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CITATIONS

M A Y – T W O T H O U S A N D S E V E N

MOTHER ESQUIRE

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By Panda Kroll

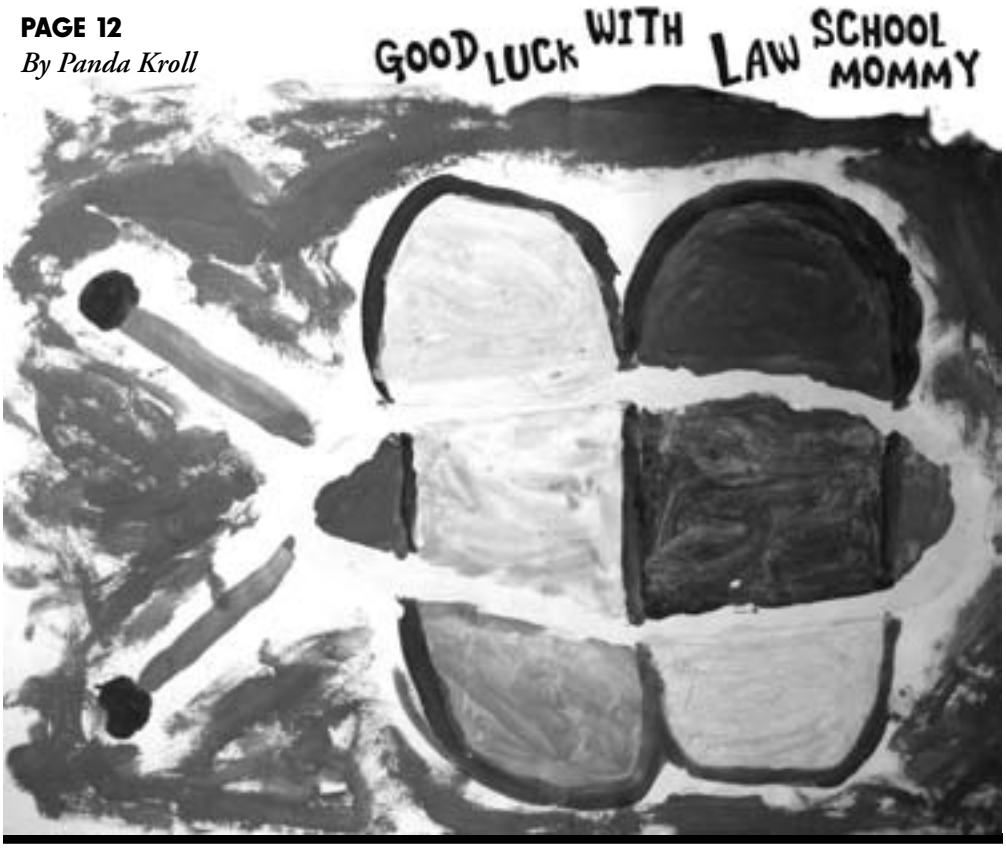

Illustration: "Good Luck in Law School Mommy" painting by Kendall VanConas, age 8

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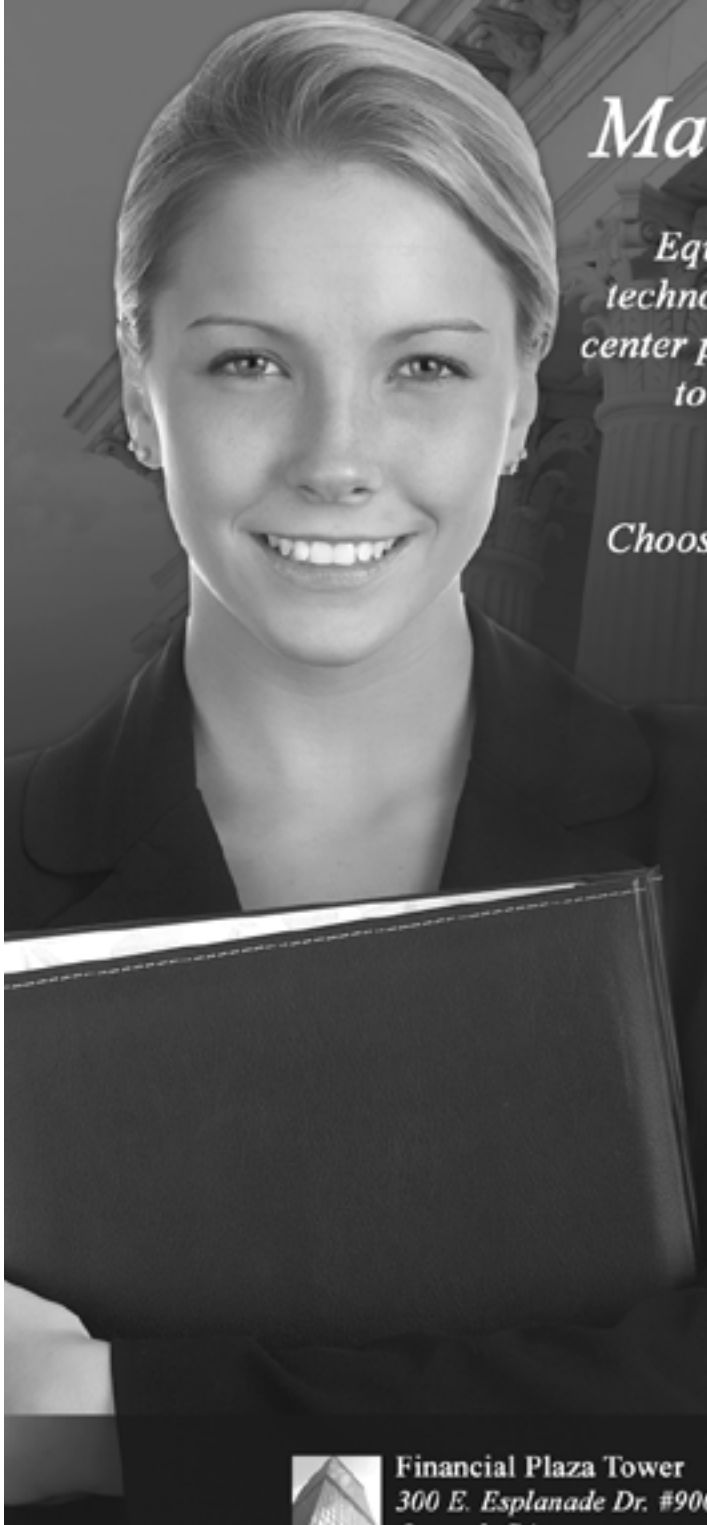

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PRESIDENT'S MESSAGE

Jonathan Fraser Light

I have been making the rounds of the various Bar sections, and March was my Diversity Month. I attended the Women Lawyers, Mexican American Bar, Asian American Bar, Barristers, Trial Lawyers, and hung out with Steve Henderson (he is in his own diverse category). Can one discriminate against cufflinks and monograms? I sat with Judge Long one night, so I've also got the bow tie set covered. (Memo to Black Lawyers Association – I haven't forgotten you).

