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CITATIONS

J A N U A R Y - T W O T H O U S A N D S E V E N

Coming Soon

California Case Management

page 5

*By Michael Planet - Court Executive Officer,
Superior Court of California, Ventura County*



JONATHAN FRASER LIGHT

SUSAN CARLISLE

PATRICIA KOCHER

CRISTIAN ARRIETA

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PRESIDENT'S MESSAGE

Jonathan Fraser Light

Now that I have been handed the mantle (“cloak as a symbol of authority” – Steve, where is it?), perhaps the best way to begin these columns is to enlighten you about how I landed in Ventura County. After an enjoyable 3-1/2 year stint at Loeb & Loeb in Los Angeles, my wife, Angela, and I decided that we wanted to have children and raise them in the friendly confines of Ventura County. Angela is a Camarillo native and her parents lived what ultimately turned out to be four blocks away (with the obvious positives and negatives that such geographical proximity brings).

My father thought I was nuts when I announced in 1984 that we were exploring a move to what was then still considered a vast, unknown, foreign region. Through a broadcast industry friend of his, I was presented with the name of a local lawyer, one Ron Harrington, whom I was to call and arrange lunch. Ron turned out to be one of the nicest people I have ever met in the law (Bruce Johnston is also in the photo finish). He treated me to a nice lunch at the Sportsman in Ventura. The place reminded me of Musso & Frank in Hollywood, so I could at least report to my dad that there were some cultural landmarks here. I had been zealously defending PacMan from copyright infringement in Los Angeles, but the standard joke I was hearing in Ventura County was that there was no intellectual property work because there were no intellectuals in town. I have since learned otherwise, Don Hurley notwithstanding (Don, you'll never get off the radar).

I told Ron that I was looking for a “large” firm, and he said there were two such choices. One was the firm known as Cohen, England & Whitfield, which Ron reported had recently been described by one local member of the judiciary as something akin to a concentration camp. Perhaps not an entirely accurate characterization, but

certainly a deterrent to my making a call. The second choice was the Nordman outfit, with 22 attorneys. The same judge had described this bunch as “the Love Boat.” My choice was obvious, but how to obtain an entrée?

I reported these names to my mother-in-law and she immediately told me that she had been giving Spanish lessons to one Amy McAvoy, mother of one of the Nordman partners. She quickly arranged a phone call to Laura McAvoy, and I interviewed with the firm in November 1985. I was able to meet Ben Nordman shortly before he had throat surgery, and I immediately disliked Marc Charney because he looked exactly like a Loeb partner with whom I had some negative experiences. Marc has since grown on me. I suspect that I have grown on him, albeit somewhat like a staph infection.

Fort Nordman on “A” Street in Oxnard was a compelling location; I was compelled to run back to Los Angeles screaming that there were no windows in the place. My most vivid memory of my interview day was walking into Ralph Cormany's office. One of the largest men I had ever met stuck out the meatiest paw I had ever seen and shook my hand. He then sat back, took a puff, and in his best John Wayne gravel voice said, “Well, your resume looks okay. We just brought you up here to make sure you had all your arms and legs and weren't an asshole.” I then was escorted to the Colonial House Restaurant across the street, at which time I suspect the partners were on their best behavior and imbibed little, if any, alcoholic spirits.

After a brief negotiation of sorts, I accepted a 40% pay cut and Angela and I were invited to the firm's Christmas party. The contrast was somewhat startling. We had just attended the McCann-Erickson ad agency

party (Angela was a traffic coordinator) at the Bel Air Hotel, complete with a 35-piece orchestra. We had also attended the Loeb Christmas party at Chasen's. The Nordman folks gathered at a local rec room, with card tables and steamed veggies, augmented by the wit and wisdom of Gary Arnold and Brian Back on a makeshift stage imitating each of the partners. Music blared from the boom box as Ron Gill shimmied around the room.

It seemed like a fun group. Two months later, on February 4, 1985, I joined the firm. Two weeks later, I was at the Alisal Ranch for a firm “retreat.” Two weeks after that I was on the firm's ski trip. I could get used to this, I thought. A year later, I received my first review, most notably from Bill Hair: “He'll be okay once the Century City sheen wears off.” Some vestiges of the sheen may remain, but after 22 years, I feel at home with this group and blessed that we not only made the right choice, but that the firm took a chance on the kid from L.A.

Jonathan Fraser Light (it's on the business cards - "Jon" for everyday use) is a partner with Nordman Cormany Hair & Compton LLP (no commas anymore).

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Coming Soon: The California Case Management System

By Michael Planet

Imagine filing a last minute pleading or response to a motion on Sunday at 11:59 pm. Imagine viewing every document filed in your complex civil case, small claims or probate case on your laptop from any place in the world you can access the Internet. Imagine having computer access to the dockets for all California courts, 24/7. Imagine no paper court files, but "paper on demand" by "point and click."

These and other services are part of the exciting future coming to civil practice in the Ventura County Superior Court. Beginning this spring, the court will deploy the first modules of the new California Case Management System. The first module will be Small Claims, followed by Probate, and then Civil – in limited and unlimited case types. Once these systems have been deployed and stabilized, probably during the summer, the court will be able to accept electronic filings via the Internet. The final piece of the new system, scheduled for early 2008, will be the launching of document imaging, replacing hard copy files with digital images that can be accessed, stored and printed on demand.

