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# CITATIONS

M A R C H - T W O T H O U S A N D S E V E N

## PORTRAIT OF A LADY (JUDGE)

*By William M. Grewe*

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JONATHAN FRASER LIGHT

LOUIS J. VIGORITA

STEVEN P. LEE

MARK A. NELSON

MARK E. HANCOCK

VERNA R. KAGAN

STEVE HENDERSON

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## PRESIDENT'S MESSAGE

*Jonathan Fraser Light*

At the risk of “going deep” on you, the last few weeks have been a time of reflection for me. Why? Start with my twin daughters, Katherine (“Kat”) and Elena, turning 16 on January 28. Certainly a milestone in any family, and unbelievable how fast 16 years went by. We’re no longer going on “bug walks” to snare butterflies and exotic insects in the long-gone fields next door to our house. Now it’s white-knuckle excursions as my daughters learn to drive. “Yes, now is a good time to make a lane change . . . BUT YOU NEED TO CHECK THE LANE FIRST!” And they no longer spill their kid’s hot chocolate in Starbucks. Now they spill their “grande-decaf-white-chocolate-latte-with-an-extra-shot” in my car on the way to school.

Segue to February 13—I turned 50 years old on that date. I remember thinking as a teenager and in my twenties how bloody old I’d be at the millennium – 42! – and how ancient that seemed. My forties just blew by in a blur, and I’m sure the fifties will be little different. My father, who was 19 years older than my mother and thus had a slightly different perspective on life, made it clear that time and aging accelerated as one got older: figuratively and literally. I now see that he was correct, although not too much bone creaking and senility have set in quite yet. I still get a little paranoid when I forget someone’s name or why I know them, however. My dad also emphasized how critical one’s health is, and even as a teenager I tried to embrace his admonition not to beat up my body too much, as I was going to need it to function properly for a very long time. So far, generally so good.

I’m still trying to figure out what my mid-life crisis is to be. I’m not terribly into cars, despite being around Don Hurley and Tony Strauss at executive committee meetings these past few months. I’m afraid I can’t work up the requisite froth over a push-button (awright, “paddle shift”) Maserati as my brethren, but I’m trying. My brother-

in-law, Marc, just rented a space capable of holding seven muscle cars, but it just doesn’t hold the same allure for me. I guess I’ll stick with the eight-year-old Expedition. Yes, it’s a gas guzzler, but it’s paid for, holds all my junk, and I’ve still got teenagers to haul around, at least for another few months. Besides, teenagers’ cars and college are soon to arrive, and I’d better keep stockpiling for those rather pricey milestones instead (don’t even mention weddings!).

I’ve said for years that my rather modest goal in life is to have enough money for all the sushi, movies and theater that my wife and I could stand, so I guess I won’t be spending my money on the trophy house or car. It might be fun to have both, but not worth the stress to obtain them and maintain them. And I found my beautiful elementary school teacher trophy wife 24 years ago, Angela, so no need to go there (she now defines “trophy wife” as “young and dumb”). Besides, it’s the small events of daily life that I generally enjoy the most, and that helps avoid what is referred to in our house as “post big-event blues”—that minor depression that sets in after the huge build-up to an event that lasts a few hours or a day, and then is done. Back to the routine of life, and you’d better enjoy that routine and the small pleasures it brings. Much more satisfying, overall.

One of those came recently when my sister, Lisa, called on a Friday afternoon. She teaches 5th/6th grade in Newbury Park. Some years ago I presented my baseball book slide show to her class, and she had told me beforehand that one young man was a Cub Scout and had been having a tough time being raised by his grandparents. As an Eagle Scout, I brought him a small token of Scouting and told him that if he didn’t become an Eagle Scout, he had to return the token to me. My sister lost contact with him until late January this year, when an envelope was waiting for her at the school office. It was an invitation to his Eagle Scout Court of Honor in late February. The young man had persevered, and I couldn’t have been happier if it had been my own son.

It was a good day. Naturally, we celebrated with sushi and a movie that night.

*Jon Light, who can be found at Nordman Cormany Hair & Compton, LLP, would like to thank attorneys Russell Baker and Martin Zaehring for mentoring his daughters’ Newbury Park High School Mock Trial team. The girls loved them, and the experience, and will be back next year.*

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# PORTRAIT OF A LADY (JUDGE)

By William M. Grewe



Alice Titus, who had heard the whistle of the southbound Southern Pacific every day of her young life, climbed aboard at the Santa Paula station and headed for the only law school in the Southwest, USC Law School, just months after her 1905 graduation from high school.

When she entered the law school, located directly across from the Bradbury Building, she would have found that she was the only woman among fifteen entering students. The space had been donated by a suffragette who toured the country with Susan B. Anthony. Women were welcome.

Alice Titus was born in California in the mid 1880's, the fifth child of James Titus and Mariette Briggs. Her siblings were born in the mid-west. The closest in age to Alice died shortly before the family reached California.

In Minnesota, Iowa, and Wisconsin, James Titus struggled as a farmer. He took the family west to some of the best soil in the world, and sold insurance. The business burned to the ground in December 1903.

