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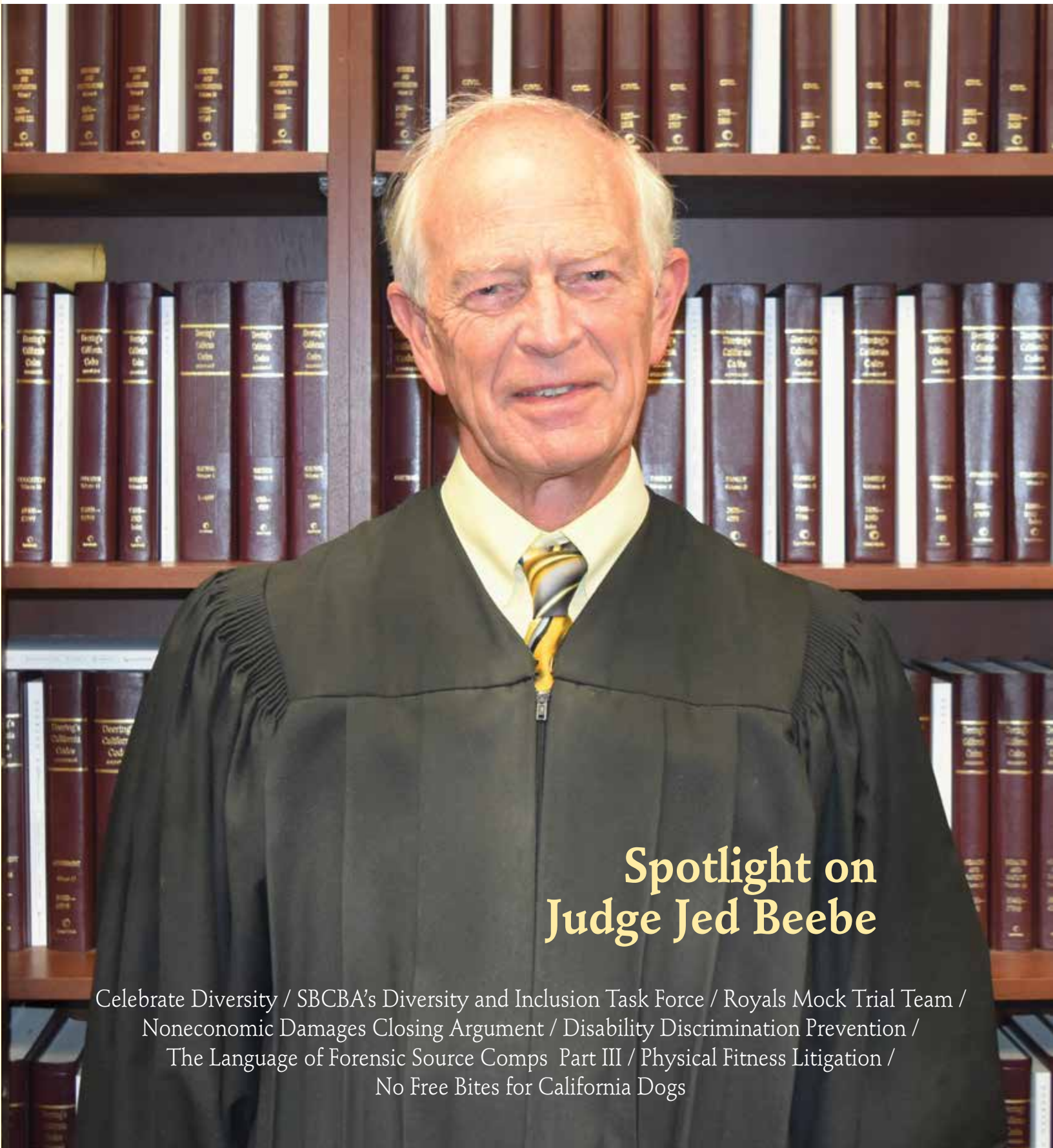

Spotlight on Judge Jed Beebe

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Mission Statement
Santa Barbara County Bar Association

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

Santa Barbara Lawyer

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On the Cover

Judge Jed Beebe

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Celebrate Diversity

By Erin Parks

Since 2004, April has been designated as the month to consciously recognize and honor the diversity surrounding us all. By encouraging the celebration of the differences and similarities amongst people, a deeper understanding of each other will be developed. Understanding and accepting differences among individuals and cultures helps people feel less insular, more alive, and less prone to judge or hurt others.

The celebration of diversity in April 2021 matters to legal professionals for a myriad of reasons, including:

One of our goals, as lawyers, is to strive to ensure that our clients receive equal justice under the law. In the absence of meaningful diversity in all aspects of the legal system, namely diversity that reflects the communities where we live and work, it is more difficult, and sometimes impossible, to achieve equal justice for everyone.

Erin Parks

A diverse legal profession allows attorneys to reflect the cultures, values, and diversity of our clients, and to bring different cultural, racial, ethnic, religious and gender perspectives to solve problems more effectively for our clients and the community.

When a client has a legal issue to solve, the client needs to feel confident that they have been heard, no matter their background, gender, color, or faith. If the client can see diversity in the legal profession, the client will feel more confident that a legal issue has been fairly resolved.

Bottom line—diversity in the legal profession promotes the public's perception of an equal and fair judicial system. Without diversity, our local legal community will lose credibility and respect among those who feel their views and circumstances are not being fairly represented within the system. Accordingly, we must have diversity not only on the Bench, where we have placed great authority for decision-making, but also among lawyers, who have been granted a special privilege to represent the interests of those with business before the courts and a corresponding responsibility to understand the clients' unique needs and circumstances.

Diversity is beneficial to the relationships between lawyers and judges. Connecting with lawyers and judges with diverse backgrounds like ethnicity, gender and religion, educates other lawyers and judges as to differences in perspectives on the law and life in general. A broadened understanding of the role of diversity and its impact on life and the profession enables us to better serve our clients and have a more well-rounded experience as lawyers and as individuals. ■

Erin Parks is *Santa Barbara Lawyer's* Editor. Her practice emphasizes Employment Law, Immigration and Estates and Trusts. Ms. Parks can be seen at www.erinparks.com and contacted at www.erinparks.com.

SANTA BARBARA LAWYER SEEKS SETTLEMENTS, VERDICTS & DECISIONS

SBL encourages all SBCBA members to share notable non-confidential settlements, verdicts or decisions. The data is valuable to our membership.

Please submit information to Victoria Lindenauer (Lindenauer_mediation@cox.net) or R.A. Carrington (ratc@cox.net).

Santa Barbara County Bar Association's Diversity and Inclusion Task Force Takes Action to Promote Access, Diversity, and Inclusion in the Legal Profession

By Elizabeth Diaz

The Santa Barbara County Bar Association (SBCBA) is committed to preserving the integrity of the legal profession and advancing the professional growth and education of its members. In alignment with this commitment, the SBCBA has created a Diversity and Inclusion Task Force to promote access, diversity, and inclusion amongst professionals in the local legal community.

The Task Force has established the following goals for 2021:

- Provide education on diversity to the local legal community; and
- Create a Mentorship/Scholarship Program for students.

The legal profession is one of the least diverse professions. Educating the legal community on diversity is necessary to show why it is so beneficial. To achieve this goal, an assessment of diversity in Santa Barbara's legal population must be done. The Task Force will create a survey for legal professionals to determine the depth of diversity in the legal community and share the results. The collection of diversity data will help raise awareness of existing obstacles and barriers while also measuring progress toward improved diversity and inclusivity.

Additionally, the Task Force intends to offer at least one presentation focusing on the topic of diversity; create a list of resources for law firms and legal organizations on hiring a diverse workforce; and create future content for the *Santa Barbara Lawyer* magazine and SBCBA's blog on the topic of diversity.

As to the second goal, the Task Force intends to create a program for students of color to connect with legal professionals and obtain information about becoming a lawyer and insight into a career in law. The Task Force shall avail itself of volunteer legal professionals to hire an intern, mentor a student one-on-one, or participate on a panel discussion about careers in the law. The program will be open to law students, and high school and college students interested in law. Also, the Task Force intends to raise funds to create a scholarship program to help students of diverse backgrounds with expenses related to the Law School Admission Test (LSAT) or California's State Bar examination.

