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CITATIONS

OCTOBER – TWO THOUSAND FIVE

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MY SISTER, FRAN SMITH, LEARNING TO JET SKI AT AGE 63 IN SEPTEMBER OF 2003

By Don Hurley

Somewhere in the distant past I remember a saying that pain is God's way of telling you something is wrong with your body. It may have been on a fortune cookie, but I still believe this is sound advice. Over the past few months I experienced regular abdominal pain, not the writhing type associated with an emergency appendectomy, but the nagging, way-too-many-jalapeños-for-lunch variety. I don't endure pain or even moderate discomfort well, however I already knew that I had a mild diverticulitis condition which would account for some portion of the pain. So I ignored the irritation, hoping it would go away, with the same misplaced logic that reasons that the antifreeze lying in a small pool on the garage floor under your car is nothing serious.

My regular doctor has an abnormal obsession with cholesterol levels, preferring them to be close to double digits. I have attempted, at length, to explain that I am condemned by my family history to having at least slightly higher than normal levels, failing to mention that this same family considered Twinkies and Fritos as two of the four major food groups. Three monthly appointments came and went with a brief examination of my abdominal area and a terse and unsatisfying diagnosis of either the ongoing diverticulitis or muscle strain.

Sleepless nights from the pain and the accompanying worry eventually caused me to request a referral to a gastrointestinal specialist. We discussed the symptoms, with nary a mention of cholesterol levels. Even though I had undergone a colonoscopy less than three years previously, as a matter of caution, based upon the prevalence of cancer in my immediate family, another examination was scheduled for a few days hence. I took the detailed preparation instructions home, ready for a very quiet weekend, skipping dinner or any other outside activities.

The idea was to clean out the stomach and intestine area so that the small television camera, which was to proceed the opposite way nature intended, would have an unobstructed view. Starting point was to have a "light breakfast and lunch" on the day immediately prior to the exam. Dinner would consist of clear liquids, broth, tea and light-colored soft drinks. I was somewhat relieved to discover that all of the diuretics were oral with the taste of poorly made Kool-Aid. Needless to say, there was an urgent need to be close to a bathroom facility at all times thereafter.

At 5:30 a.m. on the morning of the procedure, I was required to take more of the diuretic and additional liquids as the cleansing continued. By the time my wife and I arrived at the hospital, I felt my colon was ready, even if I wasn't. The check-in was quick and efficient, and I promptly found myself in hospital attire, a gown with a draft in the back. My nurse was funny, a desirable quality when one is being poked with sharp needles and stripped of dignity. I waited for the IV to do the job, putting me in a relaxed state of semiconsciousness, akin to watching four hours of Gilligan's Island reruns.

My doctor and his medical staff explained the process, which amounted to having the television probe inserted in my rectum and launched slowly through my colon, all the while sending back pictures. I vaguely remember watching as it rediscovered my diverticuli but did not reveal any polyps requiring further examination and possible removal. The procedure itself was blessedly uneventful.

I returned to the dressing room, somewhat unsteady of feet, experiencing the reason why the hospital required someone to drive you home. The nurse had one more duty, explaining that there were copious quantities of gas in your lower colon which would urgently need to be removed naturally. Picture the campfire scene in "Blazing Saddles," only with hospital gowns rather than cowboy duds. Next time, in three years, I'll bring my dog Max to take the blame, as usual.

On October 1, 2003, my sister Fran, pictured above, died of colon cancer which had spread to her liver. I was with her in late May the previous year when her oncologist revealed the results of her CT scan, which really needed no explanation. What was plainly visible was that one-half of her liver was completely black, the discoloration a death sentence giving her, at most, 18 months. None of the family collected in the small, bland room, shed a tear, the shock of the picture having the same effect as a solid shot to the solar plexus, taking your breath away and leaving you feeling hurt and empty inside.

My sister became the poster person of chemotherapy, continuing with ever increasing doses until they could do no more for her. She never completely gave up hope and worked until three days before she died, not because she had to, but because she loved what she did. If Fran had received a colon examination during the four years prior to the cancer's discovery, she would probably be alive and well today. Not a day has gone by that I don't think of her, and I will miss my big sister for the rest of my life.

If not for yourself, then for your family and friends, don't ignore a regular cancer screening, including a regular colonoscopy exam. If you're embarrassed by the procedure, Max is still available to take the blame.

Don Hurley *is an Assistant County Counsel for the County of Ventura and is President of the VCBA.*

LETTERS TO THE EDITOR

This is a response to the letter from Lindsay Nielson in the August edition of "Citations" regarding 5th Amendment protection. The writer notes that there have been few abuses in Ventura County. But having been a victim of such abuse, I find the rarity of abuses a small satisfaction.

In the early 70's I owned a small house near the beach in Port Hueneme. I was advised that this was coming under "Eminent Domain" and would be taken over by the government.

Shortly after receiving such information, I was contacted by an attorney who lived in this victimized area, who informed me that "Hueneme has sold out to a big developer from Orange County who is steamrolling settlements." As a new immigrant to this wonderful country, and as a naïve engineer, I responded that this could not happen in America.

Later, after I learned some of the disastrous results, such as a senior returning from hospital and having a heart attack upon observing her demolished home, I protested to a Hueneme hatchet job. A particularly depressing story concerned a Mr. Stafford who had a personally constructed teak-finished home that ran from one street to the other. When he was informed in the mandated public hearing that he would lose his house, he broke into tears.

By this time I realized what was happening and approached an attorney, who confirmed the "Orange County Interest" takeover, and (after extracting a fee) declined to further represent me. This taught me that to have an expectation of justice in the "Land of the Free," you had better become an attorney.

James B. Forrest, Esq., P.E., Ph.D.
is a Ventura attorney.

Past issues of CITATIONS may be found on the bar's new website at www.vcba.org.

