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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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## About the Cover

A different perspective of the Santa Barbara Mission. *Photo by Michael Lyons.*



2014 Bench and Bar Conference.

## Letter From the President

BY SCOTT CAMPBELL

2014 SBCBA PRESIDENT

The year is well under way. In late January we had our annual Bench and Bar Conference. Surprisingly, the UCLA Constitutional Law professor and the NRA appellate attorney agreed on almost everything during what was to be the lunchtime debate. Equally surprising, especially to me as moderator, Representative Capps' keynote address brought out a lively Second Amendment debate.

We have launched our new Legislative Liaison committee under the capable leadership of Angela Roach. I have spoken with Senator Jackson and Congresswoman Capps' aides, and both welcome the opportunity to share ideas and developments with the SBCBA.

Meanwhile, we are gearing up for another intense Spring campaign to lobby the legislature for adequate court funding. Our Bench and Bar Relations Committee will again be led by Jim Griffith who will use his knowledge from last year's fight to do what we can to help.

Everything that the SBCBA accomplishes each year requires teamwork. The most rewarding aspect of being SBCBA President has been interacting with our various committee members as we implement the SBCBA programs. Among all the people working to make our associa-

tion as good as it is, one person stands out – our Executive Director, Lida Sideris.

Lida has a full plate. When there is a fee dispute, she makes sure it gets arbitrated. When someone calls looking for an attorney to handle a matter large or small, she makes sure that person gets connected to the right LRS attorney. Lida handles the ad sales for this maga-

zine and when it is time to go to press, she helps make sure it is accurate and typo free. When we take SBCBA-sponsored MCLE classes, she keeps track of the paperwork. When there is an event, whether the Bench and Bar Conference, the Barbecue, or the Annual Dinner, Lida's competence shows. Lida is there when we collect membership fees, she is there when we need to follow up, and she is there when we need to pay our bills.

Lida is adept at handling whatever comes our way. At the moment, for example, the SBCBA is in the throes of expanding member benefits. This is a big job and one that has no precedent in our organization. Lida's intelligence, institutional knowledge, and superb people skills have really helped us to make progress on what turns out to be a very nuanced project.

Lida's competence and intelligence would, perhaps, be less praiseworthy if it were not for one final characteristic – she is, unfailingly, the nicest person there is to work with. ■



Scott Campbell

## Cyclists Wanted!

Bicycling lawyers: Do you commute on a bicycle or know a lawyer who does? If so, we want to contact you for the cycling month (that's May) issue of the *Santa Barbara Lawyer*. We want to show lawyers doing their part for the environment, traffic decongestion, cardiovascular health, peace of mind, and good-looking legs. (Not necessarily in that order and not necessarily all those things.) Please contact Tom Hinshaw at [thinsb@gmail.com](mailto:thinsb@gmail.com).

## eCourt: Electronic Filing and Records Access Are on the Way

BY JUDGE JAMES HERMAN

**T**ired of having to deliver your digital work product in paper form to a paper bound court? Frustrated with lack of online access to local court records? Feel like a digital lawyer caught in our court's analog purgatory?

Some of you, already familiar with the efficiencies of electronic filing and records access provided by Orange and Ventura County Superior Courts and the Central District's PACER system, are wondering when Santa Barbara will join the 21<sup>st</sup> Century. Well, the wait for a local digital court will soon be over. This summer, Sustain Technology's eCourt will go live in the Santa Barbara Superior Court.

Once Santa Barbara's eCourt system is in full swing, you will be able to scan or upload court filings from any internet access device without waiting in line at the clerk's office. You will get automatic acknowledgment of the date and time of receipt, notice of acceptance or rejection for filing, and electronic delivery of conformed copies.

Trial Judges will have direct access to your filings from the bench without waiting for lost files to be found or cartloads of files to be pushed across the courthouse. Continuances will be reduced and saved court labor can be redirected to reducing delays.

To electronically file documents, you will employ one of a number of electronic filing service providers (EFSPs) to file electronically in the same way you have used traditional attorney services. Importantly, each party to a case may select the EFSP of its choice. Once you have electronically filed a document, you will be deemed to have agreed to electronic service as well. Most EFSPs will charge about 3% on top of the filing fee which may be paid electronically as well. It is expected that this cost will be offset by savings on traditional attorney services, paper handling, and the inefficiencies of waiting in line and waiting for the court to locate your documents. In the end, electrons are cheaper

and, as a bonus, greener than paper.

In order to prepare for the going live of the digital court, the court and the County Bar will provide a luncheon presentation in April where you can learn how to use this system, see demonstration filings, and voice any concerns you may have. ISD Technologies, the court's electronic filing manager, and other EFSPs will be on hand to answer questions.



Judge James Herman

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The court intends to mandate electronic filing for represented parties...

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The court intends to mandate electronic filing for represented parties, subject to a hardship exception, through a local rule of court. Self-represented litigants, as a matter of access to justice, will not be required to electronically file unless they choose to "opt in." In order to let everyone get up to speed, eFiling will not become mandatory until January, 2015. To get a jump on the procedural parameters of eFiling, you might take a look at California Rules of Court 2.250 through 2.261. Discussion of the above rules will be part of the April training.

Through the court's digital casement system, document management system, and public access portals, our court will be able to do more with less. Please support our eCourt effort by doing your part to make the transition to this cost-saving system smooth. Join us in April for an eCourt training day and receive an hour of law practice management credit as a bonus. ■



### Judgments Enforced

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## When Is a Release Not a Release?

The Ability of a Party to Avoid a Release Without Rescinding the Entire Agreement

BY PETER A. UMOFF AND ALAN D. CONDREN

In a recent case handled by our office an issue arose regarding the enforceability of a release provision in a settlement agreement. The releasing party (the “Releasor”), having received a non-returnable benefit from the other party to the settlement agreement<sup>1</sup> (the “Releasee”) and thus being unable to rescind the entire agreement, sought to rescind only the release provisions on the ground of fraud.

The Releasee was understandably taken aback when it was faced with the possibility that, having given up valuable rights, it would not have the release for which it had bargained and was potentially liable to the Releasor for many millions of dollars.<sup>2</sup>

The Releasee’s concern was compounded by the trial court’s (not one of our local Judges) denial of its motion to dismiss based on the release provisions. Ultimately the Releasee’s position was vindicated, but not before many dollars and sleepless nights were spent.

In its motion to dismiss, the Releasee argued (among other things) that in order for the Releasor to avoid the release contained in the settlement agreement, it was required to rescind the entire agreement and restore to the Releasee the consideration it received from the Releasee. The Releasee argued that because the property at issue had been sold, the Releasee’s consideration could not be restored to it and therefore the Releasor could not rescind the settlement agreement and was bound by the release provisions.

The trial court denied the motion on the ground that rescission of an entire agreement is not required to avoid a release procured by fraud if the releasing party was entitled to the benefit it received “in any event.”

“A plaintiff seeking to set aside a release induced by fraud must only restore the funds it received if ‘the release of the . . . claims was the sole object of the contract, for which the consideration was paid.’ *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, at pp. 1154-55. Here, the parties did not enter into the Settlement Agreement solely to release defendants from the claims asserted by plaintiff in this action. Rather, the contract was executed to extinguish an

underlying debt incurred by the Borrower and guaranteed by defendants. Cf. *Garcia v. California Truck Co.*, 183 Cal. 767, 772-73 (1920) (because a release of personal injury claims was the sole object of the contract, for which the consideration was paid, plaintiff had to return the money received if he wished to assert the claim he was paid to release). In this case, plaintiff has the right to the funds paid in settlement as satisfaction of the underlying debt. This is true whether or not the parties agreed to the release. Consequently, plaintiff need not seek to rescind the Settlement Agreement in order to avoid the release.”

While it accurately states the rule of *Persson*, the trial court’s application of *Persson* was in error. First, the trial court erroneously viewed the proceeds from the sale of the property as the consideration “paid” by the Releasee to which the Releasor was entitled “in any event.” Second, the trial court erroneously viewed the “object” of the settlement agreement only from the Releasor’s side, stating that the release was not the sole object of the settlement agreement because its purpose also was to satisfy the underlying debt.

The correct analysis starts with the general rule that in order to avoid the effect of a contract, a party must rescind and restore the consideration it received:

“The general rule is that one must rescind all of his contract and may not retain rights under it which he deems desirable to have and repudiate the remainder of its provisions.” *Simmons v. California Institute of Technology* (1949) 34 Cal.2d 264, 275.

To avoid this general rule, the trial court relied on *Persson* and a line of cases that hold that a party is not required to



Peter Umoff



Allen Condren

rescind and restore consideration to avoid a release obtained by fraud if the releasing party would have been entitled to the consideration paid in exchange for the release in any event—that is, even if the contract containing the release had not been entered into. See, *Sime v. Malouf* (1949) 95 Cal. App.2d 82, 111 (“A restoration is not necessary, in order to avoid the bar of a release, where there is no question as to the right of the plaintiff, arising independently of the release itself, to retain what he received.”) These cases involved money paid in exchange for a release in fact patterns where the party giving the release would have been entitled to the money even without the transaction in which it granted the release.