Elizabeth Diaz

For the legal field to truly be diverse and inclusive, the profession must have people of diverse cultures, experiences, and backgrounds in all aspects of the legal profession. You can help the legal community become more diverse by participating in the mentorship program, or financially contributing to the scholarship fund. This project will only be successful if we all do our part to ensure that diversity and inclusivity exists in the local legal profession. If you are interested in volunteering or contributing financially to the Mentorship/Scholarship program, or if you are interested in joining the Task Force to work on the diversity and inclusion goals, please contact Elizabeth Diaz at ediaz@lafsbc.org. If you are interested in writing an article on the topic of diversity within the legal profession for the *Santa Barbara Lawyer*, please submit to Editor, Erin Parks at law@erinparks.com. If you are interested in writing on diversity for SBCBA's blog, please contact Lida Sideris at sblawdirector@gmail.com.

Elizabeth Diaz is a Managing Attorney of the Family Violence Prevention and Immigration Programs at the Legal Aid Foundation of Santa Barbara County. Elizabeth assists victims of domestic violence, elder abuse, sexual assault and human trafficking with restraining orders, related family law and civil matters, and immigration remedies. She is also President of the Santa Barbara County Bar Association.

Spotlight on Judge Jed Beebe

By Jed Beebe

Judge Beebe with Susan Swack, Torey Winn and Tanya Gutierrez

Among the easily missed down-ballot measures in the November 2008 Presidential election was a contest for an open judicial seat. The race was too close to call for several weeks but I managed to eke out a narrow victory over Senior Deputy District Attorney John McKinnon, who had been the front runner in a primary field of four.

I thought I came to the Bench with excellent credentials. I had been the North County Supervising Research Attorney for 18 years which included assisting on three Michael Jackson trials and other issues of significance. I was the first full-time attorney in that position (although retired Judge Rogelio Flores will tell you he was there first as a half-time research attorney and half-time Commissioner). I had worked closely with the Judges throughout the County. When I was hired, there were only four North County Judges (Royce Lewellen, Zel Canter, Richard St. John and Jim Jennings). The job grew with the unification of the Municipal and Superior Courts; effectively managed under the leadership of Rod Melville. Being the Court's researcher was stimulating work. It involved preparing memos on the civil law and motion calendars for the most part, but questions could come from anywhere and I was sometimes asked to sit '*pro tem*,' most often in Juvenile.

> "... there is most often a right answer to most legal issues...."

Before my stint with the Court, I had been 8 years with the County Counsel's office. I began in 1982 in the Santa Barbara office, arguing cases before Ron Stevens, Charles Stevens and Pat McMahon (who once favored me with a 351- page decision on a question of federal preemption). I opened the first County Counsel office in Santa Maria in 1990. I graduated from USC law school in 1974 (undergraduate work there as well), worked briefly in an insurance defense firm in LA, and worked for a few years on my own before working on contract for firms in Los Angeles and Beverly Hills.

As I said, it seemed like a fine background for judging. However, it was a tougher job than I expected. I was surprised at how the rubber meets the road in the courtroom. Important decisions must come timely and be announced to the parties and litigants whose vital interests are at stake. Time to research comes at a cost in efficiency. The work is typically unrelenting.

I was placed initially in a criminal assignment where District Attorneys and Public Defenders alike had to wonder about a Judge who had practiced mostly in the civil arena. I presided over a double jury two-defendant murder trial within months of starting in the assignment; something of a baptism by fire. I ultimately came to a better appreciation of the landscape, but it is a little daunting to consider all the changes in criminal law that have occurred since 2011 when I rotated to another assignment.

Currently I sit in Santa Maria in Department 4, which is a general civil assignment. My calendars are Probate on Monday, Family Law on Tuesday, CMCs on Wednesday, Law and Motion on Thursday and Small Claims on Friday. Time available after the calendars is generally filled with Family Law hearings. Even without the pandemic, civil jury trials have been something of a rarity, usually two or three a year. Except that the hearings now are on Zoom, there has been very little impact from COVID-19 on the length or frequency of hearings since reopening in May. I exclude here the three weeks when I was out sick myself with the virus in August 2020. Fortunately, there was a full recovery.

I am blessed with a great staff in the courtroom. Susan Swack is the Clerk of Department 4. We both began working

for the court in May 1990, and she has been with me in Department 4 since 2013. The judicial secretary is Torey Winn, who took over for Demi Castelli more than a year ago. Carrie Taylor had been in the position before that. So, I have been continuously well-supported. The court reporter is Tanya Gutierrez – always an important presence. It's always good advice to treat court staff well. Lawyers and witnesses can assist her conscientious efforts to provide a reliable record (despite glitchy internet and other interference) by avoiding excessive speed and/or speaking over anyone else.

I remain impressed with the idea that there is most often a right answer to most legal issues and that it is essential to the role of the judge to recognize it. Help in finding it is always welcome. Lawyers who offer solutions, cite the controlling law and remain courteous are highly appreciated.

I find I most often maintain a positive outlook and try to believe the best of others. My outlook likely derives from my good fortune in my family life. Diane, my wife of 42 years, has a heart of gold. If I make it to the pearly gates it will surely be on her coattails. We have three children. The oldest, Byron, a research attorney for the Fifth District Court of Appeal, has (with Tabitha) rendered us not only grandparents (x3) but great-grandparents as well (x2). Nathan helps manage A.G. Chevrolet. He and Tricia live wonderfully close by in Santa Maria (two more granddaughters). Our youngest child, Jerusha, resides in Kentucky and trains sexual assault counselors. I am fortunate as well to have two healthy parents in Ventura, who will celebrate 73 years together this year.

I can hardly avoid mentioning that in my spare time I am an ardent musician. I have been playing violin with the Santa Maria Philharmonic and Lompoc Pops orchestras over the last few decades. I am currently President of the Santa Maria Philharmonic Board. I also serve as my church organist, playing on a pipe organ I helped re-construct in the mid 1990's.

I appreciate the chance to have shared this article. I aspire to grow further as a judge and deeply respect my colleagues on the Bench countywide. I remain impressed as well with the high quality of legal representation offered to the Santa Barbara County community. It is a privilege to serve with you all. ■

Congratulations Royals Mock Trial Team!

By Santa Barbara County Education Office

After a closely contested final on Saturday, February 27, 2021, San Marcos High School emerged the winner of the Santa Barbara County Mock Trial competition, narrowly edging out Dos Pueblos. San Marcos represented Santa Barbara County at the virtual state competition.

In its 38th year, the Santa Barbara County Education Office (SBCEO) sponsors the Mock Trial competition with the support of the Santa Barbara County Superior Court. It takes place over two successive weekends with nearly 60 local attorneys from private law firms, the District Attorney's office, and the Public Defender's office serving as volunteer scorers. Six teams from five public and private Santa Barbara County high schools competed throughout the trials, acting as both prosecution and defense on a case developed by the Constitutional Rights Foundation. Carpinteria, Dos Pueblos, Laguna Blanca, San Marcos, and Santa Barbara High Schools participated in the competition.

"The Mock Trial program is a unique, irreplaceable high school learning experience for participants. The County Education office, local bar, teachers, and parents collaborate to produce one of California's top programs. This year presented special challenges, as trials were conducted by Zoom, which required extraordinary effort by all involved. The Santa Barbara Superior Court applauds these efforts and is committed to supporting this important educational activity," said Judge Brian Hill, who presided over one of the final round trials.

"Each student demonstrated significant preparation through their delivery of compelling arguments and presentations during the competition," said Dr. Susan Salcido, Santa Barbara County Superintendent of Schools. "Thank you to all student participants and community volunteers who contributed to this meaningful hands-on opportunity for students to gain real-life virtual courtroom experience."

SBCEO's Assistant Superintendent Ellen Barger commended the students saying, "The intense preparation, critical analysis, and reasoned arguments demonstrated by our students is inspiring. It's easy to forget that we are watching high school students and not experienced attorneys when listening to their carefully crafted testimony, cross-examinations, and motions citing case law."

Luke Ohrn, Hilary Dozer, and Jim Kreyger coached the San Marcos Team while Hannah Krieshok, Lisa Rothstein, Christine Voss, Chris Horowitz, Glenn Miller, Addison Steele, Nina Steele, and Lina Somait led the Dos Pueblos teams. ■

How to Present Noneconomic Damages to A Personal Injury Jury During Closing Argument

By Bradford D. Brown

Presentation of damages to a jury requires serious thought. This article addresses how noneconomic damages were presented in closing arguments during two recent jury trials.

California Civil Jury Instructions, CACI (pronounced "Casey"), Series 3900, *et seq*., sets forth the nature and type of noneconomic damages that are recoverable in an action for personal injuries. (Judicial Council of California Civil Jury Instructions (2020), No. 3900 et seq.) A review of CACI No. 3900, *et seq*. before starting any jury trial will aid you in identifying the constellation of noneconomic damages you may want to present to a jury. At first, you might think noneconomic damages are simply damages commonly classified as physical pain, mental suffering, and emotional distress. However, these damages are more complex. They should be broken down into subcategories to assist the jury in understanding the true nature and extent of damages suffered by a plaintiff.

