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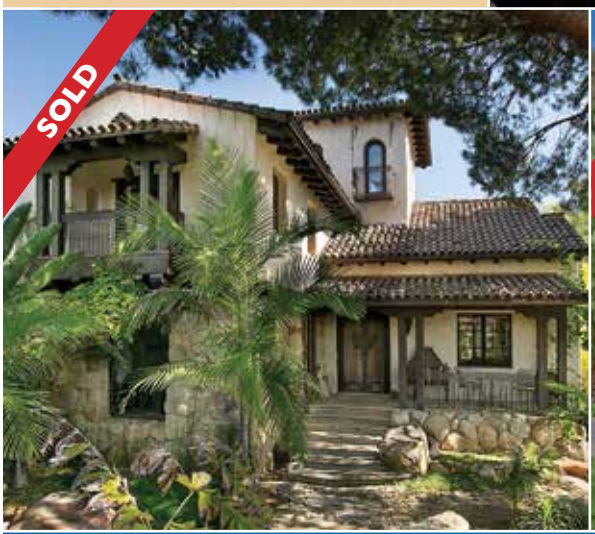

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On the Cover

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Spotlight on Judge Pauline Maxwell

I grew up in Boston, the oldest of nine children, which was surprisingly good training for a Judge. Keeping the family peace meant mediating among a lot of different personalities. After graduating from high school, I attended Massachusetts General Hospital School of Nursing, and became a Registered Nurse. I worked for 10 years in the medical field before staying home to raise my two sons for eight years.

When I was forty, I began law school at the University of California, Los Angeles. I received my J.D. in 1998. After law school, I joined the litigation section of a large firm in Century City. I enjoyed working there for four years, but not the commute. I then worked at Grokenberger & Smith as a litigator before becoming a research attorney for the Santa Barbara Court in 2006.

In 2010, I was appointed to the Bench as a Commissioner, and worked in the treatment courts. In 2014, Governor Brown appointed me as a Judge. I am excited to work as a Judge in Santa Barbara, and will become the Assistant Presiding Judge in January, and Presiding Judge in 2023. These will be difficult years as the Court deals with budget cuts, but also must reopen safely.

The most important changes I would like to see in the judicial system involve increasing access to justice, particularly providing more help for Self-Represented Litigants in Civil and Family Law, and simpler instructions on forms, as well as increased access to interpreters. COVID restrictions, unfortunately, have instead greatly limited access to justice. I hope that we will be able to change that soon. I am encouraged by some of the current trends in criminal law, especially the interest in keeping the mentally ill out of prison, and the increase in services offered to inmates when they are released. I would really like to see a more gradual release system, such as the half-way houses they have in Sweden, where supervision is decreased as released inmates establish connections in their community and take steps toward becoming housed and employed.

Judge Maxwell and extended family.

I thoroughly enjoy the Santa Barbara Bar. When I was assigned to areas of the law I was unfamiliar with, I found our lawyers very knowledgeable, and very willing to educate me. Having attorneys who come to court prepared, and able to remain professional even in contentious situations make a Judge's

Continued on page 19

Evictions and Covid-19: The Uncertain Meets the Unknown

By Anthony Principe

The Central Coast has not been spared the havoc wrought by Covid-19 on nearly every aspect of life. From stay-at-home orders to shuttered businesses across the country, tens of millions of Americans have filed for unemployment and face an uncertain future both in the short and long-term. Unfortunately, this abrupt halt to the economy has impacted the ability of people to afford and make payments on essentials, such as housing. This confluence of Covid and the legal system has ushered tenants, landlords, their respective attorneys, and the entire State's Court system into the unknown by forcing them to confront the effects of the pandemic within the confines of a legal framework in constant flux.

Guidance for eviction procedures at this time come from both a federal and state level. Initially, the Judicial Council of California voted to place a prohibition on summons, effectively halting any commercial or residential evictions from moving forward. However, the Judicial Council is the rulemaking arm of the state's court system and its summons prohibition was an unprecedented move that strayed from its stated purpose. In August, hoping for California's elected lawmakers to assume their stated role, the Council overwhelmingly voted in favor of shedding its new quasi-legislative capacities by letting the prohibition expire September 1, 2020 and yielding to legislators. Working quickly, the State passed Assembly Bill ("AB") 3088 and Governor Newsom signed it into law in early September.

The Impact of Assembly Bill 3088

Before discussing its contents, it is important to note that, with AB 3088, the State sets various dates as markers for the pandemic, which, although arbitrary, do provide some sense of foundation. Indeed, the Bill seems to set March 1, 2020 as the date the pandemic, and its effects, started to take hold.[1] It then sets what is referred to as the "protected time period," best understood as the most economically destructive time of the pandemic, as March 1, 2020 to August 31, 2020.[2] Finally, AB 3088 defines what they call the "transition time period" as September 1, 2020 to January 31, 2021.[3] The transition time period should be thought of as the time period where the worst of the economic impact is behind us but uncertainty and problems remain.

