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Getting to Know Santa Barbara Superior Court Judge Kay Kuns

Fee Arbitration Demystified / Local Climate Warriors' Interview / Sex Trafficking & Prosecution of Ghislaine Maxwell
Prop 19's Deadline: 2-16-2021 / Language of Foreign Source Comps / Book Review: Confidence Lost, Confidence Found

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On the Cover

Judge Kay Kuns

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Spotlight on Santa Barbara Superior Court Judge Kay Kuns

By Kay Kuns

Kay Kuns and her daughters

Growing up in New Mexico on a ranch most of my childhood, the one thing I never imagined was that I would grow up and become an attorney, much less a judge. Up until the summer between my junior and senior year at the University of California, San Diego, my intent was to become a marine biologist, having interned one summer at the University of Hawaii's Institute of Marine Biology and two summers at Scripps Institute of Oceanography. When I realized that I did not want to be a research scientist, I took the fall quarter off from UCSD to figure out what I wanted to do for the rest of my life. It was during that time that a high school friend of mine, who was at SMU Law School in Texas, suggested that I go to law school, emphasizing that a Juris Doctorate was a very versatile degree. I think my initial comment was, "Why would I want to do that? " After a little coaxing, I gave it some serious consideration, and ended up applying to the University of San Diego Law School. That friend, Terry Means, who later became a federal court judge in Fort Worth Texas, was the sole reason I changed directions and applied to law school. During my first year in law school, I did not give much thought to pursuing a legal career, but at the end of my first year, when I had to give a moot court presentation, I felt the thrill of advocacy, and that was the hook. From there on, I knew that I wanted to be a litigator.

My first legal job was that of a criminal prosecutor working for the Los Angeles City Attorney's Office (September 1976 – January 1979). One of my law professors and my Moot Court Advisor, Ed Imwinkelried, suggested that I apply to the Los Angeles City Attorney's Office due to its outstanding training program for new deputies. Under the new leadership of Burt Pines, with George Eskin as the Chief Assistant City Attorney supervising the criminal branch, the office put new deputies through a rigorous training program, which included mock trials, ride-alongs with various law enforcement agencies, and actual trials under the supervision of senior attorneys. The day that I was sworn into the State Bar of California, I had just given the closing argument in my seventh jury trial, under the guidance of Sam Eaton (one of several attorneys in the Los Angeles City Attorney's Office that later moved to Santa Barbara). By the time I left the City Attorney's Office, I had the experience of over 25 trials, along with a special assignment to the discovery unit (at a time when Pitchess motions were taking off and expanding), and the experience of being the assistant supervisor of the Bauchet Street Branch of the office, which handled the arraignments for our downtown central trials.

As a young, idealistic lawyer, it was a wonderful experience to be working in an office that emphasized legal ethics. My first ethical situation as an attorney came during a motion to suppress when it became evident that the officer who was the primary witness was not being truthful. I contacted Chief Assistant City Attorney Eskin to discuss the matter. He did not hesitate to tell me that as the prosecutor I was responsible for doing the right thing, not waiting for the court to act or the defense to bring a motion. The complaint was dismissed, and an appropriate memorandum was sent to the officer's supervisor.

In August of 1980, I moved to the Santa Ynez Valley and opened my own law practice. I enjoyed living back in a smaller, more rural area where there seemed to be a stronger sense of community. My friends from Los Angeles, however, thought I was crazy for moving to such a small and conservative community to start my new practice. While I did experience some "good old boy" mentality and push back, for the most part the community accepted me very

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An Interview with Two Climate Warriors about the County of Santa Barbara's One Climate Initiative

By Tara Messing

The impacts from climate change have touched most everywhere worldwide and Santa Barbara County is no exception. Despite being the birthplace for the modern environmental movement, rising temperatures, devastating wildfires, and increasingly severe weather events have impacted our community in immeasurable ways. The Thomas Fire in December 2017 signaled the unpredictability of what has now become a year-round fire season. Shortly thereafter, the Montecito debris flow catastrophe struck, costing our community far more than monetary damage. These events underscored the need for local action to address climate change impacts specific to our county. In response, the County in late 2020 announced several efforts to reduce carbon emissions, increase community resilience, and prepare for climate impacts.

This article will explore these initiatives through two conversations with climate warriors, GarrettWong, and Katie Davis. **Garrett Wong** is the Climate Program Manager for the County's Sustainability Division. **Katie Davis** is the Chair of the Sierra Club Los Padres Chapter.

Let's talk about the specific climate initiatives that make up the County's One Climate Initiative. First, the Safety Element of the County's General Plan will be updated to address climate change. What can we expect to see in these updates to the Safety Element?

GW: "The Safety Element fundamentally should inform how we plan and design our communities, and how we might respond to certain incidences that are essentially unplanned…. As we start to look at future climate change impacts, there are some risks that we may want to avoid in a concerted way so that we are not leaving people in harm's way…. We'll have to consider the likelihood of sea level rise encroaching upon residential neighborhoods [and] the likelihood of wildfires impacting certain communities. On a more programmatic level, we need to consider how we protect and treat our vulnerable populations in a more concerted way as extreme heat becomes more prevalent [and] as wildfire smoke also impacts them. Hopefully, this will be an exercise that allows us to think and prepare in advance of these events. Unfortunately, we have recent events to use as case studies about what went well and what didn't go well."

Tara Messing

KD: "It is admirable that the County is doing this work [now] and it will save us a lot of money, issues, and problems down the road. The better you can plan now for what is coming, the more prepared you will be and the less issues you will have. For instance, if you have evaluated what areas are vulnerable to flooding, then you can start planning accordingly. Maybe we do not build as close to creeks, so we have bigger setbacks from areas that are vulnerable. Maybe our building code requires that [development] is elevated in areas subject to flooding…. We could have more conditions around what can and cannot be done in high fire hazard zones. It is good to plan so you don't have as many houses that are flooded or burned down, or as many people that suffer the negative consequences."

Second, the County is also developing a new 2030 Climate Action Plan to achieve a 50% reduction of community-wide GHG emissions by 2030. The 2015 Energy & Climate Action Plan ("ECAP") had a sunset date of 2020. Tell us more about the strategy to reduce GHG emissions that was set forth in the 2015 ECAP.

GW: "The [ECAP] is a non-statutory plan. It is a voluntary document that most jurisdictions develop to do several things. One is to establish a comprehensive plan to reduce carbon emissions from different sectors of the community. The other outcome may be to streamline permitting for development so that individual projects do not need to assess and mitigate their own GHGs at the project level. The County's [2015 ECAP] had a number of different objectives and Emission Reduction Measures [ERMs]. It spanned across different sectors' emissions like buildings, transportation, agriculture, solid waste, wastewater, and aviation. It essentially identified actions to be taken in order to reduce

emissions from those sectors to achieve the County's goal of a 15% reduction by 2020 compared to 2007 emission levels."

Garrett Wong

KD: "The [County] did not meet their goals [in the 2015 ECAP] and the main drivers of that were the increase in natural gas usage and increase in vehicle miles traveled from transportation. We have a lack of housing, so that plays into it. People have to drive further to their jobs and commutes are increasing…. One thing missing from the 2015 ECAP was stationary sources, like oil production facilities…. Most places do [include stationary sources] and there was no reason to exclude those sources. We should continue to bring [stationary sources] down as well because [stationary sources] are also emitting a lot of air pollution like PM2.5. [PM2.5s are fine inhalable particles with diameters that are generally 2.5 micrometers and smaller.] [PM2.5] is particularly terrible, causes cancer, and makes people more vulnerable to COVID, so there are lots of other benefits to not having those emissions. It may be not as bad as it looks if we can keep stationary sources from increasing as well—if we don't expand oil production and restart offshore platforms."

What did the 2015 ECAP achieve and what still needs to be addressed to reduce GHG emissions?

GW: "A lot of the work that the [2015] ECAP set out to achieve is actually coming to fruition now. Community Choice Energy [CCE] … will increase renewable energy options and lower carbon energy for residential and commercial customers. We are about to open a new ReSource Center at the Tajiguas Landfill, which will increase the county's landfill diversion and increase recycling and composting rates. We are installing charging stations across county facilities and increasing the use of electric vehicles. The County—in collaboration with San Luis Obispo and Ventura counties—recently launched a new regional energy network to deliver energy efficiency to low income and hard-to-reach customers. The work that still needs to be done is … quite a lot. We know that in order to achieve our goals we must develop (or consider) more ambitious policies as well as robust programs. We need to reduce natural gas use in buildings, … we need to reduce commuter trips, and we need to electrify vehicles on the road, including those for goods movement. Those will be the primary objectives to reach our goals."

Katie Davis

What do you hope to see in the 2030 Climate Action Plan?