By applying the *Persson* line of cases on the ground that since the Releasee owed money to the Releasor “in any event,” the trial court completely missed the boat. The consideration given by the Releasee to the Releasor was not the money represented by the proceeds of the sale of the property, it was the agreement by the Releasee to allow the Releasor to sell the property, which, absent the settlement agreement, the Releasor had absolutely no right to do.

The trial court was similarly incorrect in finding that the purpose of the settlement agreement was to satisfy the underlying debt and thus the release was not the sole object of the contract. In fact, the sole purpose of the settlement agreement from the Releasee’s point of view was to get a release. The sole purpose from the Releasor’s point of view was to allow the Releasor to sell the property. The Releasor always knew the underlying debt would not be satisfied.

The general rule is that in order to avoid the effect of a release contained in a contract, one must rescind the entire contract and restore the consideration received as a condition of that rescission.

Under the *Persson* exception, it is indeed possible for a party to rescind only the release without rescinding the entire contract and restoring the consideration received to the Releasee. However, that is only possible if the Releasor was entitled to the consideration received regardless of the contract containing the release, i.e., the consideration received belonged to the Releasor in any event.

In our case, because it was ultimately found that the Releasor was not entitled to the consideration it received (the right to sell the property) “in any event” and that the sole object of the contract from the Releasee’s point of view was to receive the release, the *Persson* exception did not apply. Therefore, the Releasor was not able to avoid the effect of the release because it could not rescind the entire contract because of its inability to restore to the Releasee the consideration given by the Releasee. ■

*Peter Umoff and Alan Condren are partners in the Santa Barbara firm Seed Mackall LLP.*

ENDNOTES

- <sup>1</sup> The settlement involved the Releasee’s granting the Releasor the right to sell certain real property, which right the Releasor did not otherwise have. The Releasor proceeded with the sale and was thus unable to return the consideration received from the Releasee and therefore unable to rescind the entire agreement.
- <sup>2</sup> As one might imagine the attorneys involved were also somewhat concerned by that prospect. Fortunately we were not involved until after the settlement agreement had been negotiated, signed, and performed on the part of the Releasee.



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## Work / Life Balance

**E**ditor's Note: For this month's Work/Life Balance column, Santa Barbara Lawyer is featuring two brief pieces by local attorneys, Michael A. Colton and Renee Fairbanks, on how they attempt a work/life balance with the help of baseball.

### Our National Pastime

BY MICHAEL A. COLTON

Baseball as a spectator sport is my opera. It is exhilarating, relaxing, and multi-faceted; it is chock-full of lore, legend, history, heroes and villains, trivia, fame, drama, comedy, and tragedy. It even has music. It puts a lot of people to sleep. I find opera boring, and an expensive three-hour nap. A lot of people feel that way about baseball. Pity. Sometimes my best naps are the fraction of a minute cat naps between pitches.

I got my love of baseball from Mom. She was a life-long Dodgers fan. Having moved to San Diego with her family during WWII, Arline was probably the happiest person west of the Mississippi when her team decamped Brooklyn for the West Coast. My earliest memory of a live game was watching a [Wally] Moon shot at the L.A. Coliseum with Dad, who no doubt succumbed to repeated pressure and entreaties from me and/or Mom to "take your son to a ballgame, for heaven's sake!"

Baseball as a pastime really kicked into gear for me during law school. The Oakland Athletics (World Series Champions 1972, '73 and '74) were a short BART ride away, and weekday day games were the rule, not the exception. Do not ask me about difficult Constitutional Law issues; that was my afternoon class, and baseball beckoned. Those days, the Oakland ball field was a great place to be, the team was riding high, and the Giants played at the 'Stick, where only insane people went. I have been an Oakland A's fan, first and foremost, ever since. But I am not picky; I will attend a live baseball game in any city, between any teams.

Even when nothing is happening on the field, I would still rather be in the ballpark, with the neatly manicured emerald green field and rusty red sandstone base paths and infield, interesting fans, unique vistas and views, and (usually) good weather. I guess baseball is also my golf, without the frustration, expense, or veneer of exclusivity. Unlike golf, going to a game is a good walk, *not* ruined. Get there by train, El, subway, T, BART, Muni, Metro, Redline Trolley, Ferry from Larkspur, or by car if you must. Arrive early.

When you get there, tailgate (best in Oakland, awful in Anaheim, forbidden at Chavez Ravine), crank up the tunes, share food, meet people, and enjoy life. At some parks, the concession food is good enough to plan to arrive hungry (AT&T Park—Sheboygan brats, garlic fries, Orlando Cepeda's Caribbean cuisine, and any seafood; Oakland—popcorn chicken, barbeque, and pecan pie; Safeco Field—broiled salmon sandwiches, sushi; Fenway—grilled sausages with peppers and onions on Lansdowne Street outside the park, especially after the game; Citifield—genuine hand carved pastrami piled high on a small slice of corned rye [leaving no room for the lobster rolls, darn it!]). At others, bring a picnic, and enjoy, and bring enough to share. Dodger Stadium is where Koufax, Drysdale, and Fernando pitched their ways into our hearts and Cooperstown; it is definitely not a place to find edible ballpark food. Ditto for San Diego's Petco Park and Anaheim or Los Angeles.

My tips for enjoying baseball while maintaining a semblance of a work-life balance:

(1) Plan ahead. Schedules are now posted in October for next season, augmenting the Hot Stove League experience. Mix business with entertainment. Twice a year (April and September), I attend the ABA Legal Malpractice Conference, usually held in a major league city. The schedule-makers often bless us with a homestand before, during, or after the conference. I buy tickets at face value early, often cheaper or cheapest seats, and invite business friends, associates, and prospects at the Conference to join me—any true baseball fan, indeed any true American patriot, would relish the opportunity to take in a game at Fenway Park, even from the center field bleachers.

(2) Avoid regular season weeknight and Friday night Dodgers games, unless you are already going to be nearby anyway. The drive through commute hours in Los Angeles just is not worth it.

(3) Make a weekend day of it. Consider getting a group together and taking the train, with picnic breakfast, coffee, and potables (sometimes do-able for Dodgers, Angels, and even Padres if you drive down to Union Station early in the morning).

(4) Avoid watching televised regular season games. Go



*A grateful fan enjoying the view at AT&T Park*



*A favorite Fairbanks haunt: Dodger Stadium*

“old school” and listen to the radio broadcasts. It is good background chatter for relaxing; meditating; filling out time sheets; browsing through non-urgent e-mail, magazines, and reports of new legal developments; or just doing nothing. I can always pick up the Dodgers (who can possibly top Vin Scully?), the Padres, and often the Angels, but rarely the Giants.

(5) Avoid betting on baseball. My last bet on any sports event was the 1988 World Series; Mom was happy and gracious in victory, the expensive dinner was worth it, and the experience taught me a few lessons.

(6) Avoid getting entangled in “Fantasy Baseball” leagues, especially with CPAs. Too much time! You do have a life and a law practice, right?

(7) Try if possible to avoid scheduling anything for the month of October, if it appears one or more California teams may make the postseason. You will usually know by the day the rosters expand (first day of September for you non-fans out there). Postseason baseball, live in the ballpark, is to regular season baseball as Formula One racing is to, well, riding a horse-drawn carriage. Take clients and prospective clients to postseason games, which are pricier. Figure on working extra hours in September and November to make up for that light billing in October. ■

*Michael Colton, a Past President of SBCBA and a Certified Specialist in Legal Malpractice Law, was recently named again as the only “Superlawyer” in Professional Liability—Defense in the tri-Counties. He has his own law practice, and a modest collection of baseball jerseys and caps.*

## Balance Through Baseball

BY RENEE FAIRBANKS

Work-life balance is essential for any legal professional, but this balance is a matter of survival for the family law attorney. In my humble opinion, we family law attorneys do some of the hardest work the legal profession can offer. We provide advice to people going through one of the toughest times of their lives. We are tasked with getting the family home awarded to one spouse, securing support so that lifestyles can be maintained, and dividing assets that took years to acquire. I do not think anyone doubts me when I say that when children are added to the mix, the challenges of the job become all the more acute. Given that, it should come as no surprise that many family law attorneys see rest and relaxation as a mandate of the job. I count myself as one of them.

