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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.

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Amber Holderness and family. By Tangles's Photography

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SBCBA Annual Dinner. *See photos beginning on page 18.*

Santa Barbara County Bar Association

Message from the Editor

By Stephen Dunkle

Stephen Dunkle

It is my honor to assume the duties of editor of the *Santa Barbara Lawyer* magazine for 2019, along with my assistant editor, Joe Billings. I have been an avid reader of the magazine since my legal career began fifteen years ago and have always found it to be a valuable resource. I look forward to carrying on the tradition of providing interesting and informative content to members of the Santa Barbara legal community.

The 2018 editor, Jennifer Gillon Duffy, did a wonderful job and deserves our thanks and appreciation. Under her watch, the magazine included high quality articles and frame worthy photos of the courthouse on the cover each month. Her focus on philanthropy in the legal community highlighted the good work being done by lawyers in our community. In addition, the magazine continues to be in good financial health.

The *Santa Barbara Lawyer* exists because of the willingness of members of our legal community to submit articles, professional announcements, verdicts and other noteworthy information to the magazine. If there is an area of law you are knowledgeable and passionate about, please consider writing an article for the magazine. If you open your own practice, make partner at your firm, or hire a new associate, we would like to include your news in our Motions column. If you win your trial, let us know so we can include it in Verdicts and Decisions. Encourage others to do the same. Submit any content to the Magazine or to me or Joe Billings directly. ■

– Stephen Dunkle sdunkle@sangerswysen.com

Stephen Dunkle is a partner at Sanger Swysen & Dunkle. His practice includes criminal defense, appeals and civil litigation. He is certified as an Appellate Law specialist by the Board of Legal Specialization of the State Bar of California. He is the chair of the Amicus Committee for California Attorneys for Criminal Justice and a member of its Board of Governors.

Santa Barbara Lawyer – 2019 Submission Guidelines and Key Dates

Santa Barbara Lawyer publishes monthly. Just like last year, in 2019 the deadline for content, copy, and photographs is on the first Monday of each month. There is no "soft deadline" without pre-approval from Stephen Dunkle.

Articles

- Include a title or headline with your article. Include your name/title, and a short biography at the end of your article.
- Articles do not need to be laid out; plain text is easier for us to work with.
- Shorter paragraphs work best for our newsletter format. Aim for 600-1200 words.
- Microsoft Word, .rtf or .txt files are ideal. No PDFs.
- Please proof your material before you send it in! We cannot guarantee that we will catch every spelling, grammar, or punctuation error, and proof-reading takes time away from our design and editing process.
- Please use the endnote format for references to authority.
- Please review and submit a signed Author Agreement with your article.

Photographs and images

- Color photographs are preferable.
- Send the largest file (highest resolution) of the best quality possible. Photographs must be a minimum of 300 dpi.
- Do not edit or crop your photos. Do not imbed images in Word or any other application.
- Send photographs as separate attachments.
- Captions are best sent with their image – for example:

Image file name	caption
[ARTICLE NAME] 1.jpg	*Jane Smith, John Doe, and Miles Davis*

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President's Message

By Amber Holderness

Amber Holderness

I am excited and honored to be serving as the President of the Santa Barbara County Bar Association for 2019 and to be working with this year's accomplished officers, directors, and delegates. The 2018 Board, under Past President Jeff Chambliss's leadership, strove for, and I believe accomplished, the theme of last year's *Santa Barbara Lawyer* – Giving Back. The Bar Association supported those affected by the Montecito debris flows by providing pro bono legal services, donated money to worthwhile community causes, and added new events for the Association's members and Bar at large. In 2019, I hope to lead the Board in continuing the Bar Association's legacy of service to the legal community and to giving back.

Plans are already underway for 2019 to ensure that happens. Early in the year the Board will be looking at additional ways to strengthen the Bar Association through increasing its membership and attorney participation. This will include exploring an increased online presence, additional outreach to all attorney sectors, and providing new membership benefits and events for the Bar.

I also will work with the Board to pilot a program that focuses on the physical and mental wellness of attorneys. As part of this program, we will test an MCLE wellness section that addresses topics such as the impact of wellness on an attorney's ethical and competency duties. The Board also will look at providing social and networking opportunities for attorneys through wellness activities.

In addition, throughout 2019 the Board will explore ways to expand on the cooperation between our organization and other organizations to share information, network, and combine efforts on issues of mutual concern. We are looking into opportunities for collaboration with the newly established California Lawyers Association, and increased collaborations with our local law-related organizations. It is my hope that by increasing collaboration, we can find additional ways to inform and provide services to the Bar.

Of course, we also will continue the events and programs of past years that have been such a success in the coming year. The first of those events is the Bench and Bar Conference on January 26, 2019. The Conference this year is on the timely topic of cannabis, and features speakers from many different subject matters affected by new cannabis laws. It should be quite informative and lively. Stay tuned for the dates of other famous Bar Association events, such as the annual barbeque and golf and tennis tournament.

Once again, I am very excited to work with, and for, all of you in 2019 and look forward to a great year. ■

Mrs. Holderness is currently practicing at Santa Barbara County's Office of County Counsel. In her free time, she can be found enjoying the beautiful Santa Barbara outdoors with her family and friends.

The Need to Revise the New Bail Law – Part III

By Robert Sanger

Robert Sanger

In last two month's *Criminal Justice* column, we discussed the new bail law, SB 10. It was passed and signed into law by Governor Brown on August 28, 2018 but will not take effect until October 1, 2019.[1] The new bail law seeks to abandon the cash bail system that monetizes a person's ability to get out of jail while being detained prior to trial. In other words, cash bail, bail bonds and property bonds are replaced by a different pretrial release or detainment system. Last month we discussed the mechanisms set forth in the new statutes for determining who may be released and when, if at all.

In this month's *Criminal* Justice column, in Part III of this series, we will focus, in particular, on the "risk assessment tool" that is called for in the new legislation and whether that is a fair or even workable tool to decide who is subject to preventative detention. We will also make some modest suggestions for proposed amendments to the law and programs to be funded, starting with the legislative process this year[2] with the hope that the new law is modified before it takes effect October 1, 2019.

"Risk Assessment Tools"

SB 10 refers to "risk assessment tools" and "risk assessment instruments" interchangeably and, as codified in Penal Code Section 1330.7(k), says:

"'Validated risk assessment tool' means a risk assessment instrument, selected and approved by the court, in consultation with Pretrial Assessment Services or another entity providing pretrial risk assessments, from the list of approved pretrial risk assessment tools maintained by the Judicial Council. The assessment tools shall be demonstrated by scientific research to be accurate and reliable in assessing the risk of a person failing to appear in court as required or the risk to public safety due to the commission of a new criminal offense if the person is released before adjudication of his or her current criminal offense and minimize bias."

That sounds all very scientific, however, there are no accepted criteria for validation of a risk assessment tool. So, since this tool may mean that a person will be detained in jail for days awaiting further determination or for months or longer awaiting trial, the question is: "Is there, or can there ever be, a 'validated risk assessment tool' for the purpose of predicting failures to appear or future offending for people charged with a crime? "

First, it is important to understand what "validation" means in science and what it means in this context. In general, validation of a method is an evaluation of the procedure used to analyze data regarding the quality, reliability and consistency of the analytical technique. In other words, the method is more or less valid if it follows scientific criteria, is repeatable and renders consistent results. Validation is often associated with independent verification which means that an independent agency will test the procedures in place and confirm that the procedure has the quality, reliability and consistency claimed by the user.