The first and easiest part of implementing the new system will be the actual deployment here at the court. Our team of court experts has been a driving force in the development of this system, which will be implemented statewide among all 58 Superior Courts by 2011. Ventura will be the first court to deploy all 3 modules at all court locations. The clerk's office staff, courtroom support staff and judicial officers will be the first users

of this new technology. The technology will allow us to manage more cases, more quickly, and with fewer errors. This will allow us to better serve the attorneys and all consumers of civil-related court services.

The involvement and support of the bar is a key ingredient to this project. Over the next year, the court will do extensive outreach to attorneys practicing in the Ventura courts. We will introduce you to the California Case Management System so that you can see all of its features that will improve the court's case management. We also need and will seek your input on local rules and procedures and look forward to a dialog about how the business side of the practice of law can benefit by fully utilizing the technological services that will be available. Plan on seeing us in the coming months at meetings of the bar sections, forums here at the court, or presentations at your firm to share more about these exciting and progressive improvements.

Ventura County is one of the most "wired" and technologically advanced jurisdictions in California, if not the country. The Ventura County Superior Court is recognized nationally for its history of innovation in technology and other areas of court administration, and for its long and deep collaboration with the bar. Now is the time to get ready for the new wave. Be on the lookout for the technological revolution in civil practice coming your way.

Michael Planet is Court Executive Officer for the Superior Court of California, Ventura County.

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So consider joining a local collaborative law group. Once there, you will find attorneys and other professionals who are encouraged to work with you in a new model within a spectrum of options for resolution. You may be rewarded by a desire to maintain and grow your practice for an extra five to ten years instead of longing for early retirement.

Susan Carlisle, CPA/ABV/ PFS is a sole practitioner who works with Ventura county attorneys and mediators. She can be reached at (805)495-3197 and carlislecpa@sbcglobal.net

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Each year the State Bar's Board of Governors makes approximately 200 new appointments, replacing one-third of the State Bar committee memberships. Attorneys appointed to these committees have an opportunity to serve both the legal profession and the public in a variety of significant ways. The application materials are available at the State Bar's Web site <http://www.calbar.ca.gov>; select the left-menu links ▶ Attorney Resources ▶ Committees and Commissions. Interested applicants may also contact the Appointments Office at (415) 538-2299 or the committee's staff liaison listed.

Generally, committees seek attorneys who have experience in the relative subject matter, who can work collegially, and who can make the time commitment. Local bar and other volunteer experience can be important factors in the appointment review. The section executive committees

are the governing forces for the sections; therefore, they seek section members who are knowledgeable about the section and who have been active in that section (e.g., served on one of the section's standing committees, contributed to the newsletter, etc).

The State Bar's committees review the applications in March and April, and the Board of Governors makes the appointments by the end of July 2007. Terms commence September 30, 2007.

**Application Deadline is
February 1, 2007**

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WHAT THEY WORE; WHAT THEY BOUGHT

By *Patricia Kochel*

I have been to every VCBA Annual Dinner since 1994. It's the one event each year that my husband, himself a recipient of the Nordman Award in 1998, implores me to attend with him. I am usually glad I have gone, looked and listened. But this year...this year was not at all what I expected. Especially the vasectomy piece.

First, I had expected to be wearing white instead of common black. Whenever I go to a fancy dress affair, the shtick with my husband goes something like this, "Should I wear my black dress or my black dress?" "Oh, I like your black dress, wear that one." "OK. I'll wear my black dress." A few years ago I had worn a Carole Little long white dress made of a soft blend of rayon and polyester to some event I can't remember. I had bought it in the lounge wear department. Though it is a house dress, I thought it elegant. I planned to wear it to Saturday's dinner, but wanted to get my mother's opinion. I drove to her house, and as I was getting out of the car, my brother walked up. I asked him if he liked my dress. "Well, since you asked," he said. "It looks like something you would wear to bed." I stared hard at him. Mother agreed. "Wear your black dress. It looks nice on you." I wonder if people at that event a few years ago thought, like my brother, I looked ready for bed.

When I entered the room awash in a fabric of black, I did not expect to see a man in white: a beacon in the night's fashion, a ray of sun glinting through the dark, a glimmer of hope for a new fashion future. Where'er he went, the spotlight was on Judge David Long. My husband told me white jackets used to be popular for men ("a white sport coat and a pink carnation").

A few women wore light colors: white, beige. I saw one wonderful dress. It was purple, shimmery and diaphanous. When she moved, the dress floated about her. I was sure she bought it in Morocco or Istanbul. She said it was from a boutique in San Pedro.

A few women shared their cleavage with us. When I chatted with one, it was difficult to stay focused on her face, rather than the exposed flesh. I suppose they want you to look.

I worried that if she moved suddenly, something might pop out. I'm probably jealous. At my age, no one would want to look.

I expected the usual music: something sophisticated, soothing and highbrow: Mozart, maybe, or Brahms. A harp or a violin or a flute. They had a DJ and he looked hip.