Of course, there are the obvious ways of getting some R&R, such as scheduling the long vacation to some far-away place. (Hong Kong, Tokyo, and Kyoto, I will see you in

*Continued on page 23*

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# Interview with Judge James K. Voysey

BY JIM GRIFFITH  
SANTA BARBARA LAWYER PROFILES EDITOR

**Santa Barbara Lawyer (SBL):** Thank you for meeting with *Santa Barbara Lawyer*, Judge Voysey.

**Judge James K. Voysey (JKV):** My pleasure.

**SBL:** You're a busy guy, so let's get right to it—how did you come to be a lawyer? Do you have lawyers in the family?

**JKV:** I grew up in Montreal. No lawyers in my family. In fact, I don't think anybody in my family even went to college—we were blue collar workers. I lived there until I was about 13, and then my parents decided to move to California. So we moved out here and I started going to school in the Bay Area—Daly City. I went to junior high there and then high school, then on to Berkeley and law school, but what really got my attention about law school was, believe it or not, when I was a kid my mom liked cop stories, loved mystery movies, and one of the standard shows we'd watch on television was *Perry Mason*. And there would be Perry Mason, Della Street, and his trusty investigator Paul Drake. Every time they would have a case, they would have an innocent client, and they would be able to prove to the poor, befuddled prosecutor that they had made a mistake. So, believing as a kid that that's how it worked, I thought, "I get to wear a suit, I have a nice office, I have people working for me, everybody gets along, and the outcomes are always great." And you get paid a handsome fee. I always liked that—"I received a handsome fee." I thought, "I could do that." So the seed got planted really young.

**SBL:** So you went to Berkeley for undergrad—that was more or less your local college, wasn't it?

**JKV:** I went to Berkeley at the height of the Cambodia, Vietnam conflict. It was not a good time to be there. I started in '69, crammed through and graduated in '71, because I wanted to get out of there. I loved Berkeley, I loved the school, loved what was going on there, but

what I didn't like was the violence. I didn't want to be around the horrific things that were happening. It really disturbed me. So as soon as I could graduate, I got out. I took a couple of months off, went to Europe, did the student Eurail thing, and got a real sense of what it's like to live outside this country. Then I came back and went to Lincoln Law School in San Francisco.

I realized that I couldn't work full time and go to law school and have time to study and actually live. So after about two or three months, the Baby Bar was coming up, and I realized "Uh-uh, I'm not going to be able to pass it." So I withdrew from Lincoln before anything negative happened, and found a law school in San Diego called Western State. I got a scholarship, started out clean, figured out a plan, and did it.

**SBL:** Is Western State different from Cal Western?

**JKV:** Cal Western is across the street from Western State. They were sister schools when I was there. Western State is now called Thomas Jefferson School of Law. They've got ABA accreditation, and they're a private law school. [After graduating,] I practiced down in San Diego for around eight years.

**SBL:** What were your practice areas?

**JKV:** When I was first starting out, I clerked for a Spanish-speaking immigration

lawyer. He put me in an immigration clinic in Vista, the Centro de Información. For eight hours a day I would sit with an interpreter and fill out immigration forms, until I didn't need an interpreter any more. And then I went back to Chula Vista, which is where his office was, and once they realized that I could actually speak Spanish, they said, "You know, the court is really interested in court-appointed lawyers to handle cases for Spanish-speaking people that are charged with crimes. We don't have a public defender. We could refer them to you if you want to take those kinds of cases." I said, "Sure, I'll try it." I got hooked immediately. I was doing personal injury, family law, workers comp, business litigation. Basically anything that walked in my



Judge James K. Voysey

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I thought, if I'm  
ever going to do  
it, this is the time.  
Now I can actually  
make a difference  
and do some good.

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door that would pay my fee, I would do it. But I didn't enjoy it. What I really enjoyed was sitting down with the client, looking at the case, figuring out the mystery, playing it out in the courtroom, coming to a conclusion, and then going on to the next case. [That's what] really kept me motivated and wanting to get up and go to work—I wanted to do that stuff.

That kind of propelled me until I got to the point where—there was no public defender in San Diego, I'd had the contract for five or six years, and in fact, my partner was the sister of the ex-mayor of San Diego, so we had a really good thing going with the courts—but I decided that it was time for me to settle down into a public defender's office. I wanted roots, I wanted to go to the best PD's office I could find. So I did the research, looked all over the state, and saw Santa Barbara. I knew those guys were at the head of all the educational programs, they were the ones setting the pace for the state, and I said "That's where I want to go."

**SBL:** So you just applied for a position?

**JKV:** I applied. I had two friends that were up here, Peter Dullea and Jim Herman. So I called up Jim and asked him, "So what's Glen Mowrer all about?" Jim told me a bit about Glen Mowrer, and I thought, "He's the kind of guy I want to work for." So I got my application in, I got an interview, I came up, and the rest is history.

**SBL:** Did you know Judge Herman in law school?

**JKV:** Our connection was Peter Dullea, who was a lawyer that worked in the PD's office for years and years. Peter and I went to Western State [now Thomas Jefferson School of Law], and Jim went to Cal Western. Jim and Peter were best friends; they lived together. Peter transferred to Cal Western, and he and Jim ended up with the Riverside public defender's office. My path eventually took me here, while they went to Riverside and then came here. They got here before I did—I followed them to Santa Barbara.

**SBL:** So you came here as a PD—how long did you do that?

**JKV:** Twenty-nine years. I started out as a misdemeanor deputy in Santa Maria. I did the Municipal Division, I did the Superior Court. I did felonies for many years, a lot of felony cases. Then, about ten years ago, they were looking for a new assistant. They needed an administrator. So I just morphed into that role and did that for ten years. I basically ran the office, hired the lawyers, trained them, covered the courts, did all the administrative functions, got really involved with the core committee and all the therapeutic collaboration that goes on with the D.A., Probation, the Sheriff's Department, ADMHS. This developed into a lot of different, really good things.

There's an organization called CSI, which is a day report-

ing center that Sheriff Brown funds. I volunteered there and [worked with] parolees. When they got out of prison, I helped them out with legal issues they had—child support, traffic tickets, warrants, that kind of stuff—to give them a chance to do better. The last graduation I went to, there were 39 hard-core parolees who had been in and out of prison, back and forth, who I knew really well, who were graduating. There were only three there. The rest weren't there because they were working full-time jobs. [I thought to myself,] "Hallelujah! These guys know how to do it." If you get the right people together with the right caring, the right empathy, the right brains, you can turn negatives into positives.

That's why I'm a Judge. I wouldn't have considered it years ago, when all Judges could do was basically was put people on probation and sentence them to prison when they got done, if they violated. I could not do that. This I can do. There are a lot of different things I can do therapeutically with clients that I could never do before. When they came to me and said, "You really ought to think about [becoming a Judge]." I thought, "If I'm ever going to do it, this is the time. It's AB 109-land, it's a different world now." Now I can actually make a difference and do some good.

**SBL:** In his interview with *Santa Barbara Lawyer* [January 2013 issue] Judge McGregor also mentioned how satisfying it was for a Judge to be able to not just "administer justice," but actually help people.

**JKV:** You get your hands dirty, you get into it. You work with programs, you work with counselors, you work with probation officers, you find out what's going on in people's lives, and if you put all the pieces together, kind of put Humpty Dumpty back together again, and get them away from the negative influences—substance abuse is the big one—then you can actually turn people around. Most people are inherently good. I've had a few that just don't deserve to be in society, and those folks have to go away. But most people can be worked with and can be turned around.

**SBL:** So what [types of cases] will you mainly be handling?

**JKV:** Yes, all of my expertise really is in criminal law. Right now I'm filling in because Judge Teresa Mullaney Estrada, who was handling this murder case as an assigned Judge when Judge Eskin retired, is off for a couple of days, so I'm handling the calendar for today and tomorrow. After that, I'll be handling Department 7's calendar, the therapeutic and traffic calendar, and then I'll come here and will be here for six months. I'm not sitting in Santa Maria because

*Continued on page 26*

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# 2014 Annual Bench and Bar Conference Wrap-Up

BY MIKE DENVER

The Santa Barbara County Bar Association's annual Bench and Bar Conference took place at the Retreat Center on the grounds of the historic Santa Barbara Mission on Saturday, January 25, 2014. The sun was out, the facility was fabulous, and fun was had by all during the full day event. As if that were not enough, attendees received up to 6.5 hours in MCLE credits, including those hard to obtain credits in legal ethics, elimination of bias, and substance abuse.

An important theme of the day was the interrelationship between 2nd Amendment rights and mental health issues. The Keynote Address on these issues was given by United States Congresswoman Lois Capps. Her presentation was very well received and it sparked a lively discussion between audience members. The Congresswoman's address complemented the lunchtime discussion on 2nd Amendment issues between Adam Winkler, a noted gun expert and Professor at the UCLA School of Law, and attorney Chuck Michel, who recently won the NRA Defender of Justice Award. Messrs. Winkler and Michel were joined by representatives from the Santa Barbara County Sheriff's Department, who presented several examples of late-model firearms and educated the audience on gun vocabulary, mechanics, and proper use. Many thanks to the Congresswoman, Mr. Winkler, Mr. Michel, and our local Sheriff's representatives for their enlightening and educational presentations.