Anthony Principe

In order for the court system to prepare for its impact, AB 3088 set a prohibition on residential unlawful detainers before October 5, 2020 that are based on the nonpayment of rent.[4] It then states that, before February 1, 2021, a residential unlawful detainer can only proceed if: (1) the tenant was guilty of the unlawful detainer before March 1, 2020; (2) the action arises from an at-fault just cause or no-fault just cause reason; (3) the owner is selling the unit to a new owner that intends to occupy the unit; or (4) in response to a notice of Covid-19 rental debt, the tenant failed to comply.[5] These are the only justifiable reasons for a residential unlawful detainer before February 1, 2021, regardless of the type of residence or how long the tenant has resided in the unit. Clearly, it is this last noted basis that will be most common and a headache for landlords.

Until February 1, 2021, any notice to pay rent or quit that is based on rent due during the protected or transition time period must be 15-days.[6] In addition, in such a circumstance, the landlord must provide the tenant an unsigned declaration, which essentially states the tenant suffered some economic hardship from Covid-19, and notify the tenant that if he/she signs and returns the declaration within the 15-day period, he/she cannot legally be evicted.[7]

If the tenant returns a signed declaration for rent due during the protected time period, the landlord has no recourse save for pursuing the unpaid amount in small claims court starting March 1, 2021 (if still unpaid by then).[8] If the tenant returns a signed declaration for rent due during the transition time period, the landlord cannot seek an eviction and the tenant's only obligation is to pay 25% of the unpaid rent that came due during the transition period on or before January 31, 2021 (though they still legally owe the full amount).[9]

The Impact of the CDC Order Prohibiting Residential Evictions

If this system proscribed by the State was not confusing enough, the Centers for Disease Control and Prevention ("CDC") also recently passed a federal prohibition on all residential evictions.[10] This is an extremely unusual move,

though it does seem that the CDC has a legitimate interest in keeping tenants from being evicted and ensuring they do not end up homeless or in shelters. The CDC order states that residential evictions cannot move forward for the nonpayment of rent through the end of the year. However, in this case, it is on the tenant to garner the protection afforded by finding the necessary declaration to sign and to return to the landlord when an eviction is threatened.[11] The declaration states the tenant fits within a certain economic threshold and had some economic hardship; that they've made best efforts to make payment and secure governmental assistance; and that eviction would force them into homelessness or close quarters with others.[12]

The CDC order only allows residential unlawful detainers to proceed in limited, defined circumstances.[13] It is entirely unknown how local judges will interpret this CDC order, and it is widely anticipated such interpretation will vary by jurisdiction. At times, it seems the CDC order contrasts with AB 3088, and it is equally uncertain how the legal system will rule on these differences. The penalties for non-compliance with the order are significant.

Conclusion

To be clear, there is no statute, order, or directive that relieves a tenant of rent payments at this time, even with notice of inability to make payment. However, with that being said, it is important to remember that we are all being impacted by this unprecedented pandemic and are all in this together. Tenants, both commercial and residential, are facing legitimate and extremely significant impacts due to Covid-19.

In this extremely uncertain time, a prudent landlord would assess each tenant on a case-by-case basis and actively work with financially-affected tenants to reach agreements that are in the interest of both parties, such as the payment of partial rent for a limited amount of time with the remainder spread over the term of the lease. Landlords could also simply forbear rent and require repayment in a lump sum when the tenancy ends, or agree to a rent reduction in exchange for an agreement to extend the term of the lease, which would work to give both parties more security.

Though not provided protections, for commercial tenants, landlords could accept rental payments in the form of goods or services or modify the rental payments to reflect a percentage of sales or gross revenue. As landlords and their attorneys are aware, litigation is expensive and judgments regularly are not collectible because of insolvency, which makes avoiding litigation a practical and important consideration.

Landlords are walking a tight-rope and need to proceed very carefully these next few months. To add, although California law provides we are in the transition time period, tenants all over the State are struggling and will continue to struggle for reasons entirely out of their control. While it is clear many landlords are also in a predicament, compassion is warranted wherever possible. Clearly, if tenants cannot pay rent, it is unlikely they will fulfill a court judgment so, as always, working together and reaching mutually agreeable resolutions outside of the court system is in all parties' best interest. ■

Anthony Principe is an associate attorney in the civil litigation department at Kirk & Simas in Santa Maria. He primarily practices landlord-tenant and employment law. Anthony received his J.D. from the University of San Francisco School of Law and a B.A. from Cal Poly, San Luis Obispo.

