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Lynn E. Goebel Receives 2022 Legal Community Appreciation Award

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Guneet Kaur, Barbara Carroll, Lynn E. Goebel, Marisol Alarcon and Jill Monthei at the Santa Barbara County Bar Foundation's presentation of the Legal Community Appreciatiion Award.

Here's What You Need to Know About California's New Pay Transparency Law

By Grace Gedye

Grace Gedye

In less than two weeks, job seekers in California will finally know how much a job pays when they apply for it—if companies don't figure out a way around a new law.

Starting on Jan. 1, employers with at least 15 workers will have to include pay ranges in job postings. Employees will also be able to ask for the pay range for their own position, and larger companies will have to provide more detailed pay data to California's Civil Rights Department than previously required.

California isn't the first state to force businesses to put their cards on the table. Colorado took that step in 2019, and a similar requirement went into effect in New York City in November. Washington state has its own version that will also kick in on Jan. 1, and a similar statewide bill in New York was just signed by the governor.

The goal of the California law is to reduce gender and racial pay gaps. But New York City's measure had a bumpy start, with some employers posting unhelpfully wide ranges the first day the law was in place. When Colorado rolled out its law at the beginning of 2021, some companies posted remote jobs that they said could be done from anywhere in the U.S.—except Colorado—dodging the requirement. That wasn't widespread; about 1% of remote job listings included a Colorado carveout, according to reporting in The Atlantic.

But since California has nearly 7 times as many people as Colorado, according to U.S. Census data, excluding Californians in a remote job listing would come at a higher cost.

"California's just such a huge economic center," said Lisa Wallace, co-founder of Assemble, a compensation management platform. "There just aren't that many industries that are not going to be touched by this."

What's the pay range?

Here's what California job seekers can expect to see more frequently come January: $44 an hour to be a plumber in Berkeley; $18.38-$28.51 an hour for an assistant teacher job in Los Angeles; $74,600 – $141,000 per year for a future compensation analyst in Davis. If companies aren't adding ranges, people can sue or file a complaint with the Labor Commissioner's Office, which can issue a penalty of $100 to $10,000 per violation. Companies that don't have pay ranges in job postings won't get penalized for their first violation, so long as they add the information.

In addition to preparing to post pay ranges in job listings, companies that don't already have pay bands for current employees should put them in place, and they should make sure that there aren't pay disparities based on race, sex, or other protected classes between employees doing substantially similar work, said Jacklin Rad, a lawyer who advises employers on California workplace laws at Jackson Lewis, a law firm.

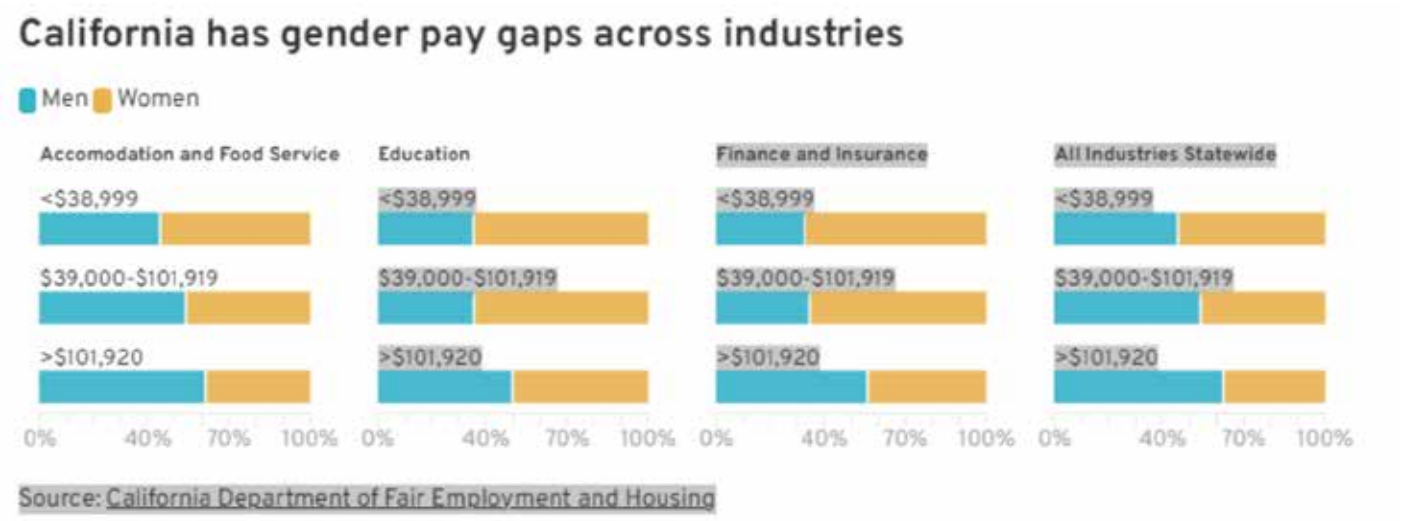
Businesses are about to have their pay scrutinized by job candidates and employees, said Wallace, the compensation platform company co-founder. "You better make sure that you have a really strong answer for why an employee is paid less," than the posted range for a similar-looking job, she said. The new California law is uncovering that a lot of organizations have been operating without pay bands, Wallace said. Many of the company's earliest customers were tech and biotech businesses, Wallace said, but since the bill was signed into law she's seen increased interest from other sectors, including manufacturing and utilities.

One question that arose immediately when New York City's law went into effect was how wide can a pay range be without violating the law? Some postings included ranges where the high end was about $100,000 more than the low end.

California's law explains the required payscale as "the salary or hourly wage range that the employer reasonably expects to pay for the position."

