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DAVID L. SHAIN

Ben E. Nordman Public Service Award Recipient

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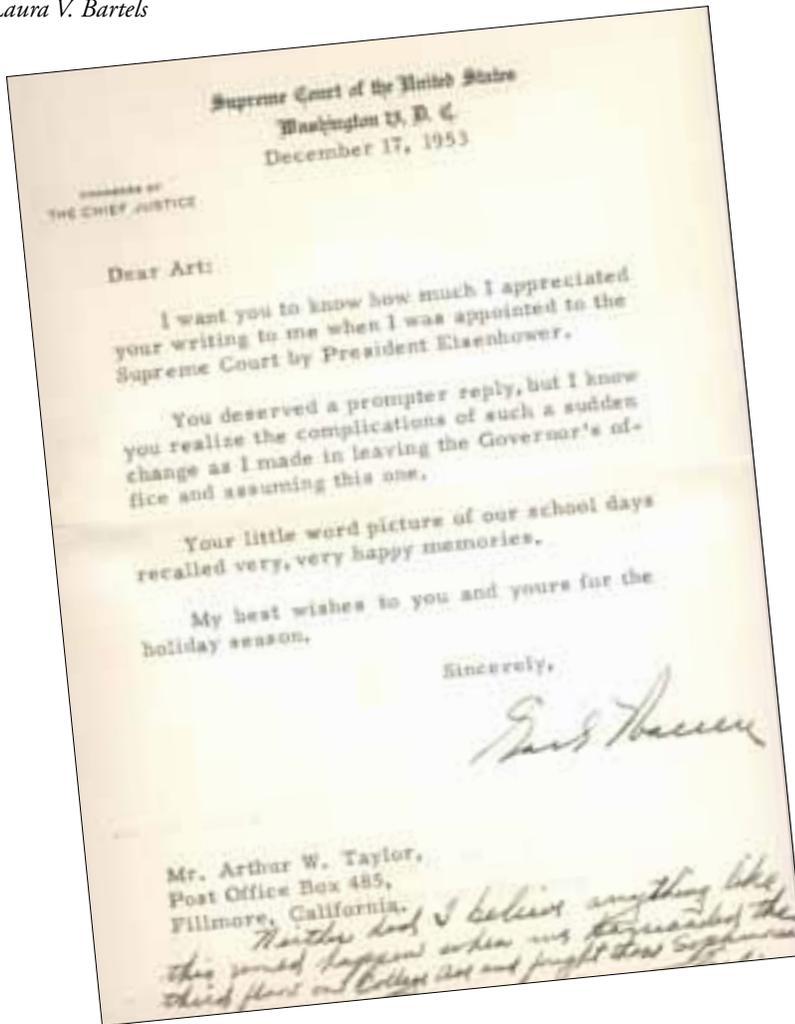
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PRESIDENT'S COLUMN:

WHEN HEROES HAVE FEET OF CLAY

by Laura V. Bartels



In December 1953, two months after Earl Warren was sworn in as Chief Justice of the United States, he wrote a thank you note to Fillmore's Art Taylor: "Neither did I believe anything like this would happen when we barricaded the third floor on College Ave and fought those sophomores, Earl." Earl and Art were college roommates.

The fountain-penned letter hung on our office wall because we enjoyed the connections of the Chief Justice to Fillmore's legal lore. Art and Earl regularly communicated and stayed friends up until Earl's death in 1974.

Art and Earl met at the University of California, Berkeley. Earl grew up in Bakersfield and Art grew up in Fillmore, both rural agricultural and railroad towns. Earl was born in his hometown. Art was six when his family came up on horse and buggy to Fillmore from Los Angeles. The journey took two days and Art's job was to place

a wedge of wood behind the back wagon wheel to spell the horses over the many hills. Art lamented moving to a town of around 200 people that consisted of two stores, three salons and two blacksmith shops. When Art and Earl attended Cal in 1908 there were 4,500 students. During Art's junior year, he and Earl joined a club where he lived with about 20 other students. The year they graduated in 1912, their "club" became Sigma Phi and Art was the fraternity's first president.

At Cal at that time, freshmen and sophomores were required to take an hour of military training two or three times a week. Art was one of the first seventeen draftees from Ventura County in September 1917. Earl enlisted also, and they both were sent to the 91st Division at Fort Lewis, Washington. Because of Art's college degree and "military training" from Cal, he was elevated to first sergeant, the highest

non-commissioned officer in the 91st Division. Earl was the first Lieutenant. Art and Earl were both discharged in 1918.

Earl went on to work for the California Legislature, then the District Attorney in Alameda County. Art received a dowry of a small kerosene heater and married his sweetheart Alice and moved back to Fillmore. Because of illness, Art did not finish law school with Earl, but later opened his law office in Fillmore, which is still open today. One of his cases required him to handle the legal process of moving bodies from the client's private burial place to the Santa Paula Cemetery. The client actually never had to remove the bodies, as they had gone back to dust, but he did say he'd find an occasional tooth. The humanity of small town law.