Then Jonathan Light announced over the loudspeaker the live auction of a vasectomy. I thought it was a joke. Steve Henderson told me it was not. He said Russell Takasugi got a doctor to donate the procedure. I wondered if he practiced in the U.S. The bidding was lively. I wondered about the men competing for the live bid: Had they previously decided to not have more children or was it a spur-of-the-moment thing because they could get a bargain on a vasectomy? Maybe they didn't like children and never wanted to have any. Maybe they had had it with condoms. Were they buying it as a gift? I quickly went through my holiday list. There was no one on it who would appreciate a vasectomy for Christmas. The vasectomy was awarded to Dan Palay

I'm a visual person. I couldn't help but see Mr. Palay, whom I don't know, lying on the doctor's table, his privates unveiled, awaiting the knife. My imagination saw more of him than I wanted to. It was weird to visualize this man I don't really know in such a position.

I never expected the audience to be able to hold their applause, as Loye Barton asked them to, until after the entire list of names for recognition was read, nor did she and said so. But I didn't expect the audience to begin a unified chant of one clap after each name was read. We were an orchestra playing the same note in perfect rhythm together. I was part of a greater whole.

I expected the night's honoree, Georgianna Pennington Regnier, to talk for about twenty minutes. Don Hurley had told us at the beginning of the evening that if we wanted a copy of Tom Hinkle's last year's acceptance speech, it was available in a six-CD boxed set. I expected to hear a few CD's worth of another speech.

Her friend Kathy Long introduced her. Kathy spoke of Georgianna's love of wild animals. "After all," she said, "she married Dick." She mentioned some of the many charities to which Georgianna donates her time. She concluded Georgianna has "shared herself tirelessly with our community and the world."

Georgianna told us of the four charities her award will benefit. The first is the Ventura County Medical Resource Foundation. The second is a Land Trust in Tanzania. She told us she had invited her friend Tony Fitzjohns, who heads the land trust, to the dinner. He couldn't come but volunteered to send a black rhino. Georgianna declined. That was a good idea, I thought. How would they have found a chair big enough for a rhino, and who would have wanted to eat with him? Where would he have sat? I suppose anywhere he wanted to.

The third charity to receive her munificence is the African Environmental Film Foundation. The fourth is the Ventura County Bar Association Volunteer Lawyer Service Program. She called pro bono attorneys the true heroes of the profession. And that was about it. She honored her mother, introduced her family, thanked her nominators and stepped down. She was brief, eloquent, and gracious.

I expected to leave worn out. But when the DJ broke out with some old fashioned rock and roll, my husband and I danced. I left charged up for another hour or so. The evening was full of delightful surprises.

Patricia Kochel is a teacher at Buena High School in Ventura.

PENSION PROTECTION ACT OF 2006: IMPLICATIONS AGAINST TAX-FREE LIFE INSURANCE PROCEEDS

By *Cristian Arrieta*

Life insurance-funded cross-purchase agreements are the prevailing way to structure a plan of succession for small business shareholders. For one, the decedent's family enjoys limited tax exposure on the sale of appreciated stocks to the surviving shareholder, to the extent that the family gets a step-up in basis on inherited assets. Moreover, the surviving shareholder as the life insurance beneficiary acquires tax-free funds in the form of life insurance proceeds which are used to purchase the decedent's shares. Meanwhile, because the shareholders own the life insurance on each other's lives, not on their own lives, the policy proceeds are not included in the decedent's taxable estate. As such, the decedent's family ends up with substantial liquidity, without triggering an estate tax issue. Therefore, the cross-purchase plan is a virtual tax-free transaction. Not to mention, a properly executed buy-sell plan facilitates the continuity of control and operation of the underlying business.

However, practitioners formulating buy-sell agreements now must beware of accidentally turning life insurance proceeds into taxable gains to the beneficiary. The tax-free status of life insurance proceeds no longer rests on sacred ground. On August 17, 2006, President Bush signed into law the Pension Protection Act of 2006, which contains new tax implications for death benefits payable on company-owned life insurance. Section 863 of the Act amends Internal Revenue Code section 101, adding subsection "(j) Treatment of Certain Employer-Owned Life Insurance Contracts."

The newly enacted rule states as follows: "In the case of an employer-owned life insurance contract, the amount excluded from gross income of an applicable policy-holder... shall not exceed an amount equal to the sum of the premiums and other amounts paid by the policy-holder for the contract." IRC 101(j)(1). In other words, an "applicable

policy-holder" pays taxes on the big appreciation derived from the life insurance vehicle. Moreover, not only the business entity itself, but the shareholders who are parties to a cross-purchase agreement, will often be treated as "applicable policy-holders." IRC 101(j)(3)(B). That can have serious tax consequences, especially where such consequences are easily avoidable.

Fortunately, the exceptions to the newly enacted general rule basically keep intact the non-taxed appreciation derived from legitimate life insurance strategies like "key-man insurance" and shareholder buy-sell agreements. See IRC 101(j)(2). Policy-wise, the amended statute is essentially a legislative crack-down on sham tactics such as the so-called "dead peasant insurance." Nevertheless, the newly enacted IRC 101(j) imposes certain written notice and consent requirements, which if unheeded, can kick a life insurance-funded buy-sell agreement out of the exceptions, thereby exposing clients to significant taxation. IRC 101(j)(4).

We have yet to see the IRS regulations, which this legislation is certain to yield. Meanwhile, the Act became operative as of August 17, 2006. Therefore, we as practitioners are well advised to adopt the safe approach by paying careful attention to the above-mentioned notice and consent requirements, which in fact are easily implemented.