As the PCAST Report[3] makes clear, scientific validity involves both "foundational validity" and "validity as applied." Much of forensic science has been based on "rough heuristics to aid in criminal investigations and were not grounded in validation practices of scientific research."[4] Foundational validity, to meet current forensic standards, must be based on the standards of a "research culture." This means that, "(1) methods must be presumed to be unreliable until their foundational validity has been established based on empirical evidence and (2) even then, scientific questioning and review of methods must continue on an ongoing basis."

Risk assessment tools have been discussed and reviewed extensively, but they have not met the criteria of "foundational validity." In other words, while sales people for various instruments and law enforcement agencies tout the usefulness of various tools, the scientific community has yet to establish robust foundational validity of these "tools." For instance, although there are two specific criteria in the new code—prediction of appearing in court and prediction of future dangerousness—most instruments are designed to provide one score that covers both criteria.

"Validity as applied" is brought into question in the administration of the existing tools because they require

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people to self-report as to some of the questions and for others, an interviewer to make subjective assessments to input into the tool. Objective data, under the new law, may be limited to criminal history within the last three years including failures to appear.[5] Other more subjective information would include the code sections under which the police officer booked the detainee since there is wide discretion to overbook or underbook a detainee.[6] It would also include information from the "victim" or from the district attorney and "any supplemental information reasonably available that directly addresses the arrested person's risk to public safety or risk of failure to appear in court as required."[7] While all this information may be helpful in a heuristic determination, it is subjective and is not made scientific by being included as a part of a "risk assessment tool."

Validity and Accuracy

Looking at the foundational validity of the testing instrument, the question is how accurate is the "validated risk assessment tool" in general. In other words, a tool may be validated in the "research culture" of science if it has an accuracy rate that is commensurate with its use. For instance, a scientific test, say, a non-invasive ultrasound test to be used to determine the presence of acute appendicitis, might be considered accurate enough to be considered a valid test if it was 90% proficient in identifying patients who have an inflamed appendix.[8] If you are the patient, you would be relatively upset if you underwent an appendectomy and were one of the ten who did not have appendicitis. Nevertheless, the appendicitis "tool" may be deemed reliable enough to be used as a part of a clinical diagnosis.

Here, the tool is one to be used to determine whether or not a person will be incarcerated pre-trial for a few days while a judge further evaluates the person or whether the person will sit in jail for months or more while awaiting trial. In this regard, the question of accuracy of these risk assessment tools—really how much risk is there that you will not show up or will (re)offend[9]—is in conflict with the right of personal liberty, one of the most highly regarded rights in American history from the Declaration of Independence, through the Constitution and Bill of Rights, and through the Civil War Amendments, including the Fourteenth.[10]

It turns out that the alleged "validated risk assessment tools" that are actually being used to determine liberty have accuracy rates that are inverted from those used to determine an inflamed appendix: more like 10% will have a serious offense pretrial for the "high risk" detainees. The statistics vary wildly as proclaimed by the proprietary owners of the tests. Some claim that they can predict that 42% of high risk offenders will offend but, it turns out, they use a two year period and count traffic offenses. Some studies show that re-arrest for a violent crime is closer to 8%.[11] So, in personal terms, if you are arrested and have a "high risk assessment" on one of these tools, you are being detained because, based on the limited profile, there is a one in ten chance that you may (re)offend before trial.

This might strike some as a "Big Brother,"[12] "Brave New World"[13] or "Minority Report"[14] sort of thing: There is a 10 percent chance a person might offend so lock them up! Even if it is a 42% chance, is that enough? In other words, even if a system of preventive detention is valid in some procedural sense (and there is no indication that these risk assessment tools meet that criteria) the accuracy of the system does not meet the criteria for use in depriving the liberty of human beings in a forensic setting. *Daubert* considers "proficiency testing" to be a part of any valid forensic test.[15] *Sargon* does not permit speculation in forensic opinions.[16] The forensic opinion based on the risk assessment tool does not meet the requirements of *Daubert* or *Sargon*. And, it is an opinion that is used *ex parte* or in a limited notice pretrial detention hearing to summarily keep a person in jail.

What to Do That May Help Avoid Improper Preventive Detention?

If the foregoing analysis is correct, then: 1) It is a good thing that SB 10 has ended monetary bail; 2) liberty is a fundamental concept in our law; 3) SB 10 provides for the denial of liberty by way of preventive detention; 4) the predictive criteria (both the litany of potentially disqualifying charges and the use of present "risk assessment tools") are not validated as sufficient for a forensic opinion; and 5) the use of such a system vests too much discretion in the PAS Officer and the judge. These combined mean that SB 10, as presently configured, is not in compliance with either Due Process or Equal Protection under the state and federal constitutions.[17]

In addition, this does not take into consideration the practical reaction of people of modest or greater means who would have bailed themselves or their friends of family out if monetary bail was set under circumstances where they now might be detained for days, weeks or months under SB 10. While that is fundamentally unfair to the poor, the fact is, for those of some means, there was a practical alternative to preventive detention in many cases.[18]

To address these theoretical, constitutional and practical concerns—without returning to monetary bail—amendments and funding are necessary, preferably before the

October 1, 2019 effective date of the law. While there is no way under any conceivable version of SB 10 to eliminate unfair preventive detention, there are three ways to possibly amend the law and to fund programs that help meet the public safety and court appearance requirements.

One way to amend is to limit the disqualifying or presumptively disqualifying criteria based on the list of charges or prior offenses or based on their implementation. For instance, eliminating the presumptive detention of a person accused of a first offense drunk driving with a .20 or more BAC[19] might be appropriate although probably politically untenable. The list of criteria was obviously the product of legislative negotiation during the pendency of the Bill, and it seems unlikely in political reality that new legislation will make significant amendments to the list. Furthermore, an effort could be made to limit the absolute or presumptive nature of the charged or prior offenses or to temper the process to favor release over detention. This also seems politically difficult, if not doomed. Thus, while the list of criteria should be given serious further thought along with ways to procedurally preference release over detention, it is doubtful that amendment of the criteria will avoid unfair or arbitrary preventive detention in practice. That is a result that is arguably unconstitutional and certainly contrary to our constitutional heritage that prioritizes liberty.

A second way is to invoke mechanical means to assure that people do not offend and that they show up in court. Some procedures are currently in effect, and there is a movement afoot to expand them. For instance, procedures could include regular check-ins with pretrial services, having government personnel call people to go to court,[20] and, even, requiring restrictive devices like GPS or SCRAM or electronic monitoring with curfew requirements. These and other mechanisms are being used in various places currently as conditions of OR release. However, they are to one degree or another restrictive and, particularly, the monitoring and curfew procedures should only be ordered if necessary. All of these "watchful" supervisory mechanisms imposed on a subject are perceived as, to one degree or another, the hand of the government that sometimes set up people to fail whereby they are swept back into custody.

What To Do That Might Have An Overall Positive Effect And Also Help Meet The Requirements Of SB 10?

A third way to address the issues related to pretrial release is to fund and implement programs that affirmatively will reduce future offenses and increase appearances in court. If they work, and they are shown to do so, the cost of these procedures would be more than offset by the reduction in cost of incarceration, future arrests, and overall harm to the community. Since they can be implemented in direct response to the requirements of SB 10, there should be no political objection to their creation and funding. A mantra throughout SB 10 is that, "the court shall order a defendant released on his or her own recognizance or supervised own recognizance with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant's return to court."[21] In fact, properly read, that is the focus of the Bill: people can be released if there are "conditions or a combination of conditions that reasonably assure public safety and the defendant's return to court." Furthermore, these conditions must be the "least restrictive" conditions. Put another way, without locking people up pretrial, how can we reasonably assure people will not reoffend and will show up for court?