The letter was recently removed from our wall and I read of Earl's role in the internment of Japanese Californians. In 1942, as California's Attorney General and soon-to-be governor, in the midst of the war hysteria after the attack on Pearl Harbor, Earl was persuasive in propelling California into policies dispossessing Japanese citizens in California, Washington and Hawaii of their homes and property. Ten prison camps were established for the 120,000 displaced. Five thousand families from Ventura County were among those imprisoned at these camps until 1945.

To the statewide meeting of district attorneys and law enforcement officials in February 1942, Mr. Warren said: "The Japanese as an entire race of people, men, women, and children alike – especially United States citizens of Japanese ancestry – are poised to take disloyal action against the United States at any moment, to move to commit acts of sabotage, espionage, and disloyalty upon some mysterious signal to be issued to them by the Japanese enemy." Warren's office was instrumental in creating maps to substantiate their argument by showing Japanese Californians living near air strips, under power lines, near railroads and using this as evidence of a "fifth column."

The fifth column was a reference to the Spanish Civil War pattern of four columns

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“IT WAS OBVIOUS SOMETHING NEEDED TO HAPPEN”

by Wendy Lascher



Time and again **David Shain**, winner of the 2014 Ben E. Nordman Public Service Award, has stepped in to offer his wisdom, time, and financial support when, as he put it, “the need was great and it was obvious that something needed to happen.” The Nordman Award is presented annually to recognize outstanding public service by a Ventura County attorney. Shain says the benefits flowed to him, in that his activities have “so enriched my life in Ventura County.”

Launching from New York

Shain’s public service long predates his 1984 move to California. Inspired by Perry Mason, he had always wanted to be a lawyer, though he had little idea of what lawyers actually did, other than criminal defense. After college at State University of New York, Albany, Shain graduated from Georgetown Law School and was admitted to the District of Columbia Bar. His first legal job, however, was back in New York as counsel to the minority leader of the State Senate. In 1979, after being admitted to the New York Bar, Shain went to work for the Legal Aid Society, which served as New York City’s public defender. In the Brooklyn office, he spent five years representing criminal defendants, including regular appearances at night and weekend arraignments and trying all manner of crimes, in an atmosphere with a “public service feel.”

Shain joined his fellow Legal Aid lawyers in a ten-week strike in 1984. The strike was eventually resolved with a “ridiculous[ly]” low raise; by the time he left Legal Aid, Shain was earning a whopping \$35,000. This was an improvement on his starting pre-admission salary of \$17,000. It increased to \$19,000 after he passed the bar! At Legal Aid, Shain learned first hand the effect of poverty on the individual as well as the impact of the legal system on the poor. Despite the odds at times, he believes that he made a positive difference in the lives of his clients.

Venue Change to California

Shain’s parents, long-time teacher’s union members, were behind him all the way. His mother Rose passed away in 2013 at age 98. But Shain’s father Mac, still active at nearly 99, will be at the Crowne Plaza November 15 to celebrate as the VCBA honors Shain.

Even before the strike, Shain feared that his public defender work would make him cynical in the long run. He concluded he did not want to be a Legal Aid “lifer.” Shain’s brother Michael, a police officer, was already living in Los Angeles, New York winters were cold, and the West Coast looked good. Shain ordered bar review books, and took and passed the February, 1984 bar exam. A New York judge swore him in (yes, that was legal.)



Like Prisoners, Lawyers Mark Days



At a fundraiser for the strikers, Shain met social worker Paula Osterbrink. Married in October, 1984, they just celebrated their 30th anniversary. Their daughter, Sarah, a 2007 graduate of University of California, Santa Barbara, recently returned home after working in Washington D.C. and currently works for BH Cosmetics.

The newlyweds drove across the country in January, 1985 and settled in Westlake Village. David’s first job was with a civil defense firm in Los Angeles, then called Cotkin, Collins, Kolts & Franscell. He hated the commute, so after a time he joined **Alan Wisotsky’s** Ventura County defense firm. Then, while Paula worked for Ventura County Mental Health, David

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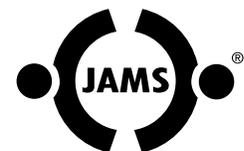
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lined up marching towards Madrid, with the fifth column embedded within the city to cause sabotage and attack from within. The thought at the time was that Japanese Hawaiians – a fifth column – orchestrated the attacks on Pearl Harbor.

Executive Order 9066 ordering the internment of Japanese Americans was signed by President Roosevelt on February 19, 1942, after Attorney General Earl Warren testified before a Congressional committee suggesting a Japanese Californian fifth column: "Unfortunately [many] are of the opinion that because we have no sabotage and no fifth column activities in this State... that none have been planned for us. But I take the view that this is the most ominous sign in our whole situation. It convinces me more than perhaps any other factor that the sabotage we are to get, the fifth column activities we are to get, are timed just like Pearl Harbor was timed and just like the invasion of France, and of Denmark, and of Norway, and all of those other countries. I believe that we are just being lulled into a false sense of security and that the only reason we haven't had a disaster in California is because it has been timed for a different date... Our day of reckoning is bound to come in that regard." That day of reckoning never arrived, as no proof of a fifth column was ever found.