Having just read Al Menaster's nihilistic review of Steve Bogira's book (July CITATIONS), I am puzzled why your publication would choose to run such a blatantly biased rant. Al Menaster purports to "know" that police routinely perjure themselves in suppression motions, prosecutors just want to win every case, and judges just try to push cases through. As for probation; well, he "knows" that the probation system and its officers have never helped anybody! He claims that the challenge of the defense attorney is "to be the only voice for justice in an industry gone mad.…"

Mr. Menaster's exposure of the conspiratorial perfidy of every participant in the criminal justice system except defense attorneys comes as quite a shock to those of us who have chosen careers as prosecutors/judges/probation and police officers because we believed it served a higher purpose than just making money and that it contributed to the greater good. Thank goodness Al Menaster has come along and set us straight.

But before one runs out to throw open all the prison gates and invite the inmates into your home, remember this: nowhere in the state bar requirements to defend criminal clients, is there a mandate to seek "actual justice." Criminal defense attorneys, public and private have one duty, to zealously represent their clients. To go one step further and adopt Mr. Menaster's views, it is also necessary to completely disregard the human suffering of victims of violent crime. To some degree, this ability to distance oneself from the emotional and physical pain inflicted by their clients is an important and necessary professional tool for all criminal defense attorneys. It allows them to zealously represent criminal defendants no matter how odious their crime or obvious their guilt. If criminal defense attorneys did not continually engage in the struggle to remain aloof, they wouldn't be able to do their job.

As a prosecutor for nearly sixteen years, I understand this concept and accept the role of defense attorneys as the welcome and necessary flipside of my job within our adversarial system. It doesn't mean I "know" that all defense attorneys are devoid of human emotion or that I "know" they constantly maneuver to sabotage the process. But that's exactly the kind of lame, twisted, imperious logic used by Mr. Menaster to come to his dramatic and silly conclusion.

We all agree the criminal justice system is flawed, and as long as it is rooted in human effort, it will continue to be so. We must always be open to new ways to improve our system to make it more accountable and less impersonal. But to blithely condemn and disparage all those who believe, contrary to Mr. Menaster's assertion, justice does get done, case by case, person by person, within our admittedly imperfect system is callow and insulting.

Of course, "justice" does not mean allowing those who break the law to go free just because being placed on probation or going to prison is unpleasant and inconvenient. Contrary to Mr. Menaster's self-important yet heartfelt philosophy, the rules of civilized society require that there be consequences for those who break the law. I don't favor punishment because it's fun to send people to prison and I like to win, I believe in it because it is necessary to preserve the rights of individuals and society to be free from victimization by others.

Finally, Mr. Menaster touts that, "No study shows that anything the criminal justice system does has the slightest impact on crime rates" and that "Almost nothing anyone is doing in the criminal justice system is actually changing anyone's life for the better." Tell that to the families of murder victims Nichol Hendrix, Crystal Hamilton, Valerie Zavala and countless others whose remorseless killers were rightly convicted and imprisoned so they won't be able to harm any other innocent victims.

Maeve J. Fox *is a Senior Deputy District Attorney in Ventura*

In response to the debate initiated by Michael McQueen [Sept. and July CITATIONS] on the "PC" issue:

I find myself compelled to enter into the debate to reframe the question. In my mind, this is not about being politically correct or quashing debate by strident opponents. It instead has to do with being tolerant of and encouraging debate on diverse views.

I also attended the Inns of Court presentation in May, and – unlike Carmen Ramirez – I did not stand to object to what I perceived as a bigoted and "Stepin Fetchit" style presentation. I just walked out. Ms. Ramirez was more willing to speak her mind, so she stayed.

Mr. McQueen appears delighted to use the Ramirez and the BAA comments as a springboard to criticize anyone who expresses dismay at unkind or insensitive language. He complains of "PC censorship on topics that deserve open discourse." However, like Rush Limbaugh, Mr. McQueen's comments have more to do with inciting entertainment than with promoting open debate in a courtesous and viable society. I have the ability to turn off the radio, or refuse to discuss sexism or racism with Mr. McQueen. Likewise, he can reserve his rights to disagree with Ramirez and the BAA. But such actions end the discussion.

What is disturbing about the Limbaugh/McQueen way of discussing issues is that they tend to villify the other side. This lack of tolerance for diverse views has created a split in the US, politically and emotionally. We have stopped having informed debates, and have devolved into an adult version of kindergarteners calling each other names. For example, Ms. Ramirez was not legitimately offended; instead, according to Mr. McQueen, she is "professionally sensitive." The BAA did not urge open discussion; instead, according to Mr. McQueen, it sought "PC censorship." He then accused the BAA of being a front for "women and hispanics," instead of being legitimately black. There are numerous equivalents of such tactics in American politics.

Mr. McQueen's efforts to re-direct the debate into historical injustice is a great technique to divert or inflame, but it doesn't resolve the day-to-day problem that Mr. McQueen chooses to ignore. There is still racism. There is still sexism. There is still discrimination. Yes, every day. If we watch how we speak to each other, perhaps our behavior can begin to change. Calling a Native American faced with a child welfare issue "Tonto" in the context of a continuing legal education presentation is not helpful. We should discuss such issues. Mr. McQueen has something to contribute to that debate, but it is difficult to argue with anyone, be he a Ventura lawyer or a US Senator, who strays from the issues in order to villify his opponents.

Open and honest debate is quickly becoming an anachronism in American society. Instead of attempting to persuade others of our legitimately held beliefs on how best to handle problems we encounter as a whole, we now suffer through labeling, name-calling, and distortion of the facts. This is not a "PC outrage." It is mourning the loss of the ability to engage in heated debate in order to find common ground. We need to return to a more elegant and courteous form of discourse.

Years ago, in the US Senate, a gentleman from the northeast made it a point to call a particularly stubborn son of the South "the distinguished senator from South Carolina." When exraordinarily outraged by the gentleman's behavior, he called him the "extremely distinguished senator." Through this form of mutual disrespect, the two men managed to bring light to issues that deeply divided the country. If they resorted to the form of discourse currently in favor, I would think our lives would be less for it. Ms. Ramirez expressed honest dismay at the May presentation, as did the BAA. While Mr. McQueen may have disagreed with their beliefs, he might consider starting his next article by referring to his "distinguished colleagues," and stick to issues instead of personal attacks.

