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About the Cover
The event known as the State Street Mile began in 1983 and has evolved into an annual community event for the benefit of the District Attorney’s Crime Victim Emergency Fund. The Fund provides financial support for victims needing help with rent, food, clothing, emergency lodging, and other expenses. This photo was taken at the 2014 event. Photo by Fritz Olenberger, who regularly and generously allows us to feature his work on our covers.
President's Message: Summer is Here!

By Scott Campbell, 2014 SBCBA President

The SBCBA’s new Legislative Liaison Committee, led by Angela Roach, with members Sue McCol- lum, Jim Griffith and Emily Allen, got off to a successful start. In late May we met with Supervisor Janet Wolf to encourage the Board of Supervisors to provide additional funding to the Santa Barbara Legal Aid Foundation. We learned that there might be additional funding available, if the Legal Aid Foundation moved quickly to make a specific funding request. It did so, and we then supported that request with additional letters to the Supervisors. On June 11th, Legal Aid’s request for $30,000 to help fund its Legal Resource Center and for approximately $3,000 to help fund an attorney to assist with domestic violence cases in North County was considered and approved by the Board of Supervisors. We are both deeply gratified by the Board of Supervisors’ decision and proud of our contribution to the process.

Jim Griffith heads our Bench-Bar Relations Committee. In that capacity, he has been encouraging the legislature on behalf of the SBCBA to restore adequate funding to the Courts. California’s budget process is intense, particularly from April through mid June. This year, as a result of outreach and lobbying by lots of interested parties, Jim and our Bench-Bar Relations Committee included, the legislature seems committed to restoring court funding. As of this writing, it is unclear how the battle will be resolved. Governor Brown has lots of leverage in the budget battles, and is holding tough on reducing court funding drastically. Regardless of the outcome this year, the signs are encouraging for some restoration in years to come. Jim has been giving lots of his time to trying to restore appropriate levels of funding for the California courts. If you see him around, thank him or buy him lunch, or both.

With luck, by the time you read this message we will be enjoying the fruits of our new Members Benefits program. We have been working on this program for about a year now, and hope that it will bring a great deal of additional value to your SBCBA membership. If any of you have ideas of the types of members benefits you would like us to offer, please contact the SBCBA. We are, in the final analysis, here to serve each of you.

We are fortunate to have such an incredible group of people volunteering their time as SBCBA directors. As a result of the work of these dedicated volunteers, we have this incredible magazine; a well run fee arbitration program; a profitable and beneficial Lawyer Referral Service; a useful, appreciated, and broad-based MCLE program; a relevant and credible connection to the Supervisors and the Legislators; a relevant and responsive connection with the local bench; and the greatly appreciated and anticipated events such as the Bench and Bar Conference, the Bar Barbecue, the Golf and Tennis Tournament, the Annual Justices’ Reception, and the Annual Dinner. Doing all this takes devotion, attention to detail, and vast amounts of time. I hope you will all join with me in thanking Lida Sideris, her assistant (and recent UCSB graduate) Melissa Hordynski, and the entire SBCBA Board of Directors for their dedication and hard work in making all these things happen.
Legal Aid Foundation Celebrates 55th Anniversary

By Alan Blakeboro

This year Legal Aid Foundation of Santa Barbara County marks its 55th year of providing civil legal services for low-income persons in Santa Barbara County. Although there are a number of organizations on the Central Coast that provide assistance to the poor, the Legal Aid Foundation is the only non-profit law firm that provides a broad base of legal services in numerous areas, including the assistance of victims of domestic violence, elder abuse, guardianships and conservatorships, tenant assistance, assistance of those facing foreclosures, advocacy for the homeless, and immigration assistance to the victims of domestic violence.

The Foundation offers legal services not only through the Foundation’s familiar Santa Barbara office at 301 East Canon Perdido Street, but also at locations in Lompoc and Santa Maria. In coordination with the Superior Court, the Foundation also offers free walk-in legal support for all members of the public through Legal Resource Centers located in the Santa Barbara, Lompoc, and Santa Maria courthouses.

Over the years, the need for legal services for the poor in the Santa Barbara community has greatly increased, with a recent poverty study showing that approximately 20% of adults in that community between 18 and 65 are living under the federal poverty level. The Foundation has sought to keep pace with the growing demand for its services through a network of community-based grants from local government agencies and private foundations coupled with direct donations from members of the community.

Effective delivery of services to meet these increased needs within budget has been a constant challenge. Over the last several years, available funds from public and private grants have allowed the Foundation to increase its staff and to greatly expand the number of clients receiving assistance. However, such grants often come with mandates not fully funded by grant proceeds and do not meet all critical needs, such as required administrative support. Private donations from the community did not keep pace with these unfunded obligations, and the resulting shortfalls created considerable financial stress on the organization which, by late last year, had reached critical proportion.

These concerns were brought to the community’s attention at a luncheon on February 5, 2014, where many members of the community gathered to learn more about the services provided by the Foundation and to show their financial support by pledging funds to support the Foundation’s continued operations. The luncheon provided the opportunity for the community to show appreciation for the hard working Legal Aid staff and, in particular, the contributions made to the organization by three employees who have recently left the organization for other pursuits: Executive Director Ellen Goodstein, Senior Staff Attorney Brandi Redman, and office administrator Susana Udden. The luncheon also provided the opportunity for a frank discussion of the difficult challenges facing the organization and the need for broader community support.

The Foundation’s Board of Directors is pleased to report that since that February luncheon, enormous strides have been taken to restore the fiscal integrity of Legal Aid and to refocus its mission. Many have contributed to this result. Actions by the Board earlier this year to reduce the Foundation’s financial burden by curtailing non-essential expenditures, downsizing facilities, and temporarily meeting administrative staffing needs with volunteer assistance have achieved immediate and positive results. The Legal Aid staff has shared in this sacrifice with a temporary across-the-board pay reduction. Equally important, members of the Board and the community have answered the call and provided extraordinary additional financial support. As a result of all of these actions, the Board is pleased to advise that, by the time this article is published, the Foundation will have achieved a balanced budget, will be current with respect to all of its financial obligations, and will be poised for a productive new fiscal year under the leadership of a new Executive Director who will soon be introduced to the community.

Although all involved should be proud of these accomplishments, they are short term solutions. For the Foundation to be sustainable for the next 55 years, there will be a constant requirement of sustained financial discipline as well as the need for broader financial support from the community to meaningfully supplement public and private grants. Over the coming months the Board will continue to reach out for such support from the legal community in particular, and from the broader community as a whole, to insure that the Legal Aid Foundation continues to fulfill its mission for the next generation. That mission is simply too important to fail.

Alan Blakeboro is a partner in Reicker, Pfau, Pyle & McRoy LLP and a member of the Board of Directors of the Legal Aid Foundation of Santa Barbara County.
Recognizing Traumatic Brain Injury

BY RENEE J. NORDSTRAND

All lawyers from time to time encounter potential personal injury clients. These clients may have suffered a Traumatic Brain Injury (TBI). This article will give you a basic understanding of what TBI is and how to recognize it. If armed with knowledge about TBI you will be able to provide clients with the counsel they need to get proper care, treatment, testing, and experts they require to establish an early diagnosis and maximize the value of their case.

