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Santa Barbara County Bar Association

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Mission Statement

Santa Barbara County Bar Association

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

Santa Barbara Lawyer

A Publication of the Santa Barbara County Bar Association

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Articles

Sections

On the Cover

Photo by John Johnston

Santa Barbara County Bar Association

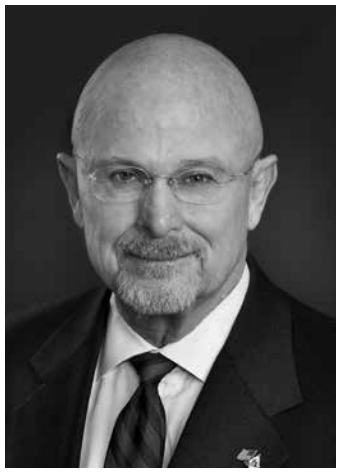
GRANT REQUESTS

The Santa Barbara County Bar Association provides grants to projects that further its Mission Statement (please see page 4). Priority is given to requests where the funds will be used for the benefit of SBCBA members or for the benefit of individuals within Santa Barbara County.

Requests for grants shall be made in writing addressed to the SBCBA (15 W. Carrillo Street, #106, Santa Barbara CA, 93101) and include the following information:

Name of Requestor
Total Amount of Request
Reason for Request
Description of exactly how the requested funds will be used and whether said request is time-sensitive.

Motions



Attorney **John W. Ambrecht**, an expert in estate planning and estate tax law, recently attended the annual meeting of the American College of Trust and Estate Counsel ("ACTEC"), an exclusive non-profit organization for the world's top probate and estate planning attorneys, in San Antonio, Texas.

ACTEC is a nonprofit association of 2,600-plus lawyers and law professors skilled and experienced in the preparation of wills and trusts; estate planning; and probate procedure and administration of trusts and estates of decedents, minors, and incompetents.

To qualify for membership, according to ACTEC, a lawyer must have at least 10 years of experience in the active practice of probate and trust law or estate planning. Lawyers and law professors are elected to be fellows based on their reputation, skill, and contributions to the field.

Ambrecht is one of the only attorneys between Los Angeles and San Francisco who has been accepted to this highly respected organization. He is the founder of **Ambrecht & McDermott**, a boutique law firm in Montecito, focusing his practice on integrating estate and tax planning with family business succession planning, and multi-state domestic trusts and estate planning, national and international asset protection, and tax controversies.

* * *

Catherine Swysen is the newest member of The **Santa Barbara & Ventura Colleges of Law** ("COL") Board of Trustees. A 1994 graduate of the school's Santa Barbara campus, Swysen joins the 13-member governance body that oversees the region's oldest and largest independent law school.

Swysen comes to COL with nearly 25 years of experience as a practicing attorney—her areas of practice spanning criminal, death penalty, appellate, civil, and administrative law. She is a partner with Sanger Swysen & Dunkle, a distinguished local firm—with offices in Santa Barbara and Santa Maria—that specializes in criminal defense and civil litigation in State and Federal courts.

Swysen's experience in governance includes board and leadership positions with the Santa Barbara Women's Political Committee, the Santa Barbara County Bar Association, Santa Barbara Criminal Defense Lawyers Bar Association, and the Federal Bar Association.

Prior to COL, Swysen earned a degree in history from the Université Libre de Bruxelles in Belgium before immigrating to the United States in the 1980s. She has lived and worked in the Santa Barbara area for over 30 years.

* * *

Guneet Kaur is pleased to announce the opening of her solo practice, specializing in Family Law (QDROs, Divorce, Child Custody, Support, Parentage, and Adoptions, etc.), and Estate Planning. Born in India, Ms. Kaur immigrated with her family to the greater San Francisco Bay Area at the age of 10. She attended the University of California at Santa Barbara where she earned her B.A. in Sociology and Religious Studies. She attended the Santa Barbara College of Law and received her J.D. in 2015. While in law school, Ms. Kaur worked full time at Consolidated Overhead Doors & Gates and volunteered at California Rural Legal Assistance, served on the Student Body Association at SBCOL, and was a pupil in William Gordon's Inns of Court.

Ms. Kaur currently serves as Vice President for the Santa Barbara County Bar Foundation and is on the board of Alumni Council for the Santa Barbara College of Law. She

also recently volunteered with Your Children's Trees, a project she hopes to continue assisting. Ms. Kaur looks forward to bringing her passion for assisting people in difficult times through advocacy to Santa Barbara and Ventura Counties.

* * *

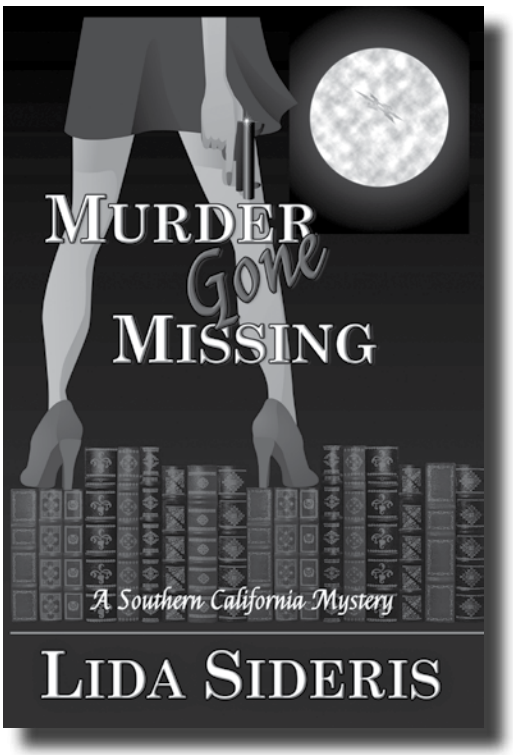
After four years in the Bakersfield business district, law firm **Ghitterman, Ghitterman & Feld** is moving its Kern County office, beginning April 1, 2018, to an easy-to- find corner lot in the Riviera-Westchester neighborhood in downtown Bakersfield at 2003 20th Street, Bakersfield, CA 93301.The phone number will remain the same: (661) 846-2270.

Current and future clients are welcome to stop in to see the progress as the quaint stand-alone home is freshened up to maintain its historical charm on the outside while being brightened and updated on the inside.

Founded in 1956, Ghitterman, Ghitterman & Feld helps employees in the areas of workers' compensation, social security disability, disability retirement, personal injury, labor and employment issues, criminal defense, and bankruptcy.

* * *

The Santa Barbara County Bar Association's Executive Director, **Lida Sideris**, will appear at Chaucer's Bookstore on Tuesday, May 8th at 6 pm for the signing of her latest novel, *Murder Gone Missing*, the second in the Corrie Locke series, published by Level Best Books. This soft-boiled mystery continues the misadventures of a newly minted lawyer whose gene for caution is a recessive one. In this installment, Corrie has to clear her best friend's name before he's arrested for murder.



* * *

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.

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a state-wide 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.

More Fallout from the Thomas Fire and Montecito Mudslide – Property Tax Issues

By Larry Dushkes

Larry Dushkes

Property Tax – The Basics

Under Proposition 13, as codified in Revenue and Taxation Code section 50 *et seq.*, real property is assessed at its "full cash value"[1] as of the later of "the 1975 lien date," "the date on which a purchase or change in ownership occurs," or "the date on which new construction is completed."[2] This value becomes the "base year value,"[3] which can be increased only by a maximum of 2% per year,[4] unless and until there is a subsequent purchase/change in ownership or new construction.[5]

These rules seem to dictate that a property owner who rebuilds following property damage will lose the benefit of low property taxes due to "new construction." Fortunately, the Legislature anticipated this problem and enacted statutes to lower property taxes pending reconstruction or purchase, and allowing retention of pre-calamity assessed values.

All property owners affected by the Montecito mudslide should meet with a consultant, attorney, or other advisor well-versed in the intricacies of Proposition 13.

Immediate Tax Relief Due to Misfortune or Calamity

Under Santa Barbara County's Municipal Code Section 170,[6] a property owner can file an application with the Assessor to have their property taxes reduced to reflect property damage or destruction. (The Assessor can also initiate the process on its own.[7]) The application deadline is 12 months after the damage or destruction.[8] To be eligible for relief, the damage or destruction must have been caused by either a "major misfortune or calamity, in an area or region proclaimed by the Governor to be in a state of disaster," or a "misfortune or calamity."[9]

The Assessor will then determine the full cash value of the land immediately before and after the damage or destruction, and will do the same for the improvements, to determine the percentage decrease in the value of each.[10] If the total reduction in value is at least $10,000, then the Assessor will reduce the assessed value of the land and improvements by the appropriate percentages.[11] The property taxes following the calamity will then be based on that reduced assessed value until the property is "restored, repaired, reconstructed or other provisions of the law require the establishment of a new base year value" (*e.g.*, the property is sold).[12]

Property owners also have the option of requesting that payment of their property taxes be deferred, without penalty or interest, until a new tax bill, based on the reduced assessed value, is issued.[13]

When the property is rebuilt, the Assessor will enroll the lesser of the prior base year value (adjusted by the inflation factor) or the new full cash value of the property.[14]

Intracounty Move

What if property owners want to move somewhere else in Santa Barbara County? Under certain conditions, they can do so and keep their old assessed value.

California Revenue & Taxation Code section 69(a) provides that the base-year value of property that is substantially damaged or destroyed by disaster may be transferred to comparable property[15] within the same county, which is acquired or newly constructed within five years after the disaster. For this purpose, property is considered to be "substantially damaged or destroyed" if there is a loss of more than 50% of the full cash value of either the land or the improvements as a result of physical damage.[16] Damage includes a loss of value due to permanent restricted access caused by the disaster.[17]

If the full cash value of replacement property does not exceed 120% of the full cash value of the damaged property (prior to the damage), then the prior base year value (with inflation adjustments) becomes the base year value of the replacement property.[18]

Even if the replacement property exceeds the 120% limit, partial tax relief is still available. In that situation, the excess value is added to the prior base year value to become the

new base year value of the replacement property.[19]

Unlike the rules for rebuilding damaged property, in the situation where the property owner purchases or constructs a replacement home within Santa Barbara County, the term "disaster" is limited to "a major misfortune or calamity in an area subsequently proclaimed by the governor to be in a state of disaster as a result of the misfortune or calamity."[20]

Intercounty Move

What if a property owner is looking to move out of Santa Barbara County? Can he or she purchase or construct comparable replacement property elsewhere in California and keep the old assessed value? Yes. And, no.

First, there are more restrictive limitations on the value of the replacement property. Also, it's an all or nothing proposition – if the value limitation is exceeded, then no property tax relief is available.

