CITATIONS

MARCH – TWO THOUSAND FOUR

VCBA MISSION STATEMENT
To promote legal excellence, high ethical standards and professional conduct in the practice of law;

To improve access to legal services for all people in Ventura County; and

To work to improve the administration of justice.

The History of the Steven Z. Perren Juvenile Justice Complex

-Alfred Vargas

EULUA ACCOUNTING

A Fact-Finding Mission to North Carolina

Philip Garrett Panitz

One of the duties of the Ventura County Bar Assocation Presidency is to do extensive comparative research regarding the functioning of other bar associations across our great land. This requires personal observation of other bar associations "on location."

The data I personally gather is then inserted into our Bar Association's computer, upgrading our functionality and enhancing our ability to serve our members by "borrowing" those functions that are working better elsewhere. These time-consuming and laborious field trips to other bar associations are done solely at my own expense due to our limited budget, and are somewhat acknowledged as one of the burdens of the office. It is a tradition that has dated as far back as the Tina Rasnow administration.

One of my recent fact-finding missions was to Pinehurst, North Carolina. Now, some might argue that it was the velvet green carpet of golf courses that actually led me to that far-flung locale; while others might claim that it was the coincidence of having a cousin getting married in a town just a few hundred miles away that made for a convenient excuse for the trip.

I assure you that my intentions were solely in serving the bar, and in the spirit of good relations I bought the North Carolina bar presidents I played with a drink at the 19th hole — at my own expense, of course. Although the trip was strictly business, I did book six rounds of golf at the various Pinehurst courses for those few moments when I could get away from bar functions. In fact, Pinehurst No. 2 is such a historic and famous course that I booked that course for play on three separate days.

Unfortunately, it rained only three days during my visit and, as luck would have it, only on the three days I was scheduled to play Pinehurst No. 2.

My cousin's wedding was in the small town of New Bern, North Carolina. This necessitated my renting a car in New Bern and ultimately driving to Pinehurst a few days later. I rented the car from a nationally known company, which shall be forever nameless but whose name rhymes with 'rational' and begins with an 'N'. I was in a hurry to get back to VCBA business, so I only took one slight sojourn to Kitty Hawk and the Outer Banks just for observational purposes. I couldn't help but notice what an ideal location it made for perhaps our next Bar Dinner.

Done with my fact-finding mission, and still morose over the rain-outs on Pinehurst No. 2, I returned the rental car to the local airport in Southern Pines for the connecting flight to Charlotte and onward to Los Angeles. I was told by the sole employee at the rental counter that my bill for the week was $4,800. She informed me that I had forgotten to request unlimited miles. She also told me that I had driven the car approximately 16,000 miles in the week that I had the car. To back up her calculations, she showed me what had been written by the clerk in New Bern as the mileage on the vehicle when I had rented it. Her math was correct, the mileage that little car had upon it after my obvious misuse was in fact 16,000 miles more than what had been written on my contract.

At first the shock dislodged all cognitive reasoning functions in my brain, but once my synapses started firing again, I questioned her calculations. The driving distance between New Bern and Pinehurst was maybe 200 miles, and the side trip to Kitty Hawk added another 250 at the most. The entire time at Pinehurst I had stayed at the resort, which had a shuttle bus. I argued that I had put 600 or 700 miles on the car at the top end. She stuck to her guns, and insisted that I sign her papers. I refused. We were at a standoff when she called her headquarters to get further directions.

While she did so, I did some quick calculations in my head. The total of 16,000 miles divided by seven days meant that I would have to have driven the car an average of 2,286 miles per day. Since there are only 24 hours in a day, I would have been driving an average of 95 miles per hour for 24 hours straight all seven days to make that kind of mileage.

Some of you who know me might not question the 95 miles per hour part, but the rental car was a Geo Metro, not my Porsche. Besides, I do need to stop to eat, sleep, and occasionally perform other functions — although as I get older, perhaps less and less. This would necessitate taking that Geo Metro over the century mark to make up for lost time. I am not sure that car could have reached a mile over 60 m.p.h., quite frankly.

When presented with this data, her headquarters realized that someone had made some kind of dreadful mistake, and it wasn't me. They agreed to look into it, but insisted that I sign my credit card for 10% of the total, or $480. It was completely arbitrary and excessive, but not wanting to miss my plane, I signed it under protest. I wrote to the car rental company upon my return home and also the credit card company, and ultimately was refunded my entire $480.

It's a tough job being President, but someone has to do it. It might also help to check the mileage when you first rent the car.

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Philip Garrett Panitz, 2004 President of the Ventura County Bar Association, specializes in corporation and tax law.

The Judge Steven Z. Perren Juvenile Justice Complex — *Alfred Vargas*

The outskirts of Sacramento, 1999. Ventura County Presiding Juvenile Court Judge Steven Perren sat at the bar of a lonely motel with tumbleweeds for neighbors. He pondered the 10-minute performance he was about to give. In retrospect, according to him, it would be the most important of his life.

He had just witnessed another delegation make its plea for a slice of the $138 million the federal government had allotted California to update county detention facilities. Judge Perren realized he had to rework his speech, and quickly.

At stake was $40.5 million to build a new juvenile complex. Cal Remington, Don Krause, Karen Staples, and Joan Splinter of the Probation Department had assembled a proposal and presentation for the Corrections Board. They were competing with delegates from 38 other counties, yet the Ventura County delegation was asking for thirty percent of the total allotted funds.

When they completed their presentation, Judge Perren spoke. Some were moved to the point of tears. One delegate from another county walked up to Judge Perren afterwards and embraced him. The Board was equally moved; Ventura County was awarded its request in full.

Juvenile Facilities

The justice system deals with juveniles in dependency and delinquency courts. Dependency court wards come into the state's custody through no fault of their own, usually because of abuse or neglect by guardians. The Clifton Tatum Center is an 84-bed co-ed juvenile hall designed as a predisposition facility for dependency wards awaiting foster homes or other placement, but it has also been used to provide temporary custody of minors in need of short-term removal from the community.