I heard some interesting stories over the course of my travels. Controlled steam emerged in at least two of the section meetings. The law being a "bastion of white males" was driven home at the Asian American Bar Installation Dinner, and at the Women Lawyers meeting, in exactly those terms. I have to say that the phrase seems entirely accurate, and at the upper reaches of the legal profession still exists. Perhaps less overtly today, but I have little doubt that a glass ceiling in one form or another remains. It was interesting that a few women around the Women Lawyers table had not felt any discrimination. The overriding theme, however, was that such discrimination had occurred rampantly in the early years of most of their careers.

This theme was repeated at the Asian American Bar Association Installation Dinner, when we heard from the Honorable Ronald Lew, the first Chinese-American federal court judge. In his self-deprecating, straightforward manner, he made it clear that had he not been appointed to the municipal bench by African-American Los Angeles Mayor Tom Bradley, he might never have embarked on a long career on the bench and reached senior status in the Central District of California.

At the Women Lawyers meeting, Melodie Kleiman told of her meeting with the dean of Stanford Law School around 1970, asking him why the school prohibited discrimination in hiring by law firms visiting the campus, but did not list "sex" as one of the protected categories. The dean said that the school could not add sex to the list, or "none of the law firms would interview on campus." There were also stories of having to come up the service elevator at the Jonathan Club because women were not allowed in the front entrance. I wondered if the women around the table would have been a bit more pointed had I, the lone male in the group, not attended. As a member of the white male bastion, I cannot say that I have experienced any discrimination. I have always wondered how a person of color or a woman feels when in a setting that is 99% white or male. I suspect that has occurred often to many of the people who were in the various meetings I attended.

The Women Lawyers meeting was actually a get-together of past presidents to determine the future of that section. In attendance was Dorothy Schechter, who had the senior bar number among the group, 36162. Apparently, there were approximately 20 members of the California Women Lawyers organization in the early 1970's.

One of their chief concerns was the work/life balance that women lawyers are trying to achieve, which is consistent with what many of today's men are also trying to achieve – now that it is more socially acceptable for men to consider such heresy. Nevertheless, I readily concede that the brunt of child rearing falls on women (although I've been quite a hands-on dad, my wife and elementary school teacher, Angela, would kill me if I thought different – which I do not). Thus, the work/life balance conundrum is particularly tough on women lawyers, in my opinion.

Judge Lew, although to be forgiven for lumping Ventura with Santa Barbara throughout his speech, and pointing out that there was "nothing" out here, commended the group for its diversity and efforts to bring people of color into the mainstream legal circles. That may be true, but I am still surprised and disappointed when I attend meetings involving the county's "movers and shakers" of one group or another, and it is all-white. More women than in the past, but few Latinos in a county that is so heavily populated with members of that community. We aren't there yet.

My lunch with the MABA members reminded me that not everyone who speaks fluent Spanish is Latino. The very white Linda Gulledge was the first to sit down next to me and she regaled me with how her father forced her to spend a year in Latin America to learn Spanish with a family who spoke no English.

As for the White Lawyers Association – the "bastion" is probably alive and reasonably well, so no need for such an organization, I wouldn't think. Occasionally, one of my white male brethren mumbles something about "what if we really had a white lawyers association, how would that go over?" Interesting question, but probably only rhetorical for the foreseeable future. In a perfect world we would need none of these groups, but for the next millennium I suspect they will continue to thrive, and for good reason.

Jon Light will not actually run at the Law Day 5K—a half jog/walk/limp perhaps, but he encourages each of you to spread the word about lawyers and the good they do in the community. Get involved! Call Deirdre Frank about speaking to students for Law Day. Roger Myers, in particular, is noted for his annual Memorial Day Stand Down for veterans.

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LAISSEZ LES BONS TEMPS ROULER

Simi Valley Cajun Creole Festival – May 26 And 27th

By Michael McQueen

For hundreds of years Louisiana has been one of the more legally, culturally and ethnically isolated areas in the country. With inhospitable swamps and difficult terrain to traverse, the countryside remained isolated until relatively recent times.

A Hell of a Deal

Louisiana became a part of the United States in 1803 when Thomas Jefferson, desiring to protect the country's access to the New Orleans port as an important export center, authorized negotiations with Napoleon Bonaparte. Jefferson harbored considerable doubts as to the constitutionality of his actions. He was concerned about the resulting erosion of state's rights such federal exercise of power might and, in historical fact, did occasion.

Jefferson was originally willing to purchase just New Orleans for $10,000,000. Negotiators were dumbfounded when the whole Louisiana territory (think Lewis & Clark) was offered for $15,000,000. It was a hell of a blue light special, costing the United States about 3 cents an acre. Not everyone was happy about the acquisition. The Northern states would have seceded from the union and formed their own confederation with Aaron Burr as president had he been able to convince New York to join. New York balked, and here we are.

Louisiana is the only state with a legal system not based on the Anglo-English common law system. Louisiana law is based in part on civil law, which was based on French and Spanish codes that were, in turn, derived from Roman law. Property, contract, business entities, civil procedure and family law are mostly based on Roman legal thinking. Legal concepts such as "forced heirship" and "lesion beyond moiety" are alive and well in Louisiana. I practiced some oil and gas law for a bit in Louisiana. Anyone ever bump into a usufructory heritiment? Thought not. Criminal law, however, is based almost entirely on Anglo-American common law.

Like Appalachia, this isolation has contributed to the preservation of a unique and infectious folk music reflecting two of the related cultures that have evolved in Louisiana: Cajun and Creole.

Cajuns from Canada

The Cajuns are a French-speaking people who originally settled in French Canada and lived in northern settlements then known as Acadia. As the colonial territorial wars ebbed and flowed these French Acadians found themselves caught on the losing end of the French and Indian war. The English prevailed and pursuant to the treaty of Paris (1763) gave the French Acadians 18 months to clear out. The English had a historic practice of "clearances" which involved shipping inconvenient people to far off places, e.g. the Highland Scots to Appalachia, maritime Canada, and New Zealand. (Ironically, the Scots repopulated the settlements left by the expelled French Acadians. The area is now known as Cape Breton – New Brunswick, Nova Scotia and Prince Edward Island – and is famous for its Cape Breton fiddle music.)