GW: "The 2015 ECAP was ambitious in the sense that there were too many actions and measures to implement in order to be effective. We hope that the next Climate Action Plan will be more targeted and specific to achieve speed and scale when it comes to emissions reductions…. [W]e plan to engage businesses and industries in order to shift their operations and their use of technology to help make them more efficient and a part of the solution."

KD: "I think that we made huge progress with renewable energy since the 2015 ECAP. Prices for solar and wind have come way down and for battery storage as well. We have a clear path. We are joining a community choice program that already has a goal of 100% renewable energy by 2030…. That is huge because we have been getting our electricity from powerplants down in Oxnard, which were polluting that area and are also reliant on one grid line coming up through the mountains that is vulnerable. To the extent we can have more solar in Santa Barbara County on buildings and more battery storage facilities, which is already happening, it will be a more resilient grid and a less polluting one.…

There has also been a lot of forward movement on electrifying our transportation sector. MTD has a goal of 100% electric buses…. I expect [fleet electrification] to continue and expand. Governor Newsom signed an order saying that we will not be buying gas cars after 2035, so that is really setting a direction for future transportation … being powered by 100% renewable energy. Once we have 100% renewable energy, we can power our cars and transportation from it—that is really how we reduce GHG emissions. There prices for electric vehicles have come way down. There are used options now and a lot more infrastructure, so I would expect to see a focus on continuing to ensure

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Take Steps to Protect Loved Ones & Clients: Proposition 19 Could Cause Significant Real Estate Tax Hikes

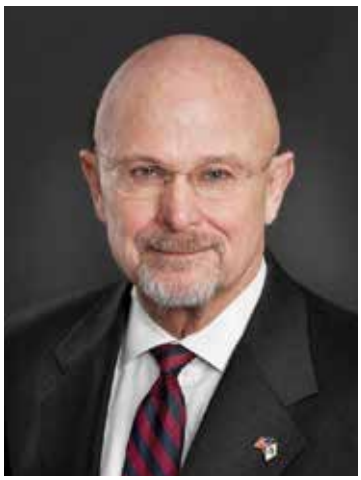
By John W. Ambrecht

A new law that goes into effect on February 16, 2021 could substantially increase property taxes for children or grandchildren who inherit family property. To protect family assets, it is important to take immediate action by reaching out to financial planners, attorneys and clients.

The change is due to Proposition 19, approved by voters on November 3, 2021.[1] The ballot measure did two substantial things:

1. It allows homeowners 55 and older, those with disabilities and those impacted by wildfires or other natural disasters to move up to three times and take their current tax assessment with them, up to the current value of their home.

2. It eliminates the exemption that allowed children and grandchildren to inherit homes and preserve the existing property tax assessment unless the home becomes the heir's primary residence.



John W. Ambrecht

Currently, a parent can leave their child a home without it undergoing a property tax reassessment, regardless of whether the child plans to live in the home.[2] Proposition 19 changes that, which means the home's annual real estate tax could be reassessed using its current fair market value. This could drive up property taxes substantially, in some cases necessitating a sell off.

Children and grandchildren can continue to use the current assessment before February 16, 2021 with options including transferring ownership directly to children or by creating a trust.

Supporters of Proposition 19 argued it closed "unfair tax loopholes used by east coast investors, celebrities, and wealthy trust fund heirs on vacation homes and rentals." What it left out was the wide-ranging implications for middle-class families, who could be forced to sell perhaps their only major asset.

Families who have owned property for decades have made lasting, meaningful contributions to the stability and growth of their community. Swift action is required to make sure such legacies remain intact. ■

John W. Ambrecht is an estate planning and tax specialty law attorney in Santa Barbara. Ambrecht has dedicated his career to helping families protect their wealth and minimize intergenerational conflict around inheritance. He is a fellow of the American College of Trust and Estate Counsel, a national organization of lawyers elected to membership by their peers for demonstrating the highest level of integrity, competence, and commitment to their profession. He also chairs the Business Families Special Interest Group for the USA for STEP World Wide, an international organization based in London with 20,000 professionals around the world who incorporate an international tax and family perspective. Mr. Ambrecht can be reached at Ambrecht@TaxLawSB.com.

Endnotes

1. The measure added Sections 2.1, 2.2, and 2.3 to Article XIII A of the California Constitution.
2. Existing California law allows an established assessed value to be increased no more than 2% per year unless there is new construction or a change in ownership.

Was Ghislaine Maxwell a Pimp, Jeffrey Epstein's Bottom Girl, Or Both? And How Should She Be Treated Under the Law?

By Erin R. Parks

This Article explores the complexities of sex trafficking issues through the lens of the sordid sex trafficking saga of rich financier, Jeffrey Epstein. In 2005, the public knew little about the under-age girls accusing Epstein of paying them to perform sexual acts. Nor was it well known that in 2008, Epstein plead guilty to felony prostitution charges in a plea bargain. Even Epstein's 18-month sentence in a private wing of the Palm Beach County Stockade was kept on the down and low until the 2020 broadcast of the Netflix documentary: Jeffrey Epstein: Filthy Rich.

(Nigel Cawthorne, *How Maxwell's life unravelled. The favourite daughter of disgraced tycoon Robert Maxwell, Ghislaine lived the life of Gatsby. How did she fall so hard?*, The Austrailian (July 9, 2020), https://www.theaustralian.com.au/inquirer/how-ghislaine-maxwells-glittering-socialite-life-unravelled/news-story/8c1f7b76ee22f5b4827eebef564f6870; Jeffrey Epstein: Filthy Rich (2020).)

When minors started accusing Epstein of paying them to have sex, Ghislaine Maxwell fell into the cross hairs of State prosecutors and attorneys representing Epstein's victims. She has been portrayed as a pimping co-conspirator in Epstein's sex trafficking organization. However, a closer look at how the world of sex trafficking works, and Ghislaine's personal history, reveals that she was likely groomed by her father, Robert Maxwell, before falling victim to Epstein.

Perpetrators of sex trafficking (pimps) prey on victims, most often females, who are "broken" and "need a daddy figure" to take care of them. The pimps employ a "grooming process" to gain the trust and dependency of victims who have nowhere else to go. The perpetrator assesses the victim's vulnerabilities and offers flattery, material items such as money, jewelry, or clothes, and/or displays other "acts of love". The female is then enticed to begin a sexual relationship with her "boyfriend" or "daddy", which leads to her trafficking others. (Olivia Carville, *The Game: Living Hell in hotel chains*, Toronto Star, December 14, 2015, https://projects.thestar.com/human-sex-trafficking-ontario-canada/.)

The media portrays Ghislaine as a rich, well-educated "daddy's girl" who was not permitted to bring boyfriends home or be seen with them publicly. (Tom Bower, *Ghislaine Maxwell, daughter of Robert Maxwell, fell under the spell of rich and domineering men*, The Times, August 12, 2019.) In 1991, Ghislaine's father died and his business empire collapsed under accusations of financial crimes. There were "lurid tales of his sex orgies...They painted a portrait of an erratic and cruel tyrant, ..." After Robert Maxwell's death, Ghislaine was "the shattered child of a man described as a monster". (Mark Seal, *In Plain Sight*, Vanity Fair, July/August 2020, at 54.)

Erin Parks

A "broken bird", Ghislaine fled England for the United States. A year later, in 1992, she claimed Epstein as her fiancé, and lived in his swanky New York townhouse with a housekeeper, driver, and secretary. She wore a large diamond "engagement" ring, rode in his private jet, and had plenty of money to spend. (*Id*.)

Epstein never professed to be in love with Ghislaine. Instead, he claims to have taken her under his wing after her father died and she fell on hard times. (Vanessa Grigoriadis, *"They're Nothing, These Girls": Unraveling The Mystery Of Ghislaine Maxwell, Epstein's Enabler*, Vanity Fair (August 12, 2019), https://www.vanityfair.com/news/2019/08/the-mystery-of-ghislaine-maxwell-epstein-enabler.) Ghislaine, on the other hand, was in love with Epstein - "the way she was in love with her father. She always thought if she just did one more thing for him, to please him, he would marry her." (*Id.*) "Her business, first and foremost, was keeping Epstein happy." Ghislaine "would have done anything for Epstein." (Mark Seal, *In Plain Sight*, *supra*.) Yet, she also claimed to hate him but could not leave him. (Dan Adler, *From Jeffrey Epstein's Home to a Bill Clinton Dinner, More Details About Ghislaine Maxwell Emerge*, Vanity Fair (September 24, 2020), https://www.vanityfair.com/style/2020/09/ghislaine-maxwell-epstein-employee-clinton-dinner; Lee Brown, *Ex-staffer says Ghislaine Maxwell hated Jeffrey Epstein — but couldn't leave him*, https://nypost.com/2020/09/23/ex-staffer-says-ghislaine-maxwell-hated-jeffrey-epstein-but-couldnt-leave-him/ (September 23, 2020).) She believed she had to give Epstein what he wanted, or she would lose

her life of luxury - again. (Mark Seal, *In Plain Sight*, *supra*.)