Although for over 25 years my solo practice emphasized plaintiff’s personal injury litigation, for much of that time I was not exposed to the field of neuropsychology and the detection of TBI. It was 2007, when I represented a woman who suffered carbon monoxide poisoning due to a defective wall heater in her apartment, that I observed first-hand the symptoms of TBI, which many would mistake as the client acting irresponsibly or feigning injury, which was the defense argument. That case was heavily litigated for 2 years. In the course of that litigation I learned about brain injury from my expert, the late Paul Satz, PhD, who was the top neuropsychologist in the country.

Having acquired this specialized knowledge about TBI, over the next several years I recognized three other clients who, in addition to obvious serious and debilitating physical injuries, had suffered TBI. The first client, a cyclist wearing a helmet, was hit by a car, and struck his head on the car windshield. A few months after the accident he told me of a loss of sense of smell. Another client, an elderly man whose vehicle was broadsided by a big rig truck, showed signs of dementia within a month of the collision. A third client was on her bicycle wearing a helmet when a car struck her bicycle at a low speed; she fell and her helmet hit the ground. This client was a young woman who had just started working at a Starbucks. A week or two after the accident she quit her job because she was unable to remember how to make all of the drinks. She was mildly confused, undirected, and unhappy.

In two of these cases I recognized symptoms of TBI before the clients ever spoke with their medical providers about the symptoms. Lawyer-client discussions led to the scheduling of neuropsychologic consultations, where complaints were articulated and TBI diagnosed. The clients ultimately obtained proper testing and treatment which substantially increased the value of their cases.

According to Mayo Clinic staff, some signs or symptoms of TBI may appear immediately after the traumatic event, while others may appear days or weeks later. TBI can be subtle, compared to broken bones and painful symptoms, and sometimes it is months until the more obvious injuries settle down and symptoms of TBI surface, at which time it may be too late to prove causation.

The American Speech-Language-Hearing Association website\(^1\) gives an excellent description of effects of Traumatic Brain Injury caused by a blow to the head, causing two types of brain damage, which I have summarized below:

Primary brain damage, complete at the time of impact, may include: skull fracture, contusions/bruises, hematomas/blood clots, lacerations: tearing of the frontal (front) and temporal (on the side) lobes or blood vessels of the brain (the force of the blow causes the brain to rotate across the hard ridges of the skull, causing the tears), and/or nerve damage (diffuse axonal injury): arising from a cutting, or shearing, force from the blow that damages nerve cells in the brain’s connecting nerve fibers.

Secondary brain damage, evolves over time after the trauma, and may include: brain swelling, increased pressure inside of the skull, epilepsy, intracranial infection, fever, hematoma, low or high blood pressure, low sodium, anemia, too much or too little carbon dioxide, abnormal blood coagulation, cardiac changes, lung changes, and/or nutritional changes.

Traumatic brain injury can have wide-ranging physical and psychological effects.

Physical Problems Following TBI

Physical problems may include hearing loss, tinnitus (ringing or buzzing in the ears), headaches, seizures, dizziness, nausea, vomiting, blurred vision, decreased smell or taste, and reduced strength and coordination in the body,
arms, and legs.

What communication problems occur after TBI? People with a brain injury often have cognitive and communication problems that significantly impair their ability to live independently. These problems vary depending on how widespread brain damage is and the location of the injury. Brain injury survivors may have trouble finding the words they need to express an idea or explain themselves through speaking and/or writing. It may be an effort for them to understand both written and spoken messages, as if they were trying to comprehend a foreign language. They may have difficulty with spelling, writing, and reading, as well. The person may have trouble with social communication, including: taking turns in conversation, maintaining a topic of conversation, using an appropriate tone of voice, interpreting the subtleties of conversation (e.g., the difference between sarcasm and a serious statement), responding to facial expressions and body language, or keeping up with others in a fast-paced conversation. Individuals may seem overemotional or “flat.” Most frustrating to families and friends, a person may have little-to-no awareness of just how inappropriate he or she is acting. In general, communication can be very frustrating and unsuccessful. In addition to all of the above, muscles of the lips and tongue may be weaker or less coordinated after TBI. The person may have trouble speaking clearly. The person may not be able to speak loudly enough to be heard in conversation. Muscles may be so weak that the person is unable to speak at all. Weak muscles may also limit the ability to chew and swallow effectively.

**Common Cognitive Difficulties in People with TBI**

Cognition includes an awareness of one’s surroundings, attention to tasks, memory, reasoning, problem solving, and executive functioning (e.g., goal setting, planning, initiating, self-awareness, self-monitoring, and evaluation). Problems vary depending on the location and severity of the injury to the brain and may include trouble concentrating when there are distractions (e.g., carrying on a conversation in a noisy restaurant or working on a few tasks at once).

Slower processing or “taking in” of new information could also become difficult. Longer messages may have to be “chunked,” or broken down into smaller pieces. The person may have to repeat/rehearse messages to make sure he or she has processed the crucial information. Communication partners may have to slow down their rate of speech.

Problems with recent memory may occur. New learning can be difficult. Long-term memory for events and things that occurred before the injury, however, is generally unaffected (e.g., the person will remember names of friends and family).

Executive functioning problems may present themselves. The person may have trouble starting tasks and setting goals to complete them. Planning and organizing a task is an effort, and it is difficult to self-evaluate work. Individuals often seem disorganized and need the assistance of families and friends. They also may have difficulty solving problems, and they may react impulsively (without thinking first) to situations.

Traumatic Brain Injury, although often not obvious, can be debilitating and have long term consequences. Identifying the symptoms is the first step to getting help.

Renee Nordstrand has been practicing law in Santa Barbara since 1990. Her practice emphasizes plaintiff’s personal injury litigation.

**Endnotes**

1  American Speech-Language Hearing Association website: http://www.asha.org
Direct and Cross Examination of Financial Experts – Lessons from the Trenches

BY THOMAS NECHES, CPA/ABV/CFF, CVA, CFE

Having testified at trial more than 75 times as an expert on damages and other financial issues, I welcome the opportunity to pass along some lessons I have learned.

**Direct Examination**

Nothing your expert does is more important than direct examination trial testimony. This is where the tires hit the road. This is your expert’s one chance to convince the jury that his findings and opinions, typically the result of complex, tedious and obscure calculations, make more sense than the opposing expert’s analysis.

Before trial, make sure you and your expert have the same understanding about what opinions the expert will offer – and will not offer – and the bases of these opinions. In a lost profit case, for example, your expert may have calculated future damages based on a projection that your client (a company) will require an additional five years to rebound to the level of profits it would have achieved absent the opposing party’s alleged wrongful acts. Perhaps unbeknownst to you, however, this projection was not the expert’s own work; he merely accepted a projection made by your client’s Director of Marketing. Or, perhaps your expert performed his own future sales projection, unbeknownst to your marketing expert, whose own projection is different. In every case, it is essential to clear up misunderstandings like these before trial, and to make sure the foundation for all assumptions accepted by your expert will be in evidence at trial.