I generally divide damages, depending on the case, into nine different categories. In a recent jury trial in Los Angeles (pre-Covid-19), my client sustained an injury to his ring and middle non-dominant fingers in a boating accident. The pain was the most severe in the first year of my client's recovery and slowly subsided over time. By the time of trial, over three years following the initial injury, my client continued to experience pain and dexterity issues in the two fingers with activities of daily living. There was some modification of my client's lifestyle with cessation of some sports and a small change in motor control as testified to by my client and several of the expert witnesses.

To assist the jury in determining how much to award my client in noneconomic damages, I broke the types of damages down into nine categories and further into time periods. The damages categories were: Grief, Anxiety, Physical Pain, Disfigurement, Inconvenience, Mental Suffering, Physical Impairment, Loss of Enjoyment of Life, and Humiliation/Emotional Distress. The time periods I used were, Past Loss for the 1st Year, Past Loss of the 2nd and 3rd Years, and then Future Loss for 16.7 Years based on CACI Life Expectancy Tables. I reduced these damages to a table using an excel spreadsheet and presented it to the jury. And I did not present just one table, but offered 4 different tables using different multipliers, to give the jury range that they can work from or at least a framework by which to calculate noneconomic damages.

Bradford D. Brown

When calculating the damages in this case, I assigned an hourly amount rate to number of hours in a day. The question might be, how much would I consider to be a reasonable award of damages if someone is in pain 24 out of 24 hours, 18 out of 24 hours, or 16 out of 24 hours. Likewise, the amount of money assigned to each hour of pain might change over time. Two of the four closing argument damages summary tables that I presented to the jury represented the low and high numbers that I asked the jury to award as noneconomic damages. I generally start with a higher number and go lower.

In Closing Argument Damages Summary 1 *(see page 14)*, I calculated the 1st year of damages using an hourly rate of $25.00/Hour, 24 Hours/Day, 365 Days/Year, since my client was in a lot of pain for that period. I lowered this to $15/Hour, 18 Hours/Day, 365 Days/Year, for the 2nd and 3rd year as my client further recovered. I then again lowered the damages to $10.00/Hour, 16 Hours/Day, 365 Days/Year for the remainder of my client's life of 16.7 years. This yielded $1,391,280.00 in noneconomic damages.

In Closing Argument Damages Summary 4 *(see page 15)*, I calculated the 1st year of damages using an hourly rate of $10.00/Hour, 24 Hours/Day, 365 Days/Year. I lowered this to $5.00/Hour, 18 Hours/Day, 365 Days/Year, for the 2nd and 3rd year. I then again lowered the damages to $2.50/Hour, 16 Hours/Day, 365 Days/Year for the remainder of my client's life of 16.7 years. This yielded $397,120.00 in noneconomic damages.

There were only $16,156.28 in past medical specials with no need for future care and treatment. There were no other economic damages. I decided to waive all medical specials/economic damages and sought only noneconomic damages. I was worried that presentation of medical specials might

Continued on page 14

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Brown, *continued from page 12*

anchor a jury award and reduce the noneconomic damages (this will be a topic for a later Article). In the end, the Jury returned a gross verdict of $500,000.00 in noneconomic damages ($300,000.00 in past noneconomic damages and $200,000.00 in future noneconomic damages). The highest offer on the case from the defense was $75,000.00. So, it was a victory for my client for sure.

The "Sources and Authority" section in CACI 3905A provides a wonderful guide to assist a trial attorney in identifying and classifying noneconomic damages available to a plaintiff. Following is a sampling of citations that I have found most helpful:

• "'In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.) "

• "'[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired

NONECONOMIC DAMAGES

CLIENT NAME

CATEGORY	PAST LOSS 1ST YEAR	PAST LOSS 2ND & 3RD YEAR	FUTURE LOSS 16.7 Years	TOTAL NONECONOMIC DAMAGES
GRIEF	$24,333.33	$21,888.89	$108,364.44	$154,586.67
ANXIETY	$24,333.33	$21,888.89	$108,364.44	$154,586.67
PHYSICAL PAIN	$24,333.33	$21,888.89	$108,364.44	$154,586.67
DISFIGUREMENT	$24,333.33	$21,888.89	$108,364.44	$154,586.67
INCONVENIENCE	$24,333.33	$21,888.89	$108,364.44	$154,586.67
MENTAL SUFFERING	$24,333.33	$21,888.89	$108,364.44	$154,586.67
PHYSICAL IMPAIRMENT	$24,333.33	$21,888.89	$108,364.44	$154,586.67
LOSS OF ENJOYMENT OF LIFE	$24,333.33	$21,888.89	$108,364.44	$154,586.67
HUMILIATION/EMOTIONAL DISTRESS	$24,333.33	$21,888.89	$108,364.44	$154,586.67
TOTAL DAMAGES	**$219,000.00**	**$197,000.00**	**$975,280.00**	**$1,391,280.00**
First Year ---------- Assumes $25.00/Hour	24 Hours/Day	365 Days/Year		
2nd & 3rd Years -- Assumes $15.00/Hour	18 Hours/Day	365 Days/Year	2 Years	
Future Loss --- -- Assumes $10.00/Hour	16 Hours/Day	365 Days/Year	16.7 Years	
Divided by 9	$24,333.33	$21,888.89	$108,364.44	$154,586.67

enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy.' (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].) "

• "'Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings, or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)"

• "'We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose

Continued on page 24

NONECONOMIC DAMAGES

CLIENT NAME

CATEGORY	PAST LOSS 1ST YEAR	PAST LOSS 2ND & 3RD YEAR	FUTURE LOSS 16.7 Years	TOTAL NONECONOMIC DAMAGES
GRIEF	$9,733.33	$7,300.00	$27,091.11	$44,124.44
ANXIETY	$9,733.33	$7,300.00	$27,091.11	$44,124.44
PHYSICAL PAIN	$9,733.33	$7,300.00	$27,091.11	$44,124.44
DISFIGUREMENT	$9,733.33	$7,300.00	$27,091.11	$44,124.44
INCONVENIENCE	$9,733.33	$7,300.00	$27,091.11	$44,124.44
MENTAL SUFFERING	$9,733.33	$7,300.00	$27,091.11	$44,124.44
PHYSICAL IMPAIRMENT	$9,733.33	$7,300.00	$27,091.11	$44,124.44
LOSS OF ENJOYMENT OF LIFE	$9,733.33	$7,300.00	$27,091.11	$44,124.44
HUMILIATION/EMOTIONAL DISTRESS	$9,733.33	$7,300.00	$27,091.11	$44,124.44
TOTAL DAMAGES	**$87,600.00**	**$65,700.00**	**$243,820.00**	**$397,120.00**
First Year ---------- Assumes $10.00/Hour 24 Hours/Day 365 Days/Year				
2nd & 3rd Years -- Assumes $5.00/Hour 18 Hours/Day 365 Days/Year 2 Years				
Future Loss --- -- Assumes $2.5/Hour 16 Hours/Day 365 Days/Year 16.7 Years				
Divided by 9	$9,733.33	$7,300.00	$27,091.11	$44,124.44

No One You Know Should Be Sued for Disability Discrimination

By Alex Craigie

Counseling clients to avoid exposure for disability discrimination can be a prickly business. Consider the following scenario:

Your client operates a small manufacturing concern. Every worker at the widget factory, from the owner to the janitor, takes lunch together at noon, every day. It has been that way every day since your client's father opened the doors forty-five years ago. This is because the factory operates as an assembly line, and it requires everyone's simultaneous involvement.

One day, an employee, "Sam," shares that he saw his doctor for vision problems and learned he has type 1 diabetes. Your client mutters some sympathetic words (not entirely sure about diabetes or its different types), and the worker goes on to say that, owing to his diabetes, he must eat more frequently. He wonders if, perhaps, he could break for lunch at 11:00 o'clock rather than noon.

Your client knows this is an absurd proposition, given the assembly line. Nonetheless, he says he will consider the request and they wander back to the factory floor. A week passes. Two. Sam continues to join everyone for lunch at noon. He does not raise the need to eat early again. However, his diabetic symptoms remind him daily that he needs to break and eat earlier. He gets shaky and light-headed. Not only is he physically uncomfortable, but he is also growing resentful. Each day that passes is a day closer to when he quits (or is "constructively terminated") because he needs to eat earlier, and your client has forgotten his request.