It turns out that there is a lot of research on just this and the research supports the holistic treatment of people accused of offenses. It is often referred to as the "Bronx Defender" system, but has been adopted in one form or another by various communities across the nation, including, for instance, Jeff Adachi's Office of the Public Defender in San Francisco and to some extent the Santa Barbara Public Defender's Office. It is common sense and it works. Treat people and their situation in life rather than processing assembly line defense of criminal charges. People are much more likely to recover their dignity and bearings. With this kind of help alone, they are much more likely to not be a threat to public safety and more likely to show up for court. This is not an idea that comes only from a progressive perspective; it has been endorsed by conservatives who have seen its efficacy firsthand.[22]

There is much written about the Bronx defender model and, as noted, it is not the only model of holistic defense. However, it is the proposal of this article that there should be legislative enactments and funding for defender services (that can extend to people who can afford private counsel as well) so that we reasonably assure public safety and appearance at court. The Bronx defender, itself, sets forth four pillars of holistic defense: "Seamless access to services that meet legal and social support needs;" "Dynamic, interdisciplinary communication;" "Advocates with an interdisciplinary skill set;" and "A robust understanding of, and connection to, the community served."[23] To implement this, they obtained funding and implemented programs involving social workers with interdisciplinary connections and civil lawyers to deal with public health benefits, housing, child welfare issues, public benefits, motor vehicle issues,

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child support, immigration, mental health and other issues. They train their criminal defense lawyers to be aware of and utilize all of the interdisciplinary opportunities available to help their clients break out of the revolving door of despair that often precipitates or accompanies criminal charges. There are benefits to the people charged, but also benefits to the taxpayers.[24]

Conclusion

As presented in this series of articles, there is reason for concern over the implementation of SB 10. Repealing monetary bail is good; preventive detention, except in rare instances, is bad. The way pretrial release is set up currently under SB 10 will lead to arbitrary, unequal and unfair use of preventive detention. SB 10, as it is written, may or may not survive constitutional challenge as a whole but some aspects, like the presumptions and the reliance on a non-existent "validated risk assessment tool" seem likely to be applied in an unconstitutional fashion. Amendments can be made before the effective date.

In an age of mass incarceration and a punitive (and ineffectual) war on crime, we might actually make the world a better place by using SB 10 as an opportunity to fund meaningful change. The more we can emulate the Bronx Defender system, or variants thereof, the more we are likely to serve public safety and assure appearance in court of people charged with crime. This will not solve everything and challenges to unfair preventive detention will still be made. But, SB 10 does provide a legitimate statutory purpose to implement programs and spend public funds in a way that benefits society and does not just pay to house and transport people accused. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for 45 years. He is a partner in the firm of Sanger Swysen & Dunkle and Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law. Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization, and a Director of Death Penalty Focus. Mr. Sanger is also an elected Member of the American Academy of Forensic Sciences (AAFS) and an Associate Member of the Council of Forensic Science Educators (COFSE). The opinions expressed here are his own and do not necessarily reflect those of the organizations with which he is associated.

Endnotes

1 Penal Code §1320.34. However, at the time of this writing, the bail industry has probably qualified a veto referendum which would re-instate monetary bail entitled currently, "California Replace Cash Bail with Risk Assessments Referendum (2020)". The proponents have submitted an excess number of signatures to the Secretary of State and, if a sufficient number are deemed valid, the matter will be on the 2020 ballot. If the signatures are certified, SB 10 will not take effect until the matter is determined by the voters.

2 We are now in the 2018-2019 legislative term and the new legislation to be considered for this term should be introduced at about the time this article is published.

3 President's Council of Advisors on Science and Technology (PCAST), *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (September 2016).

4 National Research Council. Strengthening Forensic Science in the United States: A Path Forward. The National Academies Press. Washington DC. (2009) 128.

5 Penal Code §1320.9(a)(2).

6 Penal Code §1320.10(e)(3)-(13).

7 Penal Code §1320.9(a)(3).

8 Hussain S, Rahman A, Abbasi T, Aziz T, "*Diagnostic accuracy of ultrasonography in acute appendicitis*," Australas J Ultrasound Med. 2015 May; 18(2):67-69. Epub 2015 Dec 31.

9 "Reoffend" implies a conclusion that the present charges are true. This is not a valid criteria if a person is truly presumed innocent. However, if a person is truly innocent, it certainly biases the assessment.

10 Note that the ultra-sound is used as a part of the clinical judgment of the doctor making the assessment as to whether or not to operate. There is some loose resemblance to the consideration of charges and of the judge making subjective a determination at the stage where the judge, not PAS, makes the determination pf pretrial release.

11 For a review of the studies, see, Sandra Mayson, "*Dangerous Defendants*," 127 Yale Law Journal 490, 514 (2018) and the studies cited therein.

12 George Orwell, 1984 (1949).

13 Aldous Huxley, Brave New World (1931)

14 Steven Spielberg, director, "Minority Report (2002)."

15 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

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

17 SB 10 is also not in compliance with the provisions of Art. I, sec. 12 of the California Constitution which limits the power to refuse pretrial release to three categories.

18 As mentioned in the November *Criminal Justice* column, at the time of this writing, the California Supreme Court has granted review as to the constitutionality of using high bail or pre-SB 10 denial of bail for preventive detention purposes. See, *In re Humphrey* (Review granted May 24, 2018, S247278, lower court opinion at 19 CA5th 1006); and *In re White* (review granted May 23, 2018, S248125, lower court opinion at 21 CA5th 18). The Court, in both cases, requested briefing on the future effect of SB 10.

19 Penal Code Section 1320.10(e)(5) provides that PAS, "shall not release . . . A person arrested for a third offense within the past 10 years of driving under the influence of alcohol or drugs or any combination thereof, or for an offense of driving under the influence of alcohol or drugs with injury to another, or for an offense of driving with a blood alcohol level of .20 or above."

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Remembering Bill Stewart

October 8, 1941 - October 22, 2018

By Victoria Lindenauer

The tribute below appeared in the December issue of the Santa Barbara Lawyer, *however, the second half was inadvertently omitted. We are providing the entire piece in this issue to ensure the full appreciation of Mr. Stewart's lifetime achievements.*

William John Stewart was an exquisite study in contrasts. Brilliant trial lawyer, yet humble to the core. Accomplished military officer, yet never regarded himself above any other human being. Fiercely loyal patriot (he defined himself in large part by his distinguished service to the United States Navy), but outspoken critic of what he felt constituted injustice. During the Iran Contra scandal, he joined a protest march up Refugio Road to President Reagan's Rancho del Cielo. Those seemingly incongruous and sincere convictions were natural for Bill.

Bill was an enthusiastic student of diverse cultures and cherished the people he met, the time he spent with them, and the many pieces of art he collected during the two years he served as a Law Clerk to the Chief Justice of American Samoa from 1971-1972.

Tall in stature, he had large, expansive hands with which he waved and gestured to juries, always pleading with them to exercise common sense, addressing them as "folks." That was his way. He was all heart, all soul, all dedication, and all honesty. People believed him because he told the truth. He tried 90 cases to verdict, most in the pre-Discovery Act days (*i.e.*, prior to 1986) when civil trials were more of a seat-of-the-pants, Wild-West-style undertaking. Few knew he took the solemn responsibility of advocacy so seriously that he would sometimes become ill right before his jury trials started. But as soon as the jury filed in, he conducted like it was a symphony. No one could emulate his style, nor should they have tried.