Within the subculture of sex trafficking, pimps use a Bottom Girl to sit at the top within the hierarchy of prostitutes. Typically, a Bottom Girl has been manipulated for the longest time and has earned the pimp's trust. The Bottom Girl helps recruit, train, and supervise trafficked females. While the Bottom Girl is typically the most trusted by her pimp, she is also the most manipulated and abused. (*The Forgotten Paradox Of Sex Trafficking,* Innocent Lives Foundation, https://www.innocentlivesfoundation.org/the-forgotten-paradox-of-sex-trafficking/, (last visited Sept 16, 2020).) Females are often coerced into becoming a Bottom Girl through a pimp's offers of enhanced financial or material rewards. While it may not look like it from the outside, Bottom Girls are in survival mode and making the pimp happy is their means of survival. (*Id.*)

Prosecutors from the Southern District of New York charge that Ghislaine was in an intimate relationship with Epstein between 1994 and 1997. Other sources report that Ghislaine left Epstein in the early 2000s, only to be lured back to work for him in 2004. Court papers filed by Ghislaine's "attorneys stated, '[f]rom approximately 1999 through at least 2006, Maxwell was employed by Epstein individually, and by several of his affiliated businesses.'" (*Id.*)

As Epstein's Bottom Girl, Ghislaine searched spas, massage parlors, and parties for young females and introduced them to Epstein for sex. (*Id.*) She also managed and trained a network of recruiters to target young, financially desperate women, and promised to help them further their education and careers. (Harris, et al., *How a Ring of Women Allegedly Recruited Girls for Jeffrey Epstein*, NY Times, https://www.nytimes.com/2019/08/29/nyregion/jeffrey-epstein-ghislaine-maxwell.html (August 29, 2019, updated July 10, 2020).) "She had to keep everyone in line, because one misstep would unleash the wrath of Epstein, ..." (Mark Seal, *In Plain Sight*, *supra*.)

For the last 15 years, Ghislaine hid in plain sight and evaded lawsuits until Epstein's 2019 suicide when she fell off the map. (*Id.*) In July 2020, Ghislaine was apprehended, arrested, and charged with six federal crimes including enticing minors to travel to engage in illegal sex acts, and for facilitating, aiding, and participating in acts of sexual abuse of minors. (Nigel Cawthorne, *How Maxwell's life unravelled. The favourite daughter of disgraced tycoon Robert Maxwell, Ghislaine lived the life of Gatsby. How did she fall so hard?, supra.*) She has plead not guilty and her trial is set for July 2021. (Jacob Dube, *Ghislaine Maxwell trained Epstein victim as 'sex slave,' new court documents allege*, National Post (July 31, 2020), https://nationalpost.com/news/world/ghislaine-maxwell-abused-trafficked-young-girls-with-jeffrey-epstein-on-a-regular-basis-court-documents-allege.)

At trial, a central question will be how prosecutors will treat Ghislaine. If Ghislaine was both a pimp and Bottom Girl, prosecutors could throw the book at her and try her like a pimp or let her off easy because she was an abused victim of Epstein's sex trafficking scheme. Determining criminal liability is always a complex decision if a Bottom Girl has been exploited for sex, then used to recruit others. While Ghislaine's case is portrayed as a slam dunk case of pimping in the media, it could become a challenging case for the prosecution particularly if she admits her own victimization.

The Trafficking Victims Protection Act of 2000 (TVPA) is the first comprehensive federal law to address sex trafficking. (22 USC § 7102, ¶¶ 11 and 12, 2000.)[1] The TVPA does not give blanket protection to victims engaged in a sex trafficking scheme. Instead, the prosecutor has discretion on how to proceed. (Andrew Fiouzi, *What do we do about the sex traffickers who were trafficked themselves?*, Mel Magazine (November 22, 2019), https://melmagazine.com/en-us/story/what-do-we-do-about-the-sex-traffickers-who-were-trafficked-themselves.) Prosecutors may exercise discretion by declining to prosecute cases that are brought to their attention or by charging offenders with more, or less, serious crimes. (J. Spears and C. Spohn, 'The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases', Justice Quarterly, vol. 14, 1997, 501–524.) The prosecution's conundrum is determining the level of duress or coercion necessary to absolve a person of criminal liability. (Andrew Fiouzi, *What do we do about the sex traffickers who were trafficked themselves?*, *supra*.) But relying on prosecutorial discretion only works when prosecutors are trained to spot indicators of victimization and are trained in trauma-informed approaches. (*Id.*)

Being trauma-informed is a strengths-based approach that is responsive to the impact of trauma on a person's life. It requires recognizing symptoms of trauma and designing all interactions with victims of human trafficking in such a way that minimizes the potential for re-traumatization. (U.S. Department of State, *Implementing a Trauma-Informed Approach*, Fact Sheet, Office To Monitor And Combat Trafficking In Persons (June 28, 2018), https://www.state.gov/implementing-a-trauma-informed-approach/#:~:text=Being%20trauma%2Dinformed%20is%20a,the%20potential%20for%20re%2Dtraumatization.) "Even highly experienced, well-informed prosecutors with good intentions may disagree on whether a person is a 'victim' or a 'perpetrator, ...'" (Andrew Fiouzi, *What do we do about the sex traffickers*

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The Language of Forensic Source Comparisons: Part I

By Robert M. Sanger

Robert Sanger

This Criminal Justice article is the first of a two-part series. This Part I examines the first of two word choices for forensic examiners in writing reports and giving testimony regarding source comparisons; words used to describe the results of the analysis of the data which might include an opinion, conclusion, explanation, or interpretation. Part II will examine the set of words used to describe those results which might include, "identification," consistent," "cannot be excluded," "excluded," "inconclusive," "match," and words like "certainty," "strong," "weak," or "moderate."

A national discussion is occurring within the National Institute of Science and Technology (NIST) and the American Academy of Forensic Sciences (AAFS) while drafting standards and best practices for forensic reports and testimony. In addition to common usage and the usage of legal terms of art, both the Supreme Court and the Department of Justice have looked to the philosophy of science and to logic. This article will do the same. In this Part I, after exploring these foundational issues, candidates will be considered for the words to express the results of the forensic comparison analysis. In Part II, words will be considered for description of the comparison results. [1]

Words, Science and Logic Matter

First, words matter. Empirical research is currently in progress.[2] Word choice influences the jury's understanding of the evidence. This effect may be mitigated or exacerbated by conflicting testimony, argument of counsel, jury instructions and the vicissitudes of juror education, scientific sophistication, and jury interaction during deliberations. Nevertheless, using words that reflect the scientific process, rather than a pronouncement *ex cathedra* (e.g., "based on my training and experience this is a match"), provide more useful and less biased information for the jury. Using correct words also enhances the professionalism of the expert and the discipline.

Second, science matters. Science is the study of uncertainty, particularly forensic science, the goal of which is to hypothesize what may or may not have been the case an hour ago, a day ago, or—in the case of a jury trial—months or years ago. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, and the progeny of *Frye v. United States* (1923) 54 App.D.C. 46., often *sub rosa*[3] or by rules of evidence,[4] recognize that expert opinion (whether scientific or otherwise) must be based on the analysis of reliable data using valid methods. The Supreme Court said that, when testifying, "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." (*Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137; *see also, Sargon v. University of Southern California* (2012) 55 C.4th 747: ". . . the trial court has the duty to act as a gatekeeper to exclude speculative expert testimony.")

Third, logic matters. There is no one "scientific method." (See, *e.g.*, Gauch, Jr., Scientific Method in Practice (2003).) However, generally, science requires that foundationally valid methods be validly applied to test hypotheses. (President's Council of Advisors on Science and Technology (2016) Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods.) The Supreme Court in *Daubert* specifically referred to the philosophy of science (Karl Popper) and to logic (Carl Hempel) to assess a valid forensic process. The Department of Justice (DOJ) referred to "inductive inference". (U.S. Department of Justice (2020) Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline Pattern Examination, citing Oxford University Press: Dict. of Forensic Science (2012).) Forensic science is not based on formal deduction (except, perhaps, in "exclusion" where *modus tollens* might apply)[5] and is not based on strict induction (per Hempel and the DOJ). Scientific logic applied in forensics is abduction, that is inference to the best falsifiable hypothesis or hypotheses.[6]

The Jury as the Consumer of Forensic Testimony

A forensic analysis might be preliminary, and results delivered to investigators at the crime scene to help them develop leads. The same or different experts might be called

to assist in preparation for trial or called as trial witnesses. Reports written may be relied upon at different stages of a case. The effect of the words used has different effects with the varied sophistication of the consumers of the information, from professional to lay jurors. This article focuses on the ultimate consumer of forensic analysis, the lay jury.