The annual Judges' Panel was another highlight of the day, with the Bench perspective on many practical litigation issues being very thoroughly addressed by Judges Anderle, Kelly,

and Beebe. Additionally, Judge Herman provided a scintillating presentation on the technological advances being implemented at our Courthouse, which will allow Judges, attorneys, and courthouse staff to enter the age of electronic filing in the very near future, and Judge Flores addressed the subject of Restorative Court. Many thanks to our Judges for their well-planned presentations, and the very difficult and important work they do each and every day for our Bar and the community at-large.

The Conference break-out sessions were another success, with wonderful and entertaining presentations being given on a wide variety of topics by dedicated professionals from Santa Barbara and several surrounding legal communities. Thank you to each of our volunteer presenters, and thanks to the Santa Barbara Mission for keeping attendees comfortable. Those who brought their appetites were well satisfied by the hot breakfast and delicious lunch buffet.

A very sincere thank-you to the 2014 Conference sponsors including: **Norman Schall & Associates; Lexis-Nexis; Compuvision; Foley Bezek Behle & Curtis, LLP; Hollister & Brace, APC; John Thyne III; Rogers Sheffield & Campbell LLP; Anderson Kill, P.C.; Tri-County Court Reporters; Veritext; Amherst Exchange Corporation; KCC Class Action Services; Law Copy; Personal Court Reporters; Seed Mackall, LLP; Whalen Bryan, Inc.; the Law Office of Saji Gunawardane; and Hardin & Coffin, LLP.**

Finally, thank you to each of the attendees who attended this important event, the proceeds which directly benefit our local Bar Association. ■



*Scott Campbell, Lois Capps,  
and Katy Graham*



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# Bench and Bar Conference

*SBCBA President Scott Campbell, with Judges Thomas Anderle, Patricia Kelly, and Jed Beebe*



*Participants during Judge James Herman's presentation on eFiling*



*Judge Rogelio Flores presenting on Collaborative Justice*



*Judge Thomas Anderle providing commentary on Atticus Finch during the Judges' Forum*



*Paul Roberts discussing new developments in family law.*



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*Adam Winkler and Chuck Michel's lunchtime presentation on the Second Amendment*



*Participants learning about firearms*



*U.S. Congresswoman Lois Capps providing the keynote address on firearms and mental health*



*Frank Partnoy shares the benefits of procrastination*



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# Capital Punishment in Recent Literature

BY ROBERT SANGER

In this month's *Criminal Justice* column, I want to address an interesting development in the literature relating to capital punishment. As many know, our District Attorney, Joyce Dudley, has not authorized the pursuit of the death penalty since taking office in Santa Barbara. Many applaud this course of action on abolitionist grounds, however, Ms. Dudley and her senior staff make the decisions on a case-by-case basis and for policy reasons that, no doubt, include the allocation of scarce resources as well as more fundamental concerns of justice. The point being that – although our law firm is defending several people in capital cases arising out of other counties – lawyers are not currently defending capital cases in Santa Barbara.

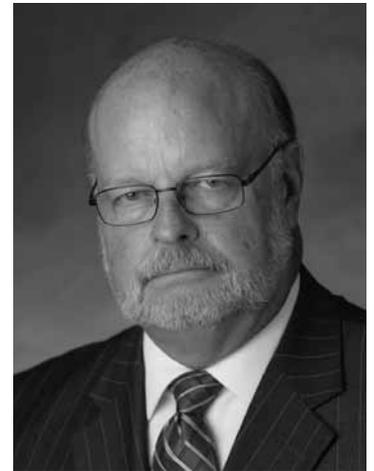
Nevertheless, there is good reason to continue to discuss capital punishment in *The Santa Barbara Lawyer* magazine. Lawyers – whether civil, transactional, or criminal – are influential among the populace. Many of you have a strong influence on legislators both state and federal. In addition, your opinions are often sought by fellow voters and you have an effect on the public discussion of legal issues.

In the January *Criminal Justice* column, we discussed the importance of having moral discourse when discussing important issues like the death penalty. Scholars, like Michael Sandel of Harvard, make the point that the position taken on moral issues is secondary to the fact of moral discourse in public affairs.<sup>1</sup> In furtherance of this, I would like to review a book just published on the death penalty which will provoke moral discourse on the death penalty whatever views the reader might hold before, during, and after reading it.

## The Lectures

The University of Chicago Press has just published *The Death Penalty, Volume One (The Seminars of Jacques Derrida)* translated by Peggy Kamuf.<sup>2</sup> They are the lectures of the late continental philosopher Jacques Derrida (1930-2004) on capital punishment. Derrida is the author of deconstruction (if deconstruction were allowed to have an author) and has a reputation for being, let us say, opaque in his writings.

In his later years, he took up certain legal and political issues in a fashion that seems more intelligible. Particularly, Derrida's lectures on moral subjects were popular in the United States as well as Europe. The particular lectures on the death penalty were originally given from December 8, 1999, through March 22, 2000, and were updated and re-presented through the year 2003.<sup>3</sup>



Robert Sanger

This is not intended to be a book review *per se* but *The Death Penalty* is a book – a text, as Derrida would be first to point out – and I think it is worth reading. Derrida approaches the subject of the death penalty with literary allusion and complex and perplexing contradictions (*aporia*) in the best tradition of post-modernism and post structuralism (if there can be such a tradition). However, fellow lawyers, do not let this deter you from reading the book. It does, in fact, make you think and perhaps feel and perhaps experience the fact of capital punishment.

These lectures draw on a good deal of the traditional literature regarding capital punishment, including the Abrahamic texts, Plato, Aristotle, Beccaria, Hobbes, Shakespeare, Lock, Rousseau, Hume, and others. But Derrida also weaves in more contemporary and provocative literature on capital punishment. He also considers the activities of the United States Supreme Court. The death penalty was abandoned in France in 1985 and is banned in all European Union nations as well as most other developed countries in the world. But the attention to American law in the lectures is not simply to the historical ebb and flow of the death penalty in the United States, but to the context and perception of American capital punishment as it was received in France while capital cases were still being tried there. It provides an allusion for understanding sovereignty, power, pardon, forgiveness, and moral choice in the course of human beings living together in the world.

As such, capital punishment is a part of the multitude of phenomena that affect our view of the world, our interrelationships with others, and our structure of society. It is much more than just the sovereign ordering the killing of a person condemned (rightly or wrongly) as a horrendous criminal. Reading the text of these lectures surrounds the reader with that which capital punishment is in its totality.

Commentary on the text cannot replicate that rhetorical effect. But, having said that, there are a couple of specific points made in the lectures which may be of interest.

### *America's View of Itself*

Derrida does not use this term in these lectures but “American exceptionalism” is certainly a view held by many Americans<sup>4</sup> and some who are not. Less boastfully, America does have a significant effect on the rest of the world, not just economically and through the use of force or threatened force but through the propagation of ideas. We pride ourselves, no doubt in some regards undeservedly, as being at the forefront of human rights. However, we are blind to the manner in which the rest of the world sees our use of capital punishment.

In 1972, when the United States Supreme Court struck down capital punishment in *Furman v. Georgia*,<sup>5</sup> Derrida points out that many in the world applauded the recognition by this country that the death penalty was “cruel.”<sup>6</sup> Torture had been abandoned, for the most part, in the world as cruel and the actual killing of a human being by the state, many thought, was indistinguishable from other forms of torture.

The example of the United States was taken to heart by legislators and parliamentarians in other nations. The death penalty was abolished in many nations where a majority of the population, in a straw vote, would have kept it.

Derrida tells the story of the lawyer in France who argued for his client’s life only to find that, one hour after the case was submitted for decision, the radio carried the news of *Furman*. He was powerless to convey this monumental development to the jury before they reached their verdict. The lawyer felt that the example of the United States would have had such a significant impact on the jury that, had they heard, they would not have imposed death.

Yet, as we know, while the rest of the world moved away from the death penalty in the 1970’s and 1980’s, the United States renewed capital punishment with a vengeance. The Supreme Court approved its return in *Gregg v. Georgia* in 1976.<sup>7</sup> While the United States ended its involvement in the war in Vietnam and continued to rhetorically claim the high road in human rights, the state killing in the United States escalated. To this day, the numbers of people on death rows in the United States remain at obscene levels. Yet, we do not see how others in the world see us.

What is remarkable to the rest of the world, and should be to us, is that most of the people facing death at the hands

of the state in this country are of color. They are also often poor, abused as children, and have mental difficulties. With thousands of people condemned to death in this country, we cannot see our own reflection in the mirror. The fact is, even if you think the criticism is unfair, the rest of the world sees us as executing and staging for execution poor people of color – it appears to be an ethnic cleansing that we would be the first to criticize in another country.