"It's really ambiguous," said Rad, the lawyer. "A lot of attorneys that work in this sphere ask themselves: 'You know, if the range is too wide, then does that defeat the purpose of pay transparency?'"

CalMatters reached out to the Labor Commissioner's



office, which is charged with enforcing the payscale component of the law. The office didn't make anyone available to be interviewed, and did not respond to a detailed list of questions about how the law will be interpreted.

California government agencies include pay scales in job postings, and some of the ranges are large. The Civil Rights Department, for example, recently had a posting for an "Assistant Deputy Director, Workforce Data Officer" with a listed pay range of $7,976 – $19,321 per month, which translates to about $96,000 – $232,000 per year. Another posting, for a Deputy Chief Counsel at the Civil Rights Department had a similar range.

Pay ranges are set by the state's human resources agency, CalHR, and are influenced by bargaining with unions, said Adam Romero, deputy director of executive programs at California's Civil Rights Department. Those two positions are "very senior," and most roles don't have pay ranges that wide, Romero said.

Reporting pay data

The second major component of the new law is that businesses with 100 or more employees will have to start reporting more detailed data on what they pay workers to the state. It builds on a 2020 law that required companies to submit reports to the state's Civil Rights Department breaking down how many employees they have in each job category and pay band by sex, race, and ethnicity. The goal was to enable state agencies to more identify wage disparities more efficiently, and to prompt companies to assess their own pay.

The reports are used "in individual investigations of complaints of pay discrimination or other types of complaints of civil rights violations against employers," said Romero at the Civil Rights Department. The data on its own doesn't prove there's been a violation of the law, but it provides context, said Romero. The Civil Rights Department cited the pay data, for example, when it sued Tesla for race discrimination and harassment in February.

The law taking effect Jan. 1 requires employers to add median and mean hourly rate for each demographic group within each job category and include pay data for contractors.

"We are really trying to shine more light on this growing shadow workforce of contract workers," said Mariko Yoshihara, policy director for the California Employment Lawyers Association, which supported the new law. Google, for example, has more temps and contractors than full-time employees, according to New York Times' reporting. The new law will reveal how contractors' pay compares to that of full-time employees, Yoshihara said.

An early version of the new law would have made each company's pay data public. But after intense pushback from business groups—who said the data is not a reliable measure of pay disparities and that it would "set up employers for public criticism with incomplete, uncontextualized reports and create a false impression of wage discrimination where none may exist"—the bill was amended to keep the reports private.

If companies don't submit their pay data, the Civil Rights department can take action. It sued Michaels, the craft store chain, and JP Morgan Chase Bank for not submitting the data; both companies settled, paying a combined total of about $23,500 to cover the department's fees and costs. ■

Grace Gedye, CalMatters. CalMatters.org is a nonprofit, nonpartisan media venture explaining California policies and politics.

Mentorship Opportunities Available

The UCSB Pre-Law Program Mentorship Team is looking for local attorneys and judges to mentor first generation college students in the Spring Quarter (April 10 through May 29, 2023).

One of the greatest needs for students exploring different fields of law in preparation for law school is to connect with lawyers, judges, and others working in the legal profession in order to get an insider's perspective and find out what it's like to practice in a given field of law. However, many students do not have access to lawyers or judges among their family or social circles. Participation in a program like this is an invaluable foundation for their future.

Cohorts will be comprised of approximately 4 to 6 mentors/mentees each. Each mentor will meet twice with their primary mentee and will also meet once with each of the other mentees in their cohort who will also have rotating meetings with the other mentors in their cohort.

Over the course of the Spring Quarter, mentors will meet with students for approximately 5 to 7 hours total – depending on the size of the cohort. In addition there will be a 1-hour mentor orientation before student meetings begin and a 1-hour closing social at the end of the program.

If you are interested in becoming a mentor, please contact Claire Mitchell at claire.mitchell@rimonlaw.com.

Lynn E. Goebel Receives 2022 Legal Community Appreciation Award

On February 9, the Santa Barbara County Bar Foundation awarded its 2022 Legal Community Appreciation Award to Lynn E. Goebel at a ceremony that took place at the County Courthouse.

Lynn is a family law attorney who works for Legal Aid and oversees the Legal Resource Center in Santa Barbara. Prior to this she ran her own practice. Lynn is a past president of the Santa Barbara County Bar Associaiton.

Her nomination for the honor was made by Guneet Kaur and Elizabeth Diaz. The Board unanimously voted on Lynn to receive the 2022 Legal Appreciation Award.

The decision was made on Lynn because of her work with the Board of the Legal Aid Foundation, as President of the Board and a board member. She has volunteered with many other organizations, such as the Rental Mediation Task Force, Santa Barbara Film Festival, Transition House and Santa Barbara Public Library. She really wants to help make her community a better place for everyone, and it is evident in both her professional and personal life.

Guneet Kaur and Lynn Goebel

During Covid, when the Courthouse was closed to self-represented litigants, Lynn spearheaded the effort for the LRC to be available for in-person services for a few hours in the morning outside the Courthouse. She got tables, chairs, and a canopy to offer services. She had printers and computers set up to a power strip to the Courthouse, so litigants had access to justice.

Lynn is also a good and kind person, always cracking jokes and making people smile.

Join us in congratulating Lynn on her many accomplishments. Thank you, Lynn, for all you do to help the Santa Barbara Community! ■

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Transitioning to Retirement

By Eric Woosley

I have been friends with Brad Brown for many years, so when he called and asked me to write an article for this publication, since he was the new editor, I was happy to do so. I assumed he would want me to write about some case I was involved with, or some heavy legal topic, but no, he suggested that most attorneys would be interested in how I transitioned (or am still transitioning) to retirement. So here it is.