A lay jury—on a good day—engages in heuristics that approximate some sort of overall folk Bayesian analysis. (See Banks, et al., Handbook of Forensic Statistics (2020), Ch. 3.) Bayesian analysis, particularly involving complex analyses, would require intensive computer usage and, something like, a Markov Chain Monte Carlo approach. (See, Gilks, Richardson & Speigelhalter, Markov Chain Monte Carlo in Practice (1996).) On a bad day, jurors allow bias or caprice to govern their deliberations. But, on a good day, jurors consider all the evidence and weigh it against an undefined standard (proof beyond a reasonable doubt in criminal cases). Juries do not have the computational apparatus and fail to meet other requirements—such as a base shared and objective perspective—to make a valid use of Bayesian analysis. However, on a good day, they use a folk version trying to decide the likelihood of the hypothesis (that the defendant is guilty) considering the null hypothesis and considering a complex network of prior probabilities.

Forensic evidence, which may involve its own Bayesian or frequentist analysis, is presented to the jury as only one of the factors in this network. Jurors are given the forensic information from expert testimony and are given little guidance on how to assess it and less on how to integrate it into their overall folk Bayesian analysis. In the simplest form, in a source comparison, the scientist is expressing an opinion (conclusion, explanation or interpretation) regarding the hypothesis of a possible common source with the null hypothesis. Each juror then takes this information, re-interprets it, and applies it - on a good day – using their own heuristics in deliberation with other jurors.

There are many issues related to the receipt of forensic evidence by jurors that do not specifically involve the words used. Transparency regarding the foundation for any analysis, profi-

ciency results and effective examination and cross examination have a significant effect on jury response. (Crozier, Kukucka, & Garrett, *Juror Appraisals of Forensic Evidence: Effects of Blind Proficiency and Cross-examination*, Forensic Science International 315 (2020) p.110433.) In fact, some studies show that some of the language choices used before the jury have only marginal effect (Garrett, Scurich & Crozier, *Mock Jurors' Evaluation of Firearm Examiner Testimony*, 44 Law and Human Behavior (2020) pp. 412-423), however, more study is needed to simulate actual juror responses, including the effects of deliberation. (See additional studies in C-Safe Webinar, Juror Appraisals of Forensic Evidence: Effects of Blind Proficiency and Cross-Examination (December 8, 2020). Having said that, the question of what words to use when trying to be as helpful to the jury in making their folk Bayesian analysis is still to be resolved by NIST and AAFS.

Analysis of "Results": An "Opinion," "Conclusion," "Explanation," or "Interpretation"

The first question, then, is what word should be used to express what the expert is offering beyond a description of the data and description of the analysis? Take an example of a firearms examiner called to testify about the source comparison of a bullet removed from a decedent and a firearm seized from the residence of a defendant. Preceding the testimony of the expert, other witnesses would lay the foundation for the circumstances under which the bullet and the firearm were located and retrieved, and would attest to the chain of custody to the examiner. Between those witnesses and the examiner, the chain of custody, integrity and lack of alteration or contamination would be established to the point of inspection by the examiner. The examiner would then testify to observations of the evidence and anything done to alter it (e.g., removing blood and tissue or bending deformities of the bullet or making the firearm safe to test fire). The examiner would testify to the foundational validity of the procedures, proficiency of the laboratory, calibration of instruments, qualifications, and proficiency of the examiner. Then the examiner would describe the procedures used to test-fire bullets from the firearm to commence a comparison.

The lawyer for the proponent (e.g., the prosecutor or defense lawyer) could then publish the "results" to the jury. The results at this stage would include the display of bullets and perhaps the firearm. The display could also include photographs, including high-definition photographs, showing the bullet and test-fired bullets side by side.

The testimony laying the foundation for this display is based on purportedly objective data and examination protocols, however, it involves subjective input by the examiner. In the example, light sources, angles, portions of the bullets photographed, and the manner of the presentation all involve subjective input. Epistemic issues, including errors, context bias and implicit bias, can impact the presentation. However, a display of the empirical data, with testimony about the source of the evidence and the protocols, would identify and potentially minimize the bias which could otherwise unduly influence the jury.

There are advocates for the idea of stopping here. But most proponents of forensic testimony want the witness to tie the results to a hypothesis in the case – the hypothesis leading to conviction for the prosecutor and the null hypothesis for the defendant. When doing source comparisons, the observations, measurements, physical modes of analysis and other data give rise to hypotheses. The expert then testifies to the basis for a claim that a hypothesis or hypotheses are not refuted by the evidence. The expert is not an advocate for a hypothesis but, instead is comparing the hypothesis and competing hypotheses to the data.

The leading candidates for the word expressing what the expert is doing at this point would be: "opinion," "conclusion," "explanation," or "interpretation." Additional candidates are judgment, view, belief, results, estimation, decision, justification, or understanding. All may have a place in the discussion, but the first four seem to be the main contenders by usage, science, and logic.

Candidate: "Opinion"

The common usage of "opinion" would seem to include the result of testing hypotheses to determine if they are refuted by robust data. It is also a legal "term of art" in the rules of evidence. For instance, while hedging the bets with the term "or otherwise," Rule 702 of the Federal Rules of Evidence says:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify ***in the form of an opinion or otherwise*** if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." (Emphasis added.)

(Fed. Rules Evid., rule 702.) The Supreme Court in *Daubert* used the term "opinion" throughout the court's decision, primarily in discussing the former version of rule 702 of the Federal Rules of Evidence. (*Daubert, supra,* 509 U.S. 579.)

California, Evidence Code section 801 states:

> "If a witness is testifying as an expert, his testimony in the form of an ***opinion*** is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the ***opinion*** of an expert would assist the trier of fact; ? and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his ***opinion***."[7]

While "opinion" is a legal term of art, "conclusion," "explanation," and "interpretation" are also terms of art to a lesser extent. That does not determine what term should be used in testimony before the lay jurors. Even if "opinion" is a term of art defined for a jury in a jury instruction, lay jurors may still derive the wrong sense.

The term "opinion" has been criticized as being too weak in that it could be taken as merely subjective. NIST through its Organization for Scientific Area Committees for Forensic Science (OSAC) lists "opinion" as a preferred term with the following definition: "View, judgment, belief—takes into consideration other information in addition to observations, data, calculations and interpretations." (NIST, OSAC Preferred Terms (2020).) This definition suggests a personal "view" or a "belief" or an act of "judgment."

On the other hand, "opinion" could also be criticized because it is too strong. "Opinion" connotes the *imprimatur* of the expert on the testimony. The undue influence of expert testimony is well documented. Any hypothesis testified to should not be a personal belief but should be supported by the data, and should be presented considering competing hypotheses that cannot be eliminated based on the data. However, in ordinary usage, an "expert opinion" can convey to the jury a sense of *ad hominem* sanction that supplants the jury's evaluation of the underlying data and analysis.[8]

Candidate: "Conclusion"

The term "conclusion" is generally used in logic or mathematics as the result of deductive logic. A "conclusion" suggests a categorical objective truth based on *a priori* principles and a syllogistic set of rules. Scientific analysis of real-world phenomenon is based on empirical data and the results are fundamentally uncertain. This is particularly true of forensic work that looks backward to represent what may have occurred in the past. (Lindley, Understanding Uncertainty (2013), 3-4, 260-264.) The result of forensic analysis is not based on pure deductive or inductive logic. Therefore, "conclusion" suggests a categorical objective truth beyond the capability of an expert witness.

The latest DOJ *Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline Pattern Examination* (ULTR-FATM) suggests that "conclusions" are different from "opinions." The "conclusion" of "source identification," for instance, is "the statement of the examiner's opinion (an inductive inference) that the probability that the two toolmarks were made by different sources is so small that it is negligible." (U.S. Depart. Justice, Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline Pattern Examination, 2.)

"Conclusion" is not included on the OSAC Preferred terms list. However, the Digital / Multimedia OSAC defined "conclusion" as, "A position reached after consideration of a set of facts or examination results."[9] In this view, "conclusion" is a "position" which does not clarify anything. "Reached after consideration" suggests but does not fully state that it is an abductive inference resulting in a hypothesis that is not refuted after consideration of the data and analysis. "Conclusion" would require a jury instruction with this clarification and, even then, could be misleading.

Candidate: "Explanation"

Abductive logic is sometimes described as the process of "drawing an inference to the best explanation." Hence, "explanation" finds its way into the short list of potential word candidates. The sort of logic engaged in by experts doing comparisons of real-world objects is abductive. After collecting and analyzing the data, the examiner "draws an inference to the best explanation or explanations." So far, so good.