In 1904, James Titus, whom everyone called J.B., was serving on-the-side as Justice of the Peace. A monthly stipend was paid. The office involved an assortment of tasks including, at times, escorting the accused to jail. He would be the only judge in the county who would run unopposed in 1910, and the only judge who would enter an automobile race in 1911.

Alice, certainly, tagged along with her father on occasion. There is a sense that her birth, following the death of her sibling, brought great joy to the family.

Why, after graduating from high school in 1905, Alice decided to go to law school, or how she knew that USC had a fledgling school, is not recorded. She was, no doubt, the first woman from Ventura County to enroll in law school. How she went about applying, and who decided to admit her, is also unrecorded.

USC Law School was incorporated in 1897. At the time, most law schools, including the most prominent, did not admit women.

It is estimated that Alice was between the sixth and tenth woman to graduate from USC Law School when she completed her studies in 1908.

Alice would have known Clara Foltz, the first woman admitted to the California Bar and a fighter for women's causes. She would have known every prominent suffragette in Southern California from 1900 to 1920.

Women would not gain the vote in California until 1911 and the Constitution would not give a nod for another nine years. Only men served on juries. Most courthouses did not have a ladies' room. That is the world Alice stepped into when she passed her oral bar examination before the state supreme court.

When Alice began law school in 1905, there were questions as to whether or not women, who were first allowed to enter the Olympics five years earlier, had the stamina to complete a professional academic program. Roughly one percent of all lawyers in the country at that time were women. It is unclear how many were actually practicing.

Los Angeles, with a population topping 100,000, was an exciting place to study and practice law. USC was under scrutiny for paying a football player; and a theater was sued for discrimination. In the year of her graduation, there was a counter demonstration protesting a KKK rally; an aeronaut dropped a fake bomb from a dirigible onto city hall, and there was talk of beautifying the Los Angeles River.

While he could not be in Los Angeles himself, President Roosevelt sent his Great White fleet chugging into Santa Monica Bay in 1908. The response: An outcry that the ships were polluting the air.

While Alice could earn a degree, using it was

another matter. At the time, women were hitched to a head-of-household. Single women generally did not live on their own. Clara Foltz had been abandoned by her husband. While in law school, Alice most likely lived at a boarding house such as the YWCA. If a woman were widowed or abandoned, a household had been established in the name of a man. In those cases, a woman could continue the household in her name.

In 1908, Alice returned to her family's Santa Paula home. It must have been a proud day for J.B. and Alice when she hung her shingle in the window of his Main Street insurance business, establishing herself as the first practicing woman attorney in Ventura County.

Alice would practice for three years in Ventura County, up to the death of her father in 1911. An older brother had moved to Los Angeles. Alice, her mother, and sister joined him there in 1911, and Alice was hired as a Deputy City Attorney for the City of Los Angeles.

We don't know, but it is reasonable to believe, that Alice was the first female deputy city attorney in Los Angeles, and, most likely, in all of Southern California, if not all of California.

Alice was a prosecutor in the city attorney's office for seven years. She resigned in 1918, when she married Robert Magill. In her words, "I gave up my position in law to become a lady for a number of years." It was more than that.

In 1918, Alice was positioned like no woman lawyer in California before her. She had graduated from an accredited school, as USC was awarded its national accreditation in 1907. She had practiced for 10 years. She most likely knew every practicing attorney in the city of Los Angeles if not the county. She preceded the creation of the women's law sorority, Phi Delta Delta. With the exception of Clara Foltz, she was out in front of all the women lawyers who would be recorded as achieving "firsts."

When Alice married, her career as an attorney stopped. No Google search will lead to her story. She would have known those to whom such searches do lead but not as pioneers. With the exception of Clara Foltz, the women who are chronicled came in Alice's wake.

Years later, when looking back, Alice had no

regrets, "I'm not much of a hand to live in the past, not much of a record keeper. I don't live in the past-I enjoy my life each day."

As of 1922, there were 130 women admitted to the California Bar. Sixteen hundred were admitted nationwide but only half were practicing. Sandra Day O'Connor would not be born until 1930.

There is little mention of Alice again until 1938. She did spend part of this time volunteering as a teacher of young women. She was active in women's groups: P.E.O. International and the Ebell Society are two. In 1926, she must have been filling-in for the city attorney's office as she was given an award for being the most polite person in City Hall.

In 1938, Robert Magill retired from the railroad. The couple returned to Santa Paula. The City Council approached Alice and asked if she would fill the position of City Judge. She agreed. She held the position, as Ventura's first woman judge, for 15 years while Robert ran a paint store. When Robert died, Alice left the bench and ran the paint store for three years when it was sold. She then ran for the position of Judge of the Justice Court but lost. In 1960, she ran again and was elected. The position changed to Municipal Court Judge in 1965.

At age 80, Alice was working in two courts and often hearing cases into the evening. She retired in 1968 after serving a total of twenty-three years on the bench. Her only plan was to learn to shoot pool. Her clerks said they would miss the judicial robe with the lace-trimmed collar, and the powder puff in the restroom.