In order to be "comparable replacement property" in another county, the full cash value cannot exceed (a) 105% of the full cash value of the damaged property if the replacement property is purchased or newly constructed within the first year following the damage or destruction; (b) 110% within the second year; or (c) 115% within the third year.[21]

Second, the county into which the property owner is moving must have adopted an ordinance allowing such tax relief. At present, 10 counties have adopted the necessary ordinances: San Francisco, Santa Clara, Contra Costa, Sonoma, Solano, Sutter, and Modoc[22] in Northern California, and Los Angeles, Orange, and Ventura Counties in Southern California.[23]

Conclusion

Following a disaster such as the Montecito mudslide, property owners with substantial damage can obtain temporary property tax relief to reflect the reduced value of the damaged property. They can then repair or rebuild their property, in which case the lesser of the old assessed value and the full cash value of the repaired/rebuilt property becomes the new base year value for property tax purposes.

Alternatively, a property owner can purchase or construct replacement property within Santa Barbara County within five years and keep their old base-year value (with an inflation adjustment). However, if the value of the replacement property exceeds 120% of the pre-calamity value of the old property, then the new base year value becomes a combination of the old base year value (with an inflation adjustment) and the excess full cash value.

Finally, a property owner who moves to one of 10 other counties in California within three years, and does not exceed specified value restrictions on the replacement property, can also transfer their old base-year value (with an inflation adjustment) to the new property.

All property owners affected by the Montecito mudslide should meet with a consultant, attorney, or other advisor, well-versed in the intricacies of Proposition 13. With this assistance, they can evaluate their situation to determine if they are eligible for property tax relief and how best to integrate the goal of retaining a low assessed value with their other priorities for repair and reconstruction, or moving. ■

Larry Dushkes is a Certified Estate Planning, Trust and Probate Law specialist with more than 35 years of experience. He is the principal of Dushkes Law Corporation, handling estate planning, probates, trust administrations, and estate and trust disputes in Santa Barbara, San Luis Obispo, Ventura, and Los Angeles Counties. Larry can be reached at larry.dushkes@dushkeslaw.com or 805.267.1202.

ENDNOTES

1 In layman's terms, "full cash value" is equal to fair market value; for leased property, rent is presumed to be current market rent even if contract rent is less.
2 Revenue and Taxation Code section 110.1(a). All subsequent statutory references are to the Revenue and Taxation Code, unless otherwise noted.
3 Section 110.1(b).
4 Section 51(a).
5 Section 110.1(a).
6 Santa Barbara County Municipal Code, Chapter 32, Article VIII.
7 Section 170(a); Santa Barbara County Municipal Code, section 32-85.
8 Section 170(a)(3).
9 Santa Barbara County Municipal Code, section 32-84.
10 Section 170(b).
11 *Id.*
12 Section 170(g).
13 Sections 194.1 and 194.9; Santa Barbara County Municipal Code, section 32-86.
14 Section 170(h)(2), (3).
15 "Replacement property is comparable to the property substantially damaged or destroyed if it is similar in size, utility, and function to the property which it replaces." (Section 69(c)(2).)
16 Section 69(c)(1).
17 *Ibid.*
18 Section 69(b)(1).
19 Section 69(b)(2).
20 Section 69(c)(3).
21 Section 69.3(a)(1), (a)(2), (b)(3), (b)(6).
22 The median sales price for single-family residences in Montecito is about $4,600,000. (http://www.scottwilliams.com/montecito-median-home-prices.) Compare this to the median listing price of $129,000 for homes in Alturas, California (the county seat of Modoc County).
23 "Calamity Reassessment, Property Tax Deferral and Rebuilding Options," published by the Santa Barbara County Clerk, Recorder and Assessor.

Reinventing Legal Education

By Jackie Gardina[1], Dean of the Santa Barbara and Ventura Colleges of Law

Jackie Gardina

Nearly two years ago, I left a traditional American Bar Association law school to join the Santa Barbara and Ventura Colleges of Law ("COL"). I did so because I wanted to be part of an institution that lived its mission to provide an affordable, accessible, and quality legal education. I wanted to be part of an institution where the sole focus was on improving student outcomes, untethered to rankings. I also wanted to be a part of an institution that embraced innovation.

I have no doubt that I made the right decision. In August 2018, COL will become the first accredited law school in California to offer a hybrid Juris Doctor ("J.D.") degree. This new program will allow COL to further its mission to open the doors to an affordable, quality legal education to individuals who might otherwise be unable to earn a law degree. In creating this new program, COL sought to address the long-standing critiques of legal education by employing advances in educational research and pedagogy to provide students with a solid foundation in the basic skills needed to enter the practice of law as well as succeed on the bar exam.

The Next Generation J.D.

For more than 50 years, commentators have critiqued legal education and recommended changes to its curricular design and pedagogical approach. The critiques and recommendations echoed a common theme: the need to balance what has been the bedrock of legal education for generations—fundamental legal knowledge and analytical skills—with the practical skills and ethical values necessary to apply theory to practice in law.

Despite these critiques, law schools have been slow to adopt wholesale changes to what or how they teach. Recent studies have found that law schools are not preparing graduates for the practice of law. Nearly 90 percent of new law school graduates surveyed say law schools must undergo significant changes to better prepare future attorneys for the changing employment landscape and legal profession. Likewise, 95 percent of hiring partners and associates believe recently graduated law students lack key practical skills at the time of hiring. These findings are consistent with the American Bar Foundation's "After the J.D." study, in which 50 percent of lawyers after seven years of practice reported that law school did not adequately prepare them for practice.

COL wanted to make sure we addressed these deficiencies in our curriculum. To aid our design process, we hosted a "Hack the J.D." weekend with a lofty goal: to design the next generation J.D. program. The participants included those from within the COL community as well as legal educators and thought leaders who traveled across the country to offer their insights and guidance. Participants were asked to answer the following questions: "What should the next generation J.D. include?" And "How should the next generation J.D. be built and delivered?" From there, the teams went to work designing their ideal J.D. program built on the foundation of the knowledge, skills, values, and modern design principles.

The designs contained common themes. Every team highlighted the need to weave professional development and skills into the core curriculum, with two teams suggesting that students do "practice rotations." Every team emphasized the need for frequent assessment, with a focus on developing mastery rather than simply obtaining a grade. Every team identified the need to ensure that students start the program with a basic foundation in civics, the legal system, and writing skills before moving into the substantive legal courses. Every team suggested utilizing digital teaching and learning into the program. Every team felt frustrated by the need to "teach to the bar" rather than the need to teach to practice realities.

Putting the Doctor back in Juris Doctor

The ideas generated during the Hack the J.D. weekend provided a solid foundation on which to build the hybrid J.D. as well as to improve the student experience in our traditional ground program. We were committed to designing a program that integrated skill development into the core curriculum rather than leaving it to the individual professors or in isolated elective courses. We wanted, as one team put it, "to put the Doctor back in Juris Doctor."

Students in the hybrid J.D. will take the same courses as

those in our traditional J.D. program, with 70 percent of the coursework in the "virtual" classroom and 30 percent in a "bricks and mortar" classroom. In the virtual classroom, students will be engaged in discussion, quizzes, and written assignments to ensure that they are understanding the material presented.

Once a month, students will travel to campus for an intensive residency component, where they will synthesize the material they learned outside of class through in-depth discussions, active problem solving, and collaborative simulations. This model has the added benefit of allowing instructors to incorporate core practice skills directly into the classroom.

In addition, the program will weave legal research and legal writing problems and assignments directly into at least one course each semester. The program seeks to create an integrated curriculum where students experience how legal writing and legal research, along with other practical skills, connect directly to their other courses.

To create opportunities for more practical skills development, the program incorporates four lawyering skill tracks: Practical Skills, Litigation, Transactional, and Professional Development and Leadership. One weekend per semester is dedicated to exposing students to the skills identified as necessary for new attorneys. Practicing attorneys will develop the courses so that they reflect the realities of practice. After being introduced to basic concepts, students will then have the opportunity to practice the skills presented. Students will be required to take one course in each track so they are exposed to a variety of skills, and then they can choose to concentrate in a particular track. Because the lawyering skills tracks will occur on the weekend, they will be available to all COL students.

The program ends with a required capstone course. A capstone is a culminating project or experience that requires review, synthesis, and application of what has been learned over the course of the J.D. program. COL's capstone course will require students to demonstrate that they have mastered the basic knowledge, skills, and values necessary for a first-year associate. For example, if a student chose to concentrate in the Lawyering Skills Litigation track, she will spend a semester doing a series of exercises focused on litigation, ending in a mini-trial. Practicing attorneys will assess whether the students have demonstrated the "minimal competence" expected of a new attorney.

In August 2018, COL will become the first accredited law school in California to offer a hybrid Juris Doctor ("J.D.") degree. This new program will allow COL to further its mission to open the doors to an affordable, quality legal education to individuals who might otherwise be unable to earn a law degree.

A 21st Century Legal Education

COL also want to modernize legal education. How legal services are delivered is rapidly transforming, and technology is at the center of that transformation. Few law schools offer courses that explore the impact that technology is having on the practice of law. Although new attorneys must navigate everything from document assembly and drafting to electronic discovery and courtroom technology (not to mention the ethics of legal technology), few law schools have courses dedicated to these issues, and none require students to graduate with core competencies related to them.

COL wants to fill this gap. We intend to infuse the curriculum with the technology of practice. By identifying core technology competencies that every new attorney should have, we can introduce students to the legal technology that is central to today's practice.

In addition to technological literacy, new attorneys also need basic financial literacy. Lawyers in every practice area need to understand the business of law as well as their client's finances. COL wants to expose students to basic accounting, finance, and project management skills, including the software tools, such as Excel, that are widely used.

While no student can leave law school truly "practice ready," COL seeks to provide students with a solid foundation on which to build their practice and be an asset to the legal community and the clients they serve. Through the integrated writing assignments, the infusion of practice technology, the lawyering skills track units, and the capstone course, students will have the opportunity to build a solid foundation of necessary skills that will make them immediately valuable to an employer. ■

Jackie Gardina is the Dean of the Santa Barbara and Ventura Colleges of Law. Before taking on this role, she was an Associate Dean and Professor of Law at Vermont Law School and a Visiting Professor of Law at Santa Clara University, University of Denver, and University of Oregon. After graduating magna cum laude from Boston College of Law School, she clerked for Chief Justice William Young at the United States District Court for the District of Massachusetts and Judge Levin Campbell at the First Circuit Court of Appeals and was an associate at Choate, Hall & Stewart, LLP.