The Acadians immigrated to the swamps and bijous of Southern Louisiana during "le grand derangement" dating from 1755 to 1763. There is some musical evidence to support my personal theory that many of these French people immigrated to Canada from the Brittany area of France and were of Celtic bloodlines. Many came to the French-ruled New Orleans area. Imagine their surprise and disappointment to learn that the French government had secretly ceded the area to Spain in the treaty of Fontainebleau the year before. Fortunately, the French governor was tolerant of the new immigrants and allowed them to keep their language. This tolerance is explained, in part, by their shared Roman Catholic religion.

The Spanish governor did relocate the French Acadians to the south and west of New Orleans. This southwest Louisiana area of 22 parishes is now known as Acadiana. During the Revolutionary War, 600 Acadians marched with the Spanish general and defeated the English at the Battle of Baton Rouge, no doubt motivated by a sense of payback for their expulsion from Canada.

The French Acadians became known as the Cajuns. For many years the term was considered a pejorative but is now widely accepted. In 1980 the Cajuns were officially recognized as a national ethnic group as a result of a federal discrimination lawsuit. (*See Roach v. Dresser Industries Valve and Instrument Division*, 494 F.Supp. 215 (D.C. La. 1980)

Cajun music is simple and unadulterated. Based on old French Catholic ballads, it is fun dancing and party music intended for social gatherings. An all-night house dance is known as "Bal de Maison" while a public dance is referred to as "Fais do-dos."

Dominated by the fiddle with a strong twin fiddle tradition, traditional Cajun music is usually accompanied by guitar and a triangle for percussion effect. The fiddle tradition is represented by the Balfour Brothers and today's Beausoleil. The button accordion is used as well. Steve Riley and the Mamou Playboys are a great example of that influence.

The Cajun musical form consists primarily of the Cajun jig, the two-step, waltz and heartbreaking laments sung in a French patois. There are French tours to hear the "Crejol Luisien" an archaic French that is little changed from two hundred years ago.

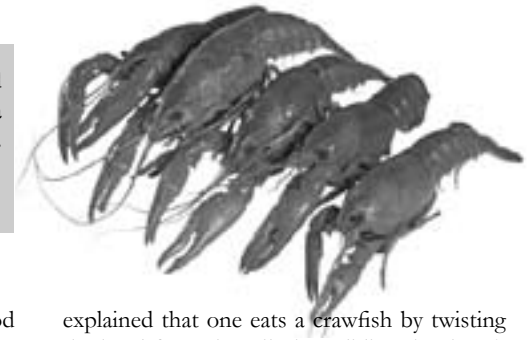
Creole and Zydeco

Aside from New Orleans jazz, the other prominent musical form developed in Luciana is Zydeco. Associated with the Creole culture, the term Zydeco is said to derive from Clifton Chenier's 1950's hit "Le Haricots Sont Pas Sales" and is a corruption of "Les Haricots" – which is French for beans. I don't speak French so I have no idea how you get there. This is country music sung in French Creole for all-night Saturday dances at country roadhouses. The snap beans that are a common food in the area are a metaphor for a style of music that is bright, strong, with a syncopated back beat – "snappy".

The term "Creole" is used to describe a broad cultural group of people of mixed races (including Black, Native American and Caucasian) who share a French or Spanish background. Under this broad definition a Cajun can be considered a Creole, but is often distinguished from the Zydeco Creole tradition. Louisianans who identify themselves as Creoles are most commonly from historically Francophone or Spanish speaking Louisiana communities that originated in the 18th and 19th centuries.

A lively 8-count with a little hitch that is hard to master characterizes Zydeco music and dance. Accordion and the washboard, often referred to as the rub-board or frottier, dominate the up-

Cajun and Creole music, as well as a slice of that culture, comes to Simi Valley on May 26 and 27, 2007. Sponsored by the Simi Valley Sunrise Rotary, the Cajun Creole Festival has been a significant fundraiser for local charities and has developed into a prominent cultural event. (www.simicajun.org)



tempo beat of the music. It is often observed that Zydeco has a close association with the Delta Blues.

The accordion is the predominant instrument in Zydeco music and again is traced to the Germans who settled in the coastal areas. Yes, I know that accordion music is less them hip. But this is not your Laurence Welk, Wisconsin polka music. This is kicking music, and I defy anyone not to dance to when Gino Delafose starts squeezing that box.

Crawfish Pie and File Gumbo

Like most cultures, the Cajun Creole's most distinctive attributes, aside from their language, are their food and music. The Simi Valley Cajun Creole festival has a great sampling of traditional Louisiana food: Jambalaya, gumbo, hush puppies, red beans and rice, catfish and crawfish.

Probably the most symbolic of Louisiana food is the crayfish, also known as a mudbug or crawfish. Boiled in a spicy mixture of herbs, this delicacy does take a bit of work, but is worth it.

Last year I was surprised to learn from some of my neighbor "festival-goers" that they thought the crawfish was just about the worst thing they had ever eaten. They complained that the taste was gross and it was difficult to eat. After expressing disbelief I discovered the problem. I asked one rather lubricated, but enthusiastic fellow, how he went about eating the crawfish." Why it is simple," he exclaimed, and crammed the whole crawfish into his mouth. I was dumbfounded. With antenna waving from his mouth, he tucked in a small red claw and crunched away. The crawfish is a crustacean with a hard red, spiny exoskeleton like a miniature lobster. This guy was just chomping away at brains, guts, and crusty exoskeleton. I explained that one eats a crawfish by twisting the head from the tail, then sliding the thumb along the back tail to pry away the tail meat. The tasty morsel is then popped into your mouth. The group soon changed their opinion and all agreed that crawfish were quite tasty and easier to consume. I just worried about how effective their digestive systems were.

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Remember, Arrette pas la Musique!

Michael McQueen *is a Camarillo lawyer and a member of CITATIONS' editorial board.*

Mother, Esquire

By Panda Kroll

For our Mother's and Father's Day issues, Citations sought out Ventura County's multi-generational lawyers. In this issue, we explore how attorney-mothers have influenced their attorney-daughters' career choices.

QUESTION: [to daughters] What role did your mothers play in your decision to go to law school? Was your decision influenced at all by the fact that your mother was a lawyer?

JENNIFER CALDERWOOD ROSE: From both our perspectives, my decision to go to law school was despite, rather than because of, my mother's career.