ENDNOTES

1 Cal. Code Civ. Proc. § 1179.02 (a)
2 Cal. Code Civ. Proc. § 1179.02 (f)
3 Cal. Code Civ. Proc. § 1179.02 (i)
4 Cal. Code Civ. Proc. § 1179.01.5 (a)-(b)
5 Cal. Code Civ. Proc. § 1179.03.5 (a)(1)-(3)
6 Cal. Code Civ. Proc. § 1179.03 (b)(1), (c)(1)
7 Cal. Code Civ. Proc. §1179.03 (b)(3), (c)(3)
8 Cal. Code Civ. Proc. § 1179.03 (b)(4)
9 Cal. Code. Civ. Proc. § 1179.03(c)(4)
10 85 FR 55292
11 *Id.*
12 *Id.* at 55293
13 *Id.* at 55294

Three Keys to Financial Success

By Kevin Bourke

Recently I was asked, "How does a person get rich?" It seems like a pretty common desire so I thought I'd address it. There are many factors but I've noticed over my thirty plus years as a financial advisor that there are three commonalities of financially successful people. It's actually pretty simple, although it isn't easy. Otherwise more of us would be wealthy.

Earning power.

In her teen years, Olivia decided that she wanted to work in hospitality as an event coordinator. She attended one of the best hospitality university programs in the country. After graduating and working in her chosen profession for a couple of years, she realized that she would never earn enough money to live the life she'd imagined.

What did Olivia do? She entered a different industry that offered more earnings potential. The lesson? Recognize that your chosen profession may never enable you to be 'rich.' If you have a passion for what you do and you find it fulfilling, then by all means follow your heart, but recognize that this may limit your ability to be wealthy.

Spending Habits.

This, as they say, is where the rubber meets the road. It's interesting to me that most people seem to think that earning power is the most important criteria when my observation is that, while earnings matter, getting rich is more about spending. Even a $1 million income can't cover $1.1 million in spending.

One wealthy family I know never had more than $115,000 per year in household income. But when the dad, Jim, retired at age 60 the family was worth multiple millions. This happened even though his wife never worked outside the home and they raised two children.

How'd they do it? They were conscious of their spending and they invested as much as they could afford consistently every month. When they purchased expensive items, they bought items that increased in value rather than decreased in value. They lived by the saying, "Live in a mansion but drive a VW."

Kevin Bourke

Over the course of my career I've had hundreds of conversations with people regarding my profession. When they learn I'm a wealth manager they nearly always laugh and say, "If I had wealth to manage, I'd hire you."

I then ask them how they're doing in maxing out their 401(k).

"Oh, I can only afford to contribute a small amount. The next time I get a raise, though…" or they tell me that they contribute just enough to get the company match.

Let's follow the logic. Unless this is the person's first job, they've likely gotten raises before. Where did that extra money go? A slightly better place to live, a little bit better car, nicer vacations, the latest technology, more dining out… you get the picture. The hoped-for raise that would allow them to fully fund their 401(k) seems to be ever elusive.

Unfortunately, nearly all Americans jump on this spending wheel and never get off. A person who is destined to be rich will more likely save that money in a retirement plan or will save to buy an asset that will then generate the income to buy the better car.

If you want to be financially rich, memorize this phrase, "pay yourself first." It means that BEFORE you spend your hard-earned cash on 'stuff,' invest in something that will grow and be available to you in later life. An example of paying yourself would be maxing out your 401(k) contribution rather than taking on that new car payment.

"The chief cause of failure and unhappiness is trading what we want most for what we want at the moment." – Zig Ziglar. Delayed gratification is mandatory in the quest to be financially rich.

Investment Approach.

Peter's parents had built a small empire of real estate rentals and seemed to be in good shape financially, so he learned from their example and decided to take an unusual approach. When most of Peter and his wife Sara's friends were buying their first family home, these two instead purchased a rental property. At a relatively young age they are well on their way to being financially successful.

In another case, Jill had read that the sooner a person began investing, the sooner a person could potentially

be financially independent, so at the tender age of 19 she opened a Roth IRA. While Jill could not contribute the maximum in the beginning, she started contributing 50% of her net pay from day one. Jill could have chosen what many others her age chose and spent the income from her part time job on items such as jeans or a better car. Instead Jill invested in the capital markets using mutual funds and Exchange Traded Funds (ETF). Jill is also well on her way to being financially successful.

The lessons here? Invest in assets that appreciate in value and start as early as possible. Now would be a good time to begin, regardless of age.