The problem with "explanation" is that, to a lay person, it suggests that the answer is certain, and the testimony is simply explaining the certainty.[10] A humorous usage appeared recently on a sweater: "I am not arguing, I am just explaining why I am right." In logic, "explanation" is a means to provide understanding of a ground truth. (Khalifa, Understanding, Explanation, and Scientific Knowledge (2017).) In forensics, the ground truth is uncertain. Testimony as to a source comparison is based on abduction by drawing an inference from the data to the best hypothesis or hypotheses that explain the evidence. But the hypotheses provide the "explanation," not the expert.

Candidate: "Interpretation"

"Interpretation" seems to best characterize what the forensic examiner is doing. The examiner authenticates

and describes the evidence, then describes the analysis protocols and the analysis. To go beyond description, the witness "interprets" the analyzed data. "Interpretation" does not convey too little – that is what the examiner is doing. It also does not convey too much – the interpretation is the hypothesis or hypotheses that appear not to be refuted by the data.

At least one scientific discipline uses this structure. The National Association of Medical Examiners (NAME) breaks down the Postmortem Examination Report into two parts: "(1) the objective forensic autopsy with its findings including toxicological tests, special tests, microscopic examination, etc., and (2) the interpretations of the forensic pathologist including cause and manner of death." (Nat. Assn. of Medical Examiners, *Forensic Autopsy Performance Standards* (2005, as amended, Aug. 11, 2011) std. H31.)

NIST OSAC Preferred Terms includes a definition for "interpretation" as: "Explanations for the observations, data and calculations." (NIST, OSAC Preferred Terms (2020).) This includes a troublesome cross-reference to "explanation" but, on closer inspection, is addressing the explanation of the data and process, not the ground truth. The NAME use of "interpretation" seems more consistent with the view that the forensic source comparison is an "interpretation" of the data, just as cause and manner of death is an "interpretation" in a postmortem examination report.

Conclusion of Part I

The term "opinion" probably carries the day as the term that will be used in characterizing what the forensic expert is doing. It has a certain inertia in view of its common usage and codification as a term of art. "Opinion" may be serviceable to the extent that the jury is properly instructed that it be used in the scientific context of comparing hypotheses to the data. It should not be allowed to convey an *imprimatur* on the part of the witness or be used as a form of advocacy.

On the other hand, there are other candidates. Of the ones considered above, "Conclusion" and "explanation" are not appropriate unless possibly counterintuitive instructions are given. The rule of parsimony, if nothing else, rules them out. "Interpretation" might be the best candidate in actual practice because it seems best to describe the results achieved by an expert testing hypothesis considering the analysis of the data. But, for "interpretation" to hold its ground, the inertia of "opinion" would have to be deflected.

This Part I is foundational to the discussion in Part II which will move to what terms of actual source comparison should be used and whether they should be quantitative and, if so, how should that be characterized. If not quantitative, what words best express the comparison. The language that is used, both in announcing what an expert is doing (as above), or in conveying the actual comparison (as in Part II), influences the understanding of the jury. And, like all language, it influences the speaker as well as the speaker's community. Word, science, and logic matter. ■

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ENDNOTES

1. This article is a summary of a more detailed academic paper in progress. Therefore, arguments and citations are kept to a minimum. The author anticipates Part II will be published in the March edition of the Santa Barbara Lawyer.
2. Empirical research on mock juror responses to particular language is ongoing. A seminar by three of the leading researchers was presented in December during which there were discussions of future feasible studies. The cost of assembling actual mock jurors to hear mock trials for evaluation is significant. With the current pandemic, those studies are logistically impossible as well. However, the webinar panel uses large numbers of participants in carefully designed online surveys (e.g., n=1400). They intend to continue their research. *(Juror Appraisals of Forensic Evidence: Effects of Blind Proficiency and Cross-Examination,* C-Safe Seminar (December 8, 2020).)
3. See, e.g., the other two prongs of *People v. Kelly* (1976) 17 Cal.3d 24, 30: "(1) the reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject."
4. See, e.g., Cal. Evid. Code § 801: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; ? and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

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Kuns, *continued from page 7*

early on and was willing to take a chance and hire this new female attorney. My practice involved significant litigation, both criminal and civil, and I found myself never regretting the move. The first six years of my private practice were particularly special since my mother, who I was extremely close to, was my legal secretary. We would joke that for eight hours of the day I could tell her what to do, but for the remaining sixteen hours she was in charge.

My private practice gave me the flextime that I needed to work with high school students in various programs. During most of the 1980s I was involved with the YMCA's Youth & Government program, helping to develop the trial advocacy portion of that program and working with the students who were in those roles. Later, from 1992 to 2009, I volunteered as the legal coach for the Santa Ynez High School's Mock Trial team. From 2003 to 2008, I became an adult advisor for various international student programs sponsored by People to People International (PTPI), an organization started by President Eisenhower that brings individuals together from different countries, focusing on cultural and educational exchange and humanitarian projects. Through PTPI it was my privilege to work with students from countries such as Egypt, Russia, Poland, the Czech Republic, Kuwait, Jordan,

Kay Kuns with daughtersaftervoting in November 2020

Kay Kuhns with her daugther
Mt. Batur, Bali, Indonesia

Croatia, and Sri Lanka. It is promising to see young people from different cultures interact with each other in a way that focuses on their similarities and attempts to overcome their differences and conflicts. Since the practice of law involves conflict, I have no doubt that my work with PTPI made me a better attorney, and hopefully has made me a better judge.

I was appointed to the Bench in October 2008 and was sworn in as a Superior Court Judge on December 15, 2008. My first assignment was in Lompoc, where I remained for two years, followed by two years in Department 7 in Santa Maria doing criminal trial work. My next assignment, which is my current assignment, was the move to the treatment courts, presiding over SATC (substance abuse treatment court), Prop 36, MHTC (mental health treatment court), DDX (dual diagnosis treatment court) and VTC (veterans treatment court). Due to court calendar changes made necessary because of the current health crisis, my department (SM5) now also reviews all DV (domestic violence) and IST (incompetent to stand trial) cases in the North County.

There is not a day I wake up that I do not feel honored to have been given the opportunity to sit on the Bench. As an attorney, I enjoyed zealously advocating for a particular position, but as a judge I enjoy being able to render decisions that hopefully resolve disputes in a just and appropriate way. Obviously, there are different skills involved in each job – one focuses more on speaking while the other focuses more on listening.

I believe my past experiences give me some appreciation and insight as to what prosecutors, public defenders and private counsel all go through when they are managing their caseloads and presenting their cases. My foundational experience as an attorney, however, was in Los Angeles in the mid to late 1970s, where the courtroom environment

was very formal and very demanding, with a high volume of cases. Attorneys appearing before the court were expected to be on time and prepared, and their demeanor was expected to be professional and civil. As a judge, I have found that on occasion an attorney appearing before the court will be missing one or more of these qualities. For any new attorney who wishes to have a sole legal practice, I would encourage him or her to first acquire experience with a government agency or private firm if possible, in order to get some supervised experience before hanging out his or her own sign. Most attorneys will have the responsibility of holding either a client's financial interests or freedom in their hands (depending upon the type of law they practice), and this responsibility ethically requires that they have a certain level of competency. Experience is one way to achieve that level of competency. More than once I have been asked whether I believe there are too many attorneys practicing law. My answer has always been that there are never too many competent, ethical and caring attorneys.

Clearly, this past year has been challenging for everyone, and with the courts it has been, and will continue to be for some time in the future, a challenge to balance public safety with individual rights and an individual's access to the justice system. If there is a silver lining in what we have gone through this past year it is the expansion of new technology in the courtroom which may result in greater access in the future to the justice system by certain parties. One example from the treatment court perspective is that individuals who previously could not enter a treatment court because there was no access to treatment where they lived may now be able to do so through receiving virtual treatment (using Zoom group and individual sessions and telehealth appointments). The virtual platforms now used by the courts can continue to be a more effective way of staffing treatment court cases and review calendars in the future. These platforms can also continue to be used by the trial courts.

There was a poet during the Black Renaissance Period, Gwendolyn Brooks, whose personal philosophy on life was to "be clear of mind, clean of heart, striving to do what is right or just." When one thinks about it, that is a great personal motto for a judge – be clear of mind, pure of heart, and always seek to do what is right and just.

During my spare time, I enjoy the outdoors and traveling. Growing up I participated in various sports, starting with rodeoing (barrel racing). During my college and law school days scuba diving was a passion. I still enjoy hiking and camping. My love of travel came after I left the Los Angeles City Attorney's Office and backpacked through Europe for four months in 1979. I still have friends that I met on that trip that I consider family. My daughters, their fiancés and I also enjoy family trips, which in 2019 included time in Spain and Italy. ■

Kay Kuns with family in Barcelona

Messing, *continued from page 9*

that upswing and making sure people have a way to charge … their cars….

