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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.

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Articles

Sections

About the Cover

March in Santa Barbara is usually our last best chance for significant rain, so this month's cover represents wishful thinking on the part of your editor for relief from the drought. © Jaromir Chalabala/shutterstock.com.

Judge Michael Carrozzo, Assistant Presiding Judge Patricia Kelly, SBCBA President Naomi Dewey, Presiding Judge Jim Herman, Judge Kay Kuns at the SBCBA Bench and Bar Conference.

President's Message

By Naomi Dewey

Naomi Dewey

Each January, as attorneys across the state scramble to meet MCLE reporting deadlines, the Santa Barbara County Bar Association puts on a full day Bench and Bar Conference. This year's conference was jam-packed with programs ranging from expert guidance on private placement memorandums to a fascinating debate on electronic surveillance. Hosted by Garden Street Academy (which donated its facility at no charge to the County Bar), the program was informative, engaging and above all else, social. Especially for those members who are not litigators and don't see each other in court on a regular basis, the chance to spend the day with other attorneys while getting updates on legal developments is invaluable. Special thanks to Mike Denver and Nathan Rogers, who guided the conference through a year of planning, and Lida Sideris and her team for providing support to the Bench & Bar Committee. We also owe thanks to the chef and staff at Garden Street Academy, who catered the event with delicious, organic pastries, a full lunch, and treats throughout the day.

One of the highlights of the Bench and Bar Conference is, for me, the Judges' Panel. This year we heard from Presiding Judge James Herman, Assistant Presiding Judge Patricia Kelly (who will be the County's first female Presiding Judge), Judge Kay Kuns, and new Judge Michael Carrozzo about the work they are doing in their courtrooms and behind the scenes, the challenges of coping with budget cuts, and the unique way each is using technology in the courtroom. Did you know, for example, that some judges will have court clerks text attorneys when their cases are about to be called? The close connection between the Bench and Bar in this County is the envy of other legal communities, and each of our clients benefits from the atmosphere of mutual respect and collaboration. ■

The Other Bar:

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

Why Does the Public Question the Honesty and Integrity of Attorneys?

By David K. Hughes

Since 1976, the Gallup Organization has conducted annual polling asking the American people to rate the honesty and ethical standards of people in different trades, businesses, and professions. How do lawyers fare in those polls? Not well.

In 2014, there were four occupations that scored lower than attorneys when honesty and ethical behavior were measured. Starting at the bottom, those four are: members of Congress, car salespeople, advertising practitioners, and business executives.

All other forms of work scored higher than attorneys, with nurses rated the highest. And, in a remarkable statistic, the ethical rating of attorneys by the public has not significantly changed in the last 20 years.

Why these dismal results for attorneys? Are we all as dishonest and unethical as some in the public apparently believe? Or, are there other factors at play that explain the consistently low ethical rating of attorneys? For example, have the ratings been affected by the imaginative and often fictional portrayals of attorneys by the entertainment industry? Or, does the historically low ethical ranking of attorneys simply reflect a longstanding cultural stereotype that has become ingrained in the minds of the public, without factual support or reasoned thought?

My research has demonstrated that lawyers have a long running image problem, and that the root of that negative image is distrust. Survey after survey shows that the American public believes that there are too many lawyers, that lawyers are greedy, corrupt, and manipulative, and that the legal profession does a poor job of policing itself. The public perceives lawyers as dishonest and self-serving, and not really caring about their clients. The causes behind this image problem are multiple. Among the factors described by the public for their perception of attorneys are: lawyers are too expensive; lawyers fail to keep their clients informed; lawyers do not demonstrate competency in a given area; lawyers fail to meet expectations; lawyers waste time and delay proceedings; lawyers mishandle client funds; lawyers make matters more complicated than they should be; lawyers misrepresent facts; and lawyers do not do a good job of adequately informing clients of the realistic costs of legal representation.

The overwhelming majority of the attorneys I have known and worked with do not fit these stereotypes. I believe that most attorneys in Santa Barbara would say the same thing. But, the public's negative perception of our profession still exists. Can anything be done to change it?

Many local and state bar associations, as well as the ABA, have adopted image enhancement programs. These public relations efforts have been designed to educate the public about the profession, and to emphasize the good works of attorneys. These programs have included radio, television and print ads, letters to the editor, educational programs, and organized attorney involvement in community activities. Studies have shown that these image enhancement efforts have a significant impact in improving the profession's image during the time period of the PR campaign but that, within months after those efforts, the public opinion of attorneys returns to the same approximate level that existed before the campaign.

> In sum, the public's perception of attorneys can only be improved by all attorneys acting in a professional manner, always.

More successful in changing public opinion have been the efforts of some states and jurisdictions, as well as bar associations, to make structural changes in the ways attorneys are regulated or self-policed. In jurisdictions where there is a robustly enforced, institutionalized form of attorney review and discipline, the public's perception of the profession has risen.

But, in the long run, the only effective answer to the question of how to improve the public's perception of our profession rests with each attorney practicing law. As can be seen from the enumerated factors that shape the public's negative opinion of attorneys, most of those factors are within the control of the profession. In sum, the public's perception of attorneys can only be improved by all attorneys acting in a professional manner, always. The solution to our profession's image problem depends upon the moral compass of each member of the profession – a compass pointed towards the true north of unselfish and ethical professional service, and not towards success, materialism or self-gratification. ■

An Expert Never Really Convinces Anyone

By Matthew Haffner

Matthew Haffner

I've never heard a jury say they decided a case due to some expert's testimony. Rarely do jurors have anything to say about experts, if they remember any expert testimony at all. Jurors will usually recall only the impression that the expert gave them, through the expert's presentation or communication skills. In my experience, experts do not persuade the jury of critical facts or opinions.

The use of expert witnesses at trial is frequently misunderstood and misapplied. Under C.C.P § 720, a "person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates..." Under C.C.P. § 801, an expert may offer testimony that is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact..."

> In my experience, experts do not persuade the jury of critical facts or opinions.

