing, typically including the amount, rate, and basis for calculation.[2] Otherwise, the fee agreement is voidable at the option of the client, and the attorney is entitled to collect only a reasonable fee.[3] The billing should also reflect which attorney or paralegal performed the itemized services, by date, along with the hourly rates.[4]

Accuracy is an important issue in billing. An attorney may charge a client only for work actually done by the attorney.[5] Value billing (adding a bonus or premium) and double billing (charging two clients for the same period of time) are improper unless a client agrees after full disclosure,[6] and the fee is not unconscionable.[7]

In general, billing time as it is worked, rather than delaying billing to a later date, results in greater accuracy.[8] This allows a greater degree of specificity, which also indicates a higher level of accuracy when bills are examined in retrospect.[9] Inaccuracy and overcharging can arise where time is billed in high minimum increments such as a .25 minimum hour.[10] For example, where several discrete short tasks such as phone calls and emails of a minute or two are billed at .25 hours each, overcharging may result. Even where clients have agreed in writing to the minimum, recording such entries with "no charge" may be appropriate on occasion in order to avoid overbilling. Round numbers on bills may also draw attention, especially where an attorney is not engaged in trial.[11]

Among other aspects of billing the arbitrator may examine are the pre-billing process, in which time entries are edited and billing is adjusted. Fee arbitrators may scrutinize any upward adjustments, as well as any failure to review pre-bills and have them reviewed for accuracy by the other attorneys billing time on the matter.[12]

Staffing is an important area in which the arbitrator's 20/20 hindsight is applied to the billing in the context of the arbitration of a billing dispute. Staffing issues resulting in reduction of bills by an arbitrator can arise from billing time that is essentially training of less experienced attorneys, or billing time by a more senior attorney whose experience is not necessary to the task.[13] Revolving billers, who join the case for a short time and are then replaced, may result in duplication of effort for which the client should not be billed. Overstaffing can also result in a significant reduction by an arbitrator. In *Christian Research Institute v. Alnor*, 165 Cal.App.4th 1315 (2008), the attorney sought recovery of 638.6 hours on a motion to strike and appeal with 228.7 hours allocated to the motion and 410 hours allocated to the appeal, which the court reduced to 71 hours. Among other problems with the fee request, the court mentioned overstaffing, indicating that, "the five Alnor deployed on the motion appear to have expended more time telephoning, conferencing, and e-mailing each other than on identifiable legal research for the motion."[14]

Comparison of the substance and quality of the work created to the cost of each item is also an area to which an arbitrator may direct his or her attention.[15] For example, a motion to dismiss may be drafted by a new attorney, revised by a senior associate and reviewed and signed by a partner. The arbitrator might ask whether part of the new attorney's time involved training, and whether the senior associate should have prepared the motion. Whether the motion necessitated an interim review or partner-level review might also be questioned. Of course, everything depends on the complexity of the matter and such an approach might be perfectly appropriate. In *Christian Research Institute*, while counsel asserted that the motion was complex and novel, the court said several issues were "settled as hornbook law" and that "a close question based on the facts is not necessarily a complex or time consuming one."[16] The same court also noted that, despite 400 hours spent on the appeal, "counsel failed to uncover or cite the seminal cases applying the dispositive standard."[17] In addition, the court said that there was no evidence extensive time was devoted to investigation or discovery, nor did the legal research entries show that the pertinent issues were difficult.[18]

One area of some concern is so-called block billing.[19] This is the failure to show the attorney, rate and time expended

Continued on page 9

"Disruptive Change" Needed Toward E-Discovery Competence

By Greg Herring

Electronically stored information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities. Electronic Discovery, or e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes. Together, they constitute interesting and important considerations and challenges that overlay family law as well as traditional civil litigation.

But ignorance of and resistance to dealing with ESI remains high. An experienced and well-respected judge in one of my cases recently asked in the middle of an e-discovery hearing, "what is ESI?"!

In a recent meeting of managing partners of Southern California law firms, one participant bragged that his large firm accepts discovery productions of emails and websites solely through hard copy printouts. It was lost on him that discovery of ESI in its native form can reveal metadata (hidden "data regarding data") potentially critical to a case. It can be much more efficient to transfer from computers and devices in its native format. It can be reviewed by technology that is much more efficient than human eyeballs.

A recent (2016) survey of federal judges and attorneys addresssed e-discovery best practices and trends. Grabbing attention was their observation that **being undereducated and underprepared in e-discovery "is no longer an option."** They continued, **"disruptive change is needed for lawyers to become e-discovery competent."** (The survey can be obtained through *exterro.com*.)

In his 2015 Year-end Report on the Federal Judiciary, Chief Justice John Roberts emphasized that new changes to the Federal Rules of Civil Procedure are in part intended to "address serious new problems associated with vast amounts of [ESI]."

Last year, the California State Bar issued a formal Opinion, providing guidance relating to ESI and e-discovery. (State Bar of California's Standing Committee on Professional Responsibility and Conduct ("COPRAC") Formal Opinion No 2015-193.) The Opinion points out that electronic document creation and/or storage, and electronic communications have become commonplace in modern life. It acknowledges that discovery of ESI is now a frequent part of almost any litigated matter. It emphasizes that **attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery.**

Greg Herring

Regardless of jurisdiction, "ESI is now an accepted part of a law practice, and may not be ignored simply because counsel may be 'highly experienced' in other aspects of litigation. Failure to be adequately prepared to conduct e-discovery qualifies as 'ethical incompetence." (A. Marco Turk.)

While not every litigated case involves e-discovery, in today's technological world almost every litigated case *potentially* does. As the Opinion emphasized, "the chances are significant that a party or a witness has used email or other electronic communication, stores information digitally, and/or has other forms of ESI related to the dispute."

Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

- Initially assess e-discovery needs and issues, if any;
- Implement/cause to implement appropriate ESI preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;
- Identify custodians of potentially relevant ESI;
- Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- Perform data searches;
- Collect responsive ESI in a manner that preserves the integrity of that ESI; and
- Produce responsive non-privileged ESI in a recognized and appropriate manner.

Commonly heard pushback includes complaints that many clients cannot financially afford substantial ESI attention and that attorneys want to practice law, not computer forensics.

But properly handling these issues and tasks need not cause heartburn. Rather, a practical and economical standard plan can easily include:

- Screening each incoming new case for ESI/e-discovery issues and tasks as part of the regular intake process – just add a new line to the usual intake checklist;
- Warning new clients through standard letters of the importance of ESI in the modern litigation environment and the need to preserve all hardware (smart phones, computers and other devices) and data while in litigation;
- Assessing clients' personal and business ESI storage systems. This can be as simple as learning whether an individual stores her personal data in a popular telecommunications cloud (icloud, etc.) or a more complex system, in the case of a businessperson, for instance. In the latter cases, a computer forensics professional can be retained to perform a basic audit, from which further assessments and planning can spring. At our firm, we regularly retain a local forensic consultant who provides clients with no-charge initial audits, which we then use to budget and plan in concert with the client.
- Sending "ESI hold" letters to opposing counsel and then monitoring when it looks like ESI might be an issue.