Cristian Arrieta is an associate attorney with Edsall & Norris, in Camarillo, representing businesses and estates.

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Kendall Van Conas has become a partner at Arnold, Bleuel, LaRochelle, Mathews & Zirbel, LLP, 300 Esplanade Dr. Suite 2100, Oxnard 93036. Phone 805-988-9886; fax 805-988-1937.

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Nina Meierding, Director of the Mediation Center for Family Law in Ventura, is pleased to announce that **Terry Anne Buchanan** has associated with the Center and is providing family mediation services in both Ventura and in Westlake Village. Ms. Buchanan received extensive training in mediation from Pepperdine University. For mediation appointments and inquiries, contact the Center at 805-643-3543.

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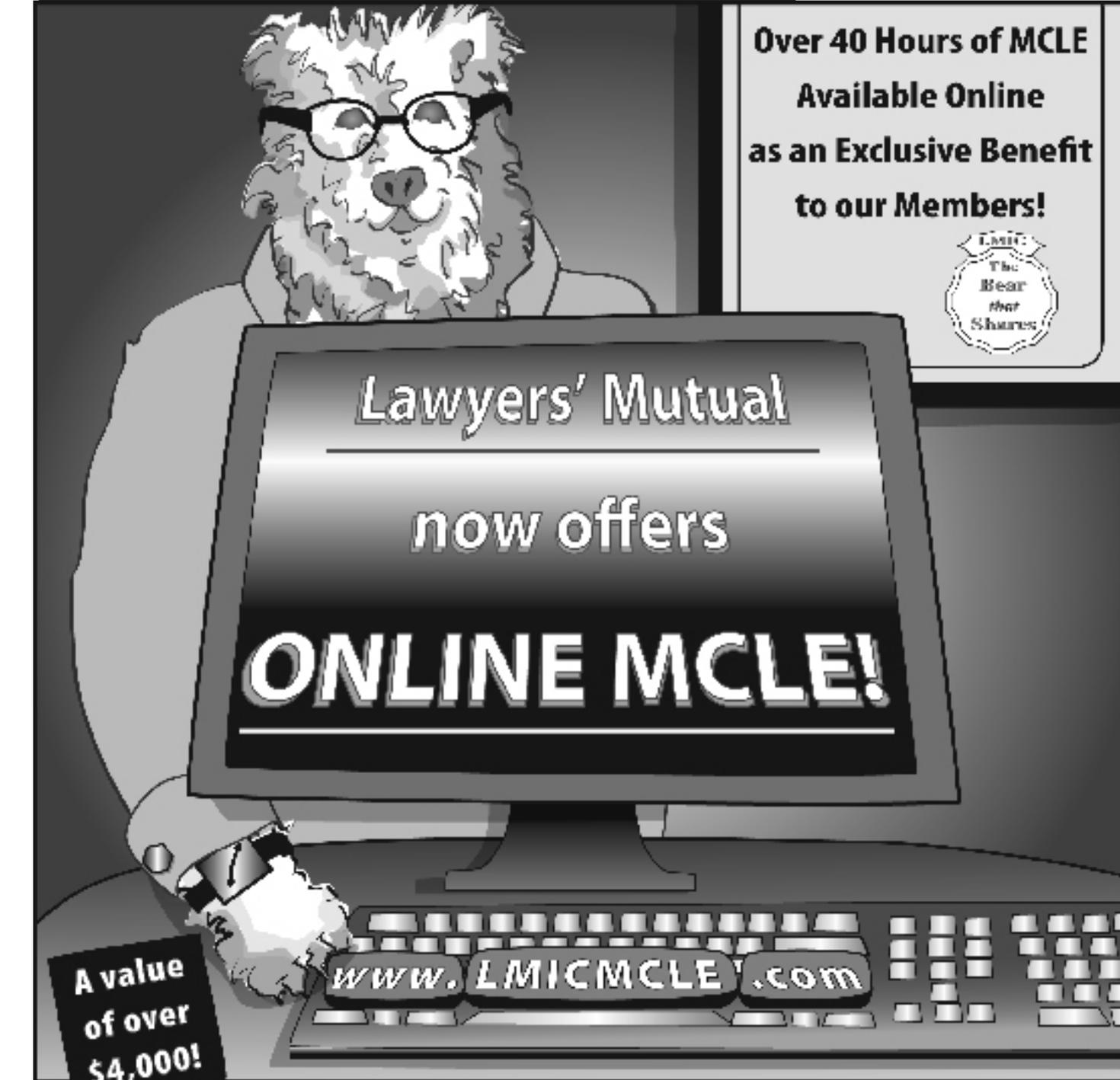
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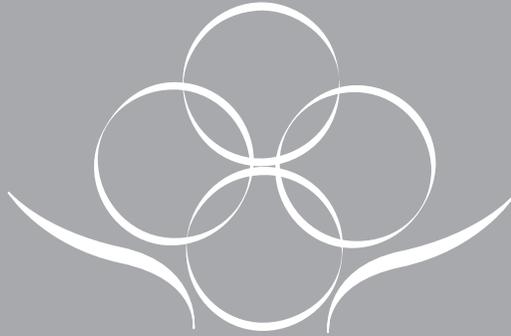


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ROBERT D. BORNET: IN MEMORIAM

By Verna Kagan

It was noon or shortly thereafter on Monday, November 6, that I was driving home from the Bar Association office. One of the streets I customarily drive was cordoned off and I took a different route. I thought no more about it until a few hours later when I was advised that Robert Bornet, my neighbor and friend, was killed in a freak accident while returning home from the courthouse for lunch.