Most trial lawyers use experts to attempt to convince the jury of salient facts. Experts are heavily relied upon for causation testimony. Expert opinions are offered from everything from medical causation for injuries to damages from construction defects, and everything in between.

Jurors, however, are skeptical of expert opinions, particularly from highly polished "professional experts." Experts in any field that garner most, if not all, of their income from offering expert testimony are subject to withering cross-examination and usually have their opinions sharply discounted by the jury. Jurors may interpret these experts as "opinions for hire," denigrating their testimony with skepticism. Rarely, if ever, are expert opinions identified by jurors as critical to their decisions. Why is that? If it is true that experts' testimony is not very important to jurors, what is the best use of experts at trial?

The best method is to approach your trial with the expectation that any expert will not significantly, or even noticeably, assist in persuading the jury towards your cause. The expert will either provide narrow aid, or may even damage the case through poor presentation or delivery of opinions. Because jurors are generally skeptical of experts, if you plan your trial with the experts as afterthoughts, their testimony may end up providing additional inertia for your case.

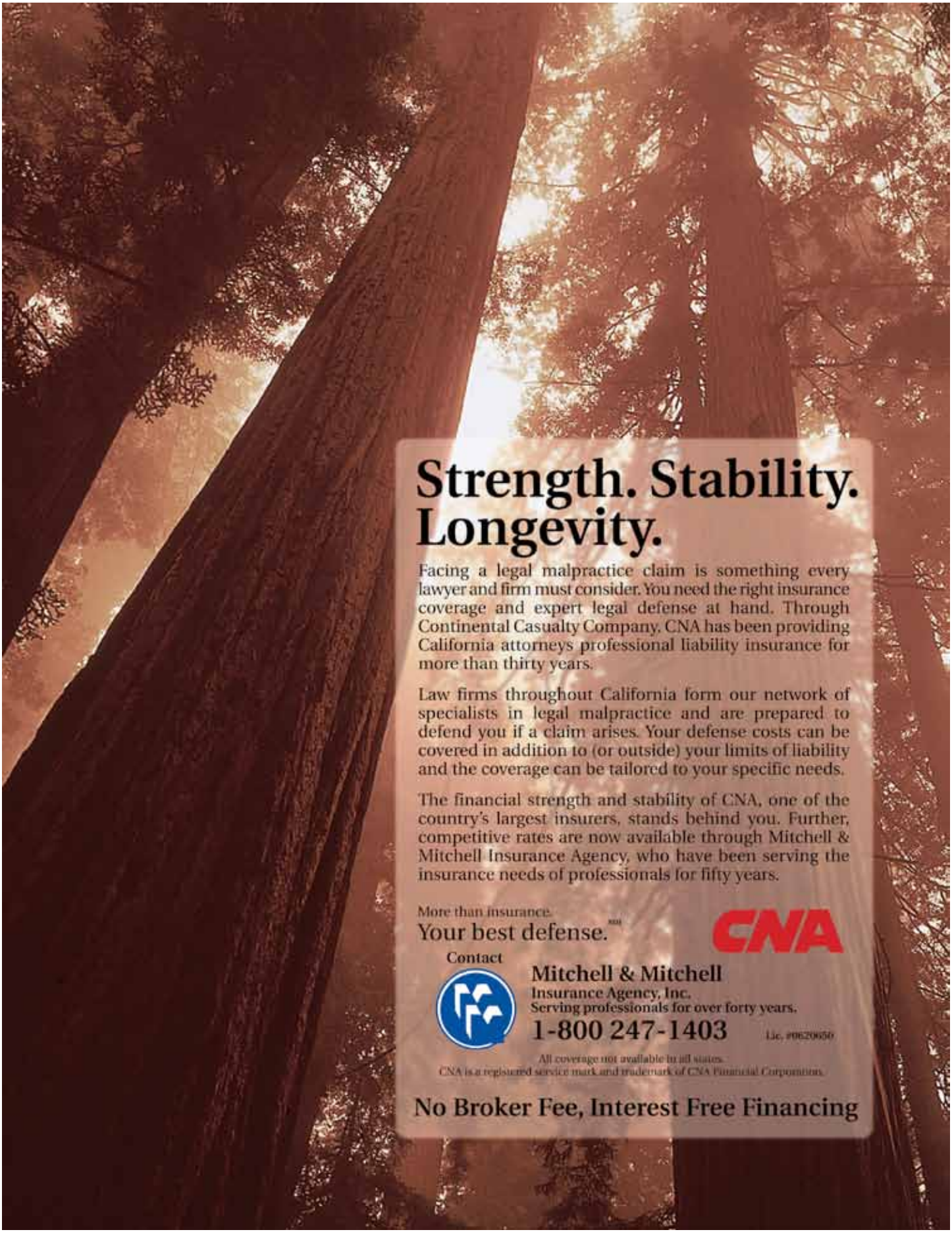
What else do you use an expert for, other than to "cancel out" the opposing expert? An expert should be able to interpret confusing facts or events, clarifying or exploring aspects of the evidence. Try to avoid using experts to offer conclusive, determinative causation opinions, unless absolutely necessary, as testimony received as overreaching is likely to ruin the expert's credibility on other issues. Offer expert testimony to explain evidence, to give the jury a manner with which to interpret it, but don't expect the expert to persuade the jury to make a particular decision.

As an example, I defended a wrongful death automobile verses pedestrian case where the plaintiffs' expert opined that the decedent had crossed opposing traffic lanes before being struck by the defendant driver, granting the driver sufficient time to observe the pedestrian and avoid the collision. The defense was that the pedestrian had entered the street immediately in front of the car, and had not crossed opposing traffic lanes, making the accident impossible to avoid.

I used a medical accident reconstruction expert to offer the opinion that the decedent's series of rib fractures was consistent with the car striking the pedestrian on the left side. From this evidence I was able to successfully argue that the decedent pedestrian must have entered the street immediately in front of the car, as opposed to traversing opposing traffic lanes, which would have resulted in an impact on the pedestrian's right side.