Negligence or lack of basic knowledge regarding ESI and e-discovery requirements constitutes professional incompetence. Our firm has gathered a variety of letters, checklists and other communications designed to help manage ESI and e-discovery challenges. Please contact us at info@theherringlawgroup.com if you would like a set. We would be pleased to assist toward achieving e-discovery competence. ■

Greg Herring is the principal of Herring Law Group, a family law firm serving the 805, with offices in Santa Barbara and in Ventura County. He is a past president of the Southern California Chapter of the American Academy of Matrimonial Lawyers and is a Fellow of the International Academy of Family Lawyers. His prior articles and ongoing blog entries are at www.theherringlawgroup.com.

Buckner, *continued from page 7*

for each task performed. Where a lawyer handles several disparate tasks in the same day, and bills one block of time to all of them, some cases indicate that this disguises non-compensable tasks.[20] Some case law indicates that a penalty is appropriate at the discretion of the trial court assigning a reasonable percentage to block-billed entries.[21] This approach may be all right "when those services are rendered in one time frame without interruption, but it is preferable when counsel interrupts research to make or receive a phone call, that the time spent on that phone call should be separately stated for the reasons set forth above."[22] Different functions performed at different times of day should result in separate entries.[23]

A prior Advisory from the Committee on Mandatory Fee Arbitration had cautioned that the practice of block billing could increase time by 10-30%.[24] Therefore, arbitrators can apply a reasonable percentage to block-billed entries or even disregard them entirely. In *Christian Research Institute*, the court found that block billing, "while not objectionable per se in our view, exacerbated the vagueness of counsel's fee request…."[25]. ■

ENDNOTES

1 Arbitration Advisory 2016-02, Analysis of Potential Bill Padding and Other Billing Issues (3/25/2016) ("Arbitration Advisory 2016-02")
2 Cal. Bus. & Prof. Code § 6148(b).
3 Cal. Bus. & Prof. Code § 6148(c).
4 Arbitration Advisory 95-02, Standards for Attorney Fee Billing Statements (6/9/1995).
5 Cal. State Bar Formal Opn. 1996-147 (1996).
6 Cal. State Bar Formal Opn. 1996-147 (1996).
7 Cal. Rules of Prof'l Conduct, Rule 4-200.
8 Arbitration Advisory 2016-02, at p. 3.
9 Arbitration Advisory 2016-02, at p. 4.
10 Arbitration Advisory 2016-02, at p. 8.
11 Arbitration Advisory 2016-02, at p. 8-9.
12 Arbitration Advisory 2016-02, at p. 3-4.
13 Arbitration Advisory 2016-02, at p. 5-6.
14 *Christian Research Institute v. Alnor*, 165 Cal.App.4th 1315, 1326 (2008).
15 Arbitration Advisory 2016-02, at p. 6-7.
16 *Christian Research Institute v. Alnor, supra*, 165 Cal.App.4th at 1327-28.
17 *Id.* at 1329.
18 *Id.* at 1326.
19 Arbitration Advisory 2016-02, at 9-10; *see, e.g., In re Tom Carter Enterprises, Inc.*, 55 B.R. 548, 550 (C.D. Cal. 1985).
20 *See, e.g., Bell v. Vista Unified School Dist.*, 82 Cal.App.4th 672, 687-689 (2000).
21 *Heritage Park Financial v. Monroy*, 215 Cal.App.4th 972 (2014).
22 *In re Tom Carter Enterprises, Inc.*, 55 B.R. 548 (C.D. Cal. 1985).
23 *Id.*
24 Arbitration Advisory 95-02, Standards for Attorney Fee Billing Statements (6/9/1995).
25 *Christian Research v. Alnor, supra*, at 1325.

This article is written by Carole Buckner of the Buckner Law Group and first appeared in the July 2016 edition of the Los Angeles County Bar Association's *Update,* copyright 2016 Los Angeles County Bar Association.

Confidentiality and the Cloud

By Larry Doyle

California has the toughest lawyer-client confidentiality standards in the United States—and quite possibly the world. Business and Professions Code §6068(e)(1)—reinforced by Rule of Professional Conduct 3-100—provides that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client" without that client's informed written consent. That language leaves very little wiggle room.

At the same time, we live in the age of digital communication, where data breaches are part of daily life. In 2015, for example, California's Attorney General's office received reports on 178 data breaches involving over 24 million records, victimizing nearly three in five Californians. Similar examples from around the country and world make clear that the concept of "information security" is becoming an oxymoron.

So there we attorneys are, faced with an incredibly high confidentiality standard and the practical impossibility of protecting the absolute confidentiality of client confidences if modern means of communication or data storage are utilized. What can we do?

The answer involves the exercise of due diligence and common sense. Even though California is the only state that has not adopted a variation of the ABA Model Rules of Professional Conduct, our rules (CRPC 1-100) and case law (City & County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839, 852) provide that in the absence of on-point California authority and conflicting state public policy, the Model Rules may serve as guidelines. In this case the exception to the duty of confidentiality (Model Rule 1.6) for disclosure "impliedly authorized in order to carry out the representation" clearly applies.

As noted in Formal Opinion 2010-179 issued by the State Bar's Committee on Professional Responsibility and Conduct (COPRAC), the absence of this language from California's statute and rule "does not prohibit an attorney from using postal or courier services, telephone lines, or other modes of communication beyond face-to-face meetings" to achieve that goal. The committee recognized that no means of communication is completely secure, and those means that are most secure (e.g., communication only by "snail mail") may be far too restrictive or slow to make effective representation possible. Therefore, the attorney's duty is to ensure that the technology used to communicate and store information is as secure as possible while still permitting the attorney to provide effective representation.

The determination of what technology meets these standards is tied to the attorney's duty of competence, which is set forth in California Rule of Professional Conduct 3-110. The rule provides that a California lawyer "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence," applying the diligence, learning and skill, and ability "reasonably necessary for the performance of such service." Again, while California's rules do not specifically require an attorney to keep abreast of important technological developments (unlike the ABA Model Rules), that duty can be inferred from the circumstances. As COPRAC noted in its Formal Opinion 2012-184, which dealt with many of the same issues in the context of a Virtual Law Office, "while [an] Attorney is not required to become a technology expert in order to comply with her duty of confidentiality and competence, [she] does owe her clients a duty to have a basic understanding of the protections afforded by the technology she uses in her practice." If the attorney does not have sufficient knowledge, she must either obtain it or consult with someone who has it—e.g., an outside savant in information technology.

Opinion 2010-179 identified certain specific factors an attorney should consider before using a specific technology:

a) The attorney's ability to assess the level of security afforded by the technology, including:

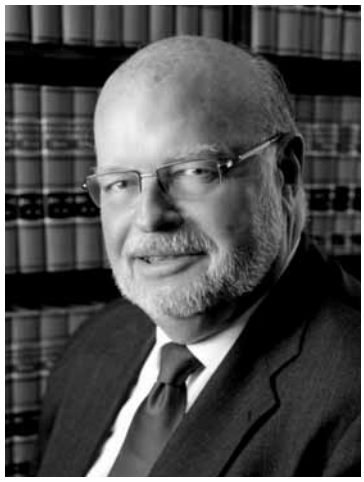
1. Consideration of how the particular technology differs from other media use. Ethics opinions once held that use of Internet email violates confidentiality obligations, but now universally conclude that use of unencrypted Internet email is permitted without express client consent. (ABA Formal Opn. No. 99-413; LA County Bar Assn. Formal Opn. No. 514 (2005).)