My thoughts of retirement began about the time the first iPhones came out. I know this because I downloaded an app called "Countdown." A very simple app that simply counts down to a specified date and then plays your chosen song when you reach that date. I entered 5:00 p.m. on the day before I turned 59. I found this kept me focused on my ultimate goal. Whenever I was considering a case, driving to Court in some remote location, participating in a multi-day deposition, responding to voluminous discovery seemingly designed to burn up as much of my time as possible, or spending weeks in a trial, I would check my remaining time to retirement and ask myself: Is what I am doing advancing my goal of retiring on my chosen date?

I ended up retiring about a month before that date, but "American Pie" still ended up playing at 5:00 p.m. the day before my 59th birthday!

Thus, the transition.

First, don't take "one last case" after your retirement begins. For me this began with an innocuous call from a client who I had been representing for about 20 years. He called to let me know he had been served a "frivolous" case and he needed my assistance one last time. I explained that I had retired and was not taking on any new cases. He said I was the only attorney he trusted and the case would take at most a month or two to dispose of. No doubt bathing in the flattery, I agreed with the understanding that this was it and if it could not be disposed of quickly, he would find someone else. Then he died. COVID brought case resolution to a standstill, and that single case spawned 8 more offshoots, in three different jurisdictions, and is still going years later. Mistake number one.

Second, all of your friends and relatives now think you have unlimited free time to help them with their various legal needs for free. It's next to impossible to say "no" as they know you are not working, and, as we all know too well, everyone thinks attorneys know everything about every aspect of the law. This resulted in a former Plaintiff's lawyer appearing in criminal court to defend a grand-niece caught in a sting operation to catch underage college students using fake ID's, fielding calls from everyone who was seeking to evict a tenant during COVID (because I MUST know how to get around the plethora of new laws that had been enacted), drafting emergency Wills for friends and relatives afraid they would get COVID and die before contacting a real estate planning attorney, challenging an Internal Revenue Service determination in Tax Court, and fielding calls from both friends and relatives who wanted to force their kid's school to reopen for in-person teaching. This mistake is hard to avoid but the term "inactive license" comes to mind.

Those are the major mistakes. Trust me, there are many smaller ones.

On the plus side, what to do with your time after you close or leave your law practice? Having been an attorney for 20 years (once having gone 10 years straight without a day off), hobbies were non-existent and I had not traveled many places except for business.

I always thought that after I retired, I would like to donate my time to a good cause. So, I explored various charities. This ended up being more of a challenge that might be imagined. I began contacting charities for which I had some type of affinity to make my interest known.

The first thing you will learn is that they want to talk to you about being on their Board (and, of course, providing financial support). Been there, done that. Not really how I want to spend my remaining years. Alternatively, there were activities like packing up food and clothing donations to be sent overseas, delivering food to those unable to leave their homes or providing transportation for those who needed it. These did not seem like the best I could contribute so, ironically given mistake number two above, I volunteered for the Legal Aid Foundation of Santa Barbara County. My thought was that it would be the best way to give back utilizing the skills I actually possess. I found it to be one of the most rewarding experiences in my life and the folks that run and staff Legal Aid are angels of the highest order. The point being, find something you really want to do once you retire and don't wait until after you retire to figure out what it is going to be.

Just so it is clear that altruism does not run that deep in me. I spend the rest of my time traveling to all of those places I missed while pursuing my career. After the first trip, we agreed to decide on, and begin scheduling, the next trip on the last night of each current one. Most recently, Paris for Christmas and London for New Years. Both places I had never been to previously. However, just to keep with the general theme here, we visited the Supreme Courts in both Paris and London as part of the trip and are attempting to visit the Supreme Court of each state or country we visit.

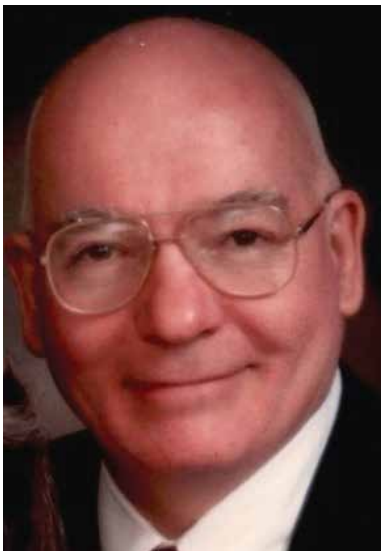
During my transition, a number of attorney friends of mine retired as well. Some notified all of their clients, did not make the mistakes set forth above, and never looked back. Oh well, live and learn. In either case, make a plan and stick to that plan until, invariably, the plan changes. Harder to let go than I would have thought. ■

Eric Woosley began his career as a defense attorney and transitioned to plaintiff's representation. He represented clients throughout the state and is a member of ABOTA. Currently, retired—more or less.

ENDNOTES

1 I attribute this to the advent of cable news where some attractive former assistant district attorney is called upon to opine on constitutional law, election law, civil law in all 50 states and the presidential records act – sometimes in the same segment.
2 If not bad enough, it was in El Dorado County.
3 "Yeah, not happening."
4 Thankfully, none did.
5 Previously I had never even heard of Tax Court.
6 Since I had handled exactly one education related case during my career, it was apparently presumed I had the expertise to take on the Governor and the Teachers Union.
7 And, no, for you skeptics, this was not just so I can write it off.

Charles Wayne Willey 1932–2022



Charles Wayne Willey

Chuck passed away on December 21, 2022 in Missoula, Montana. He was born October 7, 1932 in Dillon to Elizabeth (Leonard) and Asa Willey. He spent his early years on the family ranch in the Big Hole, where he was the doted-upon little brother of sisters Corinne, Elaine, and June.