Robert Bornet, husband, father, deputy sheriff, bailiff, active reserved Navy, had only two months before returned from a year's tour of duty in Kuwait.

He was a wonderful neighbor who, with a quick wit and a contagious smile, endeared himself instantly to all who met him. I look across the street and have to remember that he is no longer available for our usual morning and weekend exchanges.

He left his lovely wife, Vicki, two young lady daughters, Katie and Leslie, and two adolescent sons, Daniel and Christopher.

At his funeral it was said that Robert would put himself in the line of fire, if necessary, to protect the life or welfare of others. Yet he never saw himself as heroic. For him it was a fundamental part of doing his job.

Other than his marriage and his children, it appears that the happiest time of his life was that last two months before his death when he had a regular "9-5" job, a luxury generally not afforded to him by the Navy or Sheriff's Department. Many mornings he spoke with anticipation of the simple joys of evening meals and weekends with his family.

He was a bailiff for Judge White, my classmate and study partner at Ventura College of Law. This is one of those tangential circles of life that connects us all.

It comes as no surprise that one of his favorite songs was Louis Armstrong's "It's A Wonderful World." Robert found so much joy in living that he infected everyone with that joy.

It is said in some faiths that a person like Robert never really dies, but lives in the collective memory of those who knew and loved him. Emulating his most outstanding qualities makes his spirit live even into future generations. Certainly his children are doing that, in that they are easy to know and to like; they interact comfortably with their peers and adults alike. All of us who know the family wish them well and that the pain of their loss will soon ease and they will be able to remember Robert with joy.

Verna Kagan is the VLSP senior emeritus attorney.

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LAWYER COACH TRANSFORMS KIDS

By John Cressy, Ventura Unified School District



George Hultman had never heard of the Ventura County Mock Trial competition until his wife's best friend, Pepperdine University law professor Nancy McGinnis, asked him if he was willing to help out Camarillo High School's team.

"I had nary a clue what I was supposed to do, but I said, 'Sure, why not? Tell me what I need to know,'" Hultman remembered.

Eighteen years later, Hultman's still at it, instructing students on all things legal, from correct courtroom demeanor to what it takes to become an effective defense attorney, a forceful prosecutor or a compelling witness.

"I just love it," said Hultman, who has practiced family law and civil litigation for close to 30 years. "I love working with the kids. They're so bright. And what really impresses me is that they are here because they want to be here. No one's forcing them, and it takes an awful lot of work."

Also impressive is Hultman's success at getting the most out of his students. In 17 years, Camarillo High's mock trial teams have made it to the county finals 14 times. Since retired Los Angeles criminal attorney Dick Diamond and an Oxnard attorney signed on as coaches with Hultman, the Camarillo High team has flourished, winning the county championship in 2003, taking fourth in 2004, and second the past two years.

"A few of the teams around the county struggle to find one coach," Shawn Near, Camarillo High Mock Trial faculty advisor noted. "We're very, very lucky to have three. And they do a great job."

Over 20 local high schools are entered in the annual competition, sponsored by the Ventura County Office of Education, the Ventura County Superior Court and the Constitutional Rights Foundation. It will be held Feb. 26-27, 2007.

In Mock Trial, students study a fictitious legal case, and then play the various participants in a trial, from defendants, defense lawyers and prosecutors to witnesses, court clerks, court reporters, bailiffs and even courtroom artists. The competition takes place in Ventura County courtrooms with actual judges presiding. Volunteer lawyers judge the teams, with the winning team advancing to the state finals in Sacramento on March 23-27, 2007.

All but four members from last year's second-place Camarillo High team graduated in 2006. "You can say we're in a rebuilding year," said faculty advisor Near – but Hultman feels his students are up to the task.

"I love seeing the transformation some of these kids go through," Hultman said. "They go from talking and acting like a regular high school student to a polished lawyer with perfect courtroom demeanor. And when it's over, they go right back to being a high school student. It's absolutely amazing."

Hultman also feels satisfied witnessing the personal transformation that students go through over the course of their participation in Mock Trial, many going from shy and awkward teenagers to becoming confident and assertive young men and women.

"I sense girls in particular come in here and learn that they can stand up for their principles and argue respectfully, and that's very important to me," Hultman said.

Many students who join the Mock Trial team want to become lawyers, but not all. Hultman remembered one girl who joined a few years back because she wanted to become an actress. "She played the role of a witness three straight years, and she was really, really good," Hultman said, adding the girl was also good enough to earn a scholarship at a prestigious acting school in New York.

Mock Trial is a six-month commitment for Camarillo High students, who practice most Monday and Wednesday evenings, September through February.

"I haven't seen a Monday Night Football game in 17 years," Hultman quipped, quickly adding that it really isn't much of a hardship since his real passion is baseball. A Dodger season ticket-holder, Hultman also enjoys attending shows at the Hollywood Bowl and vacationing to Hawaii with Paula, his wife of 32 years. They have two adult children: Scott, 29, and Alison, 26.

