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RETURN OF THE FAMILY LAW DISPATCH: Top Family Law Legislation for 2009

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PRESIDENT'S MESSAGE

By Tony Strauss

Executive Director Steve Henderson vetted the idea, and Steve elicited the assistance of Stuart Forsyth, the Executive Director of the Los Angeles County Bar Association, to serve as a facilitator. Together we have come up with an agenda and a date. The retreat will be held the morning of February 7.

I have no idea if this will be a useful exercise or what will come out of the process. If you read my article last month, you no doubt saw my agenda of promoting collegiality, conviviality and civility among attorneys. But I don't expect that all of my colleagues on the board see these as the most pressing issues of our time. Undoubtedly, some will have

great ideas. Others may see the status quo as just fine. In any event, we will have gone through the effort with the hope of making participation in the Bar Association more enjoyable and meaningful for all. I will let you know in March if it was worth while.

Finally, I am going to repeat my plea from the last article: If you have ideas or want to get involved, contact me (ars@strausslawgroup.com) or Steve (steve@vcba.org). I have already received some good ideas from members and will be reporting on and implementing some of those in months to come.

Introspection. It can be a good thing, as long as you don't do it too often. It can also be a good thing for organizations to do periodically, especially non-profits.

One of the jobs of the incoming Bar president is to call people who have been nominated to serve as new board members. When I asked if they were interested in serving, I was usually asked in return, "Well, what does a board member do?" After explaining that the board meets for lunch once a month and reviews the Association's finances and activities, I said something to the effect that individual board members can be as active as they wish to be. What I could not tell them was what they could do to make a difference. I realized I had my own question: "What *do* we want to do as a board and as an organization?"

For at least the last 18 years, the board has engaged in an "annual planning session." Representatives of the various Bar Association affiliates and committees, court personnel, Bar staff and other interested parties have met on a Saturday early in the year to give an update about what is new in their particular areas. Each planning session that I have attended has been interesting and informative. Important issues are discussed, and typically each group makes a pitch for something it is interested in – but not much comes out of it other than the opportunity to show and tell.

Rather than repeating this process this year, I decided to forgo the annual planning meeting and instead have a board retreat for that body to explore the goals of the organization and the role of board members. The Executive Committee, made up of President-Elect Kendall Van Conas, Secretary-Treasurer Joe Strohman, Past President Matt Guasco, and

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MERRILL LEGAL SOLUTIONS

RETURN OF THE FAMILY LAW DISPATCH: Top Family Law Legislation for 2009

By Gregory W. Herring

One of my New Year's resolutions is to resurrect and maintain this column, which I put on ice years ago when I became involved with the State Bar's Family Law Section. Family law deserves a high profile, as the Family Law Department is the second largest in our Superior Court, and the substance of the law crosses over into a wide variety of other disciplines.

Future columns will explore important recent family law developments, including the establishment of same-gender partnership and marital (maybe?) rights, the enhancement of inter-spousal fiduciary duties and the significant tightening of the transmutation doctrine. The column will also focus on practical day-to-day issues, including the ethical use of (and behavior by) expert witnesses, ethical concerns regarding mediators, and the intersection of corporate versus family law rights.

A good re-starting point is to review the major new family law statutes that became effective January 1, 2009 (except where otherwise noted). The following is not comprehensive, but it does provide an eclectic list of favorites:

Husband Name Changes: Gender equality takes a new step forward through AB 102, which allows husbands to take their wives' names in a relatively streamlined manner (without a court order, which was previously required).

Real Property Taxation: SB1233 amends Revenue and Taxation Code §63.1 concerning property transfers between parents and children or between grandparents and grandchildren. The section generally excludes such transfers from reassessments. The new law adds subsection (j), which provides time limits for asserting eligibility for the exclusion. It also allows penalties against those who miss the time limits.

Parentage Files: Attorneys in parentage (typically "paternity" – but not always, in light of same-gender relationships) cases have long complained that prior law, under Family Code §7643, forced them to formally enter a case as counsel of record before being able to inspect the Court's file. As opposed to other court files, an attorney was not allowed to send someone to the courthouse to view the file before deciding whether or not to become

counsel of record. The rationale was that files should be confidential so as to protect children of non-marital unions from the assumed social stigma. A problem for a lawyer was that she might not want to become – and potentially get stuck as – counsel before actually seeing the file (where the prospective client may not be available to obtain it for the attorney). The new law assists by allowing parties or attorneys to provide written authorization to have their agents inspect the Court's records.