You see, accumulating money isn't actually that difficult. With a little bit of self-discipline, a dash of delayed gratification, a dedication to becoming financially literate and a reasonably lucrative choice of career, you too really can be financially rich. ■

As the founder of Bourke Wealth Management and author of the book Make Your Money Last a Lifetime®*, Kevin Bourke has worked extensively in the field of financial management since 1987. His designations include CERTIFIED FINANCIAL PLANNER™ (CFP®) and Chartered Financial Consultant. As a way to give back to the community, he taught the Certified Financial Planner ™ Board of Standards curriculum at the University of California Santa Barbara (UCSB). He's also been a member of the Santa Barbara Estate Planning Council for several years.*

Bourke has been featured on various media outlets including Yahoo! Finance, Fox, ABC News/KEYT and the Santa Barbara Independent. As a public speaker he's given hundreds of lectures on a variety of topics, ranging from how to thrive financially after divorce, to estate planning, to how to make philanthropy a profitable act of giving.

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California Law and Procedure on Bail after Proposition 25

By Robert Sanger

Robert Sanger

There were several ballot measures on the recent General Election Ballot in California. One of the more perplexing was Proposition 25, to repeal Senate Bill 10.[1] Prop 25 was funded by the bail bond industry.[2] SB 10 eliminated money bail but, before it took effect, the bail industry qualified the ballot measure, and eventually designated Prop 25 to stop it. Perhaps counterintuitively, a "no" vote on Prop 25 meant that the bail industry would win and stay in business. They did win—"no" on Prop 25 carried the day. SB 10 is out and money bail remains.

Many readers of this journal understood most, if not all, of this before voting in the election. However, it is worth briefly covering why it is that, for instance, California Attorneys for Criminal Justice (CACJ) and the NAACP favored a "no" vote. In addition, the legal landscape after Proposition 25 is not the same as before the passage of SB 10. The Supreme Court has ruled on three cases in the interim, and the counties have instituted some of the procedures contemplated by SB 10 even though it never went into effect. Therefore, this month's *Criminal Justice* column will briefly review why this result in favor of the money bail system may have been the lesser of two evils. It will then analyze the current law and procedures pertaining to California's bail system in light of this election result, in light of new rulings from the California Supreme Court, and in light of some of the modifications to the bail system put into place in anticipation of SB 10.

No Money Bail Under SB 10 to Money Bail (again) under Prop 25

SB 10 was signed into effect by then Governor Jerry Brown on August 28, 2018 and was scheduled to take effect on October 1, 2019.[3] It would have ended money bail. Money bail is the paradigm of our system for release of an accused pending trial. Bail is initially based on a bail schedule,[4] or on a judicial determination *ex parte* by way of a warrant of arrest.[5] In most counties, a pretrial bail process exists so that a bail review can occur at the jail on non-warrant cases and that review could result in a court order for release on the person's own recognizance or conditions of increased or decreased money bail. Whether a person actually has money or property has a lot to do with whether he or she would actually be released since property ownership, ties to the community and employment are generally considered in pretrial officers' evaluations. Once a person is arrested, he or she can immediately post cash in the bail amount, pay for a bail bond or go through a complicated process of posting real property with equity equal to twice the bail amount.[6] Alternatively, the person can wait to see if a pretrial services reviewer will recommend a lower bail or an own recognizance release. The end result is that those who have money or property are likely to go home pending trial, and those without means are more likely to stay in jail.

Thus, bail reform—basically doing away with money bail and creating fair non-monetary criteria for pre-trial release—seemed overdue. Justice Kline had said so in *In re Humphrey* (2018) 19 Cal.App.5th 1006. SB 10 was, in part, in response to Justice Kline's opinion which directly challenged the legislature to come up with a remedy. Unfortunately, there were significant problems with SB 10. It gave superficial recognition to the societal goals of 1) assuring a person's appearance at court and 2) avoiding the release of a person who would offend while awaiting trial.[7] However, it created presumptions based on the crimes for which the police arrested a person, but these presumptions were not logically related to the societal goals of assuring appearance at court or avoiding reoffending. It also enacted the use of "risk assessment tools," alternatively referred to as "risk assessment instruments" to make a combined—and unscientific—determination of whether a person was 1) likely to appear and 2) likely to offend. In addition, the process did not allow for early release for some categories of alleged crimes. In fact, since under SB 10 there was no money bail, many people would have to wait several days or more to have a pretrial detention hearing and, if not released then, they would have to spend the rest of the time prior to trial in custody. All of these issues were examined in detail two years ago in this *Criminal Justice* column in a three-part series.[8]

Of course, if SB 10 had actually ben implemented, some

people with little money or property might have been released where they might not otherwise have been able to make bail. High bail under the money bail scheme, or even low bail with people who have limited means, resulted in de facto detention. SB 10 removed that restraint on release. But, under SB 10, other people, with or without money or property, might have ended up being detained without any ability to be released prior to trial. What originally was a progressive attempt to remove money bail turned into a scary process to evaluate people based on presumption of guilt and on non-scientific "risk assessment instruments."