When his father died in 1944, Chuck and his mother moved to Wisdom and he later went to high school in Medicine Lake while living with sister Elaine and her husband Bud Hjort. Following high school, Chuck attended Montana State University, where he received a B.S. with honors in 1954. Chuck then served in the United States Air Force for two years, after which he attended law school at the University of Montana.

So began Chuck's life-long engagement with the law, studying it, practicing it, arguing about it, and teaching it. He graduated first in his class in 1959 and served as Editor-in-Chief of the Montana Law Review. After graduation, Chuck moved to San Francisco to clerk for the Honorable Walter L. Pope, Chief Judge of the Ninth Circuit Court of Appeals.

In 1960, Chuck began practicing with Price Postel & Parma in Santa Barbara, California. Chuck practiced in Santa Barbara (with PP&P, his own firm, and Hollister & Brace) for 41 years and engaged widely in the legal community. He was variously President of the Legal Aid Foundation of Santa Barbara, President of the Santa Barbara County Bar Foundation, and Chair of the State Bar of California's Committee on Administration of Justice. He served as a Judge Pro Tem in the Santa Barbara County Superior Court and was a member of the William L. Gordon Inn of Court. Chuck also served as a member of the Board of Laguna Blanca School and on the vestry of All-Saints-By-The-Sea Episcopal Church.

Following his "retirement" from active practice, Chuck returned to Montana, where he was an Adjunct Professor of Law at the University of Montana and Chair of the State Bar of Montana's Business, Estates, Trusts, Tax and Real Estate Section. Chuck loved horses (he was a deft rider and an equine whisperer), dogs (large and small, all spoiled), reading (he read deeply and voraciously, with an emphasis on history), laughter, and wine (he was agnostic and liked it all).

Chuck was an accomplished and caring man who always wanted to ensure that his children had winter coats. Chuck is predeceased by his parents, sisters, and brother (Harold). He is survived by his wife of 36 years, Alexis; his children, Stephen (Gretchen), Heather (William), Brent, and Scott (Laurel); and grandchildren, Ryan, Cole, Blake, Lucien, Sian, Caden, Katrine, and Theo. Services will be private. ■

Dog Alerts as Junk Science

By Robert M. Sanger

Robert M. Sanger

Dogs have a greater olfactory capability than humans and are able to use their sense of smell to explore the world around them. People who have dogs see that they often go outside and sniff the air and then they put their heads down and sniff the ground. This gives them information about their environment that humans cannot derive in a similar fashion.

Dog handlers, people with more or less actual training, can attempt to interpret dog behavior to assist the police. Some handlers are police officers and others are private dog owners or search and rescue volunteers. Generally, none of these handlers are scientists. This *Criminal Justice* column will look at a use of dog behavior as it relates to criminal prosecutions where the dog behavior – a dog alert – is not used to find evidence but is used as evidence itself.

Dog Alerts Resulting in Evidence

Dogs are used by law enforcement to attempt to detect drugs, firearms, explosives, or to track missing persons. The object is to find the contraband or evidence. Sometimes the handlers' interpretation of dog behavior leads to the rescue of people or to the discovery of dead bodies. Often, claims relating to "alert" behavior are used as probable cause to conduct a further search for contraband. In all these cases, the objective is to uses the dog's interpreted behavior to find something that can be retrieved.

There are many academic studies showing that these "alerts" often result in false positives, that is behavior that is interpreted by the handler to indicate that there is contraband when, in fact, there is none present. There are also documented cases of dog handlers manipulating a canine to alert when the handlers have a hunch that contraband might be present. As a an overview article on the subject noted, "Cops laugh about 'probable cause on four legs' but the damage to innocent lives is real."[1]

In addition to blatant manipulation of the dogs, there is the "Clever Hans" effect in which imperceptible (and sometimes unintentional) behavior on the part of the handlers can affect the dog's apparent alert. False positives, whether the result of incorrect interpretation by the dog or the handler or something more sinister, can cause people and their property to be searched where there really is no probable cause. When the people do not possess contraband, it may result in their unnecessary detention and the tossing of their car or home or the destruction of packages in transit. When the suspects do possess contraband, although it may have been discovered on a hunch, the Fourth Amendment is violated. But where physical evidence is found and the search survives a Fourth Amendment challenge, the jury is not relying on the handler's interpretation of the dog's behavior, they have the actual evidence that was recovered.

There is another situation in which dog alerts are used in criminal prosecutions. That is "dog-tracking." In dog-tracking cases, if there is a prosecution, the evidence is usually to the effect that the dog was given a piece of clothing or other item or that the dog was asked to follow a "scent trail." Again, the purported confirmation of the interpretation of the dog's behavior is that someone was located. This could be a false positive, that is, it could be that the dog did not follow the scent or was manipulated, consciously or otherwise, to go to a location. But, false positive or not, the fact that a person was found at the end of the trail is the actual evidence and, as shown below, for it to be admissible, there must be substantial corroboration.

Dog Alert Without Evidence

The focus of the remainder of the article is the use of a "dog alert" as evidence itself -- as probative on whether a dead body had been present on some prior occasion even though no actual evidence was retrieved. There is no scientific or legal basis for the admission of evidence of this dog behavior itself. In these cases, there is no resulting physical evidence such as contraband, a fleeing individual or an actual body. In other words, this dog behavior is offered without corroboration.