Typically, direct testimony for a financial expert lasts one hour – or less. Your expert does not need to testify about every detail of his analysis. He needs only to convince the jury: (1) he knows what he is talking about (i.e., he qualifies as an expert), (2) he did sufficient work to support his opinions, (3) he performed his work carefully and competently, and (4) his resulting opinions make sense.

Attorneys differ regarding the sequence in which they want experts to explain their analysis and opinions. Some attorneys prefer the following sequence: (1) Summarize expert opinions, then (2) Explain the rationale for the opinions. Other attorneys instead prefer the expert to: (1) Explain the steps performed in his analysis, then (2) Arrive at his expert opinions.

My personal preference is the second approach. It makes the direct testimony more like a story, and it reduces the need to flip back and forth between summary and supporting exhibits. Also, in my experience, when you attempt to present expert opinions at the beginning of an expert’s testimony, the opposing attorney sometimes objects on the basis the opinions lack foundation, and these objections sometimes are sustained.

It is well known that financial expert testimony is more persuasive, or at least less boring, when it is accompanied with the use of charts and other demonstrative exhibits. I believe financial expert testimony is best presented not as a narrative supported by charts, but as a presentation of a series of charts, each of which the expert explains to the jury.

Make sure you have all exhibits and documents the expert will refer to in his testimony organized and ready for immediate display to the judge and jury. Whenever possible, have the expert explain the exhibits while standing in front of them, rather than sitting in the witness chair.

Attorneys are accustomed to preparing direct testimony outlines for their witnesses, be it percipient or expert. But for expert witnesses, the expert should write the outline himself (at least the first draft), not the attorney. Further, it should be more than an outline, it should be a script. The advantages of having an expert prepare his own direct testimony outline include these:

The expert has the best understanding of the subject area of the testimony, and therefore is in the best position to determine how to explain it clearly.

It is a relief to trial attorneys to have at least one task lightened.

In the off chance the outline is discovered by the opposing attorney, it is better for the jury to learn the script was written by the witness than by the attorney.

To avoid disclosure, I always prepare my direct testimony outline after my deposition, and I never bring the outline to the courtroom. If an attorney (who perhaps read this article) were to try to impugn my testimony because it was
scripted, my response would be:

Q: You wrote a script for your testimony, right?
A: Of course. I didn’t want to waste the jury’s time making it up as I went along.

The effort to write a direct testimony outline is significant – typically it requires one-to-two day’s work for each hour of direct testimony. Why so long? Simple: it is hard to explain complex things clearly.

Review the testimony outline prepared by the expert from the perspective of your three audiences: (1) the jury, (2) the judge, and (3) the court of appeal. A full rehearsal of your expert’s direct testimony is ideal – if you have the time and budget. In my experience, this almost never is the case. Either way, at trial itself it is important to listen to the expert, exactly as if you and he were having a conversation. Did you understand what your expert just said? If not, ask follow up questions. Did the expert say everything he was supposed to say? Be flexible. Direct examination never goes exactly as planned at trial.

**Cross Examination**

Here is an amazing fact: frequently the foundation of the opinions I am advocating as an expert is stronger at the end of my cross examination than at the beginning. This remarkable phenomenon is not the result of any extraordinary skill as a witness on my part. Rather, it reflects two things:

An experienced expert witness can turn a poor cross examination question into an opportunity to reemphasize and restate the strongest portions of his testimony, or – worse yet – to bring up new arguments or cite evidence not mentioned during his direct examination, and

A remarkably high percentage of trial attorneys ask poor cross examination questions.

What is a poor cross examination question for an expert? It is more than merely any question to which you did not know the answer prior to asking. It is any question that fails to meet this criterion: any answer other than “Yes” is false or non-responsive. Simply put, ask only questions that end with the phrase, “... correct?” and to which the only possible answer is, “Yes.” This should not be a news flash to most trial attorneys. Unfortunately, in my experience, too often it seems to be.

Be aware, however, that some experts seem to be psychologically incapable of answering any question briefly, let alone with a single word. Early in the cross-examination, admonish this witness to answer only, “Yes,” but also listen carefully to the expert’s answers the first few times this happens. Sometimes, the more non-stop talking the witness does, the more boring, irrelevant, confusing, or exaggerated what he says becomes. In such cases, let the expert talk.

Get the admissions you were seeking, and allow the expert to destroy his own credibility.

In most cases, however, you will want to limit the opposing expert’s answers to “Yes.” When cross examining an expert, your goal is not to let the expert educate the jury by answering your questions. Your goal is to educate the jury yourself by pointing out the portions of the expert’s analysis you find useful, while the expert confirms your points as you make them. Do not argue with the expert during cross examination. Instead, guide the expert to verify the points about his analysis you want to use in your closing statement, and make your arguments then.

Creating wiggle-proof cross-examination questions requires care and preparation. Rely on your own expert to assist you in determining exactly what points you want to make. Be careful to avoid phrasing questions for which the intended meaning of a “Yes” or “No” answer can be unclear.

Many cross examinations of a financial expert appropriately may start with the time-honored “garbage in, garbage out” line of questioning:

As a financial expert, you are familiar with the phrase “garbage in, garbage out,” correct? It means that, even when the calculations are performed correctly, if the inputs to the calculations are flawed, the outputs from the calculations may be flawed as well, correct? Your opinions include calculations that have inputs and outputs, correct?

And then you can get into details. For example:

One of your inputs was using an 8.0% discount rate to discount future lost profits to present value, correct?

In your calculations, plaintiff would not have incurred a single penny of additional overhead expense to earn the lost sales you projected, correct?

You calculated lost profits continuing five years into the future, correct?

Be careful with these two frequently-asked, seemingly-“Yes”-only questions, which may not yield the hoped-for results:

You’re being paid for your testimony, correct?

No. I’m being paid for my time.

You’re a professional witness, correct?

No. I’m a professional business analyst. The time I spend testifying in court is a small fraction of the hours I work.

Refrain from asking experts questions that amount to, “You murdered your wife, correct?” In one cross-examination, my response to such a question was both easy and satisfying:

You were told to come up with the highest possible damage figure you could find, correct?
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Offshore Compliance: Now is the Time
BY J. LEE JOHNSON

Editor’s Note: As this issue was going to press, we learned that Lee Johnson, author of this article, has passed away suddenly. Our community extends its condolences to his family.

U.S. persons that have foreign bank accounts or other foreign assets or interests that are not in compliance with U.S. reporting requirements may be running out of time to seek amnesty under the IRS Offshore Voluntary Disclosure Program (OVDP). Those with Swiss bank accounts may find their names given to the U.S. government by the Swiss banks themselves. In addition, the Foreign Account Tax Compliance Act (FATCA) global reporting system goes live this summer. Consequently, now is the time to become voluntarily compliant.

U.S. Reporting Requirements
U.S. persons are required by law to report their offshore interests on one or more information returns (see the Appendix for a listing of commonly used forms). Failure to file the required forms can carry both criminal and civil penalties. For example, failure to file an FBAR (Foreign Bank Account Report) can result in a penalty of up to $10,000 per year per account if such failure is non-willful. If the failure to file an FBAR is found to be willful, the penalty increases to the greater of $100,000 per year per account or 50% of the account balance.