Thus, in this instance, the expert was used to explain the evidence in a manner best understood in my case's favor, as opposed to offering causation opinions or ultimate conclusions about the case's facts, areas that are ripe for objections and are generally not persuasive.

Continued on page 13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Don't Insult Me

By Victoria Lindenauer
Lindenauer Mediation

"Self-Control is the very essence of character. To be able to look a man straight in the eye, calmly and deliberately, without the slightest ruffle of temper under extreme provocation, gives a sense of power which nothing else can give. To feel that you are always, not sometimes, master of yourself, gives a dignity and strength to character, buttresses it, supports it on every side, as nothing else can. This is the culmination of thought mastery." (Orison Swett Marden, *Peace, Power & Plenty* (1909).)

If you have kids (or have been one yourself), at some point you have no doubt heard, or said, the following words: "You're not the boss of me." As an adult, ideally you've developed the experience and intuition to interpret that statement more as a reflection of frustration than as a declaration of power. When you go into mediation, you can choose consciously between roles.

As a mediator, I am asked with some regularity during private caucus to "go back in there and tell them we're insulted [by that demand/offer]." In the past, as a litigating attorney, I'm sure I asked my own mediator to do the same. I now dissuade that behavior for several reasons. After all, what does it mean to be insulted? On some level, isn't it just an admission to your opponent that you have allowed yourself to be emotionally manipulated? You can't be insulted or disrespected without your permission and consent.

If you're the one who is trying to insult the other party with grossly disingenuous positions or unrealistically extreme proposals, or worse, with personal affronts, consider that your chances of deal-making with your opponent just plummeted. Robert Cialdini tells us in *6 Key Principles of Influence* (2006), that people are easily persuaded by those they like. He cites the marketing of Tupperware in what might be called one of the earliest forms of viral marketing: People were more likely to buy if they liked the person selling it to them. With all other things such as technical competence being equal, the "gentlemen/women" lawyers get the most favorable deals more quickly.

Except in aberrant circumstances, deliberately angering your opponent works against you. Trial consultant, Tammy R. Metzger*, explains that anger limits our ability to consider opposing information by overriding the rational and conscious mind; it causes people to accept higher risks. I have heard this in the form of, "I don't care if I lose, or it costs more to try the case! I'm out of here!" (*www.thejuryexpert.com/wp-content/uploads/SadMadJurors.pdf)

The litigant who is delivered the news that they have supposedly insulted the other party enjoys a "gotcha" moment and generally says, "Well, we don't really care if they're insulted." This kind of dynamic unnecessarily interrupts the negotiation flow and doesn't promote a settlement tone.

If you are the insultee, re-evaluate your choices. Writers Bob Burg and John D. Mann tell us in *The Go-Giver: A Little Story about a Powerful Business Idea (2007)*, that there are two types of influence: One is through force or manipulation, and the other is through persuasion. Not only is persuasion more benevolent than force (which at best, only leads to compliance), it is also much more effective, both for short-term "buy-in" and for long-term commitment. Interestingly, however, the first person we must have influence over is ourselves. After all, while no one can make us angry, frustrated, flustered, unhappy, miserable, or any of the other negative emotions, they can certainly say and do things that push our buttons and begin the process. Once we begin acting out of emotion, our ability to persuade is ruined.

Once we begin acting out of emotion, our ability to persuade is ruined.

Psychologists refer to the distinction between influencing ourselves and being influenced by others as "responding" versus "reacting." Whereas reacting looks defensive, threatening, or insecure, responding comes from deliberation, power, and integrity. Concretely, what do these distinctions look like in practice? Instead of saying, "If that's your first offer, then we have nothing to discuss," consider, "We can work with an offer that sufficiently considers x, y, and, z factors." Instead of "That's ridiculous," consider, "Here's an example of what would work for us." Reward good behavior, and discourage bad behavior by redirecting the flow. Get on top of the process instead of underneath it.

Be the boss of yourself; however, be careful about teaching your kids how to do this. They may just outwit you. ■

Victoria is a full-time mediator in central and southern California. She may be reached at lindenauer_mediation@cox.net and www.lindenauermediation.com.

Bankruptcy Court Clinic Seeking Volunteers

By Randall Sutter and Jennifer Smith

The Legal Aid Foundation of Santa Barbara sponsors the Consumer Debt and Bankruptcy Clinic at the U.S. Bankruptcy Court for the Central District of California, Northern Division. The Clinic provides free information to consumers regarding financial debt issues and bankruptcy matters. The clinic serves a large geographical area, including Santa Barbara, San Luis Obispo, and Ventura counties, and is always looking for qualified attorney volunteers to provide their expertise and knowledge in service to our community.

LOCATION:
U.S. Bankruptcy Court, 1415 State Street, first floor lobby area.

DATES:
Every Friday except holiday dates, court closures, or other stated closures.

TIME: 10:00 AM – 12:00 PM.

HOW DO I VOLUNTEER: You may contact our Clinic volunteer attorney, Randall Sutter, by email (rsutter@rslawllp.com) or by telephone (805-650-7100) and Mr. Sutter will answer any questions you may have and schedule your first day of volunteering at the Clinic. This usually involves a day where you can "shadow" a current volunteer to learn normal practices and routines. In addition, you are always free to contact the Legal Aid Foundation of Santa Barbara County for information at (805) 963-6754.

After the preliminary meeting, the volunteer will be invited to join the Clinic's web-based sign-up list to schedule volunteer dates. In the event that a volunteer must cancel their volunteer date for an unforeseen reason, the volunteer may go on the list and delete their sign-up. If a volunteer must cancel on short notice, the volunteer will notify the Clinic staff so that an email can be sent to recruit a replacement.

HOW OFTEN DO I VOLUNTEER: Volunteers set their own schedules and may volunteer as often as they would like. With the number of current volunteers, we request that attorneys commit to attending one Clinic on a bi-monthly basis through the end of the calendar year.