Welcome to the

PHILANTHROPY CORNER

By Jenn Duffy, Editor

Featuring Local Non-Profit Organizations

In honor of Earth Day, this month's featured non-profit organizations focus on HOUSING. They are

Habitat for Humanity and Transition House

Habitat for Humanity

Habitat for Humanity of Southern Santa Barbara County believes that stable housing is the foundation that allows families, neighborhoods, and the community to thrive. Since 2000, Habitat has partnered with low-income families in need of safe, decent, and affordable housing through new home construction and neighborhood revitalization. Habitat gives a "hand up," not a "hand out." Most recently, Habitat SSBC has led long-term disaster relief efforts in Montecito; working alongside local organizations and the County to help clear out properties. With the help of generous donors and incredible volunteers, Habitat is transitioning to provide home repairs to those affected by the recent natural disasters.

Transition House

Transition House is dedicated to the solution of family homelessness in the Santa Barbara community. Capable and motivated families with children are offered life tools and respectful residential services designed to alleviate poverty, restoring self-sufficiency and dignity. Transition House's three-stage shelter-to-housing program includes comprehensive anti-poverty services, such as employment development and financial literacy training. Transition House exists through the generosity of the community. Over 85 percent of our income goes directly for programs to help homeless families.

If you have volunteer opportunities you would like to have listed in the Philanthropy Corner, please contact Jenn Duffy at (805) 963-0755 or JDuffy@fmam.com.

Transition House

Transition House is dedicated to the solution of family homelessness in the Santa Barbara community. Capable and motivated families with children are offered life tools and respectful, non-sectarian residential services designed to alleviate poverty and restore self-sufficiency and dignity.

THE WAY HOME

"Without Transition House I would not have everything that I have now. It's a hard program to go through, but then it's so rewarding. It's a program that helps if you want to be helped."

- Cindy, single mother of three

The principal causes of family homelessness locally are poverty and a lack of affordable housing.

Three-Stage Family Housing

The first stage begins with a stay at our 70-bed emergency shelter. The second stage offers six months of transitional housing at the Firehouse. Families may then continue to our third stage program, HOMES, where they can live in one of 33 Transition House-owned affordable apartments while receiving supportive services.

Programs for Children

Families who are experiencing homelessness can receive affordable care through our licensed Infant Care Center. School children participate in enrichment programs—including a literacy program—that aim to break the cycle of generational poverty for children who are at highest risk of becoming homeless as adults.

It's a Fact

Santa Barbara County had the second highest percentage of homeless students in the state

– California Homeless Youth Project, 2014

Anti-Poverty & Family Support

Parents in our shelter receive case management, employment support, and on-site antipoverty classes, which are also available to people in the community who are at risk of losing their housing. Classes cover topics such as ESL, financial literacy, computer skills, and parenting.

A Program that Works

Over 70 percent of shelter families succeed in moving to permanent and stable rental housing

How You Can Support Transition House

Volunteer · Attend an Event · Join our HOME MAINTENANCE CREW
Make a Contribution · Become a Corporate Partner

Transition House | 425 E. Cota Street, Santa Barbara | (805)-966-9668 | www.transitionhouse.com

Habitat for Humanity of Southern Santa Barbara County is *building strength, stability, and self-reliance through shelter.*

Long-term Disaster Relief

Habitat SSBC brings people together to build homes, communities, and hope. In the aftermath of recent disasters, **Habitat has coordinated over 1500 volunteers** to offer long-term relief to those affected in Montecito. Habitat has already **helped over 40 homeowners.** With the support of donors and volunteers, Habitat is moving to provide home repairs to those affected by the disasters. Habitat is simultaneously offering relief from recent disasters and building affordable housing for low-income families in the greater Santa Barbara area.

We are 805 Strong

Volunteers are needed to assist with home repairs and clean up and debris removal in Montecito. Visit **www.sbhabitat.org/disaster-response** to sign up and help our friends and neighbors regain a place to call home.

Homeownership Program

Habitat SSBC offers an affordable homeownership program that allows hardworking families in need of safe, decent, and affordable housing to purchase a home. What Habitat provides is **a "hand-up," not a "hand-out"** as all Habitat homebuyers must complete 250 hours of *sweat equity* and participate in Habitat's Homeownership Readiness Curriculum. Our current project in Carpinteria is in the final stretch of construction; just last month Habitat along with future homeowners, sponsors, and major donors celebrated **topping off the Sawyer Avenue homes.** Together Habitat's board of directors and sponsors got to walk through the future homes, writing touching messages of hope and happy wishes for the three future Sawyer Avenue families.

Volunteer

Participate in all aspects of the construction process, working alongside future homeowners. Gain construction skills as you help **three local families including 8 children** achieve the dream of homeownership.

Home Repairs

Habitat's Home Repair programs provide necessary exterior home repairs to help homeowners maintain a safe and decent place to live as well as the pride and dignity of homeownership. Utilizing volunteer labor, corporate, and individual donations Habitat is able to assist **the most vulnerable populations including veterans, the disabled, and elderly at little to no cost to them.** Recognizing the need beyond new home construction, Habitat SSBC provides much needed repairs to local homeowners who would otherwise be unable to do so.

Get Involved

No experience needed. Register for our volunteer orientation, held on the third **Saturday of every month** to learn more and start building.

Since 2000, Habitat for Humanity SSBC has helped **59 families** build and repair their homes and has educated nearly **1000 children** through its youth programs.

To make a monetary donation and support our programs, visit **www.sbhabitat.org/donate.**

Habitat for Humanity® of Southern Santa Barbara County

Sea Otters Welcomed Home

By Linda Krop, Chief Counsel of the Environmental Defense Center

If only sea otters could read. If they could, perhaps they would have complied with the 1987 rule of the United States Fish and Wildlife Service (the "Service") banning them from waters south of Point Conception. The Environmental Defense Center ("EDC") and our clients sued the Service to end this harmful program, and then helped defend the Service's subsequent action repealing its ill-fated rule. On March 1, 2018, the Ninth Circuit Court of Appeals upheld the Service's decision to terminate the program and restore protections for sea otters throughout their historic range.

Background

The story begins centuries ago, when the southern sea otter population was decimated by intensive fur hunting. In 1977, the otters were listed as threatened under the federal Endangered Species Act ("ESA").[1] The primary threats to the species were its small population size, limited distribution, and vulnerability to offshore oil and gas exploration and transportation.[2]

In 1982, the Service finalized a Recovery Plan for the southern sea otter pursuant to Section 4(f) of the ESA. Recovery plans serve as the basic road map of actions necessary to stop and reverse the decline of listed species and bring them to the point that the protections of the statute are no longer necessary.[3] The 1982 Recovery Plan determined that establishing a second breeding colony of sea otters was necessary to protect the species from extinction and to promote the species' recovery by protecting it from the risk of being "decimated" by an oil spill or other environmental catastrophes. To further this goal, the Service determined it would have to establish a "translocation program" to move otters from the parent population along the central California coast to other areas within the otter's historic geographic range.

In 1984, the Service initiated a rule-making process to develop a program that would move otters to San Nicolas Island. This new population of otters was considered an "experimental population" pursuant to Section 10(j) of the ESA.[4]

Linda Krop

The Service faced a legal obstacle. Although the ESA allows experimental populations of listed species and provides some "take" protection, the Marine Mammal Protection Act ("MMPA") does not. Because southern sea otters are also protected under the MMPA, the Service could not implement the translocation and management zones without Congressional action. Accordingly, in 1986, Congress enacted Public Law No. 99-625, which amended the MMPA and authorized (but did not require) the Service to undertake the translocation program.[5]

In 1987, the Service initiated a new rule-making process pursuant to Public Law No. 99-625. During that process, the fishing industry expressed opposition to the proposed new population due to the concern that otters would compete for urchins and other invertebrate prey. The Service strove to resolve this conflict by developing a companion "management zone" (otherwise known as a "no otter zone") where otters would be disallowed and even removed if they entered the zone. The no otter zone extended all the way from Point Conception to the Mexican border. Naturally, some scientists and conservation groups expressed concern about moving otters from this large expanse of ocean waters, all of which was historically inhabited by the species. These groups were concerned that otters would not successfully establish a new population and could even be harmed by the translocation effort.

The Service responded to the public's concerns by including five "Criteria for a Failed Translocation" ("failure criteria") in the final regulation. If any of the five failure criteria were met (meaning that the second population was not viable), the Service would terminate the experimental program.

Between August 1987 and March 1990, the Service translocated 140 otters to San Nicolas Island. It quickly became apparent that the translocation program was not working as intended. Starting in its first year, the Service saw "unexpected mortalities and high emigration" of sea otters involved in the translocation program. Of the 140 translocated otters, only 14 remained on the Island; a few

Continued on page 18

returned to the parent population but most "disappeared" or died. The Service stopped translocating otters to San Nicolas Island in 1991 due to the high rate of mortality. Because of this change in impact to the species, the Service was compelled to complete a new consultation under Section 7 of the ESA.[6]

The new Section 7 consultation, as well as a new Recovery Plan and Draft Supplemental Environmental Impact Statement ("DSEIS"), determined that the translocation program was harming sea otters and should be re-evaluated. The DSEIS recommended terminating the program altogether.

Several years passed without action. In 2009, EDC brought legal action on behalf of The Otter Project to compel the Service to make a failure determination and terminate the dangerously flawed program. (*The Otter Project et al. v. Salazar et al.*, No. C09-04610-JW (N.D. Cal. 2009).) The lawsuit was brought under the Federal Administrative Procedures Act ("APA") and alleged that the Service's inaction constituted "unreasonable delay" in fulfilling the agency's legal obligations.[7] The Service brought an unsuccessful motion to dismiss, and the parties reached a settlement that required the agency to make a failure determination by December 2012. On December 19, 2012, the Service found that the program was a failure, and – twenty-five years after its fateful inception - the agency terminated the program.[8]

Legal Challenges

The Service's action spurred more litigation. The California Sea Urchin Commission and other fishing groups (collectively, "CSUC") sued the Service, alleging that the agency's decision was beyond its legal authority because Public Law 99-625 only provided the Service the discretion to *commence* a translocation program, but not the authority to *terminate* the program. *California Sea Urchin Comm'n. v. Jacobson* (C.D. Cal. 2013). CSUC also petitioned the Service to rescind the 2012 rule terminating the translocation program. When the Service denied the petition, CSUC brought a second lawsuit, *California Sea Urchin Comm'n. v. Bean* (C.D.Cal. 2014).