MELISSA COHEN: My mother's career choice was a major influence in both of our lives. My mother, Grace Cohen, was a legal secretary for years. She went to law school while my sister and I were both still in school. My mother and father practiced together in the mid-70's. My mother practiced estate planning and family law until she retired in 1998. She left a legacy to my sister, Kendall VanConas, and me when she passed on. My sister practiced estate planning first with my mother and now as a partner in the A to Z law firm. I practiced family law at a large law firm, and now my husband and I have our own firm, Milhaupt & Cohen.

QUESTION: [to mothers] How did the mothers feel watching their daughters follow in their footsteps? Were you surprised that your daughters went to law school?

REBBECCA CALDERWOOD: I wasn't surprised when my daughter decided to become a lawyer, although I had hoped she would chose a less stressful profession.

DIANE ROWLEY: I wasn't surprised that Amy decided to attend law school. It was a natural progression. When I married Amy's father, Richard Van Sickle, Amy was in high school. Amy's mother has always been a very hard working woman who valued a good education. I know she influenced Amy to use her brain and work hard just like Richard and I did. In college, Amy wanted to be a police officer, but then she started working in our law office. At first she did light phones and clerical but soon she was doing more and more substantive work. Somewhere near the end of her college years she announced a plan to attend law school. After years as an associate at our family's Thousand Oaks office, she now manages the firm's West County satellite office in Downtown Ventura.

MICHELLE ERICH: I was surprised when Shyla decided to go to law school. As a home-schooled youth, she had observed my practice first hand on a daily basis and declared, "Not for me! Too much paperwork." She was only 20 when she started law school, so I was able to see her develop into an attorney, an adult, and a woman all at the same time. I wasn't really glad to see her enter into such a stressful profession. I wanted her to be a professional singer. She still has this year to consider a try for American Idol! But does she listen to me?!

QUESTION: [to daughters] How have your mothers influenced your professional choices, either as a way of inspiration or as a correction of mistakes you've seen made?

JENNIFER CALDERWOOD ROSE: I've been greatly influenced by my mom's skill and exceptional competence and the ways in which those have formed her very successful career and excellent professional reputation. I've always sought to emulate her in those important ways while, at the same time, I've enjoyed cultivating my own personal style.

MELISSA COHEN: My mother told Kendall and I that we could do whatever we wanted, as long as we went to law school! My mother had a strong personality and was single-minded of purpose. She knew that if she went to law school, she could make more money and could do at least as good a job as any man.

QUESTION: [to mothers] Mothers, can you think of ways in which your daughters have either influenced your professional choice or even a particular decision you've made in your practice or way of organizing your professional life?

REBBECCA CALDERWOOD: My children influenced my decision to pursue private practice, rather than government employment, over 20 years ago. At the time, I believed I would have more flexibility in my schedule in my own practice.

MICHELLE ERICH: We work well together independently, but we also collaborate and divide the labor on large projects. Having been a sole practitioner most of my 27-year career, I find having Shyla to bounce ideas off and to catch her own bouncing balls is a great comfort. We are enough alike to understand each other in a kind of verbal shorthand, but different enough that we get the benefit of two heads. I am really glad she became a lawyer. I look forward to retiring someday (a long time from now, of course) and handing over the reins!

QUESTION: [to mothers] Are daughters and other young women dealing with the same issues the mothers dealt with when they became women attorneys?

REBBECCA CALDERWOOD: Finding balance in your personal and professional life is a universal issue. I think my daughter's generation is doing it better. I'm impressed with how young professional couples today combine and share their career and parenting responsibilities. As to gender issues in the workplace, I was the beneficiary of the generation of women before me. I feel we are beyond that. Good lawyering isn't male or female; you rise or fall on your own merit.

DIANE ROWLEY: I think all women attorneys have to find their own voice . . . a way to be assertive without being aggressive. That is the same for us all. I also believe it is easier to accomplish this now than it was when I started 22 years ago. Men are more accustomed to dealing with women as equals. When I started, an older judge once leaned over the bench and called me "missy" when he challenged my argument. There is less likelihood I think of that happening today.

MICHELLE ERICH: The learning curve for Shyla has been miraculously faster. A career is more acceptable now and not seen as neglecting the home fires by the parent generation, as it was in my day. (That would be a Wednesday, for you Dane Cook fans.) Balancing work, fun, and home continues to be more of a challenge for women than men. The superwoman syndrome is alive and well in professional women. Bring home the bacon, cook it up, and clean the pan.

QUESTION: [to daughters] In what ways do the daughters feel like the issues that you deal with now are the same ones your mothers did, and to what extent do you take things for granted?

JENNIFER CALDERWOOD ROSE: By the time I entered law school, women comprised over half of law students in most of the nation's schools. The influx of women in the legal profession has had an impact on the culture of legal practice. I've never been aware of my gender being a factor in my dealings with other lawyers or judges, or with clients. I think things were quite different for my mother when she began practicing and particularly because the Ventura legal community was much smaller then.

MELISSA COHEN: Gender issues are much less overt now. Although it is rare, it is still unpleasant to be patronized. It was more common in my mother's generation. She had to overcome long-standing social views just to earn the respect of the mostly male attorneys. My generation can take that respect for granted, but we have the challenge of balancing a successful career with a happy family. I have observed that men are comfortable now saying that a depo has to end by 4:30 so they can attend a child's soccer game. This wasn't the case with my father's generation. This is because of the influence of the many women who have entered the profession.

QUESTION: [to all] What do you think young women who are entering the profession should know? What expectations do they have that are wrong? What advice would you give them?

DIANE ROWLEY: Being a lawyer is hard work. And in a smaller county like this one, the pay scale for associates is not what most people think it is. Anyone thinking about a career in the law should investigate both the billing expectations and the compensation package for new associates in the area they plan to work. No one starts at the top, and just hanging out a shingle can be a long, hard road to success.

REBBECCA CALDERWOOD: My advice is not gender specific: Your word is your bond. Your reputation really does precede you. Always maintain your integrity.

JENNIFER CALDERWOOD ROSE: I would advise young women entering the field not to "lose" themselves. It is possible to be a successful and respected attorney without losing your humanity and without hardening yourself so much emotionally that you have nothing left over at the end of the day for your loved ones.

MICHELLE ERICH: First of all, being an attorney is a privilege; it is a means to help people. Secondly, don't leave your feminine side behind. Be nurturing to clients as a woman attorney uniquely can be! Some clients will prefer a man; others will prefer you, depending on the client and the nature of the conflict. If your goal is to get rich, go into sales. I am glad that Shyla worked in several offices specializing in different areas of law before deciding on a legal career.