Kate M. Neiswender *practices law in Ventura.*

Tina Rasnow requested that CITATIONS reprint this speech by Magistrate Judge Edward Chen, U.S. District Court for the Northern District of California, to reply to the letter to the editor from Michael McQueen published in September's CITATIONS. Judge Chen delivered his speech. "The Other New Orleans," at the Diversity Celebration at September's State Bar Conference, and gave CITATIONS permission to reprint it.

Like many of you, I have been riveted by the images of immense devastation, unspeakable suffering, intensified by the shameful ineptitude in delivery of relief, the full toll of which has yet to be measured.

The events of the last 2 weeks have raised pressing questions:

1. Knowing that FEMA had listed hurricane and flooding of New Orleans as one of 3 most likely catastrophes that threaten the United States, and that the Army Corp of Engineers had repeatedly requested moneys to strengthen and rebuild the levees, why weren't resources devoted to prevent this catastrophe?

2. Given the fact that the authorities had 3 days advanced warning, why weren't government agencies better prepared? Why weren't better provisions made for those without means to escape from harm's way?

3. If FEMA could deliver such rapid relief in Florida in 2004 for Hurricanes Charlie, Frances, and Ivan when assets were deployed well in advance and hundreds of truckloads of water, ice, food and medical personnel arrived within hours, why did it take days after Hurricane Katrina to even begin serious and substantial mobilization efforts?

4. Would the response have been different had the majority of victims been white and middle class rather than poor and black? Would the response have been quicker had it been Kennebunkport instead of New Orleans?

Regardless of how these questions are answered, Hurricane Katrina raises even more profound questions that transcend this single tragedy. As NY Times columnist Nicholas Kristoff

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points out, Hurricane Katrina has exposed a much larger problem – the large and growing number of Americans trapped in the never-ending cyclone of poverty. And it reminds us of the racial fault lines that continue to run through our Nation.

There are three images that serve as a metaphor for this point.

Stranded

First are the images of New Orleans flood victims clinging to makeshift rafts, stranded on rooftops amidst rising flood waters. That image reminds us of the millions of poor and minority Americans who have been left behind by decades of neglect and indifference – whose boats of opportunity weren't lifted with the rising tide of prosperity.

In New Orleans parish, amidst the glitter of French Quarters, casinos and swank hotels, lives a population that is 67% black, where the poverty rate is nearly 2½ times the national average, where the median household income was just $27K, where more than 1/3rd of the population has no high school diploma.

These demographics are not unique. The US poverty rate has risen for 4 years in a row. Last year, the ranks of the poor rose by 1.1M to 37 million. During the current administration, the number of poor people has risen by 17%. For African Americans the poverty rate is nearly 25%, for African Americans in New Orleans, it is nearly 50%; for Latinos nationwide, it is 22%.

The most telling indicator of financial security – wealth – shows an even greater racial disparity. In 2002,White households had a median net worth of more the $88K, 14 times that of blacks ($6,000), 11 times that of Latinos ($7,900). Since 1996, the racial gap in wealth has grown, not diminished.

Children

Second are the images of children suffering from the heat and squalid conditions at the Superdome and Convention Center as their parents look on helplessly.

These images remind us of the devastating effect of economic deprivation and racial inequality that falls upon our children in so many communities throughout America.

Like the disproportionately poor and minority flood victims who lived in the lower, most vulnerable areas of New Orleans, low income and minority children throughout our Nation are exposed to grave environmental risks. Those who live along freeways and industrial thoroughfares are exposed to carbon monoxide fumes and carcinogenic particulates. More often than not, toxic dumps are sited in low income communities and unusually in minority neighborhoods. From exposure to pesticides in farm working valleys and to lead in our inner cities, children of color face undue risks. Yet, 29% of America's children go without health insurance at some point within the last 12 months.

It should come as no surprise that in poor and minority communities, the infant mortality rate rivals that of Third World countries. In our nation's capital, the infant mortality rate is twice as high as China's capital. Last year, the US infant mortality rate (ranking 43rd in the world) actually rose for the first time since 1958. Every day, an average of 77 babies die in America; it is estimated that 50 of those die needlessly, because of poverty.

For the lucky ones who do survive, they are likely to be relegated to racially isolated and underfunded schools. Recent studies show that 50 years after *Brown v. Bd. of Education*, racial segregation in US schools is increasing, not decreasing. Nationwide, nearly 70% of African American students and 75% of Latino students attend predominantly minority schools. More than a third attend schools that are 90% minority, schools most likely to suffer from deteriorating physical plant, shortage of books, and the least experienced teachers.

Neglect

Third is the image of the blanket-covered wheelchair-bound body of a victim who died outside the Superdome, waiting for help that never came. This image exemplifies the culture of neglect and disregard that has permitted us to tolerate what should be intolerable inequalities.

In the decades since the War on Poverty in the 1960's, America has, in large part, ignored the problem of the growing disparity between the haves and the have-nots. The problems of poverty has taken a back seat in policy debates. Racial equality is no longer a priority.

Consider the opinion surveys taken from time to time in which respondents are asked to identify issues which are of greatest concern. At the top of the list, you typically see such issues as education, health care, crime, illegal immigration, terrorism. When was the last time you saw racial equality or the plight of the poor on such a list? It's not even a blip on the radar screen.

We have turned a blind eye to the gross disparity that divides our communities along racial and class lines. Perhaps the most telling example lies in our typical perceptions of New Orleans before Hurricane Katrina. For most visitors to the Crescent City including myself, we remember New Orleans for its fabulous meals, great entertainment, distinct architecture, and Cajun culture. We associate New Orleans with the grand breakfast at Brennans, beignets at Café DuMonde, jazz on Bourbon Street.

Invisible to us was the immense poverty, overcrowded public housing, and deteriorating schools just a stone's throw away.