WHAT KNOWLEDGE DO I NEED TO VOLUNTEER: Bankruptcy expertise and related consumer debt and financial knowledge is important for our volunteers to be effective in assisting the Clinic clients. The majority of the questions involve Chapter 7 bankruptcies, but the clinic also deals with Chapter 13 issues and an occasional Chapter 11 issue. In the interest of helping all, Clinic volunteers assist both debtors and creditors.

A newer attorney looking to gain valuable experience in bankruptcy law is welcome to work alongside more experienced attorneys at the Clinic. The seasoned bankruptcy attorney can then point out books and other resources for a newer attorney to continue to learn the field.

Attorney volunteers with additional knowledge about

Host a Deposition or Meeting in the County Law Library's Rare Book Room

The County Law Library's Rare Book Room is now available by reservation for depositions, arbitrations, mediations and attorney-client conferences. This is a great and affordable opportunity for those who do not have conference space downtown. Host clients or opposing counsel in an elegant and private conference room in the historic Anacapa Courthouse, with free Lexis-Nexis access using your portable device. The fee is $15 per hour, $50.00 per half day (Up to 4 hours), or $100.00 for a full day. The room provides seating and work space for 10. For meeting room policies, limitations, and booking please contact library director Ray McGregor at info@countylawlibrary.org or (805) 568-2296.

options other than bankruptcy to resolve a client's financial distress are also helpful.

WHAT HAPPENS AT THE CLINIC: Clinic attendees arrive on a first-come-first-serve basis, signing up on a provided sign-up sheet. The volunteer attorney then calls out the name of the attendee and proceeds to sit down and consult with them. Each consultation is limited to 15 minutes when there are others waiting. Currently, the Clinic operates out of a lobby office that is equipped with a computer for the volunteer attorney and is stocked with forms and other resources. During Clinic hours, the Court also has a designated window in the Court lobby to provide clients with forms or resource materials and to file court documents.

ANY COST: None. All funds for resource materials and other costs associated with the Clinic are paid by the U.S. Bankruptcy Court or Legal Aid Foundation of Santa Barbara County.

LIABILITY ISSUES: Legal Aid's malpractice insurance covers anyone that volunteers at the clinic. This provides protection for anyone who volunteers and prevents the volunteer from having to make a claim with his or her own insurance carrier if a Clinic client decides to make a claim. The Professional Rules of Conduct also provide additional guidance for attorney volunteers. Contact Legal Aid with any further questions or concerns.

FUTURE DEVELOPMENTS: The Clinic is preparing to launch remote video feeds whereby a volunteer attorney may help a Clinic client via video. The volunteer attorney will be located at the U.S. Bankruptcy Court in Santa Barbara to assist clients via remote video feed to help those in further outlying areas and eliminate the need for them to travel so far.

REWARDS: Personal gratification—knowing you are helping those in the community with their financial distress, recognition on the U.S. Bankruptcy Court Pro Bono Honor Roll, helping the Court run more efficiently when dealing with *pro se* debtors, and being a part of a great group of volunteers and supportive Court staff. ■

Randall Sutter, an attorney with Rounds & Sutter, LLP, is a clinic volunteer and a prior recipient of Public Counsel's William J. Lasarow Award for Outstanding Pro Bono Service. Jennifer Smith is a senior staff attorney at the Legal Aid Foundation of Santa Barbara County.

Haffner, *continued from page 8*

This analysis also reveals the best way to cross-examine experts. Initially, challenge the expert on the substance of his professional field. How many times does he testify each year? How many depositions does he give each year? How much of his income is derived from providing expert opinions? This line of questioning is likely to increase juror skepticism of the credibility of his opinions.

Next, challenge the assumptions – the underlying facts (or lack thereof) the expert relies upon for his opinions. Experts frequently overreach, offering opinions not supported by facts, or make erroneous assumptions. For example, in my pedestrian verses automobile case, the plaintiff's expert offered the conclusion that the pedestrian must have crossed opposing traffic lanes, since she initiated her travel from the other side of the street, leaving a residence located adjacent to opposing traffic lanes. The expert's opinions were based exclusively upon the presumption that she came from the opposing traffic lane direction and did not reverse her course. The only fact supporting this opinion was that the decedent's path had originated from across the street.

The evidence, however, left room for the possibility that she had first crossed opposing traffic lanes, then reversed course, seeking to return to the residence. The expert had not considered this possibility and, when confronted with it, was not able to explain how his firmly announced opinion still carried any weight under these circumstances. Regardless, speaking to jurors after the trial, it appeared that the defense expert's opinion "cancelled out" the plaintiffs' expert's opinion, which allowed the case to be decided (for the defense) based upon other facts and testimony.

If you must use experts, it is better to retain experts that do not spend the majority of their time working for attorneys. Although your expert may not be as "polished," you can use that to your advantage by enhancing your expert's credibility and sharply contrasting the experts' styles and presentation. Do not rely upon any expert to win your case. Realize that jurors are generally skeptical to hired experts' opinions, and that use of an expert may end up hurting you more than helping. Plan a focused cross-examination of the opposing experts, which probably will help your case more than the merits of your own experts' opinions. ■

Matthew Haffner is a founding partner of Haffner Law Group, a Ventura litigation law firm created in 1997.

Attendees Enjoy Enlightening and Successful Bench and Bar Conference

By Michael Denver

On Saturday, January 24, 2015, the Santa Barbara County Bar Association's annual Bench & Bar Conference took place on the beautiful campus of the Garden Street Academy, formerly St. Anthony's Seminary, adjacent to the historic Santa Barbara Mission. 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.

The annual Judges' Panel was one of the highlights of the day, with Judges Herman, Kelly, Kuns and Carrozzo addressing the Bench's perspective on many practical issues. In addition to providing their personal tips from the bench, the Judges discussed the practical impacts the state budget is having on our courts. Finally, Judge Herman provided an informative report on the upcoming launch of electronic filing in our court. Many thanks to the 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.