In both cases, the district courts found in favor of the Service. In the first case, the district court judge found that the plaintiffs lacked standing because they could not demonstrate direct harm. The plaintiffs had alleged two types of harm: (1) reduced catch; and (2) increased liability for takes of otters that may be harmed by fishing practices. Despite finding a lack of standing, Judge Walter also addressed the merits of the lawsuit. Under *Chevron* step one[9] the Judge found that the plain language of the statute gave the Service the discretion whether to establish such a program, and thus the Service also had the discretion *not* to establish a program. Under *Chevron* step two, the Judge ruled that the Service's interpretation—that Public Law 99-625 gave it the authority to terminate the program if it proved to be unsuccessful—was reasonable.

In the second case, the district court judge found standing based on interference with the fisheries but ruled in favor of the Service on the merits. Judge Gee invoked *Chevron* step two and found that the Service's interpretation that it possessed the authority to terminate the translocation program was reasonable and entitled to deference.

The Appeals

CSUC appealed both cases to the Ninth Circuit Court of Appeals, where they were consolidated. The Ninth Circuit published its opinion on March 1, 2018.[10] The Justices found that the plaintiffs had standing because sea otters prey on shellfish and thus could reduce the fisheries.[11]

The more interesting question, however, was whether the Court would uphold the Service's action and, if so, on what theory. EDC argued that the Court need look no further than *Chevron* step one, because the intent of Congress was clear: the purpose of Public 99-625 was to further recovery of the southern sea otter, and to enable the experimental program allowed by the ESA. In the alternative, EDC argued that the Service's interpretation of Public Law 99-625 was reasonable, pursuant to *Chevron* step two, because the Service's ongoing duties under the ESA and the legislative history of Public Law 99-625 required the Service to terminate a program that jeopardized the existence of the very

species it must protect.

The Court invoked *Chevron* step two and upheld the Service's action because it was based on a reasonable interpretation of Public Law 99-625. The Court found that because the law gave the agency the discretion to implement an experimental program, it was reasonable for the agency to determine that it also had the authority to terminate the program if the purpose of the statute was no longer being served, or if the continuation of the program would be at odds with the goals of the ESA or MMPA. The Court pointed out that the plaintiffs' interpretation would require the Service to continue the program even if it "harmed, rather than protected, threatened or endangered species. That would make no sense whatsoever." Accordingly, the Court upheld the Service's action, and sea otters are free to re-inhabit their historic range without fear of harm. Hopefully this will lead the otters on the road to recovery. ■

Linda Krop is Chief Counsel of the Environmental Defense Center, a public interest law firm that is headquartered in Santa Barbara and protects the local environment through education, advocacy, and legal action. EDC represented The Otter Project and Los Angeles Waterkeeper before the Ninth Circuit Court of Appeals regarding the southern sea otter translocation program. Ms. Krop is a proud graduate of the Santa Barbara College of Law and teaches Environmental Law at UCSB.

Endnotes

1 42 Fed. Reg. 2965 (Jan. 14, 1977). A threatened species is one that is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20).
2 42 Fed. Reg. 2965 (Jan. 14, 1977).
3 16 U.S.C. § 1533(f).
4 16 U.S.C. § 1539(j).
5 16 U.S.C. § 1536 note, 100 Stat. 3500 (Nov. 7, 1986).
6 A Section 7 consultation is required when an agency action may affect a listed species. 16 U.S.C. § 1536.
7 5 U.S.C. § 706(a).
8 Federal Register Volume 77, Number 244, Page 75265 (December 19, 2012).
9 *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* set forth the test by which courts will evaluate an agency's interpretation of the law. Under step one, the court considers whether the statute is plain on its face, and if so, whether the agency's action is consistent with the clear intent expressed in the statute. If the statute is ambiguous on its face, the court will consider whether the agency's interpretation is "reasonable" in light of the legislative history and other external factors.
10 *California Sea Urchin Comm'n. v. Bean*, No. 15-56672 (March 1, 2018).
11 The court dismissed plaintiffs' contention that they were harmed by potential liability for incidental takes of otters, noting that no such liability had occurred and there was no concrete or particularized threat of harm.

Huge Tax $avings for S Corporations

By Robert W. Olson, Jr.[1]

Significant incentives already exist that make the S corporation the preferred entity for the individual business owner, as opposed to the unincorporated sole proprietorship, LLC, or ordinary "C" corporation.[2] In addition to the limited liability protection afforded by incorporation, S corporations allow business owners to achieve significant tax savings through the reduction of payroll taxes. However, the new Tax Cuts and Jobs Act ("TCJA") has added significantly to those incentives. In order to understand this new incentive, we first need to understand a few interrelated concepts and how they created the old S corporation incentives: payroll tax, **"Salary"** (also known as earned income or wages), and **"Profits"** (also known as net income in excess of wages, and as distributions when paid out to the business owner).[3]

Payroll Tax. Any Salary paid to the business owner is subject to both income tax and payroll tax.[4] The payroll tax consists of contributions for (a) Social Security (12.4%) for all earned income up to the annual FICA cap ($128,400 in 2018), (b) Medicare (2.9%) for all Salary with no upper limit, and (c) the Hospital Insurance Tax (0.9%), starting at Salary of $250,000 for married individuals ($200,000 single) with no upper limit.

Salary vs. Profits. Business owners operating as S corporations are allowed to limit their Salary to a reasonable portion of their net business income (gross income less deductible expenses, or **"Net Income"**), and allocate the remainder to Profits (Net Income in excess of Salary). Profits and Salary are subject to personal income tax at the same tax rates, but only Salary is subject to payroll tax.

Payroll Tax Savings on Profits. The payroll tax savings available on Profits are immense and are directly related to how much Net Income is allocated to Profits (as opposed to Salary). To the extent Net Income is excluded from Salary and allocated to Profits, the business owner saves 15.3% on the excluded amount up to the annual FICA cap, 2.9% from the annual FICA cap up to $250,000 for married taxpayers ($200,000 single), and 0.9% over that amount.[5] The annual payroll tax savings for a married taxpayer with Net Income from $140,000 to $420,000 can exceed $8,000 per year:

Robert W. Olson, Jr.

S Corporation Payroll Tax Savings:

Net Income	Salary[6]	Savings[7]
$70,000	$35,000	$5,034
$140,000	$60,000	$9,213
$210,000	$70,000	$8,645
$280,000	$80,000	$8,423
$350,000	$100,000	$6,854
$420,000	$120,000	$5,599

New Tax Deduction: §199A. The TCJA, signed into law on December 22, 2017, adds another huge incentive for business owners to operate as S corporations. This new incentive is Internal Revenue Code (**"IRC"**) §199A, which grants S corporations a new tax deduction of up to 20% of their "qualified business income" ("**Qualified Income**").[8] With many exceptions and limitations (discussed in part below), Qualified Income is equal to an S corporation's Profits. Therefore, the same tax savings technique applies to §199A deductions as payroll tax reduction: convert Net Income into Profits (rather than Salary).

No §199A Limitation under $315,000. Exceptions and limitations to §199A don't kick in until total personal taxable income ("**Total Income**") exceeds $315,000 for married couples ($157,500 single). If we assume this maximum amount for a married couple with Salary of $90,000 and Profits of $225,000, the TCJA provides an additional $10,800 in annual tax savings.[9] For the unmarried business owner with $45,000 in Salary and $112,500 in Profits, the TJCA provides an additional $5,400 in tax savings.[10] When added to payroll tax savings, business owners can reduce their annual tax burden by up to $20,000 for married couples ($18,800 single) by converting their business to an S corporation. That's real money in anyone's book.

Limitation #1: Deduction Capped over $315,000.

The first major limitation to the §199A deduction is that 20% deductibility of Qualified Income is limited by a formula when Total Income exceeds $315,000 ($157,500 single) over the next $100,000 in Total Income ($50,000 single), until Total Income reaches $415,000 ($207,500 single). In this range, the §199A deduction on the entire Qualified Income (not just that in excess of the starting point) is capped at the lesser of 20% of Qualified Income or 50% of Salary.[11] For example, a married business owner with S corporation Net Income of $350,000, split between $200,000 in Qualified Income and $150,000 in Salary, calculates their §199A deduction as follows:

($415,000 minus $350,000) / $100,000
= 65% of §199A deduction
The lesser of 20% of $200,000 or 50% of $150,000, times .65
which equals the lesser of $40,000 or $75,000, times .65
which equals $40,000 times .65
which equals $26,000.

Therefore, this business owner is allowed a deduction of $26,000, providing tax savings of $11,270. The astute reader now realizes junior high algebra would help determine the "sweet spot" between Qualified Income and Salary to maximize this deduction. For those who thought algebra was unnecessary in real life, the deduction is maximized when Net Income is allocated 5/7 (71.43%) to Qualified Income and 2/7 (28.57%) to Salary. That means that in our "Net Income of $350,000" example, the optimal allocation would be $250,000 to Qualified Income and $100,000 to Salary, achieving the maximum deduction of $32,500 and tax savings of $13,680, an additional $2,400 savings.

Once Total Income reaches $415,000 ($207,500 single) and above, the optimized allocation will yield a maximum $59,285 deduction. No deduction is available for Qualified Income over that maximum when Total Income is in excess of $415,000 ($207,500 single).

S Corporation §199A Savings (Married):

Net Income	**Salary**[5]	**Savings**[8]
$70,000	$35,000	$514
$140,000	$60,000	$3,520
$210,000	$70,000	$6,720
$280,000	$80,000	$7,920
$350,000	$100,000	$13,680
$420,000	$120,000	$18,971

Limitation #2: Deduction Phased Out over $315,000 on Specified Service Income. Another major limitation to §199A is that the deduction is phased out completely for Net Income over $315,000 ($157,500 single) in a straight line over the next $100,000 in Total Income ($50,000 single), and no deduction is allowed at all if Total Income exceeds $415,000 ($207,500 single), for Qualified Income earned in specified service trades or businesses (a **"Specified Service"**). The TCJA defines those trades and businesses as including "any trade or business involving the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees."[12]

Using our prior example of a married business owner, but with Specified Service Income of $350,000 optimally split between $250,000 in Qualified Income and $100,000 in Salary, the amount available for the §199A deduction is calculated as follows:

Pre-adjustment Qualified Income deduction: 20% of $250,000 = $50,000
($415,000 minus 350,000) / $100,000
= 65% of §199A deduction remaining
Qualified Income deduction is limited to 65% of $50,000, which equals $32,500.

For married Specified Service business owners, once Total Income reaches and exceeds $415,000 ($207,500 single), the §199A deduction completely disappears, even for the first $315,000 of Total Income.