When the dust settled, it seemed clear to many, including criminal defense and civil rights groups, that the bail bond system, as compared to the preventive detention system of SB 10, was the lesser of two evils. For instance, although CACJ had long opposed money bail, it concluded that SB 10 created a system that was even more pernicious and more likely to cause detention of people who would both make their appearances and not offend pre-trial. A "no" on Proposition 25 meant that SB 10 would be repealed – having never taken effect. That was the will of the voters and "no" carried the day.

White, Pena *and* Humphrey *Part III*

However, the demise of SB 10 does not revert to the law as it was prior to its passage because, for one thing, the California Supreme Court interceded with its own rulings. The *In re Humphrey*[9] and *In re White*[10] cases were granted review by the California Supreme Court prior to the enactment of SB 10. Although they were granted review at the same time and with similar issues flagged, the *White* case was eventually fully briefed and decided by the Supreme Court[11] while the *Humphrey* case languished (and still languishes) while extensions of time were requested by the parties to file their briefs. Nevertheless, although *Humphrey* still is to be decided, the Supreme Court considered a petition for review in the *Pena* matter.[12] On August 26, 2020, the California Supreme Court issued orders in in both *Humphrey* and *Pena* matters stating, respectively, that "Part III of the [*Humphrey*] opinion [by Justice Kline] now has precedential effect" and that the trial court in *Pena* entertain a renewed motion for release in light of that same Part III of the *Humphrey* Kline opinion.[13]

This changes the law in a somewhat convoluted and in a fashion yet to be completely resolved. The *White* case addressed a non-money bail question but the outcome foreshadows the approach it will take in the *Humphrey* case where money bail is addressed. *White* delt with the question of how a trial court must address the issue of detention before bail could be denied under Article I, section 12(b) of the California Constitution. This article permits holding a person on no bail for certain offenses. The Supreme Court, in *White*, required that such an order be made only after there was an "individualized determination" of the facts related to the particular defendant and the particular circumstances of the case. In that case, the relevant facts related primarily to public safety and the safety of the alleged victim.

The opinion in *White* suggests that the Court will take a similar approach to the determination required to set money bail, particularly money bail that is so high that a person cannot make bail at all – which is pretty much why people who are still in jail with a bail set are still there. By making Part III of *Humphrey* of precedential effect, the following language is now the law of California:

"Once the trial court determines public and victim safety do not require pretrial detention and defendant should be admitted to bail, the important financial inquiry is not the amount prescribed by the bail schedule but the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing."[14]

Therefore, since SB 10 was enacted, stayed and eventually repealed, the law on bail has been modified. Both *White* and *Humphrey* require an individualized determination as to the threat to public safety. Then, for the setting of monetary bail, the question focuses on the amount that would be required to secure the appearance of the accused at court. *Humphrey* prohibits de facto pretrial detention by way of high bail unless there is "clear and convincing evidence" of flight risk or danger to public safety and when less restrictive, nonfinancial means are available. A bail schedule can be used to set bail upon arrest, however, once there is a contested bail hearing, the court, according to Humphrey, must make an "individualized evaluation" of the "circumstances and propensities" of the defendant in that particular case.[15]

The Incursion of SB 10 Procedures into Bail Determinations

So, some of the abuses of money bail have been addressed by the California Supreme Court through *White* and *Humphrey*, with a nudge from *Pena* – all since SB 10 was enacted. There is reason to believe that the Court will further refine the rules with regard to the money part of the equation when it finally decides *Humphrey* itself. But, for now, we have the guidance of at least a part of Justice Kline's pioneering work, Part III of his Court of Appeal opinion. We now seem to at least have a requirement of an assessment of likelihood of appearance and an assessment of public safety leading to a determination of the ability of the individual to actually make bail. There is still much

room for legislative action—including the elimination of money bail—but that will require coming up with a better system than was proposed in SB 10.

However, some counties have already incorporated some of the procedures that were contained in the ill-fated SB 10 into their local procedures. These include creating new bail review departments within the probation department and creating a new vocabulary consistent with the moribund SB 10 jargon. The biggest incursion that SB 10 has made in county bail determinations is the use of pseudo-scientific "risk assessment tools" or "risk assessment instruments." The presumptions of guilt, the protracted procedures and, ultimately, preventive detention *per se* did not survive the repeal of SB 10. Nevertheless, counties have incorporated a statistical process—using the vacuous but pompous sounding term "risk assessment instrument"—asserting without evidence that proprietary algorithmic computer programs, based on dubious foundations and even more dubious data input, constitute reliable "tools" or "instruments." This is nothing more than computerized preventive detention. This argument was made in detail and with citations to supporting materials in the January 2019 *Criminal Justice* column a link to which is accessible online.[16]

In brief summary, these "instruments" are supposed to assess both likelihood of appearance and likelihood of offending pre-trial. Scientifically, those two cannot be assessed on a single scale or with a single "instrument." They are separate questions. Furthermore, the "instruments" are simply computer programs that are programmed with data. The input may be from the individual or it may be from a pretrial worker. It may be based on verified information or on statements from, for instance, the arresting officer. Some of the information is correlated by the software to socioeconomic circumstances. The programs do not take into account alternative approaches to pretrial services that may assist arrestees in improving their immediate circumstances so that they would be more likely to show up and less likely to offend.

