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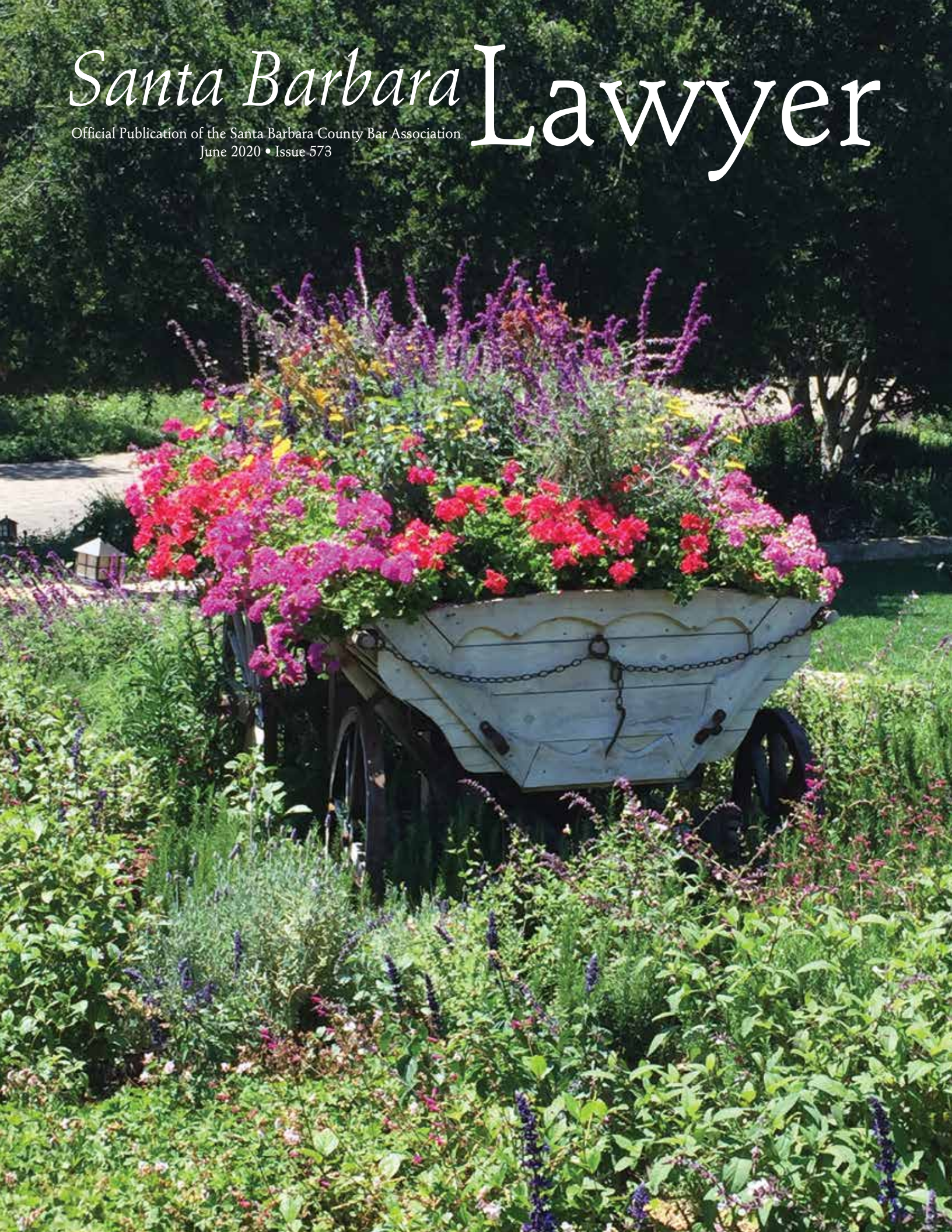

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Legal Aid Foundation
301 E. Canon Perdido
Santa Barbara, CA 93101
T: (805) 963-6754
ediaz@lafsbc.org

ERIC BERG
President-Elect
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3905 State St Ste. 7-104
Santa Barbara, CA 93105
T: (805) 708-0748
eric@berglawgroup.com

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Fell, Marking, Abkin, Montgomery, Granet & Raney LLP
222 E. Carrillo St #400
Santa Barbara, CA 93101
T: (805) 963-0755
jduffy@fmam.com

STEPHEN DUNKLE
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Sanger, Swysen, & Dunkle
222 E. Carrillo St., #300
Santa Barbara, CA 93101
T: (805) 962-4887
sdunkle@sangerswysen.com

AMBER HOLDERNESS
Past President
Office of County Counsel
105 E. Anapamu St, #201
Santa Barbara, CA 93101
T: (805) 568-2969
aholderness@co.santa-barbara.ca.us

Directors

DEBORAH BOSWELL
Mullen & Henzell LLP
112 Victoria St
Santa Barbara, CA 93101
T: (805) 966-1501
dboswell@mullenlaw.com

BRADFORD BROWN
Law Offices of Brad Brown, APC
735 State St. Ste 418
Santa Barbara, CA 93101
T: (805) 963-5607
brad@bradfordbrownlaw.com

LARRY CONLAN
Cappello & Noel LLP
831 State St
Santa Barbara, CA 93101
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lconlan@cappellonoel.com

IAN ELSENHEIMER
Allen & Kimbell, LLP
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Santa Barbara, CA 93101
T: (805)963-8611
IElsenheimer@aklaw.net

TERESA MARTINEZ
County of Santa Barbara
105 E. Anapamu St. Rm 201
Santa Barbara, CA 93101
T: (805) 568-2950
teresamartinez@co.santa-barbara.ca.us

TARA MESSING
Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101
T: (805) 963-1622
tmessing@environmentaldefense-center.org

CHAD PRENTICE
Maho & Prentice
629 State Street Ste. 217
Santa Barbara, CA 93101
T: (805) 962-1930
cprentice@sbcalaw.com

ERIN PARKS
Attorney at Law
325 E Victoria St. Garden Suite
Santa Barbara, CA 93103
T: (805) 899-7717
law@erinparks.com

MICHELLE ROBERSON
Sierra Property Group, Inc.
5290 Overpass Road, Bldg. C
Santa Barbara, CA 93111
T: (805) 692-1520 *102
michelle@sierrapropsb.com

RUSSELL TERRY
Reicker, Pfau Pyle & McRoy LLP
1421 State St. Ste B
Santa Barbara, CA 93101
T: (805) 966-2440
rterry@rppmh.com

ROSALEEN WYNNE
Law Offices of James F. Cote
222 E. Carrillo St. Ste 207
Santa Barbara, CA 93101
T: (805) 966-1204
rosaleen@jfcotelaw.com

LIDA SIDERIS
Executive Director
15 W. Carrillo Street, Ste 106
Santa Barbara, CA 93101
T: (805) 569-5511
Fax: 569-2888
sblawdirector@gmail.com

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Santa Barbara County Bar Association

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

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CONTRIBUTING WRITERS
Tanya Ahlman
Andrea Anaya
Nicole Clark
Penny Clemmons, Ph.D.
James Lisi
Robert Sanger
Russell Terry

EDITOR
Rosaleen Wynne

ASSISTANT EDITORS
Chad Prentice
Lida Sideris

MOTIONS EDITOR
Michael Pasternak

VERDICTS & DECISIONS EDITORS
Victoria Lindenauer
R.A. Carrington

PHOTO EDITOR
Mike Lyons

DESIGN
Baushke Graphic Arts

Submit all **EDITORIAL** matter to sblawyermagazine@gmail.com with "SUBMISSION" in the email subject line.

Submit all **VERDICTS AND DECISIONS** matter to:
Victoria Lindenauer
at lindenauer_mediation@cox.net
R.A.Carrington at ratc@cox.net

Submit all **MOTIONS** matter to Michael Pasternak at pasterna@gmail.com

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phone 569-5511, fax 569-2888
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Articles

Sections

On the Cover

Photo by Lida Sideris

Desperation Inside Immigrant Detention Facilities

By Andrea Anaya and Tanya Ahlman

Tanya Ahlman

Andrea Anaya

In order to minimize the potential impact of COVID-19, the Attorney General has ordered the release of medically vulnerable inmates from federal prisons, and numerous sheriffs have released thousands of jail inmates to minimize the risk of COVID-19 outbreaks. However, to date, Immigration and Customs Enforcement (ICE) has not made efforts to release detainees to minimize the risk of COVID-19. The lack of response from ICE has prompted immigrant advocacy groups to file a wave of lawsuits around the country to attempt to force ICE to release medically vulnerable detainees from detention around the United States.

Conditions in Detention Facilities

Non-citizens who are in immigration detention centers around the country for civil violations are in a particularly vulnerable situation during this pandemic. As of March 15, 2020, Immigrations and Customs Enforcement (ICE) had 37,311 people in custody. More than 60 percent of those detainees (22,936 people) do not have criminal convictions. Among the 38 percent of detainees who do have criminal convictions, many have only committed minor offenses like crossing the border without authorization. Nearly 6,000 of the people in ICE's custody have established a significant possibility of being persecuted or tortured in their home countries. Instead of letting detainees live with relatives who are willing to house them, ICE is holding them in detention centers that are already overcrowded and often notorious for unsanitary conditions and inadequate medical attention.

Prior to the emergence of COVID-19 in the United States, detention centers were already reported as having unsanitary conditions, and in many cases lack of access to soap. Now, many detainees fear dying in a detention facility from the coronavirus outbreak, especially without access to proper protection gear or basic needs such as soap or sanitizers.

Crowded facilities make social distancing impossible as detainees sleep in dormitories with dozens of others. Bunk beds are arranged in clusters. Bathrooms are shared. Hand sanitizer and disinfectant wipes are hard to find or nonexistent, according to several detainees, lawyers and advocates. Regular opportunities to shower or wash hands are severely limited.