Testimony by dog handlers that a dead body had been present at some time is simply junk science and does not meet the standards of admissibility in California. The admissibility of expert testimony is governed by the Cali-

fornia Supreme Court decision in *Sargon Enterprises, Inc. v. University of Southern California*.[2] The Court expressly acknowledged that judges are the "gatekeepers" with regard to a determination of the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*.[3] The California Supreme Court set forth three criteria to determine the admissibility of this kind of testimony:

"[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." The Court also observed that "[o]ther provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony."[4]

As gatekeepers, courts must focus on the "'principles and methodology'" asserted by the proposed expert and not "'on the conclusions that they generate.'"[5] Thus, the "gatekeeper's role 'is to make certain that 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.'"[6] As *Kumho Tire* confirms, these requirements apply to both scientific testimony as well as non-scientific expert testimony.[7]

It should be noted that the California Supreme Court in *Sargon* did not take a bold leap. The Court relied on the Evidence Code itself but also incorporated the *Kelly/Frye* analysis. Under *People v. Kelly*[8] there are three prongs: "First, there must be proof that the technique is considered reliable in the scientific community. Second, the witness testifying about the technique must be a qualified expert on the subject. Third, there must be proof that the person performing the test used correct scientific procedures."[9] Therefore, under *Sargon*, Evidence Code sections 801and 802, and *Kelly*, the court is the gatekeeper charged with the duty to exclude expert evidence unless a foundation is laid demonstrating that there is *foundational validity* to the technique employed and that it is *valid as applied* by a qualified expert using correct scientific procedures. This is consistent with the view of the scientific community as set forth in the PCAST report and other current scientific studies.[10]

Dog handlers are not scientists and are not able to establish that their claims are supported with any academic or scientific studies. They cannot not establish the validity of the "'principles and methodology'" on which they based their conclusions.[11] In fact, none of the scientific studies are able to determine why dogs alert to human remains as opposed to other scents, like that of live bodies. It is generally accepted that, if the dogs are reacting to something, it is some form of volatile organic compound. However, there is no scientific literature establishing what volatile organic compound they react to or what would differentiate postmortem compounds from live human or other organic compounds.

By way of an imperfect analogy, the courts of California have discussed evidence pertaining to dog alerts in the context of dog-trailing cases. These cases are different than human remains detection where dog alerts do not result in the location of evidence. Dog-trailing cases involve a claim that a particular person can be tracked from one place to another by unique scent. These cases generally involve locating an actual person who has other connections to the alleged crime. Thus, dog-trailing cases present a misleading analogy to dog alert cases even though something can be learned by looking at these trailing cases.

In *People v. Jackson,*[12] the California Supreme Court set forth the standard for the admissibility of dog-trailing evidence based on the Court of Appeal opinion in *People v. Malgren*.[13] The Supreme Court relying on the court of appeal established four preliminary factors that must be satisfied by the proponent in order for the dog-trailing evidence to be admissible, namely: (1) whether 'the dog's handler was qualified by training and experience to use the dog'; (2) whether 'the dog was adequately trained in tracking humans'; (3) whether 'the dog has been found to be reliable in tracking humans'; (4) whether the dog was 'placed on the track where circumstances indicated the guilty party to have been.'"[14] The Supreme Court then added a fifth criteria that the dog-trailing evidence must be corroborated by either direct or circumstantial evidence.[15] If this analogy is followed, dog alert evidence should be inadmissible where the interpretation of the behavior of the dog is offered as evidence despite the fact that nothing was located and there is no corroboration.

Before getting to the question of corroboration, dog alert cases fail to meet the first four criteria for trailing cases in *Jackson/Malgren*. The Court emphasized that "dog-trailing procedures and experiments must comply with the laws of physics, chemistry, and biology" and if they do not, courts must exclude the testimony as "unfounded."[16] There is no scientific basis for dog alerts regarding the former presence of dead bodies.

The courts in *People v. Mitchell*[17] and *Willis*,[18] both dog-trailing cases, required additional evidence to establish the foundational validity of "scent discrimination" evidence. In *Mitchell*, the court considered testimony by the dog handlers that a scent "will remain on an object for two to four months after it has been touched." This testimony was based on anecdotes regarding the dog's prior performances, but "no effort was made to present information from any academic or scientific sources, let alone peer review journals, regarding these testimonial assertions."[19] The court was also concerned about the unsubstantiated claims that "every person has a scent so unique that it provides an accurate basis for scent identification lineup." The court emphasized that neither of the dog handlers who testified had a background in science and neither were aware of scientific data supporting this claim. Thus, the *Mitchell* court stated that these "assumptions" must be supported by more than "the mere experiences of one trainer and one dog."[20]

Similarly, in *Willis*, the Court of Appeal stated that the "prosecution cannot rely solely on anecdotes regarding the dog's capabilities."[21] The court in *Willis* summarized the factors considered in *Mitchell* as follows: "a foundation must be laid from academic or scientific sources regarding (a) how long scent remains on an object or at a location; (b) whether every person has a scent that is so unique that it provides an accurate basis for scent identification, such that it can be analogized to human DNA; (c) whether a particular breed of dog is characterized by acute powers of scent and discrimination; and (d) the adequacy of the certification procedures for scent identifications." The court in *Willis* also stated that a dog "showing interest" is "a far cry from tracking a suspect and giving an unambiguous alert that the person has been located."[22]

The foundation that was found to be insufficient for the admissibility of evidence in *Mitchell* and *Willis* demonstrates that a handler's interpretation of dog behavior – a "dog alert" – is inadmissible as evidence that a dead body had been at a location where no other evidence was found. There is no scientific validity established under the first four criteria of *Jackson/Malgren*. There is also no support for the fifth criteria which requires independent evidence that corroborates the dog scent evidence since these cases, by definition, involve only an alert and no other evidence.