These "instruments" are being used to deprive a person of liberty. This deprivation may be for weeks, months or even years while awaiting trial. That deprivation may also lead to an increased likelihood of a plea to a crime that the person did not commit simply to get out of jail. Studies show that people out on bail are likely to get shorter sentences even if they do plead.[17] This is all the more important during the current pandemic. Cases have been delayed and pretrial detention has increased in may cases significantly while waiting for courts to be able to conduct meaningful trials.[18]

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As a result of the fact that the "instruments" are being used as evidence by judges to deprive a person of liberty and that the deprivation of liberty, significant in itself, is accompanied by consequences for due process, there is a constitutional and foundational basis to exclude this evidence. As set forth previously in the January 2019 issue, neither foundational validity nor validity as applied has been established for the admission of this evidence. Foundationally, alone, studies show that the ability to predict that a person will commit an offense prior to trial for these "instruments" is around 8.6%. That is barely a bad guess, let alone a valid forensic basis for an opinion.

The use of such instruments is subject to *Daubert*[19]and *Sargon*[20] just as would be any other forensic test procedure. *Daubert* considers "proficiency testing" to be a part of any valid forensic test. *Sargon* does not permit speculation in forensic opinions. The admissibility of the test results of a "risk assessment instrument" or an opinion based on such an "instrument" does not meet the requirements of *Daubert* or *Sargon*. Think of an expert coming into court and testifying that a substance was, say, cocaine using a test that is only 8.6% accurate. Whether by litigation or by legislative intervention, these "instruments" should be eliminated from any role in detention.

Must We Continue to Have Money Bail Despite the Failure of SB 10?

A fundamental question remains as to what can be done about eliminating money bail iteself. For one thing, it would have to be done in a way that CACJ and the NAACP, for instance, would not be forced to object as they did to SB 10. That will require a rethinking of pretrial detention in general and the use of other pretrial programs. As argued in the previous 2019 article, and substantiated by research, the holistic approach to collateral issues in the lives of pretrial defendants can have a salutary effect on both appearing and on not offending. The privatization of risk based on money and property has to be abandoned. In fact, locking people up as the default, rather than the exception, has to be challenged.

Most people—other than the wealthy or folks who have stashed enough money to make bail if they are accused of a crime—do not benefit from money bail. Even with requirements of *Humphrey* Part III, money bail is not rationally related to the societal goals of assuring appearance in court and not offending prior to trial. The wealthy will *always* have the advantage, the white middle class will *often* have the advantage, and the poor will languish in jail awaiting trial. The legislature has to go back to the drawing board to craft a clear, evidence-based policy that can be implemented. Then, and only then, will there be broad support to overcome the bail industry.

To make it even more complicated, if a reasonable solution can be found both conceptually and politically, there is one more legal impediment. Where a law has been repealed by referendum, as SB 10 was by Prop 25, there are limitations on new legislation addressing the same subject. Article II, section 10(c) of the California Constitution prohibits the legislature from simply re-passing legislation on which the people have voted. Although there has been much litigation in other contexts, it appears that the rule is that new legislation cannot simply re-enact the prior statute, in this case SB 10. However, if the new legislation is "essentially different" from the repealed provisions and is enacted in good faith, it may be permissible.[21]

The subject of bail reform is not precluded by Prop 25. A simple reintroduction and adoption of SB 10 would, of course, be impermissible. However, SB 10 was a complex piece of legislation. The repeal of money bail was only a part and a new law addressing that issue should not be barred. It seems that the Byzantine procedural requirements, the

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presumptions based on crimes charged, time periods for initial detention, and risk assessment—especially risk assessment based on "risk assessment instruments"—could be replaced in any new legislation with other, more effective and constitutional provisions.

Conclusion

The bail system is broken—notwithstanding the rejection of the efforts of the legislature to cobble together SB 10 as an alternative, bail reform is a legitimate goal. Money bail makes no sense and it is discriminatory. Preventive detention, especially where it is not evidence based, also makes no sense and is discriminatory. The bail landscape has changed a bit since SB 10 was attempted based on the new Supreme Court opinion in *White* and based on the *Humphrey* and *Pena* orders. Those cases leave room to re-evaluate cases of people already in custody and to resist a default of custody for those who are subject to current bail review. "Risk assessment instruments" have to be challenged in litigation and rejected in any future legislation. To resolve things overall, the legislature has its work set out before it ■

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 47 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 Past Chair of the Board 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. ©Robert M. Sanger.