MELISSA COHEN: Women lawyers need to figure out a socioeconomic answer for the inherent conflict of being both successful as parents and as professionals. It's great that fathers are able to bond more with their children and are taking so much responsibility for parenting. Managing a firm with my husband has given me more flexibility, but it's still a challenge.

Panda Kroll is a sole practitioner in Camarillo.

Editor's note: *Though we emphasize mothers and daughters, we know there are women lawyers who have attorney sons (for example, my eldest is a public defender in Portland, Oregon). CITATIONS would like to hear their stories.*

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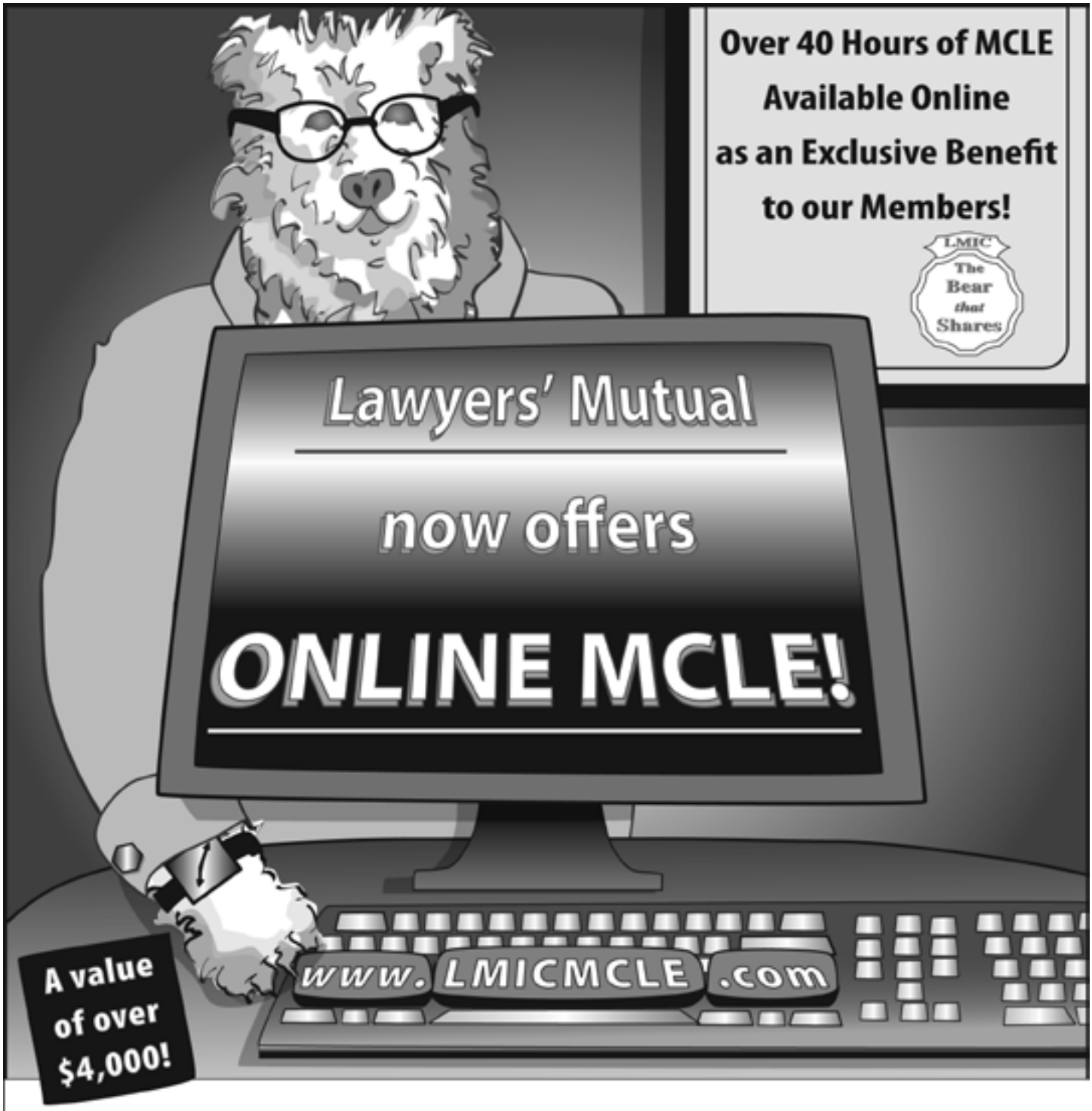

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THE GREER CASE: HANIF AND NISHIHAMA REVISITED

By Mark E. Hancock

Back in 2005, I wrote of the unfairness of extending and applying the holdings of *Hanif v. Housing Authority* (1988) 200 Cal. App.3d 635 and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 to cases that involve neither governmental entities, nor doctor defendants, nor plaintiffs who have had their medical expenses paid by MediCal. *Hanif* and *Nishihama* both held that a plaintiff may not recover medical expenses in excess of the amount paid or incurred. To highlight the unfairness of extending this rule, take the case of a plaintiff who, at $500 a month, has paid $60,000 in health insurance premiums over 10 years. That plaintiff has now suffered an injury at the hands of the defendant, and she has incurred medical expenses of $10,000. Her insurance negotiated low reimbursement rates, lowering the bills down to $3,000. That $7,000 reduction is a hard-earned benefit of having the insurance, to which the defendant did not contribute. To apply *Hanif* and *Nishihama* would be to say that the plaintiff would only be able to recover the $3,000 actually spent on her medical bills, not the $10,000 in reasonable/market value.

In my view, *Hanif* and *Nishihama* ignore and violate the letter and rationales of the collateral-source-benefits rule created by the California Supreme Court in *Helfend* v. *Southern California RTD* (1970) 2 Cal.3d 1 and *Hrnjak* v. *Graymar* (1971) 4 Cal.3d 725. (I believe the rule applies to collateral benefits and not limited to collateral payments and that the reduction in medical expenses is as much a benefit as the payment itself.) *Hanif* and *Nishihama* confer an unjust benefit upon the defendant: the plaintiff, not the defendant, paid her insurance premiums and yet the defendant receives the benefit of a reduction. Furthermore, not only were *Hanif* and *Nishihama* decided by lower courts of appeal, but they are distinguishable precisely because they involved government entities/medical defendants and MediCal plaintiffs.