Importantly, in the dog-trailing cases, to be admissible, the independent corroborating evidence of a connection to the alleged offense must be "substantial." For instance, in a dog-trailing case the prosecution relied on several pieces of

circumstantial evidence to support the dog trailing evidence, including "footprints found intermittently upon the track, along with a shiny dime," and that the officer "saw a heavy-set Mexican mail suspect flee in the direction taken by the dog" and that the suspect was "found lying face down in tall grass when found and refused to speak when confronted by the officer."[23] The court found all of that to be insufficient evidence to corroborate the dog trailing evidence.

It is safe to say that a mere dog alert that does not produce corroborating evidence is inadmissible. Dog trailing cases may be a good analogy but they also involve actually finding a person and, even at that, must have additional corroboration that the person found was the right person. That is not the case where the alert, itself, is offered in evidence.

Conclusion

Dog alert evidence standing alone is not evidence. It is junk science. It does not meet the criteria set forth in the case law even for such evidence as dog trailing evidence. In addition, the overarching law under *Sargon*, *Daubert*, *Kumho Tire* and Evidence Code sections 801 and 802 require the Court to exercise its gatekeeping function. Since no scientific foundation can be established for the basis or accuracy of mere dog alerts and, especially where there is no corroborating evidence, dog alert evidence is inadmissible. ■

Robert Sanger is a Certified Criminal Law Specialist (Ca. State Bar Bd. Of Legal Specialization) and has been practicing as a litigation partner at Sanger Dunkle Law, P.C., in Santa Barbara for 49 years. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is a Professor of Law and Forensic Science at the Santa Barbara College of Law. Mr. Sanger is an Associate Member of the Council of Forensic Science Educators (COFSE). He is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization.

Endnotes

1 Daryl James, "The Police Dog Who Cried Drugs at Every Traffic Stop," Reason Magazine, May 13, 2021.
2 (2012) 55 Cal.4th 747, 770-772 (*Sargon*).
3 (1993) 509 U.S. 579 (*Daubert*).
4 *Sargon, supra,* 55 Cal.4th at pp. 771-772.
5 *Sargon*, supra, 55 Cal.4th at 772, quoting *Daubert, supra*, 509 U.S. at p. 595.
6 *Sargon*, supra, 55 Cal.4th at p. 772, quoting *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 152 (*Kumho Tire*).
7 *Kumho Tire, supra,* 526 U.S. 137.
8 (1976) 17 Cal.3d 24 (*Kelly*).
9 *People v. Willis* (2004) 115 Cal.App.4th 379, 385 (*Willis*).
10 President's Counsel of Advisors on Science and Technology (PCAST), Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016).
11 *Sargon,* supra, 55 Cal.4th at 772, quoting *Daubert*, supra, 509 U.S. at p. 595.
12 (2016) 1 Cal.5th 269 (*Jackson*).
13 (1983) 139 Cal.App.3d 234, 238 (*Malgren*).
14 *Jackson*, supra, 1 Cal.5th at p. 321, quoting *Malgren*, supra, 139 Cal.App.3d at p. 238.
15 *Jackson, supra,* 1 Cal.5th at p. 321.
16 *Jackson*, supra, 1 Cal.5th at p. 318.
17 (2003) 110 Cal.App.4th 772 (*Mitchell*).
18 *Willis, supra,* 115 Cal.App.4th 379.
19 *Mitchell*, supra, 110 Cal.App.4th at p. 791.
20 *Id.* at pp. 791, 793-794.
21 *Willis*, supra, 115 Cal.App.4th at p. 386.
22 *Willis*, supra, 115 Cal.App.4th at p. 386.
23 *People v. Gonzales* (1990) 218 Cal.App.3d 403, 415.

California Penal Code Section 372.5

By Andrea Anaya

Andrea Anaya

There is increased conflict between federal immigration law and California's attempts to limit consequences for minor controlled substance violations. Recent changes to controlled substance laws aim to decriminalize minor violations for U.S. citizens, but they continue to have severe life altering consequences for noncitizens. A new law California Penal Code Section 372.5 is an attempt to avoid some devastating consequences for noncitizens. Even an infraction for a controlled substance violation in California is considered a criminal conviction under federal immigration law[1]. For years immigration attorneys would argue that an infraction was not a conviction for immigration purposes, because the proceedings for an infraction are non-criminal in nature with no jail, jury, or right to counsel. That argument is no longer effective. The Board of Immigration Appeals held that "the minimum constitutional safeguards for all criminal proceedings define whether a proceeding is criminal in nature, and a jurisdiction's application of these safeguards will render such a judgment a conviction". *Matter of S. Wong* 28 I&N Dec. 518 (BIA 2022).

An infraction for a simple controlled substance violation in the state of California can result in a noncitizen being removed from this country and separated from their family. The California legislature enacted a new law to help mitigate these drastic consequences. Effective January 1, 2023, California Penal Code Section 372.5 (AB 2195) provides a vehicle for relief to some noncitizen defendants.

Penal Code Section 372.5 allows a defendant who is charged with a controlled substance offense to plead to a non-controlled substance offense. The defendant would enter a plea to Penal Code Section 370 for public nuisance. A plea agreement under 372.5 can provide a sensible resolution for both criminal prosecutors and noncitizen defendants. A plea to public nuisance under 372.5 can be treated as either an infraction, misdemeanor, or felony violation. If a defendant is sentenced for a violation of Section 370 based on a disposition which includes the dismissal of one or more [infraction/misdemeanor/felony] charges that allege unlawfully cultivating, manufacturing, transporting, giving away, or selling a drug, or offering to transport, give away, or sell a drug, unlawful use of a drug, or unlawful possession or use of a drug or drug paraphernalia, is punishable:

- as an infraction, by a fine not to exceed two hundred and fifty dollars:
- as a misdemeanor, by a fine not to exceed one thousand dollars or imprisonment in a county jail for not more than one year: or
- as a felony, by a period of 16 months, or two or three years, or by imprisonment in a county jail for not more than one year.