Buildings are another major source of GHG emissions aside from electricity and transportation. That is really about, again, moving away from natural gas.… It is more affordable to build buildings without having to build out natural gas infrastructure, like dual fueling, so we will actually save money. It's a win, win, win. Reduce GHGs, make things more affordable and improve people's health, so I would expect some building stuff to be in there."

Third, the Active Transportation Plan ("ATP") will emphasize the need for both active transportation infrastructure planning and programs to help meet the County and region's goals for transportation mobility and accessibility choices. The ATP is intended to promote safety, mobility, and access while reducing carbon emissions and supporting public health. Why is transportation important to addressing climate change impacts?

GW: "As most people know, transportation is not only one of the largest sources of emissions locally and globally, but it is also just the bane of our existence. More than 98% of all vehicles on the road are still fossil fuel powered. There are many options that are available now for [electric] passenger vehicles and we need to make sure that everyone's next vehicle that they purchase will be a non-fossil fuel powered vehicle. The Active Transportation Plan is primarily focused on getting people out of vehicles and on foot, bikes, or other personal mobility devices. By making it easier for people to get around without their car, we do a number of different things: we improve individual and public health by encouraging people to be more active; we promote a stronger and more localized economy by encouraging people to patron their local retailers and restaurants; and we foster a greater sense of community by getting people out in their own neighborhoods."

KD: "Active transportation specifically refers to pedestrians, so making sure areas are walkable and bikeable. Too much of our planning has been very car-centric and very road-centric.… Re-thinking our communities so we are paying attention to pedestrians and cyclists is important. Both for the people doing it—to improve safety—but also because [there are] no GHG emissions from biking and walking. It is a more livable community when you pay attention to all forms of transportation, not just cars.…"

Fourth, let's talk about the 2021 CCE Launch, available at www.countyofsb.org/3ce. As of January 2021, the Central Coast Community Energy ("3CE") enrolled residential and commercial customers in the unincorporated areas of the county and all cities with the exception of Lompoc and Santa Barbara. What exactly is CCE and why is it an important climate initiative?

GW: "There are two portions of electricity service. One is generation and the other is distribution. Generation is where power is generated from—things like solar and wind, but also natural gas plants and large hydro plants. Distribution is how power gets to the customer through the poles and wires that go over the hillsides and crisscross over neighborhoods. We pay for two services: one is to have enough power and the other is to have reliability. CCE is a process by which local governments take over the energy generation portion of your utility bill. Local governments having climate goals in mind are able to source their community's energy from existing and new energy generators that meet those objectives, like solar and wind. CCE also enables local governments to capture rate payer dollars, which have historically gone to the investor-owned utilities who ultimately have to pay shareholder dividends. By contrast, CCE programs are not for profit and therefore have greater capabilities and interests in re-investing rate payer dollars into local projects and programs that create green jobs in the community.

3CE already has in place a suite of community programs primarily orientated around electrification of buildings and vehicles as well as a resiliency program to promote battery storage. As a member of 3CE, we have the ability to influence the programs and projects that get designed and implemented through 3CE as well as the broader community."

KD: "[Under 3CE, we are] moving to 100% renewable energy by 2030, so we have a more aggressive timetable compared to California as a whole, which has a goal of 100% renewable energy by 2045. We are going to get there faster and it is going to be cost competitive. You will get more renewable energy over time for the same price and more local investments in energy programs so they may do things like helping build more [electric vehicle] charging or paying more for people who put solar on their house. They're working on those energy programs that will be available in 2021 now and those will be finalized in the coming months."

Has CCE been successful in other jurisdictions and if so, where?

GW: "CCE has been around for over a decade now. It started in northern California in Marin and Sonoma counties. Over the past few years, it has expanded significantly across California.

KD: "[There are more than] 180 California towns and cities with CCE programs. They are all over California, [and] really expanding. In 2019, Ventura County and Los Angeles County rolled out the Clean Power Alliance, which is another Community Choice program.… [These programs] have been around for many years now and I don't think any of them have failed. They're all doing well. It is a proven program."

How does environmental justice fit within the County's One Climate Initiative?

GW: "Environmental justice is one of the leading principles or objectives that all of these efforts share. It is still a relatively new concept and space for the County to occupy, but we are very cognizant of the fact that those who have been marginalized, disenfranchised, or left out of the civic process are the ones who are likely or are already being impacted by climate change as well as the pandemic on top of the other structural and institutional barriers that they face. We have started by creating an Equity Advisory Committee that includes representatives from the Central Coast Climate Justice Network as well as representatives from the disability community, the LGBTQIA community, and rural communities to help inform and guide our plans as we start to develop them."

KD: "We put most of our polluting and toxic things in communities that are low income and minority, traditionally. Powerplants in Oxnard, for instance. These are also the communities that live near freeways, which have high air pollution levels.… Then there are the climate impacts too. It is harder for low income and minority communities to be able to overcome these climate disasters and respond to them. When we are talking about climate justice and environmental justice, it is centering those communities and making sure that we are really seeing who is most vulnerable and providing protections and support to those communities.… There really are some great statewide programs that have some really generous rebates based on people's income. It used to be everyone got the same rebate no matter what you're buying, but now it is really income-based, so you have bigger rebates for lower income folks. We need to make sure to get the word out about those. We need to make sure that the solutions are accessible to everyone and that the adaptations we are making do not leave people out, center the people most vulnerable, and make sure that we are responding to their needs."

Where can the public go to find more information about the County's One Climate Initiative?

To learn more about what is happening locally, please visit: https://www.countyofsb.org/oneclimate. ■

Garrett Wong is the Climate Program Manager for the County of Santa Barbara. He is responsible for developing the County's 2030 Climate Action Plan and is the Acting Manager for the Santa Barbara Regional Climate Collaborative. Prior to the County, Garrett was the Sr. Sustainability Analyst for Climate & Energy at the City of Santa Monica. Garrett also serves on the Board of the Local Government Sustainable Energy Coalition, which represents local governments before the California Public Utilities Commission.

Katie Davis is Chair of the Sierra Club Los Padres Chapter and Santa Barbara Group and was recently elected to the board of Sierra Club California. She also serves on Sierra Club's National Marine Team and California Climate and Energy Committee and the Community Environmental Council's President's Council. She was appointed by local elected leaders to the Community Advisory Council for Central Coast Community Energy, and the Santa Barbara Air Pollution Control District. A former VP at tech company, Citrix, she was involved in corporate sustainability initiatives. In 2012 she trained with Al Gore's Climate Reality Project, became a climate change speaker and activist. Since then, she has helped lead successful campaigns including local goals for 100% renewable energy and 100% electric buses and stopping oil expansion. Her roles with the Sierra Club provide her with a unique vantage point to see how local actions can best plug into California's statewide goals.

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Demystifying the Fee Arbitration Process

By Eric Berg

Sitting down with clients to go over their legal bill does not usually rank highly among the reasons why we went into the law. While volumes have been written about how to keep clients happy and avoid fee disputes, billing issues sometimes happen. When they do, the Santa Barbara County Bar Association's Fee Arbitration Program is here to step in quickly and effectively on behalf of both attorney and client. As Chairperson of that Program, I see significant confusion about the Program, what it is designed to do, and how you can utilize it to get your fee dispute resolved.

Some Background

The Mandatory Fee Arbitration Act (the Act) is found at Business & Professions Code sections 6200 through 6206. The Act was enacted in 1978 to provide a faster, less expensive, and more confidential way to resolve fee disputes. Prior to the Act, attorneys and clients had to sue each other in court or—assuming the fee agreement so provided-- pursue an arbitration action. This created the perception that the process favored the attorney over the client, who was forced to retain counsel to "even the playing field". The Act was partially designed to address that inequity.

The Act is client-friendly in that one of its mandates is that neither party can recover fees incurred in participating in fee arbitration. The Act is also client-friendly in that it requires the attorney to participate if the client so elects. Attorneys were not left without some benefit of their own, however. Pursuant to California's State Bar Rules of Professional Conduct, Rule 3.512, a request for arbitration, any record of proceeding, and the award are all confidential.

The Basics

Most of us do not appreciate how fortunate we are that the Santa Barbara County Bar Association continues to run a robust Fee Arbitration Program. About half of the counties in California do not. It takes a lot of time and resources to do it properly, let alone well. Counties that do not sponsor their own program utilize the California State Bar's Fee Arbitration Program. Here in Santa Barbara, the State Bar's program will only assume jurisdiction if either party asserts that the County's program cannot offer a fair hearing.