Though one could argue that allowing a damage award for past medical expenses in an amount greater than their actual cost, *paid or incurred,* constitutes overcompensation and violates fundamental principles relating to recovery in tort actions, the California Supreme Court addressed those issues and condoned such recovery as fair, legal and permissible. While I still disagree with the application of *Hanif* and *Nishihama* to private party/private insurance cases, a compromise worked out in some courts has now been confirmed in a case involving purely private parties: *Greer* v. *Buzgheia,* 141 Cal.App.4th 1150, decided in July 2006 by the Third District Court of Appeal. (Please note, however, that this case was issued by a lower court of appeal - in another district no less.)

In *Greer*, the defendant argued that the trial court erred in denying his motion in limine to exclude evidence of the full (i.e., billed) amount of the medical expenses, contending that *Hanif* and *Nishima* limit recovery to the amount actually paid. The *Greer* court stated that neither *Hanif* nor *Nishihama* preclude the admissibility of evidence of the reasonable cost of medical care at trial. In fact, the trial court ruled and the *Greer* court agreed that such evidence in all likelihood gives the jury a more accurate picture of the extent of the plaintiff's injuries. In other words, *Greer* allows the jury to hear evidence of the full/reasonable/market value of the plaintiff's medical expenses. This conforms with the jury instructions that permit a plaintiff to recover the reasonable cost of reasonably necessary medical services.

Greer is instructive and interesting in its discussion about how a request for a *Hanif/Nishihama* reduction is properly made. A *Hanif/Nishihama* reduction must be raised by motion in the trial court, post verdict, but before an appeal is filed; it is not made by way of a motion for a new trial or JNOV. Further, to make the motion successfully, and preserve the matter for appeal, a defendant should request a special verdict containing a separate line item for medical expenses.

A fatal mistake that the defendant made in *Greer* was to approve a special jury verdict that asked the jury to determine plaintiffs "past economic loss, including lost earnings/medical expenses." Since the plaintiff put on evidence of $232,363 in lost wages and $216,000 in medical expenses, and the jury found the amount of past economic loss (combining together both medical expenses and lost wages) to be $260,000, the *Greer* court concluded that it was impossible to calculate a *Hanif/Nishihama* reduction, since the jury award failed to separate what part of the $260,000 economic damage award was for medical expenses and what part was for wage loss. The court held that, "[b]y failing to request a verdict form that differentiated plaintiff's medical expenses from other items of economic damage, defendant forfeited the right to assert *Hanif/Nishihama* error on appeal."

To summarize *Greer*'s procedure for making a *Hanif/Nishihama* reduction, you must segregate the plaintiff's medical expenses on a proper special verdict form, make your motion after trial but before appeal, and support your motion with competent (i.e., admissible) evidence of the amount actually paid by the plaintiff. In *Greer,* the court criticized the defense for presenting their "evidence" of $132,984.92 as the "paid" amount of medical expenses, by way of an unsigned handwritten note from plaintiff's counsel and eleven pages of computer printouts, with no mention of any supporting/foundational testimony or declaration.

While *Greer* (hopefully) helps the plaintiff to argue for more in the way of general damages and thereby pay his or her attorney (which is one of the rationales given in support of the collateral-source-benefits rule), it still reduces a plaintiff's award if the plaintiff has private insurance, because, if a defendant does his or her job right, the amount of medical specials is reduced to the amount actually paid. Since the defendant does not contribute to the payment of the plaintiff's insurance premiums, this rule is unfair; a plaintiff should be entitled to realize and profit from the reduction in his or her medical expenses thereby achieved, since they are the product of sweat and investment. It is not "unfair" compensation. It is not fair to award insureds less than those treated by lien doctors. But, until the Supreme Court and/or another district steps in, the *Greer* case appears to set up a framework for handling a plaintiff's medical expenses paid for by insurance.

***Mark E. Hancock** is a Ventura attorney who handles tort and insurance matters for plaintiffs and defendants.*

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AND WHO DO YOU THINK IS PAYING FOR THAT NOW?

By Lou Vigorita

Most of you, if you're like me, look at your paychecks and wonder where all that Social Security withholding is going. Retired Uncle Bob. Disabled veterans. Orphans. Even your very own retirement! But how many of you realize that some of your hard-earned Social Security money is now being used to support a select group of people who should be working in full time jobs? How many of you realize that workers who are injured on the job are no longer assisted in returning to modified work, and have been placed on the disability rolls of the permanently disabled, through no fault of their own? Probably no one realizes this – unless you have been involved in the Governor's Workers Compensation reforms over the past few years.

Formerly, injured workers in the State of California were eligible for a benefit known as vocational rehabilitation under Labor Code §139. If injured and unable to return to their usual and customary occupation, they were then retrained at the expense of the Workers Compensation insurance company. Upon completion of their program they were to return to some form of modified work using their newfound skills. They simply were to return to full time work. Earning wages. Paying taxes. The usual stuff that the rest of us have to do. The Workers Compensation insurance carrier paid for this as part of the return to work program under the Workers Compensation Laws of California. The employer paid for the premiums for his workers who were injured on the job while performing the job duties that made money for the employer. John Q public did not pay for this. None of this. It was a cost of doing business to help return the injured worker to the wage earning and taxpaying world. This was the situation before April 19, 2004.

Now enter the reform Governor and his SB899 reform package at the request of the insurance lobby. Yes, *at the request of the powerful insurance lobby*. In this reform the injured workers' rights under Labor Code §139 were essentially eviscerated. There is no retraining following serious injuries that prevent workers from returning to their jobs. There is no financial support during a school program designed to get the worker back into the work force as soon as possible. There is no counseling to assist in preparing the worker for job interviews nay guide them how to dress and conduct themselves through the new job search. No effort is made to assist the injured worker in getting back to work. So the injured worker, due to his or her debilitating injury, while able to work in some modified capacity with a little training, is unable to do so. There is no more training and assistance that in the past was a proven way of expeditiously returning workers to the work force. Instead, we have a myriad of cases with untrained, injured workers who have lost their jobs with no prospects nor useable skills. And most of these people we see in Ventura County are hardworking farm workers who have little if any English speaking skills. Think of the group of workers recently displaced in the winter frost of 2007. What do they do now?

First of all, they become eligible for a federally mandated program known as Social Security Disability, which is an *early retirement program*. Social Security Disability benefits a worker who meets certain criteria. The worker needs to have paid taxes, worked a certain number of quarters and have been " . . . unable to perform substantial gainful activity. . ." in order to qualify. With no retraining under California law, these injured workers become unemployable and therefore easily eligible for Social Security Disability ***at a time in their lives when they normally would be productive, taxpaying individuals.*** Think of a non-English speaking farm worker who cannot use his or her back to work, and is limited to sedentary work. What work in the national economy is this worker able to perform on a full-time basis following a devastating back injury? None. So the worker collects Social Security that you and I pay for with our federal tax dollars.