Delinquency court wards come into the system because of a criminal act or status offense such as habitual truancy, curfew violations, failure to obey parents, or being a runaway. The Colston Youth Center is a 45-bed juvenile detention facility where delinquency wards may be incarcerated for three to six months.

New Complex Needed

The sad truth is that even after two million dollars in renovations over the years to correct earthquake damage and general deterioration, the old facilities were still woefully inadequate. The Clifton Tatum Center is literally sinking into the ground. There are tales of loose wires and other dangerous conditions, not to mention overcrowding.

Pam Grossman, Senior Deputy D.A. for the juvenile unit, reports that she has used photographs of these facilities at intervention and truancy meetings to illustrate to kids that the path they were on would lead to very bad things. Parents of these kids say this was enough to scare some youths into changing their behavior.

When asked what should be done with the old juvenile hall, a very somber Juvenile Court Presiding Judge Back would only say, "It needs replacing."

The New Facility

The Board of Supervisors honored now-Justice Perren in June of 2001 at the ground-breaking ceremony of a new juvenile center. It is named the Judge Steven Z. Perren Juvenile Justice Complex. The 196,000-square-foot facility sits on a 45-acre parcel off Vineyard Ave., north of Highway 101. It has 420 beds.

By mid-March of this year the populations of both the Clifton Tatum Center and the Colston Youth Center will be moved into the new complex. All the treatment programs that were administered in the old buildings will be housed under one roof. Counselors, therapists, and teachers will work in the new facility.

Each of the living units has its own classroom and exercise area. Also available are a large gym and a technology training center. In addition the complex has medical offices, a visitor center, kitchen, laundry facilities, and offices for education and facility programs. The complex resembles a college dormitory more than it does an institutional facility. Some parts of the complex have comfortable armchairs in front of television sets. There are also tabletop amusement games such as chess and ping-pong.

However, the college campus illusion is shattered by peering into one of the individual sleeping rooms. Each has a concrete shelf for a mattress and the brushed-steel toilet/sink combination indicative of a correctional institution.

New Courtrooms
Ventura County will have six new courtrooms adjacent to the juvenile complex: two dependency courtrooms, two delinquency courtrooms, and two general trial courtrooms that will accommodate juries. The 45,000-square-foot court building will be completed in July 2004 and is minutes away from the juvenile center by tunnel.

Judges Brian Back, Charles Campbell, and John Dobroth will relocate to the new courthouse. Michael Planet, Executive Officer of the courts, says there are no immediate plans to transfer anyone else to the new facility.

The move will leave vacant three courtrooms at the Hall of Justice. Courtrooms 36 and 37 have jury boxes, while courtroom 30, the Dependency Court, will need renovation before it can be used as a trial court. However, since the population of Ventura County has not increased to allow for new judicial appointments, these will remain vacant.

The new courthouse will accept payments for traffic fines but will not accept court filings.

If you build it, will they come?
Opponents of any new juvenile detention facilities argue that if the beds are available, the justice system will fill them with our youth and thus more kids will be institutionalized.

While the number of beds available for juveniles has jumped from 130 to 420, and will expand to 540 in the future, this facility is designed to eventually meet the needs of the county's population through 2050.

The old juvenile hall was built fifty years ago at a time when the county's population was about 150,000. Just because it has 85 beds does not necessarily mean that there are only 85 juveniles in need of intervention. Today there are five times as many people in the county as in 1955, with a population jump of at least 10% every ten years.

The goal is not to incarcerate these kids because there is room to do so. According to Justice Perren, the goal is to remove them, where necessary, from their current

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Ventura Music Festival Tenth-Anniversary Season

Anthony R. Strauss

Although many people are unaware of it, the City of Ventura plays host to an annual world-class music festival each spring. The Ventura Music Festival, which runs over a ten-day span during the first week in May, is celebrating its tenth anniversary this year.

In past years, we have had world-renowned notables, such as classical guitarists Christopher Parkening and Pepe Romero, classical pianist Alicia de Larrocha, and jazz pianist David Benoit, performing classical, jazz, blues, and other types of music in historic venues in Downtown Ventura.

New Artistic Director Takes Up the Baton this Year

In addition to celebrating its Tenth-Anniversary Season, this year's Festival sees the arrival of a new artistic director, Navroj Mehta. Mehta — a violinist, and cousin of the internationally recognized conductor Zubin Mehta — also serves as music director for a variety of symphony orchestras, which gives him the ability to draw on his personal contacts with many of the world's premier musicians in order to benefit the Festival.

The Tenth Anniversary has given us the opportunity to preview the Festival with events scheduled every month since August. The event in January featured Mehta on violin and Cuban pianist Santiago Rodríguez performing works by American composers in the beautiful adobe Ventura Community Presbyterian Church.

But the evening didn't end there; those fortunate enough to take advantage of the intimate after-party at the hillside villa of Stephen and Lynn Kipp were treated to fine wine and delectable food, culminating with both Mehta and Rodríguez performing before captivated guests.

Members of the Bar Association Are Active in the Festival

Some of our colleagues are initiates of the Ventura Music Festival world. **Judges Roland Purnell** and **Bill Peck**, along with **Larry Matheney**, **Tom Hinkle, Peter Goldenring, Bill Fairfield, Donna De Paola, Al Contarino, Dick Chess**, and I are Founders of the Festival. Regular attendees and contributors include **Judges Vince O'Neill** and **Fred Bysshe, Don Benton, Wendy Lascher, Melissa Cohen, Mike O'Brien, Melody Kleiman, Michael Case, Bruce Crary, Jim Griffin, Mary Howard, Michael Kelly, Dan Palay,** and **Bill Moritz**.