It is additionally concerning that dozens of immigration detention centers are in remote areas with limited access to health care facilities. Many facilities, because of their rural locations, have only one on-site medical provider. If that provider gets sick and requires being quarantined for at least fourteen days, the entire facility could be without any medical providers during a foreseeable outbreak of a rapidly infectious disease.

Unfortunately, there is precedent for this; ICE has previously struggled to contain infectious diseases that enter its detention centers. In 2018 and 2019, a mumps outbreak tore through 57 detention centers in 19 states, according to a government report on outbreaks in the nation's immigration system. The Centers for Disease Control and Prevention said that the mumps virus sickened 898 detainees and 33 staff members.

On March 19, 2020, two contract physicians for the Department of Homeland Security's Office for Civil Rights and Civil Liberties wrote to Congress urging the department to consider releasing all immigrant detainees who do not pose a risk to public safety citing health and safety concerns and calling detention facilities a "tinderbox" for infections that could overwhelm local hospitals.

Lack of Information Regarding Spread of Coronavirus within Detention Facilities

Due to lack of transparency from ICE, it is difficult to assess the magnitude of the spread of coronavirus inside ICE facilities. ICE officials have disclosed little information about its testing procedures – they will not say how many tests have been administered or at which facilities, saying only that detention centers follow testing guidelines from

the Centers for Disease Control and Prevention.

On March 24, 2020, ICE reported the first migrant in custody who tested positive. The detainee was being held in Bergen County Jail in New Jersey. On March 26, 2020, ICE reported four unaccompanied migrant children in custody at a shelter in New York tested positive for coronavirus. As of April 7, 2020, 32 people in the custody of ICE in sixteen different facilities in ten states had tested positive for the novel coronavirus, the agency reported. Eleven staffers at facilities in Colorado, Louisiana, New Jersey, Ohio and Texas have been diagnosed with the virus.

The lack of information about testing makes it impossible to know how rapidly the virus is spreading inside ICE detention centers. For example, a recent federal lawsuit forced the government to acknowledge that it had not tested any ICE detainees inside the Howard County Detention Center in Jessup, Maryland, had no test kits at the facility, and had "no plans to conduct testing," according to a ruling issued by U.S. District Judge Theodore Chuang who ordered ICE to begin testing at the detention center.

Additionally, the data provided by ICE on coronavirus cases is missing a large pool of people – the thousands of private contractors who work as wardens, administrators, guards, doctors, nurses, janitors and cooks inside ICE detention centers. ICE owns and operates only five of the more than two hundred facilities that house ICE detainees around the country. The rest of the work is done by private prison companies and jails.

Since the thousands of private contractors are not employed by ICE, ICE's total case count does not include two guards working at the Krome Service Processing Center outside Miami who tested positive for coronavirus recently. An ICE official confirmed their positive tests. ICE's count is also missing two nurses and one guard who died because of coronavirus complications at the Hudson County Correctional Center in Kearney, New Jersey, since they worked for the county or a private health care company under contract. The facility holds nearly 300 ICE detainees.

Federal Litigation on Behalf of Medically Compromised Detainees

The lack of testing and transparency by ICE, in addition to the notoriously unsanitary conditions in detention facilities, has prompted lawyers to file lawsuits to request the release of the most medically at-risk detainees, according to Eunice Cho, a senior staff attorney at the American Civil Liberties Union who coordinated more than a dozen lawsuits the organization launched in recent weeks. The lawsuits argue that it is "effectively impossible" for detainees to protect themselves from the virus while in custody. They cannot practice social distancing and do not have access to adequate hygiene supplies. The American Civil Liberties Union (ACLU) and other advocacy groups have filed lawsuits against ICE in five states: California, Maryland, Pennsylvania, Massachusetts, New Jersey, Louisiana, Georgia, Washington, DC and others alleging that the due process right of detainees to be free from conditions of confinement that amount to punishment or create an unreasonable risk to detainees' safety and health is being violated. As relief, plaintiffs are seeking an order of release pursuant to 28 U.S.C. § 2241.

In California, U.S. District Judge Dolly Gee is considering a request to fast-track the release of nearly 7,000 unaccompanied minors after Health and Human Services said four migrant children in its custody in New York tested positive for coronavirus, as well as eight staffers, contractors and foster parents in New York, Washington and Texas.

On April 8, 2019, U.S. District Judge Maxine N. Chesney in the Northern District of California granted an order releasing four detainees with serious medical conditions from immigration detention in California to self-quarantine with relatives. The judge found that the other detainees who were part of the lawsuit did not demonstrate that their health was compromised to a sufficient degree.

U.S. District Judge Analisa Torres in the Southern District of New York ordered the release of ten detainees in New Jersey County jails where COVID-19 has been confirmed, citing chronic medical conditions of the detainees making them particularly vulnerable to the disease. Those ordered to be released ranged in age from 31 to 56 years of age and had medical conditions including diabetes, heart disease and obesity, and some with past histories that include pneumonia and smoking. Five were being held at Bergen County Jail, three at Hudson County Jail and the other two at Essex County Jail. The judge ordered the detainees' immediate release, writing that the nature of detention facilities makes the spread of the virus more likely, as social distancing is more difficult to maintain.

When U.S. District Judge John Jones ordered ICE to release eleven chronically ill detainees from a Pennsylvania detention center last week, he wrote that he issued the order because he could not be party to the "unconscionable and barbaric" possibility of those detainees contracting coronavirus. ICE facilities "are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19," wrote Jones, who ordered an additional twenty-two ICE detainees freed based upon medical conditions. "If we are to remain the civilized society we hold ourselves out to

Continued on page 14

When an Order to "Shelter-in-Place" Begets "Unspeakable" Crimes

By Joyce E. Dudley, District Attorney
Santa Barbara County

I am beginning to write this article on April 25, 2020, it will be published in June. I sincerely hope that by the time you read it, what we are now experiencing will have evolved into a mere memory, rather than a reoccurring nightmare.

Right now, all of us are experiencing some type of grief. For some, it's the grief of the loss of a loved one; for many, it's that our income and/or savings have been significantly reduced; and for everyone, our plans for the foreseeable future have been obliterated, as exemplified by our Outlook and Google calendars appearing eerily bare, except for the occasional remote "meeting".

Many of us became lawyers in order to feel we could have some control over life's predictable, but seemingly uncontrollable moments, and then along came this unpredictable and uncontrollable moment, which has made us feel, at times, quite powerless, an emotion we lawyers hate.

On Friday March 13th, I met with my Executive Staff (seven of the smartest people I have ever worked with), and we brain-stormed in search of all the foreseeable criminal justice problems we needed to get ahead of in order to best protect our communities. The answer that quickly rose to the top was something we called "in-home crimes". Specifically: Domestic Violence, Spousal Rape, Child Abuse, Elder Abuse and Animal Abuse.

Our concern was based upon our collective knowledge that: Increased stress (financial, children home from school, lack of diversions, reductions of safety valves, etc.), PLUS easy access to alcohol and drugs, PLUS isolation (no witnesses to observe the injuries, no one outside the home to talk with, no mandated reporters to notice signs of abuse, etc.) EQUALS an increase in abuse and a decrease in reports to law enforcement, social service agencies or an attorney.

We in law enforcement had always believed that if something was predictable, it was preventable.

On that Friday the 13th, we realized these crimes were now 100% predictable, but not nearly as preventable. At this point, we knew we needed to come up with new ways to help our vulnerable victims, because they were suddenly both invisible and overwhelmed by feelings of helplessness and hopelessness.

Joyce Dudley

We Americans hold many things dear, especially our right to privacy and our ability to help others. Now, we were faced with the fact that the first was a road block to the second.

Governmental social service agencies can only go into homes if they are invited or are accompanied by law enforcement officers with a warrant. A warrant won't be issued without probable cause, and there can't be any probable cause without at least some evidence. Social services or law enforcement staff can perform a "welfare check", but unless we are invited in, there must be a warrant or an exception to the warrant requirement in order for us to enter.

Unfortunately, if the horrendous crimes listed above were presently happening in someone's home, the perpetrator would likely be controlling both the victim(s) and access to their home. Thus, the victim(s) would continue to be victimized, and the perpetrator would remain undeterred and perhaps even emboldened if a law enforcement officer showed up, but was denied entrance.

Given that scenario, we needed to figure out how our social service or law enforcement agencies could help those who felt helpless?

Our response was to go very public with our concern.

Our first thought was that we wanted to reach out to the victims or witnesses themselves, to encourage them to seek help, but after decades of experience, we all felt that many victims of, and witnesses to, in-home crimes often remain silent in order to stay alive.

Still others don't report the abuse because they keep hoping it will stop.

Therefore, in order to intervene, we sought the help of victim's families, friends, neighbors and even strangers. We asked them all to report what they knew, or feared, was occurring.

We asked them to go back in time to an era where neighbors actually looked out for each other.

As an office, we decided the best approach was to reach

out to our fellow law enforcement, social service, governmental agencies and non-profits and to enlist the help of local and national media. Our goal was to educate everyone about these crimes and to encourage them: "If they see or hear something - SAY something by calling 911. If they are uncomfortable calling 911 - call us, their DA's office." It was at this point that our Director of Victim/Witness Services, Megan Rheinschild created a 24/7 hotline (805-568-2400), which ensured any victim or witness that they could speak with an advocate any time of day or night.

So, as of now, do I believe it is working? Yes, I do. I believe a few people and families are being helped, but sadly, I also know we are just reaching the tip of this very cold and lonely iceberg.