Invisible to us was the fact that New Orleans is one of the poorest large cities in America; its population 67% black, nearly half of whom live below the poverty line. A city where whites have fled the public schools, leaving 96% of the student body black.

If it is one thing we must learn from Hurricane Katrina, it is that we can longer turn our heads and ignore the devastation to human life caused by decades of neglect and indifference. New Orleans now means something different, at least for me. It stands as an open wound revealing the deep social scars that have festered for far too long.

But the tragedy of Katrina gives us a chance to start the healing process that is long overdue. As columnist Nicholas Kristof put it, "the best monument to the catastrophe in New Orleans would be a serious national effort to address the poverty that afflicts the entire country. And in our shock and guilt, that might be politically feasible."

I am heartened by the outpouring of charity and humanity emanating from every corner of our nation. A sense of caring and community that cuts across all races, socio-economic classes, and political parties. We now have a rare opportunity to capture that goodwill and capitalize on it to achieve something larger:

To reverse the policies of the last four decades which have redistributed wealth from the poor to the rich, which have widened the economic gap between the whites and people of color, and which have left behind millions of Americans trapped in the never-ending cycle of poverty, living at the edge of the next catastrophe.

As we celebrate the importance of diversity this evening, I hope you will join me in reflecting and thinking about what we can do, both individually and collectively, to awaken the conscience of our Nation, to reorder our priorities, to ensure that we address the problems of deprivation and inequality in a serious and systemic way, to reaffirm our commitment to not only legal justice, but social justice as well. Our success will be measured by the extent to which we achieve true diversity, not just among the impoverished and dispossessed, but in all sectors of our society.

The enormous challenge we face goes beyond rebuilding the great city of New Orleans and the Gulf Coast. We must build a better, a more fair, a more just America.

Commissioner Young Reports: "Same High Emotions Present in Same-Sex Dissolutions"

By Panda Kroll

Ventura County is no stranger to registered domestic partnerships, and several domestic partnership dissolution actions have already come before Ventura County Superior Court. Commissioner Bruce Young commented that in two of these recent cases, the parties sought resolution of issues involving child custody, child support, and division of partnership property, the same issues he sees in traditional dissolution proceedings. Former same-sex partners, like their heterosexual counterparts, come to court equally "wounded and hurting."

Since January 1, 2005, registered domestic partnership status may be terminated by a court proceeding in which the laws governing marriage dissolution, nullity and legal separation apply (Fam. Code, §299). Death of one of the partners also terminates a Domestic Partnership. In some cases, the partnership may be terminated without judicial intervention six months after both parties sign and file a prescribed Notice of Termination of Domestic Partnership with the Secretary of State. Most dissolutions, however, will not be eligible for such summary disposition. As in a marital dissolution, dissolution of a domestic partnership may entail:

- An equal division of the partners' community property estate;
- Joint title presumptive community property (Fam. Code, §2581) and reimbursement rights (Fam. Code,§2640);
- Community estate and separate property debt liability;
- Spousal support (Fam. Code, §4300 et seq.);
- Automatic temporary restraining orders;
- Child custody, child visitation, and child support.

While under the new law, the courts may, for the most part, apply the laws governing marital dissolution to domestic partnership dissolution, Commissioner Young notes that this is not the case with orders that would otherwise involve tax consequences or federal benefits. Neither California nor the IRS recognize the partners' earned income as community property for tax purposes. Unlike a traditional dissolution, the payor of domestic partner support currently is not entitled to claim an income deduction and the payee of such support does not claim the support as earned income. The allocation of federal benefits that might otherwise be awarded in whole or in part to a former spouse is similarly complicated because the federal government does not recognize California Domestic Partnership.

Commission Young also is concerned that another state may decline to recognize California custody, support, and other domestic partnership dissolution orders. The Uniform Child Custody Jurisdiction Act (UCCJEA) currently does not contemplate whether a California court may bind another state to a custody order made in the context of a domestic partnership proceeding. Choice of law may eventually become a complicated issue in such litigation. Many state legislatures have passed laws that either expressly or impliedly preclude the recognition of domestic partnerships – some of these laws are compiled in *Knight v. Superior Court* (*Schwarzenegger*) (2005) 128 Cal.App.4th 14, 24. No court has yet required interstate recognition of a domestic partnership order under the U.S. Constitution's full faith and credit clause. Were such a challenge raised, a California family law court's orders ultimately could be interpreted by the federal court.

Despite these uncertainties, Commissioner Young still believes that same-sex couples should continue to register with the Secretary of State. Such registration permits domestic partners to solemnize their relationship to the greatest extent possible under current law. In the context of a dissolution, prior registration allows the court to adjudicate the division of property rights, support, and to determine the best interests of the children of the partnership. Failure to register a partnership could result in the court being called to find a putative or de facto domestic partnership. (See *Marvin v. Marvin* (1976) 18 Cal.3d 660 [enforcing an implied and/or oral contract for half the community property where the consideration was not merely for sexual services], and its same-sex progeny, *Whorton v. Dillingham* (1988) 202 Cal.App.3d 447 [same].)

In the domestic partnership dissolution cases that have come before Commissioner Young, the parties initially disputed their custodial and support rights and responsibilities. Commissioner Young was pleased that the parties and attorneys were able to resolve those issues through mediation, and notes that domestic partnership cases involving children will be somewhat easier to adjudicate since the California Supreme Court's recent watershed decision proclaiming both partners in a same-sex relationship to be legal parents when they use assisted reproduction to produce children, whether or not they were biological parents (*Elisa B. v. Superior Court* (2005) __ Cal.4th __ SC S125912). Commissioner Young notes that this ruling parallels the traditional family law presumption that a child of either of the spouses, even if not the biological child of both, is a child of the marriage.