As well as providing a forum for listening to wonderful music performed by some of the world's greatest musicians, the Festival's mission also includes education. Mehta has visited approximately ninety third-grade classes in Ventura and Oxnard to introduce children to the concept of melody and the creation of music. He has also held master-class workshops for middle and high school students.

This year's Festival, entitled "Celebration of the Americas," runs from April 29 through May 9, and will include performances by Chris Brubeck and Triple Play, Santiago Rodríguez, the Vermeer String Quartet, Eddie Daniels, Paul Galbraith, and Dmitri Demiashkin. For ticket information, contact the Ventura Music Festival Association at

(805) 648-4103 or visit
www.venturamusicfestival.org.

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Anthony R. Strauss, of Strauss-Uritz, is President of the Ventura Music Festival.

Masters in Trial

John H. Howard

On Friday, March 26, 2004, area lawyers will have a rare opportunity to experience a live trial demonstration by renowned civil trial lawyers from California and around the nation. The California Coast Chapter of the American Board of Trial Advocates (ABOTA) is sponsoring this one-day event, at which twelve trial lawyers, six each for the plaintiff and defendant, will examine live witnesses and argue their case before an actual jury, presided over by Associate Justice Paul H. Coffee of the Second District Court of Appeal.

This Masters in Trial program is similar to programs periodically presented around the country and featuring ABOTA-member panelists who volunteer their time and pay their own expenses. The last Masters in Trial program conducted locally was in 1997. A unique feature of this event will be a live video feed of the jury's deliberations in an adjoining room.

This year's participants include Thomas V. Girardi, Bruce A. Broillet, Browne Greene, Robert C. Baker, Edward J. Nevin, Donna Melby, and others. It will be presented at Fess Parker's Doubletree Resort in Santa Barbara.

Attendees will receive 7.25 hours of continuing legal education credit, including one hour of legal ethics. The registration form for this program is enclosed in this edition of *CITATIONS* and is posted on ABOTA's website at www.abota.org, together with information about ABOTA and other Masters in Trial programs. You may also contact Elaine Flynn, director of Professional Education, ABOTA Foundation, at (800) 779-5879, or by e-mail at elainef@abota.org.

For more information on the California Coast Chapter's March 26th Masters in Trial program, you may contact Evelyn Downs, legal assistant to Craig Price of Griffith & Thornburgh LLP, at downs@g-tlaw.com.

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John H. Howard is President of the California Coast Chapter of ABOTA.

Divine Hall

Pacific Coast Reporters

Elder Abuse in Our County — *Jody C. Moore*

In January of 2004, Attorney General Bill Lockyer released an important report in conjunction with State of California Department of Justice Bureau on Medi-Cal Fraud and Elder Abuse. The report inspected nursing homes in 16 counties in the state of California, with an eye to improving the quality of care for elderly and dependent-adult residents by identifying and correcting violations of applicable federal, state, or local laws and regulations.

Ventura County was included in the study. Six nursing homes were inspected and the results were published in the 400-plus page report. You may have read a blurb about it in the Ventura County Star on January 22, 2004. But the newspaper account glossed over the evidence of elder abuse by referencing trivial findings such as rotting olives outside a facility and torn window screens. The real stories are about profound malnutrition, seriously infected bedsores rotting away flesh down to the bone, contractures which rob the elderly of their mobility, and diapering residents for staff convenience rather than based on the abilities of the residents.

The root cause of these problems is that the facilities are horribly understaffed. Staffing was a large component of the attorney general's findings. In fact, four out of six of the Ventura County facilities surveyed are not in compliance with the mandatory minimum state staffing requirements. Yet the facilities continue to operate in violation of the law because there are few, if any, consequences.

Few cases of elder abuse and neglect are prosecuted, either criminally or civilly. Many families complain about incidents of abuse. They complain to facilities; they complain to the local ombudsman's office; they complain to attorneys. Very often their stories go unheard. There are always problems of proof when dealing with elderly, demented, frail clients. Often the victim of the elder abuse has passed away and there is no "witness" to explain the suffering associated with the neglect. There are financial disincentives to prosecute claims on behalf of the elderly because special damages are limited, if they exist at all.

Despite these hurdles, it is important for us to raise awareness of abuse in our community. We should not dismiss client complaints regarding quality of care. We should not expect perfection in nursing homes. But we should expect compliance with the law. Many elderly nursing home residents are not granted even that dignity.

I fear that the Ventura County Star article left our community with the impression that urine smells and buzzing flies are the most serious problems facing the elderly in nursing homes. Please help me raise awareness of the true stories of neglect which occur in our county facilities. Only by giving the victims of elder abuse a voice can we hope to avoid future abuses.

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Jody C. Moore specializes in nursing home and elder-care-facility litigation based on elder abuse and neglect.

Juvenile Justice Center

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predicament — whether it's gangs, drugs, or their household situations. This breaks the downward spiral and allows a child to attend school, counseling, or receive substance-abuse treatment. The system gives children sanctuary and an opportunity to participate in programs that develop life skills necessary to function in society.

Answering the criticism that we may lock up more juveniles, Justice Perren says that some of them, unfortunately, need to be locked up. By their behavior they have demonstrated they are a danger to themselves and to those around them. Through intervention we can stop them from self-destructing and perhaps protect a future victim. These are children who "haven't figured it out yet. It is our job to at least try to help them with our best efforts until they turn 18. If we can't help them, they are on their way to becoming residents of our adult penal system."

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Alfred Vargas is an associate at Lascher & Lascher, handling appeals, writs, and trial court motions. He is a member of the *CITATIONS* Board.

Ear to the Wall

Law Offices of **Joseph J. Beltran** have relocated the Oxnard office to 3585 Maple Street, Suite 270, Ventura, 93003. Telephone (805) 650-2077 and fax (805) 650-2079.