Earl's biographies are light on the internment camps, though later he said he "deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens." It is difficult to reconcile the actions of a man who orchestrated the internment camps with the man who recognized the importance of a unanimous decision in *Brown v. Board of Education*, and penned many civil rights and voting rights cases we respect and honor today.

What happens when heroes have feet of clay?



Laura Bartels practices estate law in Fillmore at Taylor, Scoles & Bartels. She is the President of the Ventura County Bar Association for 2014

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“IT WAS OBVIOUS SOMETHING NEEDED TO HAPPEN”

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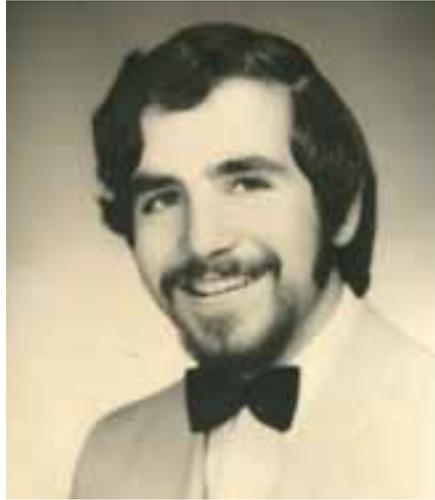


opened his own office in **Ron Harrington's** suite. Shain and Harrington have been close friends ever since. Later, David moved his office to Oxnard, where he shared space at different times with **Frank Bellinghiere** and **Peter Groom**, before partnering with **Ken Wennergren**.

Tim Sottile, who was a law clerk at the Cotkin firm while Shain worked there, says Shain has always been “really committed to his clients. He is willing to go the extra mile for clients when many other lawyers would throw up their hands and turn away.” Sottile credits Shain with making him aware that Ventura County is a great place to live and work. In 1998, when Wennergren decided to go in-house with his entertainment law practice, David met with **Lou Carpiac**, a now-retired partner of the firm then known as Case, Orr & Cunningham (now, Ferguson Case Orr Paterson LLP in Ventura.) Shain joined the firm as a partner, a move he considers his best career decision. One of the pioneers in the firm’s Westlake Village office, Shain handles personal injury and criminal defense matters.

Public Interest from Day One

Shortly after moving to California, former newspaper editor Marv Sosna told Shain about the Conejo Free Clinic, which provides legal services, daily medical services, and patient advocacy. Shain immediately volunteered, and still does, consulting with Clinic clients monthly.



Over the decades, Shain has also served as the clinic’s president and as a member of its board of directors. According to the clinic’s current president, Frank Baldano, Shain guided the clinic through some of its most financially turbulent times and helped ensure its survival to continue helping the neediest people in the Conejo Valley.

In 1986, when Shain was President of the Ventura County Bar Association, he worked with **Tom Hinkle**, former County Counsel **Jim McBride**, **Roger Myers**, **Carmen Ramirez**, and former Public Defender **Ken Clayman**, to launch the Volunteer Legal Services Program. Under the initial leadership of Alice McGrath, and then **Verna Kagan**, the program was unique in its use of retired attorneys to evaluate and refer out cases. Initially, the presiding judges of the then Municipal Court, the Superior Court and the Court of Appeal all signed a letter imploring attorneys to volunteer their time. Shain has not only taken a fair number of pro bono cases over the years, but has chaired the VLSP advisory committee since its creation.

Shain has also served, and financially supported, the Thousand Oaks Library Foundation, the Cancer Support Community (formerly known as The Wellness Community Valley/Ventura) and, through his membership in Temple Adat Elohim in Thousand Oaks, Habitat for Humanity’s efforts to build homes for underprivileged Ventura County

families. While doing all of this, Shain has advanced the interests of his fellow lawyers as VCBA President, as a longtime member of its Judicial Evaluations Committee, and through the Ventura County Trial Lawyers Association.

The State Bar of California recognized Shain for public service with its 2000 Pro Bono Award. Over four years, with co-counsel **Barbara Macri-Ortiz** doing much of the day to day work, he won \$380,000 for farm workers living in substandard, “Grapes of Wrath”-quality housing from their Oxnard landlord. Then, when the landlord transferred his holdings to a third party, David devoted more than 120 hours to a conspiracy and fraudulent transfer case, resulting in a settlement providing quality, affordable housing for farm workers. Macri-Ortiz described Shain as “truly a credit to the legal profession,” someone who is “committed to the notion that all members of our society, including the poor, are entitled to equal access to the courts.”

In the words of **Enrique Schaerer**, a Ferguson Case Orr Paterson LLP associate, Shain is “a class act” and “one of the kindest, warmest lawyers I had ever met. He projects an genuine interest in people, which is reflected in his unwavering commitment to the plight of the less fortunate.” **Doug Goldwater**, one of Shain’s law partners, nominated Shain for the Nordman Award as “a role model for me of what an attorney can – and should – be.” Precisely what **Ben Nordman** had in mind when he endowed this prestigious award.



Wendy Lascher, another of David Shain’s partners at Ferguson Case Orr Paterson LLP, specializes in appeals, writes, trial court motions and consultation. Lascher is the editor of CITATIONS.