Commissioner Young expects that many variations of domestic partnership disputes will come before Ventura County courts in the near future. In the absence of uniform laws among the 50 states, and given the federal Defense of Marriage Act, many of the varied disputes will defy a cookbook adjudication. Even in the most straightforward of cases, the court and attorneys must become acclimated to new terms. For example, the references to "H" and "W" must be replaced with the gender-neutral "Petitioner" and "Respondent." Commissioner Young anticipates, however, that one thing won't change: The parties will continue to come into court with the same passions, emotions, and high anxieties that every couple experiences when their relationship unravels.

Panda Kroll *is a lawyer at Norman Dowler, Sawyer, Israel, Walker & Barton, and a member of CITATIONS' editorial board.*

California's Same-Sex Marriage Yo-Yo

By Panda Kroll

2000: Yo-Yo Down – California voters pass Defense of Marriage Initiative (Proposition 22, codified in Family Code, §308.5 ["Only marriage between a man and a woman is valid or recognized in California"]; see also §300 ["Marriage" is a personal relation arising out of a civil contract between a man and a woman"]). On the federal level, in 1996, the U.S. Congress had passed, and then-President Clinton signed into law, the Defense of Marriage Act, limiting federal definition of "marriage" and "spouse" to opposite sex partners (1 U.S.C. § 7), and providing that a state need not recognize same-sex marriages performed in other states (28 U.S.C. § 1738c).

2003: Yo-Yo Up – California Legislature expands earlier state laws recognizing domestic partnerships and enacts the California Domestic Partner Rights and Responsibilities Act (Fam. Code, §§297 et seq.) The Act permits same-sex couples (as well as heterosexual couples where at least one partner is over 62) to register in California as Domestic Partners, and affords them "the same rights, protections, and benefits, and [subjects them] to the same responsibilities, obligations, and duties under law,... as are granted to and imposed upon spouses" (Fam. Code, §297.5(a), effective January 1, 2005). The Act excludes rights and benefits granted to spouses by the federal government, precludes same-sex couples from filing joint state or federal tax returns, and provides that domestic partners' earned income is not treated as community property for state income tax purposes (Fam. Code, §297.5(g)).

2004: Yo-Yo Up – San Francisco County's Clerk, in response to a directive of Mayor Gavin Newsom, alters the County's official marriage forms and documents to be gender neutral. **Yo-Yo Down** – The California Supreme Court, expressly reserving the issue of whether California's statutes precluding gay marriage are constitutional, rules that San Francisco public officials had exceeded their authority in making such a determination on their own (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1069). The court also voids the approximately 4000 same-sex marriage licenses granted by those officials (*Id.*, p. 1113).

2004/2005: Yo-Yo Up – A San Francisco trial court, ruling on four consolidated cases, determines that California may not limit marriage to a man and a woman without violating the state's equal protection guarantees, and strikes down Proposition 22's denial of recognition of other states' same-sex marriages. (*Marriage Cases*, Judicial Council Coordination Proceeding No. 4365 (March 14, 2005)). The consolidated cases currently await a hearing by the First District Court of Appeal. The losing parties will almost certainly seek and be granted review by the California Supreme Court.

2005: Yo-Yo Down, Yo-Yo Up – While upholding California's Domestic Partnership Act as consistent with Proposition 22, a California appeals court writes that Proposition 22 precludes the state legislature from legalizing same-sex marriages (*Knight v. Superior Court* (*Schwarzenegger*) (2005) 128 Cal.App.4th 14, 23-24, pet. for review denied June 29, 2005 [dicta]). Another state appellate court, however, writes that Proposition 22 merely protects California's sovereignty to define marriage (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1424 [dicta]).

September, 2005: Yo-Yo Up – California legislature narrowly votes to legalize gay marriage; **Yo-Yo Down** – Governor Schwarzenegger promises to veto the gay marriage bill, citing as justification Proposition 22 and the pending court action.

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LEGAL URBAN LEGENDS: *TENDERLOIN HOUSING CLINIC v. SPARKS* AND NOTICES OF UNAVAILABILITY

By David Hazelkorn

In recent years, an increasing number of lawyers have been serving "notices of unavailability" stating that, for one reason or another, the lawyer is unavailable for anything to do with a particular case during a specified period of time. The notice is then waved before opposing counsel, like a cross in front of a vampire, to ward off all service, discovery, motions, hearings, and everything else concerning the case during this period of unavailability.

Tenderloin Housing Clinic, Inc. v. Sparks (1992) 8 Cal.App.4th 299 is invariably held up as authority for this proposition. However, *Tenderloin Housing* does not so hold. The belief that it does is a legal urban legend. In *Tenderloin Housing*, an attorney persistently exercised the right to discovery in a frivolous and oppressive fashion with an obvious intent to harass and inconvenience opposing counsel and her client.

Attorneys who say *Tenderloin Housing* is about notices of unavailability are misreading the case by taking the facts out of context. In that case, opposing counsel advised the lawyer that she would be away for two and one-half weeks, first at an arbitration in New York, then on a long-planned vacation in England. Shortly after the telephone conversation, Plaintiff's trial counsel: (1) set three discovery motions for hearing on a date on which he knew opposing counsel would be out of town; (2) served trial subpoenas for an unrelated matter on two witnesses represented by opposing counsel; (3) set three depositions for the last week of opposing counsel's vacation; and (4) secretly moved forward a hearing date which required opposing counsel to file opposition papers while she was still supposed to be in England. When opposing counsel was unsuccessful in getting one of the depositions continued, she returned from England early. Upon arrival in San Francisco, she was informed by the attorney that the deposition had been canceled. After a hearing the trial court found that the attorney had acted in bad faith and solely for the purpose of harassing opposing counsel.

Tenderloin Housing is not about "unavailability," "notices of unavailability," or any similar concept. And it certainly did not rule that such notices are talismans imbuing attorneys with the power to stay all proceedings. Rather, *Tenderloin Housing* has been cited for two principles: (1) sanctions and, (2) bad faith tactics. No case or article citing *Tenderloin Housing* mentions "unavailability," "notices of unavailability," or any similar concept.