The scenario above describes an actionable case of "disability discrimination" or, at the very least, a case of "failure to engage in the interactive process". Yes, these are two separate causes of action. What happens next is anyone's guess, but it probably does not end well for your client. If he had asked your advice, would you have known what to say? If not, read on.

Alex Craigie

An employer's duties in this area are triggered when your client learns an employee has a "disability." California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900, *et seq*.)[1] The FEHA defines disability to include a physical or mental disability, or medical condition. While "medical condition" encompasses a limited list of conditions, "physical disability" is read expansively, to include any condition that "limits a major life activity." (Gov. Code, § 12926.1(c), (d)(2); see *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 362.)

While "mild" conditions, such as a common cold, non-migraine headaches and nonchronic gastrointestinal disorders do not meet the standard, the case law makes clear that FEHA has no durational requirement and even a passing condition may qualify. (2 C.C.R. § 11065(d)(9)(B); *Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 595.) Employers tempted to define disability too narrowly must know that it has even been found to include uncorrected severe myopia (nearsightedness)and monocular vision. (*EEOC v. United Parcel Service, Inc.* (9th Cir. 2005) 424 F3d 1060, 1072, fn. 2 and 7 [applying FEHA].)

Back to the widget factory. Sam was diagnosed with type 2 diabetes. A disability? Some would argue his condition affects the digestive, hemic and endocrine systems and, because eating is a "major life activity," type 2 diabetes limits a major life activity and thus qualifies as a disability. (See *Rohr v. Salt River Project Agricultural Imp. and Power Dist.* (9th Cir. 2009) 555 F.3d 850, 858.)

Assuming Sam has a disability, this knowledge triggered a duty by your client to "engage in the interactive process" to reasonably accommodate Sam if he could perform the essential function of his job with an accommodation. (Gov. Code, § 12940(n); 2 Cal. Code of Regs. § 11069(a) [duty to engage in the interactive process]; Gov. Code, § 12940(m); 2 Cal. Code of Regs. § 11068(a); *Fisher v. Superior Court* (1986) 177 Cal.App.3d 779, 783 [duty to provide reasonable accommodation].)

What does the interactive process look like? It is a "discussion about an applicant's or employee's disability -- the applicant or employee, health care provider and employer each share information about the nature of the disability

and the limitations that may affect his or her ability to perform the essential job duties." ("ADA: Reasonable Accommodation/Interactive Process," Society for Human Resource Mgmt., https://www.shrm.org/resourcesandtools/tools-and-samples/exreq/pages/details.aspx?erid=818.)

The best practices for the interactive process include the following:

- Review the accommodation request;
- Obtain written medical release(s) or permission from the employee to obtain records and communicate with providers;
- Request the employee to provide documentation from his or her health care or rehabilitation professional regarding the nature of the impairment, its severity, the duration, the activities limited by the impairment(s) and the extent to which the impairment(s) limits the employee's ability to perform the job's essential duties/functions.

(Id.)

At the widget factory, your client did not do any of the above. Such a failure to engage in the process by itself supports an action and damages under FEHA. (Gov. Code, § 12940(n).)

Imagine if your client had engaged in the interactive process with Sam. They would have explored whether it was possible to "accommodate" Sam's disability. California's Government Code and corresponding regulations provide guidance on reasonable accommodation. (Gov. Code, § 12926(p); 2 Cal. Code of Regs. § 11065(p)(2).) These include:

- Making facilities readily accessible to and usable by disabled individuals (e.g., providing accessible break rooms, restrooms, or reserved parking places, etc.);
- Job restructuring;
- Offering modified work schedules;
- Reassigning to a vacant position;
- Acquiring or modifying equipment or devices;
- Adjusting or modifying examinations, training materials or policies;
- Providing qualified readers or interpreters;
- Allowing assistive animals on the worksite;
- Altering when and/or how an essential function is performed;
- Modifying supervisory methods;
- Providing additional training;
- Permitting an employee to work from home; and
- Providing paid or unpaid leave for treatment and recovery.

(Id.)

But, there are limits to this duty to reasonably accommodate. FEHA does not obligate an employer to choose the best accommodation or the specific accommodation an employee or applicant seeks. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215.) They are not required to accommodate a worker's medical marijuana use. (*Ross v. Raging-Wire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926.) Moreover, they are not required to provide an accommodation that causes the business to suffer "undue hardship" [Gov. Code, § 12940(m); 2 Cal. Code of Regs. § 11068(a)], defined as an action requiring "significant difficulty or expense" when considering at least the following factors:

- Nature and cost of the accommodation weighed against tax credits, deductions, or outside funding; and
- Nature, size and resources of business and accommodation's impact on other employees.

(Gov. Code, § 12926(u); 2 Cal. Code of Regs. § 11065(r).)

At the widget factory, Sam's desired accommodation was to break an hour earlier for lunch so that he would not

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The Language of Forensic Source Comparisons: Part III

By Robert M. Sanger

Robert M. Sanger

This *Criminal Justice* column is Part III of a three-part summary[1] that addresses the word choices for forensic examiners in writing reports and giving testimony regarding pattern source comparisons.[2] Part I, in the February edition of the *Santa Barbara Lawyer*, addressed what language should be used to describe the results of the analysis of the data, such as "opinion," "conclusion," "explanation," or "interpretation." Part II, in the March edition of the *Santa Barbara Lawyer*, addressed the scientific basis for making forensic source comparisons. In this month's column, the specific language that should or should not be used for the opinion (or interpretation) relating to pattern source comparisons will be analyzed.

As has been reported, this is an area of forensic science and law that is rapidly changing. After the writing of this series of columns began, a major case was decided by the Court of Appeal for the Sixth District in California pertaining to firearms and toolmarks source comparisons. (*People v. Azcona* (2021) 58 Cal.App.5th 504.) The case follows the logic set forth in Parts I and II of this column and warrants attention as it applies to all forensic source comparison testimony. In addition, this column will discuss the case law developing in other jurisdictions. All of this will be informative on the issue of what kind of opinion can be offered in pattern source comparisons along with the vocabulary to express it.

Latest Law on Scientific Opinion or Interpretation in Source Comparison

As chronicled in Parts I and II, the FBI through the various Scientific Working Groups (SWG's) and the Department of Justice (DOJ) through Uniform Language for Testimony and Reports (ULTR) and other law enforcement agencies have had their say. In addition, the National Institute of Standards and Technology (NIST) through its Organization of Scientific Area Committees (OSAC) and the American Academy of Forensic Sciences (AAFS) consensus bodies (ASB) have continued to work on the proper scope of, and language for, expressing pattern source comparisons. In addition, professional organizations have worked to create their own standards. As mentioned, the Association of Firearms and Toolmarks Examiners (AFTE), the International Association for Identification (IAI) and the National Association of Medical Examiners (NAME) are among those groups.

Ultimately, the trial courts, as reviewed by higher courts, are the gatekeepers as to what is to be admitted. It is the purpose of this three-part summary to provoke thought (and make some suggestions) about how those gates should be kept. While this series of articles was being written, courts have continued to grapple with this subject matter, that is, the scope and language of forensic source comparison. Trial courts have traditionally shown deference to law enforcement and to the "standards" of the professional organizations. In the area of firearms and toolmarks, great deference has been shown to AFTE which, as argued in Parts I and II, may or may not embody unbiased scientific principles.

Even recently, courts have approved what they believe to be in line with AFTE guidelines. For instance, in *United States v. Romero-Lobato* (D. Nev. 2019) 379 F.Supp.3d 1111, the District Court in Nevada held that the expert's testimony, which was "derived from the AFTE method" and would identify the recovered handgun as the source of recovered rounds, was "reliable and therefore admissible." There, using standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the trial judge acknowledged that the National Academy of Sciences Reports and the PCAST Report were critical of the AFTE method but found that the AFTE method has been repeatedly tested. (See National Research Council of the National Academies, Ballistic Imaging (2008); and National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009). The court then found (contrary to NAS and PCAST) that the AFTE Journal was a source of peer review, that there is a low error rate, that it is subjective but subject to other subjective standards, and that it is accepted by other forensic experts. This is in line with older cases giving wide latitude to an examiner's opinion as to the source of an expended bullet based on the examiner's subjective analysis of the striations.