If there were any doubt as to whether Alice knew of her contribution, she made it clear upon leaving the bench, saying, "I wish there was a woman to succeed me. I wish there was a woman to carry on."

Alice's bar number is 9098 but her actual ranking is lower. Numbers were first assigned in 1927. Except for a few honorary ones, numbers were assigned randomly to those already admitted.

Throughout her life, an etching of the Santa Paula railroad depot from whose platform Alice stepped in 1905 hung on a wall in her home. Alice Titus Magill had much to tell.

She kept such things close but she has winked at us across a century for when she left Santa Paula in 1905, she was age 17 or 18. When she reached the law school, she was 20. When asked about her age in 1968 she said, "I don't remember." The Honorable Alice Titus Magill died on December 22, 1975. Her portrait will hang in Courtroom 22.

*Bill Grewe is a partner with Rose, Klein, & Marias in Ventura. He used quotations from the 5/5/1968 issue of the Oxnard Press-Courier. Mr. Grewe thanks Nancy King, Beverly Harding and U.S.C. Associate Dean John G. (Tom) Tomlinson for their assistance in researching this story.*



### Bill writes of investigating this story:

Alice was the real thing. What I have written is a pared-down piece. I saw her name on the list of judges long-since retired and was curious. She has no living relatives that I could locate. There has been no one to trumpet her tale. I pulled her probate file. She left money to P.E.O. International and USC Law (she expressly left the etching of the depot to the son of a longtime, if not life time, friend).

I called the law school but they had no record of Alice ever attending. It did not seem right to me. Ed Beach said that she was a USC Law graduate. I called the school again and pleaded that there must be someone who could clear this up. Indeed there was. I was referred to A.D. Tomlinson whose hobby is the school's history. Before I could finish my sentence, and say Alice's name, he interrupted and said, "Titus. Alice Lynette Titus. You've come looking." He was so excited that someone else had an interest. I pictured this guy sitting in a basement somewhere surrounded by dusty books and papers. He said, "When this happens, I feel like a paper doll lying on the desk stands up and comes to life."

## Letters to the Editor

I just finished reading the article Verna Kagan wrote for CITATIONS about Rob. It was perfect. She was able to capture the joy he had for life and the love he had for his family.

Thanks to Verna for doing such a great job. Best wishes to you and your family in the coming year.

*Colleen Toy White, Judge*

There are not enough words to express how I feel over all Verna Kagan has done for us. Her support, strength and love have been so helpful. We thank her so much for taking pictures, making an album and a disk. Everyone has been so touched by all of that, also we thank her for the writing in your Bar Association magazine; the words were just beautiful. She wrote about her usual morning exchanges. When Daniel leaves in the morning for school and she is out there, it just brings those memories back. They are good memories because Robert always said he would make his morning comments to Verna and loved doing it

*Vicki Bernet, widow and neighbor*

*Editor's note: These letters were written directly to Verna Kagan. CITATIONS has paraphrased them as Letters to the Editor.*

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# FAMILY HISTORY

By *Louis Vigorita*

This is traditional Irish bread, but the addition of raisins makes it what is known as a "Spotted Dog". Also the addition of baking powder and sugar makes it a "cake" according to the purists. See the web site [www.bookguy.com/cooking/](http://www.bookguy.com/cooking/) for a little history on this traditional Irish bread.

My own mother, who is a great cook and not a stranger to collecting recipes from around the world, was walking on the beach in East Hampton, New York one breezy August when she came across some picnickers. They were sampling from a "black skillet" on a beach blanket. My mother, not being shy, introduced herself.

An elderly woman of Italian descent told my mother that when she was a young girl growing up in Little Italy on the lower east side of Manhattan during the Great Depression of the 1930's her family was destitute. Her father abandoned them and left her mother with six mouths to feed and no visible means of support. In order to survive her mother went to work and the rest of aunts and uncles and cousins pitched in on a regular basis. One would bring clothes and shoes, another would bring food, another would pay utility bills, etc. This was a sacrifice for each of them. The woman remembered that without these monthly visits they would not have been kept together as a family. But they survived, and all six children went to college.

This was a summer reunion. My mother asked the woman what brought her to East Hampton, a far cry from the lower east side. The woman told my mother that she went to England as an exchange student on a scholarship, where she met her future husband, who was studying at the London School of Economics. He was Irish. They got married, he became a successful entrepreneur, and now they live in a castle in Ireland and summer in East Hampton. All her brothers and sisters are still alive except for one, who was killed in the World Trade Center on 9/11. My mother looked around and counted those on the blanket...

Oh, the skillet. When they married his mother's best friend gave her the skillet as a wedding present because she knew that she liked to cook.

Happy Saint Patrick's Day!

## IRISH SODA BREAD

5 cups flour  
2/3 cup sugar  
1 Tblsp baking powder  
1 tsp baking soda  
1 tsp salt

2 cups raisins  
1 stick sweet butter  
2 1/2 cups buttermilk  
1 slightly beaten egg

10 1/2 inch black skillet

Preheat oven to 350 degrees.