Cases
The impact of the civil penalties can be easily illustrated by the case of an elderly man from Coral Gables, Florida. In June of 2013, the U.S. Department of Justice filed an action against Carl Zwerner with regard to a foreign account Mr. Zwerner allegedly owned in Switzerland but had failed to disclose. While the account in question never exceeded $1.5 million, the government is pursuing penalties approaching $3.5 million.

The potential criminal sanctions are well illustrated by the ongoing case against Ty Warner, who allegedly failed to disclose a Swiss account worth $93.6 million. In a plea agreement entered into last September, Mr. Warner pled guilty to tax evasion and agreed to pay a civil penalty of $53.5 million. In January of this year, Mr. Warner, who faced imprisonment of up to 57 months, was sentenced to two years of probation and 500 hours of community service. The government is appealing his sentence.

The Noose is Tightening
In August of 2013, a joint statement by the U.S. and Swiss governments announced a non-prosecution program being offered by the U.S. Department of Justice for eligible Swiss banks. If eligible, these banks can avoid prosecution by agreeing to pay a penalty ranging from 20 to 50 percent of the aggregate value of all non-disclosed U.S. accounts. Furthermore, and most relevant to U.S. persons, these banks also must agree to provide detailed information on accounts owned by U.S. persons. Under the program, any Swiss bank seeking to enter the program was required to provide, no later than December 31, 2013, a letter of intent to enter into a non-prosecution agreement. Earlier this year, Kathy Keneally, Assistant Attorney General for Tax, told attendees of a tax conference in Phoenix that 106 Swiss banks have entered into such an agreement. This author has personally read several letters from Swiss banks (dated mid March) informing U.S. account holders of the non-prosecution program and urging such account holders to enter the offshore voluntary disclosure program as soon as possible.

In addition, FATCA, which was passed into law in 2010, is finally coming into effect this summer. Under FATCA, foreign financial institutions will have the choice of becoming FATCA compliant or facing 30% withholding on all U.S. source income payments.

Since FATCA became law, the U.S. government has been entering into Intergovernmental Agreements (IGA’s) with foreign jurisdictions. Currently, there are signed IGA’s with 26 countries and another 19 countries that have “agreements in substance.” These agreements require that information regarding U.S. account holders be reported to the IRS. In those countries with a Model 1 IGA, the financial institution will report to its own jurisdiction, which in turn will report to the IRS. Foreign financial institutions in countries with a Model 2 IGA (or those without any IGA) will be required...
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A Support Obligation That May Never End

By Abbe Allen Kingston
Kingston, Martinez & Hogan LLP

Family law practitioners should be aware of unique support obligations created by the Immigration and Naturalization Act (INA). In all family-based immigration petitions, a U.S. citizen or permanent resident must execute and file Form I-864 (Affidavit of Support). An Affidavit of Support is required for each individual seeking permanent status in the U.S. based upon a family relationship. This article will focus on spousal-based affidavits of support.

Immigration attorneys have great familiarity with the Affidavit of Support [USCIS Form I-864] and experience completing the form, but do not necessarily have experience of, or expertise with, dealing with the actual legal obligations created when an individual sponsor executes the I-864.

The obligations under the Affidavit of Support arise from Section 212(a)(4) of the Immigration and Nationality Act (INA), which makes an alien inadmissible if he or she is likely at any time to become a public charge.1 In basically all family based immigrant visa petitions, a properly executed Form I-864 Affidavit of Support is required to demonstrate that the alien will not become a public charge.

Family Law practitioners should read and become familiar with the obligation created when a sponsor, co-sponsor, or household member executes an I-864/I-864A.

Contract Provision of I-864

To address the “public charge” provision of the INA, the I-864 Form is required when seeking an immigrant visa in basically all family based petitions and a limited number of employment based petitions. The instructions to the I-864 provide that the form is a contract between a sponsor and the U.S. Government as follows:

Completing and signing this form makes you the sponsor. You must show on this form that you have enough income and/or assets to maintain the intending immigrant(s) and the rest of your household at 125 percent of the Federal Poverty Guidelines. By signing Form I-864, you are agreeing to use your resources to support the intending immigrant(s) named in this form, if it becomes necessary.

The submission of this form may make the sponsored immigrant ineligible for certain Federal, State, or local means-tested public benefits, because an agency that provides means-tested public benefits will consider your resources and assets as available to the sponsored immigrant in determining his or her eligibility for the program.

If the immigrant sponsored in this affidavit does receive one of the designated Federal, State, or local means-tested public benefits, the agency providing the benefit may request that you repay the cost of those benefits. That agency can sue you if the cost of the benefits provided is not repaid.3

The I-864 provides that a sponsor's obligation ends only once the sponsored immigrant:

- Becomes a United States Citizen;
- Works 40 quarters (which equates to approximately 10 years, as defined by the Social Security Act);
- Is no longer a lawful permanent resident (LPR) and has permanently departed the United States;
- Receives a new grant of Adjustment of Status, which includes a new Affidavit of Support; or
- Dies. 4

[Note: The instructions specifically provide that divorce does not end the sponsor's obligations.]

Execution of the I-864 creates a contractual obligation to support the sponsored alien at 125% of the Federal Poverty Guidelines5, even after divorce, and where the immigrant sponsor does receive one of the designated Federal, State, or local means-tested public benefits, the agency providing the benefit may sue the sponsor for the cost of the benefits, provided it is not repaid. The Federal Statute provides that the I-864 is enforceable against the sponsor in actions brought by either the sponsored immigrant or a federal, state, or other entity.6

For family law practitioners, the support obligation of 125% of the poverty level following divorce is of primary concern. The Federal Poverty Guideline for a single household at 125% for 2014 is $14,587.50 per year.

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Kingston, continued from page 16

**Enforcement in General**

The I-864 is a contract between the sponsor and the federal government with the sponsored immigrant as a beneficiary and the federal, state, or local government agency or private entity that provides a means-tested benefit for the sponsored immigrant. Any of the intended beneficiaries may bring a civil action to enforce the contract. By signing the I-864, the sponsor agrees to submit to the personal jurisdiction of any Federal or State Court that has subject matter jurisdiction of a lawsuit to enforce the I-864 obligation.

**Recent Case Law**

Case authority, including the California Courts, supports a finding that the I-864 creates an enforceable contract. The beneficiary (sponsored immigrant) can sue the sponsor to enforce the support obligation, in both state and federal court.

A recent United States District Court decision, *Erler v. Erler* (November 21, 2013), addresses several obligations and definitions created by execution of Form I-864. Among other issues, the District Court reviewed the continuing obligation under the affidavit of support (subsequent to divorce) and found a pre-marital agreement did not void the affidavit.

In *Erler*, the plaintiff (immigrant wife) brought action against her former husband for breach of his obligation under the Affidavit of Support he executed as part of her application for residency in the U.S. The parties married in 2009, separated in 2011, and the final divorce decree was entered in 2012. Following the divorce, the immigrant spouse took up residency with her adult son.