A defendant cannot be charged with 372.5 affirmatively but the prosecutor can offer this plea if the defendant is facing a controlled substance violation. A plea under 372.5 is not a categorical match for a controlled substance offense under federal law. The language of the California statute uses the term "drug" as defined under California Health and Safety Code Section 11014 which is an overbroad term that lists more substances than are listed on the federal controlled substance schedule. A plea to Section 372.5 is a far better plea than a controlled substance violation for many noncitizens, especially when faced with a charge for felony possession for sale.

Section 372.5 may be the best option for many noncitizens, but it is not the best plea for every noncitizen. The right plea for the noncitizen defendant will depend on their current immigration status in the United States. The analysis always requires asking the defendant about their current immigration status. A noncitizen defendant may be a lawful permanent resident, asylee, DACA recipient, foreign student, or has no lawful status but is in the process of immigrating. The objective for each of these individuals may vary.

A defendant without lawful status in the United States but currently in the process of obtaining permanent residency through their spouse may want to plead to something else. This defendant will be presenting themselves to be "admitted" into the United States and will carry the burden of proving they were not convicted of a controlled substance

offense. They would have to show that the "drug" offense they pled to was not for a substance listed in the federal schedule, which can be difficult when pleading to the general term "drug". Even a mere admission to a controlled substance violation, with no conviction, will bar admission to the United States under INA § 212(a)(2)(A)(i). A noncitizen who must establish that they were not convicted of a controlled substance offense may want to obtain a plea with less ambiguity.

In contrast, a lawful permanent resident faced with a charge for possession for sale would rather plead to Section 372.5. A plea to 372.5 can keep the lawful permanent resident from being removed from the United States if that is their only deportable offense, because the government will not be able to prove that the defendant was convicted of a controlled substance offense under INA § 237(a)(2)(B)(i). The burden of proof of determining whether a noncitizen is convicted of a controlled substance offense will switch between the Department of Homeland Security and the noncitizen. For example, if that lawful permanent resident, then travels abroad and returns to the United States they will likely be pulled aside by Customs and Border Patrol who will argue that they are now seeking an "admission" to the United States and must prove the 372.5 conviction was not a controlled substance offense.

The objective for a noncitizen defendant will vary depending on their status in the United States at that time and their future objectives (e.g., travel abroad, become U.S. citizen). There was a time when creating a vague record of conviction for drug offenses was one of the best practices for noncitizens, but that is no longer advised for noncitizens who must apply for relief, admission, or avoid becoming deportable. *Pereida v. Wilkinson*, 141 S.Ct. 754 (March 4, 2021). A preferable alternative to a controlled substance violation is pre-trial diversion, if it can be completed successfully. Pre-trial diversion is not considered a conviction for immigration purposes because no plea of guilt is ever entered.

California continues to make efforts to mitigate some of the dire consequences from minor controlled substance violations. Unfortunately, federal law controls for noncitizens so it is important to perform an analysis for every noncitizen defendant charged with a controlled substance violation. Even a minor controlled substance infraction can create devastating consequences for noncitizens and their families. ■

Andrea M. Anaya is a Partner with Kingston, Martinez & Hogan. She practices immigration law, specializing in family-based immigration, deportation/removal defense, crimmigration, deferred action, and federal immigration litigation. She is licensed by the State Bar of California and is a member of the American Immigration Lawyers Association.

Endnote

1 There is one exception for a controlled substance conviction that does not cause deportability. The exception is only for a marijuana related conviction involving possession of 30 grams or less for personal use. The conviction will bar admission for a noncitizen. Immigration and Nationality Act (INA) § 237(a)(2)(B)(i).

Historic Courthouse Update

By Darrell Parker

Darrell Parker

If it has been a while since you've visited the halls of the Historic Courthouse, things look different. During the peak of the COVID-19 pandemic, we took advantage of the empty corridors to make modifications. In addition to the proliferation of Zoom, those changes included new digital displays, converting an old records office into a modern Self-Help Center and increased security at the perimeter of the building.

For years I have seen people holding up their cell phone flashlight next to the paper court calendars hanging on the doors of the courtrooms. I often thought to myself, "There's got to be a better way!" The County of Santa Barbara owns the court building but is required to provide the court space to perform its duties. The Court can't make modifications to the building without the County's approval. The County did invest in lighting enhancements over the course of the last several years, but it was still too dark to read the calendars at times.

The Judicial Council of California is the governing body for the Courts in California. It is chaired by the Chief Justice of the California Supreme Court. There are 26 members of this body which sets rules and policies for the judicial branch. The Judicial Council budgeted funds to increase access to justice in the courts. One of the initiatives funded by this allocation was digital signage. I thought this would be a great way to post our calendars and other information. Additionally, when calendars are moved from one courtroom to another, we can post information about the calendar change on the appropriate digital sign, directing attorneys and litigants to the target courtroom.

During the peak of the pandemic, we had an informational video produced about the proper type and manner of masks to be worn in the courthouse. That video played regularly on all the displays around the courthouse to enforce those public health mandates. Additionally, the docent's council worked with the Court to post information about tours and interesting facts about the building. But there were other changes ushered in by the pandemic.

The move to Zoom appearances was rapid in our court system. In the first days of the pandemic I watched, with interest, what other courts were doing to go online with their court proceedings. There were some rather crude efforts around the state. Some people were streaming live on YouTube, others were broadcasting a live stream of audio proceedings. Fear of Zoom bombing was rampant along with FBI warnings about a lack of security. In discussing potential outbursts on Zoom calls with one judge, they remarked, "We have outbursts in courts all the time. That's not new to us. We'll simply remove them from the Zoom call." We did not suffer any Zoom bombing after all.