2. Whether reasonable precautions may be taken when using the technology to increase the level of security. The circumstances under which a message is sent (e.g., from an office server behind a firewall as opposed to using public WiFi at a local coffee shop) can impact security greatly, and an attorney may need to employ measures (e.g., encryption, firewall) to guard against data breaches in the latter case. Likewise, employing password protection on mobile

Continued on page 17

The Death Penalty in California

By Robert Sanger[1]



Robert Sanger

In this month's *Criminal Justice* column, we will discuss progress or lack thereof in the criminal justice system in California, particularly as it pertains to the California Death Penalty system. *Disclaimer*: The present author assisted with the drafting of Proposition 62 – the California initiative to repeal the death penalty which is now on the November ballot[3] – and has had an active role in the opposition to the death penalty on a statewide basis for many years, through testimony before a State Senate Committee,[4] authorship of reports,[5] white papers[6] and law review articles,[7] as a Board Member of Death Penalty Focus, as Chair of the Death Penalty Committee and later President of California Attorneys for Criminal Justice (CACJ) and as the current Co-Chair of the Capital Case Defense Seminar for CACJ and the California Public Defenders Association (CPDA).

Nevertheless, over the last few months, the author undertook to do an empirical study of the death penalty system in California and examine, in particular, what criticisms have been leveled against it over the last couple of decades and what, if any, changes have been made in the system. The study was focused, most importantly, on what flaws in the system were identified that could lead to wrongful conviction of the innocent and to the imposition of a death sentence on an individual for improper reasons, such as race or location. The Santa Barbara and Ventura Colleges of Law published the law review article resulting from that study as a *Special Law Report.*[8] This *Criminal Justice* column, in turn, will summarize the research and findings and indicate what remedy the evidence supports.

Recent History of the Death Penalty in California

The California Supreme Court, almost 45 years ago, found that the death penalty was unconstitutional as then practiced in California in *People v. Anderson*, 6 Cal. 3d 628 (1972). The Court held, in an opinion that bears re-reading today, that capital punishment degrades and dehumanizes everyone involved and that the death penalty is "unnecessary to any legitimate goal of the state and incompatible with the dignity of man and the judicial process." Following this decision, the United States Supreme Court, the same year, in *Furman v. Georgia*, 408 U.S. 238 (1972), found the death penalty unconstitutional under the Federal Constitution. However, after the United States Supreme Court approved capital punishment schemes four years later in *Gregg v. Georgia*, 428 U.S. 153 (1976), the California Legislature enacted a new death penalty scheme in 1977 followed by a more expansive initiative, Proposition 7, the Briggs Initiative, in 1978.

Since the resumption of the death penalty there have been 1,437 executions in the United States.[9] California executed 13 people since 1976 with the latest, Stanley "Tookie" Williams, being executed in 2006.[10] According to the California Department of Corrections and Rehabilitation, as of August 5, 2016, there are 746 people in CDCR custody facing death sentences on California's death row.[11] Thus, California has the largest death row in the United States and, in fact, the largest in the Western Hemisphere. There are approximately 20 inmates who have exhausted all of their appeals and post-conviction remedies and who would be subject to having the sentence of death carried out if and when a lethal injection protocol is legally established.[12]

The Death Penalty and Exonerations

The National Registry of Exonerations maintained by the University of Michigan Law School, currently lists 1,866 innocent criminal defendants who were convicted of capital and non-capital offenses in the United States from 1956 to the present.[13] This includes 156 people sentenced to death row who were exonerated from 1973 to the last exoneration recorded October 12, 2015.[14] These exoneration figures, as Judge Kozinski stated, may be a "miniscule portion" of those convicted who are innocent but do not have DNA evidence or otherwise cannot prove it.[15] Furthermore, these statistics do not take into account people who may have been factually guilty of crimes but, under a fair administration of the rules, should not have received the death penalty.[16]

The issue of wrongful conviction was addressed in many

states as the exoneration figures grew to be more worrisome. In 2000 in Illinois, 13 people on death row were exonerated as a result of the work of the Journalism Department of Northwestern University. Ultimately 10% of the Illinois death row population was exonerated. Famously, Illinois Governor George Ryan imposed a moratorium on executions and empaneled a Blue Ribbon Commission to study how innocent people could have been convicted and incarcerated on death row.[17]

The wrongful convictions throughout the United States were found to be the result of flaws in the criminal justice system that seemed to be exacerbated by the limelight of capital litigation contests.[18] The flaws were systemic and were found in all stages of the criminal process, from police investigations, false confessions, mistaken eyewitness identifications, failure to preserve exculpatory evidence, unreliable jail-house informants, prosecutorial misconduct, ineffective assistance of defense counsel, perjured testimony, forensic error, tunnel vision, under-trained judges and inadequately informed jurors.[19] After a serious study in Illinois, the Illinois Commission issued a Report in 2002, fourteen years ago, setting forth 85 recommendations to fix these flaws while acknowledging that, even if all 85 were enacted into law, it would not guarantee that an innocent person would not be executed.[20]

California's Death Peanlty System as of Fourteen Years Ago

It was clear to practitioners and others involved in the death penalty litigation fourteen years ago that California needed the same fixes as Illinois. By late 2002, the California State Senate had information about the specific fixes needed. In April of 2003, the Senate held hearings with live testimony from Governor Ryan, himself, and several experts on capital punishment, including the present author.[21] That year, the Santa Clara Law Review published a study showing that California's death penalty system needed over 92% of the same fixes as Illinois.[22] In addition, California's death penalty system suffered from other problems that Illinois did not have including a failure to have proportionality review and a greater systemic flaw in the narrowing process.

Warnings about the deadly nature of these failures and the need for the same fixes were repeated over and over again during the last fourteen years. The California Commission on the Fair Administration of Justice, headed by former Attorney General Van de Kamp, found significant failures of the California system.[23] The California Commission Report confirmed the flaws and needed fixes documented in the Illinois Report and applied to California in the Santa Clara Article. The Commission's work was complemented by scholarship, such as law review articles written by Judge Alarcon and Professor Paula Mitchell,[24] a scathing review of the systemic flaws of the criminal justice system in general by Judge Alex Kozinski,[25] exposure of the racial and geographic disparities that affect who gets death by Professors Pierce and Radelet,[26] warnings from United States Supreme Court Justices including Justice Stevens,[27] and Justice Breyer,[28] a campaign in 2012 to repeal that was two points short of succeeding,[29] and other scholarship.[30]

Meanwhile, the forensic sciences continued to advance and while they did, evidence of faulty science and wrongful convictions continued to mount.[31] The National Academy of Sciences, at the request of the Attorney General of the United States, embarked on a comprehensive evaluation of forensic science in the U.S. concluding in 2009. With the exception of DNA analysis in cases with non-contaminated, non-degraded, single source donors, forensic science was found significantly wanting.[32] Many but not all of these concerns were predicted in the Illinois Commission Report and echoed in California.