An important theme of the day was the delicate balance between the government's need to gather electronic information for national security purposes and individuals' Fourth Amendment privacy rights. The Keynote Address on these issues was given by Nate Cardozo, an attorney with the Electronic Frontier Foundation ("EFF"). The EFF presentation was very well received, sparking a lively discussion between audience members. The EFF's presentation complimented the lunchtime discussion on information gathering and Fourth Amendment rights between Peter Bibring of the ACLU and Kyle Graham of Santa Clara Law School. Bibring and Graham provided a no-nonsense historical review of the key issues, their development over recent decades and the current state of the legal issues under judicial review. Many thanks to Cardozo, Bibring and Graham for their enlightening and educational presentations on what is most certainly a controversial and current topic.

The Conference break-out sessions were another success, with wonderful and entertaining presentations 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 Garden Street Academy for keeping everyone comfortable and well fed at the delicious breakfast and lunch buffets.

A very sincere thank-you the 2015 Conference sponsors including: Amherst Exchange Corporation; Fell, Marking, Abkin, Montgomery, Granet & Raney LLP; Foley Bezek Behle & Curtis LLP; Frank's Legal Services; Hollister & Brace, APC; The Law Offices of John J. Thyne III; Lawcopy; MyCase.com; Norman Schall & Associates; Personal Court Reporters; Price Postel & Parma LLP; Rogers, Sheffield & Campbell LLP; Seed Mackall LLP; Thomson Reuters; and Tri County Court Reporters.

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

See more photos page 16.

Katy Graham teaches legal ethics.

Jason Dominguez speaks about human rights.

Judges Kuns and Herman

2015 Bench and Bar Conference

Andrea Hurd, Justin Fox, John Thyne, Jason Dominguez

Peter Susi enlightens his group about bankruptcy sales.

Matt Mazza discusses "Founderitis."

Katy Graham discusses legal ethics.

Kirsten Schmidt discusses securities litigation.

Michael Denver, Bench & Bar Conference Chair

Judges Carrozzo and Kelly

Dr. Jeff Herton talks about substance abuse.

Get to Know... Robert Sanger

1. What is your idea of perfect happiness?
Unlike the Platonic Socrates, I don't think there is a form of perfect happiness. Aristotle said that virtue was the habit of choosing the mean between the extremes and that virtue led to eudemonia (a form of enlightened happiness). I'll go with that.

2. What is your greatest fear?
That someone will read this and take it seriously.

3. Which living person do you most admire?
Bryan Stevenson, the dedicated civil rights lawyer in the South (see, his new book, ***Just Mercy***).

4. What is your greatest extravagance?
Playing golf at Pebble Beach every once in a while – which is one of many reasons I will never be like Bryan Stevenson.

5. What is your current state of mind?
Marcel Proust's own answer in 1890: "Boredom from having thought about myself to answer all these questions." I'll go with that.

6. Which words or phrases do you most overuse?
There is an expletive or two that I probably use in excess – especially on the golf course.

7. What or who is the greatest love of your life?
My wife, kids and grandkids.

8. When and where were you happiest?
Aside from answering these questions, which is a momentary distraction, I would say right now and here.

9. Which talent would you most like to have?
The ability to speak more languages.

10. What do you consider your greatest achievement?
Graduating from High School in Oxnard, California – everything since has been easy.

11. Where would you most like to live?
Anywhere but Oxnard, California.

12. What is your most treasured possession?
I am not sure that I have one – I am fond of my Harley and my golf clubs but . . .

13. What is your most marked characteristic?
Humor – but, as to whether it is a sense of humor, others will have to be the judge.

14. What do you most value in your friends?
A sense of humor and compassion for others.

15. Who are your favorite writers?
All time: Homer, Aristotle, Moses Maimonides, Martin Heidegger, John Rawls. Recent: Sam Kean, Bryan Stevenson

16. Who is your hero of fiction?
The Homeric Ulysses, Jason (of the Argonauts), Zarathustra, Jesus and Bart Simpson

17. Which historical figure do you most identify with?
Thurgood Marshall

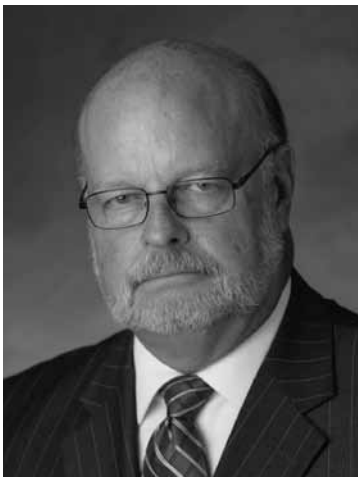
18. Who are your heroes in real life?
Millard Farmer, Steven Bright, Bryan Stevenson, Thurgood Marshall and that passer-by who pulled the elderly man out of the burning building (and folks like him or her).

19. What is it that you most dislike?
Self-centered enterprises like this one.

20. What is your motto?
We are only here for the duration so our job is to leave the world a better place than we found it. ■

Sentencing Trends for Economic Crime

By Robert Sanger



Robert Sanger

Economic crime is something that intersects with the work of many practitioners, whether corporate counsel, business lawyers, civil litigators, estate planners, or family lawyers. As many know, the United States Sentencing Guidelines ("Guidelines") have treated economic crimes with stiff guideline sentences. When the amount of intended loss rises, the sentences accelerate to the level of being extremely harsh.

The United States Sentencing Commission has just published the results of their study of sentencing for economic crimes as applied in practice.[1] The Guidelines have been declared to be advisory by the United States Supreme Court *in United States v. Booker*, 543 U.S. 220 (2005). The Guidelines are to guide the sentencing decisions of judges rather than place more rigid upper and lower ranges and provide for alternative sentencing only with formal "departures." Since this change in 2005 in the *Booker* case, a study of actual sentencing practice has shown significant variations from the Guidelines.

> When all is said and done, economic crime continues to result in prison sentences and those sentences . . . continue to be lengthier.