Today, I can only hope that by the time this article is read even more vulnerable victims will have been rescued by their own bravery or the kindness of others. ■

Joyce E. Dudley has a BA in psychology, and two Master's Degrees in Education. In 1990 Joyce received her JD degree. The day she passed the Bar she was hired by the Santa Barbara County District Attorney's office. For 20 years Joyce was a Deputy District Attorney specializing in prosecuting violent crimes against vulnerable victims. In 2010 she was elected District Attorney.

How to Practice Law Competently During a Pandemic

By Penny Clemmons, Ph.D.

MCLE Self Study
Earn one hour of MCLE Credit in ***Competency*** *– a required MCLE subject.*

No subject in law school anticipated or prepared us to practice law in a pandemic, much less ethically and competently. Yet in the past three months we have been confronted by a crisis of unknown and unpredictable physical, emotional, financial and cognitive challenges.

Rule 1.1 of the Rules Of Professional Conduct provides guidance to us for normal times which may be extrapolated to specific application to the pandemic response.

> ***"RULES OF PROFESSIONAL CONDUCT*** *Chapter 1. Lawyer-Client Relationship (Rules 1.1 – 1.18) 1 Rule 1.1 Competence (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence. (b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service. (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent. (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances."* [1]

I would draw your attention in particular to the definition of competence: "competence shall mean…(i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for such service".

Penny Clemmons

Learning and Skill

At first glance, assuming we have the necessary learning and skill in our practice area(s), it would be easy to dismiss these criteria as met. However, in Santa Barbara, most of us in the legal community are sheltered in place as advised by our County Health Department. Much as we might want to disagree, we are not essential workers. Some of us are of an age that puts us at risk for the Novel Corona 19 virus, and others of us, irrespective of our age, are at risk because of underlying health conditions or someone in our family needs to be protected because they are in a high risk group. So we are practicing from home; but do we have the necessary learning and skill to do so competently?

Competency during a pandemic requires possessing the technological skill set to practice remotely. This includes a workspace that maintains a client's confidentiality. Telephone conversations are private. If communicating with your client electronically, your work is password protected from everyone in your household. When using Zoom or other conferencing platforms, no other individuals are within earshot or can see the visuals. Children and pets should not be seen or heard.

It is imperative that computer systems are as impervious to hacking as possible. If you do not have remote access to your office computer and the files on the server, it is essential to plan in advance for how to secure access in an emergency. Meanwhile, it may be necessary to physically access files from the office.

Mental Competency

Distractibility, forgetfulness, difficulty focusing, short-term memory loss and lack of concentration are common experiences during this time. Some people report feeling like they are swimming through molasses or slugging through a swamp. Physical energy is compromised. Perception is altered. It may be difficult to remember what day of the week it is.

Our legal calendar is no longer reliable. The Courts, in an abundance of caution and wisdom, as of this writing, are closed except for emergencies and some criminal

hearings. Litigators have been encouraged to work with opposing counsel, consider mediation or arbitration and bring civility to their interactions. Meanwhile, deadlines for discovery and application of the statute of limitations may have changed, and dates for Requests For Orders, Case Management Conferences, Mandatory Settlement Conferences and trial dates were vacated. Upon resetting, there will be a significant backlog, and it is unlikely the Courthouse will be open for business as we have known it for some time. This will require practitioners to become proficient in Zoom.

We no longer have the structure that the Local Rules of Court, the California Rules of Court and the Rules of Civil Procedure normally provide and that we rely on to manage our case planning. Some counsel practice in multiple venues and each has its own set of local, and sometimes conflicting rules. The unknown and unpredictable landscape of the future creates more anxiety.

One of the most useful psychological concepts I learned in graduate school was that structure binds anxiety. If we have clear boundaries and expectations, we will experience less anxiety and less stress. But the current pandemic leaves us with little structure and significant anxiety, thus the need for clear communications from the California Supreme Court and the Judicial Council.

Emotional Competency

Next, we need to address emotional competency. Some of the symptoms of living through a pandemic include malaise, depression, anxiety, fatigue, strange dreams, irritability, mood swings, and insomnia. Denial is not the name of a river in Egypt, but a symptom. The practice of denial siphons off significant emotional and physical energy that is required to address the personal and professional obligations that require our best efforts during this time.

In addition to the Other Bar, there are telehealth options for counseling available both through our Santa Barbara County Psychological Association[2] local counseling centers and health insurance providers, and many are free of charge. There is no better time to do a mental health check and add some additional coping arrows besides baking bread

and making brownies to our quivers.

Physical Ability

Are you a solo practitioner? If so, what plan do you have in the event you are impaired, incapacitated or die? Competency requires a succession plan. It makes sense in our close-knit community to pair up with another attorney who practices in the same area of law. In the event of an interruption of your practice, the Successor Attorney would review files, inform clients, contact opposing counsel and the courts of the attorney's incapacity. Obviously, any State Bar rules need to be observed. This is also an opportunity to participate in a peer review process to enhance client services. Clients should be informed, perhaps, in the Representation Agreement, that there is a Succession Plan in the event of a catastrophic event, and should be informed and consent to the back up attorney.

Firms also need contingency plans for attorney incapacitation, but it is more likely that other firm attorneys are able to take over the services for the incapacitated attorney.

CLIENTS

Our ethical duty to clients impels us to communicate with them expediently. The most frequent complaint to the State Bar from clients is the lack of responsive communication from their attorneys. During this time, clients need to know how to reach us by phone at our remote workplace. Some attorneys use call forwarding to preserve their personal privacy; others make their cell phone or landline connections available to their clients.

Many clients need and benefit from weekly written status reports. Landlords want to know when they can file an Unlawful Detainer; when will a writ be enforced? Criminal defendants want to know when their trial will take place; civil litigants want to know the timetable for their action. A three sentence e-mail informs the client you have not forgotten about them, what the current status of their case is in relation to current pandemic parameters, and the delays they can expect once the legal system is functional and on the road to recovery. This basic practice tool will significantly reduce the number of client telephone calls.

Clients are experiencing financial stress, unemployment, physical illness, adult children moving back home, closing of businesses, domestic violence, child custody and child and spousal support disputes. Family law clients are impacted by lost wages resulting in the need to recalculate child and/or spousal support. It is in the interest of the payor to obtain the earliest possible reduction, and it is in the interest of the payee to

obtain the latest possible reduction. Health insurance for children is lost because of parental layoffs. There are disputes between parents about front line workers' custodial time and the safety of the children. Across the country, different jurisdictions have handled this issue in diametrically opposed rulings. A California client reads a Florida decision and thinks they should be able to make the same argument and prevail.

Substance abuse increases, as does domestic violence. District Attorney Joyce Dudley reported that: "The first week after the shelter-in-place mandate was imposed, domestic violence reports countywide went up 21 percent."[3] As a panel leader at the Prosecutors Against Gun Violence (PAGV) virtual summit on May 7th she stated: "Our shelter-in-place order for many has been akin to a great 'pause" but from my perspective being a prosecutor for 30 years, I've been deeply concerned about great 'paws.' During this unprecedented time, I envision the great paws of an angry bear, or in our case a violent perpetrator. I see great big paws committing horrendous acts of domestic violence. I see paws holding down a spouse and raping her. And I see paws abusing the most defenseless among us — our children, our elders, and our pets.[4]

Clients needs to be assessed for physical and emotional impairment. If physically ill, what steps need to be taken to protect their legal rights? Are they able to make knowing and intelligent decisions? Are they able to make rational choices? Are they being unduly influenced? If elderly, is there reason to suspect elder abuse? These can be difficult assessments to conduct from a distance and require heightened sensitivity.

Pandemic Fatigue

No one knows when, if, or how the pandemic will end. The abnormal is the new normal. During this time of adaptation and adjustment it is more vital than ever that we take all the steps necessary to practice competently. Remember, you are not alone. We are all in this together. ■

A special thank you to Deborah Boswell, Chair of the County Bar MCLE Committee and Lida Sideris our Bar Director for their support of this MCLE self-study.

Penny Clemmons, Ph.D. is a professor at the Santa Barbara and Ventura Colleges of Law. She has taught on-line classes in psychology and law for the past five years. She maintains mediation practice and is a volunteer on all of the Court's Settlement Calendars and ADR Calendars.

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To receive 1 unit of MCLE credit in the required subject of Competency, complete the test and e-mail to clemmonsjd@cs.com by June 30, 2020. A Certificate of Completion will be provided to you from the County Bar Office.

Practicing competently in a pandemic does not require technical expertise.

o True
o False

Domestic violence in Santa Barbara County has decreased during the pandemic.

o True
o False

In the event of an emergency, attorneys do not need a succession plan.

o True
o False

be, it would be heartless and inhumane not to recognize Petitioners' plight. And so we will act."

As of the time of writing, U.S. District Judge James Boasberg of Washington is considering a request to release approximately 1,350 members of migrant families who are detained at three family detention centers in Pennsylvania and Texas. On March 21, 2020, a lawsuit was filed by three advocacy groups helping migrant families seeking asylum and being held at three centers in Berks County, PA; Dilley, TX; and Karnes City, TX, under the Trump administration's family detention policy. Last week, U.S. District Judge James E. Boasberg of Washington, DC ordered ICE to report on their efforts to release the approximately 1,350 migrant families detained at these three centers in Pennsylvania and Texas by April 6, 2020, as well as provide information about the capacity of the centers and videotapes of living conditions. Boasberg also directed U.S. immigration authorities to comply with Centers for Disease Control and Prevention guidelines for congregate housing and the Constitution's guarantee that prisoners be held in safe and sanitary conditions.

Judge Boasberg's order expands on a similar one issued by U.S. District Judge Dolly M. Gee in Los Angeles related to an emergency hearing seeking the release of 6,900 detained children. Judge Gee had ordered that federal agencies operating detention facilities for migrant children report their efforts to release children in custody by April 6, 2020. Judge Boasberg has since widened this order to cover their parents.