Hultman has a bachelor's degree in Political Science from California State University at Northridge and earned his law degree from San Fernando Valley College of Law in 1977. A Camarillo resident, he practices law in Ventura, Los Angeles and Orange counties out of his office in Calabasas.

"This has been fun for me," Hultman said of his long association with the Camarillo High Mock Trial team. "I've had a good life, so I feel it's only right to give back to the community. And it's great to see kids achieving success."

IN YOUR CORNER – An Essay on Independent Counsel

By Mark E. Hancock

If you could use an additional \$985,000 in coverage (the difference between one auto policy's permissive user coverage and the full limits of that policy plus the owner's umbrella coverage) to help settle a case involving multiple deaths, could independent counsel be helpful to develop and argue the requisite agency theory?

If you were being sued for injuries claimed to have been caused by your [alleged] road rage, [alleged] sexual misbehavior, [alleged] drunk driving and/or [allegedly] improper use of force, and you had insurance, could independent counsel be useful?

If you were underinsured for the amounts claimed, and there was a possibility of a judgment in excess of your insurance, could independent counsel be useful?

I submit that the answer is yes. There are situations where conflicts of interest can interfere with "the tripartite relationship" between an insurance company, its insured and insurance defense counsel, and it is everyone for him-, her-, or itself. A lawyer is supposed to be a zealous advocate for a client. In the above situations, however, how zealous, how focused, how devoted can one lawyer be to any one client when they are lawyer for more than one? I say a lawyer cannot be devoted enough to represent the interests of insurer and insured simultaneously, and necessarily has to equivocate and compromise.

LET'S TALK ABOUT REALITIES.

Insurance defense Counsel may have their own motivations. Insurers as customers are highly sought after by outside defense firms. If insurance company employees and insurance defense lawyers glowed in the dark, I'd bet there'd be more than a few adjacent lights in the stands at the Staples Center, or other professional sports venues. Many defense firms have a stable of client insurers. Look at Martindale-Hubbell; it's a matter of bragging rights.

Once obtained as a client, I submit that the idea is to do repeat business with the insurer. To deny the presence and effect of financial incentives and the incentive not to displease the carrier is naïve. This is not to say that insurance defense counsel are bad. In my experience, many of them are competent, experienced and very hard working, but firms that play it the straightest will only take it so far. At crunch time, they will advise the insured that they need independent counsel (but not volunteer to pay for it and/or advocate that the insurer pay for it). Defense counsel may ask the client for waivers. They might also say: "We don't get into and can't advise you on coverage matters," despite the fact that the policy is there in black and white for an advocate to read, apply and argue, and despite the fact that coverage and the amount of coverage, may be the real ball game.

Second, in situations where coverage is contested, or where damages exceed the coverage, or there is exposure to (uncovered) punitive damages, insureds have their own strong motivation. They do not want to be out-of-pocket. They probably don't enjoy litigation, or desire to see it prolonged.

Third, insurers have their own motivations. Might an insurer faced with a perceived loser (i.e., a case in which the limit is clearly blown) desire to cut its losses by only authorizing a passive, low-budget defense, despite its dual duties to defend and indemnify? If the insurer views a case as arising from uncovered conduct, might it not want to fight very hard? Might it want to develop the uncovered angle?

I submit that independent counsel is useful in the above situations, at the least as an adjunct to insurance defense counsel. The harder part is getting the insurance company to pay. Despite the Cumis case (*San Diego Federal Credit Union v. Cumis Ins. Soc'y.* (1984) 162 Cal.App.3d 358) and the subsequent enactment of Civil Code section 2860, insurers don't readily accede to requests for Cumis counsel, i.e., independent counsel paid for by the insurer.

A BRIEF RECAP OF THE HISTORY OF CUMIS COUNSEL

Liability insurers have two basic contractual duties: the duty to defend and the duty to indemnify (i.e., pay a judgment, etc.) *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263 held that the insurance company's duty to defend is broader than the duty to indemnify; therefore, an insurer must defend the entirety of any action in which there is a potentially covered claim.

Most policies provide that the insurer has the right to select defense counsel. This works fine in the absence of conflict, but the fact that the duty to defend is separate and broader than the duty to indemnify creates the potential for conflict – a reason for independent counsel.

In Cumis, the court held that an insured is entitled to choose defense counsel in cases of conflict, with the insurer required to pay the reasonable cost of such representation.

Many attorneys believe that Cumis holds that a conflict requiring independent counsel exists whenever an insurance company agrees to defend pursuant to a reservation of rights, but that is not the law (See *Dynamic Concepts, Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999). A "reservation of rights letter" is a method by which the insurer reserves the right to argue there is, ultimately, no coverage and no duty to indemnify, while providing a defense because of the possibility of coverage. If the insurer does not reserve rights, it waives coverage defenses (*Insurance Co. of the West v. Haralambos Beverage Co.* (1987) 195 Cal. App.3d 1308).

Civil Code section 2860 is a retraction/restriction on Cumis counsel. The statute restricts when Cumis counsel is required. Not every reservation of rights and not every conflict necessitates Cumis counsel. For example, section 2860 specifically provides that there is no duty to pay for independent counsel just because punitive damages are claimed or damages exceeding

policy limits are sought. An insurer's denial of coverage for certain facts or allegations does not by itself merit Cumis counsel (subd. (b)). Section 2860 does not require Cumis counsel where coverage turns on an issue independent of those in the underlying case (*Blanchard v. State Farm Fire & Casualty* (1991) 2 Cal.App.4th 345).