1-Sift together flour, sugar, baking powder, baking soda, salt.;

2- Cut 1 stick sweet butter into flour mixture;

3- Mix into flour mixture: buttermilk and slightly beaten egg. Do not beat! Just incorporate ingredients into flour mixture.

4- Add Raisins.

5- Pour into buttered 10 1/2 inch black skillet and make cross + on top of flour mixture.

6- Bake at 350 degrees for one (1) hour.

*Lou Vigorita practices in Ventura, where he handles workers compensation and Social Security matters. He is a member of CITATIONS' editorial board.*

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# FROM TASHKENT TO VENTURA (VIA MOSCOW AND MIAMI)

## Russian Lawyer Comes to Town

By Steven P. Lee



One of Myers, Widders, Gibson, Jones & Schneider LLP's newest associates is Svetlana Kalganova. She was born and raised in Uzbekistan and received her law degree from the Moscow State Institute of Economy and Humanitarian Sciences in 1999. She emigrated to the United States from Russia in 2000 and earned her Masters of Law in Taxation from the University of Miami School of Law in 2002. She eventually made her way to Ventura and MWGJS, where she practices in the areas of corporate, transactional, general business, tax and estate planning law. I recently had a chance to interview Svetlana for Citations and learned that not only is she adept at business law, but she even knows a little bit about martial arts and how to wield a sword!

### **Svetlana, where were you born and raised?**

I was born and raised in Tashkent, Uzbekistan. It used to be one of the Central Asian Republics of the former Soviet Union. Now it is an independent country.

### **Tell me a little about what it was like growing up in the former Soviet Union.**

It was the best time of my life! I realize now that the socialist system was far from perfect, but from a child's perspective, it was great.

The education was free. Sports were free. A child could try any sport he or she was interested in or just curious about. Medical services were free, and the doctors made house calls!

### **When and why did you leave?**

I left for the United States in October 1999 because I "won" a green card. There is a U.S. Government program called the Diversity Visa Program, which is known as the Green Card Lottery. It is an official U.S. Government program which grants 50,000 visas every year to people all around the world. To enter the "lottery," you just have to provide your name, place of birth, marital status and citizenship, and then keep your fingers crossed that the computer will pick your application out of millions received from all around the world. The computer picks 100,000 applications and then a real background check begins. The whole process takes about two years. Eventually, 50,000 out of the initially selected 100,000 will get their green cards. Once you get approved for a green card, you have to physically enter the United States within 6 months after your last interview in order not to lose it. That's how I got here.

### **Do you still have family and friends in Russia?**

Absolutely. In fact, all of my family is in Russia. They emigrated to Russia from Uzbekistan after the break up of the Soviet Union. I also have friends in Uzbekistan with whom I keep in touch.

### **Do you ever go back? Do you have plans to visit?**

I try to, but it is rather far for a "quick" visit. The last time I visited my family was in 2003. I spent the whole summer there. Since I started working, I cannot take such long vacations, so they visit me instead.

### **What brought you to Miami?**

When I first came to the United States, I lived in New York. After working as a law

clerk for about a year at the New York office of Holland & Knight, LLP, I decided to go back to school to be eligible to take the Bar Exam and became a lawyer in the United States. The University of Miami has a very good tax program. Plus, you cannot beat the weather!

### **What brought you to Ventura?**

I got a job! I was admitted to the California Bar in December 2005. In May 2006, I moved from Miami to Los Angeles and started looking for a job. I moved to Los Angeles because it is the biggest city in the Southern California and the odds of finding a job in a big city are usually better. After living for a couple of months in Los Angeles, I realized that Los Angeles is too crazy for me, and I began focusing my search on neighboring cities. When I was offered a position with Myers, Widders, Gibson, Jones & Schneider LLP, I quickly accepted the position and have not regretted my decision.

### **What is the biggest difference between practicing law in Russia and in the United States?**

First, the legal systems are completely different. Russia is a civil law country, which means there are no cases, no precedents and everything is codified. Actually, that was one of the reasons I decided to enter a Tax LLM program. I figured that since I was comfortable working with codes, it would be easier for me. Well, it was not. However, it helped. Second, the client base is different in Russia. Individual clients are very rare. With the exception of the criminal law practice, it's mostly corporate clients, local and international.

### **Are attorneys in Russia the subject of as many jokes as they are in the United States?**

Not so much. Again, since individuals do not deal with lawyers on day-to-day basis, they have nothing against them. In addition, for a long time, the legal system was associated with the government. There was

## COLLABORATIVE CORNER

By Mark Nelson

When I discuss Collaborative Family Law, especially with attorneys, there always are a lot of very intelligent questions. I think we all intuitively believe there must be a better way. These are questions I ask when considering and handling a collaborative case:

- What do I know about a client's capacity to respond to constructive alternatives?
- Will I be able to change the client's frame of reference from short term specifics to long run macro goals?
- Will the client commit to conscious constructive choices?
- What process goals will need to be set and achieved in order to reach outcome goals?
- What will I have to do as a process manager?
- Am I confident that party participation will be in good faith, with full disclosure?
- What are each client's "under the line" interests?
- What personal or psychological impediments to agreement does the collaborative team face?
- What has been the historic evaluation and decision path of the couple in past resolutions of matters they jointly faced?
- What support and understanding does my client need in order to feel comfortable with a resolution?