In April, ICE said that it had started reviewing cases to determine whether the most vulnerable detainees could be released from custody, given the "unprecedented nature of COVID-19. "The agency said it was reviewing 600 detainees deemed "vulnerable." "Utilizing CDC guidance along with the advice of medical professionals, ICE may place individuals in a number of alternatives to detention options," the ICE statement read. "Decisions to release individuals in ICE custody occur every day on a case-by-case basis."

Access to Counsel Limited by ICE Regulations Requiring Attorneys Provide Own Personal Protective Equipment

While detained non-citizens rightfully worry about an outbreak in their unit, they also face the additional hurdle of obtaining access to their attorneys. New regulations from U.S. Immigration and Customs Enforcement (ICE) are turning attorneys away from immigration detention centers if they do not bring their own nitrile gloves, surgical mask or N95 respirators, and eye protection, despite the fact that such protective gear is in high demand for medical professionals.

The requirement for personal protective equipment for attorneys visiting detention facilities limits attorneys from being able to provide legal assistance to clients because attorneys do not have access to the required personal protective equipment. Like most individuals, immigration attorneys do not have access to N95 respirators, surgical masks, or eye protection. To make matters worse, many detention facilities lack secure videoconferencing capabilities that would allow lawyers and clients to speak confidentially about their cases.

The Department of Justice is moving forward with removal proceedings for detained individuals, including individual removal hearings (equivalent to a trial). The Department of Justice is also requiring attorneys to either appear telephonically or wear personal protective equipment if they wish to represent their clients in Immigration Court. In a time when access to personal protective equipment is extremely limited (and needed by medical professionals), requiring immigration attorneys to obtain and wear their own personal protective equipment, limits access to counsel for detainees.

In the absence of a uniform policy, advocates for detained non-citizens have filed a lawsuit against The Executive Office of Immigration Review (EOIR) in the United States District Court for the District Of Columbia for "failing to put in place a uniform policy suspending in person appearances and enacting protective measures for detained noncitizens who wish to proceed with their immigration hearings. EOIR is effectively forcing attorneys to choose between adequately representing their clients and jeopardizing their health; EOIR is also forcing detained immigrants to choose between their health and safety and their statutory, regulatory, and due process rights."[1] ■

1 This article was last updated on April 10, 2020. Given the rapidly changing environment due to the global coronavirus pandemic, the information contained herein may no longer be current.

Andrea Anaya is an associate attorney with Kingston, Martinez & Hogan LLP. She practices immigration law, specializing in family-based immigration, deportation/removal defense, crimmigration, post-conviction relief and federal immigration litigation. She is licensed by the State Bar of California and is a member of the American Immigration Lawyers Association. Andrea can be reached at andrea@kmhimmigration.com.

Tanya Ahlman is a Junior Partner at Kingston, Martinez & Hogan LLP. She is a Certified Immigration and Nationality Law Specialist recognized by the State Bar of California. Tanya practices immigration law, specializing in representing employers and employees in employment-based immigrant and non-immigrant visa petitions, as well as post-conviction relief. Tanya can be contacted at tanya@kmhimmigration.com.

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What Happens When AB5 Meets COVID-19?

By Nicole Clark

The COVID-19 pandemic has placed a spotlight on the underbelly of the United States economy. With many Americans following orders to stay at home, gig workers have moved into the forefront of the marketplace. Delivery workers, truck drivers, and other independent contractors are still going out into the world to work and to keep the world working.

We can only imagine what would have happened to our daily lives without these workers. Three weeks ago, ordering from a company like Postmates, DoorDash, or Instacart could have been considered a luxury. Now, it feels like an essential service.

The CARES Act (2020)

Many gig workers have been hit hard by the pandemic. Some have tested positive for COVID-19, developing symptoms that have forced them to self-quarantine. But there is another problem. Since gig workers are classified as independent contractors, they lack the same benefits and protections as employees. The drivers for many of these essential services do not have access to company health insurance, sick leave, family leave, or workers' compensation.

As a $2 trillion economic relief measure, the Coronavirus Aid, Relief, and Economic Security Act (2020) includes financial assistance to gig workers. It contains provisions that will allow independent contractors to apply for unemployment insurance, a resource from which they are generally excluded. Unsurprisingly, many gig economy companies have backed the measure.

In a letter to President Trump, Uber CEO Dara Khosrowshahi requested that any coronavirus economic stimulus measure "include protections and benefits for independent workers, both those who use Uber and all others across the economy." His letter then takes a political turn, highlighting a contentious issue that has been brewing across the industry: employment classification. Khosrowshahi outlines a proposal for a new approach to labor law, one that would revise "the current binary system of employment classification" wherein "a worker is either an employee who is provided significant social benefits or an independent worker who is provided relatively few." He dubs this approach 'the third way'.

AB5 as a Catalyst for the Third Way

Just before the coronavirus pandemic hit the United States, California residents were already engaged in a heated debate about the status of independent contractors.

Across the State of California, a new law went into effect on January 1, 2020. Introduced by Assemblywoman Lorena Gonzalez (D), California Assembly Bill 5 (AB5) reconfigured the employment landscape, fundamentally altering the working conditions for professionals as diverse as musicians and journalists, construction workers and truck drivers, rideshare providers and physical therapists.

AB5 codifies into law a ruling made by the Superior Court of California in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* (2018). This ruling reinterprets the manner in which workers shall be classified by the court, adopting a new legal standard that requires the court to presumptively categorize all workers as employees —not independent contractors . This means that any hiring entity attempting to classify an individual as an independent contractor has the burden of establishing the propriety of that classification.

Enforcing AB5 in the Time of Corona

Before the pandemic, tentative court rulings related to AB5 began to trickle through the Superior Courts of California. There was *The People of the State of California vs. Maplebear, Inc.* (2020), a case in which the City of San Diego alleged that a same-day grocery delivery company maintained "an unfair advantage by misclassifying its Shoppers [as independent contractors] and evading long-established worker protections under California law." The Hon. Timothy B. Taylor agreed.

But the Superior Court of California is no longer the only court hearing AB5-related matters. On April 2, 2020, the Hon. Vince Chhabria of the United States District Court for the Northern District of California heard an emergency injunction filed by Lyft drivers. The motion asks the court to require Lyft to immediately reclassify its drivers as employees under AB5, arguing that such a reclassification would enable drivers to obtain sick leave as required by state law.

In his ruling , Judge Chhabria denied the emergency injunction, claiming that it is riddled with legal defects. However, he agreed with the plaintiffs that Lyft has not been in compliance with California labor laws vis-à-vis the matter of worker classification. Still, he questioned " how the paltry amount of sick leave would provide much ben-

efit to drivers or the public when a recently passed federal law gives independent contractors up to $511 per day for 10 days of sick leave ." This renders the argument for immediate reclassification uncompelling. California sick pay is limited to only three days a year, days for which most part-time Lyft drivers would not even qualify.

With this ruling, the judge recognized the extent to which employee reclassification could jeopardize drivers' eligibility for emergency benefits under the CARES Act. We can see, then, how the CARES Act has helped to temporarily sidestep the question of worker classification, effectively giving California workers on both sides of AB5 some of the benefits the state law has made difficult to access. By Nicole Clark CEO and co-founder or Trellis Research Business litigation and labor and employment attorney Trellis is an AI-powered legal research and analytics platform that gives state court litigators a competitive advantage by making trial court rulings searchable, and providing insights into the patterns and tendencies of your opposing counsel, and your state court judges. ■

Nicole Clark is CEO and co-founder or Trellis Research She is a business litigation and labor and employment attorney.

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2020 Bench and Bar Meetings

As Presiding Judge, the Honorable Michael Carrozzo has set the schedule for the Bench and Bar Meetings that will take place as follows:

August 27, 2020 • November 19, 2020

These Bench and Bar Meetings provide a forum for local members of the Bar to engage in an informal dialogue with the presiding judge as a means of raising issues and concerns that may not otherwise be addressed. All attorneys and paralegals are welcome to attend.

For any practitioners wishing to submit agenda items for consideration before any of the scheduled meetings, please email those items to Ian Elsenheimer: Ielsenheimer@aklaw.net

Crime and Punishment During an Epidemic

By Robert Sanger

Robert Sanger

Two things seem pretty clear at the moment: first, neither crime nor law enforcement has ended in deference to the public health emergency; and, second, the American fascination with incarceration is being forced into question. The types of crime during this emergency vary and so do the means of enforcement. Police and federal investigations continue law enforcement activities during the emergency. Courts and correctional facilities are functioning—more or less—and will resume fuller functioning as a matter of time.

In this *Criminal Justice* column, we will look at how the criminal justice system is handling the present and future caseloads and the implications for imposing of criminal sanctions. Then we will look at the wisdom of the American paradigm of punishment: *incarceration*.[1] The result of the use of this paradigm has been mass incarceration. Mass incarceration has had a devastating effect on individuals subject to such punishment and on this nation as a whole. That has long been known and well-studied.[2] The tragedy of the current public health crisis has finally brought it to the attention of the wider public.

Crime

Unfortunately, alleged criminal activity continues to be brought to the attention of law enforcement during the current public health crisis, people are arrested and cases are filed. Anecdotally, we have continued to be called on new criminal cases, including homicides, sex offenses and white-collar matters. We have even seen new DUI's and other cases that we might have expected to abate with people being in public less often. As the restrictions lift – and probably have lifted somewhat between this writing and publication – there is little doubt that the "garden variety" criminal cases that arise out of closer human interaction will increase.