In *Romero-Lobato*, the court allowed the opinion that it was "the same gun." (*United States v. Romero-Lobato,* supra*,* 379 F.Supp.3d 1111.) However, this opinion has not been allowed by other courts. In *Williams v. United States* (D.C. 2019) 210 A.3d 734*,* the federal Circuit Court for the District of Columbia held that it is an error to permit an expert to "provide unqualified opinion testimony that purports to identify a specific bullet as having been fired by a specific gun via toolmark pattern matching." Using the DOJ's own guidelines, in *United States v. Harris* (D.D.C. 2020) ___ F.Supp.3d ___ [2020 WL 6488714], the District of Columbia district court permitted a firearm toolmark expert to testify in accordance with the limitations set by the DOJ Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline – Pattern Matching Examination, thereby permitting an examiner to testify as to both class and individual characteristics. However, the Court accepted the limitations that the witness, "will not use terms such as 'match,' he will 'not state his expert opinion with any level of statistical certainty,' and he will not use the phrases when giving his opinion of 'to the exclusion of all other firearms' or 'to a reasonable degree of scientific certainty.'" (*United States v. Harris,* supra.)

On the other hand, another line of cases has gone in a different direction. In New York, a Bronx trial court in *People v. Ross* (2020) 68 Misc.3d 899, granted a *Frye* motion "to preclude a ballistics expert from testifying that shell casings found at a crime scene matched a firearm found in a car the defendants occupied." (Id. at 901.) The court emphasized two major issues in determining the foundational validity of this area of forensic evidence: defining the relevant scientific community and calculating the error rate. The court ultimately included "[r]esearchers in traditional scientific disciplines," which the court often referred to as "mainstream scientists," in the relevant scientific community which included "study design and research methodology, statistics and psychology." (Id. at 902.) Based on what was generally accepted by this broader scientific community, the court determined that experts may testify as to class characteristics, but not individual characteristics, and the expert may not give an opinion using "subjective terms" like "'sufficient agreement' or 'consistent with'" which "may mislead the jury." (Id. at 918.)

The courts in *United States v. Shipp* (E.D.N.Y. 2019) 422 F.Supp.3d 762, and *United States v. Tibbs* (Sept. 5, 2019, 2016-CF1-19431) 2019 WL 4359486 (D.C. Super.), both limited expert testimony because of the lack of foundational validity for the forensic discipline of toolmark comparison, focusing on the issue of error rates. In *Shipp*, District Court for the Eastern District of New York limited the expert's testimony to stating that the recovered evidence is "consistent with having been fired from the recovered firearm" and that "the recovered firearm cannot be excluded as the source" of the recovered evidence. (*Shipp*, supra, 422 F.Supp.3d at 783.) The court in *Shipp* stated that the expert could not testify "to any degree of certainty" that the firearm is the source. The Superior Court in the District of Columbia in *Tibbs* held that the expert could testify as to the class characteristics of the evidence but could only opine that "the firearm *may* have fired the recovered casing." (*Tibbs*, supra, 2019 WL 4359486, *22.)

The limitation on source comparison in firearms continued with a new leading opinion in California, *People v. Azcona*, supra, 58 Cal.App.5th 504, just published January 11, 2021. In *Azcona*, the California Court of Appeal considered, first, whether visual firearm toolmark comparison is inadmissible under *People v. Kelly* (1976) 17 Cal.3d 24, and second, whether the expert's opinion as given at trial was supported by the material on which the expert relied. With respect to the first issue – whether visual firearm toolmark comparison is inadmissible under *Kelly* – the court held that it would not, on the record before it, hold "that firearm toolmark comparison testimony is no longer admissible in California." (*Azcona*, supra, at 479.) The court stated that it was not clear that the *Kelly* standard even applied to visual comparisons of firearm toolmarks as visual comparison is "not so foreign to everyday experience that jurors would have unusual difficulty evaluating it." (Id. at 478.) However, the court stated that even if *Kelly* did apply, the defendant had not presented any evidence showing that a "clear majority" of the relevant scientific community "rejects ballistics comparison as unreliable." (Id. at 478-479.)

In *Azcona*, the court's inquiry did not end there. The court emphasized that regardless of whether the *Kelly* standard applies or whether the discipline meets that standard, the trial court has "a critical gatekeeping function when it comes to expert testimony beyond merely determining whether the expert may testify at all." (Id. at 479.) Furthermore, the "significant criticism" to the methodology is "particularly important" in the trial court effectuating its duty to keep out "unfounded opinions." (Id. at 480.) According to the Court of Appeal, the trial court "abandoned its gatekeeping role, allowing unfettered expert testimony that went far beyond what the underlying material supported." (Ibid.) The trial court allowed the expert to testify to a "purportedly infallible conclusion" that the "matching marks" on the projectiles were "'much more than can ever happen by random chance," and therefore the projectiles came from the same gun, 'to the practical exclusion of all other guns.'" (Ibid.) This opinion was based on a "broad

reference to having 'done numerous studies on the subject trying to see what can happen by random chance.'" (Ibid.) The court concluded:

> "Such a purportedly infallible conclusion is a leap too far from what the underlying method allowed. There was support for the opinion that the projectiles likely came from the same gun, perhaps more likely than not, but there was no basis to present it as a scientific certainty. The trial court abused its discretion by failing to limit the expert's opinion to what was actually supported by the material the expert relied on."

(Ibid.) The California court did not expressly decide what opinion could be expressed. It may be that further review would result in a conclusion like the *Shipp* or *Tibbs* opinions discussed above.

The Appropriate Language

In jurisdictions like California and New York, as well as some of the federal districts and circuits, the AFTE type opinions may no longer be given free reign. Suffice it to say that using the term "match" or suggesting "identity" are not allowed. The opinion that the bullet or expended cartridge casing came "from the same gun" is not going to be allowed without considerable qualification, such as suggested by the final paragraph on the subject in *Azcona*. (*People v. Azcona*, supra, 58 Cal.App.5th 504.)

The above are recent examples from firearms and toolmarks but the same issues pertain to all source comparison disciplines that rely on pattern comparisons. Forensic experts should be limited by *Daubert*, supra, 509 U.S. 579, and, in California, *Kelly*, supra, 17 Cal.3d 24, as well as by Federal Rule of Evidence 702, and state evidence codes, to presenting opinions that are scientifically valid. These kinds of source comparisons are subjective, and the opinions should be limited accordingly.

It has been suggested that a pattern comparison is not really an expert opinion if it goes beyond "excluded" and "not excluded" both of which would be based solely on class characteristics. It is possible that any comparison or random characteristics could be eliminated or limited to a display without any other explanation. The expert would present the raw data, perhaps magnified photographs of the possible source and the evidentiary item, and then let the jury decide.

On the other extreme is numerical quantification. Here, it seems that the examiner conducting a pattern source comparison is not in the position to make a showing of validity, at least at the present. For friction ridge comparison, no database will ever contain all possible examples of human fingerprints. In other disciplines, like firearms, there can never be a database of all firearms or expended bullets and cartridges. And, since firearms can change due to wear or other factors, it is impossible to obtain samples of all possible fired rounds. Shoe sole impressions, tire marks, glass fragments, trace evidence and all other substances can only be compared to databases that are incomplete and may or may not be representative.

Even DNA databases, while subject to more scientific assumptions, can be skewed based on specific populations. Numerical quantification has gained traction in single donor DNA analysis and more recently in probabilistic genotyping but there are still problems with mixtures or degraded samples. However, likelihood ratios or frequentist analyses are not supported by the databases for pattern source comparison. Those databases are not robust enough, nor is it likely that they can be, to do a quantification. (See, e.g., Berger, Charles and Slooten, Klaus, "The LR does not exist," 56 Science and Justice 388-391 (2016), citing De Feinetti, Theory of Probability, Wiley & Sons (1974) p.x and pp.3-4: "the degree of belief in the occurrence of an event attributed by a given person at a given instant and with a given set of facts.") Even in DNA testimony, there is a concern that numerically quantified testimony will lead to the "prosecutor's fallacy" or otherwise unduly influence the jury.

Verbal quantification is not much better because jurors translate verbal cues into disparate numerical quantifications. For instance, the DOJ proposes in DNA Probabilistic Genotyping analysis that verbal testimony can be given based on the following:

> 1/LR value greater than 99 is an exclusion.
>
> 1/LR value from 2 to 99 provides limited support for exclusion.
>
> LR value between 0.5 and 2 is uninformative.
>
> LR value from 2 to 99 provides limited support for inclusion.
>
> LR value from 100 to 9,999 provides moderate support for inclusion.
>
> LR value from 10,000 to 999,999 provides strong support for inclusion.
>
> LR value greater than 999,999 provides very strong support for inclusion.

(See DOJ, ULTR of Forensic Autosomal DNA Examinations Using Probabilistic Genotyping Systems (3/18/19).) However, jurors must translate that back and forth or otherwise make sense of it. Jurors are not up to integrating metrology into their deliberations. (See, e.g., William Thompson, "How Should Forensic Scientists Present Source Conclusions?"