FAMILY LAW DISPATCH: STATE OF THE FAMILY COURTS

by Greg Herring

At the recent Ventura County Bar Association Family Law Section meeting, Judge William Liebmann gave the annual "State of the Family Courts" presentation. Distinguishing Ventura County from other jurisdictions, all of our family law judicial officers attended. Joining them was a robust complement of child custody recommending counselors ("CCRCs"), other court professionals and staff. The family law bar, and especially the distressed families it serves, are fortunate to enjoy this level of commitment.

Judge Liebmann summarized the Court's financial condition as "serious but stable." The overall Superior Court continues to struggle with a \$2.4 million structural deficit. Through good management, it has survived without having to impose some of the Draconian courtroom closures and other cutbacks other counties have. Furloughs, staff reductions and other trimming have helped.

The Superior Court ranks 14th in the state in overall case filings per judicial officer. The good news is that it is in line for two more judicial positions; the bad is that the funding is absent!

How have our family courts continued to serve at their high level? Teamwork is the key. The family law bar continues to pitch in, providing judges pro tem and settlement officers. We generally continue to facilitate resolution, either through settlement or trial, in a civil manner not always demonstrated by our friends in other counties.

The clerk's office remains helpful and efficient. For instance, the turnaround period for submitted judgments remains in the two-week range. (This author's experience teaches that the period can stretch to months in other counties.) Judge Liebmann also thanked the family court's

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NEW POLICY PROMPTS INNS OF COURT RESIGNATION

Dear Judge Cody:

It is with considerable reluctance and disappointment that I must resign from this year's Inns of Court. The adoption by the IOC trustees of the new policy regarding disparagement is troublesome. I certainly have no difficulties with the concept of the policy but I am troubled by the perceived necessity for the rule, its application, and its chilling effect. I'm certainly not advocating that any Inns of Court group disparage or mock any particular group because of that group or person's sex, gender, religion or sexual preference. What I find uncomfortable is the chilling effect of this policy, which I find vague and almost impossible to apply.

I've enjoyed my tenure at Inns of Court, though it's been a lot of work

and there has always been a bit of push and pull among the group members with respect to how topics are presented. That's to be expected. My primary goal was to amuse; my second goal was to educate, and my third was to provoke. What I have found is that the rule has empowered the politically correct among us to take on the role of hall monitors to curtail what we discuss and how we discuss it.

My current IOC group has a quite interesting topic involving what issues arise when lawyers die. One of the members actually raised concerns that under the new policy, lawyers might be considered a protected class. That was obviously ludicrous on its face and quickly abandoned, but the policy adopted by the IOC appears to be a "thou shalt not offend" rule which leads to this kind of nonsensical thinking. What's the fun in that?

The difficulty with the policy of protecting a group is that you also inadvertently protect their ideas. The examples are endless. If I draft a skit lampooning the idea that government should actively serve as a

chaperone of sexual activity at college, the feminist groups get offended.

If I joke about the religious basis for Ventura County's attempt to ban sex or the use of the new term for prostitution, i.e. trafficking, I irritate the church and women. If I make fun of the enormous waste of money involved with the ADA and ADA trolls, I get in trouble with the disabled groups. If I argue that we don't have a gun control problem – but a crazy people problem – yep, I have offended yet another protected group. If I make fun of the weird growth

This has real world ramifications. It empowers the twittering mob to conduct public shamings where people lose careers and businesses, and the ability to make a living, without a modicum of due process protections – they are lynched by the mob of Political Correctness.

of animal rights, the crazy cat lady nation comes unglued.

Humor is a complex and delicate endeavor. It can dispel tensions, it can bring a group together, but most importantly, to my mind, is that humor allows you to safely speak truth to power.

This IOC policy empowers the lowest common denominator, the most sensitive and least secure, to take easy offense at the expression of contrary ideas. This has real world ramifications. It empowers the twittering mob to conduct public shamings where people lose careers and businesses, and the ability to make a living, without a modicum of due process protections – they are lynched by the mob of Political Correctness.

The other point of concern with the IOC is the mandate of "collaborative team" effort. Again, nice thought. Wish it could be true. Collaboration is another one of those communitarian ideas that sounds great in theory, but unworkable in practice.

Every team has to have a leader – the Masters have filled that hierarchy position traditionally. A Master is necessary to focus the group. You always need a "trace horse" – otherwise progress is a herky-jerk affair. Orchestras need conductors, football teams need quarterbacks, etc. I have found that a little common sense coupled with a sense of humor and sense of direction as well as buying everyone drinks, makes for a rewarding IOC experience.

In the last analysis, I have come to the point where it's just not any fun to participate in Inns of Court. I truly appreciated the experience, but it has now come to the point where the aggravation has now exceeded

the benefits. And of course, as Groucho Marx reportedly remarked, "he would not join a club that would have him as a member."

Very Truly Yours,
Michael L. McQueen.



Michael L. McQueen is a Camarillo-based attorney. His letter was originally addressed to **Judge Tari Cody** and is reprinted here with permission from Mr. McQueen.