As a Senior Partner at Archbald & Spray, Bill mentored many of the new litigation associates. I second-chaired my first trial with him. I watched him intently, learned much, and forgave him when he unceremoniously spilled one of his ever-present warm Coca Colas on my car's pristine leather upholstery. Who drinks warm cola? He, with his black patent leather military dress shoes (which he sometimes wore with Hawaiian shirts), was *quirky*. It was all part of his inimitable charm.

Kenneth Moes, Bill's law partner at Archbald & Spray, has said of Bill, "He was recognized throughout the Central Coast legal community as a highly accomplished and effective litigator whose word was his bond... He was an honorable and principled man, and I am proud to have been his friend and partner."

Bill graduated with a B.S. from the U.S. Naval Academy in 1963. He earned his J.D. from California Western University (Law Review) and was a graduate of the U.S. Naval War College. He served in Vietnam with the First Air and Naval Gunfire Liaison Company, Fleet Marine Force, from 1965-1966. He served in the Naval Reserve from 1967-1989, rising to the rank of Commander. He recruited countless candidates for the Naval Academy. Many of his friends and colleagues affectionately referred to him as "Commander" for the rest of his life.

Bill tirelessly devoted himself to initiating and often directing tremendous philanthropic and volunteer efforts. Hillside House, Vietnam Veterans of America (Chapter 218), and Transition House knew him well. Bill was instrumental in the creation of the Veterans' Memorial Walk at Elings Park.

A loving family man, Bill and Sandra Stewart (who passed away in 2003) raised three wonderful children: Susan, MacKenzie, and Cameron. As well as being impressive people in their own rights, each of them is a reflection of Bill and Sandra's best qualities. Susan has a background in law enforcement and elder care. MacKenzie is an accomplished paralegal. Cameron is a distinguished teacher of students with special needs. The love, care, and devotion they showed for their father as he faced the final years of his life with Alzheimer's disease is beyond measure.

In 2006 (close to the time he retired from practice), following Hurricane Katrina, Bill flew to New Orleans to volunteer in the clean-up and rebuilding efforts. There he met an equally rare and fine human being, Joan Davis, who was also volunteering. In 2008 they married. Joan lit up his life in a way that was immediately apparent to everyone who spent time around them. Bill was a very happy man from the day they met until he passed, thanks in large measure to Joan.

No one who ever knew Bill will forget him because his life was devoted to helping, honoring, and recognizing others. On the very day the verdict was rendered in my first solo jury trial in October 1986, he typed a letter to me, which I have to this day. I quote it here not because of anything related to the intended recipient, but because it demonstrates beautifully the kind of introspective and caring person he was:

> "Vicki, On other days, in other cases, you will have wins which, for a time, may seem of more import than your first today. Bigger and more complex cases will attract more attention. No victory, however, from my experience is as sweet as the first. Savor it. Twirl it around in your mind. You hit a home run your first time at bat in the major leagues. Few of us do that. There are a lot of lawyers around. There aren't many good trial lawyers. You certainly have the potential to be one. Your sisters in generations past are proud of you today. You've made good use of opportunities that fate denied them. Be proud of yourself. You have a right to be. Congratulations, Trial Lawyer. With Admiration, Bill Stewart"

He was one of the few really good ones. It is not an overstatement to say that the world is a better place because he was in it. May his memory and the fruits of his countless good deeds live on, and may he forever rest in peace. ■

Sanger, *continued from page 13*

20 Having a court "wake-up" call seems benign and is being used in some counties; however, even that has unintended consequences. People who have been told by their lawyer (either on a misdemeanor or with a 977 Penal Code Section 977 waiver) that they do not have to appear, get the early morning robo-call from the government anyway telling them they have to appear.

21 See, e.g., Penal Code Section 1320.17, however, this mantra is used in both positive form and negative form throughout SB 10; see also, 1320.18(a)(5) or (e)(1) or 1320.20(a) and *passim*.

22 See, e.g., Brittany Williams, "*Is Zealousness Enough? Holistic-Based Advocacy and the Difference It Makes*," The Liberty Law (2017) 6-7.

23 Bronx Defender website: https://www.bronxdefenders.org/holistic-defense/.

24 Cynthia G. Lee, Brian J. Ostrom, & Matthew Kleiman, "*The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*." 78 Albany law Review 1215 (2015) wherein they note the significant benefit to both defendants and taxpayers but make the point that, while there are monetary benefits, there are also non-monetary benefits that are otherwise difficult to compare. A more recent and large scale rigorous assessment of the positive consequences of the "holistic" defense system is forthcoming: James Anderson, Maya Buenaventura, Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, (Draft, November 2018) *forthcoming*, Harv. L.R. (2019).

Submission Guidelines, *continued from page 6*

Miscellaneous

Coverage: From time to time, an article idea, feature, profile, event, or photo opportunity may come along that you think should be in the magazine. Please send it to us when you think of it. This allows us to plan ahead and make sure it is covered.

Verdicts & Decisions: *Santa Barbara Lawyer* seeks to objectively report verdicts and decisions from cases involving firms and lawyers based in Santa Barbara County or involving issues of local significance.

Profiles: We welcome suggestions.

Work/Life Balance/Exercise/Quality of Life/Stress Relief: This is an ongoing challenge for all of us. We welcome submissions and suggestions.

Space in the magazine: *Santa Barbara Lawyer* is printed in multiples of four pages (i.e. an edition will be 28/32/36/40 pages long). Thus, when space is a concern, we may shorten or even omit an article. When this is done, we will take into account timing, need to publicize events or other deadlines, and whether the article can run in the following issue.

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Dogs in the Courthouse: Challenges and Benefits of Working with Facility Dogs

By Emily P. Eccles, M.L.S., M.A. & Penny Clemmons, Ph.D., J.D.

Meet Malvern, the Santa Barbara County District Attorney's office facility dog. He is a Golden Retriever and Black Labrador Retriever cross who has worked for the office since 2012. His job description is to provide comfort to witnesses, district attorney office staff, courtroom personnel, volunteers, and attorneys.

As any attorney knows, involvement in a legal proceeding is one of the most stressful events that an individual may experience. Facility dogs may reduce anxiety in victims of sexual or physical abuse as they participate in court proceedings, depositions, interviews, and custody mediations. They enhance the morale of prosecutors and support the work of victim advocates. Outside the courtroom before hearings and trials, facility dogs can promote trust between prosecutor and child, accompany and assist individuals with psychological, developmental, and physical disabilities, and create a comfortable and safe climate for both children and adults.

A number of considerations arise before deciding to employ a facility dog in legal settings. These include: the age of the individual during the court proceedings, the age of the sexual offense victim or witness at the time that the alleged crime occurred, the rights of the parties in the litigation, the presence of an intellectual, emotional, and/or physical disability, or relevant factors that would assist the victim or witness in testifying.

Legal professionals often suffer the consequences of working in high stress environments. Facility dogs are reported to be particularly helpful in improving morale for attorneys, judges, victim's advocates, and courthouse staff. Attorneys in particular, experience high rates of stress, substance abuse, physical issues, and mental health problems (Reed, Bornstein, Jeon, & Wylie, 2016). The presence of a facility dog may significantly lessen the negative impacts associated with involvement in the legal system.