Why should we pay for this disability injury that was formerly covered under Workers Compensation insurance? Why shouldn't the Workers Compensation insurance pay for this workers plight instead of us? Why do Californians have to burden this additional expense? Why was this vocational rehabilitation law repealed? These are valid questions that the Governor failed to address when he signed SB899 into law on April 19, 2004 and that have come to haunt us now.

Lou Vigorita *is a workers compensation and Social Security Disability lawyer who practices in Ventura.*

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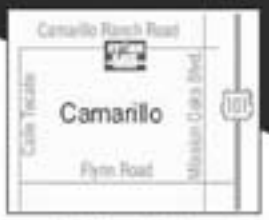

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Cheri L. Kurman has been certified as a Legal Specialist in Estate Planning by the California Board of Legal Specialization. Cheri is one of only three women in Ventura County who are certified in estate planning, and the only one north of the Conejo Grade: 1601 Carmen Drive, Suite 211, Camarillo. Cheri can be reached at (805) 445-7670 or by e-mail at CLK@KurmanLaw.com. For more information, go to www.kurmanlaw.com.

Longtime Ventura and Santa Barbara attorneys **Steven H. Wohlgemuth** and **Edwin K. Loskamp** are now partners at **LOSKAMP & WOHLGEMUTH**. They have offices at 840 County Square Drive, Ventura 93003 (805) 650-7300 and at 3887 State Street, Suite 212, Santa Barbara 93105, (805) 563-1410. The partners bring together over 40 years of litigation experience and will continue to provide service throughout Southern California.

Arturo Gutierrez III joined **Glass & Seebode** in January focusing on worker's compensation and criminal defense matters. He may be reached at 1544 E. Main St., Ventura, CA 93001, (805) 585-0005, fax (805) 585-0015.

Strauss Uritz is excited to announce a new beginning. **Anthony Strauss** is now heading the **Strauss Law Group** which will continue the practice of employment law and employment, business & real estate litigation. Firm members are **Bruce Crary, Aletheia Gooden** and **Michael Strauss**. **Curt Uritz** and **Mary Howard** will continue their established practice of business law, real property, transactional and related areas, as **Uritz & Associates**. Both firms will continue to practice at 199 Figueroa Street, 2nd Floor, in downtown Ventura, (805) 641-9992.

SUPERIOR COURT SEEKS COMMENT

The Superior Court is considering changes to rules about the venue of each division, and about the Court's Conflict of Interest Code. Interested? Check www.venturacourts.ca.gov.

The Charity Clause: How Attorneys Can Give Back

Michael A. Strauss

We all remember the question on our law school application: "Why do you want to become a lawyer?" For most of us, the answer was probably the same: "I want to give back to my community." Now, reflecting on our careers, how many of us have actually given back?

Daniel J. Palay is a partner at the employment law firm of McTague & Palay in Ventura. A few years ago, Dan began giving back by adding a new paragraph – the charity clause – to his contingent-fee agreements. The charity clause allows a client to forego paying the normal retainer fee of $1,500 so long as they agree to donate 2% of their recovery to charity. So far, due to the charity clause, Dan's clients have given over $300,000 to the charities of their choice.

Here's how it works. Say Dan obtains a $100,000 verdict or settlement for his client. His out-of-pocket costs – in this example, $10,000 – come off the top. Then he receives, as part of the contingent-fee agreement, 1/3 of the remaining $90,000, or $30,000. His client's recovery would be $60,000. At this point, the recovery is split so that 2%, or $1,200, goes to whatever charity the client chooses and the client receives the remaining 98%, or $58,800.

To Dan's knowledge, no other attorneys – in Ventura County or elsewhere – have their own charity clauses. He came up with the idea after hearing how Leigh Steinberg, the famous sports agent and real-life inspiration for Jerry Maguire, insisted on a similar clause in every contract negotiated for his athletes. As a result, Mr. Steinberg's clients have donated over $100 million to many charities and scholarships nationwide. Dan wondered if it would be possible to do the same with a clause in his contingent-fee agreements.

So far no one has stood in Dan's way. Before implementing the charity clause, he sought approval of local and State Bar authorities. Obviously, the Ventura County Bar Association appreciates the innovation, since approximately 25% of Dan's clients have chosen to donate to the Ventura County Bar Association's Volunteer Legal Services Program. However, even the State Bar approved the charity clause without hesitation.

Nevertheless, the provision has raised some eyebrow in the local legal community. Admirers point to the fact that the charity clause has not only enriched local and national charities, but it has encouraged other lawyers to increase their own donations. What's more, the charity clause does its part dispelling the popular notion that lawyers can be Scrooges.

The skeptics of the clause, who still admire its eleemosynary effects, wonder whether it is an unfair business practice for Dan to insist on including the clause in each of his contingent-fee agreements. That is, might potential clients feel more inclined to hire him as their lawyer over another attorney who does not offer a charity clause? While the Rules of Professional Conduct may allow attorneys to advertise about their charitable giving, most lawyers agree that it would be tacky for anyone to do so. To Dan's credit, he does not spend anything on advertising . In any event, he says he hasn't seen any increase of business due to the clause.

Some critics also wonder about the tax effects of the charity clause. Specifically, who should be taxed on the 2% donation? The Supreme Court's decision in *C.I.R. v. Banks* (2005) 543 U.S. 426, suggests that the client should pay federal income taxes on the total award, including the donation. *Banks* holds that the client must pay taxes on a total award, even the amount pre-designated as the attorney's contingent fee, because "anticipatory assignment" of the contingent fee to the client's attorney does not affect the attribution of income for tax purposes. By this reasoning, the client would not be able to claim that the 2% donation never vested as the client's income; instead, the client would have to pay taxes on the total award.

However, despite *Banks*, an argument could be made that Dan is actually the one who should pay taxes on his clients' 2% donations. Professor Joel S. Newman of Wake Forest University School of Law in Winston-Salem, North Carolina, points out that, if, by the terms of the attorney-client fee agreement, Dan's normal retainer fee of $1,500 would be income to Dan, then the payment to charity, as a substitute for the taxable retainer and made at his direction, might also be income to him.

Confused yet? Have you wondered who takes the charitable deduction? Dan doesn't care. He is unperturbed by the concerns. If it is unethical for a lawyer to give to charity, then he does not want to be a lawyer. Considering how much Dan and his clients have given already, we should all want Dan to continue his legal career. And future attorneys might start giving a new answer for why they want to become lawyers: to be like Dan.