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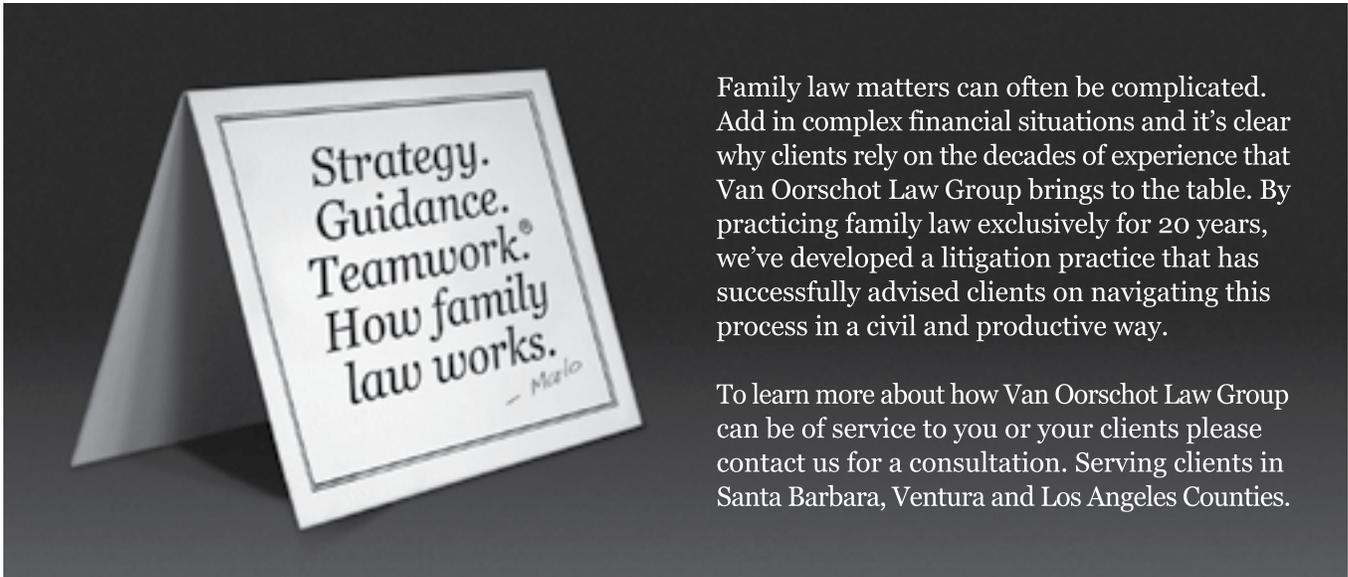
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(Left to right): Steven A. Meadville, Esq., of Counsel, Richard M. Hoefflin, Esq., and Jason M. Burrows, Esq.



Ray Rice fired for knocking his wife out in an elevator... Adrian Peterson indicated for child abuse.... Crisis in the NFL...

Few topics recently have grabbed the headlines as much as domestic violence. These incidents with professional athletes and even elected officials have prompted discussion on every major media outlet and sports channel. We have heard from instant authorities and talking heads telling us what causes this violence and many very simplistic solutions to a complex family problem.

As a court, we applaud the focus on this serious problem that affects thousands of families and welcome the opportunity to discuss how we handle the issue in our court.

Domestic abuse in Ventura County

Ventura County has one of the highest per capita rates of reported domestic abuse in the state, a rate more than double the state average. According to data from the California Department of Justice and US Census in 2013, there were 8.37 domestic violence related calls to police per 1,000 Ventura County residents, compared to a state average of 3.95. And this is not a recent development; reports of domestic violence in the county have been well above average for at least the past 10 years. On the positive side, since 2010, reported calls in Ventura County have dropped by 11 percent compared to a drop statewide of almost 6 percent.

DOMESTIC VIOLENCE BEYOND THE HEADLINES

By Judge Colleen Toy White and Michael Planet

Due to the sheer volume of domestic abuse cases, the Ventura County Domestic Violence Court started to experience the kind of problems that have been identified by other courts: inconsistent statements, problems with criminal protective orders, and lack of liaison with other justice and social service partners.

In the past we handled our criminal domestic violence cases in what could be described as the “traditional way.” Although law enforcement and district attorneys handling these cases had special training, the court assigned cases in much the same fashion as burglary or robbery cases.

Law enforcement takes a more specialized approach. “As a commander in the patrol division in the Sheriff’s Office, we educate and stress with our deputies when they arrive on scene of a domestic violence call, they have the opportunity to get help for all involved in the call,” Sheriff’s Commander Monica McGrath said.

The Ventura County Superior Court Domestic Violence court began in 2000. Retired Judge Charles Campbell established the court on a part-time basis with only misdemeanor cases. It expanded in 2005 to include all felony and misdemeanor domestic violence crimes (spousal, child, and elder abuse) committed in the county.

What we’ve learned

In Ventura, we “think” we have learned some lessons about how best to handle domestic violence cases. Many of our lessons were learned the hard way, such as:

We needed a court that specialized in domestic violence.

Even though judges worked hard to handle these cases we could not achieve consistency in sentencing and services to victims if these cases were assigned in a random fashion to a variety of Judges.