48 Seaton Hall Law Review 772 (2018); *Cf.*, Vosk, Ted and Safir, Gil, Metrology, "Jury Voir Dire and Scientific Evidence in Litigation," 24 IEEE Instrumentation and Measurement 10 (2021).)[3]

Based on the rationale of the latest cases, for instance in firearms and tool marks set forth above, there is no basis for the numerical quantification at all in pattern source comparisons. Since there is not, there is a good argument that pattern source comparison experts should not be allowed to use the verbal quantifications. The AFTE standard of "sufficient agreement," according to the cases referred to above, may not be justified by the science nor can the "range of conclusions" set forth in the AFTE literature -- "Identification, Inconclusive, Elimination and Unsuitable for Comparison." (See, AFTE Range of Conclusions, https://projects.nfstc.org/firearms/module13/fir_m13_t05_09.htm.)

The proposal of this paper is based on the current state of the science and, to an extent, at least one line of cases.[4] The conclusion of this article is that a consistent framework for an examiner's opinion (or interpretation) should be adopted. The tentative proposal is as follows:

1. The examiner must first determine if the item or items of evidence are in a condition that there is sufficient data for further analysis. If not, then the opinion would be that the discernable characteristics are not sufficient to form an opinion. (This would be the case with, for instance, a deformed bullet fragment or a fingerprint without sufficient ridge detail.)
2. If there is sufficient data, then the examiner can offer one of the following opinions:
    a. The source is most likely excluded. (This would usually be based on an opinion that the class characteristics of the evidentiary item and the potential source were incompatible, such as for instance, a .45 caliber bullet and a .38 caliber firearm or a latent print with a whorl compared to a rolled print with an arch.)
    b. Not excluded. (This would be based on the opinion that there is a positive correlation between class and random characteristics of the potential source item with the item of evidence and that there are no observed characteristics that are incompatible.)
    c. Nature and extent of correlation. (If not excluded, the examiner may offer an opinion as to how the data supports the correlation of the characteristics of the potential source and the item of evidence and, in the case of a strong correlation, whether the random characteristics are correlated to the extent that a different source would be unexpected.)

Conclusion

The word choices for forensic examiners in writing reports and giving testimony regarding pattern source comparisons is subject to current litigation, ongoing jurisprudential, and scientific scrutiny. Considering the *Azcona* case, read in conjunction with *Ross*, *Shipp* and *Tibbs*, there is reason to pause as to firearms and toolmarks and, by extension, as to all pattern source comparisons. Maybe this all will pass and experts, through peer reviewed studies, will establish that a more refined opinion can be offered. Many forensic experts would claim that that threshold has already been met. It seems though that the requirement of *Daubert*, *Kelly*, and the rules of evidence suggest that an additional showing is required. Forensic science is a part of a process of uncertainty, jurors are not equipped to do formalized Bayesian analysis (let alone Bayesian networks), and expert opinions should not be presented in a way that they convey any more or less than what truly aids the jury in its job. ■

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Endnotes

1 This is a summary of a more detailed academic paper in progress. Therefore, arguments and citations are kept to a minimum.

2 While the distinction between source comparisons and *pattern* source comparisons was not called out in the two previous Parts of this article in the February and March editions of the *Santa Barbara Lawyer*, it should be made explicit that the issues here are related most specifically to pattern analysis.

3 Vosk and Sapir are more optimistic about educating the jurors on metrology.

4 This formulation greatly benefitted from discussions over the last years and months with my colleagues at AAFS and particularly members of the Consensus Body on Firearms and Toolmarks. The formulation is my own and not that of the ASB and suffice it to say, many or perhaps all, would disagree with all or part of it.

JAGS & Physical Fitness Litigation

By Charles White

Charles White

The Judge Advocate General's Corps (JAG Corps) is a specialty of every United States military branch concerned with military justice and military law. Only the chief attorney within each branch is referred to as the Judge Advocate General; individual JAG Corps officers are called Judge Advocates, and colloquially known as JAGs.

JAGs serve primarily as legal advisors to the command to which they are assigned. Their advice may cover a wide range of issues dealing with administrative law, government contracting, civilian and military personnel law, law of war and international relations, environmental law, etc. They also serve as prosecutors for the military when conducting courts-martial. They are charged with both the defense and prosecution of military law as provided in the Uniform Code of Military Justice. Highly experienced officers of the JAG Corps often serve as military judges in courts-martial and courts of inquiry.

JAG applicants, as well as applicants for any job with physical fitness tests, could use the services of good counsel because the path to becoming a JAG involves rigorous physical fitness testing which may disparately impact applicants and may not test essential functions of the job performed.

In a Title VII class action on behalf of women who failed a physical agility test for firefighting jobs, the court conceded that the test had a "disparate impact" on women. So unless the test (more specifically the method of scoring and administering it—the focus of the plaintiff's attack) serves a legitimate interest of the employer, it violates Title VII. The district judge found a violation and gave judgment for the class. (*Evans v. City of Evanston* (7th Cir. 1989) 881 F.2d 382, 383.)

The Americans With Disabilities Act & Rehabilitation Act

The Americans With Disabilities Act (ADA) prohibits discrimination: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (42 U.S.C.A. § 12112.)

Likewise, the Rehabilitation Act prohibits discrimination:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. (29 U.S.C.A. § 794.)

In *Rick v. Travis County* (D. Tex 2015) 2015 WL 1486376, Rick served in the U.S. Army Reserves during which he did two tours of duty in Iraq. He came home with service-connected medical conditions to his knees and ankles. Rick was hired by the Travis County Sheriff's Office and was required to take and pass its Job Specific Test of physical ability, which he passed. Later, Rick was terminated because of his inability to perform jumping jacks and for not passing a physical fitness test that was not a job requirement. Rick filed an action, alleging violations of Title I of the ADA, and Chapter 504 of the Rehabilitation Act, among other claims. (Id.) The court suggested that "... there is clearly a genuine issue of material fact regarding whether jumping jacks, burpees, and mountain climbers, taken alone, are essential functions of the Corrections Officer job." (Id. at 5.)

JAGs do not run a mile on the job. Therefore, a court could conclude that there is a genuine issue of material fact regarding whether a mile run, taken alone, is an essential function of being a JAG, or any similar job.

When Special Agent candidate Mitchell failed to complete a 1.5-mile-run training time requirement for the sixth time, the Department of State terminated her status for the Bureau of Diplomatic Security. (*Mitchell v. Pompeo* (D. D.C. 2019) 2019 WL 1440126.) The court decided:

> For the reasons explained below, this Court concludes that Mitchell has not presented any evidence from which a reasonable jury could infer that Mitchell could have performed the essential functions of the

> Special Agent position even with accommodation, but the record evidence does give rise to a genuine issue of fact regarding whether or not another position existed within State that Mitchell could have performed.

(Id.) The court noted that "Mitchell applied to be a Special Agent and that she "was hired as a Special Agent candidate" [Id. at 9], while Mitchell claimed that she was hired "as a Foreign Service Officer and placed into the special agent candidacy program [,]." (Id.)

JAGs are hired as military lawyers, and Army JAGs are placed into a Direct Commission Course program. As in *Mitchell v. Pompeo*, evidence could give rise to a genuine issue of material fact regarding whether another position existed within the military that a JAG applicant could have performed.

Title VII & Attorneys' Fees

> Title VII of the Civil Rights Act prohibits discrimination:
>
> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
>
> (42 U.S.C.A. § 2000e-2.)

Before remanding the case in *Evans v. City of Evanston* (7th Cir. 1989) 881 F.2d 382, the court explained:

> The rub is in the scoring of the test. Since men are on average stronger and faster than women, the higher the passing score on a test such as Evanston's physical agility test (that is, the shorter the time in which it must be completed) the smaller the percentage of women likely to pass it.
>
> (Id. at 384.)

Since some classes of people have on average more slow twitch muscles than others, the higher the passing score on a running test such as a 1.5 mile, the smaller percentage of fast twitch muscle groups that will pass it.

In another Title VII action, *Thomas v. City of Evanston*, (N.D. Ill. 1985) 610 F.Supp. 422, the City of Evanston's use of physical agility tests to screen job applicants for the Police Department was challenged. (Id. at 424.) The Court held: "We find that the City's use of a physical agility test violated Title VII. We therefore grant the plaintiff's motion for summary judgment and deny the City's cross-motion. The sub-class which took the 1976 test is entitled to $188,059.44; those who took the 1979 test are entitled to $87,132.53." (Id. at 437.)