Tenderloin Housing does not discuss a "notice of unavailability" as a recognized legal document or even a concept. Nor does *Tenderloin Housing* or any other case say a lawyer's unavailability creates or abrogates legal rights, tolls deadlines, or has any other effect except when there is bad faith by a party (including, probably, the unavailable party).

[Editor's Note: There does not appear to be any authority in the Code of Civil Procedure imbuing "Notices of Unavailability" with any legal effect. Rather, such notices may simply be used as evidence of bad faith should opposing counsel try to take advantage of the attorney's absence.]

David Hazelkorn *is an attorney practicing in Newport Beach.*

URGENT NOTICE/REMINDER: UPCOMING BANKRUPTCY DEADLINE

The VBCA Bankruptcy Section and the Ventura Bankruptcy Forum urge all practitioners and professionals to take notice of the upcoming deadline for federal bankruptcy cases.

Monday October 17, 2005 is the effective date for the new bankruptcy laws contained in the Bankruptcy Abuse Prevention And Consumer Protection Act of 2005. Any bankruptcy case filed on or after that date will be subject to all of the new laws, including the required "means testing" for Chapter 7 debtors.

To avoid the impact and requirements of the new laws relating to Chapter 7, a bankruptcy case must be filed BEFORE October 17, 2005. Please advise your clients to act immediately and seek qualified advice, and to not delay. Potential debtors should not wait until the last moment or right before the deadline. Chapter 7 filings are already on the increase, up 18% over last year.

This is the last opportunity to file a Chapter 7 bankruptcy case under the old law and rules, and avoid being sent into a payment plan bankruptcy. Any person considering filing a Chapter 7 bankruptcy should do so before October 17, 2005.

***Michael Sment**, Chair*
VCBA Bankruptcy Section

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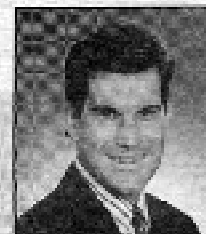

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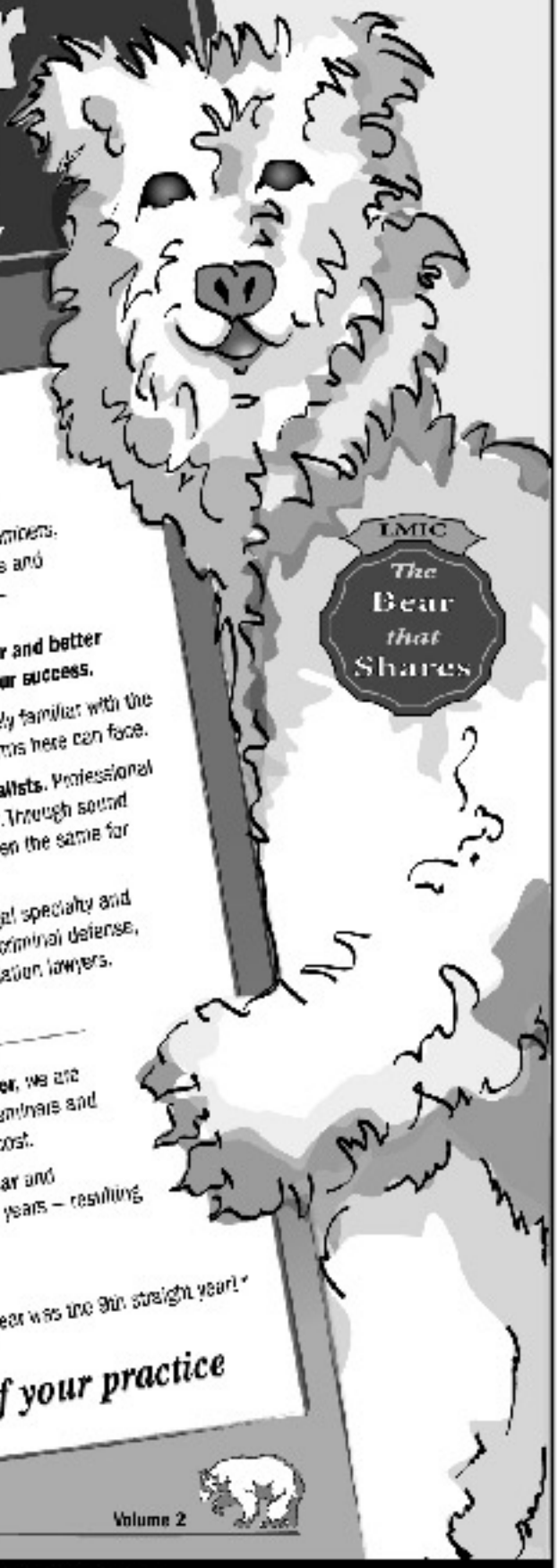

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PRO-BONO HIGHLIGHTS

By Verna R. Kagan, VLSP Senior Emeritus Attorney

At the time of this writing, it is late August and I am recently back from a vacation. My vacations consist of setting up camps at the edge of the wilderness far from telephones, cell phones, squalling children and wrangling adults. As one emeritus tells it, I am a "tree hugger."

I try not to think about my job but inevitably thoughts of work and home creep in. In my musing about work, I found myself truly wondering about the purposes and value of the VLSP program.

I concluded that our first purpose was to serve those who need us. Secondly, we try to justify the confidence that the Board of Directors of VCBA had in taking the gigantic step in creating the VLSP Program. Finally, we need to alter the opinion that the general public has of lawyers.

I believe, for the most, we have succeeded. The success does not happen in a vacuum. We are blessed with a wonderful Emeritus Attorney Team. There is a fine office staff led by Alice Duran and supporting group: Sonia Hernandez, Elizabeth Davis, and Nadia Avila and Naydean Dankert. Last, there are you, my colleagues and friends who have given so generously of your pro bono time and, I hope, will continue to do so.

Perhaps the attached letter says it all.