The collaborative model compels the practitioner to seek resolution within the team. It does not permit the shifting of outcome responsibility to an unknown player outside the team – i.e., a judge. But we remind ourselves that the attorney is responsible for controlling the process; the client is responsible for controlling the outcome. Good process will result in a good outcome.

*Mark Nelson practices family law in Oxnard.*

no private sector, and people did not joke about the government. They were afraid of it. Police, "militsiya", on the other hand, are a different matter, especially road patrol. They are the real "victims" of ridicule.

### What do you miss most about Russia?

The food. It took me a couple of years to get used to the food here.

### What is the biggest misconception Americans have with Russia and Russians?

That every place in Russia is cold. Americans think that Russia consists of Siberia only. In fact, Russia is very big. It is bigger than the United States, and it has different climate zones.

### So when you are not busy reading the tax code, drafting trusts or drafting purchase agreements, what do you do in your spare time?

I like to read...things other than the tax code. I enjoy cooking and trying new recipes. I also love everything associated with water - swimming, scuba diving and walking on the beach. I even like doing the dishes.

### What is something very few people know about you?

I used to be a pretty good dancer. I even wanted to become a professional. But everybody told me that was not a profession, so I became a lawyer instead. I also was pretty good at fencing. I was involved in fencing for 5 years – training, competing and even became a candidate for what is called a master of sport. That is the rank which is one degree below being considered a master of sport. When you are a master of sport, you can compete in international competitions. I also have a red belt in taekwondo.

*Steven Lee is a business and employment law attorney with Myers, Widders, Gibson, Jones & Schneider, LLP.*

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## IN YOUR CORNER – An Essay on Independent Counsel - Part Two

By Mark E. Hancock

*In the January, 2007 CITATIONS, Mr. Hancock wrote about reasons insureds may need independent counsel, and described the history of Cumis counsel (San Diego Federal Credit Union v. Cumis Ins. Soc’y, (1984) 162 Cal.App.3d 358).*

Civil Code section 2860 states that a conflict exists when an insurer “reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer...” In determining when a conflict is “Cumis-worthy,” one may also go beyond that statute. Section 2860 does not provide the exclusive guideline for determining when Cumis counsel must be provided (*Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal.App.4th 1372, 1396*).

### CONFLICT, WHAT CONFLICT?

I believe that defense counsel shapes what happens in a case, and can affect coverage and outcome most of the time. However, don’t expect insurers to concede this. They may ask you to prove that their lawyer would be conflicted in representing the insured, knowing the way to compel appointment of Cumis counsel at the outset is by filing a declaratory relief action (*U.S.F&G Co. v. Sup. Ct. (1988) 204 Cal.App.3d 1513*).

*Dynamic Concepts, Inc. v. Truck Insurance Exchange (1999) 61 Cal.App.4th 999* held that the mere possibility of an unspecified conflict does not require Cumis counsel. “The conflict must be significant, not merely theoretical, actual, not merely potential.” The court explained its reluctance to presume a conflict by stating that insurer-appointed defense counsel owe the insured the same level of competent and ethical representation as if the insured had retained them personally. It overlooked concerns of who selects and pays for insurance defense counsel and started with a counter-presumption that defense counsel are good guys and gals. In my view, this might be ok if the Insurance Commissioner or State Bar maintained satisfaction ratings for defense counsel akin to the seller ratings on eBay, but they don’t. (If they did, it would

be interesting if the ones with the highest satisfaction ratings from insureds remained panel counsel.)

The problem with the *Dynamic Concepts* view is it asks too much of insureds. The decision plays into insurer reluctance to ever recognize a need for Cumis counsel. The attorney-client privilege protects attorney-client communications. Why, pray tell, should an insured have to go to court to elaborate on concerns, fears, and strategy issues in order to secure independent counsel, at the outset no less?

In a 2005 State Bar MCLE seminar, attorney Edward Susolik gave an example of an insurance defense lawyer, who, in answering interrogatories, identified “the occurrence” as happening on a date that (coincidentally) benefited the insurance company that selected him. How does one “prove” this is going to happen at the outset of the litigation?

Not only did the *Dynamics Concepts* court require one to name and demonstrate a conflict, but it went on to state that conflicts (even if identified) can be reconciled based on a “defense of total nonliability.” Is everything copacetic because an insurer has stated, “We deny conflicts and even if there are any, we are pursuing a case of total non-liability?”

Take the case of a guy accused of battery, whose insurer is defending him under a reservation of rights. His real interest is resolving the case and avoiding the risk of going out-of-pocket. To accept the argument that pursuing a case of total nonliability resolves conflict would be to accept that the insurer could choose to take the case to trial with insurance defense counsel. The result might be a defense verdict, but it might also be a verdict outside of coverage, or exceeding policy limits. Just because one possible result *might be* total nonliability doesn’t take care of the conflict.