Where physical agility tests are challenged in litigation, attorneys' fees awards are a big hammer. Barbara Scimeca prevailed in a Title VII employment discrimination case in which she challenged the physical agility test used in the selection of police officers. (*Scimeca v. Village of Lincolnwood* (N.D. Ill. 1989) 1989 WL 106679, 1.) The court ordered the defendant to afford Scimeca the opportunity to become a Lincolnwood Police Officer without use of the physical agility test. Scimeca declined relief because she had already become a police officer for the City of Chicago, but she sought, and the court granted, her request for attorneys' fees with an enhanced "lodestar" figure of fifteen percent. (Id.)

When a person applies to the military, he or she is treated as a civilian with the protections under the ADA, the Rehabilitation Act, and Title VII.[1] JAG applicants, whether they apply through the Army, Air Force, Navy, Marine Corps, or Coast Guard, and other jobs with physical fitness tests, should be aware that the retention of trial counsel could be a feather in their cap. ■

The author, Charles White, was offered Army Active Duty and Army Reserve commissions in the U.S. Army Judge Advocate General's Corps. He has a Juris Doctor from the University of South Carolina School of Law and a Master of Laws LL.M. with an emphasis in Taxation from Chapman University Fowler School of Law.

ENDNOTE

1 Telephone conversation between Charles White and Equal Employment Opportunity Commission (2021).

Brown, *continued from page 15*

from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required.' (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)"

• "'To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value.' (*Salgado, supra*, 19 Cal.4th at pp. 646–647.)" (Judicial Council of *California* Civil Jury *Instructions* (2020), No. 3905A.) ■

Bradford D. Brown performed his undergraduate work at Lewis & Clark College. He earned his law degree from Southwestern University School of Law in Los Angeles in 1992, and soon thereafter established his practice in Santa Barbara which is limited to representing plaintiffs in personal injury actions. In September 2014, Mr. Brown's client was awarded the largest jury verdict in Santa Barbara County that year in Reese v. Mingramm. *Mr. Brown is also a Director on the Board of the Santa Barbara County Bar Association. Bradford enjoys spending time with his family and is an avid cyclist, skier, boater, golfer, and tennis player.*

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a state-wide network of recovering lawyers and judges dedicated to assisting others within the profession who have problems with alcohol or substance abuse. We protect anonymity. To contact a local member go to http://www.otherbar.org and choose Santa Barbara in "Meetings" menu.

Craigie, *continued from page 17*

feel shaky from a drop in blood sugar. On its face, this was not unreasonable, particularly given that a "shaky," "light-headed" factory worker can endanger himself or others. Unfortunately, your client did not give this much thought. He clearly did not engage with Sam to explore potential (alternative) accommodations.

To be clear, it may be that your client cannot accommodate Sam. His proposal to allow him an early break might have proven unreasonable, given how the assembly line operates. If all possible accommodations would cause your client undue prejudice (applying the factors above), then it is unfortunate, but Sam will need to find other work. Included in this equation is the principle that employers need not create a new position to accommodate a disabled applicant or employee. (*Spitzer v. The Good Guys, Inc.* (2000) 80 Cal. App.4th 1376, 1389.) Thus, your client need not create a job for Sam in Accounting, where he can break early to eat without disrupting the assembly line. But the interactive process must be thorough and well-documented before this conclusion is reached without exposing your client to possible liability.

California's employment disability laws are nuanced. Unless your client has an experienced human resource professional, it is a good idea to involve employment counsel, at least at the outset. The concepts and obligations may be unfamiliar, and the stakes are high. At least a client can rest easy having a basic understanding of the risks in this area, and you can help your clients avoid disability discrimination liability. ■

Alex Craigie is the Labor and Employment Section Head for the Santa Barbara County Bar Association. A recognized thought leader and proven courtroom lawyer, Mr. Craigie helps businesses throughout California prevent, manage, and resolve employment disputes in a rapid and cost-efficient manner. He can be reached at: Alex@CraigieLawFirm.com.

ENDNOTES

1. The FEHA applies to employers with 5 or more employees. (Gov. Code, § 12926(d).)

2021 Bench & Bar Meetings

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

May 20, 2021
August 19, 2021
November 18, 2021

These Bench and Bar Meetings will be held via Zoom. They provide a forum for local members of the Bar to engage in an informal dialogue with the presiding judge as a means of raising issues and concerns that may not otherwise be addressed. All attorneys and paralegals are welcome to attend. For any practitioners wishing to submit agenda items for consideration before any of the scheduled meetings, please email those items to Ian Elsenheimer: Ielsenheimer@aklaw.net

No Free Bites for California Dogs

By Renee Nordstrand

I am a firm believer that dogs are wonderful "family" additions. They are loyal, fun, get you outside more often, and provide a lot of entertainment, companionship, and stress relief, particularly during this past year of Covid-19 lockdown. However, the fact remains that many dogs are capable of unpredictable, aggressive behavior that can result in physical and emotional scars to a victim. For the dog, it can result in abandonment or euthanasia. And, for the owner, dog bites can lead to costly litigation and various forms of liability.

Over the 32 years I have been practicing personal injury law, I have seen a dramatic increase in the number and severity of dog bite injuries. Compelling statistics underscore the rise of such attacks:

- There were over 90 million dogs in the US in 2019/2020. (www.petpedia.com.)
- There is a 1 in 112,400 chance of dying from a dog bite or attack. (www.petpedia.com.)
- Over 70% of all dog bites occur because the dog is not neutered. Others attack because they have been maltreated, with pit bulls being the most abused breed and likely to attack. (www.petpedia.com.)
- According to the Center for Disease Control (CDC), someone in the US must get medical attention for a dog bite every 40 seconds, with a least 800,000 people requiring serious medical attention. (CDC Dog Bite Injury Statistic, 2019, www.petpedia.com.)
- In 2019, California led all states in lethal dog attacks with 9 deaths, the highest on record for a state in a single year. (www.dogbite.org.)
- Hospitalizations and ER visits by people bitten by dogs in CA have increased markedly in recent years (up by 50% and 30%, respectively), according to dog bite statistics published by California's Department of Public Health. (www.dogexpert.com.)
- Facial injuries are the most reported type of dog bite injury (77% of all casualties). (www.caninejournal.com/dog-bite-statistics.)
- Homeowner's insurance data reveals that the number of dog bite liability claims increased by 2.9% in just one year – from 17,297 in 2018 to 17,802 in 2019. (www.petpedia.co.)
- And, not surprisingly, there was a 300% increase in dog attacks during the Covid-19 pandemic per 1,000 emergency room visits. The data shows that dog bites, especially in children, have surged during social distancing. (www.petpedia.co.)

Renee Nordstrand

Immediate Steps Following A Dog Bite/Attack

If you are the unfortunate victim of a dog bite or attack, it is important to take certain steps to protect yourself. First, if you are able, take a photograph of, and identify the dog, dog owner, your resulting injury, and obtain the names and contact information of witnesses. Second, seek immediate medical attention and determine if the dog has rabies so you can obtain anti-rabies shots. Monitor the wound to prevent potential infection. Doctors are required to report to the local health officer all cases of dog attacks that require medical attention. (See Cal. Code Regs., tit. 17, § 2606.) Third, be sure to report the attack to local Animal Control who will investigate and monitor the dog to make sure it does not have a history of attacks or rabies. (See Civ. Code, § 3342.)

Liability for Dog Bites in California

Owners: California's dog bite law, codified in Civil Code section 3342, imposes strict liability on owners of dogs that bite someone. This means that you can be held liable even if your dog has no history of biting or vicious behavior; in California, every dog does not get one free bite. Although this rule seems straightforward, there are some noted exceptions: (1) this rule only applies when the person bitten was in a public place or lawfully in a private meeting (i.e., so it does not protect trespassers); (2) it does not apply to police or military dogs performing their duties; (3) it applies only to bites (but the skin does not need to be penetrated), no other injuries or property damage; and (4) it applies only to the owner of the dog.

Alternatively, an injured individual can bring a lawsuit under the common law "one bite rule." Under this doc-

trine, the "keeper" of the animal is liable for damages it causes when he or she is aware of the animal's dangerous propensities. The two key elements of this claim are: (1) prior dangerous behavior by the dog, and (2) the defendant's knowledge of this behavior. As a litigant, you would utilize this common law doctrine against anyone other than an owner who has exerted control over the animal, such as a dog walker or sitter. Generally, with proper investigation and expert witness testimony you can find facts to support prior knowledge of dangerous propensities.

In addition, in California, you are presumed to have acted negligently whenever you violate a law and cause an injury that the statute was designed to prevent. This "negligence per se" doctrine, codified in Evidence Code section 669, comes into play when someone violates animal control laws, such as walking a dog off leash. (See also Judicial Council of California Civil Jury Instructions (2020 edition), CACI Nos. 418 & 419.) It is always good practice to plead such a claim in addition to the dog bite strict liability statute in case the statute does not apply for some unforeseen reason.