We needed a courthouse within a courthouse. By dedicating a floor of our Ventura Courthouse to courtrooms and services that impact the family, all courtrooms and services that are designed for domestic violence victims are located on the third floor of the building, including the District Attorney’s Victim Services Unit offering assistance with restraining orders.

It is critical to have the probation department formally and intensively supervise all defendants placed on probation to insure they comply with probation.

The presence of experienced probation officers in the domestic violence courtroom and the intensive monitoring outside the courtroom has been essential to our success. A formal report is prepared in each case with information about the facts, the defendant’s criminal record, victim input and a sentencing recommendation with suggested terms and conditions of probation that also provides the judge with information on other cases the defendant may have in the system, including dependency cases.

Involvement by the judge in monitoring compliance with 30/90 day reviews is important to the successful compliance and completion of probation.

Each of our defendants has an in-court 30-day review and a 90-day review.

A special focus and attention is needed in cases where children are witnesses to violence between parents.

Unique to Ventura County is a public health nurse assigned to every case where a child lives in the household or may have been a victim or witness to violence. The nurse who visits the family in the home and provides whatever assistance the child/children need. That may include referrals to medical attention, dental care and then a report back to the judge at a future review hearing.

FAMILY LAW DISPATCH: STATE OF THE FAMILY COURTS

continued from page 10

secretaries, facilitator’s office, judicial assistants, CCRCs and bailiffs. We all know that they are helpful, friendly, efficient and demonstrably hard-working.

Distressingly, it still takes twelve weeks to schedule a non-emergency child custody “mediation” session. This is unacceptable, but it is the best that can be accomplished under the current circumstances.

Hopefully the “not on life support, but not in recovery, either” status might change. In the meantime, Judge Liebmann’s presentation reminded us that we are all in this together, and that maintaining our remarkable civility, cooperation and overall professionalism is the best bet.

Good news is that the governor recently signed SB 1306, which cleans up much of the Family Code following the acceptance of same-gender marriages. Included was a long-needed revision to section 4323. Its rebuttable presumption towards reduced spousal support is now triggered in cases of cohabitation with a “non-marital partner,” regardless of gender or “relationship” status.

The precise meaning of “cohabitation,” though, will apparently remain a mystery to be eternally argued on a case-by-case basis.



Gregory W. Herring is a certified specialist in family law and a partner at Ferguson Case Orr Paterson LLP in Ventura.

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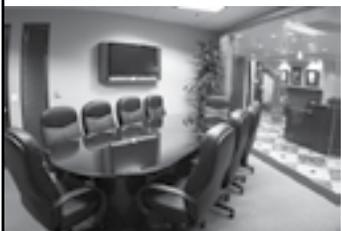
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DOMESTIC VIOLENCE BEYOND THE HEADLINES

continued from page 15

Referrals for drug, alcohol, and mental health assessments and treatment are critical to the population in domestic violence courts. We accomplish that with behavioral health clinicians.

Our families needed many services, which included the assistance of a family law facilitator. The court's facilitator's office is located just a few doors from the criminal and civil domestic violence courtrooms to provide help with family court matters including dissolution, child custody and child support issues that often need to be dealt with by the families involved in our domestic violence court.

The court should be a sanctuary for the victims of domestic violence.

The court has a room connected to the criminal domestic violence courtroom with district attorney victim advocates to assist with last minute restraining orders, prepare victim impact statements, and offer other support and assistance that may be needed. The most unique feature of this room is the window that allows victims to see and hear court proceedings without being observed by defendants in custody or others in the courtroom who might attempt to intimidate them.

Children, too, need a safe place to stay during any court proceeding.

We have a children's waiting room on the same floor as the courtrooms.

Criminal protective orders are a necessary part of every criminal case and often troublesome to get issued, modified (if necessary) and terminated at the appropriate time.

In criminal cases a criminal protective order (CPO) is issued in each case, either at arraignment or sentencing. These orders are served on the defendant by the deputy DA before the defendant leaves the courtroom. Either the district attorney or the victim advocate will provide the victim with additional information about services which may include help with family law matters or other community services including shelters.

continued on page 21

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The Ventura Family Law Bar presented the VLSP, Inc. a check for \$2500 in honor of Verna R. Kagan. You to can help by donating your tax deductible contribution. Please call or email Sandra Rubio at 650-7599 or Sandra@vcba.org.