California's Death Penalty System Today

Exactly none of the unmet 92% of the recommendations of the Illinois Commission Report from fourteen years ago have been met as of today in California.[33] Two proposed bills were passed in 2006 by both houses of the California Legislature which did not address any particular full recommendation but which addressed some of the sub-issues raised both by the Illinois Commission and the California Commission.[34] Nevertheless, they were vetoed by Governor Schwarzenegger. The next year, the two bills, watered down, were passed again accommodating the Governor's veto message along with a third.[35] They were all vetoed again. It was not until 2014 that a bill was finally passed incorporating some fixes recommended in a subpart of a recommendation of both the California and Illinois Commissions (that is, where practical, requiring video recording of interviews of murder suspects). But, even that was restricted to minors, who are not subject to the death penalty in any event.[36]

Therefore, over the last fourteen years, despite the Recommendations of the Illinois Commission, their application to California, the recommendations of the California Commission, the scholarly and judicial writings, and the growth of California's death row (now 746),[37] the fact is that California has done virtually nothing to fix the fatal flaws. Yet, five of the ten counties which imposed the most death sentences in the United States are in California.[38] Los Angeles leads the nation with 228 death sentences, with

Riverside (76) in fifth place and Alameda (43) and San Diego (40) in 9th and 10th. And Los Angeles is more than double Harris County Texas which is second with 101. When executions start again in California, there will be some twenty people who have exhausted all remedies who will be put to death, followed by a number of others whose remedies are almost exhausted. They will be disproportionately of color, poor, suffer from mental health issues, be victims themselves of abuse and some will be innocent.

Conclusion

Illinois enacted several of the reforms of their Commission Report in 2003 over the veto of ill-fated Governor Rod Blagojevich. The legislation, known as SB 472, made reforms in screening of jailhouse snitch testimony; provided access, pre-trial and post-conviction, to DNA databases; created an eyewitness pilot project using double blind and sequential procedures for photographic and live line-ups; required a statement of level of confidence as well as pre-line-up admonitions; required disclosure of jail-house snitch reliability information and any inducements for testifying; allowed appellate review on fundamental fairness of any particular death sentence; judicial notation of disagreement with juror's views; corroboration of jailhouse snitch testimony and that of sole witnesses or a single accomplice; and a program for recording of interrogations.[39] Even with these reforms, Illinois recognized that the human process was too fallible and Illinois abolished its death penalty in 2011.[40]

California continues to have all the same flaws and then some; California has failed and refused to make any of the changes recommended by the Illinois or California Commission; and California has not repealed its death penalty. California continues to accumulate people on death row with demonstrated racial and geographical disparities and without the basic protections recommended by the Commissions. The empirical evidence is that innocent people are in jeopardy of being killed; that for over fourteen years California has been on notice of the flaws that cause these wrongful convictions; that study after study has confirmed these flaws and that the system is broken; and that California has done nothing to fix these fatal flaws and broken system. This evidence supports the conclusion that, if no one has the will to fix the system (and, perhaps, it is simply unfixable), the death penalty should be repealed.

The only plan on the table offered by death penalty supporters is one that does not deal with any of the recommendations to fix fatal flaws but increases the cost by millions, lowers the requirements for qualified counsel, and seeks to shortcut the system to expedite executions.[41] This proposition has been carefully studied by Professor Paula Mitchell and lawyer Nancy Haydt who published a definitive evaluation of the impracticality of the proposition and concluded that it is not only costly but unworkable and probably unconstitutional.[42]

Proposition 62, on the California ballot for November 2016 provides for repeal of the death penalty, the automatic substitution of life in prison without the possibility of parole, and the requirement of work and restitution. This is proposed in light of the failure of the Legislature to do anything. It is also proposed in light of the fact that the courts, dealing with complex and slow-changing Eighth Amendment law, seem light-years from finding the death penalty unconstitutional.

When asked about state repeal initiatives, like that in California, Justice John Paul Stevens recognized the limited ability of the courts to deal with the fundamental problems with the death penalty. In February of this year, he said:

"Given the ever present potential for error in every case, the risk of error in capital cases is simply unacceptable …. It is time to put an end to mistaken and irrevocable state action of that kind; a goal that can only be accomplished by abolishing the death penalty …. So, the answer is yes. I feel even more strongly and I have thought about this repeatedly and the more I think about it the more it seems to me that it really doesn't make much sense for society to engage in such a wasteful enterprise when there are so many good arguments against going forward. The issue should be reflected on by voters in states, state by state …."[43]

Repeal of the death penalty appears to be supported by the evidence, as well as the wisdom of Justice Stevens, especially where there have been no efforts over the last fourteen years, and no present proposals, to fix the probably unfixable flaws. ■

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.

SBL Editorial Note: One source for a neutral comparison between Proposition 62 and Proposition 66 can be found at https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016) .

ENDNOTES

1 ©Robert Sanger. The opinions expressed herein are those of the

Continued on page 16

Sanger, *continued from page 14*

author alone and not of the Colleges of Law or the other organizations with which the author is associated.

2 Office of the Attorney General files, at: http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066%20%28Death%20Penalty%29.pdf?.

3 Office of the Attorney General files, at: http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0066%20%28Death%20Penalty%29.pdf?.

4 Sen. Gloria Romero, presiding, California State Senate Select Committee on the California Correctional System, convened April 2003.

5 Colloquially, "*The Sanger Report*." See, Lance Lindsey, *An Executive Report on the Formation of the California Commission on the Fair Administration of Justice*, The Sentry, (Fall 2004). ("The Sanger Report was instrumental in State Senate hearings conducted by Senator Gloria Romero in April 2003 to look into the flaws of the death penalty – hearings that led to lawmakers voting to establish such a commission on August 24, 2004.") at: http://www.deathpenalty.org//downloads/SentryFall2004.pdf.

6 Sanger, Robert M., Stephen Rhode and Jeff Gillenkirk, "*The Report of the Foxes: Analysis of Prosecutors' Perspective on California's Death Penalty*," A Report of Death Penalty Focus, 2003, http://deathpenalty.org/downloads/ResponsetoCDAA.pdf.

7 Sanger, Robert M., *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 Santa Clara L.R. 101 (hereinafter, "Santa Clara article") and, Sanger, *I.Q., intelligence Testing, 'Ethnic Adjustments' and* Atkins, 65 American Univ. Law Rev., 87 (2015).

8 Sanger, Robert M., *Fourteen Years Later: The California Death Penalty System*, 1 Special Law Report, Santa Barbara & Ventura Colleges of Law, 1 – 60 (September, 2016), available SSRN at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830677 or the Berkeley Electronic Press (BePress) at: https://works.bepress.com/robert_sanger/35/.

9 See Death Penalty Information Center ("DPIC") execution database at http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.

10 See, DPIC, at http://www.deathpenaltyinfo.org/node/5741#CA.

11 See http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates.

12 See, e.g., http://www.ocregister.com/articles/inmates-696852-state-appeals.html.

13 See, National Registry of Exonerations, at: http://www.law.umich.edu/special/exoneration/Pages/about.aspx.

14 See, DPIC, *Innocence List*, at: http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

15 Alex Kozinski, *Preface: Criminal Law 2.0*, Geo. L.J. Ann. Rev. Crim. Proc., xiv (2015).

16 *See*, Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases,* 37 Golden Gate U. L. Rev. (2006).