Edsall & Norris has relocated their office from its previous Camarillo address to 751 Daily Drive, Suite 325, Camarillo, CA 93010. The telephone and fax numbers remain the same. The attorneys in the firm include: **David E. Edsall**, **Gary W. Norris** and **Timothy S. Camarena**, with **Jerry L. Freedman**, of counsel.

The law firm of **Van Sickle and Rowley, LLP** is pleased to announce that **Rein Perryman** has joined the firm as an associate attorney. Ms. Perryman will divide her time between the Family Law Department and the Business Services Group.

Santa Barbara law firm Cappello & McCann LLP has changed names and added a new partner, according to managing partner **A. Barry Cappello**. The new name is **Cappello & Noël LLP** and reflects the decision to add partner **Leila J. Noël** to the firm name and the departure of **Michael W. McCann**, who has begun a solo legal practice. In addition, **Troy A. Thielemann**, an associate with the firm since 1996, has become a partner. On the web at: www.cappellonoel.com. E-mail: info@cappellonoel.com.

The Law Library has a list of books up for bid in March. Come in and pick up a copy of the list or call and ask to be put on our mailing list. (805) 642-8982.

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Make Law Now!

If you are interested in joining VCBA's State Bar delegation (see December 2003 CITATIONS), please contact Melissa Hill at MelissaJ.Hill@mail.co.ventura.ca.us or 477-1954. Remember: this email address must not be used to communicate about any matters before the court or anything else except delegation-related matters.

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Invoking Judicial Notice: Some Common Problems — *Melissa Hill*

Sections 451 and 452 of the **Evidence Code** set out which things are judicially noticeable. See also *Weil & Brown, California Practice Guide: Civil Procedure Before Trial* (Rutter Group 2002), at 7:18 et seq. It's a good idea to review the statutes and a practice guide before asking a court to take judicial notice. With increasing frequency we research attorneys are seeing requests for judicial notice where it is unnecessary or simply impossible.

Most often judicial notice is sought in connection with a demurrer. When ruling on a demurrer, the court may consider only those matters stated on the face of the subject pleading, and matters judicially noticeable. Often attorneys request judicial notice of the very pleading that is under attack. Of course the outcome of the demurrer depends on the sufficiency of that pleading, and the court will review it anyway. There's no need to request judicial notice of the complaint or answer one is demurring to.

Attorneys moving for summary judgment or summary adjudication similarly often request judicial notice of the operative pleading. Again, the issues are framed by that pleading. The court will be reviewing its allegations in the course of deciding the MSJ or SAI motion. It is not necessary to request judicial notice. That being said, the court always welcomes a copy of the complaint or applicable pleading, especially in multi-volumed cases. Attaching a copy of the complaint as an exhibit can save the court time, and save a weary deputy clerk another trip to Legal Research or chambers to deliver the one missing volume of a multi-volumed case.

Attorneys also ask for judicial notice of matters that simply are not judicially noticeable. I have seen requests for judicial notice of correspondence, of discovery responses, and, once, of a phone message. The erring attorney can save much face by advance review of the Evidence Code. If a demurrer depends on facts in the extraneous document which are not proper subjects of judicial notice, there's no point in consuming time and money on it.

Don't forget that although the court may take judicial notice of certain types of documents filed in other cases, it cannot accept as true the contents of those documents. We often see requests for judicial notice of documents or exhibits attached to previously filed motions, or those filed in other cases, and it is clear from counsel's arguments that counsel is expecting to have the contents taken as true and in this way win his or her motion.

Take a moment to consider the difference. Is the matter for which you are seeking judicial notice a judgment or final order? Then its contents might well be taken as true. On the other hand, are you seeking judicial notice of an exhibit, or a pleading, or a declaration, or a motion filed in some other case? Don't rely on the statements made in another motion to support the motion you're bringing here. Again, a brief review of the applicable rules and law can keep you on track.

There are other considerations to be made when seeking judicial notice. First, though it's not required by statute, you do well to bring a request separately from your motion. That is, if you merely request judicial notice in the body of your motion or demurrer, you stand the chance of having it overlooked. If on the other hand you bring it separately, both the research attorney and the judge will likely deal with the request first before moving on to the motion. The court will appreciate this method because it avoids the frustration of working partway through a motion only to have to go back and reconsider already considered arguments after stumbling across a request for judicial notice buried halfway through the moving papers.

Finally, be sure the material for which you seek judicial notice is delivered to the court for its consideration. This means that if you are seeking judicial notice of documents, provide authenticated documents as exhibits to the request. If you are seeking judicial notice of another file in the same court, make sure you arrange for that other file to be delivered to chambers prior to the hearing.

Most helpful are those attorneys who make this request when they file the motion and include some sort of clear written request to the clerks — so that when the calendar clerks are pulling files, they notice the request and know to bring both files. **CRC Rule 323** requires the party to make sure the clerk has the other file in the courtroom at the time of the hearing. How-

ever, since we know the court reviews the motions several days prior to the hearing, you will want to ask the clerk's office to deliver the second file along with the main file so it can be analyzed in the regular course of review. It's more difficult when one is requesting judicial notice of a file from another jurisdiction.

It's surprising how often an attorney will request such notice, yet fail to obtain either certified copies of the subject documents or to subpoena the file from the other court. Of course there's no way the court can take notice of the other file, much less consider the contents of a final order or judgment in that other file, if the materials are not delivered to the court.

We attorneys are busy folk. Litigators have too few hours in each day, and too few days in the billable month. Yet we do well to remember that a bit more attention to the codes, the Rules of Court, and to detail can save time, money, and the frustration that comes from a motion denied because we didn't fully understand the rules attendant to seeking judicial notice.

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Melissa Hill is a research attorney for the Ventura County Superior Court.

2003 Developments in Insurance Law – Part 2

Mark E. Hancock

This is the second part of a two-part article. Part 1 appeared in the February 2004 issue of *CITATIONS* and presented recent developments in ERISA and in insurance subjects ranging from advertising injury to rescission. This installment covers punitive damages, focusing on the case of *State Farm Mutual Auto Insurance Co. v. Campbell* (2003) 538 U.S. 408 (123 S.Ct. 1513, 155 L.Ed.2d 585).