S Corporation §199A Savings
For Specified Service Income (Married):

Net Income	**Salary**[5]	**Savings**[8]
$70,000	$35,000	$514
$140,000	$60,000	$3,520
$210,000	$70,000	$6,720
$280,000	$80,000	$7,920
$350,000	$100,000	$8,892
$420,000	$120,000	$0

Sole Proprietorship vs. S Corporation under §199A. The run-up to the TCJA included a lot of discussion in Congress about the Qualified Income deduction applying to any business other than an ordinary "C" corporation: the so-called "pass-through" entities such as S corporations, partnerships, LLCs disregarded for tax purposes or taxed as S corporations, and sole proprietorships. These entities don't pay any federal corporate/entity level income tax, so

the tax burden effectively "passes through" the entity itself and is applied only at the personal level. In comparison, ordinary "C" corporations are double taxed on profits paid out to the business owner: first as Net Income at the corporate level, then again as a "dividend" at the personal level. In fact, the introductory text of §199A reflects that intention: "In the case of a taxpayer other than a corporation, there shall be allowed as a deduction…." Therefore, one would expect that all pass-through entities would be eligible for the same Qualified Income deduction.

However, other language in §199A, when read in combination with other sections of the IRC, ends up requiring disregarded LLCs and sole proprietorships to make their Qualified Income deduction calculations differently than calculations made by S corporations or partnerships. The difference lays in the fact that Net Income for these other pass-through entities is deemed to not include Salary, so the entire Net Income appears to be treated as Qualified Income.

Initially, this looks like a good thing for sole proprietorships. For example, a sole proprietorship with $315,000 in Net Income and Total Income would also have $315,000 in Qualified Income and Total Income, and therefore be entitled to a §199A deduction of 20% of its $315,000 Qualified Income, or $63,000. This generates an additional $4,320 in §199A savings than under an S corporation paying $90,000 in "reasonable" Salary.

Unfortunately, a business owner's "self-employment income" from a sole proprietorship is considered Salary for payroll tax purposes. Therefore, all $315,000 of the Net Income is treated as Salary and subject to $21,500 in payroll tax.[13] The owner of a sole proprietorship ends up paying $5,280 *more* in payroll and income taxes than the owner of an S corporation paying $90,000 in "reasonable" Salary.

In fact, the sole proprietorship's situation could get even worse. An IRS auditor could point out (quite fairly) that because none of a sole proprietorship's Net Income is considered Salary, and the §199A deduction is limited to no more than "50% of Salary," the §199A deduction is completely eliminated when Total Income exceeds $315,000. Under this scenario, the sole proprietorship ends up in the worst of both worlds: paying payroll tax on its entire Net Income, but not being eligible for *any* §199A deduction.[14] That's not fair, but that's exactly how a quota-driven IRS employee could approach the situation.[15]

Ultimately, the Treasury Department may recognize this conflict between text and congressional intent, and fix the discrepancy at the regulatory level to allow other pass-through entities to allocate a reasonable portion of Net Income to Salary and the remainder to Profits, just like S corporations. Then again, you can't count on Treasury (or Congress) making the fix. For the business owner, choosing the S corporation over a sole proprietorship is the obvious choice. ■

Robert W. Olson, Jr., is an attorney in Santa Barbara, focusing on business and corporate law, commercial real estate, estate planning, and related tax issues.

Endnotes

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2 The term "S corporation" includes both corporations and LLCs, either of which have made the "S" election available under IRS Form 2553 and IRC §1362§(b).

3 The proper legal terms are "wages" for Salary and "distributions" for Profits. "Wages" and "distributions" are defined at IRC **§301(c)(1), and earned income is defined at IRC §401(c)(2). I chose to use more user-friendly terms since** this audience has very few accountants or tax attorneys.

4 The payroll tax applies to corporations that pay Salary to employees, including that paid to stockholders for services provided to the corporation. The payroll tax is called "self-employment tax" for sole proprietorships that cannot pay Salary to the owner/employee under current law.

5 Before you get all excited about reducing Salary to $0, be advised that this technique guarantees an IRS audit. Salary must be considered "reasonable" to justify allocating the balance of Net Income to Profits. As to what constitutes reasonable Salary, IRS publications and a few federal court opinions provide general guidance, but there is no definitive method to calculate what percentage of your Net Income is reasonably allocated to Salary. Please discuss the specifics of your situation with your accountant or tax attorney.

6 Salary figures are for illustration purposes only and are not posited as "reasonable." Check with your accountant or tax attorney for specific guidance.

7 Savings based on assumed federal payroll tax of 15.3% up to $128,400, 2.9% from $128,400 up to $250,000 ($200,000 single), and 3.8% over $250,000 ($200,000 single), and includes California's 1.5% tax on S corporation Profits over $53,333, and 50% deductibility of self-employment taxes for sole proprietorships.

8 The full text of §199A can be found at https://www.law.cornell.edu/uscode/text/26/199A.

9 Assumes no other income and using 2018 federal tax brackets.

10 Yes, getting married is great tax planning.

11 For purposes of this calculation, Salary includes that paid to S corporation employees, not just to the business owner. There is a very favorable alternative limitation available for businesses heavily invested in employees, equipment, and/or real property: 25% of Salary plus 2.5% of the unadjusted basis of all "qualified property." Real estate investors will love this alternative.

12 See IRC §§199A(d)(2)(A) and 1202(e)(3)(A). The extent to which Specified Service business owners may get around the "specified services" limitation is the subject of another article.

13 See IRC §§1401, 1402(b), 1402(d), and 3121(a).

14 The same argument would apply to LLCs not electing S corporation treatment. A partnership's "guaranteed payments" are considered Salary for §199A calculation purposes.

15 Many tax professionals theorize that IRS agents have an audit quota and IRS auditors have a collections quota.

Working Effectively with Accounting Expert Witnesses

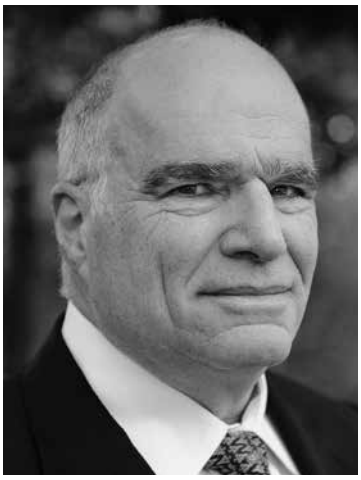
By Thomas M. Neches, CPA/ABV/CFF, CVA, CFE

During the past thirty-three years, I have been retained as an accounting expert witness by hundreds of attorneys. Here are some lessons learned about how to maximize the efficiency and quality of the attorney and the accounting expert witness relationship:

First of all, attorneys should understand the nature of accountants. Courts uniformly have accepted the accountant, in particular the certified public accountant, as an expert.[1] Trial attorneys, however, have been known to consider accountants to be poor expert witnesses. This perception is often justified. Accountants often seem unable to avoid the use of arcane terminology and detailed qualifications to explain accounting issues. Such testimony will more likely mystify than persuade the judge or jury. After all, accounting deals with numbers, and it would seem reasonable to expect an expert opinion based on numbers to be clear, precise, and unqualified.

Accountants are not entirely at fault, however. Often the issues facing accountants are not simple. Most laypersons do not understand the large role that subjective judgment and assumption play in the development of accounting and financial statements. An example of the role of judgment in what at first appears to be a simple arithmetic task is valuing inventory. If the costs of supplies and manufacturing are known, the value of the product would seem easy to calculate. But which value should be used, cost or market? If cost is used, is historical or replacement cost appropriate? If historical cost is chosen, what method should be used to compute historical cost: last-in-first-out, first-in-first-out, or some other cost method? If market value is used, should it be based on normal selling price or liquidation selling price? The expert witness testifying to the value of inventory clearly has to do more than add up columns of numbers. He or she must make sophisticated accounting decisions and explain them to the judge or jury.

For their part, in presenting complex issues in court, accountants often take for granted that the judge or jury understand accounting principles and terminology. Accountants may use technical terms without explaining them adequately, and they may dwell on subsidiary issues of minor importance in their overall conclusions. This is a frequent problem among accountants, most of whom spend their time working with other financial professionals. Most accountants are more comfortable with the role of practicing their craft than with the often more difficult task of explaining it to nonaccountants by testifying in a trial.



Thomas M. Neches

Many accountants make excellent witnesses. As is true with most technical subjects, accounting transactions can be explained in terms understandable to judges and jurors who have no background in accounting. The attorney should retain the accountant who says, "They bought the tractor with a cash down payment and borrowed the rest," instead of, "the acquisition of the farming machinery resulted in a debit to fixed assets and credits to cash and notes payable."

Bring Expert in Early (and Save Money)

The first conversation with an attorney about a new matter frequently starts out with the attorney saying: "Well, it turned out we didn't settle the case. I have to designate my experts by tomorrow. Trial is scheduled for next month, and your deposition will have to take place sometime next week. Please tell me the documents you need, I'll see what I have, and I'll send them to you soon. Can you give me an estimate of your fees?"

I understand attorneys' impulses to wait until the last minute to hire accounting experts. We are expensive. It turns out, however, that it is almost always less costly and more efficient to retain the accounting expert at the very beginning of a case. The result of last-minute calls is usually extra effort and cost as well as a weakened ability to present an effective case. The expert may have to redo work already performed by the attorney or the attorney's client because the expert must be able to testify as to his independent analysis of the facts. Experts brought in after the close of discovery may find the credibility of their analyses undermined because important information is not available to them – information which could have been obtained readily if an expert had been available to point out its significance earlier.

Both the attorney and client benefit by bringing in experts

early. Two of the most important services an accounting expert can provide at the early stages of a litigation are to assist in preparing requests for documents and to prepare a preliminary estimate of damages. These tasks may require only a few hours' work.

Requests for Documents

Nothing is more important to an accounting expert than the documents on which he or she will rely to perform his or her analysis. Bring in your accounting expert early to maximize the likelihood of obtaining the right documents. The expert can enable the attorney to prepare document requests that avoid an imprecise request like "produce all financial records," which often results in one of two costly and inefficient results: (1) a truck-full of unorganized documents that, even when produced in electronic format, require many hours to index and review, or (2) a motion to disqualify the document request as overbroad and burdensome, effecting time-consuming motion practice to clear up the production issues and obtain the documents needed.

Usually, the most useful and important documents an accounting expert wants to see are the company's financial statements (assuming respondent is a business). The accounting expert can assist in avoiding improperly-worded document requests seeking financial statements. For example, a request for copies of all "audited profit and loss statements and balance sheets" may result in the truthful response that the responding party has no documents responsive to the request, rightfully neglecting to produce any of the company's many "reviewed" financial statements. The respondent also will have no obligation to produce copies of other important financial statements (the statement of cash flows, for example).