17 North Carolina Actual Innocence Commission was the first major effort to investigate innocence, but Governor Ryan's commission gained much more national attention. *See*, Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 Drake L. Rev. 647 (2004). The Virginia Innocence Commission was also active. See, Jon Gould, *The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System*, New York Univ. Press (2007).

18 *See, e.g.*, Brandon Garrett, *Judging Innocence*, 108 Columbia L. Rev. 55 (2008).

19 Jon B. Gould, Richard A. Leo, *One Hundred Years Later: Wrongful Convictions after a Century of Research*, 100 J. Crim. L. & Criminology 825 (2010); Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L.Rev. 1 (2009).

20 *Report of the Commission on Capital Punishment, Governor Ryan's Commission on Capital* Punishment (Apr. 15, 2002), [hereinafter Illinois Commission Report]. http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf.

21 Gloria Romero, presiding, California State Senate Select Committee on the California Correctional System, convened April 2003.

22 *See,* Santa Clara Article, n. 4, *supra*.

23 California Commission on the Fair Administration of Justice, *California Commission on the Fair Administration of Justice Final Report*, Northern California Innocence Project Publications, (2008) at: http://digitalcommons.law.scu.edu/ncippubs/1 (hereinafter "California Commission Report")

24 Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 U.S.C.L. Rev. 697, at 708-09 (2007); Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi–Billion–Dollar Death Penalty Debacle*, 44 Loy. L.A. L.Rev. S41, S61 (2011); and Judge Arthur L. Alarcón and Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform this November?*, 46 Loy. L.A. L. Rev. S1 (2012). Note that publication occurred after Proposition 34 failed by a slim margin, although an earlier draft had been published online.

25 Alex Kozinski, *Preface: Criminal Law 2.0*, Geo. L.J. Ann. Rev. Crim. Proc., (2015).

26 Glenn L. Pierce and Michael L. Radelet, *Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999, The Empirical Analysis*, 46 Santa Clara L. Rev. 1 (2005).

27 *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari) to his position on the potential unconstitutionality of the death penalty in *Baze v. Rees*, 553 U.S. 35, 71 (2008). Concurring opinion of Stevens, J., his book, John Paul Stevens, Six Amendments, Little Brown and Company, New York (2014), and his most recent interview, *CACJ's Past President Robert Sanger Interviews United States Supreme Court Justice John Paul Stevens*, (February 2016) at: http://www.cacj.org/Resources/Educational-Video-Archive/Interview-with-Justice-Stevens.aspx.

28 *Glossip v. Gross*, __ U.S. __, 135 S.Ct. 2726 (2015) Concurring opinion of Breyer, J..

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30 *See, e.g.*, Steven Shatz, *The Eight Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 Florida L.Rev. 719 (2007); Catherine Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California*, 35 Journal of Criminal Justice, 17–27 (2007); *and see*, Lee Kovarsky, *The Local Concentration of Capital Punishment*, University of Maryland Francis King Carey School of Law, Legal Studies Research Paper No. 2016–14, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738958. Sarah Rose Weinman, *The Potential and Limits of Death Penalty Commissions as Tools for Reform: Applying Lessons from Illinois and New Jersey to Understand the California Experience*, 14 Berkeley J. Crim. L. 303 (2009).

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35 California Senate Bills 511 and 609 (2006-07 Session).

36 California Senate Bill 569 (2013-14 Session).

37 http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf?pdf=Condemned-Inmates.

38 http://www.deathpenaltyinfo.org/death-row-inmates-county-sentencing.

39 Illinois Senate Bill 476 (2003).

40 http://www.deathpenaltyinfo.org/illinois-1.

41 Proposition 66 on the California November 2016 ballot.

42 Paula Mitchell and Nancy Haydt, California Votes 2016: *An Analysis of the Competing Death Penalty Ballot Initiatives*, Alarcón Advocacy Center of Loyola Law Center, Special Report, Vol. 1 (July 20, 2016).

43 *CACJ's Past President Robert Sanger Interviews United States Supreme Court Justice John Paul Stevens*, (February, 2016) at: http://www.cacj.org/Resources/Educational-Video-Archive/Interview-with-Justice-Stevens.aspx.

Doyle, *continued from page 10*

devices, such as laptops and smartphones, is essential to guarding against access to confidential client information by a third party if the device is lost, stolen or left unattended.

3. Limitations on who is permitted to monitor the use of the technology, to what extent and on what grounds. If a license to use certain software or a technology service requires the attorney to grant third party access to information communicated or stored, the attorney should confirm that the terms of the requirement or authorization do not permit the third party to disclose confidential client information to others or use such information for any purpose beyond ensuring the functionality of the software or that the technology is not being used for an improper purpose.

b) Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person's electronic information. The fact that a third party could be subject to criminal charges or civil claims for intercepting, accessing, or engaging in unauthorized use of confidential client information favors an expectation of privacy with respect to a particular technology.

c) The degree of sensitivity of the information. The greater the sensitivity of the information, the less risk an attorney should take with technology.

d) Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges. Even though Evidence Code §917(b) clearly provides that an otherwise confidential communication "does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication," Opinion 2010-179 notes that "it is possible that, if a particular technology lacks essential security features, use of such a technology could be deemed to have waived these protections."

e) The urgency of the situation. The more urgent, the greater the justification for using less secure technology.

f) Client instructions and circumstances. If a client has instructed an attorney not to use certain technology, it should not be used.

Similarly, Opinion 2012-184 identifies factors an attorney should consider in selecting a technology vendor, including the vendor's credentials, policies and procedures on data security, and whether client information in the cloud is transmitted across jurisdictional boundaries, raising potential legal issues. Other factors include terms of service,

Continued on page 31

Short Story Contest

Congratulations to Clark Stirling, winner of the August 2016 short story contest! He collects another $50 credit against the price of a future SBCBA event. Clark's story is published to the right.

The *Santa Barbara Lawyer* looks forward to continuing the contest in the future, and welcomes reader comments on its frequency and format. Would you be more likely to submit a story quarterly than monthly? Would you rather write about a photo than a topic sentence? Should connections to legal themes be encouraged? Forbidden? Please send suggestions to jsweeney@aklaw.net . In the meantime, enjoy the August winner! ■

By Clark Stirling

He insisted that, despite appearances to the contrary, Truth is not a matter of imagination.

Watching the jury, I nearly gagged hearing the sycophantic murmurs of support, realizing they were already under Karl's spell, bamboozled by his intoxicating looks and slick tongue. It was a good opening.

"So folks, that's the evidence. A case of clear liability with permanent injuries that will hamper Matt his entire life."

I pressed closer to the rail, saw Karl rub his thumb and fingers together to semaphore their expected generosity, the gesture hidden from the jury.

If he could prove his case, Karl would recover millions. I was there to collect my cut.

You see, his client was a fake. The zip-line hadn't failed. I'd witnessed the whole thing from next door. The plaintiff had tripped carrying a tray of shot glasses and tequila to his college friends lazing around the pool, his head smashing on the stone terrace.

As I filmed the aftermath, my concern turned to shock as I watched Matt's friends tamper with the zip-line and drip blood from his cut below the line.

I approached Karl during the afternoon break, introduced myself and got quickly to the point.

"You filmed it?"

"Let's move down the hall," I encouraged. A safe distance away, I pressed play, held my phone so he could watch it.

He looked like a ghost when the two minute short concluded.