In this column, we will look at some of the statistics and the story that they tell. The United States Sentencing Commission reviews and revises the Guidelines, effective November of each year. While they may make changes to any of the various guidelines for any of various federal crimes, they have expressed an intention to examine the fraud guidelines in particular this year. Those guidelines, as we will see, have an effect on sentencing in a substantial number of federal cases.

The Sentencing Guidelines for Fraud under USSG Section 2B1.1

The Guidelines are a systemic attempt to create a rational and consistent framework for sentencing people convicted of federal offenses pursuant to the general federal sentencing statute.[2] The Guidelines cover all of the offenses, either specifically or generically, for which a person or organization might be convicted under federal law. They take into account broad policy and philosophical considerations as well as practical issues. Basically, within the Guidelines as a whole, there are seventeen categories of guidelines (Parts A through T of Chapter Two, with some letters not used) and one catchall for "Other Offenses" (Part X of Chapter Two). Chapter Eight pertains to sentencing of organizations and Chapters Three through Seven cover adjustments to the sentence, criminal history, the procedure for determining the sentence, and violations of probation and supervised release.

While economic offenses can come under money laundering, taxation and other guidelines, most economic cases come within USSG Section 2B1.1 (that is, Chapter Two, Part B, Section 1.1). This Part, and Subsection 1 in particular, is generally referred to as the "fraud guidelines," which cover theft, embezzlement, receipt of stolen property, property destruction, and offenses involving fraud and deceit. Importantly, it covers the ever popular crimes of mail fraud, wire fraud, bank fraud and securities fraud.[3] Sentences start at a base level and then increase based on the amount of the loss, role in the offense, sophistication and planning, and some other factors. The level can decrease based on early acceptance of responsibility and cooperation in prosecuting others. The effect of the levels varies according to the criminal history category of the offender and then the levels translate into a range of months in federal prison, anywhere from 0 to 6 months, to 360 months to life, to straight life.[4]

Actual Sentencing Statistics

In fact, 11% of all federal cases, economic or otherwise, were sentenced under 2B1.1. In 2012, this accounted for 8,503 offenders. In that year, only about 50% of those sentenced were sentenced within the Guidelines. That is down from 83% pre-*Booker* in 2003 and 2004, and 71% the

first year of *Booker* in 2005. The number of sentences above the Guidelines was less than 1% in 2003 and 2004, but has only risen to 2.3% in recent years. So, in English, this means that almost half the sentences these days are generally lower than the Guidelines.

However, the fact is that the Guidelines have actually increased as applied in actual cases, even though they are only Guidelines. What that means is that the lower end of the Guideline range for the average case in 2003 was 10 months, and in 2012, it was 29 months. The average actual sentence was 10 months in 2003 (the bottom of the range) but now is 22 months. So, while the average sentence today is about 75% of the Guidelines, it is, in fact, more than double the lower Guideline sentence of 2003. As a practical matter, white collar sentences have increased substantially.

Interestingly, what seems to be driving this de facto increase in sentences is not an increase in the Guidelines levels. They have been fairly steady. It is the amount of loss. In 2003, the median loss was $18,414, whereas in 2012, the median loss was $95,068. Furthermore, this loss doubled in the last three years of the data available, from 2010 through 2012. The amount of loss can add up to 30 levels to the base level of 6. This means that, without any other increases for role in the offense, sophistication, or the other factors, a first time offender could go from a sentence of 0 to 6 months up to 188 to 235 months. Six more levels and the Guidelines call for 360 months to life.[5]

For this all to make sense, there has to be some significant disparity between the Guidelines and the actual sentences at certain levels of loss. And, in fact, that is the case. From under a $5,000 loss to a $10,000 loss, the Guidelines are undercut only 10% to 30% of the time. Whereas, if the loss is larger, say in the $120,000 to $7,000,000 range, they are undercut 60% to over 70% of the time with the sample over $20,000,000 being too small and erratic to make statistically significant findings. In other words, whether to make up for inflation or just to be more compassionate in avoiding the draconian sentences accompanying larger losses, the federal courts have imposed far lower sentences compared to the Guidelines in high dollar cases than in smaller dollar cases.

Conclusion

When all is said and done, economic crime continues to result in prison sentences, and those sentences, Guidelines or otherwise, continue to be lengthier.

Classifieds

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Criminal Justice

We have not factored in the fact that there are increasing prosecutions under economic crime statutes (not all of which fall under 2B1.1) that result in even longer sentences. For instance, money laundering or Racketeer Influenced Corrupt Organizations (RICO) prosecutions can reach the top of the Guidelines even more quickly than 2B1.1 sentences.

In addition, the choice of cases to prosecute and the plethora of new statutes which do not require a recognizable criminal intent, have led to the over-criminalization of business dealings in this country over the last twenty or thirty years. That has resulted in more and more economic prosecutions and more people committed to the Bureau of Prisons for doing business.

As to this particular problem -- the increase in the length of prison sentences for economic crime under 2B1.1 notwithstanding static Guidelines -- it is hoped that the Sentencing Commission will take a realistic look and modify the increase in levels for the amount of loss. If the Guidelines are truly going to be guidelines, they should reflect as well as shape rational sentencing decisions made by actual judges in individual cases. ■

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 Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization. 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. He is a Member of the American Association for the Advancement of Science (AAAS). Mr. Sanger is also a member of the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS).

Endnotes

1 Courtney Semisch, Ph.D., ANALYSIS OF FEDERAL SENTENCING DATA FOR ECONOMIC CRIME OFFENDERS, Office of Research and Data, United States Sentencing Commission, Washington, D.C., 2015. Details and statistics contained herein, unless otherwise noted, are from the research of Dr. Semisch.

2 18 U.S.C. § 3553.

3 *See* 18 U.S.C. Sections 1341-1343 and 1348.

4 Although it is theoretically possible to get a life sentence under USSG Section 2B1.1, most sentences, even under the pre-*Booker* guidelines, were in the mid-range.