A well-worded request for financial statements is this:

"For the period beginning [five years from today] to the present, produce all financial statements, notes thereto and reports thereon, whether prepared weekly, monthly, quarterly or annually, whether audited, reviewed or compiled, whether prepared for internal or external reporting purposes, including but not limited to: income statements, balance sheets, statements of cash flows and statements of changes in retained earnings."

In addition to financial statements, there are many other financial records that may be useful to the accounting expert, *e.g.*, general ledgers, cash disbursement journals, accounts payable and accounts receivable journals, invoices, and accounts receivable aging reports, just to name a few. It usually takes little time for the accounting expert to help identify these documents and make properly-worded requests for their production.

Be sure to ask for a copy of the data file for the accounting software package used by the company (*e.g.*, the file [Company Name].qbw, if the company uses QuickBooks). This is the mother-lode of all financial productions. It contains all the information in the documents discussed above and allows the accounting expert to create reports and export data as he or she sees fit, obviating the need to reenter the data contained financial records produced by respondent.

One additional document request often is useful:

"For the period beginning [five years from today] to the present, produce all budgets, forecasts, projections, one-year or long-term financial plans and management reports relating to anticipated sales and financial activity."

Preliminary Analysis of Damages

Whether retained on behalf of the plaintiff or defendant, one of the most useful tasks an accounting expert can perform early in a litigation is to prepare a preliminary estimate of potential damages, accepting the assumption that liability has been proved. Although the final damages analysis may be quite complex, it is often possible to develop a back-of-the-envelope estimate of damages in a few hours. Such an estimate necessarily will involve a series of estimates and (sometimes heroic) assumptions. Nonetheless, having even an order-of-magnitude estimate of damages is extraordinarily valuable in the conduct of case management and in early settlement negotiations.

In even the most complicated case, a good expert can develop a rough estimate of damages in a matter of days. This analysis can be refined as further information becomes available. Developing a preliminary damage estimate as soon as possible in litigation offers several advantages to the client. First, it helps determine the appropriate level of further effort. If the exposure or potential is lower than first thought, a more detailed damage analysis may not be cost-effective. Second, this information is also extremely useful in settlement negotiations. Third, the preliminary analysis may reveal that further discovery is needed.

A fourth advantage of developing a preliminary analysis and subsequent updates is that they provide the accounting expert with a basis to testify to his or her findings even if time or budget constraints do not allow the expert to finish every aspect of the analysis. In a sense, it is an insurance policy against the possibility that the expert will run up large fees while collecting, organizing, and analyzing the data without reaching any opinions.

As documents are produced, the accounting expert can update, revise, and replace the preliminary damages calculations with more refined estimates, which can be used in final settlement negotiations and at trial.

Work as a Team

The expert and the attorney must work together to develop the expert's testimony. The good expert witness makes it clear, albeit diplomatically, that he will not say simply what the lawyer wants the witness to say. The attorney must take care not to impose his or her preconceptions on the expert. In most litigations, the attorney is far more familiar with the facts of the case initially than is the expert. However, the attorney often has only an incomplete understanding of what the expert potentially could do to assist in the litigation. The attorney should solicit the expert's advice concerning the tasks the expert will perform. At the same time, the expert must be guided by the attorney, who is responsible for presenting the case.

After the expert's deposition, the attorney and the accounting expert should work together to develop the script of the expert's direct testimony to be presented at trial. Personally, I always prepare the draft direct testimony outline, which I present to the attorney for consultation and editing.

Establish and Monitor a Budget

To repeat a time-worn lawyer joke, a famous lawyer was once asked, "How much will this case cost to litigate?" His answer was, "Everything you've got." Experts rarely are, or should be, in a position to treat budgets so cavalierly. Litigant parties and insurers take a dim view of exploded budgets for experts, and they respond by refusing to pay the fees of the experts and the attorneys who hired them. Estimated budgets can and should be developed for any litigation task. Attorneys should be informed before budgets are exceeded so that they may react appropriately, either by authorizing further expenditures or by scaling back the expert's scope of work. Doing this helps protect both the expert and the client against disputes concerning fees. In major litigations, when budgets take a second seat to frantic efforts to meet deadlines, attorneys and their clients should be kept informed on a frequent basis of fees incurred.

It is not fair to ask an accounting expert how much it will cost to perform an analysis before the expert has had the opportunity to take a look at the documents on which he or she will rely to perform the analysis. Once that is done, however, budgets can and should be developed and monitored. This reduces the probability that the client will react unpleasantly to an unexpectedly-large bill from the accounting expert. For very large cases, I have on a few occasions agreed to perform a preliminary survey of documents produced, after which I prepared a proposed budget for performing the analyses identified during the survey. Performing the survey typically required a few hours' work, for which I was reimbursed.

Confer Frequently

The attorney must be informed of the progress the expert is making, both in terms of the analysis and the fees being incurred. Experience shows that the experts often must take the initiative to contact the attorneys to let them know what they have accomplished and what they intend to do next. When dealing with experts, many attorneys seem to take the attitude that no news is good news, and they may be unpleasantly surprised when the expert's findings or fees were not as expected. Similarly, when using multiple experts, for example, a marketing expert, an accountant, and an appraiser, information must be shared. Lack of communication during preparation of the case can lead to disaster in the courtroom.

Establish a Primary Contact

Major litigations often involve multiple attorneys and law firms representing different parties in the case. To save costs, several parties may agree to share the services of an expert. Because the interests of parties in litigation rarely converge exactly, the expert may be pulled in conflicting directions. To avoid this potential problem, the attorneys should establish one attorney as the primary contact to whom the expert reports and from whom the expert receives his or her instructions. This attorney also should be responsible for making sure that the expert is provided with the resources (documents and access to individuals) he or she needs to accomplish tasks. Often this role is delegated to a more junior attorney involved in the litigation. A better choice is the litigator who will examine the expert on the witness stand.

Be Aware of Expert-Client Interactions

Accounting experts frequently interview officers and employees of the litigant party to obtain information about the company and/or its industry. Often information obtained in these interviews is used as the basis for assumptions the accounting expert accepts to arrive at his or her final opinion. Attorneys must be aware of these interactions, and they must be sure to include in the company's representative's testimony outline the relevant facts (and in some cases opinions) on which the accounting expert has relied.

Know the Rules of Discovery of Expert Opinions

Both experts and attorneys should be familiar with the work products doctrine and attorney-client privilege as they relate to the discovery of expert opinions. The laws can differ among states and from the federal rules of evidence.

Continued on page 32

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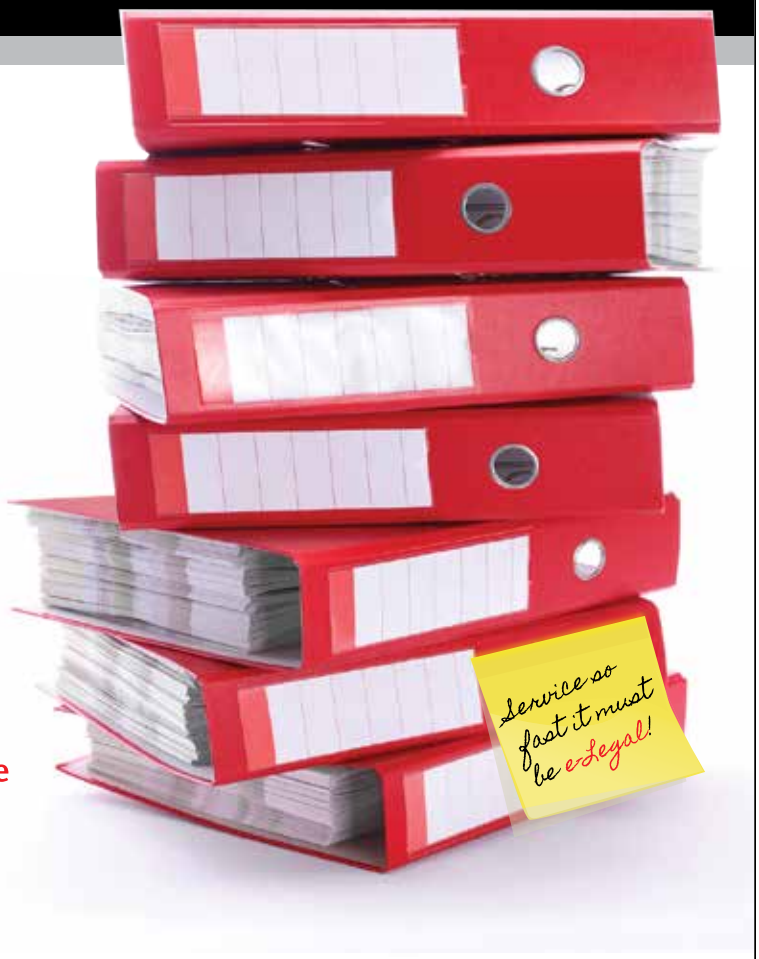

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The United States Supreme Court and the Death Penalty

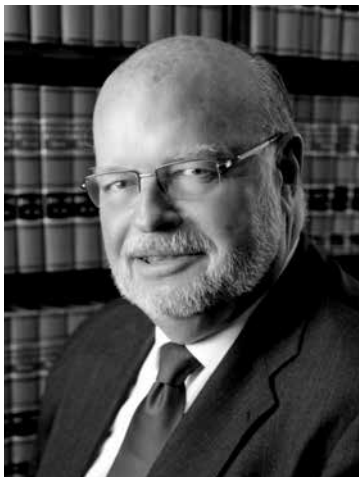
By Robert Sanger

Based on political trends and federal judicial appointments, it seems unlikely that the United States Supreme Court will find capital punishment unconstitutional in the near future. As a result, it is important for people interested in the issue to focus their attention on local attitudes, and local and statewide politics. Justice John Paul Stevens, retired from the United States Supreme Court, made this point both in his book[1] and in his interview with this author.[2] Abolition, which he supported in his later years on the Court, was not going to take place as an interpretation of the Constitution. In his opinion, it had to take place politically.