"So," I continued, "if the insurance company gets a copy, the offer of two million will evaporate. You settle today, after such a brilliant opening, I'll bet you could squeeze them for another million. Less my consulting fee of five hundred thousand, you've done pretty good."

"I'll need to dismiss."

Now it was my turn to blanch. "What? Settle, pay me and no one's the wiser."

"You forget I'm a lawyer. Sure I'd love to recover millions on this case, but you've shown me it's a fraud."

Now I really was gagging. How could I pay for my new BMW?

"Truth is tough, requires integrity. I don't go to trial without it. Thanks for your insight." ■

Verdicts & Decisions

Lewis v. Café Club Fais Do Do, Inc., et al.

LOS ANGELES COUNTY SUPERIOR COURT, PASADENA DIVISION

CASE NUMBER:	BC468234
TYPE OF CASE:	Personal Injury, Premises Liability
TYPE OF PROCEEDING:	Jury Trial (bifurcated, liability phase)
JUDGE:	Hon. Margaret L. Oldendorf
LENGTH OF TRIAL:	8 1/2 Days (liability phase)
JURY DELIBERATIONS:	3 Hours
DATE OF VERDICT:	July 1, 2016
PLAINTIFF:	Brett Lewis
PLAINTIFF'S COUNSEL:	Eric C. Bonholtzer of Ball & Bonholtzer
DEFENDANTS:	Café Club Fais Do Do, Inc. and Steven Yablok
DEFENDANTS' COUNSEL:	Jan Eric Kaestner of Ghitterman, Ghitterman & Feld

OVERVIEW OF CASE: On November 29, 2009, Plaintiff was bartending at a private event hosted on Yablok's property and suffered a depressed skull fracture with Traumatic Brain Injury (TBI) as a result of an altercation with a patron. Plaintiff filed suit in August of 2011 alleging both Defendants were his employers and therefore required to have workers' compensation insurance under Labor Code section 3700. Plaintiff also alleged negligence against both Defendants. The jury found Defendants were not Plaintiff's employers. The jury also found that Café Club Fais Do Do, Inc. was not negligent and that, although Yablok was negligent, his negligence was not a substantial factor in causing Plaintiff's harm.

FACTS AND CONTENTIONS: Café Club Fais Do Do ("CCFDD") is a bar/nightclub in Los Angeles that is operated by a corporation of which Steven Yablok ("Yablok") is the sole shareholder. Yablok also owns a building directly adjacent to the bar that contains a large ballroom space where CCFDD sometimes promotes shows or concerts. CCFDD, Inc. also rented its corporate offices from Yablok in office space located within the building housing the ballroom. Yablok also leased the ballroom venue for events such as private parties, film shoots, community events, fundraisers and concerts. Unlike the bar, the ballroom was not licensed to sell alcoholic beverages and there were no connecting interior passageways between the bar and the ballroom. Plaintiff had been an employee of CCFDD (the bar) for a number of years, although Defendants contended Plaintiff had been fired several months before the night Plaintiff was injured while bartending in the ballroom. Defendant had no documentation regarding Plaintiff's employment.

Extensive discovery was conducted in the intervening 4 ½ years before trial. Defendants served Plaintiff with a Notice to Appear at trial, but Plaintiff's counsel objected on the grounds that Plaintiff's TBI and PTSD made his appearance in court too dangerous for his health. The Court issued an order that Plaintiff need not provide live testimony, either in court or remotely, and that counsel were to select video clips from Plaintiff's video deposition to play for the jury.

Plaintiff testified during his deposition that Yablok asked Plaintiff several days before the event to bartend at a private party in the ballroom. Plaintiff showed up several hours before the event to set up the bar. Plaintiff knew liquor was to be served and was the only bartender that worked throughout the evening. Plaintiff saw only three security personnel and opined there were 300-400 patrons during the busiest hours and 200-300 left at closing. Plaintiff testified that over many years working at CCFDD, he had witnessed numerous incidents of violence and was concerned about security

for the event. Plaintiff stated that throughout the event there were problems with patrons coming behind the bar to steal liquor. He said his complaints to Yablok and requests for better security went unheeded. Plaintiff described having to build barricades at each end of the bar and stated that he succeeded in having one unruly patron ejected for coming behind the bar. Plaintiff stated that the lights came on and he began closing the bar around 2:00 a.m. when he was "bum rushed" behind the bar by 5 men, one of whom he recognized as the individual that had been ejected earlier. He stated the previously ejected patron hit him over the head with a bottle of Grey Goose vodka. Plaintiff testified that he heard Yablok and security personnel argue about whether to call paramedics and that Yablok sent the police away. Plaintiff also testified he was soaked with vodka, bleeding from broken teeth in his mouth, and that his brains were coming out of his mouth and ears.

Plaintiff's witnesses were not present on the night of the incident but, over objection, were called solely to testify that they were former employees of CCFDD and had witnessed violence at the bar on previous occasions and that the poor security at the bar made them "feel unsafe". Plaintiff retained Roger Clark, a retired LA County Sheriff's station commander, to provide opinion testimony, over defense's objection, regarding the adequacy of the event security. Beginning with the event promoter's failure to obtain a license to sell alcohol, through the promoters' use of unlicensed security guards and security's failure to put the assailant in a "control hold" before the incident and march him off the property, Plaintiff's retained witness arrived at the expert opinion that the criminal act of violence, which resulted in Plaintiff's injuries, was not only foreseeable but preventable.

Testifying for the Defense were Yablok and three former employees of CCFDD, two of which were present on the night of the incident. Yablok and all three former employees testified Plaintiff had been fired months before the incident because of his poor customer relation skills. Yablok and one of the former employees (MT) testified Yablok had orally leased the ballroom to MT to promote a private party. MT further testified he had been friendly with Plaintiff for a number of years and that Plaintiff had come to him looking for work, so MT offered Plaintiff the bartending position at the event that he was co-promoting with an unnamed individual.

Yablok admitted he did not have workman's compensation insurance but claimed he only leased the ballroom and never hired employees for events in the ballroom unless they were promoted by CCFDD. Yablok testified the party was not a CCFDD event and produced documentary evidence to corroborate that testimony. Yablok also testified that after leasing the ballroom to MT he left town for 4 days over the Thanksgiving weekend, which was corroborated by a former girlfriend he stayed with. Yablok testified when he returned to Los Angeles, around 11:00 p.m. on the night of the incident, he went to the ballroom, saw Plaintiff working the bar, but made no effort to interrupt the party and eject him from the property. Though Yablok had no recollection of speaking to MT about Plaintiff's presence on the property, MT believed that he and Yablok had spoken about Plaintiff. Regardless, Yablok testified he went upstairs to his office and took a nap for several hours and only awoke when the lights were on and the party was shutting down.

Yablok, MT and another witness (EB) all testified there were less than 100 people left in the ballroom at around 2:15 a.m. when the incident took place. MT testified he witnessed the incident and said Plaintiff's injuries occurred after Plaintiff and a single male patron were arguing about whether the patron could obtain another drink after the bar had closed. MT intervened in the argument and began to escort the patron out when Plaintiff made an inflammatory remark and the patron grabbed a nearby glass candle holder and threw it at Plaintiff. The glass candle holder struck Plaintiff in the side of the head after he had already begun to turn away from the patron. Yablok, MT and EB had varying recollections of the Plaintiff's appearance, actions and statements shortly after being attacked, but were uniform in their testimony that Plaintiff was not soaked with vodka, was not bleeding anywhere, was not showing any obvious signs of trauma and there was no broken bottle of Grey Goose vodka anywhere around the bar. Paramedics were called and Plaintiff was taken to a local hospital's ER for evaluation.