Statistics are hard to interpret for a variety of reasons. First, sheltering in place, while it has only been in effect for a short time,[3] probably has an effect on the nature and, possibly, the amount of criminal activity,[4] but some statistics, including, for instance, gun violence in some areas,[5] and computer based fraud crimes[6] have actually increased. Secondly, arrests and jail bookings may be down, but citations to appear in court or deferred arrests for serious crimes will be up. Third, prosecutors are not proceeding on matters currently referred to them that may be pursued when the courts are more readily available. Fourth, while courts have held arraignments for people in custody, the further proceedings in those custody cases, as well as proceedings in all criminal cases, have only started to move forward. Fifth, for those reasons and because all jury trials have been suspended, convictions are down.[7]

This is not the place to review the COVID-19 rules since they are changing on a frequent basis. Suffice it to say that the current status of the state courts is based on a somewhat complicated interaction between the orders of the Governor,[8] the orders of the Chief Justice,[9] the Emergency Rules of the Judicial Council,[10] the orders of presiding judges of each county's Superior Courts,[11] the Presiding Justices of the Courts of Appeal and a collection of procedural rules and guidelines created by local administrators. The federal courts have regularly issued orders from judge to judge, district wide and circuit wide.[12]

The common response has been to close the courts and only to reopen gradually. Generally court is conducted by remote proceedings which are still being tested. Since there have been time waivers for preliminary hearings and few other proceedings, most state prosecutions have been on hold. The courts want to encourage plea bargains to resolve cases and to reduce pre-trial detention at the jails but, absent an agreement between defense and prosecution, there has been limited judicial involvement.[13] Preliminary hearings have only just begun using remote technology and, of course, jury trials are currently out of the question.

In federal court, commencement of criminal prosecutions is even a bit more complicated. An on-view arrest for a violent offense, for instance, armed bank robbery, will result in incarceration and the accused being brought before a judge. Despite much criticism, for instance, immigration violations have also resulted in incarceration. The federal detention centers and contract county jail facilities

used to house federal pretrial detainees, will continue to have people in custody. However, just as in state matters, federal law enforcement is less likely to arrest and incarcerate people they seek to charge with non-violent offenses.

There is an issue in federal cases that is not present in California state cases. In the state cases, indictment by a grand jury is relatively rare and, of course, criminal grand juries cannot be convened as of this writing. But, in state cases, indictments are not necessary and a case can proceed on complaint followed by a preliminary hearing. Although the time for preliminary hearings has been tolled in state cases, they are starting to be held, primarily by remote technology. In federal cases, on the other hand, while preliminary hearings are possible, generally a case is either commenced by a grand jury indictment or there is an arrest followed by a complaint which is superseded by a grand jury indictment. Currently, all federal grand juries have been suspended and, as of this writing, no indictments are being returned.

For federal non-violent offenses, investigations will continue on the part of federal law enforcement. These investigations often go on for months or even years even without a public health crisis. However, when the investigations are concluded, the agents will submit the matter to the United States Attorney's Office (USAO) and the USAO will present the matter for indictment to the grand jury. Based on this procedure alone, we can expect that a backlog of federal white-collar cases will be ready for indictment when grand juries are again convened, and a spike in the indictment statistics will occur at that time. Of course, it also means that we, as criminal defense lawyers, will have additional time to try to resolve cases pre-indictment with the prosecutors if we hear an investigation is afoot.[14]

Punishment

All of this is to say that initiation of criminal cases by arrest, by notice to appear or by some other form will continue. People will be subject to detention or release prior to adjudication.[15] Law enforcement and the courts have temporarily decreased the pretrial detention population in both state and federal jurisdictions. There are simply fewer arrests for the reasons stated above, and there are rules in place to decrease the pretrial population of the jails. For instance in California, the Judicial Council issued Emergency Rule 4, stating that all non-violent offenders' bail should be reduced to $0.[16] Of course, no sooner was this Rule enacted than prosecutors and superior court judges resisted. This already led to a decision, rendered but not final as of this writing, in *Ayala v. Superior Court* out of San Diego.[17] Nevertheless, the population of the Santa Barbara County Jail was down close to the rated capacity for the first time since the new jail was built in 1972.[18]

However, incarceration remains as the paradigm of punishment in this country. We already incarcerate record numbers of human beings in this country, five times the number per capita of countries with similar demographics and crime statistics and fifteen times the number of some other industrialized countries.[19] If the analysis of criminal activity and of delayed prosecution and sentencing is correct, we can expect to see a brief dip in people sentenced starting in March 2020 and continuing until the courts are able to take care of the backlog of cases pending and to be filed, including the backlog of cases delayed in investigation. If the analysis is correct, then we will see a spike in criminal sentences following the delay. We should not necessarily expect more convictions when things average out, but we should not expect much less.

The current coronavirus crisis has focused attention on the health problems that are exacerbated by holding people in jails and prisons.[20] Even if they are not overcrowded, facilities are prone to the spread of infections and viruses. California prisons and jails have been chronically overcrowded and, even with emergency reductions, are unable to safely deal with outbreaks like the one we are currently experiencing. As we write, the current conditions are being addressed in multiple cases individually[21] and systemically state-wide.[22] It may or may not be the case that lessons will be learned from this current crisis and that conditions of confinement will be improved relating to general hygiene, conditions of confinement (including light and air), upgraded facilities and more space per prisoner.

However, if nothing is done systemically, when the lull and spike conclude and when sentencing returns to the general statistical level we expect, California, other states and the federal system will return to the same levels of mass incarceration. This will occur unless there is a paradigm shift.[23] That paradigm shift requires a change in the mindset that incarceration is the paradigm of punishment. There has been an effort to change that mindset since it became one. Look, for instance, at the work of Michelle Alexander in which she documented in a popular book how the "war on drugs" and "tough on crime" rhetoric resulted in the increase of incarceration and its racially prejudiced and unjust results.[24] Prison reform, of course, has been a cause since the invention of prisons but maybe we are at a pivotal moment.

It may have taken this public health tragedy for most Americans—and therefore, politicians—to actually take note of what scholars, prison reformers and writers, like Michele Alexander, have been saying. Mass incarceration

is not effective and, in fact, has a disastrous effect on large positions of our communities, thereby diminishing all of us. Oddly, the harsh reality of imprisonment may resonate in a more self-centered context among the well-off, unincarcerated. People are now feeling the effects of quarantine and self-isolation which could cause them to rethink the paradigm of imprisonment.[25] But, whether the reader agrees or not, the fact is, we cannot sustain the levels of incarceration and do so safely. So, for a variety of reasons, ones of which will resonate more with some than others, we need to finally accomplish that paradigm shift.

Conclusion

The public health crisis has had and will have a temporary effect on the number of criminal sentences, but that number will probably see a spike and then generally revert to the average. In other words, people will be sentenced to be punished for crimes. The current paradigm of that punishment is incarceration—typified by the question in response to hearing someone is being sentenced, "How much time will they get?" That paradigm has to shift. Not just in "alternatives" to incarceration but in a new paradigm that does not have anything to do with incarceration as the primary means of dealing with crime. That is a big shift—but, then again, that is what it takes; ask Copernicus. ■

Robert Sanger is a Certified Criminal Law Specialist (Ca. State Bar Bd. Of Legal Specialization) and has been practicing as a litigation partner at Sanger Swysen & Dunkle in Santa Barbara for over 46 years. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is a Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law and an Associate Member of the Council of Forensic Science Educators (COFSE). Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization and is a Director of Death Penalty Focus. The opinions expressed here are those of the author and do not necessarily reflect those of the organizations with which he is associated.

Endnotes

1 Incarceration was first proposed as an alternative to the death penalty or torture. See, e.g., Cesare Beccaria, Of Crimes and Punishments, (1764). Note also, Jeremy Bentham's proposal for the "panopticon" as a form of penal institution which looks disturbingly like the Santa Barbara County Jail medium security facility (formerly, the "Honor Farm") and the "new" modules in the Inmate Reception Center. However, also note that Bentham was actually opposed to incarceration as a paradigm of punishment, which is lost in the fascination with his inventions.

2 Volumes and articles abound. Alexis de Tocqueville came to this country to study the prison system but, of course, made much broader observations in his Democracy in America. See, e.g., B.F. Skinner, Beyond Freedom and Dignity, (1971), but more currently, for instance, see the conservative Koch brothers joining with the ACLU and others on prison reform, Tim Mak, "*Koch Bros to Bankroll Prison Reform*," Daily Beast, April 14, 2017. And, see, for a popular history, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, (New York, 2010).

3 Statewide in California, it was imposed by Governor Newsom's Executive Order N-33-20, March 19, 2020.

4 Kenny Jacoby, Mike Stucka and Kristine Phillips, "*Crime rates plummet amid coronavirus pandemic, but not everyone is safer in their home*," USA Today (April 16, 2020).

5 Daniel Nass, "*Shootings Are a Glaring Exception to the Coronavirus Crime Drop*," The Trace, (May 1, 2020)

6 See the latest from the FBI on COVID-19 related crimes: https://www.fbi.gov/coronavirus.

7 Plea bargains can be made but the threat or promise of a jury trial is not available to induce them. Of course, convictions after trial are non-existent and, for instance, there will be no new death judgments announced since those require a penalty phase jury trial.

8 Executive Order N-38-20 (March 27, 2020).

9 March 28, 2020 and March 30, 2020.

10 April 6, 2020 and April 14, 2020.

11 E.g., Los Angeles, General Order, April 14, 2020; Santa Barbara, General Order, March 30, 2020.

12 E.g., Central District of California, Continuity of Operations Plan, March 23, 2020.

13 The cases that resolve will generally be those where release is offered. Those offers may be more liberal in light of the crisis, however, on the other hand, there is little incentive to settle those that would require additional incarceration. Thus, cases that may result in prior commitments are more likely to be deferred.