Eric Berg

The Program is mandatory for attorneys. It is not mandatory for clients. That means that a client may compel an attorney to mandatory fee arbitration, but not the other way around. How does the attorney avoid this outcome? By including a mandatory fee arbitration provision in their fee agreement. Unless there is a mandatory fee arbitration clause in the engagement letter, the Santa Barbara County Bar Association has no authority to proceed with an attorney-requested arbitration if the client refuses. (Bus. & Prof. Code, § 6200, subd. (c).) And for any attorney thinking they can insert language in the fee agreement getting the client to waive the protections afforded the client under the Act, think twice: such an attempt is void on its face. (*Alternative Systems, Inc. v. Carey* (1998) 67 Cal. App. 4th 1034, 1043.)

The statute of limitations for a client to file a claim for arbitration is one year from discovery of the wrongful act or omission. (Code Civ. Pro., § 340.6, subd. (a).) However, once an attorney serves the client with Notice of Client's Right to Fee Arbitration, the client's time period is shortened to thirty days from issuance of the Notice.

The award is binding only if both parties consent. The parties may not consent to binding arbitration until after the dispute arises. (Bus. & Prof. Code, § 6204, subd. (a) [a clause in the engagement letter requiring the parties to submit to binding fee arbitration will typically be reformed to read as non-binding fee arbitration].)

The Arbitration will typically be heard by a single arbitrator selected by the County Bar Association. More significant matters will result in the appointment of three arbitrators, at least one of whom is required to be a layperson. Fees associated with the arbitration are paid by the initiating party, are based upon the amount at issue, and are subject to reallocation as part of the final award.

Discovery is limited. While subpoenas are technically available, they are rarely issued, and only upon a showing of good cause. (Bus. & Prof. Code, § 6200, subd. (g)(3).) Additionally, attorneys often do not appreciate that in advance of the fee arbitration, the client has the right to obtain and inspect a complete copy of their file. (Rules

Prof. Conduct, rule 3.540(B).)

The Hearing

The hearing can proceed even if a party does not appear. That is not wise, however; if the non-appearing party challenges the award in court and the court determines that the failure to appear was willful, then that party loses the right to a trial after arbitration. (Bus. & Prof. Code, § 6204, subd. (a).) The hearing is not transcribed or recorded. (Rules Prof. Conduct, rule 3.541(F).)

In terms of evidence presented, think of the basics—the engagement letter and any modifications thereto, bills and invoices, proof of payment, communication between the parties regarding whatever issues may be in dispute. During the hearing, the attorney may disclose client confidences and work product without violating confidentiality restrictions. (Bus. & Prof. Code, § 6202.)

Lawyers often are less than clear about the client's right to assert a malpractice claim as part of the Fee Arbitration. The client can assert such a claim. However, the malpractice claim is only admissible to the extent that the attorney's alleged negligence adversely affected the value of the legal services rendered. That is not the same thing as saying that any fee award can be offset against a claim for malpractice. Think of the following example: The lawyer claims that the client owes $50,000.00 in fees. The client defends that claim by stating that the lawyer's work comprising the fee fell below the applicable standard of care. If the Arbitrator finds the client's defense valid, that can operate to reduce the attorney's fee claim, in whole or in part, as a result of the malpractice. However, the arbitrator cannot (1) award the attorney some or all of the fees sought; and then (2) separately award the client a monetary recovery based upon the attorney's negligence. More likely will be the procedural scenario where the client files a separate Complaint for Malpractice against the attorney in Superior Court.

The Award

The Final Award will be in writing and signed by the Arbitrator. Once prepared, the Santa Barbara County Bar Association's Fee Arbitration Committee will review the award for any procedural errors. The Committee does not review nor does it offer suggestions or changes to the substance of the award or of the particular outcome.

Sometimes attorneys believe that the Fee Arbitration process by definition gives them some advantage over the client. Sometimes clients believe that the Fee Arbitration process by definition is stacked against them. Both assumptions would be gravely in error. The Santa Barbara lawyers who generously give of their time to serve as Arbitrators

have undergone formal training with the State Bar. They have access to the most up-to-date California administrative and legal opinions on the topic of fee disputes. They work incredibly hard to reach the right result. Sometimes lawyers get all of the fees they are seeking. Sometimes they get some of the fees they are seeking. Sometimes they get none of the fees they are seeking. Sometimes they have to return fees to the client. Each arbitration, like each client relationship, is unique.

Once finalized, the Bar will issue the award to the parties along with a form entitled *Notice of Your Rights after Fee Arbitration*. A request for trial *de novo* must be filed within 30 days after the date the Bar serves the award. Even if it is non-binding, the award becomes binding if no one files a *de novo* request within 30 days. (Bus. & Prof. Code, § 6203, subd. (b).)

Both attorney and client need to be careful, however, about utilizing the *de novo* process. Often one or both will "make light" of a non-binding Fee Arbitration, reasoning that any adverse result can simply be unwound by the Superior Court. What the litigants often fail to consider is the Superior Court's discretion to award fees to the losing side of any such trial *de novo*. As set forth in Business & Professions Code section 6204, subdivision (d):

> "The party seeking a trial after arbitration shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorney's fees and costs incurred in the trial after arbitration, which allowance shall be fixed by the court. In fixing the attorney's fees, the court shall consider the award and determinations of the arbitrators, in addition to any other relevant evidence."

So, while the Superior Court will utilize a *de novo* standard of review and give the parties a fresh look at their case, the Court will also have the discretion to award fees to the prevailing party in such proceeding. And it is important to remember that the "prevailing party" in such an instance could be the client who, while ordered by the Court to pay the attorney some amount of fees, achieves a better result than that achieved at the Fee Arbitration.

There is another reason for the attorney to be mindful of utilizing the trial *de novo* process. The confidentiality afforded the attorney as part of the Fee Arbitration process goes away once the trial *de novo i*s sought—that case becomes a public proceeding like any other court action.

Collecting the Award

If the Fee Arbitration results in an award to the client, and if that award becomes binding, the client may file a *Client's Request for Enforcement of an Arbitration Award* with the State Bar of California if the attorney has not satisfied the Award within one hundred days. The attorney must appreciate that a binding fee award in favor of the client is not to be trifled with. The State Bar can and will place the attorney on involuntary inactive status until the refund is paid, and can fine the attorney up to twenty percent (20%) of the amount owed—up to $1,000.00—to ensure collection. (Bus. & Prof. Code, § 6203, subd. (c)(3).)

Final Thoughts

You do not have to be a member of the Santa Barbara County Bar Association to enjoy the benefits of its Fee Arbitration Program. But for those of us who take a hard look every year at our various professional memberships and ask, "what am I getting out of this? " the County Bar's Fee Arbitration Program is reason alone for our continued membership. For those of you who find the subject particularly interesting and you have some time to give, the Santa Barbara County Bar Association would welcome your inquiry as to how to become a trained and certified Fee Arbitrator. ■

Eric Berg *is President-Elect of the Santa Barbara County Bar Association and Chairperson of its Fee Arbitration Committee. His litigation practice includes the defense of law firms and other professional service firms in litigation throughout California. Eric also serves as a Commercial Arbitrator with the American Arbitration Association. He can be reached at eric@berglawgroup.com.*

Parks, *continued from page 13*

who were trafficked themselves?, *supra*.)

In most cases, Bottom Girls do not understand their own victimization and therefore, do not claim to be victims. The process of becoming a Bottom Girl starts off just the same as all other sex trafficking victims; she is groomed by a trafficker who earn her trust. The Bottom Girl engages in sex crimes because she believes she is in a romantic relationship with her pimp. This, in short, is why a Bottom Girl — also a victim in nearly every case — is also charged with sex trafficking crimes. (*The Forgotten Paradox Of Sex Trafficking*, Innocent Lives Foundation, *supra*; Andrew Fiouzi, *What do we do about the sex traffickers who were trafficked themselves?*, *supra*.)

The pimp / Bottom Girl dependency is the core of the victim-perpetrator dilemma — "the epicenter of the legal grey area in the realm of human trafficking. It's where right and wrong become inextricably enmeshed, forming a moral fabric that doesn't align with a federal justice system that's so often absolute in its determination of purity." It can be futile to debate over whether a Bottom Girl is a victim or a perpetrator because the line between the two can become almost indistinguishable. (Andrew Fiouzi, *What do we do about the sex traffickers who were trafficked themselves?*, *supra*.)

Should it matter that Ghislaine did not fit into the typical mold of a young Bottom Girl born into poverty and continually homeless? From a psychological perspective, the form of duress she suffered from coming down in the world after her father's death, and prostituting herself to, and pimping for, Epstein to survive may not be any different from a typical Bottom Girl. It will be interesting to learn the extent to which such facts unfold, if ever, as Ghislaine's trial approaches.