Isn’t it better to be safe than sorry? Shouldn’t the idea be avoiding conflict in the first place? With the provisions about experience and rates, why favor the insurer?

### SO WHAT IS A CUMIS-WORTHY CONFLICT?

The most common situation where an insurer has provided Cumis counsel is where the nature of the insured’s conduct is at issue, i.e., the conduct is alleged, or might be characterized, as either intentional or negligent. Courts seem to acknowledge that defense counsel can have an impact in how such a case turns out. I would not be surprised, however, to see even this challenged on a where’s-the-proof-we-wouldn’t-do-as-well-basis.

One treatise opines that Cumis counsel is also required where facts affecting the coverage will be determined in the underlying action, where the amount of available insurance might be affected by defense counsel’s handling of the underlying action, where the insurer has reserved its rights based on alleged lack of notice and/or failure to cooperate (since a loss in the underlying case would further the coverage defense), where the insurer lacks the incentive to provide a vigorous defense (such as where the insurer insures both sides in the dispute) and where the insurer has filed suit against the insured (1 California Liability Insurance Practice: Claims & Litigation (CEB, 2005) §13.9, p. 454; see also *James 3 Corporation v. Truck Insurance Exchange (2001) 91 Cal.App.4th 1093*).

*Blanchard v. State Farm Fire and Casualty Company (1991) 2 Cal.App.4th 345*, upheld the denial of Cumis counsel in a case where certain kinds of damages would be covered and others would not be. The *Blanchard* opinion states that there was no showing of a way that the defense attorney could have controlled the damages issue. You take your damages as you find them. The court breezed through its “analysis” by stating that both the insured and the insurer had an interest in minimizing liability, so there was no conflict. I disagree, because not discussed is how hard one looks. An attorney controls the thoroughness of the search for covered consequential property damage, and the advocacy for classification and coverage of gray-area items. Might that

not affect the amount of insurance available to resolve a dispute? Remember that with settlement money, it's not generally a dispute over its classification, or what it's for that's important, but how much is available.

Although Civil Code § 2860 states that an insurer is not obligated to provide Cumis counsel merely because the insured is being sued for an amount in excess of policy limits, Cumis counsel must be provided if the plaintiff makes an offer within policy limits in a case that presents a substantial likelihood of an excess judgment (*Foremost Ins. Co. v. Wilks* (1988) 206 Cal.App.3d 251).

## CONCLUSION

Independent counsel can be useful in many situations, from finding, evaluating and proving up insurance coverage, to representing a client where the insurer resists defending or indemnifying its insured. To improve chances of having that independent counsel paid for, the client should request Cumis counsel, not waive it. The client should contact an attorney qualified to act as Cumis counsel to review the facts and insurance coverage. Although not every conflict gives rise to the right to Cumis counsel, independent counsel may be able to develop an argument for insurance and/or additional insurance and get the client defended by a competent attorney at insurer expense.

The *Cumis* rule is not based on insurance law but on the ethical duty of an attorney to avoid representing conflicting interests (*James 3 Corporation v. Truck Insurance Exchange* (2001) 91 Cal.App.4th 1093). If you are denied Cumis counsel despite a request, remember that in addition to a possible bad faith case, you may have a possible basis for complaint against an insurance defense attorney who fails to look out for you, or who favors the insurer to your detriment.

*Mark E. Hancock is a Ventura attorney who represents insureds in first party claims and third party matters*

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## EAR TO THE WALL


Changes at **Koppel, Patrick, Heybl & Dawson**, a firm focusing on intellectual property matters. **James K. Dawson** has become a director and shareholder, **Brian J. Philpott** and **Abbey M. Kulkarni** have joined the firm as associate attorneys, and **John J. Deinken** and **Judith G. Shelling** have become of counsel. The firm's offices are at 555 St. Charles Drive, Suite 107, Thousand Oaks 91360. (805) 373-0600.

**Miles Lang** has joined Cunningham & Associates as a litigation associate. The firm focuses on wills, trusts, and estate law. 771 E. Daily Drive, Suite 350, Camarillo, CA 93010. Phone (805) 484-2769 fax (805) 987-8183.

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# PRO BONO HIGHLIGHTS

By Verna R. Kagan, VLSP Senior Emeritus Attorney

This past month, one of our Emeritus Attorneys, Dolores Anderson, submitted her resignation. Along with her resignation, she did explain that she really enjoyed her work with our department and all the people with whom she came in contact.

Dolores has made a decision that she is going to move to Oregon. In fact, she has her eye on a piece of property she hopes to buy there. It sounds like more of a rural atmosphere than we have here, with a less frenetic pace. As a camper who has visited several of the national forests of Oregon, I am jealous enough to want to go Park on her doorstep.

Dolores came to us with an abundance of valuable experience needed in our program; she spent many years in the Child Support Division when it was still in the office of the District Attorney. Following that she was in private practice for several years before her retirement when she came to assist with probono.