Our Court went all in on the equipment and hired a reputable video conferencing service to integrate cameras and audio systems in the courtrooms and integrated with Zoom. While there were other platforms, Zoom was the only one with useful break out rooms and translation features for our certified interpreters. The Court's interpreter staff were very helpful in making that system work. Those systems have made it easier for us to get access to interpreter services where they are most needed. These Zoom courts are not perfect, but they certainly changed the landscape in California Courts. We still need to tighten up the protocols and rules on remote appearances so work continues in those areas.

During the pandemic we were required to take the temperature of persons entering the building. We scrambled to locate touchless thermometers as well as several other necessary items. At one point, our purchasing staff acquired 37 gallons of hand sanitizer from a retrofitted gin distillery out of Sonoma. We are now the proud owner of no less than four electrostatic fogging sanitizing machines which ensured our jury assembly rooms and courtrooms were safe for occupants. In order to control access to the courthouse, enforce public health orders regarding masks and temperature taking, we posted security guards at the perimeter of the building. This was the last active courthouse in the county to have weapons screening introduced.

At first the weapons screening was limited to the main entrance under the arch. Later we added another weapons screening station at the Santa Barbara street entrance. That entrance sees the most pressure when jurors are ush-

ered into the building. It is routinely used by members of the district attorney's office as well. There is also a guard posted on the spiral staircase. This staircase could be easily breached by someone trying to bring a weapon into the courthouse. While it is not the most efficient use of security staff, other alternatives would not be as effective as a deterrent.

At the top of the spiral staircase, across from Dept. 1 is the old records office for the Superior Court. It was a dream of mine to one day digitize the millions of pages of documents once occupying the shelves of high-density file systems in this office. That was accomplished by the records staff and another source of Judicial Council funding aimed at the digitization of records. The shelving was relocated to the basement of the criminal courts building in Santa Maria. In its place now stands a training/workshop room for self-represented litigants to receive direction. Additionally, there are private offices that were constructed immediately adjacent to the training room. The lobby was modified to enhance security and put a transaction window in place. It is now staffed by the friendly court staff serving the self-represented community in Santa Barbara's superior court. The Santa Barbara Legal Aid Foundation partners with the court in providing attorney support in the Self-Help Centers located in Santa Barbara, Santa Maria and Lompoc. We're proud to provide this new space in Santa Barbara.

While the pandemic was a challenge, our approach was to make lemonade out lemons. The increased security is inconvenient but benefits everyone inside the halls of this historic building. The digital signage should make it easier to read your calendar information now. In the coming months we are also working to enhance the content on these screens. Zoom is here to stay in some form and the Self Help Center will continue to provide assistance to those most in need. ■

Darrel Parker has served as the Jury Commissioner, Clerk of the Court and Court Executive Officer for Santa Barbara the last ten years.He holds a BA from Drew University, and an MPA from USC with specialization in Court Administration.

Motions

Catherine Swysen, distinguished managing partner of Santa Barbara law firm chosen to replace retiring SLO County judge

Catherine J. Swysen

Governor Gavin Newsom announced the appointment of Catherine J. Swysen to a judgeship in the San Luis Obispo County Superior Court. Swysen fills the vacancy created by the retirement of Judge Ginger E. Garrett.

Swysen had been Managing Partner at Sanger Swysen & Dunkle since 1997, where she held several positions since 1992 including Associate and Law Clerk. She earned a license in history from the Université Libre de Bruxelles and a Juris Doctor degree from Santa Barbara College of Law.

Swysen is an experienced trial lawyer who handled both criminal defense and civil litigation matters in state and federal court. She served on the boards of the Santa Barbara County Bar Association, Santa Barbara Women's Political Committee, the Chad Relief Foundation and the Santa Barbara and Ventura Colleges of Law. She was president of the Santa Barbara County Bar Association in 2013.

Monique L. Fierro joined the **Myers, Widders, Gibson, Jones & Feingold LLP** team in January 2023. She is a civil litigator with nearly a decade of experience in education, employment, civil rights, and personal injury cases. Monique works zealously to achieve just outcomes for clients in plaintiff-side and defense matters. She graduated from Stanford Law School in 2014.

Monique L. Fierro

* * *

Ohmigoodness!

What a wonderful retirement party Judge Anderle gave me! And you all made it overwhelmingly heartwarming and memorable. I am still feeling the impact of your kindnesses and generosity. I certainly didn't expect gifts or even a mountain of cards and flowers. Such a magnificent surprise. I'll be writing thank you notes until February!

Thank you all so much from the bottom of my heart to the top of my head (which isn't far enough to be as thankful as I am). Waiting in line for more than an hour for just moments to say the astonishingly wonderful things you said was above and beyond! I was overwhelmed. I will never forget any of you. Many blessings for the rest of the life of each one of you. Luv, hugs and prayers.

-Marilyn Metzner

Santa Barbara Lawyer seeks editorial submissions

Articles should be 700 to 3,500 words in length.

Articles should be submitted in Word format, including a short biography of the author. A high resolution photo of the author is desired.

Please submit articles by the 8th of the month for publication in the following month's issue. The editorial board of *Santa Barbara Lawyer* reserves the right to edit for accurateness and clarity, or reject any submission if it does not meet magazine guidelines.

Please submit articles to Brad Brown at info@bradfordbrownlaw.com.

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March

2023

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3 Employee Appreciation Day	4
5	6	7	8 International Women's Day	9	10	11
12 Daylight Savings Time Begins	13	14	15	16	17 St. Patrick's Day	18
19	20 Spring Equinox	21	22	23	24	25
26	27	28	29	30	31 Cesar Chavez Day	

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