Nevertheless, in this month's *Criminal Justice* column, we will review some of the nuances of the changing views among Justices. We will explore the possibility that there is *some* chance that the United States Supreme Court (the "Court") could reconsider the constitutionality of capital punishment, itself, under the Eighth Amendment or the Eighth and Fourteenth Amendments – and, however improbable, the possibility that it could be found unconstitutional. Those who seek abolition in death states like California should still focus their energy politically through organizations like Death Penalty Focus.[3] But, lawyers handling death cases will not abandon the effort to show that standards of decency have evolved to preclude the killing of prisoners and that the heightened due process requirement cannot be met.[4]

The United States Supreme Court Currently on Capital Punishment

First, in our limited space here, we will discuss the potential for abolition of capital punishment itself under the Eighth or Eighth and Fourteenth Amendments to the United States Constitution. The question under the Eight Amendment is whether, under "evolving standards of decency that mark the progress of a maturing society," the death penalty is cruel and unusual punishment.[5] This same standard has been used to determine, for instance, that it is unconstitutional to execute persons with a diagnosis of intellectual disability,[6] people who were minors at the time of the offense,[7] or people mentally incompetent at the time of execution.[8] The Eighth and Fourteenth Amendment question is whether it is impossible to create a system that provides the heightened reliability necessary to decide life or death.[9]



Robert Sanger

The closest that the Court came this term to considering the matter, if it was ever actually close, was the case of *Hidalgo v. Arizona*.[10] There, Justices Ginsberg, Sotomayor and Kagan joined in a "statement" by Justice Breyer appended to a summary denial of certiorari. The issue presented to the Court was the constitutionality of Arizona's capital sentencing scheme, which allegedly contains so many aggravating circumstances that virtually every first-degree murder defendant is eligible for death. Despite the statement, the four Justices concurred in the denial of certiorari based on a finding that the record below was not based on an adequate empirical study.

By accepted Supreme Court practice, four Justices can grant certiorari. This is not pursuant to a promulgated rule, statute, or constitutional provision, but is an accepted practice of the Court called the "rule of four."[11] Therefore, in *Hidalgo*, the four Justices who signed the "statement" could have compelled the Court, as a whole, to consider the constitutionality of the statutory scheme in Arizona. As expressed in the separate statement of Justice Breyer, "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" (Citations omitted.)

Although "narrowing" itself is a major concern, once the case was before the Court, the even bigger question of constitutionality of the death penalty could have been addressed. Any time a capital case is before the Court, constitutionality can be addressed under the evolving standards of decency. However, it also could be addressed on the grounds that, at some point, tinkering with the "machinery of death" is simply insufficient to assure a constitutionally fair system.[12] A similar argument could be made regarding the expansion of the *Atkins* and *Roper* rationales. That is, while we recognize more and more reasons to find people ineligible for death due to cognitive neuroscience regard-

ing issues like intellectual disability and adolescent brain development, it makes less and less sense, as a matter of fairness, to execute the remaining and increasingly smaller class of eligible subjects.

It may be a reasonable reading of the separate statement in *Hidalgo* that the four Justices did not think that they had the fifth vote to confront the specific question presented and, perhaps, that opening capital punishment up to a broader review would backfire. That interpretation is supported by the tepid nature of prior separate opinions by Justices Breyer and Ginsberg, such as, Justice Breyer's concurrence in *Dunn v. Madison*,[13] where the *per curiam* upheld the execution of a person who had multiple strokes and could not remember committing murders, but understood death is a punishment in retribution for crimes. Justice Breyer also dissented, joined by Justice Ginsberg in *Glossip v. Gross*, but came short of declaring that the death penalty was unconstitutional. He said, "For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question."[14] Nevertheless, the four Justices joining in the statement in *Hidalgo* could, if given the chance, reconsider constitutionality.

The Possibility of the Death Penalty Being Found Unconstitutional

Still, there is little likelihood that the majority of the present United States Supreme Court – or one in the foreseeable future – will find the death penalty, itself, unconstitutional under the Eighth Amendment doctrine of the *Trop* "evolving standards of decency that mark the progress of a maturing society" or under the Eighth and Fourteenth Amendments that it is incapable of being administered with heightened due process. *Little likelihood, but it is possible*.

Justice Scalia was one of the most fervent advocates for the death penalty. His concurrence in *Glossip v. Gross* started with, "Welcome to Groundhog Day. The scene is familiar: Petitioners, sentenced to die for the crimes they committed (including, in the case of one petitioner since put to death, raping and murdering an 11-month-old baby), come before this Court asking us to nullify their sentences as 'cruel and unusual' under the Eighth Amendment." [15] He is gone but his replacement, Justice Gorsuch, seems equally committed to maintain the death penalty. So, why is there any hope?

Scalia said in a 2015 speech to students at Rhodes College that he "wouldn't be surprised" if the Court overturns the death penalty since he has four colleagues who believe the death penalty is unconstitutional.[16] Reading between the lines, it seemed that he may have been reflecting a sense that the frustration Justice Blackmun had about tinkering with the "machinery of death" had been taking its toll on the Court as a whole even after Justice Blackmun's 1994 retirement. A logical extension of this might have been that Justice Scalia, himself, seeing the handwriting on the wall, would be the one to write the opinion saying that capital punishment was historically proper, in his opinion, but unworkable as a matter of due process. It could have been a sort of "Nixon goes to China" moment.

The persuasive argument along these lines would have been, not solely that capital punishment was cruel and unusual under the Eighth Amendment, but that it was simply unworkable. If it is unworkable, it would not meet the requirements of "heightened reliability" as a matter of the super due process required in death cases under both the Eighth and Fourteenth Amendments.[17] Hence, the importance of Justice Blackmun's words in *Callins*, "if the death penalty cannot be administered consistently and rationally, it may not be administered at all." Of course, Justice Blackmun had long since retired and Justice Scalia's passing in 2016 precluded him being the messenger.

Nevertheless, the four Justices signing the statement in *Hidalgo* might vote for abolition on hybrid Eighth Amendment, cruel and unusual, and Eighth and Fourteenth Amendment due process grounds. Justice Breyer dissented from a denial of certiorari in *Boyer v. Davis*,[18] saying, "Put simply, California's costly 'administration of the death penalty' likely embodies 'three fundamental defects' about which I have previously written: '(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose.'" (Citation omitted.) Justice Ginsberg has joined with Breyer in this position in *Glossip*.

The question, of course, remains as to from where the fifth vote would come. There are two candidates: Justice Kennedy and Chief Justice Roberts.[19] Justice Kennedy has been a swing vote on a number of issues. He supports the death penalty in the sense that he has voted in favor of imposing it. However, he did agonize over the decision in *Hall v. Florida*, in which he said, "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." [Quoting *Roper*]; also quoting *Trop*, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." He then looked at evolving standards and clinical judgment of the medical profession in assessing the fairness of a bright line cut-off based on a 70 IQ score. Although he rejected drawing a bright line, there is reason to think he would be troubled by the concept of

drawing lines between life and death in general. He joined the majority in *Moore v. Texas*[20] in rejecting the artificial *Briseno* factors[21] in favor of relying on clinical judgment in assessing intellectual disability. He may see the wisdom in ending the "tinkering" in one of his last terms on the Court.

The even more controversial possibility is the Chief Justice. While he dissented in *Moore*, he did not endorse the *Briseno* factors but was concerned that clinical judgment only, and not consensus or judicial reasoning, was the point of reference for the majority's opinion. Nevertheless, over a Justice Thomas dissent, he also wrote the opinion for the Court in *Buck v. Davis*.[22] The facts requiring reversal were pretty clear: the defense lawyer called an expert witness who said both in his report and on the stand that Mr. Buck's race increases the risk of "future dangerousness." The Chief Justice navigated the procedural minefield and concluded that this testimony not only injected noxious racism into the trial but that, procedurally, Mr. Buck was entitled to relief. This could be seen as a coming out by the Chief, breaking away from Justice Thomas. It could also be seen as the beginning of the realization that the procedural minefield for capital litigants is an arbitrary and sometimes manipulative mechanism used to make a life or death determination.

Justices have a way of moderating their views in light of reflection on their inevitable place in history. It is not hard to see that support for the anachronistic and sometimes byzantine procedures for imposing death on prisoners may put each of the Justices on the wrong side of history. Some Justices have made the commitment early and consistently, like Justices Goldberg, Marshall, Douglas and Brennan, and others have come to it only after voting for death in given cases, like Justices Frankfurter, Blackmun, Powell and Stevens. Justices Breyer, and Ginsberg seem to be tending toward the latter category, maybe joined by Justices Sotomayor and Kagen – they have voted for death and continue to do so but express some serious concerns. To make a majority, it will take Justice Kennedy or the Chief Justice to have an epiphany. It could happen!

Conclusion

Nevertheless, the abolition of the death penalty itself is unlikely in the hands of the United States Supreme Court as it is presently constituted. The Eighth and Eighth and Fourteenth Amendment arguments will continue to be made case-by-case. There are, of course, many other constitutional and statutory issues to be litigated in the state and federal courts. In California, the proponents of Proposition 66, due to ill-thought-out drafting, have committed the courts to years of litigation to sort out the effect of that initiative. But all of these issues—short of a judicial determination that the death penalty is unconstitutional under the Eighth or Eight and Fourteenth Amendments – means that capital punishment will stay on the books and be a threat to the lives of people randomly—and sometimes wrongfully—sentenced to death. Therefore, absent this unlikely turn of events, those seeking abolition need to take the advice of Justice Stevens and seek a political remedy. ■

Robert Sanger is a litigation partner in Sanger Swysen & Dunkle, and a Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law.

ENDNOTES

1 John Paul Stevens, SIX AMENDMENTS, Little Brown & Company (2014),
2 See, video, *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
3 Disclaimer: The author's partner, Catherine Swysen, was one of the early Board members of Death Penalty Focus, led by Board Chair Mike Farrell, and the author took over her seat on the Board upon the birth of their youngest child over 24 years ago.
4 Further disclaimer: The author has five pending capital cases, one pending a decision of the California Supreme Court, one pending trial in Los Angeles and three others in stages of post-conviction litigation and has consulted on several others.
5 *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
6 *Atkins v. Virginia* (2002) 536 U.S. 304; *Hall v. Florida* (2014) 134 S.Ct. 1986; *Moore v. Texas* (2017) 137 S. Ct. 1039.
7 *Roper v. Simmons* (2005) 543 U.S. 551.
8 *Ford v. Wainwright* (1986) 477 U.S. 399 and *Panetti v. Quarterman* (2007) 551 U. S. 930.
9 ee, e.g., *Lockett v. Ohio* (1978) 438 US 586 and *Woodson v. North Carolina* (1976) 428 U.S. 280.
10 *Hidalgo v. Arizona*, (Decided March 19, 2018) 2017 WL 3536644.
11 See, e.g., *Rogers v. Missouri Pac. R. Co.* (1957) 352 U.S. 52, 527.
12 *Callins v. Collins* (1994) 114 S. Ct. 1127, 1130 (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.").
13 *Dunn v. Madison* (2017) 583 U.S. 9, 12.
14 *Glossip v. Gross* (2015) 576 U.S. 1276, 2777-2778; see also, *Reed v. Louisiana* (2017) 137 S.Ct. 787 (Breyer, J. dissenting)
15 *Id.,* at 2746(Scalia, J., concurring).
16 Debra Cassens Weiss, *Scalia says he 'wouldn't be surprised' if SCOTUS overturns the death penalty*, American Bar Association Journal, (September 24, 2015) at: http://www.abajournal.com/news/article/scalia_says_he_wouldnt_be_surprised_if_scotus_overturns_the_death_penalty.
17 See, e.g., *Lockett v. Ohio* (1978) 438 US 586 and *Woodson v. North Carolina* (1976) 428 U.S. 280.
18 *Boyer v. Davis* (2016) 136 S.Ct. 1446 (Mem., Breyer dissent from denial of cert.).
19 It is, of course, possible that Justices Thomas or Alito could join – or even take the lead – but that is in the realm of "anything is possible." Both have been avid death supporters and show no inclination of being imaginative in this sense. Justice Gorsuch

Continued on page 32

Is Recording Home Buyers Illegal?