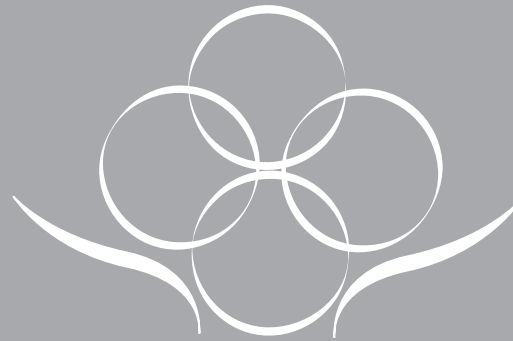
Concurrently, she has served on the ground jury at least two fiscal years and will be leaving the community at the end of this term.

Knowing Dolores as I do, she won't be sitting still but will find ways to lend her many talents to her new community. We wish her a fond farewell and the best of luck.

We send get-well wishes to two of our Emeritus Attorneys. Ray Clayton suffered a TIA in late January. He appears to be returning to good health and we wish him the very best. He is a very long term valuable member of the team.

Another long-term valuable member of our team, Pauline Zebker, underwent back surgery. Recuperation will take from two to three months. We believe she will return feeling more comfortable than she has in years.

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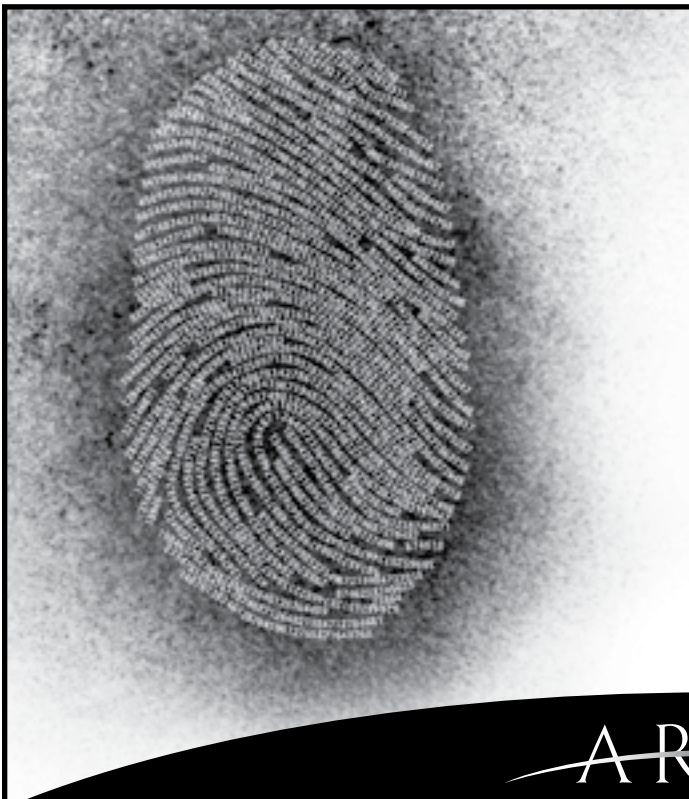
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**David Cunningham's** last day at **FCOP&C** was Jan. 30. He grabbed a desk at **NCH&C** as a senior real estate litigator. David helped start the firm with **John Orr** and **Mike Case** 25 years ago . . . Well, I may not be impeccable, unimpeachable, and flawless after all. For the first time in my 16-year plus tenure, I engaged in a somewhat heated, verbal standoff with a member of our bar. Didn't last 30 seconds. So wrong on so many levels, but cooler heads eventually prevailed and we exchanged email apologies. For any members who may have witnessed or overheard, I apologize; for the rest of y'all, I remain near perfect . . . Maybe he'll actually do it this time. **Don Hurley**, bar president in 2005, will retire April 6. Don remains the fund-raising guru of our foundation, **VLSP, Inc.** . . . From Roy M. Cohn: "I don't write polite letters. I don't like to plea-bargain. I like to fight." . . . Want the illustrious history of the yellow legal pad? [www.legalaffairs.org](http://www.legalaffairs.org). Click search and type "yellow pad". I promise you, it's worth it, including, "AMPAD (as the company is known) manufactures legal pads under its own name, but it also makes pads that are later stamped with other brand names, like Staples and Wal-Mart." How about who purchases the white ones? How much money did the US Supreme Court save by eliminating the legal size legal paper? Good stuff . . .

The new board of the Family Law Bar Association begins with president **Sandra Bolker**. Officers include **Donna DePaola**, president-elect; **Tom Hutchinson**, past-president/treasurer; and **Nancy Pierson**, secretary. The members at large are **Marsha Neidens**, **JoAnn Johnson**, **Joe Beltran** and **Marc Dion** . . . From *Eats, Shoots & Leaves*: "The initial letter of a sentence was first capitalised in the 13th century, but the rule was not consistently applied until the 16th. In manuscripts of the 4th and 7th centuries, the first letter of the page was decorated, regardless of whether it was the start of the sentence or not. Nowadays, the convention for starting a new sentence with a capital letter is so engrained that word-processing software will not allow you to type a full stop and then a lower case letter; it will capitalise automatically. This is bad news,

## EXEC'S DOT...DOT...DOT...

By Steve Henderson, Executive Director, M.A., CAE

obviously, for chaps like e.e. cummings." . . . Two must attend events this month – the Trial Lawyers dinner honoring the "Judge of the Year" on March 27 ([vctla.org](http://vctla.org)) and the Asian American Bar Installation dinner March 13 ([vcaaba.org](http://vcaaba.org)) . . .