Dearest Verna,

I have been putting off writing you this letter for many months. I was trying my best to forget the pain and struggle of the difficult custody battle that your office assisted me with last year. Although writing this letter dredges up all of those memories I could not go without letting you know how much your help has meant to me, my children, and the rest of my family. I thank you for listening to a grieving, pregnant, and hormonal mother on the verge of a nervous breakdown about losing her children. Your patience and understanding was a blessing to me. I thank you for not turning me away or referring me to someone else when so many other doors had already been closed for me. I thank you for leading me to Earl Price and Susan Ratzkin who were both absolutely angels on earth to me. Words cannot express my gratitude to you and your staff. My only regret is not getting to meet you face to face to let you know how pleased I am with the outcome of my case. My boys have been with me since April and my baby is now one year old. I have three wild, crazy, wonderful boys running all over my home now. Be careful what you pray for, huh? Please give Earl and Susan my love and thanks. May God bless you for helping me at the worst time of my life.

Sincerely yours,

Tammy Morgan

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LOCAL MEDIATOR HONORED

Nina Meierding, Director of the Mediation Center for Family Law in Ventura, California has been selected to receive the John Haynes Distinguished Mediator Award by the Association for Conflict Resolution. The award, to be presented in Minneapolis on October 1, 2005, is given annually to a prominent and internationally recognized leader in mediation who demonstrates personal and professional commitment to finding mediated solutions to conflict, and who demonstrates creativity, innovation, and outstanding competence in the field.

Meierding has conducted over 4,000 mediations in the last 20 years. She has trained and taught negotiation, conflict resolution skills, cross-cultural and gender issues to thousands of individuals throughout the United States and abroad, and consults and trains at corporations, court systems, school districts, and universities. She is the former president of the Academy of Family Mediators and was awarded the Peacemaker Award by the Southern California Mediation Association for her work in advancing peaceful solutions to conflict. She is an adjunct professor at Pepperdine University School of Law and Southern Methodist University and was the co-founder of the Ventura Center for Dispute Settlement.

EAR TO THE WALL

PHIL ERICKSON died September 15. He is survived by his beloved wife, Senior DDA Maeve Fox, and other family. A Loyola graduate and attorney since 1988, Phil was a partner at Bamieh & Erickson for the last three years. Phil loved music. His family has asked that memorial donations be made to the New Orleans Musicians Hurricane Relief Fund, (888) 229-7911.

GREGORY W. HERRING, a partner in the law firm of Ferguson, Case, Orr, Paterson & Cunningham LLP, has been admitted as a Fellow in the American Academy of Matrimonial Lawyers. The AAML is a national organization of family law experts dedicated to studying, improving the practice of, elevating the standards of and advancing the cause of family law. All the members are certified by the State Bar of California, Board of Legal Specialization as Legal Specialists in Family Law. Mr. Herring also currently serves as the Chair of the Executive Committee of the California State Bar Family Law Section. He can be reached at gherring@fcopc.com.

The Law Offices of Edsall & Norris is pleased to announce the recent addition of **CRISTIAN R. ARRIETA** as associate attorney. Cristian graduated from California Western School of Law in San Diego and was admitted to the State Bar of California in June of this year. Edsall & Norris is a full-service law firm emphasizing estate planning and probate, business matters including organization and civil litigation, and family law. Cristian may be reached at 751 Daily Drive, Ste. 325, Camarillo, CA 93010; (805) 484-9002.

The Law Firm of Musick, Peeler & Garrett LLP is pleased to announce the opening of its Ventura County Office at 200 North Westlake Blvd., Suite 204, Westlake Village, CA 91362, (805) 418-3100. **GREGORY J. PATTERSON** will be the resident manager of the office. **LAURA K. MCAVOY, DAVID A. OSSENTJUK,** and **BRENT A. REINKE** have merged their practices into the firm and become partners of the firm. **AARON L. BOTTI** has become associated with the firm.

VOLUNTEER NEEDED to serve as alternate member of Ventura County General Hospital's Institutional Review Board (IRB). The IRB's function is to review proposed human subject research at County General. The Board meets two or three times a year. For details contact Wendy Lascher, (805) 648-3228, wendy@lascher.com

JEROME H. BERENSON
INN OF COURT

Impresario Glenn Campbell and Judge David Long led their team's performance in "A Night in Casablanca" for September's opening session of the Jerome H. Berenson Inn of Court. Contact Judge Henry Walsh at 654-2997 if you'd like to apply for membership in the Ventura Chapter. Applications may also be had online at www.vcba.org.

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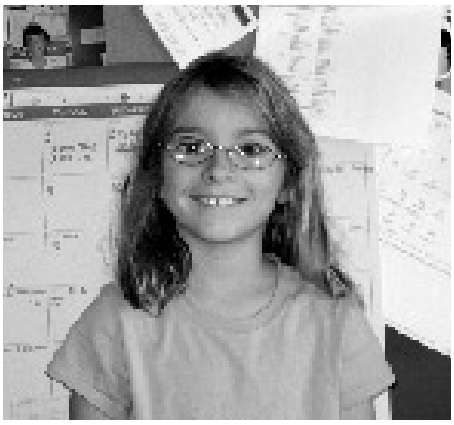

EXEC'S DOT…DOT…DOT…

By Steve Henderson, Executive Director

Looking for a unique way to help lawyers and their families in the Metropolitan New Orleans area? The Louisiana State Bar Association has established a fund to assist lawyers who lost their homes and offices in the storm. The Fund is being administered by the Baton Rouge Bar Association and intended to help only attorneys whose law practices and families have been displaced by this unprecedented disaster. Donations may be sent to the Hurricane Katrina Legal Community Relief Fund, c/o Bar Rouge Bar Association, 544 Main Street, Baton Rouge, LA 70802... From the AP: "U.S. Supreme Court Justice Antonin Scalia blasted what he called 'judge moralists' and the infusion of politics into judicial appointments after joining law students in a reenactment of a 100 year-old landmark case. Speaking before a packed auditorium at Chapman University, Scalia said he was saddened to see the Supreme Court deciding moral issues not addressed in the Constitution, such as abortion, gay rights and the death penalty."...