SUMMARY OF CLAIMED DAMAGES: Trial was bifurcated so no evidence of damages was presented at the trial. However, at the damages phase Plaintiff was expected to claim total damages in excess of $2,500,000 for past medical treatment, future medical treatment, loss of past and future earnings, a life care plan and general damages.

RESULT: Defense verdict. The jury found no employment by either Defendant by a vote of 12/0. The jury found Café Club Fais Do Do was not negligent (12/0). The jury found Yablok was negligent (11/1) but determined his negligence not a substantial factor in Plaintiff's injury (10/2).

Motions

Mullen & Henzell L.L.P., specializing in Civil Litigation, Employment & Labor, Business & Real Estate, and Estate Planning & Tax, is pleased to welcome **Daniella Scioscia-Regencia** as a new associate attorney to the firm. Daniella joined the firm as an associate in the firm's Litigation Department this summer. Daniella received her J.D. from University of Michigan Law School in 2015; and her B.A., cum laude, from New York University in 2011. Mullen & Henzell proudly recognizes her achievements and is confident she will continue to provide the highest level of legal services to the firm's clients.

Your humble "Motions" editor Mike Pasternak and wife Meagan (6th grade teacher at Peabody Charter School) are excited to announce the birth of their second child, Charlotte "Charlie" Rose Pasternak. Charlie was born at 9:44 a.m. on August 19, 2016, weighing in at 8 lbs. 8 oz. and 21 in. Charlie is decidedly more mellow than her older brother Cooper (now 2 years old), who has enough energy and gets into enough mischief for the both of them. Welcome to our family and the world, Charlie – can't wait to see what you're going to get up to!

Cristi Michelon Vasquez marks 15 years of providing the Santa Barbara community with legal services. Six years ago she became the principal of her own firm, the Law Office of Cristi Michelon Vasquez, which specializes in business matters, real estate, landlord tenant, trust litigation, conservatorships, and general civil litigation.

Moving to a new location, within steps of the Santa Barbara Courthouse, coincides with Ms. Vazquez's professional anniversary. Now, the Law Office of Cristi Michelon Vasquez is located at 132 E. Figueroa St., in downtown Santa Barbara.

In 2001, Ms. Vasquez received her law degree from Santa Barbara College of Law. She is admitted to practice law in the State of California and before United States District Courts, the United States Court of Appeal, and the Supreme Court of the United States. Her professional affiliations include serving as former president of Santa Barbara Women Lawyers, former vice president of the Santa Barbara Women Lawyers Foundation, former affiliate governor to the Board of California Women Lawyers, and former board member of the Santa Barbara County Bar Association. A committed community volunteer, Ms. Vasquez sat on the board of the Santa Barbara Rape Crisis Center and is a past president, Women's Economic Ventures and currently sits on the board of Coastal Housing Partnership.

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.*

The Santa Barbara County Bar Association Proudly Presents:

A Reception with the Appellate Justices of Division Six

*Q & A with the Justices**

Please join us on
Wednesday, October 19, 2016
6:00 pm – 8:00pm
The Santa Barbara Club – 1105 Chapala Street

1 MCLE Credit
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** Questions may be submitted in advance to sblawdirector@gmail.com*

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

A Conversation with In-House Counsel

What special challenges do in-house counsel face in serving a single client? What do they look for in hiring and working with outside counsel for discrete projects and ongoing matters? What are their major concerns in managing their companies' intellectual property? Join us to explore these questions with top-level in-house counsel from Santa Barbara-based companies.

Moderator:

Betty Jeppesen, Broker Associate & Attorney, Goodwin & Thyne Properties; Attorney, Law Offices of John J. Thyne III

Betty Jeppesen is both a real estate broker and an attorney with a law firm. Prior to taking on this dual position, she worked for many years as in-house counsel with a major real estate investment company. Betty is a graduate of U.C. Santa Barbara and the Santa Barbara College of Law.

Panelist

Arnold Brier, Vice President & General Counsel, Yardi Systems, Inc.

Arnie Brier has worked at Yardi Systems since 2011. Before going in-house with Yardi, he was a partner in the Santa Barbara office of Brownstein Hyatt Farber Schreck. Arnie holds a B.A. in economics from UCLA and earned his law degree at University of Michigan Law School.

Panelist

Denise Kale, VP Legal, Invoca, Inc.

Denise Kale has an extensive background working in-house with high-tech companies, including lynda.com and Citrix Online/Citrix Systems. In addition to her work with Invoca, she maintains her own independent legal practice. Denise earned her law degree at Santa Barbara College of Law.

Date and Time

Tuesday, October 25, 12 noon

Location

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

Reservations

Reserve via email to Chris Kopitzke,
Chair of Intellectual Property/Technology Business Section, by Thursday, October 20, ckopitzke@socalip.com

Cost and Payment

$25.00 – includes lunch

RSVP

Mail checks by Thursday, October 20, 2016
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One hour credit applied for

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

SELF-CARE & THE LAWYER

Self-care is the foundation for all healthy attorney-client communication and relationships. It can be hard to think clearly when we are hungry, angry, lonely or tired - let alone be productive and effective. In this interactive and stimulating MCLE, Ms. Kohan will explore positive psychology tools to help lawyers reduce their stress, and create more fulfilling relationships with their clients- leading to better retention, referrals & outcomes.

Speaker

Arezou Kohan, Esq., CPCC

Arezou Kohan, Esq., CPCC is a certified coach, mediator, and the author of Coaching Your Client: A Lawyer's Guide for Improving Communication and Client Outcomes (ABA 2015).

Date and Time

Thursday, October 13, 2016, 12 to 1:00 pm.

Location

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

Reservations

Reserve via email to Mark Coffin,
Chair of Litigation Section, by Thursday, Sept 15th, at: mtc@markcoffinlaw.com

Cost and Payment

Members $30, Nonmembers $35.00 includes lunch.

Please mail checks by Thursday, October 6th, payable to:

Santa Barbara County Bar Association,
c/o LAW OFFICE OF MARK T. COFFIN,
21 E. Carrillo Street, Suite 240
Santa Barbara, CA 93101

MCLE Credit

One hour: 1 hour mandatory Specialty Competence credit.

The Employment Law Section of the Santa Barbara County Bar Association presents:

Reaching Decisions in Sexual Harassment Investigations

When

October 7, 2016, 12:00 - 1:00 p.m.

Where

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

MCLE

1 hour General

Speaker(s)

Jay Sherman, Esq., Law Offices Jay Sherman, APC

About the Event

Allegations of sexual harassment in the workplace continue to plague employers. Lawyers, even those who do not regularly practice in the area of employment law, are frequently called upon to advise their business clients on what to do when faced with a claim of sexual (or other protected classification) harassment. A lawyer's involvement can range from recommending what action to take based on already collected evidence, to directing or actually conducting a full blown investigation.