Derrida, in his lectures, pointed out that there is still popular support for the death penalty in the United States, even though “for the same crime a black man is ten times more likely to receive the death penalty than a white woman in Florida, Texas, Georgia, and California.” (*Id.* at 90) He goes on to say:

“In the twenty years, from 1977 to 1997, there were 385 executions<sup>8</sup> (averaging about twenty each year, the majority being poor blacks, a proportion that is repeated in the more than three thousand prisoners condemned to death who are waiting on death row.”<sup>9</sup> (*Id.* at 91-2)

Two things can be taken from this part of the lectures alone: First, that we are, in fact, conducting a state killing program of poor people of color. It may be that

someone will want to try to justify this but it does not change *the fact* that we are killing primarily poor people of color. Second, that from outside the American exceptionalism view of ourselves, others in the world *see* this actual fact – *we are systematically killing poor people of color.*

The greater impact of the lectures is to place these decisions to allow killing of the poor and those of color (and those who were abused as children and often suffer from mental disabilities) in a greater context. It is also to place state killing, itself, in context even if seemingly justified by horrendous crimes. The context is that of sovereignty, power, pardon, forgiveness, and moral choice in the course of human beings living together in the world.

The death penalty is the exercise of the ultimate power of the executive – the governor in the American death states and the President in the federal system. One person can ultimately grant clemency or sign the death warrant. That person has a hot line phone directly to the death chamber and can call off an execution at the last second. That life or death decision – or non-decision, which is a decision – is based on some loose concept that the executive is making a moral decision, yet it is an unguided and arbitrary decision by and large exercised in favor of actually killing the poor and people of color.

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...the rest of the world sees us as executing and staging for execution poor people of color – it appears to be an ethnic cleansing that we would be the first to criticize in another country.

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**Conclusion**

To say the least, there is much more to these lectures. Though he refers to statistics and historical facticity, there is much more to be derived from his pedagogical technique. I suppose that, for most, the effect of reading these lectures is to come away with a strong aversion to capital punishment or, at the least, for even the staunchest advocates of the death penalty, an uneasy feeling that there is something disturbing and unresolved about this aspect of our living together. ■

*Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 40 years. He is a partner in the firm of Sanger Swysen & Dunkle. Mr. Sanger is Immediate Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization, and the former Chair of the CACJ Death Penalty Committee. He is a Director of Death Penalty Focus. Mr. Sanger is a Member of the ABA Criminal Justice Sentencing Committee and the NACDL Death Penalty Committee.*

ENDNOTES

- 1 Michael Sandel, *Justice*, (Farrar, Straus and Giroux, 2009).
- 2 *The Death Penalty, Volume One (The Seminars of Jacques Derrida)* edited by Geoffrey Bennington, Marc Crepon, and Thomas Dutoit, translated by Peggy Kamuf (University of Chicago Press, 2014). Citations follow quotations in the text.
- 3 Derrida's last lectures in the United States were given at the University of California at Santa Barbara in October 2003 at which he gave a lecture now entitled "Avowing – The Impossible: 'Returns, Repentance and Reconciliation,'" published in Elizabeth Weber, *Living Together*, (Fordham University Press 2013). The *Death Penalty*, reviewed herein, are more readily intelligible to those not familiar with continental philosophy.
- 4 Famously, President Obama made this claim while discussing America's role in possibly taking military action in Syria in September 2013.
- 5 *Furman v. Georgia*, 408 U.S. 238 (1972).
- 6 Of course, the *Furman* opinions focused on many aspects of the unfairness of the then current capital punishment system and brought it all under the constitutional Eighth Amendment claim of "cruel and unusual." Derrida makes a point that, in France, for instance, the "take-away" was that the Supreme Court recognized state killing as "cruel."
- 7 *Gregg v. Georgia*, 428 US 153 (1976).
- 8 *Present author's note:* As of January 30, 2014, there have been 1356 executions in the United States since 1976; fifty-six percent were designated as white and 44% of color. Although a statistically majority were white, the numbers are still vastly disproportional to the cross-section of the population.
- 9 *Present author's note:* The percentages of those waiting for death are even more racially biased than those who have been executed. There are currently 3108 people condemned to death in the United States and only 43% are white and 57% are of color. California's Condemned Row has 731 people, only 257 of whom (35%) are white and 474 of whom are of color (65%).

Fairbanks, *continued from page 11*

March.) I have also been known to sneak out of the office on a random weekday and be a tourist in Santa Barbara for the day. Then, there are the days when I hop on the bus to unwind. Yes, the bus. The destination: Dodger Stadium. The team: The Best of the West Los Angeles Dodgers. (You know, the only baseball team in Los Angeles.) Yes, the good 'ol Santa Barbara Airbus takes me and my fellow travelers straight to Dodger Stadium. With any luck, we get there at an early enough time to enjoy a pre-game drink at "The Short Stop" in Echo Park. (Hat tip to Lynn Goebel for that find.) We chat with friends, smack talk with Giants fans (what are they doing on the bus, anyway?), and have a good time. After all, there is nothing like baseball at Dodger Stadium.

Now, I would be lying if I said that my trips to Dodger Stadium are always about "relaxing." Admittedly, I am one of "those people." I shout "C'mon, you're killing me!" at nearly every strike out. I suddenly become religious when the bases are loaded. Yet, I love every minute of it. So, come Friday, April 4<sup>th</sup>, I will not be at a Mandatory Settlement Conference, coming up with creative ways of dividing one estate into two. I will be on the bus heading down for Opening Day to watch the Boys in Blue beat the Giants. I will be joined by my husband and friends, including Santa Barbara legal community's very own, Lynn Goebel, Barbara Carroll, and Ben Feld. So, if you are a Dodgers fan, get on the bus! If you are a Giants fan, I believe the bus may be sold out. ■

*Renee M. Fairbanks is a Certified Family Law Specialist. She formed her firm, Ehlers & Fairbanks, P.C., in 2008 with Jeralyn C. Ehlers, CFLS. Their practice is limited to family law.*

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## Legislation Pending

BY ANGELA D. ROACH

2014 SANTA BARBARA COUNTY BAR ASSOCIATION  
LEGISLATIVE LIAISON

The California State Legislature reconvened on January 6, 2014. Below is a sampling of legislation introduced in the Senate and Assembly since that time.

### *Small Claims Court*

**Senate Bill 914** (Lui): Existing law generally requires that plaintiffs and defendants in small claims court actions represent themselves, but provides certain exceptions to this requirement. This bill would amend Section 116.540 of the Code of Civil Procedure to create another exception to that rule by permitting a plaintiff in a small claims action to submit declarations to serve as evidence supporting his or her claim or allow another individual to appear and participate on his/her behalf, if the plaintiff is a senior citizen or dependent adult and appearing for a hearing would pose an undue hardship, as determined by the court, due to limited mobility or limited access to transportation. The bill was introduced January 23, 2014.

### *Damages/Childhood Sexual Abuse/Statute of Limitations*

**Senate Bill 924** (Beall and Lara): Existing law requires that an action for recovery of damages suffered as a result of childhood sexual abuse, as defined, be commenced within 8 years of the date the plaintiff attains the age of majority or within 3 years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by sexual abuse, whichever occurs later. Existing law provides that certain actions may be commenced on and after the plaintiff's 26th birthday if specified conditions are met. This bill would instead require that an action for recovery of damages suffered as a result of childhood sexual abuse be commenced within 22 years of the date the plaintiff attains the age of majority, or within 5 years of the date the fact of the psychological injury or illness occurring after the age of majority and its causal connection to the sexual abuse is first communicated to the plaintiff by a licensed mental health practitioner practicing within the state, whichever period

expires later. This bill would also provide that a party may conduct discovery before the court may rule on a motion challenging the sufficiency of the plaintiff's showing that a person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct and failed to take reasonable steps, and to implement reasonable safeguards to avoid those acts in the future. This bill was introduced January 29, 2014.

### *Sexual Offenses/Disabled Victims*

**Senate Bill 922** (Knight): Under existing law, a person who commits rape against a person incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, where that fact is known or reasonably should be known by the person committing the act, shall be punished by imprisonment in the state prison for 3, 6, or 8 years. Under existing law, a person who commits that crime voluntarily acting in concert with another person, by force or violence and against the will of the victim, shall be punished by imprisonment in the state prison for 5, 7, or 9 years. This bill would increase the punishment for these crimes and make them a crime punishable by imprisonment in the state prison for 9, 11, or 13 years, and 10, 12, or 14 years, respectively. This bill was introduced January 29, 2014.

### *Statute of Limitations/Felony Sex Crimes*

**Senate Bill 926** (Beall): Under existing law, prosecution for specified felony sex offenses that are alleged to have been committed when the victim was under 18 years of age, may be commenced at any time prior to the victim's 28<sup>th</sup> birthday. This bill would authorize prosecution of those crimes at any time prior to the victim's 40th birthday. This bill was introduced January 29, 2014.

### *Wiretapping*

**Assembly Bill 1526** (Holden): Existing law establishes a procedure for a prosecutor to apply for, and a court to issue, an order authorizing law enforcement to intercept a wire or electronic communication. Existing law requires the Attorney General to prepare and submit an annual report to the Legislature, the Judicial Council, and the Director of the Administrative Office of the United States Courts regarding these interceptions, as specified. Existing law provides that a violation of these provisions is punishable as a misdemeanor with specified penalties, or as a felony. Existing law further provides that these provisions shall remain in effect until January 1, 2015. This bill would extend the operation of these provisions until January 1, 2018. This bill was introduced January 17, 2014.