Quite a few of our colleagues attended the State Bar's 78th Annual Meeting in San Diego. Many of them honoring **Susan Ratzkin** and **Robert Guerra**, who received Pro Bono Service Awards from **Chief Justice Ronald George** on a Friday night in the Marriott's Grand Ballroom. CDPD **Michael McMahon** and DPD **Liana Johnsson** appeared to be leading the delegates' charge through their rituals and idiosyncrasies. Spotted at some point during the festivities were **Justice Gilbert, Judges Campbell, Reiser,** and **Smiley**; (participating in the California Judges Association), **Carmen Ramirez** (new Board of Governors member), **Tina Rasnow, Dien Le, Susan** and **Robert Miller, Steve Trolard, Nancy Goldstein, Jim Griffin, Steve Brown, Kate Neiswender, Meghan Clark, Joel Mark, Laura Bartels** and **Michael Planet**. Ms. Ratzkin completed her victory party by falling at home two nights later and fracturing her humerus... From Daniel Kaffee, in A Few Good Men: "My client's a moron – that's not against the law."...

Lisa Spillman gave birth August 29 to Atticus Jude Spillman weighing-in at 7 pounds, 13 ounces and 21 inches in length. Husband Paul and first-born Ella doing very well... From Cassandra, Mighty Aphrodite: "I see disaster. I see catastrophe. Worse, I see lawyers!"... A new survey by the ABA indicates two-thirds of lawyers give a full workweek of free legal aid per year. The ABA's survey queried 1,100 lawyers about their pro bono activity... License Plate of the Month: LIBESQ on a gold Infiniti driven by **Libby Barrabee**... Fun Fact: The Ten Commandments contain 297 words. The Bill of Rights 463 words. Lincoln's Gettysburg Address has 266 words. A recent federal directive to regulate the price of cabbage contains 26,911 words (The Atlanta Journal)... **Commissioner Mark Borrell** and **Rick Loy** are planning to participate in the Death Ride over 5 Sierra Passes on their bikes in July '06... From Ferdinand Lundberg: "Apologists for the profession contend that lawyers are as honest as other men, but this is not very encouraging."... **Greg Herring** has been admitted as a Fellow in the American Academy of Matrimonial Lawyers. It's an organization of family law experts studying, improving and elevating the standards of family law...

Deborah Sutherland will be honored October 6 at the National Women's Political Caucus of Ventura County's Eleven Remarkable Women and One Good Guy 2006 Calendar Reception at the County Museum of History. Get your calendar directly from Deborah at 644-6635... A pencil is deadly as a matter of law. (*People v. Page* (2004) 123 Cal.App.4th 1466). Sharpened pencil (here held to the victim's neck while he was being threatened) was a deadly weapon as a matter of law because it was capable of being used in a dangerous or deadly manner and it could be inferred that its possessor intended to use it as a weapon. (See also *People v. Simons* (1996) 42 Cal.App.4th 1100 [screwdriver])... **Mary Howard** of Strauss•Uritz, is president of the Rotary Club of Camarillo. **Georgianna Regnier** is on the Camarillo Rotary Foundation Board... From Will Rogers: "The minute you read something you don't understand, you can be almost sure it was drawn up by a lawyer."...

Judge Brian Back returned to work September 12 following a little surgery... Real World Rules by Bill Gates: "Television is not real life. In real life, people actually have to leave the coffee shop and go to jobs."... From Judge Irving Kauffman: "The trial lawyer does what Socrates was executed for: making the worse argument appear the stronger."... Over 60 folks attended the Barristers' Wine and Cheese event at the law offices of **Lascher & Lascher** in a successful effort to recruit mentors for Barristers. **Justice Coffee** and **Judges Smiley** and **Cody** were there too. . . From Erik Pepke: "Any society that needs disclaimers has too many lawyers."... From Conan O'Brien: "Yesterday at his confirmation hearing, Supreme Court Nominee John Roberts said, "Good lawyers can argue any side of a case." Then Roberts said, "No, they can't."

When the Intellectual Property Section showed up for their monthly lunch meeting at the Black Angus in Thousand Oaks, the restaurant was closed because of backed-up sewer lines. Thinking quickly on his feet was IP Chair **Chris Balzan**, who asked the manager if he could use the facility and have pizza delivered as an alternative. The manger agreed and our 17 attendees were relatively happy. Overheard comment by the waitstaff – "This places is unfit for everyone but lawyers."... The August issue of California Lawyer identifies the six busiest practice areas in an article, "Catching the Wave." In order, they are: Corporate Governance, Employment, Entertainment, Intellectual Property, Mergers and Acquisitions, and Real Estate... On the Move: **Sam Gasowski**, has departed **Nordman, Cormany, Hair & Compton** after nearly two years and is employed at **Stowell Zeilenga Ruth** & **Treiger** in Westlake. Sam has been a member of the Barristers' Board the last two years. **Glenn Fuller** is also leaving Nordman and has joined-up with **Weston Benshoof's** office, also in Westlake... From Neil Skene: "Good writing, especially good persuasive writing, pulls the reader in. Most legal writing is, by contrast, repulsive."...

Bart Bleuel finished 4th in his age division at the Annual Gatorman LaJolla 3 Mile Ocean Swim. He finished in 1:40... Serious and compelling read in the summer edition of the California Court Review entitled: "The Truth About the Terri Schiavo Case," written by **Justice Arthur Gilbert**. (www.courtinfo.ca.gov/reference)... Over at the County Government Center: **Lou Frassinelli** and **Alexa Jakowski** have left their jobs as Superior Court Research Attorneys. Kathy Bower moves from Simi Courthouse to Ventura and the two new faces are **Carol Choi** and **Hunter Strayer**...

Steve Henderson *has been the executive director of the Ventura County Bar Association since November 1990 and considers himself somewhat like a "Judicial Umpire." He doesn't make the rules – just applies them. "Nobody ever went to a ballgame just to see the umpire." (Well, actually, he did attend plenty of games to see the umpire – remember Palone, Ashford, Gregg, Williams and McSherry?)*

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