One couldn't write an article on insurance-related developments in 2003 without mentioning *State Farm v. Campbell*. This case is important for its discussion of the guideposts for reviewing a punitive damage award, the kinds of evidence allowable in the determination of punitive damages, and the limits on such damages. It arose from State Farm's mishandling of a third-party auto liability claim in the State of Utah.

Punitive Damages — How Much is Enough?

To appreciate the *Campbell* case, a little context would be useful. Although there are those who would like to do away with punitive damages entirely, they are an established part of American tort law. For example, by 1935, all states, with the exception of Louisiana, Massachusetts, Nebraska and Washington, had adopted some form of punitive damage remedy. It has been a feature of English law for hundreds of years. (20 CEB Civ Litigation Rep 166, 167, Aug. 1998)

Punitive damages are awarded for the dual purposes of punishing the defendant and deterring similar egregious misconduct in the future. (See, for example, *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1593.) Such egregious misconduct must consist of oppression, malice, or fraud. (Civil Code §3294; see also BAJI 14.71 and 14.72.1) Punitive damages are awarded not for the purpose of rewarding the plaintiff but rather for the purpose of punishing the defendant. (*Kaye v. Mount La Jolla Homeowners Ass'n* (1988) 204 Cal.App.3d 1476, 1493)

The deterrence rationale, in turn, has two objectives. The first is to deter this particular defendant from repeating the conduct, and the second is to deter others from doing similar things.

Many would argue that this is a good feature of the law, because without the deterrence of punitive damages there are those who might, through calculation, engage in misconduct for profit. This debate arises in light of some large punitive damage verdicts in the modern era. Did you know that, until 1955, the largest punitive damage award in California was $75,000? (20 CEB Civ. Litigation Rep 166, Aug. 1998)

The current debate and attack on punitive damages isn't so much a head-on assault to eliminate them; they are too entrenched. Instead it is about the issues of: How much is enough to punish and deter? Who should make this decision? And what evidence is admissible in the determination? It is in this context that the *Campbell* case is so important.

In California, before the *Campbell* case, juries determining punitive damages have been instructed to consider: (1) the reprehensibility of the defendant's conduct and (2) the amount necessary to have a deterrent effect on the defendant in light of the defendant's financial condition. The defendant can also request that the jury be instructed (3) that the punitive damages must bear a reasonable relation to the injury or damage suffered by the plaintiff. (BAJI 14.71 or 14.72.2) The *Campbell* decision signals important changes.

One Two-Lane Highway — One Dead, One Disabled

Anyone reading the facts of *Campbell* might reasonably ask what State Farm, its lawyers, and their insured were thinking when they refused the settlement offer and decided to litigate the underlying case. It is important to realize and remember that no court involved in the review of this matter has really questioned that punitive damages were "merited."

But it is sad that a bad-faith case clearly meriting punitive damages has been turned, through advocacy no doubt partially funded with premium dollars, into a victory of sorts for well-funded tortfeasors with multi-state presences.

> What were the insurance company and its lawyers thinking when they refused to settle?

Let's start with the facts of the *Campbell* case. In 1981, Mr. Campbell, the insured, was driving on a two-lane highway in Utah. He crossed into oncoming traffic while attempting to pass six vans. A man, with the seemingly fated name of Mr. Ospital, driving in the opposite direction, was forced to swerve to avoid Campbell. Ospital lost control of his car and hit a car driven by one Robert Slusher. Mr. Ospital died and Mr. Slusher was rendered permanently disabled.

Settlement of $50,000 Offered and Rejected

Slusher and Ospital's heirs/estate then offered to settle for — and divide between them — the $50,000 occurrence limit of Mr. Campbell's policy. Unbelievably, State Farm and its insured refused to settle!

Unbelievable for several reasons.

First, factually, several investigators and witnesses opined that Mr. Campbell was at fault for "unsafe passing." That seems, on the face of things, to be a reasonable conclusion. Was the issue of who was at fault reasonably subject to debate? Query: Is it "OK" in Utah, in the face of oncoming traffic, to cross into the opposing lane of travel while passing, say, only five vans? Probably not. Isn't an insurance company supposed to pay in a case where the liability of their insured is reasonably clear, or is that being naive?

Second, because one person died and another was left permanently disabled, weren't damages reasonably in excess of $50,000? Was there a reasonable argument that the case and the injuries were worth less? By contract, insurance companies generally have the right and discretion to settle auto claims against their insureds, in spite of obstinate, foolish, or misguided

insureds. There was, in other words, a substantial likelihood of an excess verdict if the case were to go to trial, such that one could argue that there was not just the right, but the duty, on the part of State Farm, to settle the case.

Third, if the plaintiffs were indeed willing to settle for policy limits, that would eliminate the danger of an excess, uninsured exposure for the insured. You might expect that a reasonable, well-counseled insured would demand that the carrier settle in such a situation. Emphasizing that point is sometimes the function of independent counsel, but where was independent counsel in this case? (State Farm apparently told Mr. Campbell that there was no need to procure independent counsel.)

One wonders what principle State Farm was litigating here: stupidity, greed and/or the prerogatives of the proverbial 800- pound gorilla? In any event, State Farm and its insured gambled and lost. The judgment was for $185,849, and the scene was set for the next phase of this folly.

The Insured Sues the Insurer

State Farm paid its $50,000 and tried to abandon its partner/insured, suggesting that he sell his home to pay the judgment. State Farm even refused to hire appellate counsel and/or to post a supersedeas bond. Foreseeably, Campbell entered into an agreement with the plaintiffs in the case, whereby they would not execute against him and he would initiate a bad-faith lawsuit against State Farm. State Farm then paid the whole judgment but the lawsuit was still filed and went forward, resulting in a jury award against State Farm of $2.6 million in compensatory damages and $145 million in punitive damages (55.77 times the compensatories).