14 See one of the earlier *Criminal Justice* columns, "The Postal Inspector Only Rings Once," (*Santa Barbara Lawyer Magazine*, April 2008; http://www.sangerswysen.com/articles/postal-inspector-only-rings-once.) where the present author emphasized how important it is to immediately react when there is any sign that a criminal investigation is underway.

15 Of course, SB10 passed two years ago was designed to eliminate money bail, but is stayed due to the bail bond industry placing a repeal on this November's ballot. The significance of this is mixed since SB10 also provided for fairly wide discretion to detain the accused for days, weeks or even the month prior to trial.

16 Emergency Rule 4, adopted April 6, 2020.

17 On April 29, 2020, the Court of Appeal for the Fourth Appellate District took up a San Diego case and rejected the "petitioners' contention that the superior court cannot depart from the zero bail amount in the statewide Emergency Bail Schedule in any individual case." *Ayala v. Superior Court of San Diego*, reproduced at: https://ca-times.brightspotcdn.com/73/32/6830002d47ba97dd495cf81b4bae/emergency-bail-schedule-ruling-4th-dca.PDF.

18 Based on the records and testimony over the years in *Inmates v. County of Santa Barbara*, (originally *sub nom. Miller v. Carpenter*), filed by the author in 1981 and still pending. Current levels as stated by jail personnel to author.

19 See, e.g., based on pre-coronavirus statistics, the analysis of the still high incarceration rate of the United States compared to other countries, John Gramlich, "*America's incarceration rate is at a two-decade low*," Pew Research Center, (May 2, 2019) at: https://www.

pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/.

20 See, e.g., Tiffany Caban, "*This Crisis Demands and End to Mass Incarceration*," The Nation, (April 28, 2020).

21 Mark Saitjaan of the Santa Barbara Public Defender and other lawyers, including, Sanger Swysen & Dunkle, have litigated individual matters in individual cases with the hope of broader application. At the time of this writing, as to those our firm is litigating, we do not intend this to be a comment on our pending cases, now or at the time of publication.

22 *National Association of Criminal Defense Lawyers, California Attorneys for Criminal Justice and Youth Justice Coalition v. Newsom and Becerra*, Petition for Writ of Mandate filed in the California Supreme Court April 24, 2020, case number S261827 and "Preliminary opposition to writ petition" requested by the court , April 24, 2020. (Note: Stephen Dunkle, Sarah Sanger and the author have consulted on this matter.)

23 Thomas S. Kuhn, The Structure of Scientific Revolutions, Chicago and London: University of Chicago Press, (1970, 2nd ed.).

24 Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, (New York, 2010).

25 See, Hannah Giorgis, "*Quarantine Could Change How Americans Think of Incarceration*," The Atlantic (April 28, 2020).

Jones v. Commissioner Kress v. United States Approaches to Tax Effecting Clarified in 2019 Valuation Cases

By James Lisi

Estate of Jones v. Commissioner, T.C. Memo 2019-101

Kress, v. United States of America, Case No. 16-C-79, United States District Court, Eastern District of Wisconsin

Cecil, Sr., Donor, et al. v. Commissioner, Docket Nos. 14639-14, 14640-14

Two cases in 2019 helped to clarify the consternation that the valuation community holds around tax effecting of S-corporations, while a pending 2016 case may also add clarity to the discussion.

Jones v. Commissioner seemingly reverses a twenty-year position of the Tax Court against tax-effecting, and yet again a different court, in Kress v. U.S., comes to the opposite conclusion. Outside of Tax Court, tax-effecting had generally been accepted since the 1950s. Even though the debate continues, important guidelines come out of the two cases.

Background

Since S-corporations were created by Congress in 1958, tax-effecting S-corporations in business valuation has gone through periods of acceptance and dispute. The issue has to do with whether shares of the S-corporation, a pass-through entity, should be valued differently from a C-corporation due to lower perceived tax costs. Two taxes on C-corporations affect value to the C-corporation owner; an income tax inside the corporation and a dividend tax after distribution. Only one tax applies for an S-corporation, which, like the dividend tax, occurs after the financial statements. Common sense, and economics, says 'yes', the values are different if the costs are different.

It is when C-corporation data is used to value an S-corporation that the issue arises. This is the dominant approach of valuators particular to what I call the AICPA segment of the valuation profession. This group likes standardized data and repeatable formulae, preferring perfect market theory over private deal information. Its main model is an income approach based on 'build-up' capitalization rates, which come from C-corporations in public markets. Through the 1980s, to avoid overvaluing S-corporations, these experts "tax effected" the subject's net income, meaning the S-corporation was modeled as if it were a C-corporation.

James Lisi

In 1999, this tax-effecting practice was challenged by the IRS in Gross v. Commissioner (2001). *Gross* eventually made a 0% adjustment for its case, which resulted in a value 67% higher than if after-tax cash flows had been used. The decision led to vehement arguments within the valuation profession. From 2001 to 2019, analysts struggled to make their models work for the court. While, the U.S. Tax Court rejected traditional tax effecting, the Delaware Chancery Court and other state courts generally accepted the practice. Now, a shift has occurred.

The Problem

The difficulty is that traditional tax-effecting values the company on an 'as-if-public' basis. This leaves out relevant information on what a privately-held S-corporation is actually worth.

The first issue is that under *economics*, the cash flow relevant to the owner is after the owner pays all tax, not only the tax paid by the corporation. Economically, when comparison costs are the same, they don't affect value. When they are different, they need to be assessed. Tax cost is clearly different for an S-corporation owner and C-corporation owner.

However, from an accounting view, the external tax cost isn't usually 'seen' because conclusions are drawn at company level. The solution takes a perspective beyond the financial statements. So, traditional tax-effecting omits a most relevant piece of data – the two different external taxes on the owner.

The Tax Court rejections since 2001 were simplistically interpreted by the valuation community as the denial of tax-effecting, but the Tax Court was merely refusing faulty valuation work, then dealing with the facts left over. Depending

on how the expert built their case, the court's exclusion of the errant evidence resulted in a poor set of facts, and massive value swings. This hopefully has changed now. In selecting one expert's opinion over the other, the Tax Court takes a portion of the 2019 *Jones* decision to explain the issues valuators need to address:

> In Gross, the court concluded that the principal benefit that shareholders expect from an S corporation election is a reduction in the total tax burden imposed on the enterprise. The owners expect to save money, and the court sees see no reason why that savings ought to be ignored as a matter of course in valuing the S corporation. More recently, in Estate of Gallagher, the court again rejected tax-affecting because the taxpayer's expert did not justify it but again acknowledged that the benefit of a reduction in the total tax burden borne by S corporation owners should be considered... [underlines added]
>
> … in the final analysis, the court may find the evidence of valuation by one of the parties sufficiently more convincing than that of the other party, so that the final result will produce a significant financial defeat for one or the other, rather than a middle-of-the-road compromise

Quantitative Solutions

Like the saying that goes 'if the only tool you have is a hammer, every problem looks like a nail'. When public market data is the only tool you apply, S-corporations look like slightly modified C-corporations. Data for S-corporation shares doesn't exist like it does for public companies. This makes a direct valuation of S-company shares impossible. The difference in *Jones* is that the analyst gets there in a couple of steps instead. First, the missing tax is adjusted at the corporate level, and then the external tax is imputed at the owner level. The key is to abandon the single stage calculation and look at the valuation problem in two pieces.

Another analogous solution has been presented in *Cecil*, but while the trial was held in 2016, the decision has been pending for over three years. It applies an algebraic equation referred to as the S-corporation Equity Adjustment Multiple (SEAM) published by Daniel R. Van Vleet.

Like *Jones*, SEAM adjusts for the differences in entity-level and shareholder-level taxation between C-corporations, S-corporations and their respective shareholders. Depending on the tax rates used in the equation, the SEAM may provide an indication of S-corporation equity value that is greater than, less than, or equal to C-corporation equity. All experts in *Cecil* tax affected a discounted cash flow model with SEAM.

When you look at total tax burden, S-corporation and C-corporation tax is pretty similar. At marginal rates, the impact of an S-election compared to a C-election is generally a single digit percentage adjustment. Valuation models should track with this reality. A 67% change in after-tax cash flow at the level of the financial statements, does not translate to a 67% change in business value. But when external taxes are omitted, a court does not have the facts in the record to properly adjust, and the result may go far awry. Now in *Cecil* and *Jones*, it has those facts to address.

No Tax Effect

In seeming opposition to *Jones*, *Kress* by a U.S. District Court has been hailed to totally reject tax effecting. Don't believe that either. *Kress* came to its conclusion on its case facts. The significance of *Kress* is that it assessed both non-monetary impacts and monetary impacts of S-form. It found that the benefit of lower income tax was offset by the S-corporation's limited number of allowed shareholders. For this case, the S-election was neutral to owner value.

Justification

The second part of the Tax Court's directive is to justify the result. This means that being able to calculate a number does not mean that it necessarily should apply to the subject being valued. Economic fundamentals say no cost means no effect. For example, if the subject is profitable, a tax effect should be considered. If unprofitable, the argument can be made that form may have no effect on value. If there is nothing to tax, there is no cost or cost savings.

A decision on SEAM is pending, which I believe is under a full review of the Tax Court with this 'justification' aspect in mind. Application needs to be connected to the facts of each case, and not used as a formulaic response, or some kind of standard in and of itself.

And as *Kress* points out, S-status may affect value for reasons unrelated to profit or distributions. With S-corporations unable to issue a second class of stock, a start-up company's value may be diminished if that limitation restricts access to capital. If this condition exists, subtracting the cost of converting to a C-corporation may be the answer instead of assuming capital access will be permanently restricted or that S-election is neutral.

Accordingly, it becomes evident that solving the value-to-the-owner problem takes a well-rounded analysis of likely options, instead of a blind one-step calculation of figures.