Prior to the marriage, each party signed a premarital agreement, which provided that “neither party shall seek or obtain any form of alimony or support from the other.” The Judgment of Dissolution of Marriage provided in part that “there shall be no spousal support due or owing either party for the other.” Following the Judgment of Dissolution, the immigrant wife brought a District Court Action under the Affidavit of Support to maintain her income at no less than 125% of the Federal Poverty Guidelines, seeking declaratory relief and damages in the amount of $20,978.22 plus legal fees.

The Court concluded that the Affidavit is valid and enforceable despite the parties’ earlier premarital agreement, finding that the Affidavit constitutes a contract between the sponsor and the United States government. In *Erler*, the court held that a sponsor cannot unilaterally absolve himself of his contractual obligation with the government by contracting with his spouse in a premarital agreement. If that were possible, parties could routinely rely on premarital agreements to undermine the Affidavit of Support’s goal of preventing immigrants from becoming public burdens.

The Court in *Erler* cited the exact language of Form I-864 to confirm the contract obligation:

I agree, freely and without any mental reservation or purpose of evasion to accept each of those obligations in order to make it possible for [Plaintiff] to become a permanent resident of the United States.

Of significance, the Court held that the Judgment of Dissolution which provided “there shall be no spousal support due or owing either party and to the other” did not bar an immigrant’s rights to support at 125% of the Federal Poverty Guidelines. The Court in *Erler* then conducted an analysis of “household size,” concluding that by living with her adult son, the immigrant spouse was in fact receiving benefits and living above the 125% poverty level threshold. The “household size” discussion and the court’s reasoning are not within the scope of this article.

It should be noted in an earlier District Court decision, *Blain v. Herrell*, the opposite conclusion was reached. The District Court in Hawaii found a premarital agreement could waive a beneficiary’s right to enforce the I-864 on the reasoning that the beneficiary was entitled to bargain away her private rights if she chose to do so. In both *Blain* and *Erler*, the premarital agreement was executed prior to marriage and prior to signing the I-864.

Recently, in *Toure-Davis v. Davis*, a District Court in Maryland held that an ante-nuptial agreement attempting to waive I-864 support was ineffective. The alien’s spouse relied upon *Blain* to demonstrate that the I-864 support contract should not be enforced due to a preceding ante-nuptial agreement. The Court narrowly reasoned that based on the time sequence, the portion of the ante-nuptial agreement concerning spousal support was modified by execution of the I-864. The Court also broadly reasoned that since the I-864 support obligations are imposed by federal law for the benefit of the taxpayers and the alien’s spouse agreed to provide support by signing the I-864, the spouse cannot absolve himself of his contractual obligations with the U.S. government by having the alien waiving any right to support via the ante-nuptial agreement. The Court declined summary judgment, finding that the alien’s spouse was liable for support under the I-864 despite the ante-nuptial agreement.

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The Hallmark of a Champion—or Not

BY ROBERT SANGER

In past Criminal Justice columns, we have discussed the death penalty and, once again, it is prominent in two decisions that just came down, one from the United States Supreme Court and the other from the California Supreme Court. The former is Hall v. Florida¹ and the latter is In re Champion on Habeas Corpus.² The Hall and Champion cases, although they do not cite each other, both discuss significant issues with regard to who is eligible for execution under the Atkins decision.³

Hall and Champion perpetuate the myth that capital punishment can be imposed accurately and consistently. Additionally, both cases contain serious errors in interpreting science while suggesting that life and death decisions can be based on science. Hall and Champion stand less for jurisprudential principles than they do as hallmarks for the futility of trying to rationally decide who lives and who dies under capital punishment.

To be Constitutional, Capital Punishment Cannot be Arbitrary

The United States Supreme Court in Furman v. Georgia⁴ held that the then current set of death penalty systems in the United States were constitutionally infirm. A major concern of the opinions concurring in the per curiam order was the imposition of the death penalty in an arbitrary fashion. Justice Brennan, in his concurrence said,

“In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause—that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.”⁵

This principle, that capital punishment cannot be arbitrary and withstand review under the Eighth Amendment, is violated if the decision as to who lives or dies is not based on accurate and consistent principles. What could be more arbitrary than saying that one person is to die and another to live based on IQ scores when the courts cannot agree on what IQ scores mean? In Hall and Champion, the courts addressed the minutiae of what they understood to be the science behind test scores.

IQ and Ineligibility for Death

In California, the legislature enacted Penal Code Section 1376(a) to define “intellectual disability”⁶ for the purposes of complying with the United States Supreme Court’s decision in Atkins that people who were intellectually disabled were ineligible for execution. The Code identifies the three major “prongs” that have been used over the last 60 years to describe intellectual disability:


The first prong, “significantly subaverage general intellectual functioning,” is usually thought of in terms of scoring two standard deviations below the mean on standardized and properly normed full scale intelligence quotient (FSIQ) tests. Simplistically, a test result of 70 or less would qualify a person under “prong one.” The use of the arbitrary IQ of “70 or less” as the bright line criteria for “prong one” before moving on to prongs two and three was adopted by the Florida legislature. That was the law being reviewed by the Court in Hall.

Settling on an arbitrary figure of 70 is far too simplistic and is not supported by medicine or science. One issue that scientists recognize is that the test score is not precise. They generally recognize a standard error of measurement (SEM) with regard to FSIQ tests of approximately 5 points plus or minus. However, the SEM is an interval of confidence that approximately 95% of those who score a 70 would be within the range of 65 to 75. Importantly, for the purposes of ineligibility for execution, there is a 95% level of confidence that a score of 75 might be as low as a 70.

Even then, the score might not be clinically decisive of the first prong regarding intellectual functioning. The Diagnostic Statistical Manual V (DSM V) published by the American Psychiatric Association calls for “clinical judgment” in assessing this first prong. Sometimes disparate scores can
suggest significantly subaverage intellectual function even though the combined scores average above 75.7

On the other hand, there are those who claim that test scores should be “ethnically adjusted” upwards for African Americans, thus making more Black American eligible for execution. This claim is not supported by medical or scientific literature. Nevertheless, there are some prosecution “experts” who have offered this opinion in order to defeat an *Atkins* claim by a defendant. This is an issue that is referred to without critical comment by the California Supreme Court in *Champion*.

**Hall v. Florida and the Standard Error of Measurement**

Justice Kennedy, writing on behalf of the Court in *Hall v. Florida*, seemed to be taking a scientifically correct view of the Standard Error of Measurement (SEM). Upon reading of the opinion, however, he uses some language that brings into question the Court’s understanding of SEM. Certainly, striking down Florida’s law making a 70 IQ a bright line over which intellectual disability cannot be considered is correct, however, misunderstanding the SEM as a “scientific fact” establishing another arbitrary line is also incorrect.

The SEM is simply a level of confidence, not a scientific fact. As such, it cannot establish an arbitrary number any more than the Florida legislature could establish an arbitrary number at 70. The fact is, that the SEM establishes a “comfort zone” or confidence interval in which scientists feel 95% confidence in the conclusion reached by the arbitrary numbers.