Companion animals facilitate social interactions, lessen depression, anxiety, and loneliness, and ameliorate negative symptoms associated with stressful experiences (Wells, 2009). Although there are observed benefits to the presence of facility dogs in legal settings, there are situations when the use of facility dogs is not beneficial. Some victims may not experience the presence of a dog as comforting. Additionally, an individual's past experiences with dogs should also be considered. There are some individuals who for health reasons such as asthma or allergies are precluded from the services of facility dogs.

Malvern's presence in Santa Barbara courtrooms predates recent changes to California law. Section 868.4 of the California Penal Code was revised effective January 1st, 2018. It allows adult and child witnesses to be accompanied by a trained facility or therapy dog while testifying to reduce anxiety, or if it would be otherwise helpful.

The right to a fair trial is a fundamental tenet of the United States Constitution. Consequently, opposition to the presence of facility dogs is most often based on the concern that their presence is inherently prejudicial and denies the defendant due process. Specifically, a significant challenge to the presence of facility dogs arises from the argument that it will cause the jury to sympathize with the witness thus, influencing the verdict. Section 868.4 is responsive to these conditions. It requires the court to take appropriate measures to make the presence of the dog as unobtrusive and non-disruptive as possible and the court, upon request, must issue a jury instruction if a therapy or service dog is used.

In an effort to eliminate or to reduce prejudice, case law concerning facility dogs provides two standards of analysis (1) judicial discretion and (2) a showing of necessity. Judicial discretion is exemplified by the judge's evaluation of the potential effects of prejudice compared to the benefits of providing an accommodation to the witness while providing the defendant with a fair trial. A showing of necessity requires the court to balance the prosecution's interest

Continued on page 26

2017 SBCBA President Mike Denver, 2018 SBCBA President Jeff Chambliss

Lynn Goebel (Pro Bono Award Recipient), Michelle Roberson

2018 SBCBA Annual Dinner

Amber Holderness took over as 2019 President of the Santa Barbara County Bar Association at the Annual Dinner, held on November 30th at the Wine Cask. Awards were presented to Mike Denver, Lynn Goebel, Allan Ghitterman, Robert Sanger, Jessica Diaz and Kenneth Falstrom. Justice Martin Tangeman was the Keynote Speaker. ■

Russell Ghitterman (Accepting the Richard Abbe Humanitarian Award on behalf of Allan Ghitterman) and Michelle Roberson

Stephen Dunkle, Bob Sanger (Special Recognition Recipient)

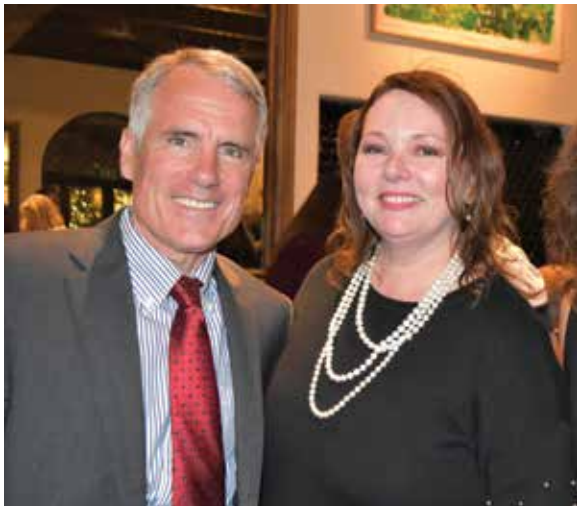
Santa Barbara Superior Court Judge Patricia Kelly

Supervisor Janet Wolf, 2019 SBCBA President Amber Holderness, Rachel Van Mullem, Michael Ghizzoni, Teresa Martinez

Michelle Roberson, Jessica Diaz (Pro Bono Award Recipient)

Kenneth Fahlstrom (Pro Bono Award Recipient)

Erin Schaden, Judge Pauline Maxwell, Lyn Moore



Justice Tangeman, Judge Patricia Kelly

Through AB 2044, The Legislature Enhances Child Custody Protections in Cases Involving Domestic Violence

By Greg Herring

Gregory W. Herring

Domestic violence ("DV") is a potential game-changer in child custody contests. In 2014's Assembly Bill ("AB") 2089, the Legislature expressly declared, among other findings, "[t]here is a positive correlation between [DV] and child abuse, and children, even when they are not physically assaulted, suffer deep and lasting emotional, health, and behavioral effects from exposure to [DV]." (Uncodified section I of AB 2089.)

Family Code sections 3020, 3011 and 3044, in pertinent part, address DV in child custody cases. They are a part of the "hodgepodge" of confusing and sometimes contradictory provisions, as California Family Law guru, Garrett Dailey, has put it, enacted by the Legislature in its rush to enact one DV statute after another over the past twenty or so years.

AB 2044, signed by Governor Brown in September 2018, strengthens the anti-DV aspects of all three statutes.

Section 3020 broadly addresses competing policy concerns. One is the policy of protecting children's health, safety and welfare. Another is that children should have frequent and continuing contact with both parents. In adding new section 3020(c), AB 2044 clarifies that the former trumps the latter: "When [these] policies … are in conflict, a court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members."

Section 3011 provides that, in making a custody order, the court "shall" consider any history of abuse by a parent seeking custody.

As a prerequisite to the consideration of allegations of abuse, the court **may** (not "must") require **"independent corroboration."** This can be, without limitation, through written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or DV. AB 2044 **de-emphasizes** the level of "independent corroboration" potentially required. The statute previously stated "substantial" amounts, but the adjective is now eliminated.

If DV allegations are made in a custody proceeding, 3011(e)(1) requires a court to "consider" them and to ultimately state its reasons in writing or on the record if it makes any orders allowing custody rights to the abuser.

Because 3011 (1) merely makes a finding of DV one of many potential factors to be considered in a custody award and (2) allows a trial court to potentially require "independent corroboration," **DV victim/parents -- especially those who might not have previously reported the DV -- would be better off if they could come within the purview of section 3044.**

Section 3044 provides a narrower universe than 3011 of people against whom the DV must have been committed: the other parent, a subject child or the child's siblings. It requires that the DV must have occurred within the previous five years, whereas 3011 provides no time limit.

In contrast to 3011's requirement for a court to merely "consider" DV allegations and then state its overall reasoning for its eventual order, 3044 requires a specific **"finding"** of whether or not DV was committed within the above parameters. AB 2044 requires a court to make that finding **prior** to making any custody orders at trial. In practice, this might call for **bifurcated proceedings** regarding the existence of prior DV before litigating custody. The court would have authority to proceed in this manner under Code of Civil Procedure section 128(a)(3) ("[e]very court shall have the power to do all of the following … provide for the orderly conduct of proceedings before it ….") and Evidence Code section 320 ("… the court, in its discretion, shall regulate the order of proof.").

A big plus to victim/parents who did not previously report DV is that **"independent corroboration" is *never* required** as it can be under 3011. Rather, 3044 broadly provides that the court "shall" consider any relevant, admissible evidence submitted.

If a victim/parent can overcome these barriers and establish DV, then 3044 provides a **rebuttable presumption** that an award of sole or joint physical or legal custody of a child to the perpetrator is detrimental to the children's best interests. **To victim/parents, this is 3044's main advantage over 3011.**

2016's *In re Marriage of Fajota* 230 Cal.App.4th 1487 sent a strong message upholding 3044's integrity. There, the trial court found that the father had previously engaged in DV under 3044, but nonetheless awarded him joint legal custody of the children. The Court of Appeal reversed, stating that 3044's principles must be applied, and that it did not matter if the mother had not previously obtained DV restraining orders. The rebuttable presumption must not be ignored. (*Accord, Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655.)