5 This is a difference between a loss of under $5,000 and one of over $400,000,000. Nine of the 8,503 cases analyzed for 2012 involved this highest loss level. Even a loss of $7,000,000 triggers a 20 level increase. On the other hand, there are statutory maximums that may limit the actual sentence unless multiple counts are not grouped and are available for consecutive sentences.

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Real Property Section of the Santa Barbara County Bar Association

Due Diligence in Real Estate Transactions Concerning Land Surveying and Techniques

Date:
Friday, March 27, 2015

***Time*:**
12:00 p.m. – 1:30 p.m.

***Topic*:**
Land Surveying and Techniques. This program will outline a brief history of land surveying and techniques. It will explain several types of surveys and their differentiation, when the use of each type applies, how they contribute to understanding the character of particular properties, and how the scope may or may not relate specifically to title insurers. A section will be devoted to the ALTA Standards and essential items that need to be recognized, reviewed, and identified on an ALTA survey. New products and technologies in the survey industry will be discussed and specific uses explained. The final section will compare the differences and uses of an ALTA survey and an aerial with boundary overlay for title insurance purposes and industry acceptance.

***Speaker*:**
Jen Johns is Senior Vice President, National Accounts at National Due Diligence Services.

***Place*:**
Wells Fargo Private Bank, 118 E. Carrillo St., 2nd Floor

***MCLE*:**
One hour of credit, approval pending

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Lunch will be provided

Price:
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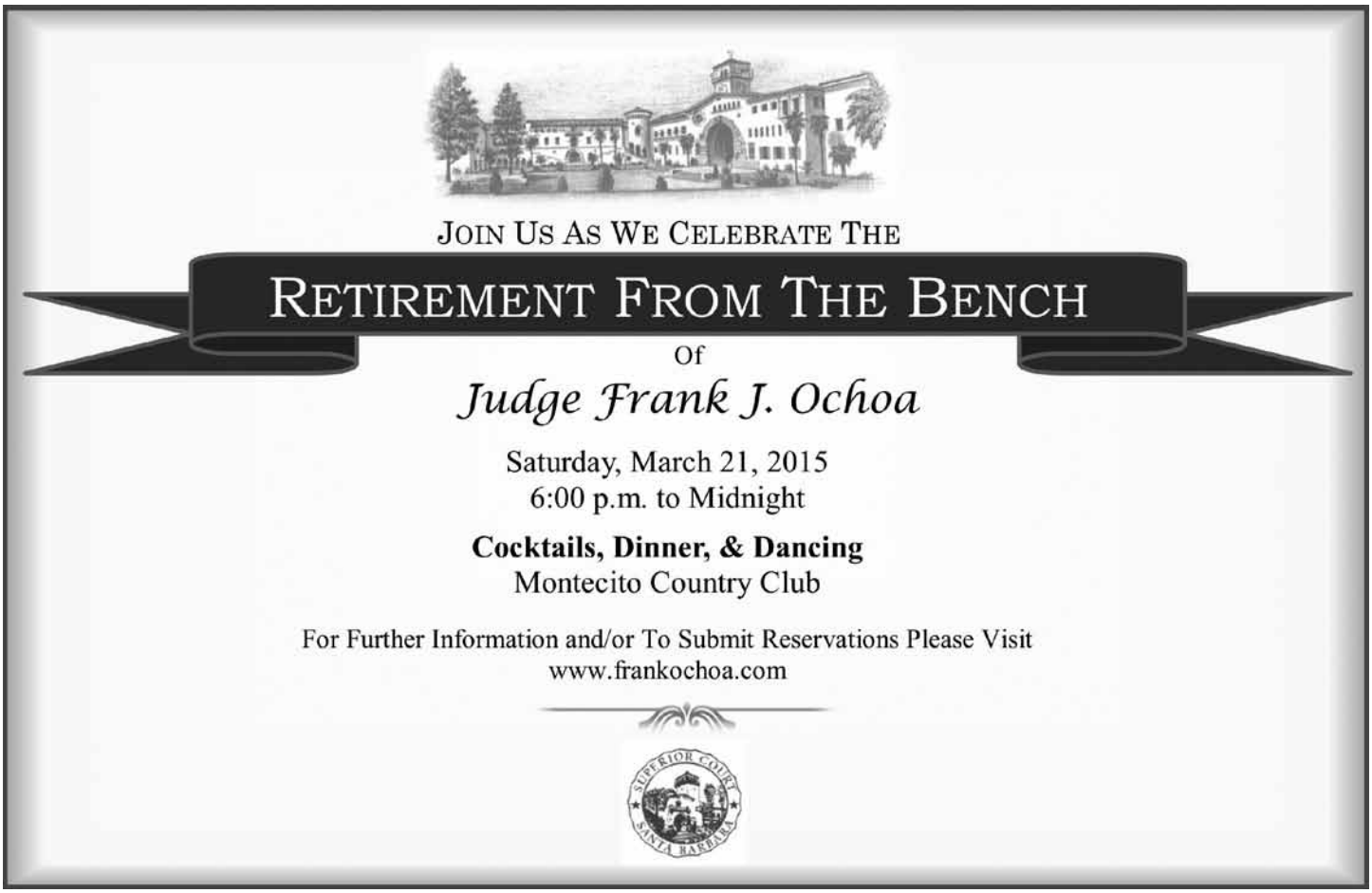

Verdicts and Decisions

Emmett McDonough, et al. v. James Knell, et al.