There is language in the Court’s opinion that correctly confirms that the intellectual disability is an overall clinical judgment. In that sense, Justice Kennedy’s opinion is sound from a scientific standpoint. The problem is that, if his characterization that the SEM of plus or minus 5 points is a “scientific fact” is taken literally, it is simply arbitrary.

**In re Champion on Habeas Corpus and Adjustments Upward for Race**

Justice Kennard, who is now retired and was sitting by assignment, issued the order of the California Supreme Court discharging the order to show cause following a reference hearing on the claim of ineffective assistance of counsel at the penalty phase of petitioner’s capital trial. The holdings of the Court do not address IQ testing. However, there is a disturbing passage citing the testimony of a popular prosecution expert who espouses the opinion that the IQ scores of African Americans should be increased by 5 to 15 points to “adjust for ethnicity.”

The passage is disturbing:

> “And Dr. Hinkin disagreed with Dr. Riley’s method of scoring the tests given. He explained that because Blacks ordinarily perform more poorly than Whites on those tests, it is preferable to use ethnically corrected norms when scoring the tests, which Dr. Riley did not do.”

There is no scientific basis for the claim that “Blacks ordinarily perform more poorly than Whites” as a matter of ethnicity. There is a disparity in cross-racial performance based on socio-economic background. But that performance is based on the actual tested intellectual ability of people subject to hunger, abuse, stress, and other factors consistent with that background. Those conditions cause actual physical, biological impairments to learning and are, therefore, real impairments in intellectual functioning.

It is a tragic fact that African Americans as a group in this country are more likely than whites to be in these debilitating socio-economic conditions. However, science supports the fact that there is no basis to “ethnically correct” test scores. The passage in the opinion noted this testimony without comment, however, the fact that the decision reported that there was a claim that norms should

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This is the second installment in Santa Barbara Lawyer’s “Remembering Our Colleagues” series, an “in memoriam” to remember some of our “fallen comrades.” For more details on this series, please see the introduction to the first installment published in the May 2014 issue of Santa Barbara Lawyer.

Judge Ron Stevens

Judge Stevens and I did not always see eye to eye. He was a tough judge with a sometimes brusque demeanor. I liked him a lot. He was always fair, and he was always honest. Even as an “older” jurist, when he smiled he looked like the boy he must have been in simpler times. I always thought of him as a product of the depression, a square-shooting, hard-working, no-nonsense kind of guy. Judge Stevens’ mother lived across the street from me. She was a “Midwestern” grandmother, stern but kind, exactly the kind of mother you would think he would have had. Judge Stevens never said anything about it, but I somehow felt he was happy to know we were there. I have two vivid memories of Judge Stevens on the bench, neither of them very happy events for me, but both memorable to me and therefore important to my development as a lawyer.

The first was in 1985. I had just moved to Santa Barbara from Los Angeles as an associate at Schramm & Raddue. A new case came to the firm and I was assigned to try it. It was 30 days from trial and no experts had been designated on behalf of our client. The first thing I did was to make a motion for leave to designate an expert despite the expiration of the time for doing so. The lawyer who had been handling the case for our client was a good guy, a non-litigator, and things had just gotten away from him. I explained these circumstances to Judge Stevens and pointed out to him that it was the client who would be prejudiced by the lawyer’s mistake and that the other side would not be prejudiced because they had plenty of time to depose the expert before trial. I really expected him to grant the motion. I think the other side did as well. He denied the motion, I prepared for trial with no expert, and tried the case. The result was a good one and the lesson was learned.

My second lesson at the hands of Judge Stevens came in 1990. By that time I was a partner at Schramm & Raddue. Again I had a case coming to trial, but this time I was leaving private practice to go in-house at Gregg Motors. I was scheduled to start my new career on March 1st, but my trial was scheduled to start on March 15th. So I made a motion to continue the trial to allow the client to get a new lawyer and to allow the new lawyer to get up to speed. Again, it seemed like a reasonable motion to me, motivated by a legitimate change in circumstances and the desire to protect the client’s interests, and I thought Judge Stevens would grant it. He did not. He told me I needed to put the interests of the client and the Court in a speedy resolution of the matter ahead of my own interest in starting a new job. I delayed my departure from private practice, I tried the case, and then I moved on. Again, a valuable lesson learned. Lest you think I harbor any ill will toward Judge Stevens because of these events, let me assure you nothing could be further from the truth. I respect his integrity and his willingness to make the hard call when he felt it was the right call. In both cases, while I was not happy at the time, in retrospect I realized he had made the right call. I had many other interactions with Judge Stevens, and we had a very good relationship. I remember him fondly and am grateful to him for challenging me to be a better lawyer.

Jay Michaelson

If you knew Jay, it is almost as if there is nothing else to say. Just saying his name evokes the same emotional response in everyone who knew him. He was an all-around good guy—the kind of guy you want your kid to be, the kind of guy you want to be, and the kind of guy your wife wishes you were (although she would never admit it). Handsome, friendly, helpful, caring, warm, courageous, kind, highly intelligent, trustworthy, he was the guy you want to run into at the grocery store on Saturday morning. In fact, one of my most vivid memories of Jay was a Saturday morning when I ran into him at Lazy Acres. But before I get to that, here are a few general memories and comments.

I first met Jay when I was at Schramm & Raddue back
in the late 80’s. He was counsel for a Chapter 11 debtor, and I was counsel for a creditor. Even then Jay was “who I knew he was.” He was the absolute picture of professional courtesy. He was so good at what he did that he had no reason to play games. If you needed information, he gave you information. If you needed help, he gave you help. And he was an absolute gentleman about it all. Over the years, I called Jay many times when I had a question about some arcane bankruptcy procedural issue or to consult with him about a bankruptcy issue affecting a client. He was always there, and he was always willing, no, eager to help. He would never accept my offers to pay for his time. Even his voice was the voice of a gentleman. I can still hear that voice in my head.

Jay was the proverbial “hale fellow, well met.” After Jay got sick I ran into him one Saturday morning at Lazy Acres. It was so great to see him. He looked great. His natural optimism was shining through as it always did. We talked for a few minutes, caught up a little bit, smiled, and shook hands. That was the last time I saw Jay. I think of him all the time.

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**Summary**

The Affidavit of Support requirements were enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.\(^{20}\) To date, there have been relatively few enforcement actions; however, effective representation of both the U.S. sponsor and the sponsored spouse requires an understanding of the unique support obligations created by the Immigration and Naturalization Act.

Mr. Kingston has practiced immigration law in Santa Barbara for over 35 years. He has been certified by the California State Bar as an Immigration Law Specialist and has served as a Commissioner on the California State Bar Commission on Legal Specialization. He earned his bachelor’s degree in Electrical Engineering from the University of California, Santa Barbara and his law degree from Loyola Law School in Los Angeles. He is a founding member of Kingston, Martinez & Hogan, LLP and his practice has exclusively focused on Immigration and Nationality Law.