The trial court reduced the award to $1 million in compensatories and $25 million in punitives; but on appeal the Utah Supreme Court reinstated the $145 million punitive award, relying on State Farm's "massive wealth."

The trial court had also found that State Farm employees had altered records to make Campbell appear less culpable. This isn't the only time a State Farm entity, albeit State Farm Fire & Casualty, has been accused of Enron-like conduct. See the Zuniga declarations and the discussion in *State Farm Fire & Casualty Co. v. Superior Court* (Taylor) 54 Cal.App.4th 625.

The U.S. Supreme Court Finds the Award Excessive

The U.S. Supreme Court agreed that punitive damages should be awarded, but took up the issue of whether an award of $145 million in punitives, in a case now involving $1 million in compensatories, was excessive and violative of the Due Process Clause of the 14th Amendment to the U.S. Constitution.

Its short answer: Yes.

Writing for the majority, Justice Kennedy stated: "While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards," citing to such cases as *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559. In reviewing punitive damages, three (*Gore*) guideposts are to be considered: (1) the reprehensibility of the defendant's conduct, (2) the disparity between the actual (or potential) harm suffered by the plaintiff and the punitive damage award, and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases.

Nationwide Evidence Was Offered

In working through these guideposts, the Supreme Court also considered and acted on State Farm's arguments that company-wide/nationwide evidence should not have been admitted.

In the bad-faith lawsuit at the trial-court level, over State Farm's objections the plaintiffs had put on evidence of company-wide conduct that was allegedly part of a nationwide scheme to pay less than fair value on both first- and third-party claims. The purpose of the scheme was to enhance State Farm's overall fiscal goals (i.e., the "Performance, Planning and Review Policy") by such methods as targeting "the weakest of the herd" and by unjustly attacking the character of the claimant/plaintiff. For further exposition, see Justice Ginsburg's dissent in *Campbell*.

In fact at trial, counsel for Campbell argued: "[T]his is a very important case...[I]t transcends the *Campbell* file. It involves a nationwide practice. And you, here, are going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages."

In the process of minimizing the conduct and reversing the judgment, the Supreme Court majority began with what sounds like understatement: "We must acknowledge that State Farm's handling of the claims merits no praise."

Reprehensibility, it would seem, depends on the beholder and that is part of the issue: Who should decide? Interestingly, Justices Scalia and Thomas also separately dissented in *Campbell* and stated their views that the Constitution (and the Due Process Clause) provide no protections against the size of state court punitive damage awards. They would have affirmed the judgment of the Utah Supreme Court.

State Sovereignty Reaches Only So Far

The U.S. Supreme Court held that the Utah courts erred in relying upon much of the out-of-state conduct that the plaintiffs introduced. It held that punitive damages were awarded to punish and deter conduct that bore no relation to the harm in *Campbell*.

First, the Court stated that a state only has a legitimate interest in, and can only punish for, improper and unlawful conduct that occurs within its own boundaries. The state cannot punish a defendant for out-of-state conduct that may have been lawful where it occurred, and the state has no legitimate concern for punishing a defendant for unlawful acts that occur outside its own boundaries.

Second, the Court stated that punishment should be based upon particular conduct that harmed the plaintiff. Punitives should not be awarded based on unrelated conduct or dissimilar acts and not just because someone or some entity is, overall, unsavory. To allow in all this other evidence raises the threat that a defendant may be punished on more that one occasion for the same conduct, or may be punished just because it is unsavory.

In other words the Court was stating that State Farm was being unfairly punished, at least in part, for unrelated and/or out-of-state (reprehensible) conduct. The Court concluded that much of the conduct introduced in *Campbell* had no nexus to the conduct toward Campbell.

These are very interesting points. How far does one go in proving up a case for punitives? How far should a court allow a

plaintiff to go? One has to grudgingly admire the defense strategy in this: compartmentalize and thereby minimize.

The Court was not stating that evidence of out-of-state conduct is never admissible. In fact it stated: "[l]awful out-of-state conduct may be probative where it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."

But the jury must be instructed that it may not use evidence of out-of-state conduct to punish a defendant. While these points, in general, have a ring of reason to them, there were some questionable judgment calls on the way, such as stating that only evidence pertaining to the handling of third-party claims was related. Why shouldn't State Farm's handling of first-party auto claims also be considered? To me the distinction the majority made between third-party and first-party claims is artificial.

After all, if State Farm was mishandling the claims of its own insureds on first-party auto claims, how much more likely would it be (in the post *Moradi-Shalal* period) that they were also mishandling third-party auto claims? But the Court did not stop there in reversing the Utah Supreme Court.

Ratios & Multipliers — Good or Bad?

The Court went on, in the context of considering the second *Gore* guidepost, to discuss the idea of ratios and multipliers. While stating: "[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," the Court nevertheless went on to note that:

1. Few awards exceeding a single-digit ratio between compensatories and punitives will satisfy due process.
2. Historically, cases upholding punitive awards as nonexcessive have involved punitives of not more than four times the compensatories, and
3. When compensatories are substantial, a smaller ratio (i.e., a multiplier smaller than four) will be warranted.

The Court described Campbell's $1 million dollar award as substantial; however, it also noted that particularly egregious behavior resulting only in small economic loss might merit a higher ratio.