### **DNA Evidence**

**Assembly Bill 1517** (Skinner): Existing law establishes the “Sexual Assault Victims’ DNA Bill of Rights,” which, among other things, encourages a law enforcement agency assigned to investigate specified sexual assault offenses to perform DNA testing of rape kit evidence or other crime scene evidence in a timely manner to assure the longest possible statute of limitations.

Existing law also requires a law enforcement agency to inform victims of certain sexual assault offenses, if the identity of the perpetrator is in issue, if the law enforcement agency elects not to analyze DNA evidence within certain time limits. This bill instead would encourage a law enforcement agency to submit sexual assault forensic evidence to the crime lab as soon as practically possible, but no later than 5 days after being booked into evidence, and that the crime lab process evidence, create DNA profiles when able, and upload qualifying DNA profiles into the Combined DNA Index System as soon as practically possible, but no later than 30 days after the evidence is submitted by a law enforcement agency, in order to assure the longest possible statute of limitations. The bill would also require a law enforcement agency to inform victims of certain sexual assault offenses, whether or not the identity of the perpetrator is in issue, if the law enforcement agency elects not to analyze DNA evidence within certain time limits. By imposing additional requirements on local law enforcement agencies, this bill would impose a state-mandated local program. The bill was introduced January 15, 2014, and referred to the Committee on Public Safety on January 23, 2014.

### **Marriage**

**Assembly Bill 1525** (Lowenthal): Existing law provides that a marriage may be solemnized by authorized persons of any religious denomination, by specified legislators, constitutional officers, and California Members of Congress, while those persons are currently holding that office, by specified justices, Judges, and magistrates, both current and retired, by the county clerk, and by a county supervisor or an elected city mayor, as specified. This bill would amend Family Code Section 400 to additionally authorize a city clerk to solemnize a marriage. This bill was introduced January 17, 2014, and referred to the Judiciary Committee on January 30, 2014, and may be heard in committee on February 20, 2014.

### **California OSHA/Adult Film Industry**

**Assembly Bill 1576** (Hall): The California Occupational Safety and Health Act of 1973 establishes certain safety and

other responsibilities of employers and employees. Violations of the act under certain circumstances are a crime. This bill would require an employer engaged in the production of an adult film to adopt prescribed practices and procedures to protect employees from exposure to, and infection by, sexually transmitted diseases, medical monitoring, and information and training on health and safety. The bill would define terms for those purposes. Because a violation of the act would be a crime under certain circumstances, the bill would impose a state-mandated local program by creating a new crime. This bill was introduced on January 30, 2014, and may be heard in Committee on March 2, 2014. ■

Legislative information was tracked via [www.leginfo.ca.gov](http://www.leginfo.ca.gov) and [www.legiscan.com](http://www.legiscan.com).

## SPECIAL ANNOUNCEMENT SBCBA LEGISLATIVE LIAISON COMMITTEE

BY ANGELA D. ROACH

2014 SBCBA LEGISLATIVE LIAISON

In January 2014, the Santa Barbara County Bar Association Board of Directors formed a Legislative Liaison committee. The purpose of the SBCBA Legislative Liaison Committee is to serve as a liaison between the SBCBA and legislative branch of government on all issues which may affect members of the California Bar in Santa Barbara County. Activities of the legislative liaison will include establishing and maintaining communication with city, county, state, and federal elected officials that represent Santa Barbara County relating to issues relevant to the SBCBA. Additionally, the legislative liaison will communicate with the SBCBA membership regarding legislative issues that may impact members of the California Bar in Santa Barbara County.

I am honored to have been selected as the 2014 Legislative Liaison. We are currently working to select committee members. If you are interested in learning more about the SBCBA Legislative Liaison Committee or are interested in being considered for committee membership, please contact me at [angelaroach5@hotmail.com](mailto:angelaroach5@hotmail.com).

Griffith, continued from page 14

I have too many cases there that are still going through the system in which I was the attorney of record, or I was the supervising attorney, so I know too much about the cases, and if I were the Judge I'd have to recuse myself. We all got together and decided that the smartest thing was to displace me for six months, get me away from all of the cases that I have knowledge about, and then bring me back when the time has come. So I'll probably go back [to Santa Maria] after Judge's College, in or around July I would think.

**SBL:** What was your nomination and selection process like?

**JKV:** Well, filling out the application was a bit painful, actually. It involved combing through all my past files, because they want to know every serious felony that you've handled—case number, co-counsel, and the like. It took me three days to dig all that information out. They were all murders. My last ten trials were murders. So I laid all that out. Then the JNE commission (the Commission on Judicial Nominees Evaluation) called in October, and I went down and saw them, which was one of the most pleasant experiences I've ever had. Then Josh Groban (Governor Brown's judicial appointments secretary) called me and said he wanted to meet me in L.A. I had an hour and a half conversation with him, which was as easy as it could be. When it was over I couldn't believe we'd been talking for an hour and a half.

**SBL:** Without betraying any confidences, what do you think they're mainly looking for—judicial temperament, intelligence, knowledge of the law? All of the above?

**JKV:** I think they're looking for a package. I think they want someone who's got the kind of experience that is going to bring something to the bench. I think they want diversity, and as a white male I had a couple of strikes against me on that score, but I think my long experience as a public defender and my reputation in the community caught their attention.

**SBL:** How has it been so far, in your brief time on the bench?

**JKV:** I love it. I used to tell people that I had the best job in the world when I was an assistant Public Defender, because I had people coming into my office all day long, wanting to know "How do I do this? What do I do about that? What about this strategy? What about that expert?" People were constantly coming to me for information, and since I had done most of it, I had pretty good answers to give them. Now, it's different. I control things in a different way than I did before. Now it's my calendar and my courtroom. I don't have a lot of people asking me a lot of questions. I get to

figure things out and use all the knowledge that I've built up from 37 or so years of doing criminal law.

**SBL:** That kind of answers my next question, which was going to be about your learning curve, if any.

**JKV:** I have a fairly good handle on criminal law and procedure. What I'm trying to soak in is that from the perspective of a Judge, you have to be concerned about the court reporter, you have to be concerned about what you're saying so the clerk can take down the information that she knows, you've got to have eyeball-to-eyeball contact with the bailiff so that you know if there's anything stressful going on in the courtroom. You're juggling all these things, while remembering all the things you have to say to perfect a record. I never worried about that as a lawyer. If the Judge goofs up, so what, it doesn't bother me—and if it helps my client at some point down the road, so be it. But as a Judge you have to be very careful that you get the right time waivers, you get the right acknowledgements and the right pleas, if you're taking a plea. The waivers have to be correct, otherwise they won't withstand legal scrutiny. That is what I'm focused on now as a Judge, making sure all those bows are tied nice and tight.

**SBL:** Tell us about your life outside the law, if you can find time for one.

**JKV:** Well, I play in a rock n' roll band called Class Action, and I'm very proud of it.

**SBL:** Really? What instrument do you play?

**JKV:** I play guitar. And if you go to my enrobing on February 27 at 5:30 at the Solvang Vets' Hall, there will be a band composed of four ex-lawyers—Rogelio Flores, Dino Innumerable, John McGregor, and myself.

**SBL:** That's why the name sounded familiar—Judge McGregor mentioned the band in his interview.

**JKV:** Yes, we've been playing together about 20 years. And Dino Innumerable was just elevated to the bench in the last week of January, so now we actually have four sitting Judges in the band. We play rock n' roll, Motown, Latin, jazz—you name it, we play it.

**SBL:** Do you have a family?

**JKV:** Yes, I've been married 30 years, we have three boys, each with their own families, scattered across the country. [We have] nine grandkids, and two great-grandkids. My dad lives in Montreal, so I go back and visit him every September, and my wife has a humungous family back in Virginia, so we visit them as well.

**SBL:** Excellent. Thanks so much for taking the time to meet with *Santa Barbara Lawyer*, and best of luck on your new career.

**JKV:** Thank you. ■



*Calling All Runners to*

# SAVE THE DATE

## June 14, 2014!

The Law Day Foot Races are coming back in a new form, known as Running for Justice!

Look for updates to come from Santa Barbara County Bar Foundation.

**If it's there,  
we'll find it.  
It's that simple.**



**White, Zuckerman, Warsavsky, Luna & Hunt, LLP** offers much more than accounting expertise. Our creative ideas and new strategies give our clients a competitive edge. In family law, you need professionals who can analyze financial situations and provide unimpeachable analysis and expert testimony. With decades of experience, we are highly qualified in all areas including:

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To attend our Santa Barbara Family Law Study Group, e-mail [llasseube@wzwlw.com](mailto:llasseube@wzwlw.com). There is no charge for the dinner or program and you will receive one hour of MCLE credit.