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**NOTES**

1. INA §212(a)(4)
4. Id at p. 10. See also INA §213A
6. INA §213A(a)(1)(B)
7. A civil suit may not be brought by a third party for obligations incurred by the alien based upon INA §213A.
8. INA §213A(a)(1)(C)
9. INA §213A(a)(1)(C)
10. CV-12-02793-CRB, 2013 WL 6139721, at 4-8 (N.D. Cal. Nov. 21, 2013) (order denying plaintiff’s motion for summary judgment and giving parties notice regarding possible summary judgment for defendant)
11. Id. at p. 2.
12. Id.
13. Id.
14. Id.
15. Id. at p. 3.
16. Id.
17. Id. at p. 5.
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To be FATCA compliant, all foreign financial institutions are required to register with the IRS to obtain a Global Intermediary Identification Number (GIIN).

FATCA’s withholding requirements go into effect on July 1, 2014, and the required reporting will begin in 2015.

**Now is the Time**

Given the implementation of FATCA and the non-prosecution agreements with Swiss banks, practitioners have begun to speculate whether the IRS may suddenly terminate the offshore voluntary disclosure program without notice. While such a possibility is pure speculation at this point, it cannot be doubted that the non-prosecution agreements coupled with the implementation of FATCA globally will make it all the more difficult for U.S. account holders to avoid detection by the IRS. It is therefore prudent to urge those who are non-compliant to become compliant as soon as possible.

To report information directly to the IRS. To be FATCA compliant, all foreign financial institutions are required to register with the IRS to obtain a Global Intermediary Identification Number (GIIN).

J. Lee Johnson, J.D., LL.M., is a partner with the Montecito firm of Ambrecht & Associates where he advises individuals and families with regard to cross-border tax planning and U.S. tax reporting requirements.

**Appendix**

Below is a listing of IRS forms commonly used to report offshore interests:

- Foreign Bank Accounts (FBAR) (now filed electronically on FinCEN Form 114)
  - Required when the aggregate balance of all foreign accounts exceeds $10,000
  - Statement of Specified Foreign Assets (Form 8938)
    - Filing threshold depends on filing status as well as location and ranges from $50,000 for singlefilers living in the U.S. to $600,000 for those located outside of the U.S. who are married filing jointly
    - Broader than FBAR – includes interest in foreign estates, corporations, and partnerships
    - Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts (Form 3520)
      - Used to report foreign gifts to U.S. persons if aggregate gifts exceed $10,000 (if from a foreign corporation or partnership) or $100,000 (from a single foreign individual or estate)
      - Also reports distributions from foreign trusts
      - Annual Information Return of Foreign Trust With a U.S. Owner (Form 3520-A)
        - Required when U.S. person creates a foreign trust, transfers assets into a foreign trust (unless a sale), or is deemed the owner of a foreign trust

Information Return of U.S. Persons with Respect to Certain Foreign Corporations (Form 5471)

Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Form 5472)

Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Form 5472)

Complex rules and tests for determining reporting requirement

Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (Form 5472)

Return by a U.S. Transferor of Property to a Foreign Corporation (Form 926)

Return of U.S. Persons With Respect to Certain Foreign Partnerships (Form 8865)

Endnotes:

1. The term “U.S. person” includes citizens and residents (whether via a Green Card or meeting the substantial presence test). See 26 U.S.C. §7701(a)(30).
2. 31 U.S.C. §5321(a)(5)(B)
3. 31 U.S.C. §5321(a)(5)(C)
5. Id.
6. Id.
7. Id.
8. Id.
11. Please note this is not intended to be an exhaustive list of all foreign reporting requirements but only those most relevant to this article.
12. 31 C.F.R. §127(c)
13. 26 U.S.C. §6088D
14. Id.
15. 26 U.S.C. §6039F. See also IRS Notice 97-34.
16. 26 U.S.C. §6048(c)
17. 26 U.S.C. §6048(a) - (b)
18. 26 U.S.C. §6088
19. 26 U.S.C. §6088A
20. 26 U.S.C. §6088C
22. 26 U.S.C. §6046A
Climb the mountains and get their good tidings. Nature’s peace will flow into you as sunshine flows into trees. The winds will blow their own freshness into you, and the storms their energy, while cares will drop off like autumn leaves.


My eyes were getting crossed from trying to read microscopic text on .pdfs and scanning Westlaw headnotes, my shoulders and back were throbbing from hunching over documents, and the rest of my body was basically in suspended animation. I had hours more to go. This was a typical day for me. Eventually, 14-hour days of research, writing, and document review cost me 72 hours of laying flat on the floor to heal an inflamed disc. I learned the hard way that when the scale of work-life balance starts tilting too heavily in the direction of work, the whole thing can tip over. “But I didn’t have a choice!” I told myself, “I had briefs to write, trials to prep for. What could I have done?” Easy. Take a hike.

One of the greatest assets of my office in Bozeman, Montana was the view of the mountains. Those mountains were home to miles and miles of trails, that led to peaks, lakes, meadows… And hiking them has been the trail to my own health, joy, and inner peace. As one of the most hassle-free and versatile recreational activities, hiking was the perfect solution for my life out-of-balance. I just had to lace up my shoes, hit the trailhead, and in a few minutes, the stress of the day would evaporate. I could engage my quads and glutes and sweat out my frustrations far away from the confines of the gym. When I was tired and caught up in the minutia of a case, I could be alone on the trail, and engage in a moving meditation to sort out my thoughts and gain perspective.

When I left those mountains for California, I thought I was leaving behind my trail life, my inner and outer journey. Instead, I was amazed at the accessibility, the variety, and the views in Santa Barbara’s own backyard. Questioning your practice? The bending oaks provide a contemplative umbrella for self-reflection. Working on your closing statement? A change of scenery and break from technology can provide you inspiration. Immerse yourself in the scent of sage or pine, the ripple of the creek and the chattering of woodpecker, the brilliant wildflowers and soaring red tail hawks. Want to vent about opposing counsel or trouble shoot a complex issue? Bring a colleague. Social time offers great psychological rewards, and you will double your benefits of the normal happy hour with physical activity.

**Rattlesnake Canyon Trail**

When the sun is beating down, Rattlesnake Canyon offers cool, shaded respite, along clear pools. In wetter months, it can be a challenge just to find the numerous creek crossings. Hikers can exercise a sense of adventure trying out different trails, those hugging the creek or others veering up into the hills. Photography opportunities abound as clear pools reflect rounded stones, and different flora thrive in each microclimate: Canyon Sunflowers, wild roses, bay trees, and enough poison oak to make things interesting. Oh— and yes, there have been a couple of rattlesnake sightings lately. The trail starts on either side of the bridge on Las Canoas, just next to Skofield Park. Hike up to Gibraltar Rd. (at about 2.5 miles) or meet up with Tunnel Trail.
Jesusita Trail
If you are crunched for time, Jesusita Trail offers easy access to some interesting terrain. Grab your buddy and take San Roque Rd. past the Cater water treatment plant until the road ends. The trail offers gentle downs and ups and easy creek crossings, so you can save your breath to chat. The trail opens up about a mile in, offering some nice views and you will see some lupine in spring. A little further in, stop at the water fountain and give your canines a drink. If you are feeling energetic and daylight is with you, continue along the trail to Inspiration Point (3.5 miles) or beyond.