The effect of this discussion of ratios and multipliers may be to reduce the significance of a defendant's wealth in the punitive-damages equation and possibly call into question a plaintiff's ability to conduct wealth discovery and/or offer wealth evidence in the first place. After all, after discussing multipliers and ratios, the Court stated: "We have no doubt that there is a presumption against an award that has a 145-to-1 ratio," and never delved into State Farm's financial picture. But it didn't stop there either. In fact, in concluding, the majority stated that, "[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages...likely would justify a punitive damage award at or near the amount of compensatory damages." This goes beyond capping punitive damages at a particular percentage of a defendant's net worth, which is another method courts have used to limit punitive damage awards. (20 CEB Civ Litigation Rep 166, 168, Aug. 1998)

Is that fair, especially in light of the evidence that the conduct in Utah was part of a nationwide program to boost profits by underpaying claims? Didn't that add anything to the mix? Or could the Court simply have stated that a Utah plaintiff is only entitled to 1/50th of a $145 million punitive damage award based upon nationwide conduct?

Heretofore, the defendant's wealth has been a big factor in California in assessing punitive damages. Yet in *Campbell* the Court repeated: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award." It also stated "'[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy....That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' [or the disparity between the actual harm to plaintiffs and the punitive damage award] to constrain..an award...." (matter in brackets added).

Campbell could be used to argue that the conduct meriting punitive damages is what it is, and that it should be punished based on multiples of the compensatories, regardless of the wealth of the defendant.

In my view the danger of multipliers for punitive damages is precisely that it makes them predictable, and therefore less of a deterrent — especially to well-financed, multi-state tortfeasors. And if we lose the deterrence feature, we have lost a historical rationale and purpose for punitive damages.

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Mark E. Hancock is an attorney with offices in Ventura. He handles insurance disputes for insureds in first-party cases and defends insureds in liability insurance cases where there is a conflict of interest, a reservation of rights and/or excess exposure.

ARC

CITATIONS Solicitation

The CITATIONS Board members have a pretty good time at CITATIONS meetings, trying to figure out what should go into the next issue.

At the January meeting we talked about launching an anecdote column. Suggestions came from all points of the room. We could call the column:

"Unintended Consequences"
or
"Uncivil Procedure"
or
"It Seemed Like a Good Idea at the Time"
or
"How Stupid Can You Be?"

However, while we do not lack for good ideas for columns, the editorial board can't come up with all of the content. So please bring your funny stories, and outrageous ones, too, to one of our meetings, the last Friday of the month at the VCBA office at noon.

Can't make it then? You can also e-mail items to CITATIONS c/o
wendy@lascher.com.
And please remember to put "CITATIONS" in the subject line of your e-mail message.

LAW SCHOOL CAREER FAIR

All VCBA members are cordially invited to participate in Ventura College of Law's Career Fair, to be held on Wednesday, March 17, from 5:30-7:00 PM, on the College's campus at 4475 Market Street in Ventura. The purpose of the event is to allow the College's students to speak with members of the legal community about various legal careers and what you can do with a law degree. For further information and to RSVP (refreshments will be provided), please contact Barbara Doyle, Assistant Dean, at (805) 658-0511 or bdoyle@venturalaw.edu.

Classified Ads

Office Space for Rent

Located in Court of Appeal building, 200 E. Santa Clara St., Suite 200, Ventura. Large office, receptionist included, use of fax, scanner, copier, voicemail, coffee room and law library/conference room. Contact Terry Viele, (805) 643-8658.

Ventura Law Office for rent: County Square Professional Offices, 674 County Square Drive, Suite 101; 2 minute walk under Victoria Street to Court House, Law Library etc., first floor, large window, large parking area, share secretary/receptionist and client waiting area, with 2 other law offices; $425/mo; Intercom, DSL, Pitney Bowes Postage, and Credit Card equipment. Call Douglas English, Esq. 642-2025

Employment Opportunities

Do you believe that the attention and appreciation one gives to others is always reciprocated? We do. That's why at FTMLaw we take great pride in providing our clients with the service, sensitivity and respect they deserve. We are building a team of specially-trained professionals to guide our valued clients in the creation of a meaningful, lasting legacy for their families and community. Are you an experienced, well-trained, highly-motivated trust administration and estate planning legal assistant curious to see what this position at our A-rated Ventura firm might mean to you? E-mail us at ftm@ftmlaw.com for details.

Norman, Dowler, Sawyer, Israel, Walker & Barton, LLP, is looking for a Legal Assistant with experience in the areas of probate, trust administration, and estate tax returns, or some combination of those areas. Please send resume with salary requirements to Loye M. Barton, 840 Country Square Drive, Ventura, CA 93003, or e-mail lbarton@normandowler.com.

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Steve Henderson, Executive Director

Verbal fisticuffs with a judge led to handcuffs for rookie public defender Kermie King, 27, who was ordered to sit next to jail-inmate clients in the Kissimmee, Fla., courtroom's jury box. First Circuit Judge Margaret Waller complained that Ms. King had arrived unprepared, and then Ms. King responded that it was not her fault. As the two began arguing, Judge Waller warned: "Oh please, do not argue with me. Do not argue with me, or I am going to put you in jail." Finally, the judge said: "Contempt." Ms. King wound up cuffed next to the client she was representing…

Tom Beach, a defense litigator with **BeachPM&S** since 1984, will become Of Counsel with the firm and transition into a family real estate development company in Camarillo shortly…**Derryl Halpern** is a new daddy again. Little Max weighed in at 7 pounds, 7 ounces, and was a full 20 inches in length. His wife Shelly and 22-month-old daughter Emily are well — and "cutting the cord" was a breeze…**Renee Mercado**, CLA extraordinaire, is moving on to dryer pastures. After five-and-a-half years at **FergusonCOP&C** and five years at **BohlC&W**, she's relocating to Phoenix towards the end of this month…

I planned to stop her murder but I forgot, says a Washington man accused of having his ex-wife killed. Roland Augustine Pitre reportedly told police he ordered the hit, but meant to intervene in time to play the hero and win back his ex-wife's love. Instead, he said he "blacked out" at his girlfriend's house, and Cheryl Pitre was beaten and strangled to death…