**Roberta Burnette** has taken over the reins as president of the East County Bar, replacing **Marge Baxter**. **Matthew Hicks** has agreed to be the VP . . . In the January issue of *California Lawyer*, there's an article authored by Donna Horowitz, about the low pay of government attorneys. "On the low end, Fresno County pays \$42,094 for entry level counsel, a few thousand dollars less than Ventura County pays." . . . From Hart Pomerantz: "Law school taught me one thing: how to take two situations that are exactly the same and show how they are different." . . . License Plate of the Month spotted by Sandra Rubio: **MEDI84U**, driven by **Jack Draper** on a BMW SUV (he's from Kern County) . . . In case you missed it in the January issue of the *California Journal* – "Nearly a quarter of the State Bar's membership, some 45,000 lawyers, changes their address every year." I'd say that goes for us around here too, meaning about 200 plus make some sort of change to their contact info. So, let us know! . . .

After two years of dating, **Aris Karakalos** and Ariane Paul tied the knot February 10 on the bluff overlooking the ocean at Del Mar's Seagrove Park. Their immediate families live overseas, so the ceremony was attended by only a handful of Southern Calif friends and family. Aris and Ariane met four years ago in while Aris was studying law at the University of Arizona and Ariane was spending a year in Tucson as an exchange student from the University of Leipzig in Germany. The couple plans a more formal ceremony this summer somewhere in Germany. . . . From Archibald Cox: "Through the centuries, men of law have been persistently concerned with the resolution of disputes in ways that enable society to achieve its goal with a minimum of force and a maximum of reason." . . . **Catherine Duffy** has replaced **Jay Leiderman** as president of the Criminal Defense Bar. She may be reached at 641-3686 . . . From Clarence Darrow: "The only real lawyers are trial lawyers, and trial lawyers try cases to juries." . . .

**Tom Hinkle**, chair of the bar's Court Tour Program, is looking for money to fund a new video for the 3,500 kids he and his troops marshal through the courthouse each and every year for the past 27. He needs to raise 20 grand and to date has collected \$1,000 each from **A to Z, Nordman, Cormany et al., Hiepler &**

**Hiepler, Strauss-Uritz, McTague & Palay**, and retired judge **Roland and Peggy Purnell**. Tom's thrown in a few bucks too, and is looking for others. His committee wrote a grant late last year to the State Bar Foundation and was awarded \$4,000. Buzz him at 656-4223 or [thinkclear@juno.com](mailto:thinkclear@juno.com) . . . Motion Denied: "A 1996 District Court case in Georgia involved a particularly litigious prisoner who filed a civil case against a district judge. Throughout the course of the case, the litigant, Mathew Washington, began filing frivolous motions on a weekly basis, resulting in more than 75 pleadings. Most notorious was a motion titled, 'Motion to Kiss My Ass.' . . . The comma was first used by Greek dramatists two thousand years ago to guide actors between breathing points – thus leading to the modern explanation of why a cat is not a comma: A cat has claws at the end of its paws; A comma's a pause at the end of a clause . . .

**Meghan Clark** and hubby Justin are the proud first-time parents of one Brendan Graham Donnelly, born Feb. 4 in the evening. Good lookin' Brendan weighed 8 lbs., 5 oz., and was 20 inches in length . . . Recommended Reading of the Month: *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*, by Todd C. Peppers. Stanford University Press, 310 pages, \$55, hardcover. Did you know there's currently a 30-year streak in which at least one-third of the court's sitting justices have been former clerks? . . . Mark your calendar. **Joe Strohmman**, for the 24th consecutive year, will direct the Law Day 5K Race and 1-Mile Family Fun Run. It's May 12 and proceeds benefit our pro bono program. . . . CITATIONS, May 1987: "Do we need this? The April 9 *Star-Free Press* reports that a new 'law school' will open in Ventura this June, only this one will teach undergrads too. The founder is confident his intention 'can compete' with existing programs because he'll charge less tuition and give undergraduate degrees. There's no question that even with 100,000 lawyers, California will always need more good ones. It's hard to believe, though, that this is how to get them." . . .

*Steve Henderson has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. He will be playing the last few days of the month with the offspring in Mammoth traversing the black diamonds via snowboard. He'll be gouged at The Village, only 100 paces from Starbucks. In his younger days, Henderson once dated Anna Nicole Smith. Additionally, he's considering changing his name to Peyton Manning and was accepted into the NASA program although he eventually declined because of the diaper requirement.*

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Oxnard non-profit seeks bi-lingual attorney specializing in immigration law. \$50,000 - \$60,000 plus generous benefits. Will provide services to victims of domestic violence and direct court-based and local clinics. Must have 3 - 5 yrs.' experience and be a member of the Bar Assoc. Fax resume to HR (805) 983-6240.

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