Civil Code section 2860 also requires that a Cumis counsel have relevant experience. It limits fees to what the insurer actually and ordinarily pays in that community. The statute also gives insurers permission to obtain waivers of the right to Cumis counsel from their insureds (subd. (e)).

A waiver can make things cleaner and less perilous for insurers, who get to maintain coverage defenses, select defense attorneys and avoid having to pay an additional, independent attorney. The insurance defense counsel gets a waiver of conflict and the job. What does the insured get? They waive independent counsel at their own risk. Why would anyone do so? How much "counsel" does the insurance defense lawyer really give an insured in requesting such a Cumis waiver? Try this for fun: ask the insurer to waive its reservations.

NEXT MONTH: What kind of conflict warrants Cumis counsel?



Mark E. Hancock is a Ventura attorney who represents insureds in first party claims and third party matters, and acts as Cumis counsel.



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Ken Clayman called to correct me and rightfully so. I was lazy and knew different, but it just did not register in the 'ol' noggin." Like someone who had been sitting in my ED chair a month, I wrongfully identified **Mary Shea** from the County Counsel's office instead of the **Public Defender's office**. And it's **Mary Shea**, not Jones. You'd think I'd get it straight. Yes, she's a real attorney too...From the Los Angeles Times: "Spend the night in jail. What better place to contemplate the freedom of vacation than from behind bars? The Jailhouse Inn, which until the '70s was Sierra Madre's slammer, costs \$150 a night. Co-owner Noreen Berra was an interior designer before she became a prosecutor, and her handiwork makes the one-bedroom inn so comfy that any disgraced CEO would happily call it home. Amenities include bathrobes, a CD player, LCD TV and, for \$5, a "breakfast subpoena" from neighboring Corfu restaurant."...

Mark Fang has been elected president of the Ventura County Asian American Bar Association. Other officers are **Brian Nomi**, president-elect; **Julie Lin**, secretary; and **Leah Gasendo**, treasurer. Members of the board are **Lilian Jiang**, **Mitch Noda**, **Davey Kim**, **Tina Rasnow**, **Leeton Lee**, and **William Short**. **Dien Le** will serve as the Immediate Past President...From J.R. Solly: "Be frank and explicit with your lawyer – It is his business to confuse the issue afterwards."... Recommended Reading of the Month: *The Innocent Man-Murder and Injustice in a Small Town*, by John Grisham. Illustrated. 360 pp. Doubleday. \$28.95. Don't cringe. "Not in my most creative moment," he explains, "could I conjure up a story as rich and as layered." It's got it all – True story, baseball,

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

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

DNA and death row...From Jean Kerr: "A lawyer is never entirely comfortable with a friendly divorce, any more than a good mortician wants to finish the job and then have the patient sit up on the table."...

On December 7, during the **A to Z** holiday party, it was announced that **Kendall VanConas** would become a partner. Kendall's been with group since September 2003, and A-Z currently has 10 lawyers...A recent decision from the U.S. District Court in Northern California may require law firms to make their websites accessible to the blind. In *National Federation of the Blind v. Target*, 2006 U.S. Dist. Lexis 63591, the Plaintiffs, the National Federation of the Blind, the National Federation of the Blind California, on behalf of all their members, and Bruce F. Sexton, brought an action against Target Corporation alleging that Target's website, Target.com, was inaccessible to the blind and thus violated federal and state laws prohibiting discrimination against the disabled...**David Cunningham** failed to negotiate a corner and therefore went splat on Highway 1 near Lompoc. He managed to shatter his right wrist and left hand when he connected with the embankment, bike lying on top of him. Two operations later, there remains no update on the condition of the Ducati 748...From California Lawyer: "The Supreme Court bobblehead doll craze reached a new high in July when a Washington, D.C., lawyer paid \$2,100 for a limited edition, eight-inch-tall bobblehead of late U.S. Chief Justice William Rehnquist."...

They held a surprise birthday party (numero 60) for **Mike Case** early December. 100 folks dined on munchies catered by Hosea's, while he was roasted a tad by partners **Lou Carpiac** and **Bill Paterson**. **Judge Long** jumped in, too...The number of lawyer lawmakers in the Senate is 8 and in the Assembly, 16. A neat 20% in each and an increase from the last session...From California Lawyer: "In Sudan, a council of elders decided that instead of taking a man who had just had sex with a goat to the police, they made him marry the goat and pay the goat's owner a dowry. At last report, the man and the goat were still together."...A beautiful quote from Massachusetts State Senator, Jarrett Barrios, when announcing that he planned to file legislation that would prohibit schools from

offering *Fluffernutter* sandwiches: "I don't want our kids eating anything that sounds like something you'd see in a Swedish porn film."...From Milton Berle: "Most attorneys practice because it gives them a grand a glorious feeling. Hand them a grand and they feel glorious!"...