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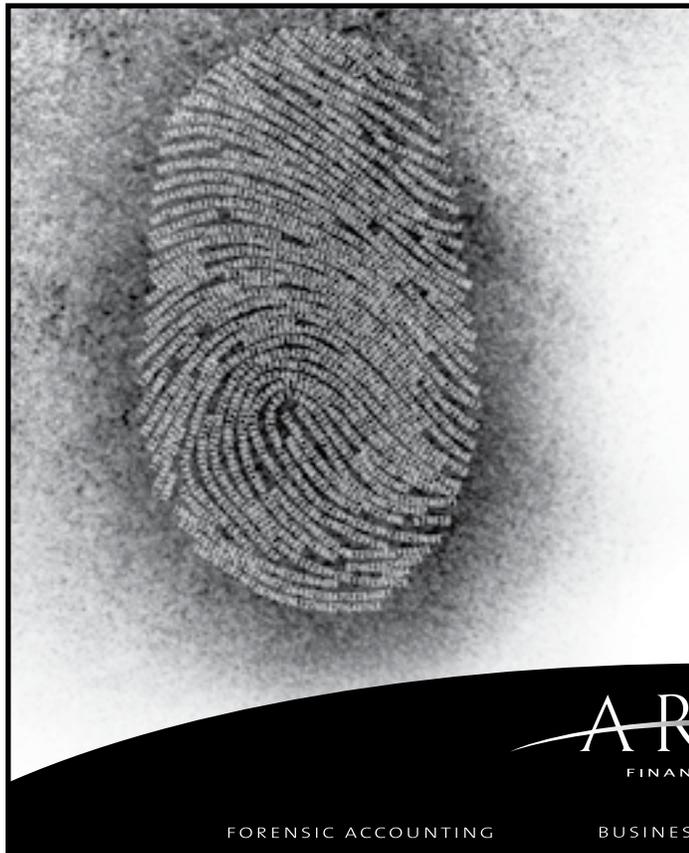
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EMPLOYEE CELL PHONES: WHO PAYS?

by Enrique Schaerer



So, do employers now have to pay for their employees' new iPhones and Androids? How about their minutes? Well, if an employer requires employees to make work-related calls on their personal cell phones, the Court of Appeal recently said that the employer must pay "some reasonable percentage" of its employees' cell phone bills. (*Cochran v. Schwan's Home Serv., Inc.* (2014) 228 Cal. App.4th 1137, 1144.)

In *Cochran*, the lead plaintiff brought a class action against a food delivery company, on behalf of 1,500 service employees who allegedly were not reimbursed for making work-related calls on their personal cell phones. Apparently, the employees were using their personal cell phones to coordinate food deliveries with clients. The plaintiff claimed that he and other employees were entitled to reimbursement under Labor Code section 2802, which requires an employer to reimburse an employee for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." The trial court said that section 2802 did not require the company to reimburse employees who had unlimited minutes and would have had unlimited minutes even if their jobs did not require them to make work-related calls. (*Cochran*, 228 Cal.App.4th at 1142.)

The Court of Appeal disagreed. It said the purpose of section 2802 is "to prevent employers from passing their operating

expenses on to their employees." (*Id.* at 1144 (internal quotation marks omitted)). It therefore concluded that, under section 2802, reimbursement is "always" required for an employee's "mandatory use" of personal cell phones to make work-related calls; otherwise, the court reasoned, "the employer would receive a windfall because it would be passing its operating expenses onto the employee." (*Id.*) To avoid this windfall, the employer must pay "some reasonable percentage" of the employee's cell phone bill. (*Id.*) What makes *Cochran* so alarming for employers is its holding that employers must provide the reimbursement – even when the employee has unlimited minutes and thus has not incurred any extra expense!

There are at least three important takeaways from *Cochran*.

First, the reasoning in *Cochran* rests on a questionable premise. Citing the California Supreme Court, *Cochran* asserted that the *overriding* purpose of section 2802 is to prevent employers from passing along costs to their employees. Although there may be some legislative history to support this assertion, the plain text of section 2802 suggests that its purpose is not to prevent employers from shifting costs to employees, but rather to ensure that employees are compensated for "all reasonable costs" they incur "in direct consequence" of their jobs. If employees do not incur *additional* costs because of their jobs – that is, if they would have incurred the *same* costs absent their

jobs – why should it matter whether or not an employer has saved costs? Indeed, nothing in the text of section 2802 precludes an employer from wisely minimizing costs where, as the case may be, it does not cost the employee anything at all. But this argument did not carry the day in *Cochran*.

Second, *Cochran* opens employers to greater liability exposure if they in fact *require* employees to make work-related calls on personal cell phones. The *Cochran* court said that, to show liability under section 2802, an employee "need only show" two things: (1) "he or she was required to use a personal cell phone to make work-related calls"; and (2) "he or she was not reimbursed." (*Id.* at 1145.)

A third, related takeaway is that employers may perhaps reduce their liability exposure under section 2802 by making personal cell phone use voluntary rather than mandatory. Indeed, the *Cochran* court repeatedly noted that the company in that case "required" employees to use personal cell phones to make work-related calls, presumably as part of a "mandatory" policy. (*Id.* at 1144–45.)

But *Cochran* left open several important questions. Where, for example, should courts draw the line between what is recommended or voluntary, on the one hand, and what is required or mandatory, on the other? May an employer avoid liability if its policy does not explicitly require or mandate the use of personal cell phones to make work-related calls? Or is it enough that the circumstances of employment *reasonably* require employees to use their cell phones in this way? Courts will likely grapple with these questions in future cases. In the meantime, expect some employers to pay for at least some of their employees' iPhones, Androids and minutes.



Enrique Schaerer is an associate at Ferguson Case Orr Paterson LLP, where his primary focus is litigation and counseling in the business and employment context.

Before joining FCOP, he graduated from Yale School, clerked for federal judges and practiced law in Los Angeles.