Join Jay Sherman, an attorney and forensic expert who devotes his practice to conducting workplace investigations and counseling employers faced with harassment claims, as he explains the nuts and bolts of workplace investigations. The presentation will also include valuable information concerning possible ethical issues, as well as tips to get more truthful "testimony" from parties and witnesses. Finally, Jay will explain the strategies he calls upon in reaching the crucial, but often difficult, decision whether unlawful harassment has occurred and what should be done.

Price

$20/$25 members/nonmembers - includes lunch

Contact Information/R.S.V.P.

By September 30th to Alex Craigie (Alex@Craigielawfirm.com).

Mail Checks, payable to "SBCBA" to:

Alex Craigie, The Law Offices of Alex W. Craigie
791 Via Manana
Santa Barbara, CA 93108

American Board of Trial Advocates

CALIFORNIA COAST CHAPTER

Against the Crowd: Defending Judges Who Make Unpopular Decisions

Tani Cantil-Sakauye, *Chief Justice of the State of California*
John V. Hager, *California Coast Chapter ABOTA President*

CLE CREDIT AVAILABLE

WHEN
Thursday, October 20, 2016
6:00 p.m. Cocktail/Social Hour
7:00 p.m. Dinner
8:00 p.m. Program

WHERE
The University Club of Santa Barbara
1332 Santa Barbara Street
Santa Barbara, California 93101
www.uclubsb.org | 805-966-0853

COST
$125 per person on/before October 1, 2016
$150 per person after October 1, 2016
Check payable to ABOTA California Coast

RSVP
RSVP to the ABOTA California Coast Chapter by October 7, 2016
(818) 470-2035 | abotashirley@gmail.com

REGISTRATION

❑ **I will attend the October 20, 2016 dinner and program**

Number of guests: _____ Amount enclosed: $_____

Name (please print): _____

Member email: _____

Guest name(s): _____

Dinner selection: ❑ New York Steak ❑ Mahi Mahi ❑ Vegetarian

Send check, payable to ABOTA California Coast Chapter, to:
Shirley Schwartz
4140 Laurelgrove Ave.
Studio City, CA 91604

Real Property Section of the Santa Barbara County Bar Association Luncheon Program:

Insurance, Indemnity Provisions, and Commercial Real Property

Date:
Wednesday, October 27, 2016

***Time*:**
12:00 p.m. – 1:30 p.m.

***Topic*:**
Recent Issues Insurance and Indemnity Provisions Affecting Commercial Real Property. This program will include a round-table discussion of Additional Named Insured coverage, Indemnification Clauses and the interplay between the two.

***Speaker*:**
WESLEY G. HAMPTON. As President and CEO of Narver Insurance, Wesley Hampton is an innovative insurance professional with over 30 years of senior management experience. Wesley's professional affiliations include membership in the Professional Liability Underwriting Society, the Western Insurance Agents Association, and The Council of Insurance Agents and Brokers.

***Place*:**
Wells Fargo Private Bank
118 East Carrillo Street, 2nd Floor

***MCLE*:**
One hour of credit, approval pending

***Menu*:**
Lunch will be provided

Price:
$30.00

Reservations:
Must be received by October 15, 2016.
In ADVANCE please send your payment payable to:
Fell, Marking, Abkin, Montgomery, et al. LLP:
Attn: Carys Morgan
222 E. Carrillo Street, 4th Floor
Santa Barbara, California 93101

Questions*:*
Josh Rabinowitz, 963-0755

You are invited to the 2016 Annual Dinner

Thursday November 3, 2016 starting at 5:30pm, dinner at 6:30pm

Canary HOTEL SANTA BARBARA

Payments Received	On or before 10-14-2016	After 10-14-2016
Members	$95	$105
Nonmembers	$105	$115

Santa Barbara County Bar Association

Reservation Form

Name		Price	
_____	❑ Member	❑ Non-member	$_____
_____	❑ Member	❑ Non-member	$_____

To reserve & pay via USPS, please complete this form and send with your check payable to SBCBA: 15 W. Carrillo St., #106, Santa Barbara, CA 93101. To reserve and pay by credit card, or if you have questions, call SBCBA at (805) 569-5511. Fees paid are nonrefundable.

SAVE THE DATE!

2017 Bench & Bar Conference

"Government vs. Privacy Rights in the Digital Age"

Featuring

Steve Zipperstein, Esq., General Counsel - Blackberry

Santa Barbara County Bar Association

6.5 hours of MCLE, including mandatory subject units

Saturday, January 21, 2017, at the Historic Courthouse

2016 SBCBA SECTION HEADS

Alternative Dispute Resolution
David C. Peterson 772-2198
davidcpeterson@starband.net

Bench & Bar Relations:
Stephen Dunkle 962-4887
sdunkle@sangerswysen.com

Civil Litigation
Mark Coffin 248-7118
mtc@markcoffinlaw.com

Criminal
Catherine Swysen 962-4887
cswysen@sangerswysen.com

Debtor/Creditor
Carissa Horowitz 708-6653
cnhorowitz@yahoo.com

Employment Law
Alex Craigie 845-1752
alex@craigielawfirm.com

Estate Planning/Probate
Tim Deakyne 963-8611
tdeakyne@aklaw.net

Family Law
Maureen Grattan 963-9721
mgrattan@rogerssheffield.com

In House Counsel/Corporate Law
Betty L. Jeppesen 963-9958
jeppesenlaw@gmail.com

Intellectual Property
Christine Kopitzke 845-3434
ckopitzke@socalip.com

Mandatory Fee Arbitration
Tom Hinshaw 882-4558
thinsb@gmail.com
Eric Berg 708-0748
eric@berglawgroup.com
Scott Campbell 963-9721
scampbell@rogerssheffield.com
Naomi Dewey 966-7422
ndewey@BFASlaw.com
Michael Brelje 965-7746
gmb@grokenberger.com

Real Property/Land Use
Josh Rabinowitz 963-0755
jrabinowitz@fmam.com
Bret Stone 898-9700
bstone@paladinlaw.com

Taxation
Peter Muzinich 966-2440
pmuzinich@rppmh.com
Cindy Brittain 695-7315
Cdb11@ntrs.com

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

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a statewide network of recovering lawyers and judges dedicated to assisting others within the profession who have problems with alcohol or substance abuse. We protect anonymity. To contact a local member go to http://www.otherbar.org and choose Santa Barbara in "Meetings" menu.

Classified

"Legal office for rent across the street from the Courthouse. Includes reception, use of conference rooms, access to copier, high speed scanner, coffee, postage meter, etc. Contact Claude Dorais at cdorais@dorais.com or 965-2288 x 101."

Doyle, *continued from page 17*

and the ability of the attorney to supervise (since the attorney is responsible under CRPC 3-110).

Most important, the attorney should periodically reassess the technology used. Technology changes, as do vendors, and what may have been perfectly acceptable a couple of years ago may now not meet the standards. ■

Larry Doyle is a Sacramento-based attorney, lobbyist and mediator, and a member of the State Bar's Standing Committee on Professional Responsibility and Conduct and the Association of Professional Responsibility Lawyers. He can be contacted at larry@larrydoylelaw.com.

Santa Barbara Lawyer
The Santa Barbara County Bar Association
15 W. Carrillo St., Suite 106
Santa Barbara, CA 93101

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