SANTA BARBARA SUPERIOR COURT, ANACAPA DIVISION

CASE NUMBER:	1415007
TYPE OF CASE:	Breach of Contract, Fraud, Breach of Fiduciary Duty
TYPE OF PROCEEDING:	Jury Trial
JUDGE:	Hon. Thomas P. Anderle
LENGTH OF TRIAL:	12 days
LENGTH OF DELIBERATIONS:	2 days
DATE OF VERDICT OR DECISION:	October 29, 2014
PLAINTIFFS:	Emmett McDonough, as Trustee of the McDonough Family 1996 Trust dated June 11, 1996, John T. McDonough Family Limited Partnership, Stephen E. McDonough Family Limited Partnership, and David J. McDonough Family Limited Partnership
PLAINTIFFS' COUNSEL:	Peter W. Ross and Jonathan Gottfried of Browne George Ross LLP
DEFENDANTS:	James Knell, SIMA Corporation, and SIMA Management Corporation
DEFENDANTS' COUNSEL:	Peter J. Bezek and Robert A. Curtis of Foley Bezek Behle & Curtis, LLP

OVERVIEW OF CASE: Plaintiff Emmett McDonough, on behalf of his family's trust and partnerships, invested more than $2,400,000 in real estate entities managed by James Knell and his company, SIMA Corporation. Plaintiffs contended that Defendant breached its contract with, and fiduciary duties to, the Plaintiffs by failing to pay a "Preferred Return" on certain investments. Plaintiffs also contended that Defendants intentionally misrepresented the true financial performance of the investments and concealed important facts from the Plaintiffs. Defendants denied all claims and contended that they did nothing wrong.

FACTS AND CONTENTIONS: Emmett McDonough invested more than $2,400,000 in real estate entities managed by Defendants. Plaintiffs contended that Mr. Knell promised the McDonough family guaranteed "Preferred Returns" on these investments ranging from 7% to 10% annually. In addition, McDonough contended that Mr. Knell agreed in writing that Mr. Knell could be required to purchase the McDonough Family's interests under certain conditions. Plaintiffs alleged that for certain investments, the McDonough family could trigger this obligation "for any reason whatsoever" but for other investments the McDonough family could cash out only if Mr. Knell breached the parties' agreement.

In 2011, the McDonough family exercised their contractual right to require Mr. Knell to purchase certain of their interests. Mr. Knell offered to pay Mr. McDonough back his original investment but did not agree that the contract required a "Preferred Return" to be paid on the investment, an office building in Thousand Oaks that had been lost to foreclosure during the depths of the Great Recession. As a result of this alleged breach, the McDonough family then exercised their contractual right to require Mr. Knell to purchase back the McDonough family's remaining interests in several other real estate investments. Plaintiffs also contended that Mr. Knell and SIMA made various misrepresentations to the McDonough family regarding the investments' financial performance and that Knell and SIMA were operating a Ponzi scheme.

Defendants contended that Plaintiffs, who made a 60% return on their investments with Knell, were simply greedy

and that the contract did not support Plaintiffs' demand for a "Preferred Return," irrespective of the financial performance of the investment. In addition, Defendants vehemently denied any fraud associated with the financial statements provided to their investors. To that end, Defendants hired a forensic economist to pore over SIMA's books and records to demonstrate that Defendants had not provided any false information to the investors. Defendants argued that Plaintiffs were not entitled to any damages.

SUMMARY OF CLAIMED DAMAGES: Plaintiffs sought over $2,800,000, plus punitive damages under various fraud-based theories, and over $2,400,000 under their breach of contract theory.

RESULT: Defense verdict of all five causes of action (12-0 on breach of contract, 11-1 on intentional misrepresentation, negligent misrepresentation and concealment, and 10-2 on breach of fiduciary duty).

Lopez v. Wicklman

SANTA BARBARA SUPERIOR COURT, ANACAPA DIVISION

CASE NUMBER:	1438174
TYPE OF CASE:	Personal injury
TYPE OF PROCEEDING:	Jury Trial
JUDGE:	Hon. Thomas P. Anderle
LENGTH OF TRIAL:	4 days
LENGTH OF DELIBERATIONS:	4 hours
DATE OF VERDICT:	October 6, 2014
PLAINTIFF:	Arthur Lopez
PLAINTIFF'S COUNSEL:	Trevor Quirk of Quirk Law Firm, LLP
DEFENDANT:	Lisa Bilyeu Wicklman
DEFENDANT'S COUNSEL:	Jay Rubin of Mark Weiner & Associates, for State Farm Insurance

FACTS AND CONTENTIONS: Plaintiff, age 62, was riding his bicycle on State Street on a Saturday after leaving work at Chick-Fil-A. Defendant, a passenger in a car driven by her husband that was stopped for traffic, opened her door in front of Plaintiff. Plaintiff alleged a fractured clavicle and a medial meniscus tear in the left knee. Defendant alleged the knee injury was unrelated and, therefore, treatment was both unrelated and unreasonable.

SUMMARY OF CLAIMED DAMAGES: Plaintiff suffered a fractured clavicle. He was treated at Cottage and released. Plaintiff did not mention knee problems in the emergency room or at subsequent visits with his doctor. However, a month later he saw a different doctor complaining of knee pain. An MRI revealed a meniscus tear. Plaintiff underwent a successful surgery to fix the tear.

RESULT: By a vote of 11 to 1, the jury awarded Plaintiff $79,995 in past medical expenses, $3,120 in lost earnings and $2,500 in past pain and suffering.

Motions

James F. Cote is delighted to announce that his son, **Connor C. Cote**, a recent graduate of Loyola Law School, and **Rosaleen Wynne**, a graduate of Santa Barbara College of Law, have joined him as associate attorneys in the **Law Offices of James F. Cote**. To accommodate these additions, they have moved to larger offices at **222 East Carrillo Street, Suite 207**. All other contact information for the firm will remain the same. The practice will continue to concentrate in the areas of estate planning, probate, and trust administration.

Brandi Redman and **Sean Tucker** joyfully announce the birth of their daughter **Emilia Joy Tucker** on October 25th, 2014 at 1:37 a.m., weighing a small but mighty 5 lbs., 12 oz.

Brandi and her partner **Ellen Goodstein** are also very excited to announce the official opening of **Redman Goodstein and Associates**, a conflict resolution firm specializing in family law, probate, real estate litigation and employment law. For more information please email Brandi at b.redman@cox.net or Ellen at egoodsteinsb@gmail.com.

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.

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