PARTY! The East County Bar attracted over 80 people to their holiday party at the Moorpark CC, including loads of personnel from Simi Valley Courtrooms 1 and 2. Thanks to **Marge Baxter**, **Dien Le**, and **Matt Hicks** for publicity tricks. The VC Trial Lawyers, not to be outdone, corralled nearly 70 in the Tower Club. Hats off to event coordinators **Bob Bayer**, **Becky McCarthy**, **Jim Prosser**, and **Dennis Jones**. Largest event of the year outside our annual banquet? CPA-Law Society Scholarship lunch hosting nearly 200...In the Sunday edition of the LA Times dated 12.3.06, a powerful piece about Chief Justice Ronald George and the opinions which "split on the justice's sweeping reach." Example – "staff is starting to run this branch, rather than the judges." www.latimes.com. Recommended Website of the Month: www.abovethelaw.com...From Melvin Belli: "There is never a deed so foul that something couldn't be said for the guy: that's why there are lawyers."...In the LA Daily Journal (12.5.06) is a fine profile on Earl Rogers, whom Clarence Darrow called "the greatest jury trial lawyer of our time." People would actually climb trees to witness his work, peering through overhead windows. www.dailyjournal.com...

Erik Feingold, with **Myers**, **Widders**, **Gibson**, et al. for the last five years, has made partner...**Marv Jacobs** has returned to his old haunts on Alessandro Drive in Ventura after a short venture to the East end of the county...

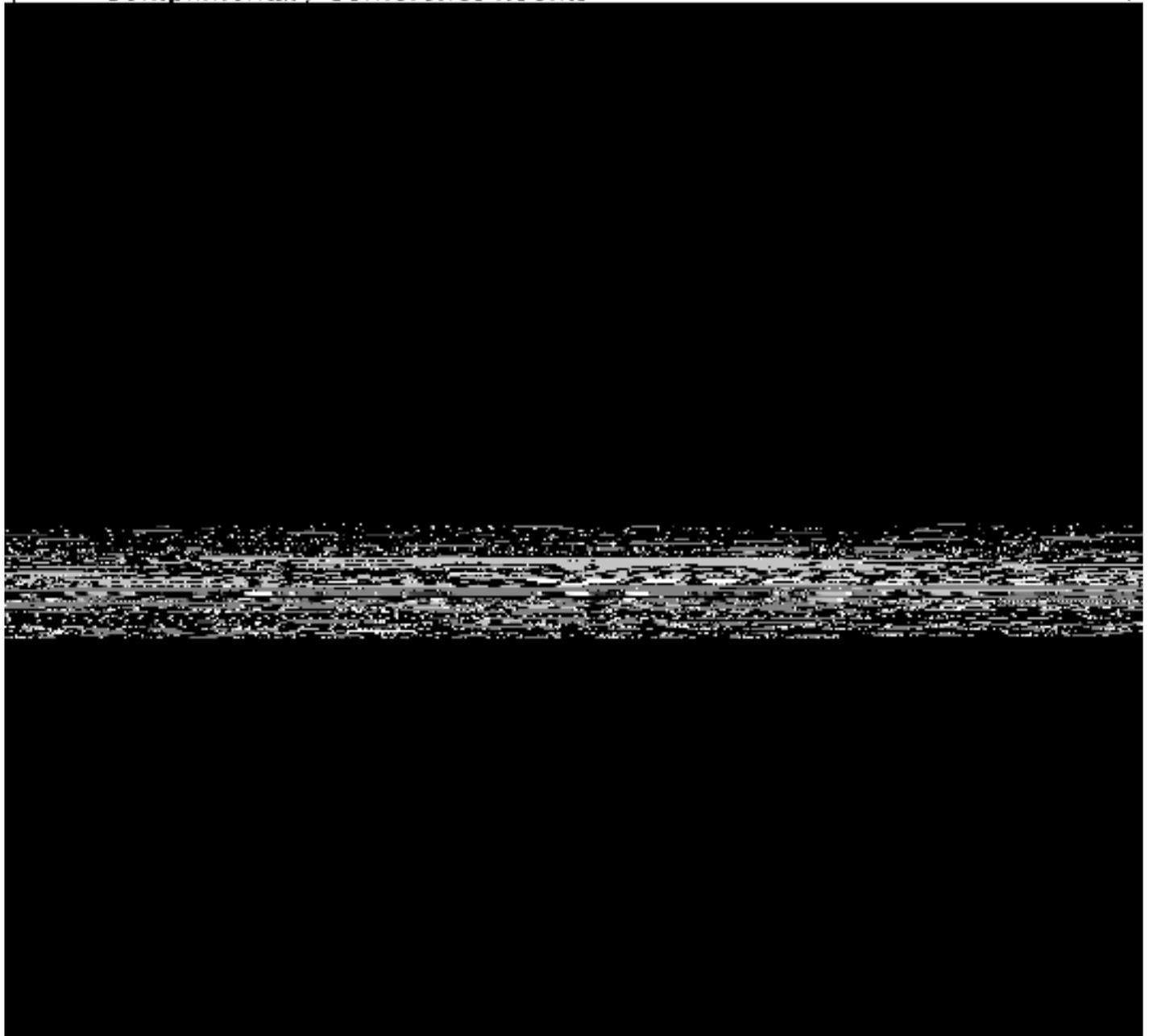
Steve Henderson has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. If you must know, indeed he has made a few new year's resolutions and only a couple have to do with attorneys. I'll take the points and Ohio State, and want nothing to do with AI.

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