If the presumption against joint custody is achieved, 3044 provides that a court must consider seven specified factors in determining whether the abuser is able to rebut it. They include, without limitation, whether it is in the best interest of the children for the abuser to have custodial rights, and whether the abuser has successfully completed a batterer's or substance abuser's treatment program. AB 2044 requires the trial court to make specific findings concerning each of the factors and also why the findings are consistent with the children's health, safety, and welfare, and also general "best interests," under 3020. Consistent with the holding of *Fajota*, the purpose is to give judicial officers cause for pause consistent with the Legislature's above 2014 findings.

As recently as November 21, 2018, the Fourth District issued its published Opinion in *S.Y. v. Sup'r Ct. (Omar)* Cal. App., November 21, 2018, D073450. In the underlying proceedings, the trial court found that the father had previously committed DV under 3044, but also that he had successfully rebutted the statute's presumption. The father was thus awarded joint custody. In upholding the trial court, the Court of Appeal provided:

> "The legal presumption [under 3044] is not … `that a parent who has committed an act of [DV] should not be awarded sole or joint legal or physical custody of a child.' [Father's] burden was only to persuade the court his custody would not be detrimental to [the child's] best interest. (Citations omitted.) The determination of custody is not to reward or punish the parents for their past conduct, but to determine what is currently in the best interests of the child." (Citations omitted.)

The Court further clarified that 3044 does not require a trial court to find that all the specified factors have been satisfied in order to hold that the presumption has been rebutted. It stated that, under the section's "clear language," a DV perpetrator might properly be awarded joint custody, even if he has not attended or completed such classes. It emphasized that, even where **prior** DV is found under 3044, a child's **present** safety and best interests are what ultimately matter. The Court upheld the trial court in part because the trial court had found that, with the parents now living separately, the child no longer lived in a household where DV occurred, and he was not a witness to continuing DV.

Conclusion:

The "positive correlation" between DV and child abuse is undeniable. Multiple statutes require serious consideration of it toward protecting children in custody proceedings. AB 2044 enhances them in various ways. In light of the ongoing legal "hodgepodge," victim/parents must thoughtfully traverse them. ■

Greg Herring is a CFLS and is the principal of Herring Law Group, a family law firm serving the 805 with offices in Santa Barbara and in Ventura County. He is a Fellow of the Southern California Chapter of the American Academy of Matrimonial Lawyers, which named him the Family Law Person of the Year for 2018. He is also a Fellow of the International Academy of Family Lawyers. His prior articles and ongoing blog entries are at www.theherringlawgroup.com.

High Income Workers: Independent Contractor (1099) or Employee (W-2)?

By Robert W. Olson, Jr.

Robert W. Olson, Jr.

The Problem - Dynamex. The news has spread about the California Supreme Court's April 30, 2018, ruling in ***Dynamex v. Superior Court***. The news is that ***Dynamex*** established a new "ABC" test that further pushes California business owners to classify workers as employees (W-2) rather than independent contractors (1099-MISC):

> "Under this test, a worker is properly considered an independent contractor … only if the hiring entity establishes: (A) that the worker is *free from the control and direction* of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs *work that is outside the usual course* of the hiring entity's business; and (C) that the worker is *customarily engaged in an independently established trade, occupation, or business* of the same nature as the work performed for the hiring entity *[emphasis added]*."

When asked how to classify professional associates and other high income staff, most legal and tax advisors are focused narrowly on the ABC test and are advising their owner-clients that *all* staff members must be treated as W-2 employees. While I believe that full time workers generally need to be classified as employees under ***Dynamex*** and Federal law, I also believe that if the worker is part-time or works for multiple owners, both business owners and high income workers (annual income over $150,000) can use independent contractor status to take advantage of a great tax saving opportunity. Here's why:

Substantial Tax Benefits for Independent Contractors and Business Owners. Section 199A of the 2017 Tax Cuts and Jobs Act makes independent contractor status far more desirable to high income workers than it ever was for business owners. Switching from employee to independent contractor status now gives high income workers a tax cut of $12,500 to $24,000 annually – even when taking into account the worker's payment of the owner's (former) half of the social security and Medicare (FICA) tax. Also, the owner who hires an independent contractor, rather than an employee, receives the financial benefit of not being required to pay its half of FICA taxes, a tax cut of over $10,000 annually on high income workers. The owner also avoids paying for worker's compensation insurance or any employee benefits (although that isn't an issue if the worker doesn't work at least 30 hours per week[4]). These matched financial incentives now permit business owners and workers to be fully in agreement on independent contractor status!

The Existing Federal 3-Part Test. Although ***Dynamex*** has its own 3-part ABC test, there is a longstanding Federal 3-part test for determining independent contractor or employee status. The Federal test has a somewhat overlapping different approach than ***Dynamex***, focusing on behavioral control, financial control, and type of relationship, and remains the Federal tax standard for determining independent contractor or employee status.

The "New" California ABC Test. ***Dynamex*** does not change or supplant the Federal 3-part test for determining independent contractor or employee status. The "new" ABC test in ***Dynamex*** isn't really that new, in that it consolidates the original multi-factor text from the 1989 California Supreme Court case ***Borello v. Dept. of Industrial Relations***. Also, that consolidation essentially duplicates another 3–part test set forth in the 1991 California Appeals Court case ***Yellow Cab v. WCAB***, a test currently used by the California Department of Industrial Relations for determining independent contractor or employee status. For these reasons, I consider the drama surrounding this "new" ABC ***Dynamex*** test to be a bit overblown, although ***Dynamex*** *did* endorse the ***Yellow Cab*** approach over ***Borello***.

New California Factor: Legislative Intent. In addition to promoting the ***Yellow Cab*** test, ***Dynamex*** also declares

that the "underlying legislative intent and objective of the statutory scheme at issue" must be considered when applying the ABC test and other applicable law. This is the true impact of ***Dynamex***: allowing California agencies and attorneys to use legislative intent arguments to expand or even avoid the literal terms of the statutes being interpreted, this time in the context of classifying workers as independent contractors or employees. Legislative intent for Federal law has been a consideration for quite some time already, but ***Dynamex*** reminds us that this argument has always been there and clarifies its usefulness in the California context.

Legislative Intent of Worker Classification Laws. Two categories of "intent" typically support Federal and California legislation concerning the proper classification of workers: **(a)** protecting lower-wage workers that have little negotiating power against the owner trying to avoid employee-based costs (e.g., FICA taxes and employee benefits); and **(b)** preventing loss of tax receipts when the owner fails to withhold taxes from workers who fail to pay taxes altogether. However, it's not safe to assume that every employment-related statute passed by Congress or the California legislature contains that same legislative intent, since legislative intent is very specific to the statute in question.

The Danger to Workers: Loss of Tax Benefits. High income workers have an immense financial incentive to maintain independent contractor status, particularly in light of the huge tax savings available to the S corporation business structure ($12,500 to $24,000 annually). Employee status requires the worker to work as an individual, rather than as a contracting S corporation, and eliminate ALL of those tax benefits, as well as all other corporate tax deductions that are disallowed to employees.

The Danger to Business Owners - Risks of Misclassification. Business owners must ensure proper classification of their high-income workers. Both the IRS and the California Employment Development Department (EDD) make business owners liable for misclassified workers' unpaid taxes not subjected to tax withholding, and the EDD imposes serious penalties ($5,000 and up per violation) for business owners that willfully misclassify workers as independent contractors.