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Judge Rocky J. Baio: Swearing-In Ceremony

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DOMESTIC VIOLENCE BEYOND THE HEADLINES

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We needed to be responsive to requests for emergency protective orders.

A judge is available to law enforcement during business and non business hours (24 hours, 7 days a week) for review of emergency protective orders applications. The procedures and steps necessary to obtain an order have been streamlined.

Collaboration and more resources are critical. We have had regular meetings since 2001 with the organizations and agencies that impact domestic violence cases in our county. These meetings are used as a conduit for new information regarding anticipated changes in procedures and/or protocol or to address problems. The list of attendees has grown to 46 representatives from the agencies in the courtroom including the district attorney, public defender, and probation to representatives of the military bases in our county.

Still more to do

Working with our justice partners, this court remains a respected state leader in domestic violence courts in California and throughout the nation and continues to implement the best practices to handle domestic violence cases. Clearly, there is more work to be done to combat this complex issue. The challenge is compounded by budget reductions that have had significant impacts on the court and our partners in the struggle to provide services to keep pace with the demand. After the headlines recede and attentions shift to the next scandal, responding to domestic violence in our communities continues.

Judge Colleen Toy White presides over the Criminal Domestic Violence and Elder Abuse Courts of the Superior Court of California for Ventura County. Michael Planet is the Court Executive Officer.



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Exec's Dot...Dot...Dot...

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



Thought you all should know VCBA Board of Director member **Kata Kim** has been one of the recipients of the **James McGahan** Award of Excellence presented by the JHB Inn of Court three consecutive years, and she's also only been a member for three years. **Richard Walton** has been on the winning team three times also, but he's been a member for many years. Want to be part of the IOC fun? Are your second Thursdays of the month open from 6-8 pm? Contact Nadia at the bar offices at 650.7599 or bar@vcba.org... A prominent Cincinnati criminal defense attorney who told her client to destroy his cellphone SIM card was acquitted October 14 on a charge of obstruction of justice. Federal prosecutors had argued lawyer Mary Jill Donovan likely knew that her drug-addicted client was being investigated when she told her client to destroy the SIM card. The defense had argued, however, that Donovan told her client to destroy the card because she wanted to eliminate text messages of legally protected attorney-client conversations...

Past VCBA President **Joel Mark** has been appointed to another three-year term on the State Bar of California Committee on Mandatory Fee Arbitration commencing October 1. Joel previously served 14 years on the committee, chairing it in 1998 and 2008 and serving as the State Bar Presiding Arbitrator from 2009 through 2012... On October 6, Tony Maura in *Supreme Court Brief* noted that Bancroft partner Paul Clement argued his 75th case before the Supreme Court of the United States on October 8... Looking for past Bar president **Dien Le**? He took a fantastic job as senior attorney with Roxborough Pomerance Nye & Adreani in Woodland Hills. He may be reached at 818.992.9999 or dil@rpnalaw.com...



Assistant Ventura City Attorney **Andy Viets** has penned his 4th edition, *"Evidence: Federal & California Evidence Law."* The Kindle edition is a nifty \$50 and will be a nice Christmas gift... Sexism is pervasive in the legal profession, and it's highly unusual if a week passes that there isn't something to decry about the way women are treated by their male colleagues. Last week, Georgia lawyer Stacy M. Ehrisman-Mickle was forced to attend an immigration hearing with her infant child because Judge J. Dan Pelletier, Sr. refused to approve her motion for a continuance of the matter due to her maternity leave. The solo practitioner's husband is a truck driver who was on the road and her relatives live elsewhere. The local day-care centers won't take children less than six weeks old. "When the judge saw me with my daughter," Ehrisman-Mickle wrote, "he was outraged. He scolded me for being inappropriate for bringing her. He questioned my mothering skills as he commented how my pediatrician must be appalled that I am exposing my daughter to so many germs in court. He humiliated me in open court."... **Joe Hohenwarter** is the elected Lions Club District Governor for a one-year term starting July 1, 2014 through June 30, 2015. The local Lions District encompasses the counties of Ventura, Santa Barbara, and SLO and includes over 1,250 members in 35 clubs. Joe plans to visit with Lions Club leaders in the Shanghai region to exchange ideas during his annual trip to China this winter holiday...



Brett Templeman with Lowthorp, Richards, et al., was named the Men's Grand Champion at the 2014 World Body Surfing Championships in September. During the 38th Annual World Bodsurfing Championships, which were held at Oceanside Pier, 350 bodysurfers from California, Hawaii, Oregon, the East Coast, Australia, Brazil and France competed in twelve divisions. Brett, competing on the South Jetty Swells Team, placed first against nearly 275 men... Pregnant and planning to have her baby adopted, an Oklahoma woman sent a Facebook post to the father to let him know. But that was not sufficient notice to prevent him from later asserting his parental rights, the state's top court has ruled. "This court is unwilling to declare notice via Facebook alone sufficient to meet the requirements of the due process clauses of the United States and Oklahoma Constitutions because it is not reasonably certain to inform those affected." ...

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Steve Henderson has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. HIS Giants were his team all the way and November 16 marks his 10th year with the association.

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