With that said, the idea of not holding someone accountable for their criminal conduct is controversial. "The unfortunate truth is that victims aren't immune from criminal liability, and in instances in which a victim's conduct isn't deemed a product of coercion and is sufficiently harmful to third parties, it may be appropriate for prosecutors to consider charging [and prosecuting] a victim, despite their victimization." (*Id.*) On the other hand, "since trafficking victims are uniquely situated and suffer varying degrees of coercion that often directly contribute to their involvement in criminal conduct, '"statutes should provide a victim with a presumption of coercion for any non-violent crime committed during the course of her trafficking,..."' (*Id.*)

What is clear is that there is no one simple solution from a public policy perspective for dealing with the criminalization of Bottom Girls as illustrated in Ghislaine Maxwell's high-profile case. The issue should not be whether Ghislaine is guilty of sex trafficking. The real issue should be what the government does to Ghislaine, and to all Bottom Girls for that matter, to make a difference to society.

If Ghislaine was pimping for Epstein, her incarceration will not eradicate sex trafficking. If she was Epstein's Bottom Girl, there is no federal vacatur law, like there is in California, which permits sex trafficking survivors to vacate their conviction records for prostitution and other criminal activities committed because of their involvement in sex trafficking. (Cal. Penal Code § 236.14.) For now, the best our federal criminal justice system has to offer is procedural safeguards and fact-intensive inquiry to determine the degree of Ghislaine Maxwell's culpability. The court will consider any acknowledgment of victimization Ghislaine offers and can use its discretion to deviate from sentencing guidelines, order treatment, or find other ways of accommodating the situation in which she was herself a victim, as well as a perpetrator, of sex trafficking. (A F Levy, *Innocent Traffickers, Guilty Victims: The case for prosecuting so-called 'bottom girls' in the United States*, Anti-Trafficking Review, Issue 6, 2016, at 130–133, www.antitraffickingreview.org.) ■

Erin R. Parks is a solo practitioner in Santa Barbara emphasizing Employment Law, Immigration, and Estates and Trusts. Early in 2020, she committed to taking concerted action to create awareness and eradication of Human Trafficking. This Article was submitted in November 2020 as Ms. Parks' final project for Pepperdine's Caruso School of Law Anti-Human Trafficking Lab sponsored by the Sudreau Global Justice Institute.

Endnotes

1 The Trafficking Victims Protection Act of 2000 (TVPA) includes "severe forms of trafficking in persons" as: (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. (22 USC § 7102, ¶¶ 11 and 12, 2000.)

Confidence Lost, Confidence Found: How to Reclaim the Unstoppable You

Author: Kate McGuinness
(2020) Two XX Press
By Naomi Dewey

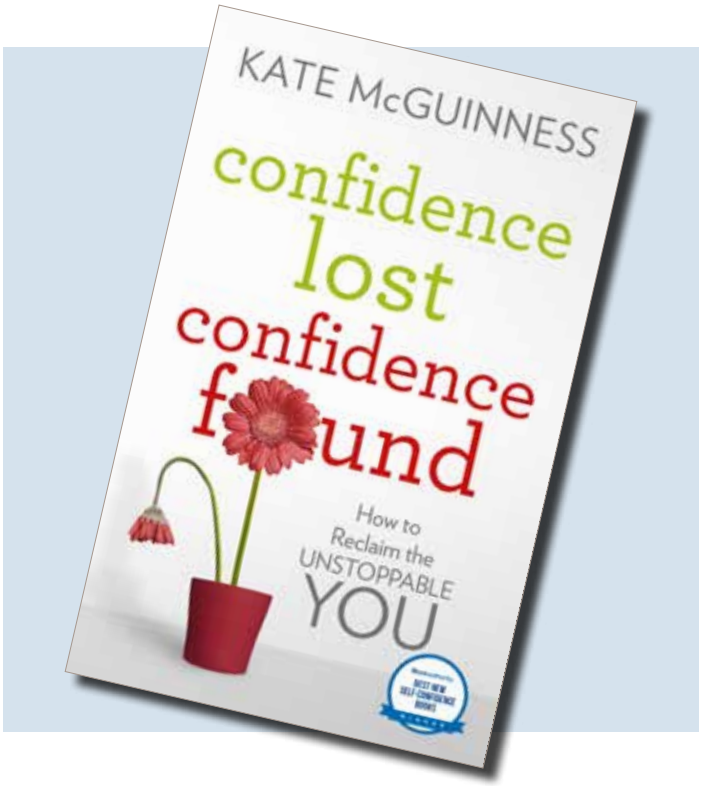
"Grit" and "resilience" have been big words for women in the legal profession in recent years—but underneath it all, confidence is key. If you are trying hard to bring grit to your personal toolkit, and striving to become resilient, pause for a moment. What underpins grit and resilience? Confidence.

Right now, on the brink of a financial depression, at a time of pandemic and most of all at a time of uncertainty, all of us could use a little confidence.

Kate McGuiness is a living example of how confidence can be gone in a moment, but also, how confidence can be built from the ground up. In full disclosure, she was also my executive coach when I decided to leave a successful law firm partnership to start my own firm - so I have lived her methods firsthand.

By combining personal experience with resources on neuroplasticity, mindfulness and self-care, this book is a great resource for lawyers at any stage of their careers. McGuinness' personal stories are woven throughout the book and they speak volumes. As a lawyer, McGuinness had a string of successful accomplishments. An early equity partner at O'Melveny and Myers, in 1995 she was recruited by Times Mirror Group, then a Fortune 200 company, to serve as Vice President and General Counsel. She was riding high and preparing to be honored by her law school as a distinguished alumnus. Then, without warning, she was fired. I won't spoil the story by sharing what happens next, but trust me when I say that McGuinness has experienced disappointments and setbacks that would shatter the strongest women I know.

Kate McGuinness



McGuinness describes the careful reconstruction of her confidence as "similar to Japanese kintsugi pottery in which broken pieces are repaired with lacquer mixed with powdered gold to highlight the cracks." To find answers on how to make those repairs, McGuinness explored meditation, trained as an Executive, Career and Life Transition Coach at the Hudson Institute and took time to pause and consider how neurological training can strengthen our confidence (and yes, resilience and grit too).

Confidence Lost, Confidence Found takes readers through a series of exercises, starting with a deep dive to find our innate confidence, and then sharing the foundations for rebuilding it. Each exercise comes with the why, and the how, and also something more powerful - by sharing her own vulnerability at various times in her career, McGuinness is giving readers permission to be vulnerable as well. The structure of the book is simple, moving from authenticity and self-compassion to real-world advice on networking, performance reviews and public speaking. Hands-on exercises and practical advice are interwoven with resources and well-researched references to other materials. It is clear that McGuinness enjoys her work immensely and this shines through the energy and enthusiasm she has for her readers' success.

I especially enjoyed the chapter on adopting a growth mindset. Pointing out that many women (and men, I would add) think their abilities or talents are fixed, McGuinness explodes the myth that we can't grow and develop new

skills. First, McGuinness points out, people with a growth mindset are free of the urgent need to succeed, and thus better able to accept failure. By taking pleasure in learning a new skill and being open to setbacks and bumps in the road, we not only build resilience but we gain the confidence needed to take risk. How do we develop our growth mindset? By learning, of course. Taking our brains back to school and going step-by-step through the process of embracing growth is no different, it turns out, than learning to read, or as many of us are doing right now, learning to bake sourdough bread. The more we practice, the more we succeed.

The conscious exploration of our strengths and the decision to build on our weaknesses might seem like a lot for people struggling with shelter-in-place orders, remote law practice and homeschooling. However, I think we need this more than ever. What better time to master mindfulness and strengthen ourselves for what might come next? We all need a little extra confidence right now. ■

Naomi Dewey is President Elect of California Women Lawyers and the Founder of Trusted Legal, a boutique law firm in Santa Barbara, California

Sanger, *continued from page 18*

5. If P then Q, not Q, therefore not P. For instance, if the class characteristics of the source comparison were incompatible, an exclusion could be deduced, although even this depends on a valid major premise and a valid empirical basis for the minor premise.
6. A selection of hypotheses may be left up to the laboratory or a binary choice may be submitted to them as, for instance, "Was this bullet fired from this firearm? " The source hypothesis would be opposed by the null hypothesis. The results of the analysis may or may not rule out neither, one, or both hypotheses.
7. California's Evidence Code, enacted in 1968, was the first codification of the rules of evidence in the United States, and it formed as a well-drawn-upon basis for the Federal Rules of Evidence which were adopted in 1974.
8. Theoretically, it should be the science, not the witness, that provides evidence for the trier of fact. In this regard, for instance, the United States Department of Justice (DOJ), in the "Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmark Discipline Pattern Examination," (ULTR-FATM) rejected the term "decision" in favor of "opinion" in its latest iteration. (Department of Justice, Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmark Discipline Pattern Examination, approved August 15, 2020. https://www.justice.gov/olp/page/file/1284766/download.)

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