Franklin Trail
Those of you in the southern end of the county are probably interested in Carpinteria’s newly opened Franklin Trail. The trail historically provided access from Carpinteria to the Los Padres National Forest, but recreationalists ceded the trail to agriculture over the years. After a concerted effort by several local constituencies, the trail is in the process of reconnecting residence to recreation and currently offers about 2 1/4 miles of the planned route to join backcountry trails near East Camino Cielo. The trail skirts the north side of Carpinteria High School (look for the white on brown “trail” sign) then turns to head up the hill. At this point in the hike, you will be wondering if there is a hunk of cheese awaiting you (even more so if you thought you could pick up the trail on the right side of the school and get trapped on the wrong side of the fence. Hint: do not do this!). When you finally emerge from the chain-link maze amid avocado trees, there will be a series of switchbacks. The trail still looks pretty fresh from construction, but some beautiful, large cactus line the trail. This exposed trail continues up, offering views of Carp’s vast greenhouses and Salt Marsh and beyond to the ocean. Enjoy the vista from Frank’s bench, then you are just about at the end of the road. If you are thinking of making the trip from Santa Barbara, you might want to wait for the extension of the trail to make it worth the drive. For details, see http://franklintrail.org/trail-project/.

Tequepis
With an elevation gain of 2000 feet, Tequepis offers both a good workout and incredible views. Take 154 just past Cachuma Lake to the sign marked “Circle V.” You may think you are in the wrong place as you walk past the boy scout camp to get to the trail, but do not worry: this will not put you on the Megan’s Law list. Because the Valley tends to be a little hotter, head up in the morning to enjoy some shade. This wide trail provides ample room to hike with your partner and have a picnic at the top, where you can see the ocean on one side, and Cachuma Lake on the other. You will still have plenty of time to end your day with wine tasting in the valley.

Figueroa Mountain
Finally, I highly recommend exploring Figueroa Mountain in the spring. Seas of bright California poppies and lupine are apparent just from the road. Take 154 to Los Olivos, then head north on Figueroa Mountain Road, past the old Neverland Ranch (you will know it by the storybook tudor gatehouse), and up onto the mountain. There are several trails off of the road, which continues up for about 15 miles before heading down the other side. Try taking the trail down to Davy Brown campground. You may need an Adventure Pass ($5 at Big 5) to park and hike. The road down the other side to Happy Canyon Rd. is quite narrow, and not entirely maintained. I would recommend saving it for the bikers! For details, see http://www.fs.usda.gov/activity/lpnf/recreation/hiking.

For details on most of these hikes, as well as many more, see http://www.santabarbarahikes.com/. Happy Trails!
Conclusion: Hall and Champion and Arbitrariness

These debates about FSIQ points are not merely about what Independent Educational Plan (IEP) will be developed for a student, although IEP’s are extremely important. We are talking here about who is eligible to be executed by the state and who is not.

If Justice Brennan and the others in the majority in the Furman decision are to be taken seriously, we cannot have arbitrary rules over life and death. Certainly, where the rules are not based on a clear understanding of science and where science would tell you there are no clear rules, any decision of this sort is arbitrary.

Justice Blackmun came to the conclusion, in dissent in Callins v. Collins in 1994,9 that we should “no longer tinker with the machinery of death.” He said, “The basic question - does the system accurately and consistently determine which defendants ‘deserve’ to die? - cannot be answered in the affirmative.” This quibbling over IQ points with death in the balance promises neither accuracy nor consistency.

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. 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 12-10882, Slip Opinion filed May 27, 2014
2 SO65575, Slip Opinion filed April 14, 2014.
4 408 U.S. 238 (1972)
5 Id. at 274.
6 In Atkins the United State Supreme Court referred to “mental retardation” which was, in turn, used by many courts throughout the country to describe what is currently described in the medical and scientific literature as “intellectual disability.” We will adopt the current usage consistently throughout.
7 There are also corrections for the Flynn effect which accounts for the fact that the norm increases by about 3 points every 10 years. The Flynn effect is accepted by the medical and scientific community and, based on when a test was normed and when it was given, it is proper to adjust the individual score downward for this advance.
8 Slip opinion p. 29.
9 510 U.S. 1141.
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**Speaker Bio**
Mr. Ohlenkamp graduated with a Bachelor’s Degree from California State University, Northridge in 1976. He was responsible for administering Social Security benefits in Santa Barbara and San Luis Obispo Counties through a staff of up to 80 professionals. He retired as District Manager in 2013 after 37 years of service. During 2006 and 2007 he served in Washington D.C. as a Legislative Fellow for the U.S. Senate Finance Committee. From 2010 through 2012 he served in a variety of high profile executive positions such as Director for Negotiation and Dispute Resolution in the Office of Labor, Management, and Employee Relations; head of the national team developing internet applications; and Director for staffing, budget, and facilities in the western region.

Mr. Ohlenkamp received many awards throughout his career, including the prestigious Commissioner’s Citation. He graduated from the Federal Executive Institute, and participated in extensive training in public relations, leadership, alternative dispute resolution, and other topics. He is an accomplished public speaker and trainer who has been very active in the Santa Barbara community.

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**Legal News**
Neches, continued from page 11

No.
Have every document you plan to use in cross examination at your fingertips. Having prepared your cross-examination outline, be flexible with how you use it at trial. Like direct examination, cross examination at trial never goes exactly as planned.

**Redirect Examination**
Unless your expert needs major rehabilitation, or you fear some of the opposing attorney’s cross-examination questions of your expert have misled the jury, I recommend no redirect examination. If your expert’s direct testimony went as planned, he already has explained his findings and opinions as clearly and persuasively as you and he could devise. Rehashing the support for the weak points in your expert’s work – which should have been the only subject of cross-examination – may only emphasize these weak points in the jury’s mind and provide opposing counsel additional bites at these particular apples on re-cross examination.

The sweetest sound after the end of my cross-examination testimony is when counsel says, “No redirect. We rest our case.”

Thomas Neches, managing partner of Thomas Neches & Company LLP, provides accounting, financial, business valuation, and statistical analyses to assist attorneys involved in litigation. Mr. Neches has testified as an expert in state and federal courts in Arizona, California, Florida, Kentucky, Missouri, Nevada, New York, and Oregon.

Mr. Neches has testified to juries on behalf of both plaintiffs and defendants in antitrust, breach of contract, fraud, intellectual property, lender liability, personal injury, and wrongful termination cases. Examples of the litigation issues he has addressed include lost profits, lost business value, determining a reasonable royalty, and piercing the corporate veil. Representative industries regarding which he has testified include banking, entertainment, insurance, manufacturing, retail, securities, and wholesale.

He is a Certified Public Accountant, Accredited in Business Valuation, a Certified Valuation Analyst, a Certified Fraud Examiner, and is Certified in Financial Forensics. He received his BA in Mathematics and Literature from UC San Diego and his MS in Operations Research from UCLA.
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