New California Factor: Burden of Proof. ***Dynamex*** also shifted the burden of proof to the owner that the worker's independent contractor classification is justified. This shift isn't so much a legal issue as it is a business/compliance issue. It is now imperative that the owner have a good argument in place that its worker is, in fact, an independent contractor. This, in turn, requires that the owner obtain and commit to writing the relevant facts surrounding the relationship between the owner and worker, at the earliest possible time after that relationship begins.

The Solution: Highly Customized Independent Contractor Agreements. Fortunately, with ***Dynamex*** and pre-existing Federal law, we have a powerful argument that these high-income workers are independent contractors, *precisely because they benefit from independent contractor status*! If the legislative intent of the statute is to protect workers, then interpret the statute that way, to allow these licensed workers to be classified as independent contractors. Therefore, business owners and their high-income workers can and should cooperate in creating a comprehensive and customized independent contractor agreement, long before any government investigation or tax audit occurs, to demonstrate that independent contractor status is both justified and mutually desired. In my opinion, that contract must do the following:

- Describe how this worker's particular fact situation satisfies both the ***Dynamex*** ABC test and the Federal 3-part test, and therefore establishes the worker is an independent contractor.
- Compare that fact situation to the legislative intent behind the applicable statutes to show how that legislative intent is not served by treating this worker as an employee, and therefore justifies independent contractor status.
- Don't run afoul of the Federal economic substance doctrine. In short, this doctrine will require that the reasons for the parties' structuring of a transaction (in this case, the choice of independent contractor status over employee status) cannot be strictly tax-based; there must be another substantial business purpose *and* a meaningful change in the parties' economic position to support that choice. If economic substance is not established, the IRS can impose a 40% underpayment penalty on the taxpayer.
- Use that combination of facts, legal tests and legislative intent to have the worker assure the owner that treating the worker as an independent contractor isn't "willful misclassification" of an employee that otherwise could expose the owner to California penalties.
- Document that the worker instigated creation of the contract, either alone or under joint representation with the owner. A worker taking the initiative to

argue for independent contractor status backs up the worker's claim to be an independent business. If the owner is the sole client, the worker's claims are likely to be viewed as disingenuous: if those claims were drafted on the owner's behalf, it looks like the owner is forcing independent contractor status on the worker. This situation would conflict directly with any legislative intent to protect workers from being forced into independent contractor status.

The Final Result – Tax and Penalty Protection. This contract not only provides justification of independent contractor status, but also creates major roadblocks for the IRS and the EDD seeking additional taxes and penalties from the owner or worker. These roadblocks don't even need to be airtight: they only need to be strong enough to encourage the IRS or EDD to spend their limited resources pursuing far less protected targets. ■

Mr. Olson is an attorney in Santa Barbara, focusing on professional practice transitions, business and corporate law, commercial real estate, estate planning, and related tax issues.

ENDNOTES

1 © 2018. All rights reserved.
2 *Dynamex v. Superior Court* (2018) 4 Cal.5th 903
3 Public Law No. 115-97 (12/22/2017), 26 USC §199A
4 For details, please see my May 2018 article in *Santa Barbara Lawyer* "Huge Tax $avings for S Corporations"
5 IRS Information Page: Identifying Full-time Employees
6 IRS Information Page: Independent Contractor (Self-Employed) or Employee?
7 *Borello v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341
8 *Yellow Cab v. Workers Compensation Appeals Board* (1991) 226 Cal. App.3d 1288
9 Now codified at 26 USC §7701(o)
10 26 USC §6662(i)

The SBCBA Alternative Dispute Resolution Section Presents:

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Eccles and Clemmons, *continued from page 16*

versus the potential that the presence of a facility dog will violate the defendant's constitutional rights. A number of trials involving facility dogs have been appealed by the defense based on concerns of undue prejudice and sympathy. However, all appellate court decisions have upheld the use of facility dogs as an accommodation for vulnerable witnesses (Courthouse Dogs Foundation, 2018).

Burd (2013) investigated the issue of whether comfort items and facility dogs were found to be prejudicial against defendants. This study employed a mock jury and a child witness. There were two conditions: (a) the child witness held a comfort item (e.g. a stuffed bear) or (b) the child witness was accompanied by a facility dog. Results indicated that that the presence of a facility dog did not have any direct effect on the verdict. In addition, neither the presence of the comfort item nor the facility dog was related to the jurors' perceptions of the credibility of the child.

California Penal Code Section 868.4 codified the holding in ***People v. Chenault,*** 227 Cal. App. 4th 1503, 175 Cal. Rptr. 3d 1 (2014). In that case, defendant, Darrell Chenault, was convicted of multiple counts of lewd acts committed against two of his daughters and two of his nieces. During the trial, the nieces were 11 and 13 years old. Chenault appealed his conviction on the grounds that the presence of a support dog was inherently prejudicial and that his constitutional rights to a fair trial were violated. Moreover, Chenault contended that the court abused its discretion by failing to show individualized necessity of the presence of the support dog.

In the trial transcript, the facility dog was labelled as a "support" dog that was trained to provide support to victims and witnesses. As a precautionary measure, the support dog entered the courtroom and the witness stand while the jury was in recess. The court required this logistical procedure and stated that it would "minimize, if not eliminate" any prejudice against the defendant. Furthermore, the handler was seated close enough to the support dog to ensure she would not be disruptive. Records indicate that the dog was visible to the jury. When the jurors entered the courtroom, they were informed of the dog's presence. They were told that the dog was a "service animal, companion dog, whose [name] happens to be Asta". The jury was further instructed that Asta was a "nonparticipant", other than her role as a permitted accommodation for the child witness. The record reflects that when referring to Asta, the judge stated to the jury that "Frankly, I often find myself having more problems with two-legged animals than the four-legged variety."

The appellate decision upheld the lower court's ruling, citing California Evidence Code Section 765, which gives the court the discretion to allow a therapy or support animal during witness testimony. It provides that with "…a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions." Further, the court concluded that in determining the individual necessity of a support dog for a witness, trial courts should consider individual circumstances for each witness in order to establish whether the support dog would facilitate truthful testimony by reducing stress and trauma that may be experienced while testifying. Moreover, no burden was placed on the prosecution to establish individual necessity.

Malvern is unlikely to be Santa Barbara's last facility dog. His efficacy has been proven and, as a result of the holding in *People v. Chenault,* he and his progeny can now work under the auspices of California Penal Code Section 868.4. ■

Emily Eccles received her Masters in Legal Studies degree from the Santa Barbara & Ventura Colleges of Law in 2014. Currently, she is a doctoral candidate in clinical psychology at Fielding Graduate University. Her research interest is developing ethical guidelines for animal-assisted mental health interventions.

Penny Clemmons is a clinical psychologist and a Certified Family Law Specialist whose practice is focused on mediation. Neither of her labradoodles have qualified to be therapy dogs.

References

- Cal. Penal Code § 868.4
- *People v. Chenault*. 227 Cal.App.4th 1503
- Burd, Kayla. The Effects of Facility Animals in the Courtroom on Juror Decision-making (Unpublished Master's Thesis). Arizona State University, Glendale, 2013. https://repository.asu.edu/attachments/110576/content/Burd_asu_0010N_12989.pdf
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- Signs in Law School: Fostering Attorney Well-being Early in Professional Training." *International Journal of Law and Psychiatry,* vol. 47, pp.148-156, May 2016. doi:10.1016/j.ijlp.2016.02.09.
- Wells, Deborah. "The Effects of Animals on Human Health and Well-being." *Journal of Social Issues,* vol. 65, 2009, pp. 523-543. doi: 10.1111/j.1540-4560.2009.01612.x

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After 22 years in business in Santa Barbara, Tri-County Court Reporters merges with Personal Court Reporters and Veritext Legal Solutions.