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# The Art of Cross Examination

BY DAVID K. HUGHES

Most lawsuits are won at trial by the effective presentation of testimonial and demonstrative evidence during the direct examination of a party's witnesses. Yet, the public perception of courtroom life is that the real drama in a lawsuit, and the key to success, is the devastating cross-examination of an opposing witness which reveals the duplicity of the witness or the proverbial "smoking gun." Trial lawyers also fall under the spell of Perry Mason, and relish the opportunity to regale colleagues at a Bar Association event about how their deft and rapier-like cross-examination destroyed a witness and won the day. In truth, those opportunities occur infrequently and often when they do, the skill of the advocate is no match for the witness or the moment.

Do my comments mean that cross-examination should be relegated to the dustbin of courtroom procedure and skills? Of course not. To paraphrase one famous advocate, cross-examination is the greatest vehicle for the search for truth ever invented. There is no more effective way to elicit truth in an adversarial proceeding than by cross-examination. What I do posit, however, is that cross-examination is a learned skill no different than any other art of the advocate and that it is most effective when judiciously used and well planned.

## ***What then makes for an effective cross-examination?***

First and foremost, the advocate needs to plan the cross-examination of each witness. That may not always be possible for a surprise or rebuttal witness but, in most cases, the identity of the opposing witnesses and their expected direct examination is well known. Attorneys who have no purpose or plan in their cross-examination of witnesses achieve nothing for their client, inevitably bore the jury, and are usually referred to as the "attorney for the losing party."

Second, every cross-examination must have a purpose. Basically, there are two objectives that may be accomplished by cross-examination. The first is to establish a

fact that you may not be able to prove otherwise. The second objective, and usually the most important, is to discredit the witness and his testimony.

Third, a planned cross-examination must be consistent with the theme of your case. Every witness in the case, whether direct or adverse, must be used by the trial lawyer as a vehicle for telling the story of the case. The basic rule of cross-examination is to cross-examine only to the extent necessary to secure the information you need to support your case. Never ask a question on cross-examination unless you have a good reason for asking it.

Fourth, if a witness has not hurt your case, do not cross-examine that witness. In short, if there is nothing to gain, do not cross-examine.

Fifth, you should be yourself during cross-examination. You should not try to copy the cross-examination manner of a David Boies or Johnny Cochran but, instead, to learn basic cross-examination rules and techniques and adapt them to your own personality. For example, one mistake a lot of young trial lawyers make in cross-examination is to believe that they have to raise their voice and engage in armed battle with the witness in order to be an effective cross-examiner. The most effective cross-examination is surgical and precise, asked in a firm manner.

Sixth, a trial lawyer needs to learn the basic steps to impeach a witness by the use of prior inconsistent statements.

## ***How then should the cross-examination actually be conducted?***

A trial lawyer should be familiar with the late Professor Irving Younger's famous ten commandments of cross-examination. Those ten commandments will help any trial attorney conduct a reasonably competent cross-examination. The commandments are not inviolate but they do provide an excellent framework for any cross-examination.

Those commandments are:

1. Be brief. If you are brief, the jury will remember the cross examination. Generally, there are less than half a dozen points about a witnesses' credibility or testimony that you need to expose on cross-examination.
2. Use short questions in plain English.
3. Never ask anything but a leading question. Do not ask questions that begin with a "how" or "why."
4. Ask only questions to which you already know the answer. As Professor Younger concisely states, "If you do not know everything there is to know

about the case you should not be trying it.” There are two exceptions to this commandment: you may ask the question if you do not care what the answer is; or, if it is an important question for which you do not know the answer, ask apparently innocuous questions to determine the answer.

5. Listen to the answer.
6. Do not quarrel with the witness, or answer questions from the witness.
7. Do not permit a witness on cross-examination to simply repeat what the witness said on direct-examination.
8. Never permit the witness to explain anything.
9. Avoid one question too many.
10. Save it for summation.

There are occasions when your cross-examination is so subtle that you will need to explain its impact in your closing argument. Make that explanation in closing argument rather than trying to illicit the significance of the cross-examination from the witness.

In addition to the ten commandments espoused by Professor Younger, the following rules have applicability as to how cross-examination should be conducted.

First, remember the rules of primacy and recency. Jurors remember most often the first and last things they have heard from a witness, the Judge, etc. Therefore, you want to start your cross-examination strong and end it strong. Always cover the devastating material first when the jury is most attentive and the witness uneasy, and always try to end your cross-examination on an “up-tick.” You should save for last the question that you know the answer to that will best help your case and will be indelibly imprinted in the memories of the jurors.

Second, use the rule of sequestration to exclude witnesses from the courtroom during trial.

Third, use descriptive words in your cross questions to tell your story to the jury, to highlight important points, and to provide a transition from one cross-examination topic to another.

Fourth, do not let your opponent interrupt your cross-examination.

Finally, do not be frustrated by the fact that you have not achieved the total control of the adverse witness that you would have liked in your cross-examination. Control of an adverse witness by cross-examination is not the easiest skill to learn. Just do your best, and years of trial practice will hone and improve your abilities to control the witness. ■

## *The SBCBA Debtor/Creditor Section Presents:*

### Meet the New Bankruptcy Judges

#### **When**

Thursday, March 6, 2014, from 12:00 to 1:15 pm

#### **Where**

Santa Barbara Public Library, Faulkner Gallery

#### **Speaker(s)**

Honorable Peter Carroll and Honorable Deborah Saltzman

#### **About the Event**

As many of you know, the Honorable Robin Riblet will be retiring this year after over twenty years on the bench. Chief Judge Peter Carroll and Judge Deborah Saltzman will soon be taking the reins in the Northern Division. The Judges have graciously agreed to discuss the transition and the coming procedural changes. Please join the Santa Barbara County Bar Association for a lunch-time MCLE to hear what is in store for the future.

#### **Questions**

Due to the interest in this event the Judges will be collecting questions in advance and will address selected questions during the presentation. Please email your questions to Casey Nelson at: [cnelson@lafsbcb.org](mailto:cnelson@lafsbcb.org) with the subject line “Question for the Judges.”

#### **Price**

\$25.00 for SBCBA Members, \$30.00 for non-members. Seating is limited.

#### **MCLE**

1 hour credit

#### **Contact Information/R.S.V.P.**

Carissa Horowitz, Esq. can be contacted at [carissa@beallandburkhardt.com](mailto:carissa@beallandburkhardt.com).

#### **Checks should be made payable to the Santa Barbara County Bar Association.**

Checks should be mailed to:

Beall & Burkhardt APC

Attn: Carissa Horowitz

1114 State St., Suite 200

Santa Barbara, CA 93101.

**Please RSVP BY Tuesday, March 4, 2014.**

# Motions



**Santa Barbara Paralegal Association** is happy to announce its new board of directors for 2014 is as follows: President: **Kimberly Mumford**; Vice President of Membership: **Angie Robuck**; Vice President of Programs: **Meaghan Haynes**; Secretary: **Jennifer Ricards**; Treasurer: **Rebecca Riggs**; Members at Large: **Teri Villegas** and **Colleen Dennis**. The SBPA also announces the new 2014 chair positions: Bar Liaison: **Barbara Liss**; Employment Chair: **Carrie Taylor**; Parliamentarian: **Seth Marsh**; MCLE Accreditation: **Bea Dunn**; and Website Manager: **Alexis Henderson**.

The new directors were installed in a ceremony at Le Café Stella on Friday, January 24, 2014. Among those in attendance were **Sen. Hannah Beth Jackson**, the **Hon. James E. Herman**, **Santa Barbara County Bar Association** president, **Scott B. Campbell**, and **Santa Barbara Women Lawyers** past president **Danielle DeSmeth**.

**Nathan C. Rogers**, former partner with the firm of **Griffith & Thornburgh, LLP**, is pleased to announce the opening his own solo practice of **The Law Offices of Nathan C. Rogers**, emphasizing business transactions and litigation. The office is located at 3 W. Carrillo St., Suite 214 Santa Barbara, CA 93101.

**Renee M. Fairbanks, CFLS**, has been asked to serve on the **Association of Certified Family Law Specialists' Outreach Committee**. The Outreach Committee is designed to bring continuing education to family law practitioners throughout California. Ms. Fairbanks, through the ACFLS Outreach Committee, will be bringing free mandatory continuing education classes to Santa Barbara County. Lunch time presentations are scheduled for March 27 and April 17, 2014 at Santa Barbara College of Law. Please contact Ms. Fairbanks at [rfairbanks@ehlersandfairbanks.com](mailto:rfairbanks@ehlersandfairbanks.com) for more information.

Calling All Runners to SAVE THE DATE for **Saturday June 14, 2014** – the **Law Day Foot Races** are coming back in a new form, known as Running for Justice! Look for updates to come from **Santa Barbara County Bar Foundation**.