Conclusions

Without doubt, tax costs are a legitimate issue in assess-

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Seed Financing for Startups – Let's Talk About SAFEs

By Russell Terry

When a startup is ready to raise its initial round of financing – known as a "seed" or "friends and family" round – the startup and prospective investors must determine how to structure the financing. The conventional way to structure a modest seed round is through the sale and issuance of convertible notes.

However, in recent years, SAFEs (Simple Agreement for Future Equity) have gained popularity in the startup and angel communities as a simpler and more practical seed investment instrument. This article provides a brief overview of SAFEs and how they compare to convertible notes.

What is a Convertible Note?

To provide context for SAFEs, it is helpful to understand the features of a convertible note.

A convertible note is a debt security in which an investor loans money to a company in exchange for a written promise (the convertible note) to pay the investor back. Convertible notes include the following features:

- a principal balance (the investment amount);
- an interest rate;
- a maturity date by which the company must pay the investor back (or after which a majority-in-interest of the investors can demand that the company pay them back); and
- conversion of the principal and accrued interest of the note into the preferred stock issued by the company in a future equity financing round of a minimum size, typically at a discount based on a percentage of the per-share price offered in the round or a maximum pre-money valuation of the company (known as a "valuation cap").

For experienced investors, conversion is the most important feature of the note. The goal of a convertible note investment is to receive preferred stock, on the terms negotiated and determined by a venture capital firm or other institutional investor, at a discounted price. The preferred stock will have a much higher upside than repayment of the principal and interest on the note.

Russell Terry

What is a SAFE?

SAFEs are a relatively new type of investment security, created and popularized by the leading startup accelerator Y Combinator. SAFEs were developed to be a more straightforward alternative to a convertible note.

A SAFE is, literally, a Simple Agreement for Future Equity. Investors in a SAFE receive an instrument that includes the conversion features of a convertible note – namely that their investment will convert, at a discount, into the preferred stock issued by the company in its next equity financing round – but without the debt features of an interest rate and maturity date.

Startups prefer SAFEs to convertible notes for several reasons. First, because they lack a maturity date, founders do not have to fear the possibility of reaching the maturity date prior to conversion. Second, unlike convertible notes, SAFEs are typically issued in a stand-alone format, with each investor receiving its own SAFE, a relatively straightforward document, within a series of identical SAFEs. This is a simpler format than a convertible note financing, in which the company and investors typically enter into a master Note Purchase Agreement containing various terms, representations, and conditions and also a separate convertible note with each investor. Finally, because of the reduced compilation and paperwork involved in a SAFE financing, they are fast, easy, and inexpensive.

Investors are increasingly willing to invest in SAFEs. While the lack of a maturity date and interest rate are potential drawbacks for investors, the purpose of their investment is to receive preferred stock at a discounted price. As such, convertible note investors rarely exercise their repayment rights at maturity (and the company will not typically have the funds to make repayment at that time) and focus more on the conversion discount than the interest rate.

In addition, many early-stage investors are either too inexperienced to appreciate the terms, representations, and conditions of a Note Purchase Agreement and convertible note, or too experienced to care about them in an early-stage

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

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Speaker:
Kevin W. Brown, Supreme Marketing for Attorneys

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mtc@markcoffinlaw.com

Santa Barbara County Bar Association

Verdicts & Decisions

Linea Polk/Shannon Morgan Polk v. David Gerrity

SANTA BARBARA SUPERIOR COURT, DEPARTMENT 6

CASE NUMBER:	18CV00938
TYPE OF CASE:	Personal Injury, Damp Indoor Environment/Toxic Mold
TYPE OF PROCEEDING:	Jury
JUDGE:	Hon. Pauline Maxwell, Dept. 6
LENGTH OF TRIAL:	4 weeks, 16 days
NUMBER OF DAYS/DELIBERATIONS:	½ day
VERDICT DATE:	November 22, 2019
PLAINTIFFS:	Linea Polk, Shannon Morgan Polk (Tenants)
PLAINTIFF'S COUNSEL:	Law Office Of John B. Richards
DEFENDANT:	David W. Gerrity (Landlord)
DEFENDANT'S COUNSEL:	John J. Thyne, III, Esq., Lacy L. Taylor, Esq.
INSURANCE CARRIER:	None
PLAINTIFFS' EXPERTS:	Steven Epcar, C.P.M. (liability expert), Robin Bernhoft, M.D., Roger Katz, M.D., Nate Seward, C.I.H. (mold inspector, Criterion Environmental) Mark Schniepp, Ph.D. (Economist), Paden Goeppner (mold inspector, Insight Environmental), Judy Wood (mold inspector, Insight Environmental), Wayne Ward (Water Intrusion, Foundation expert)
DEFENDANT'S EXPERTS:	Jonathan Corren, M.D., Lester Zackler, M.D., Brian Daly, C.I.H. (mold inspector, Hygiene Technologies International)

OVERVIEW OF CASE: Plaintiffs moved into the Subject Property at 510 E. Victoria St. on January 1, 2013. In or about May/June 2017, Plaintiffs reported the smell of mold in the front bedroom to Defendant's property manager and to Defendant. Defendant waited months before personally inspecting the property and then waited months before having the subject property inspected by mold inspection professionals. During this time, both Plaintiffs began to suffer adverse health symptoms. More specifically, Linea Polk began to experience memory problems, fatigue and difficulty focusing. Shannon Morgan Polk also began to experience fatigue and developed a severe rash on her body. Plaintiffs subsequently requested that Defendant provide them with copies of the mold reports he obtained from Insight Environmental and Wood Environmental so that they could: 1) have an understanding of the nature/extent of the mold problem at the subject property; and 2) give the reports to their medical providers. Defendant, however, refused to provide Plaintiffs with the mold reports as requested.

In or about October, 2017, Plaintiffs requested that Defendant hire a professional mold remediation company, however Defendant refused to hire a professional mold remediation company, and instead insisted that his untrained/inexperienced maintenance crew be allowed to conduct the mold remediation while Plaintiffs were still living at the subject property. Plaintiffs insisted that Defendant re-locate them while his maintenance crew performed the work at the house, however Defendant refused to provide Plaintiffs with the alternative living accommodations requested.

When Plaintiffs refused to allow Defendant access to the subject property, Linea Polk set up a tent and began to live outside. At the same time, Shannon Morgan Polk moved from the front bedroom to the back of the house. The front bedroom remained closed. Unable to obtain access to the property, Defendant decided to begin a roof-replacement project in

October 2017 that continued for some six months until April 2018. As a result of this six-month roof-replacement project, the subject property began to experience severe water leaks during the rainy winter months that further compromised the habitability of the subject property.

Plaintiffs and Defendant attempted to mediate their dispute in December 2017 but were unable to resolve their differences. Plaintiffs filed their complaint for personal injuries, property damage and wage loss on or about February 23, 2018 and left the subject property in April, 2018. Defendant filed his cross-complaint for property damage on May 7, 2018.

FACTS AND CONTENTIONS: At the time Plaintiffs moved in, they were given a C.A.R. residential lease to sign by the Defendant landlord's property manager, which contained an attorney fees provision allowing the prevailing party to recover reasonable attorney fees for all actions "arising out of" the lease agreement. Plaintiffs signed the subject lease and returned it to Defendant's property manager, who forwarded the lease to Defendant. At no time did Plaintiffs ever receive a signed lease back containing Defendant's signature from either Defendant or his property manager. Defendant claimed he was unable to locate a copy of the subject lease agreement which contained his signature. As a result, counsel for Defendant contended that because the parties were unable to locate a copy of the subject lease signed by Defendant (i.e., the party to be charged), Plaintiffs would be unable to obtain an award of attorney fees in the event they were to prevail at trial. Subsequently, Plaintiff served Defendant with a RFPD requesting the production of all leases on all property owned by Defendant. The Court subsequently ruled that Defendant would have to produce all leases requested unless Defendant stipulated that the subject lease, and all its provisions, would be considered in full force and effect, including the attorney fee provision. Defendant chose to stipulate to the enforceability of the subject lease rather than produce all leases requested by Plaintiffs' RFPD.

SUMMARY OF CLAIMED DAMAGES: Plaintiffs claimed damages for their personal injuries and property damage as a result of their exposure to the damp indoor environment at the Subject Property in general, and with respect to toxic mold in specific. In addition, Plaintiff Linea Polk claimed damages for lost income.
Defendant claimed damages for the harm/damage he claimed Plaintiff Linea Polk did to the Subject Property.

SUMMARY OF SETTLEMENT DISCUSSIONS: Plaintiffs' CCP 998 Offers: Plaintiffs served Defendant with 998 Offers in the amount of $85,000 on behalf of Linea Polk and $65,000 on behalf of her daughter Shannon Morgan Polk.

Defendant's CCP 998 Offers: Defendant initially served both Plaintiffs with 998 Offers in the amount of $25,250. These Offers were not accepted. Defendant subsequently served both Plaintiffs with 998 Offers in the amount of $38,250, and then revoked said Offers.

RESULT: The jury voted 12-0 to award Plaintiff Linea Polk a total of $95,650 ($75,650 on her negligence cause of action and $20,000 on her nuisance cause of action). The jury voted 12-0 to award Plaintiff Shannon Morgan Polk a total of $26,500 ($16,500 on her negligence cause of action and $10,000 on her nuisance cause of action).

The jury voted 12-0 to award Defendant $10,000 on his cross-complaint against Plaintiff Linea Polk on his negligence cause of action for property damage.

The jury denied both parties' respective claims for breach of contract.