Landlords: If a property owner allows a tenant to have a dog on the property, the landlord has a duty to ensure the property is safe. A landlord has a basic duty of care to keep the property safe of dangerous conditions and to make reasonable inspections of their property. (Judicial Council of California Civil Jury Instructions (2020 edition), CACI No. 1001 [Basic Duty of Care] and No. 1006 [Landlord's Duty].) If a landlord determines, or should have determined by reasonable inspection, that there is a dangerous condition on their property, they have knowledge of the danger and may be liable for the damage caused. If you are the victim of a dog bite, it is important for you or your attorney to obtain a copy of the lease agreement to determine whether dogs are allowed, whether any breeds of dogs are prohibited as well as other house rules. If the lease provides that dogs are prohibited or certain breeds are prohibited and the owner knew or should have known by inspecting the property that the dog was on the property, the owner may be liable for injuries caused by the tenant's dog.

Criminal Liability: Anyone who has control over a dog may also face criminal charges when the animal injures someone while roaming at large, but only if the owner or keeper knew the dog was a danger and failed to keep it under control. (See Pen. Code, § 399.)

Defenses: Dog owners may have one or more legal defenses in civil lawsuits. For instance, they might argue that the victims were trespassing at the time of the injury. A defendant dog owner might also argue that the victim was comparatively at fault for the incident, or voluntarily

Continued on page 29

Motions

The **Environmental Defense Center (EDC)** is pleased to announce the addition of **Rachel Kondor** as a Staff Attorney. Rachel comes to the EDC with diverse experience working with nonprofits, elected officials, and in a legal capacity, but always focused on the environment and conservation. After working as an attorney in the nonprofit sector for various environmental advocacy organizations in Arizona, Rachel spent more than a decade working for federal lawmakers. As a Senior Legislative Assistant for environmental and tribal matters to Congressman Raúl Grijalva, Rachel staffed him in his role on the Natural Resources Committee and as Chairman of the Subcommittee on National Parks, Forests, and Public Lands. Later, she served as a District Representative for Congresswoman Lois Capps. In this role Rachel developed the Congresswoman's legislation to designate wilderness, wild and scenic rivers, the Carrizo Plain National Monument, and the Condor National Recreational Trail in the Los Padres National Forest. Most recently, Rachel has served as a consultant for nonprofits on environmental policy, while representing clients as a volunteer through the Veterans Consortium's pro bono program.

Rachel Kondor

Rachel completed her undergraduate degree at the University of Arizona and received her Juris Doctor from Lewis and Clark Law School in Portland, Oregon with a Certificate in Environmental and Natural Resources Law. She has served on the boards of several environmental nonprofits, including the California Wilderness Coalition, the Sky Island Alliance, and Natural Allies.

"We are so pleased to have Rachel join the EDC team," said Linda Krop, Chief Counsel at the EDC. "Her background in federal environmental law and policy, especially her focus on natural resource and public lands law, as well as her knowledge of local issues, will help EDC serve our clients and our community in protecting our environment, our communities, and our climate. Rachel is already bringing her skills to help EDC and our clients preserve Naples and protect wildlife from oil and gas development."

* * *

On March 1st, 2021, **Rick Montgomery** opened a new practice in downtown Santa Barbara. For more than 40 years, attorney Frederick "Rick" Montgomery has been a fixture in Santa Barbara legal circles. As co-founder in January of 1977 of one of the City's most esteemed law firms, Fell, Marking, Abkin, Montgomery, Granet & Raney, LLP, he helped generations of Santa Barbara families and businesses work through their legal challenges. The move follows the natural winding down of Fell, Marking, Abkin, Montgomery, Granet & Raney. Rick Montgomery's new practice continues his specialization in complex family law. For Montgomery, giving up the profession he loves simply wasn't an option. "I'm not ready to give up the tussle. I love what I do," said Montgomery. "This is an exciting new chapter in my professional career. It's invigorating, it's a brand new set of challenges, and challenges make my world go round."

Rick Montgomery

While his new office is in downtown Santa Barbara at 926 Garden Street, Montgomery works with clients from all over California and across the country. He is licensed to practice law in state and federal courts, both trial and appellate. For decades, has held an AV-preeminent rating with LexisNexis® Martindale-Hubbell®. A practicing attorney since 1971, Montgomery received his undergraduate degree in political science from Stanford University in 1967, and his law degree from the University of California, Hastings College of Law in 1970. At Hastings, Montgomery was a member of the staff and, thereafter, managing editor of the Hastings Law Journal. He graduated as a member of

the Order of the Coif (top 10%) and Thurston Society (top 5%).

Montgomery is a member of the State Bar of California and the Santa Barbara County Bar Association. When not practicing law, he enjoys snow skiing, and spending time with his family. He and his wife, Sherri, have been married for 53 years. They have three adult children and five grandchildren, all living in Santa Barbara.

To contact Mr. Montgomery, call (805) 560-0100 (landline) or (805) 452-4702 (cell), or send an email to rick@montgomerylaw.legal.

* * *

If you have news to report such as a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc., the Santa Barbara Lawyer *editorial board invites you to "Make a Motion!" Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com.*

Nordstrand, *continued from page 27*

took a risk of injury. Such defenses are sometimes known as a "provocation" defense—i.e., some form of physical action on the part of the plaintiff that directly provoked the dog. This defense cannot be used where the victim is a child under the age of five or a child followed the instructions of a parent.

What Kinds of Damages Are Recoverable After A Dog Bite/Attack?

Compensation for dog bite injuries typically include medical and future medical expenses, including necessary reconstructive surgery and psychological therapy, wage loss and future lost wages due to your injuries, pain, and suffering, and may include punitive damages depending on the extremity of the circumstances. Families of people who are killed by an animal attack may be able to recover wrongful death damages or damages for loss of consortium in California.

In addition, an owner whose dog is injured or killed by another dog may be entitled to compensation for medical bills or the cost of replacing the dog. The dog owner may also be entitled to wage loss if the victim dog was a show dog or otherwise earned the owner income.

As noted above, damages in a dog bite case can be diminished based on any degree of negligence the victim may have shown in the situation. For example, if a dog is notably distressed and acting aggressive, but someone approaches the dog without good reason and is bitten, he or she might be seen as acting negligently.

Insurance Coverage for Dog Bites in California

Dog bite claims may be covered by a homeowner's insurance or renter's insurance policy. In criminal proceedings, the Victim Witness Program will provide reimbursement for out-of-pocket expenses.

In sum, as I caution my children and clients, always be aware of your surrounding circumstances and do not assume that all dogs are friendly – even the small, cute, or calmer breeds! If you sense a dog is about to attack you, do not turn your back to it. Instead, remain calm and motionless until the dog loses interest, and then slowly back away. If the dog attacks, try "feeding" it your jacket or purse to slip away. If you own a dog, keep it on a leash and be sure to get it neutered as soon as possible, as this surgery calms many dogs down. For more tips on how to protect yourself from a dog attack, see the Humane Society's website at www.humanesociety.org/animals/dogs. ■

Renee J. Nordstrand is a partner at NordstrandBlack P.C. AV rated by Martindale Hubbell, Renee exclusively represents Plaintiffs throughout California in personal injury matters, including dog bite cases.

TWO OFFICES FOR RENT

For rent (available March 1) two professional furnished offices (11'8" x 8'8" for $1,200.00 and 11'8" x 10'9" for $1,350.00). Includes a shared reception, two conference rooms, kitchen and workroom with copier. Located in a great Santa Barbara Downtown location across from the Courthouse and above the old Café Ana. Please contact Howard Simon at hsimon@jhslawsb.com for further information.

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CITY OF SANTA BARBARA CITY ATTORNEY'S OFFICE SEEKS DEPUTY OR ASSISTANT CITY ATTORNEY

The ideal candidate will be an entry-level attorney (Deputy or Assistant DOQ) with demonstrated interest and commitment to public law. Public law experience is desirable and may be demonstrated through prior public agency representation in either a public or private law office. Litigation experience is highly desirable.

The ideal candidate will enjoy working and contributing in an office environment that emphasizes collaboration and flexibility, with frequent client and co-worker teamwork, both in the office and at the clients' various sites. The Santa Barbara City Attorney's Office is highly computerized, so demonstrated experience with legal case management and document preparation applications is a plus.

Open until filled. Apply by 5:30 p.m. on March 12, 2021 for priority consideration.

You may visit the City's website to view more information (including job description) and to complete the application and required supplemental questionnaire:

SantaBarbaraCA.gov/jobs

2021 SBCBA SECTION HEADS

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