Endnotes

1 Proposition 25, November 3, 2020 California General Election, submitting the proposed legislation included in Senate Bill 10 of the 2017-2018 Regular Session, Chapter 244 of the Statutes of 2018, for a referendum under Section 9 of Article II of the California Constitution.

2 Triton Management Services, Bankers Insurance company, AIA Holdings, Lexington National Insurance Corporation and American Surety Company, as listed on Ballotpedia.

3 Penal Code §1320.34.

4 Penal Code §1269(b) and Government Code § 72301. Bail schedules are required to be maintained by each county and, therefore, differ from county to county.

5 The judge shall set the amount of bail when issuing an arrest warrant. Penal Code § 815a.

6 Penal Code § 1298. The process for posting property requires obtaining a title policy and an appraisal along with a proper deed of trust.

7 Under a strict reading of the law, the court may consider the nature of the charges (not a presumption of guilt) in determining bail. The California Constitution states that bail must be set based on the seriousness of the alleged crime, the record of the accused and the probability of his showing up in court and not based on a "public safety" criterion except in violent felonies or cases of threats. (California Constitution, Article I, section 12.) The public safety language in the printed Constitution should have no effect. *People v. Standish* 38 Cal.4th 858, 874-875 (2006); *People v. Barrow* 233 Cal.App.3d 721, 723 (1991); see also *In re York* 9 Cal4th 1133, 1140 n.4 (1995): "Because Proposition 4 received more votes than did Proposition 8, the bail and OR release provisions contained in Proposition 4 are deemed to prevail over those set forth in Proposition 8. (Cal. Const., art. II, § 10, subd. (b); *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255, 186 Cal.Rptr. 30, 651 P.2d 274; *People v. Barrow* (1991) 233 Cal.App.3d 721, 723, 284 Cal.Rptr. 679 [additional citations omitted.]" However, this has been glossed over in *In re Humphrey* (2018) 19 Cal.App.5th 1006.

8 See, Santa Barbara Lawyer Magazine, November and December 2018 and January 2019, "*The Need to Revise the New Bail Law – Parts I, II, and III.*"

9 *In re Humphrey* (Review granted May 24, 2018, S247278, lower court opinion at 19 CA5th 1006).

10 *In re White* (2020) 9 Cal.5th 455 (review granted May 23, 2018, S248125, lower court opinion at 21 CA5th 18).

11 *In re White* (2020) 9 Cal.5th 455.

12 *In re Gil Pena on Habeas Corpus*, S263336. A Petition for Review was pending and the Supreme Court ordered informal briefing on the issues relating to bail that were also in front of the Court in the stalled *Humphrey* case. (Disclosure: the author's firm, by attorney Sarah Sanger, represented the Petitioner in the *Pena* matter before the Supreme Court.)

13 *Humphrey, supra,* 19 Cal.App.5th at p. 1041-1045.

14 *Humphrey*, *supra*, 19 Cal.App.5th at p. 1044.

15 *Humphrey*, *supra*, 19 Cal.App.5th at p. 1040; and compare the language of "individual determination" in *In re White* (2020) 9 Cal.5th 455.

16 *"The Need to Revise the New Bail Law – Part III,"* 556 Santa Barbara Lawyer 8 (January, 2019) at: https://sblaw.org/wp-content/uploads/2019/01/556-1.pdf.

17 Emma Andersson and Jeffrey Robinson, "*The Insidious In justice of the Trial Penalty*," 31 Federal Sentencing Reporter, 222 (2019).

18 Ryan Cannon, "*Sick Deal: Injustice and Plea Bargaining During COVID-19,* Journal of Criminal Law and Criminology Online, (forthcoming, June 21, 2020), Available at SSRN: https://ssrn.com/abstract=3632508 or http://dx.doi.org/10.2139/ssrn.3632508.

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

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

21 See, *Assembly of State of Cal. v. Deukmejian*, 30 Cal.3d 638 (1982).

Motions

NordstrandBlack PC is pleased to welcome **Daniel Bauerlein** to our team of personal injury attorneys. For the last three years Daniel Bauerlein worked as a Legal Assistant at NordstrandBlack while he attended the Santa Barbara College of Law. In December 2019, he graduated third in his class with honors and then passed the February 2020 Bar Exam.

Daniel Bauerlein

Daniel brings a wealth of experience and knowledge to the firm. Daniel earned a B.S. in Environmental Science, Technology, and Policy from California State University, Monterey Bay. Thereafter he enlisted in the U.S. Coast Guard where he served as an Operations Specialist on a National Security Cutter and sailed across the Pacific Ocean with port calls in Japan, Costa Rica, Panama, Peru, and Chile. While in the Coast Guard, Daniel earned an M.S. in Environmental Policy and Management from American Military University, graduating with Honors. The combination of Daniel's education, service background, success in law school, and experience with the firm have made him an immediate asset to the firm's clients and their cases.