POST-TRIAL MOTIONS: The Court determined that Plaintiffs were both prevailing parties and awarded cases costs in the amount of $33,452. In addition, the Court awarded Plaintiffs attorney fees in the amount of $231,400. The Court also found that Plaintiff Linea was entitled to reimbursement of expert witness fees per CCP 998, however the Court declined to award any expert witness fees because it claimed such fees were not properly documented.

The Court denied all of Defendant's post-trial motions.

On February 6, 2020, the Court entered judgment in favor of Plaintiffs.

On February 26, 2020, after hearing and considering the post-trial motions of both parties, the Court entered judgment in favor of Plaintiffs in the amount of $377,002.04.

On April 7, 2020, Plaintiff Linea Polk filed a CCP 473 motion for reimbursement of her expert witness fees. On April 10, 2020, the parties resolved this matter via a remote/Zoom mediation, Lol Sorensen presiding, at which time Defendant agreed to pay Plaintiffs a one-time lump sum of $350,000 within 14 days in exchange for a satisfaction of judgment.

Motions

Brownstein Hyatt Farber Schreck expands its real estate expertise with the addition of **Josh Rabinowitz** as a shareholder along with attorney **Jessica Burns**. Rabinowitz has more than 20 years of experience in California commercial real estate and business transactions.

Rabinowitz assists companies and individuals with real estate, business and related legal needs. His practice focuses on all aspects of real property matters, including leases, purchase and sales agreements, land use planning, financing, syndications, work-outs, tax deferred exchanges, easements and boundary disputes, and residential transactions. His business practice includes counseling emerging and established companies; planning, structuring, forming and advising entities (including corporations, limited liability companies and partnerships); negotiating, reviewing and drafting commercial contracts; and financings, sales, mergers and acquisitions. Rabinowitz also represents home offices in connection with various family, business and charitable matters. Rabinowitz earned his bachelor's degree from the University of California at San Diego. He earned his law degree and a master of laws in taxation from the University of San Diego School of Law.

Burns brings experience drafting and modifying commercial leases, loan documents, real estate purchase and sale agreements, easements, releases, consulting/employment agreements, and entity formation and governance documents. Burns received her bachelor's degree from the University of California, Berkeley and her law degree from the University of Southern California Gould School of Law.

* * *

Allen & Kimbell, LLP is pleased to announce that **David E. Graff** has been made a partner at the firm. Admitted to the bar in 2004, David has been practicing law for the past ten years at Allen & Kimbell.

A dual certified specialist in Estate Planning, Trust and Probate Law, as well as Taxation Law, David is equipped to advise clients in estate planning, trust administration, and tax planning.

In his estate planning practice, David represents individual clients and families to plan for the transfer of wealth from one generation to the next, to provide for friends and loved ones, and to accomplish philanthropic goals. He also counsels clients through the legal complexities that follow an individual's passing, advising on beneficiaries' rights and fiduciaries' duties and obligations. In his tax practice, David advises clients in personal and business transactions, tax controversies (including gift and estate tax audits), and real property tax matters.

David received his J.D. from UC Davis School of Law and an LL.M., Masters in Taxation, from NYU. He serves on the Boards of Directors of several local charities, including the Santa Barbara Zoo, and is active in many Santa Barbara civic organizations. Along with his wife, daughter, and dog, David enjoys traveling, hiking, and camping. His other interests include photography, scuba diving, and playing ice hockey.

* * *

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.

Attorney Renee M. Fairbanks Elected President of Santa Barbara Courthouse Legacy Foundation

Renee M. Fairbanks, a prominent family law attorney and community volunteer, is the new president of the Santa Barbara Courthouse Legacy Foundation. Fairbanks was elected president by the foundation's board on April 21. The Santa Barbara Courthouse Legacy Foundation is dedicated to the conservation, restoration, and educational legacy of the historic Santa Barbara Courthouse.

"I'm so honored to have the opportunity to lead this incredible organization," said Fairbanks, an attorney and certified family law specialist with family law offices in Santa Barbara and Los Olivos. "The Santa Barbara Courthouse is an icon for our community, and my goal is to ensure this magnificent building can be enjoyed for many generations to come."

Completed in 1929, the Santa Barbara Courthouse is a nationally recognized architectural gem and one of the most famous examples of the city's Spanish Colonial Revival civic style. While the County of Santa Barbara is responsible for maintaining the Courthouse, it does not have the artistic resources or funds to authentically restore the building.

The Santa Barbara Courthouse Legacy Foundation is the only organization dedicated to preserving and restoring the Courthouse, which has been designated a local, state, and national historic landmark. Since its founding by a small group of committed citizens in 2004, the foundation has funded numerous conservation projects, including restoring murals and paintings, rehabilitating the Hall of Records, and restoring the Courthouse Seth Thomas Tower Clock.

Fairbanks has served on the foundation's board since 2018. She is also active in many other community organizations, including the Legal Aid Foundation of Santa Barbara County, the Fund for Santa Barbara, and the local Animal Shelter Assistance Program.

A graduate of UCSB and Santa Barbara College of Law, Fairbanks has spent more than a decade advocating for clients in divorce, legal separation, support, parentage and custody proceedings in Santa Barbara County and along the Central Coast. She is a member of the Santa Barbara County and the Northern Santa Barbara County bar associations, a past president of the County Bar Foundation, and a former board member of Santa Barbara Women Lawyers. She is also an adjunct professor of law at the Santa Barbara College of Law, where she teaches community property.

For more information about the Law Office of Renee M. Fairbanks visit www.reneemfairbanks.com/, or contact assistant@reneemfairbanks.com ■

Lisi, *continued from page 23*

ing shares of every company, but there is no rigid requirement on the effect, either way. The effect can be avoided by simply not valuing S-corporations with C-corporation data, and instead use M&A deal data. As an alternative to complicating the modeling, this removes the fundamental mismatch.

Twenty years of cases went before the Tax Court before a successful tax effecting argument was made. Locked into standardized data, making poor assumptions and executing terribly, results were unconnected to relevant S-corporation business factors. Let that sink in for a moment. For sixty-one years from 1958 to 2019, S-corporation valuations presented to the Tax Court were unacceptable. Now, we may be coming close to some relevant structure.

The Tax Court has put forth two requirements which make sense: base results on total tax burden to the owner and justify the result. *Kress* then points out that qualitative issues related to an S-form must be considered as well as the quantitative ones.

As for the S-election, nothing has really changed, other than that AICPA aligned professionals may finally be 'seeing' a solution. As always, it remains the valuation analyst's job to investigate the facts, find the differentiators, apply the right data and make their case. ■

James A. Lisi is the owner of Santa Barbara Valuations Inc. He has completed over 300 valuations, evaluated close to 100 angel investment opportunities and has been involved in a half dozen M&A deals. He has operating experience in Fortune 100, Private Equity and his own personally held businesses.

His valuations focus on closely-held companies, real property holding entities and growth companies of $2 million to $50 million in revenue. He has worked with clients in technology, internet, aerospace, industrial distribution, consumer goods and services, franchises and financial services. Jim brings the structured approach of economic analysis together with finance and market principles in his valuations. His reports have been used in support of business sales, estate and gift matters, 409a, ESOP, founder exits, divorce and discounts. The IRS has accepted all his reports to date.

Jim is a member of the National Association of Certified Valuators and Analysts (NACVA), holding the Certified Valuation Analyst (CVA) designation, a former Tech Coast angel and former Finance instructor in Antioch University's MBA program.

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mtc@markcoffinlaw.com

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Jeff@Chamblisslegal.com

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Carissa Horowitz 708-6653
cnhorowitz@yahoo.com

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alex@craigielawfirm.com

Estate Planning/Probate
Connor Cote 966-1204
connor@jfcotelaw.com

Family Law
Renee Fairbanks 845-1604
renee@reneemfairbanks.com
Marisa Beuoy 965-5131
beuoy@g-tlaw.com

In House Counsel/Corporate Law
Betty L. Jeppesen 450-1789
jeppesenlaw@gmail.com

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

Mandatory Fee Arbitration
Eric Berg 708-0748
eric@berglawgroup.com
Naomi Dewey 979-5160
naomi@trusted.legal
Vanessa Kirker Wright 964-5105
vkw@kirkerwright.com

Real Property/Land Use
Joe Billings 963-8611
jbillings@aklaw.net

Taxation
Peter Muzinich 966-2440
pmuzinich@gmail.com
Cindy Brittain 695-7315
cindybrittain@gmail.com

Feature

Terry, *continued from page 24*

round. A SAFE is a simple instrument that accomplishes the primary goals of both the company and investors without any added complexity.

Tax Treatment

As a new-ish instrument, the tax treatment of SAFEs is not well established. SAFEs lack both the typical characteristics of debt and the typical characteristics of equity. So, for tax purposes, SAFEs could reasonably be characterized as debt, equity, or potentially a derivative instrument similar to a prepaid forward contract. The current and future tax liabilities and benefits of a SAFE depend on that characterization. Due to that uncertainty, some investors may prefer the vetted tax treatment of a convertible note or feel uncomfortable taking an uncertain or aggressive tax position with respect to a SAFE.

Going Forward

SAFEs provide the features and simplicity valued by both startups and early-stage investors. SAFEs are becoming increasingly common and are likely to have broad appeal as investors become familiar with them. Expect to see SAFEs gaining on convertible notes as the seed instrument of choice in the coming years. ■

Russell Terry is a Partner in Reicker, Pfau, Pyle & McRoy LLP's corporate group. His practice focuses on emerging companies, mergers and acquisitions, debt and equity financing, and business ventures. During his 10 years in practice, Russell has represented dozens of companies in financing rounds with angels and VCs and exit sales to financial and strategic buyers.

The Santa Barbara County Bar Association will be postponing its June barbecue in compliance with Governor Newsom's order "to prohibit ALL gatherings of any size, effective immediately."

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