As a sole proprietor, woman-owned business, I am very proud of what I accomplished in the Santa Barbara legal community. I know it was not only by my efforts, but also the loyalty of many great, professional reporters, who I call friends, and the loyalty of you, my clients, and your wonderful support staff. After much thought and consideration, I made the decision to merge my company with Personal Court Reporters, who now operates under Veritext Legal Solutions.

Throughout the years, Tri-County Court Reporters has supported local legal associations through participation and sponsorships. This is not going to change! I am continuing to be integrally involved with the reporters that you have come to know and trust with your record, and I am an email/phone call away for your and your staff.

I want to thank all of you who have supported Tri-County Court Reporters throughout these past 22 years, and I hope you will continue to schedule your deposition, hearing, arbitration and/or trial with me. We have office locations throughout California and the country. I can personally assist you with your scheduling and any other matters related to your firm's needs.

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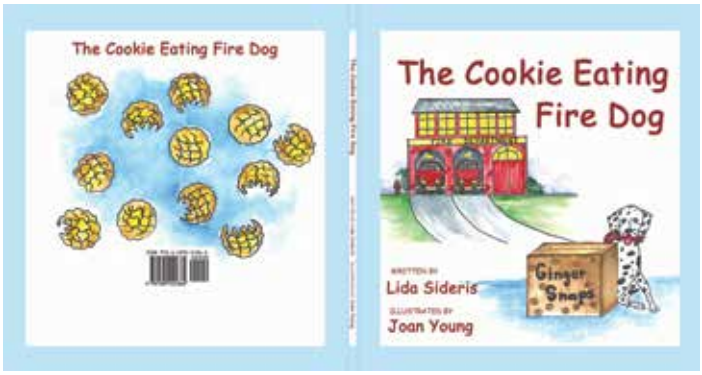
Motions

The Law Office of Lana Clark is pleased to announce that **Ashley Hussey** has joined the firm as an associate attorney. Like Lana Clark, Ms. Hussey's practice focuses on estate planning, probate and trust administration. Ms. Hussey previously worked for the estate planning law firm of Okura & Associates in Hawaii. Ms. Hussey is a native of Santa Barbara. She holds a Juris Doctorate from Santa Clara University School of Law, where she was a member of the Arbitration Team and a volunteer with the Community Law Center. She holds a Bachelor's degree in Philosophy from the University of California, Santa Cruz. Ms. Hussey is a member of the California State Bar and the Hawaii State Bar. Lana Clark is a Certified Specialist in Estate Planning, Trust and Probate Law with over two decades of experience in the field. The Law Office of Lana Clark handles all aspects of estate planning, including probate, trust administration, conservatorship, trust litigation, and related business and real estate matters. With locations in Solvang and Santa Barbara, the Law Office of Lana Clark serves clients throughout Santa Barbara County.



SBCBA Executive Director, **Lida Sideris**, will appear at Chaucer's Bookstore on Sunday, February 3rd at 2 pm for the signing of her latest, THE COOKIE EATING FIRE DOG, a picture book for ages 4-8, published by The Wild Rose Press. Dan is a fire dog who prefers eating cookies to helping the fire fighters. Will he ever learn the importance of helping others?

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.*

Have you renewed your membership in the Santa Barbara County Bar Association?

See page 30 for the 2019 SBCBA Renewal Application

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Santa Barbara County Bar Association

2019 Membership Application

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Mail completed form along with check to:
Santa Barbara County Bar Association, 15 West Carrillo Street, Suite 106, Santa Barbara, Ca 93101 Tel: (805)569-5511

2019 Bench and Bar Conference
January 26, 2019 at the Santa Barbara Club
Schedule

8:15 AM – 9:00 AM	Registration and Breakfast. **Location: Santa Barbara Club** **1105 Chapala Street, Santa Barbara, CA 93101**	
Joint Session 9:00 AM to 10 AM 1 hour MCLE Competence Issues	**Substance Abuse Perspective** William Makler	
Breakout Session 1 10:05 AM to 11:05 AM 1 hour MCLE	**City of Santa Barbara Perspective** Tava Ostrenger, Esq. – Santa Barbara City Attorney Cannabis Laws in Santa Barbara - Regulation, licensing, compliance, implementation, and comparisons to other Counties.	**Family Law Perspective** Renee Fairbanks, Esq. - Law Office of Renee M. Fairbanks P. Joseph Frawley, MD Sherif Elasyouty, MD Marijuana Use and Child Custody
8:15 AM to 2:00 PM	**Legal Services & Technology Exhibits**	
Breakout Session 2 11:10 AM to 12:10 AM 1 hour MCLE	**Insurance Perspective** Brian Marblestone, CLCS – Stratton Agency Risk Management History of cannabis in California, overview of license types, types of insurance polices available, OSHA compliance, written safety plans, safety training, and human resources	**Employment Law Perspective** Jennifer Gillon Duffy, Esq - Fell, Marking, Abkin, Montgomery, Granet & Raney LLP **and** David Secrest, Esq – Law Offices of David S. Secrest Hiring, inside the workplace, and drug testing
12:15 PM to 12:45 PM	**Luncheon Buffet**	
Joint Session 12:45 PM to 1:45 PM 1 hour MCLE	**Keynote Presentation: First District Supervisor, Das Williams**	
Breakout Session 3 1:50 PM to 2:50 PM 1 hour MCLE	**Business Perspective** Hilary Bricken, Esq. – Harris / Bricken Corporate Structure and Contracts Related to Cannabis Businesses	**Land Use Perspective** Amy Steinfeld, Esq. - Brownstein Hyatt Farber Schreck, LLP Land Use Permitting of Cannabis Operations on the Central Coast
Joint Session 2:55 PM to 3:55 PM 1 hour MCLE	**Judicial Panel: Moderated by Santa Barbara Superior Court Judge Patricia Kelly**	

Santa Barbara County Bar Association

Bench & Bar Conference

LEGAL HAZE:
Cannabis in California

Saturday, January 26, 2019
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Featuring

- Keynote Presentation featuring First District Supervisor Das Williams
- Judges' Panel led by Judge Patricia Kelly.
- Courses include a presentation from the City Attorney, and experts in the fields of business, insurance, family law and employment law regarding the effects and implications of the legalization of cannabis in California

Registration will be open exclusively to attorneys until December 1, 2018, after which registration will be opened to the general public. This is expected to be a very popular event so please register early!

6 Hours of MCLE Credit including Competence

Registration Form

Registration Payments received →	On or before 12-19-2018	After 12-19-2018
SBCBA Members	$110.00	$130.00
Non-SBCBA Members	$130.00	$150.00
New Admittee/Public Interest Attorneys	$90.00	$90.00
Three or More Attendees from Same Firm or Organization	$90.00	$90.00

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To register and pay by credit card, call SBCBA at 805-569-5511. Otherwise, mail completed registration form with payment to SBCBA, 15 West Carrillo, Ste. 106, Santa Barbara, CA 93101. Attach additional sheets for additional registrants.

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clemmonsjd@cs.com

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jsoderborg@barneslawsb.com

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Jeff@Chamblisslegal.com

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vkw@kirkerwright.com

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jrabinowitz@fmam.com
Bret Stone 898-9700
bstone@paladinlaw.com

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Peter Muzinich 966-2440
pmuzinich@gmail.com
Cindy Brittain 695-7315
cindy.brittain@kattenlaw.com

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

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