The firm looks forward to continuing to work with him and watching him thrive in the years to come.

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Herring Law Group is pleased to welcome **Viktoria Morgan** as our newest attorney. Viktoria brings over thirty years of legal experience, including an extensive foundation in civil litigation. She previously worked as the Director of the Family Law Division of a firm representing clients in divorce, legal separation, support, parentage, and custody proceedings. Viktoria brings a welcome level of experience, maturity, and perspective toward resolving our typically complex cases. HLG looks forward to growing together in our team-oriented firm.

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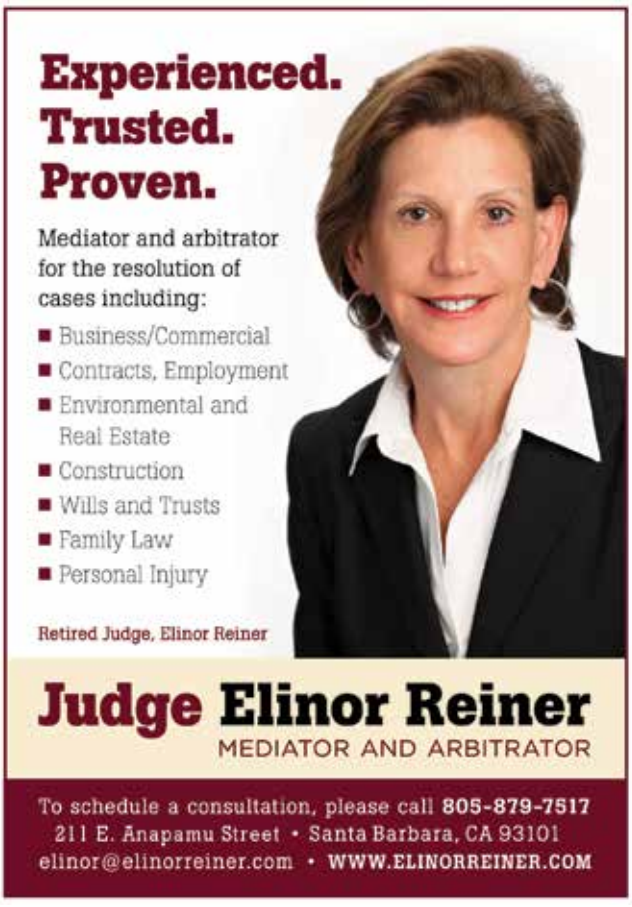
Maxwell, *continued from page 7*

job much easier – and more enjoyable. My advice to new litigators would be to assemble your jury instructions early on in a case. For one thing, it will save you some time as you won't have to do it when you are busy with the trial. But more importantly, it will help you to identify the evidence you are going to need to win your case. I've noticed that even experienced attorneys sometimes seem surprised late in the trial when they realize what they need to prove, or that something they spent a lot of time on wasn't necessary to the case.

I have found that our Santa Barbara jurors meticulously follow the jury instructions. As for me, I try to be my best every day in the courtroom. It is not the place to have a bad day. Attorneys and litigants deserve all of a Judge's attention while hearing their cases. In addition, my goal is to be prepared and above all, to be fair. I have had attorneys say that they were surprised that I ruled in their favor because I spent so much time talking to the other side. But it's very important to me that a party I have to rule against knows that I listened to them, and understands why I ruled the way I did, even though they disagree. It is also a goal of mine to try to make everyone feel comfortable in the courtroom because I remember what it was like as both a layperson, and a new attorney, to face the Court for the first time. When Self-Represented Litigants appear before me, I try to use plain English, and not "legalese," because for more than half of my life I didn't know what a TRO was.

In my time off I love cooking for a crowd, skiing, tennis, and adventure travel. I have run with the bulls in Pamplona, hiked the Inca Trail to Macchu Picchu, attended Sturgis (yes on a motorcycle), been on four safaris, and have been to all seven continents and over forty countries. I celebrated my 60TH birthday by going heli-skiing for the first (and last) time. ■



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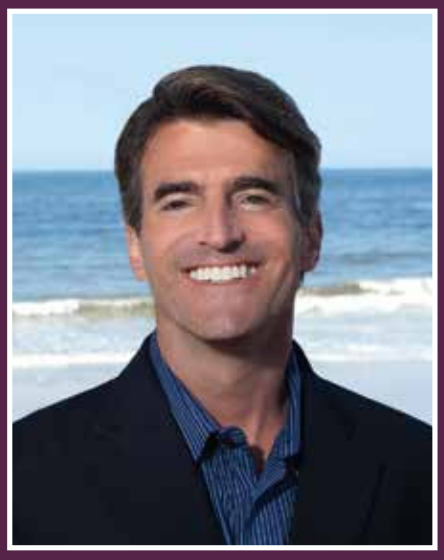

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