Michael A. Strauss *is an associate attorney with the Strauss Law Group in Ventura.*

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EXEC'S DOT…DOT…DOT…

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

Now I remember why I work here. From Duke Lacrosse player, David Evans: "We went to hell and back. We owe our lives to our lawyers."…**Stephen Millich** has retired from the City Attorney's office in Simi Valley. He's holed-up somewhere in Monterey golfing and consulting…Eye-catching article in the NY Times Magazine (March 11 edition/www.nytimes.com) about Sir John Mortimer, the noted lawyer and author of the "Rumpole of the Bailey" series. He rises at 8 a.m. each day, has a bath a writes until lunch. Before he puts pen to paper? A glass of Champagne. "Sets his brain racing," he states…Humorist James Thurber was once asked: "why did you have a comma in the sentence, "After dinner, the men went into the living room?" And his answer was one of the loveliest things ever said about punctuation. "This particular comma was a way of giving the men time to push back their chairs and stand up."…License Plate of the Month: LEHRLAW on a late model 745 BMW and driven by **David Lehr**…

Tina Rasnow was one of 25 people, including the bench, the bar and academia, appointed to the Council on Access and Fairness. Their charge? Increasing diversity in the legal profession…Someone please explain to me how P Diddy, aka Calvin Broadus, receives 5 years probation and 800 hours of community service for being convicted on felonies #2 and #3? Weapons and drug charges---Before you go Don Imus on me, I loved Snoop as Captain Mack on *Soul Plan*, Huggy Bear on *Starsky and Hutch* and Slim Daddy on *The L Word*…I have never run into any peer or colleague that uttered a nasty word about Kurt Vonnegut. Like the Kennedy assassination, I remember when and where I consumed *Slaughter House Five* the first time. Going to do it again too…**Phil Drescher** is retiring after 30 years as General Counsel for the United Water Conservation District and a commemorative dinner was held for him on April 24. He remains Of Counsel with NCHC…

The obituary of one Raoul D. Magaña, an immigrant from Mexico and a Phi Beta Kappa from Boalt in '35, included a quote from Professor Bernard Witkin. Apparently he stated to Raoul over dinner: "Raoul, you and I are both professionally modest, but you have an ostentatious humility!"…The State Bar of New Mexico announced a formal partnership with EsqSites123.com to provide web design and hosting services. Am sure you could take advantage of it too if so compelled…From George Herbert: "The worst of law is that one suit breeds twenty."…Separated at birth? **Ralph Chabot**, page 20 of your Legal Services Directory, and **Robert Roy**, page 104. The new 2007-2008 directory? Should have it in your hands mid-May…**Robert Boehm** is retiring as city attorney with the City of Ventura at the end of June…

Barrister **Lynn Smiley** has opened her own shop at 290 Maple Court in Ventura. Suite 118 if you need to know and her phone number is 639.0428…Q: What's the difference between a herd of buffalo and a lawyer? A: The lawyer charges more!…Advertisement in the U. Va. *Law Weekly*: "West Virginia's infamous once and future Chief Justice Richard Neely, America's laziest and dumbest judge, seeks a bright person to keep him from looking stupid. Preference will be given to U. Va. Law students who studied interesting but useless subjects at snobby schools. If you are dead drunk and miss the interviews, send letters."…In the NY Times March 18 Sunday edition, author Thomas Vinciguerra pens an article about how the 13th President of the United States, Millard Fillmore, may have been the unluckiest. What I didn't know was he practiced law in New York before being elected to the legislature—(www.nytimes.com)…Did you see in the March 13 issue of The Star that past bar association president, **Bob Noe** (1987) won a significant case in Federal District Court in Philadelphia – the court awarded $2.7 million to his company, AgriZap -- www.VenturaCountyStar.com…In his bid to run 10 marathons within 12 months, Al Vargas completed number 10 in Virginia Beach in March…

Ron Bamieh was nominated for the Steve Lester Memorial Sportsmanship Coach of the Year for his efforts with the Ventura Youth Basketball Association…Who'd I witness coaching against my 10 year-old son's club basketball team in UCSB's Thunderdome? **Mark Hiepler** coaching a team from Camarillo and doing a terrific job, e.g., no yelling and screaming at the players or refs…From Jay Leno: "The administration is still taking a lot of heat for firing eight U.S. attorneys. This just shows you how unpopular the administration is---when people are siding with the lawyers!"…From Representative Duke Cunningham on March 5, 2003: "I took the Grey Poupon out of my cupboard." Cunningham stated this on the floor of the House denouncing French opposition to the Iraq war. He later plead guilty to accepting bribes from defense contractors. The prosecutor? Carol Lam, later fired by the Justice Department…Recommended Book of the Month: The *Little Book of Plagiarism*, by Richard Posner. Pantheon Books, 110 pages, $10.95, softcover. "There are very few lawyers, and even fewer judges, who write with an original style; Judge Richard Posner of the Seventh Circuit is one of them."…

Am pleased to announce **Roger Lund** and his wife Kelley, gave birth to their fourth child, Nick, weighing in at a tiny 5 lbs., 14 oz, and 19 ½ inches. Both parents doing well and older siblings, Bryson, Mark and Amanda are very happy Nick's finally arrived…The opening lines of an appellate opinion issued the week of April 2: Paraphrasing Alexander Pope, a court "should never be ashamed to own [it] has been in the wrong; which is but saying, in other words, that [it] is wiser today than [it] was yesterday." (Swift, *Thoughts on Various Subjects* in Miscellanies in Prose and Verse (1727) Vol. I, p. 340.)... From Floyd Abrams: "The difficult task, after one learns how to think like a lawyer, is relearning how to write like a human being."…And from Ayn Rand: "The purpose of the law is not to prevent a future offense, but to punish the one actually committed."…Mr. D., a seasoned practitioner, tells of talking to a rather coarse client. She was a witness in a Mann Act case. He tried to clean up her language. He gave her an acceptable word to replace a common word of Ango-Saxon fame. The prosecutor on cross was unbelieving of her newfound respectable vocabulary. "Do you know what intercourse is?" he asked. "I never knew what intercourse was until I met Mr. D.," she replied…

Steve Henderson has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. He will run again in the Law Day 5K Race May 12th to defend his crown in the Men's Open. Henderson wrote this month's column from the parking lot at Chavez Ravine and saved Sean's locks for sentimental reasons (see photo above).

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