The Officers and Directors for 2014 board of the Foundation are as follows: President: **Renee M. Fairbanks, CFLS**; Vice President: **Christine Kopitzke**; Treasurer/CFO: **Vanessa Kirker Wright, CFLS**; and Secretary: **Barbara Carroll**. The board members for 2014 are: **Hon. Pauline Maxwell**, **Ronald Perry**, **Wendy Kosche**, **Brandi Redman**, **Saji Dias Gunawardane** and **Benjamin Feld**.

As previously mentioned, the Santa Barbara Barristers recently hosted a swearing-in ceremony for new attorneys to be admitted to the bar. Those new attorneys include **Katharine Allen**, **Brian Stanton**, **Doug Black**, **Elvia Pacheco Garcia**, **Lindsay Cooper**, and **Hodi Dalton**. A group photo appears below of the new attorneys along with the Judges that swore them in, **Hon. James Herman**, **Hon. Thomas Anderle**, **Hon. Donna Geck**, **Hon. Denise deBellefeuille**, and **Hon. Colleen Sterne**.



**Welcome New Attorneys**

*Santa Barbara Lawyer* and the Motions column welcomes new attorneys to the Santa Barbara legal community. We asked new attorneys to share their backgrounds and introduce themselves. Below is more information from those who chose to share.

**ELVIA P. GARCIA**

Ms. Garcia is a first generation Mexican immigrant whose family settled in Ventura County nearly 20 years ago. Ms. Garcia was raised in Moorpark where she attended Moorpark High School. After graduating in 2003, she pursued her undergraduate degree at the University of California at Santa Barbara (UCSB). At UCSB, Ms. Garcia double majored in Spanish and Women Studies and earned her Bachelor of Arts degree in 2007.



Ms. Garcia completed her legal studies at the Santa Barbara College of Law and graduated in 2012. In 2013, Ms. Garcia passed the California Bar Exam and was admitted to the practice of law. Ms. Garcia has significant legal experience. While attending law school, Ms. Garcia worked fulltime as a paralegal with the Law Offices of Gregory I. McMurray, P.C. In that capacity, she gained invaluable practical experience, managed her own caseload and assisted clients with issues related to their family and criminal law cases. Ms. Garcia also interned with the Santa Barbara Public Defender's office where she acquired valuable skills on how to represent and defend individuals accused of committing crimes.

Lastly, Ms. Garcia currently provides legal support to the Mexican Consulate in Oxnard through the Department of Protection in association with Programa de Asistencia Legales Externas (PALE). This program provides low cost and pro bono legal representation to hundreds of Mexican nationals.

Ms. Garcia is associated with the following organizations: Santa Barbara Women Lawyers Foundation, Member of the Board of Directors, Vice President; Santa Barbara Women Lawyers Association, Member of the Board of Directors; Santa Barbara Teen Legal Clinic, Member of the Board of Directors, Secretary; William L. Gordon, American Inns of Court, Member.

**BRIAN T. STANTON**

Mr. Stanton grew up in the Santa Cruz Mountains and graduated from Los Gatos High School. He did his un-

dergrad at UCSB, where he majored in political science and international relations. During college, he spent several years in South America doing volunteer work in Uruguay and working at the U.S. Embassy in Brazil. After they both graduated from UCSB in 2009, Mr. Stanton's wife, Jane, and he were married. Before going to law school, Mr. Stanton briefly worked for a property and real estate attorney in San Jose, and then started law school at the University of California, Hastings College in fall 2010.



While at Hastings, Mr. Stanton was an editor on the Hastings International and Comparative Law Review and a member of the Moot Court Board. He competed in several national moot court competitions, including the National Criminal Procedure Tournament held at the University of San Diego School of Law, the Evan A. Evans Constitutional Law Moot Court Competition held at the University of Wisconsin Law School, and the National Sports Law Invitational held at the Tulane University Law School. He finished as a quarterfinalist at the criminal procedure competition, and won the national championship at the Evans constitutional law competition and Tulane sports law competition. During his third year of law school, Mr. Stanton worked as a judicial extern for the Honorable Joyce L. Kennard at the Supreme Court of California.

He began working at Mullen & Henzell this past fall after taking the bar exam. At the moment, he is not assigned to a particular practice group.

When not working, Mr. Stanton and his wife enjoy traveling, cooking, hiking, and skiing.

**KATHERINE W. ALLEN**

Ms. Allen is originally from Sacramento and went to college at UCSB, where she majored in anthropology. After graduating, she moved to Washington, D.C. to work for a women's health project for the U.S. Department of Health and Human Services. After a couple of years there, she moved back to California to attend law school at USC in Los Angeles.



At USC, Ms. Allen was the Executive Senior Editor of

## Legal Community

the Southern California Review of Law and Social Justice, as well as chair of the OUTLaw organization, a group for LGBT students and members of the legal community. During her third year of law school, she was a judicial extern for the Honorable Neil W. Bason in the U.S. Bankruptcy Court for the Central District of California.

Ms. Allen is now working as an associate at Mullen & Henzell, LLP, where she primarily works in the business and real estate departments. She is also on the board of directors for Santa Barbara Women Lawyers.

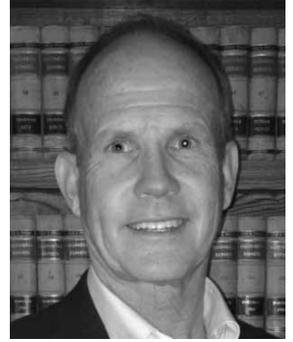
Her hobbies include weightlifting, cooking, hiking, and skateboarding.

### **DOUGLAS M. BLACK**

Doug Black became an attorney at the age of 56. He grew up in Santa Barbara, went to local schools, and graduated

from high school in 1975. After high school, Doug became a third generation brick mason earning his masonry contractor's license in 1982. He later added a general contracting classification.

After contracting for over 30 years, Doug attended Taft Law School where he graduated in 2012 with honors. He is a former private pilot, a certified diver, cyclist, marathon runner, triathlete, and snowboarder. He is married to attorney Renee Nordstrand, has five children ages three to 29 and a one-year old granddaughter. In his spare time Doug enjoys traveling and spending time with his family.



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Doug currently works in the Law Office of Renee Nordstrand and specializes in personal injury, criminal defense, and construction litigation.

**LINDSAY COOPER**

Lindsay Cooper grew up in Pleasanton, CA. She moved down to Southern California to attend college. She graduated from UCSB with a major in Business Economics. After college, she decided to pursue her lifelong dream of becoming an attorney, and enrolled and graduated from Santa Barbara College of Law. In her downtime she enjoys snow skiing, watching foreign films, walking her rescue dogs along the beach, and campaigning for animal rights. She would like to utilize her two biggest passions—animals and the law—to invoke a positive change in the lives of animals.



*If you have news to report - e.g. a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc... - The Santa Barbara Lawyer editorial board invites you to "Make a Motion!". Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com. If you submit an accompanying photograph, please ensure that the JPEG or TIFF file has a minimum resolution of 300 dpi. Please note that the Santa Barbara Lawyer editorial board retains discretion to publish or not publish any submission as well as to edit submissions for content, length, and/or clarity.*

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*The Intellectual Property/Technology Business Section and In-House Counsel & Corporate Law Section of the Santa Barbara County Bar Association present:*

**Fighting Patent Trolls:  
Who They Are and  
How to Defeat Them**

***What and who are patent trolls, and what are their motivations?***

Are their claims valid? What are the available options to fight trolls on their own terms or to end cases quickly? The Federal Circuit is modifying case law to give defendants increased ability to fight trolls, especially in cases of questionable merit. What are the benefits and drawbacks of the anti-troll legislative "fixes" that are currently being debated, and how likely are these laws to be enacted? Join us to discuss the legal, ethical, and economic issues that arise from the prevalence of patent trolls and current efforts and strategies to curb their activities.

***Speaker***

Jonathan Pearce, SoCal IP Law Group  
Jonathan Pearce is a partner with SoCal IP Law Group LLP, where he practices in the areas of patent, trademark, copyright, and trade secrets, and represents clients in technology transactions, intellectual property licensing, and adversarial proceedings before the United States Patent and Trademark Office.

***Date and Time***

Tuesday, March 18, 12 noon

***Location***

Santa Barbara College of Law, Room 1, 20 East Victoria Street, Santa Barbara

***Reservations***

Reserve via email to Chris Kopitzke, Chair of Intellectual Property/Technology Business Section, by Thursday, March 13, ckopitzke@socalip.com

***Cost and Payment***

\$35.00 – includes lunch  
Mail checks by Thursday, March 13, payable to Betty Jeppesen, Chair of In-House Counsel & Corporate Law Section, 800 Garden Street, Suite K, Santa Barbara, CA 93101

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One hour credit applied for

1	Mock Trial Finals								1
3	Santa Barbara Lawyer Submission Deadline	2	3	4	5	6	7	8	
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18	Intellectual Property/Technology/Business and In House Counsel and Corporate Law Sections MCLE Luncheon	16	17	18	19	20	21	22	
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