By Joe Parker

Joe Parker

For several years, articles have been written about home sellers listening in on buyers and their agents as they tour a home for sale. In 2012, the Iowa Gazette published one of the first such pieces entitled, *Home Sellers Recording Would-Be Buyers.* In that article, it was suggested that recording people in your home was perfectly legal.

Is Recording Home Buyers Legal?

Recording or eavesdropping on people without their knowledge or consent is legal in many states, but California is not one of them. California's Constitution has language on this subject that has resulted in interpretations designed to protect unknowing people. The constitution says in pertinent part:

All people have an inalienable right to, among other things, "… pursuing safety, happiness and privacy." This protection does not extend to public spaces where they can reasonably expect to be overheard or recorded. In non-public places people can assume the belief that their conversations are private and confidential.

The California Association of Realtors ("CAR") has addressed home buyer concerns regarding privacy in the standard listing agreement used by California Realtors. In the agreement, sellers are advised to post a notice to prospective buyers and agents disclosing the presence of any security cameras and/or recording devices on the property.

Home sellers might be tempted to ignore CAR's advisory. Heck, it's only our nanny cam, or we have a right to monitor people entering our home. In fact, you do, as long as you disclose in advance the fact you may be being recording people on the property or in the home.

What Is the Risk of Recording Home Buyers?

In many states there is no risk, but there is in California, which has privacy laws that speak to this subject. Penal Code Section 632 states in pertinent part:

"A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, … shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."

Whether recording devices are disclosed as required by law or not, the Santa Barbara Group at Berkshire Hathaway Home Services is not a fan of home buyers being recorded.

Conclusions on Recording Home Buyers

Whether recording devices are disclosed as required by law or not, the Santa Barbara Group at Berkshire Hathaway Home Services is not a fan of home buyers being recorded. It sets a bad tone and experience. We want the potential home buyer to feel comfortable, to hang out and imagine living in the property. If they feel they are being recorded, it is unlikely they will feel relaxed. The small chance of getting helpful negotiation information is heavily outweighed by the probability of creating a bad experience. It may also land the buyer in jail or with a heavy fine.

We believe our home sellers do best when they spend time and thought on creating ways to help people fall in love with the home so powerfully, that they will wildly want the home. ■

Joe Parker, a Santa Barbara native and UCSB graduate, has 17 years of experience selling real estate in Santa Barbara. He is part of the Santa Barbara Group with Berkshire Hathaway Home Services with fellow Realtor, Garrett McCaw. Joe is an interesting mix of warm/casual and intense competitor. Joe's enthusiasm is infectious. He is passionate about his work and is always learning. Besides keeping up on all things real estate, he loves to surf, exercise, travel and is a dedicated husband and father to two girls.

Verdicts & Decisions

Zavriel Loza v. Ronald Dean Birdsall et al.

SANTA BARBARA SUPERIOR COURT, ANACAPA DIVISION

CASE NUMBER:	17CV00536
TYPE OF CASE:	Automobile Incident
TYPE OF PROCEEDING:	Jury Trial
JUDGE:	Hon. Donna D. Geck, Dept. 4
LENGTH OF TRIAL:	4 Court Days
LENGTH OF DELIBERATIONS:	3 hours
DATE OF VERDICT/DECISION:	March 15, 2018
PLAINTIFF:	Zavriel Loza
PLAINTIFF'S COUNSEL:	Mi Hyang Hong of Drake Law Firm
DEFENDANT(S):	Ronald D. Birdsall, Rich Bernal, and Air Test & Balance, Inc.
DEFENDANT'S COUNSEL:	James G. Stanley of the Law Offices of John A. Hauser
INSURANCE CARRIER:	The Hartford
EXPERTS:	Plaintiff Experts: Christopher Gaynor - Accident Reconstruction Alan Moelleken, M.D., Orthopedics Defense Expert: Hrair Darakjian, MD, orthopedics
OVERVIEW OF CASE:	Automobile v. Skateboarder

FACTS AND CONTENTIONS: Plaintiff Zavriel Loza claimed that defendant Ron Birdsall, while in the course and scope of his employment with defendant Air Test & Balance, Inc. and driving a vehicle owned by defendant Rich Bernal, negligently made a right turn while Mr. Loza was crossing Santa Barbara Street at the intersection with Micheltorena Street. Mr. Birdsall contended that Mr. Loza negligently entered the crosswalk contrary to traffic indications and subsequently caused the collision.

SUMMARY OF CLAIMED DAMAGES: Plaintiff claimed for suspected herniated discs, in the amount of $16,825.00, the cost of his medical expenses.

SUMMARY OF SETTLEMENT DISCUSSIONS: Plaintiff made an offer pursuant to Code of Civil Procedure §998, in the amount of $22,900.00. Defendants made an offer of judgment pursuant to Code of Civil Procedure §998, in the amount of $17,001.00.

RESULT: The jury found 9-3 in favor of the defense.

Feature

Neches, *continued from page 25*

Generally speaking, observations and opinions of an expert employed as a pretrial consultant rather than a potential witness are deemed *work product* of the attorney and are protected from discovery.[2] Once an expert is employed to testify at trial, his or her opinions are relevant evidence and generally are not protected by the work product doctrine.[3]

The law can be complex, and misunderstandings may have important consequences in litigation. For example, an expert's examination and analysis of confidential client documents may be privileged, but certain types of direct testimony may constitute a waiver of the privilege and enable the adverse party to cross-examine the expert on the subject of the privileged information.[4]

Understand the Rules of Evidence Regarding Expert Testimony

Whatever your understanding of the rules of evidence regarding expert testimony may be, the only understanding that matters is that of the particular judge in your case. Do all documents on which the expert relied need to be admitted into evidence? In my experience, some judges have said yes, and others have said no. When an expert relied on information obtained in an interview with a third party, must the third party testify at trial to support the basis for the information relied on by the expert? Again, in my experience, some judges have said yes, and others have said no. Find out the rules of evidence used by your particular judge and prepare accordingly.

Rehearse Testimony

When time and budget allow (which seldom happens, unfortunately), the attorney and accounting expert should have a full-dress rehearsal of the accountant's proposed direct testimony at trial. This allows the actual trial testimony to be delivered more smoothly and effectively. It also can bring into focus weaknesses in the presentation, which then can be fixed before trial. ■

Mr. Neches is a Certified Public Accountant, a Certified Valuation Analyst, a Certified Fraud Examiner, and is accredited in Business Valuation and certified in Financial Forensics.

ENDNOTES

1 *Computer Sys, Eng'g, Inc. v. Qantel Corp.* (1st Cir. 1984) 740 F.2d 59; *Westric Battery Co. v. Standard Elec. Co.* (10th Cir. 1973) 482 F.2d 1307.
2 Fed. R. Civ. P. 26(b)(3); *Scotsman Mfg. Co. v. Superior Court* (1966) 242 Cal. App. 2d 527, 531.
3 *Quadrini v. Sikorski Aircraft Div.* (D. Conn. 1977) 74 F.R.D. 594. See also Fed. R. Civ. P. 26(b).
4 *People v. Whitmore* (1967) 251 Cal. App. 2d 359.

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Criminal Justice

Sanger, *continued from page 29*

is still getting settled but seems unlikely to break from the arch-conservative positions for which he was appointed.
20 *Moore v. Texas* (2017) 581 U.S. 1039.
21 The *Briseno* factors were criteria adopted in Texas to determine whether a person's adaptive functioning (their behavior as opposed to their IQ) qualified them as intellectually disabled. Everyone agreed in *Moore*, including the Chief Justice in dissent, that these were artificial lay stereotypes and not medically based.
22 *Buck v. Davis* (2017) 580 U.S. 759.

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COME KICK OFF YOUR SUMMER WITH THE SBCBA! MASTER CHEF-ATTORNEYS RUSTY BRACE AND MACK STATON WILL BE MANNING THE GRILL AND DRINKS WILL BE POURED BY MIXOLOGIST WILL BEALL, INCLUDING FABULOUS WINES DONATED BY JOE LIEBMAN

WHEN: 5:00 PM, FRIDAY, JUNE 15 TH

WHERE: TUCKER'S GROVE, AREA 1, 805 SAN ANTONIO CREEK ROAD, GOLETA

RSVP BEFORE JUNE 1ST TO GET THE EARLY BIRD SPECIAL RATE!

COST/PAYMENT

- $40 PER SBCBA MEMBER/ $50 PER NON-SBCBA MEMBERS (AFTER JUNE 1ST: $50/$60)
- $20 PER LAW STUDENTS, NEW ATTORNEYS (0-3 YEARS) & PUBLIC INTEREST ATTORNEYS (AFTER JUNE 1 ST : $30)
- CHILDREN 12 AND UNDER: $5

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SPONSORSHIP OPPORTUNITIES AVAILABLE! INQUIRE: DIRECTOR@SBLAW.ORG

ALL FEES ARE NON-REFUNDABLE

The SBCBA Alternative Dispute Resolution Section Presents:

PSYCHOLOGICAL IMPEDIMENTS TO MEDIATION SUCCESS

POSTPONED TO TUESDAY, JUNE 5th

Speaker:
Penny Clemmons, Ph.D., JD

IDENTIFICATION OF PSYCHOLOGICAL IMPEDIMENTS

CAUSES OF FAILURE IN MEDIATION

INTERVENTIONS

When:
June 5, 2018

Time:
12:15 pm – 1:15 pm

Where:
Santa Barbara College of Law
20 E. Victoria Street

Cost:
$30 Lunch Included

MCLE:
1 Hour (General)
Contact Information/RSVP:
Penny Clemmons
clemmonsjd@cs.com or
Lida Sideris director@sblaw.org

Please make checks payable to the Santa Barbara County Bar Association and mail to:
SBCPA 15 W Carrillo St. Santa Barbara, Ca. 93101

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

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