After 23 years, **Joe Beltran** moved his office from Oxnard to Ventura. Check out Ear to the Wall for his new vitals…License Plate of the Month: 4JSTCE driven by **Laura Bartels**. Spotted Jan 9: **LTHL ESQ** — but do not know who owns that screamer…**Ron Harrington's** wife, **Patricia Kochel**, has been writing stories from time to time for The Star about the bright lights and dim bulbs she encounters as a counselor at Buena High. Patricia is a lawyer…With the addition of **Rein Perryman**, the law offices of **VanSickle & Rowley** has grown to 13 attorneys in four practice areas…

The first empirical study of **attorney fees in class action lawsuits**, conducted by Theodore Eisenberg of Cornell and Geoffrey Miller of New York University Law School, found that there has been no real-dollar increase in the level of client recoveries of fee awards over the last decade. Sen. Orrin Hatch, R-Utah, responded: "jackpot justice, with attorneys collecting the windfall." To see the full study, go to www.papers.ssrn.com and type "attorney fees" in the first field…

Some leadership changes in the bar association — **Dennis LaRochelle** has agreed to replace the hard-working **Lou Carpiac** as chair of the Business Law and Litigation Section. **Dan Palay** and **Roberta Burnette** will co-chair the Employment and Labor Law Section after a two-year effort by **Nancy Miller**. **Deirdre Frank** has accepted the daunting task of coordinating the activities of the Public Education Committee. Lastly, **Larry Nathanson** will assume the responsibilities as captain of the Taxation Section — filling the capable shoes left by **Phil Panitz**…**Lou Vigorita** tells me James Carville was quite a hit at the 2004 winter convention of the California Applicants' Attorneys Association… **Mark Sellers'** retirement reception was held Jan. 27 at the T.O. Civic Center and attracted 100 or so. Mark is retirement-eligible by PERS standards — and, no, the **Ed Masry** troops did not attend. **Kathryn McMenamin-Torres**, **Alyse Lazar**, and **Laura Callero** will be holding the fort down on an interim basis…150-plus wandered into the **Bob Davidson** gig at the Pierpont Jan. 29, including lots of lawyers and **Judges Walsh**, **White**, **Bysshe**, **Long**, **Back**, **Curtis**, and **Justice Perren**. Name partners **Donald Benton** and **Henry Buckingham** were there too. Bob will be playing Lt. Schrank in the production of *West Side Story* at the Ventura College Theatre March 19-28, and joining Bob on stage are **Mike Velthoen** and **Ed Buckle**…

Los Angeles has about **52,000 attorneys**. Sixteen of them are going to prison. Eight more are in the process, not counting the dozen under investigation. The Integrity Division of the Los Angeles District Attorney's office is cleaning house, weeding out lawyers, mostly solo practitioners, who have skimmed, siphoned, and, in some cases, looted their clients' trust accounts. The office has a 100% conviction rate; so far…**New York City is experimenting** with an on-line system to settle suits. In a two-year pilot program, Cybersettle, Inc. will allow persons to use the web to make small personal-injury claims against the city. The city hopes the program will speed processing of about a third of the *24,000 claims made against the city each year*…

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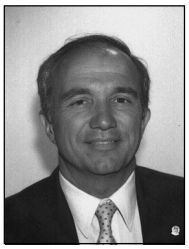
Steve Henderson has been the executive director of the bar association since November 1990. He will be taking off the month of March to view and enjoy the Madness. Go Blue Devils, Cardinal, Panthers, St. Joe's and Bobby Knight. Additionally, he asks: *If you have a bunch of odds and ends and get rid of all but one of them — what do you call it?*

ARTIME GROUP

Meaningful Workers' Compensation Reform:
We Should Change the "Bunkhouse Rule"

Louis J. Vigorita



I recently attended the Ventura County Housing Summit as a representative member of the board of the Advocates for Civil Justice (AFCJ), a nonprofit organization involved with local affordable-housing issues.

The Summit was attended by some 300 people representing a wide array of parties interested in issues concerning farmworker housing. The mostly congenial atmosphere was peppered with questions and suggestions about how these divergent groups could and should work together to integrate farm workers into communities where they are sorely needed to pick our food.

At present, there is not enough housing for these important members of the agricultural community.

During the din of give and take, I heard one grower mention that the "bunkhouse rule" was an example of something that could and should be addressed to make it easier for growers to provide housing for their workers. My impression was that this grower was genuinely concerned for her workers and that perhaps this rule should be changed to encourage more housing.

Although the "bunkhouse rule" is not one of those sexy issues in the workers' compensation debate, changing the rule could provide some real relief to the housing shortage faced by farm workers today.

But this creates a dilemma: Do we amend the workers' compensation system to take away the benefits accorded the farm worker who is presently covered in the "bunkhouse" in order to create more housing for other farm workers?

So what is this bunkhouse rule? The general rule is that if an employee is *required* to live or board on the premises of an employer, either by terms of the contract of employment or by the necessity of the work, an injury received while making reasonable use of the premises may be compensable, though the employee is not at work at the time of the injury.

As one court has put it, "[t]he bunk house rule is merely an extension of the general rule that where an employee is injured in his employer's premises as contemplated by his contract of employment, he is entitled to compensation for injuries received during the reasonable and anticipated use of the premises" (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 620, citing *Argonaut Ins. Co. v. Workmen's Comp. App. Bd.* (1967) 247 Cal.App.2d 669, 677-678).

This source of liability is a factor that discourages employers from providing housing for workers.

While the "bunkhouse rule" is not one of those sexy issues in the workers' compensation debate, how many of those issues are relevant to real reform anyway? Changing or modifying the rule could provide some real relief to the housing shortage faced by farm workers today. Although a change may whittle away some minor benefits for workers, I believe that this is one compromise that workers should embrace.

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Louis J. Vigorita is a State Bar certified specialist in Workers' Compensation Law. He practices in Ventura.

CITATIONS
Ventura County Bar Association
4475 Market Street, Suite B
Ventura, California 93003

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