Electronic Harassment: Prolific State Senator Sheila Kuehl sponsored SB 129, which expands the scope of existing law concerning harassment by phone or electronic device. Existing Penal Code §653 generally makes it a misdemeanor to make repeated phone calls (or other electronic contacts) to annoy someone at home or work. SB 129 provides in part that such annoyances or harassment are criminal, regardless of the victim's location. It also criminalizes the act of knowingly allowing someone else to use one's phone or device to annoy or harass another.

Electronic Incitement of Harassment: AB 919 goes a step further in making it a misdemeanor to use an electronic communication device to distribute personal identifying information about someone to incite third parties to harass, injure or make any unwanted contact with the intended victim. It does this in creating new Penal Code §653.2. I know at least one attorney, the subject of a particularly caustic "blog" by a disgruntled former client, who will be interested in this.

Real Property/Domestic Violence: AB 2052, which became effective in September 2008, added Civil Code §1946.7. It allows victims of domestic violence, sexual assault or stalking to avoid their real property rental and lease agreements if they need to move for safety - theirs or a household member's. The law requires victims to meet certain notice and reporting requirements, after which rent would be required for only the next 30 days.

Real Property/Domestic Violence/Nuisance: Conversely, AB 2052 also amended Code of Civil Procedure §1161(4), making it easier for landlords to terminate the leases of domestic violence, sexual assault or stalking perpetrators under "nuisance" theories.

Drug Testing/Custody: SB 1255 maintains existing Family Code §3041.5 (allowing drug and alcohol testing in custody cases where a preponderance of the evidence indicates habitual, continual or frequent use) by extending its sunset date from January 1, 2009 to January 1, 2013. Family law attorneys will recall that §3041.5 itself was passed as a reaction to *Wainwright v. Super. Ct.* (2000) 84 Cal.App.4th 26, which held that then-existing laws did not provide for drug testing.

Custody/Confidentiality of Custody Evaluation Reports: The confidentiality of custody evaluation reports, issued under Family Code §3111, is an ongoing practical issue for family law attorneys. Although the current law requires such reports to be kept confidential, parties who have proceeded through difficult custody evaluations (they are all difficult) often have trouble refraining from vindicating themselves (and trashing the other parent) by disseminating the reports (or portions thereof). AB 1877 amends this section (as of January 1, 2010) by allowing a court to impose a monetary sanction against a party who makes a reckless or malicious disclosure. The sanction may be high enough to deter further disclosures without imposing an unreasonable financial burden.

Adoptions: Recent years have seen much streamlining and other amending of the laws concerning adoptions. AB 1279 (concerning post-adoption sibling contacts and independent adoption fees), AB 2651 (criminal record checks for prospective adoptive parents) and SB 1726 (waiver by birth parents; adoption facilitators) continued the trend.

As the scope of this list illustrates, developments in family law affect many other areas of law. I hope that estate planning, business, civil litigation, real estate, tax, criminal law and other attorneys will also find future columns helpful, even though they may never set foot in Family Court.

Greg Herring is a State Bar certified specialist in family law and is a partner with Ferguson Case Orr Paterson LLP. He is a Board member of the Southern California Chapter of the American Academy of Matrimonial Lawyers and past chair of the Executive Committee of the State Bar's Family Law Section.



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Civil trials, law and motion

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Courtroom 44

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Probate, conservatorships, guardianships

Courtroom 45

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Criminal matters

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Criminal jury trials

Courtroom 47

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Criminal jury trials

Courtroom 48

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Civil trials, law and motion

Courtroom S3

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Family law, domestic violence and
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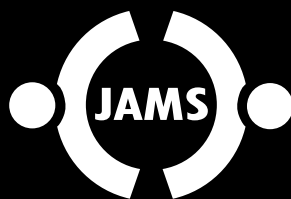
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PRO-BONO HIGHLIGHTS

By Verna R. Kagan

It is always a pleasure for me to be able to share letters of appreciation sent to our pro bono attorneys. These are selections from two emails sent to Marc Dion. The compliments are well deserved. Marc is not only a pro bono award winner from VCBA, but is also a winner of the State Bar Pro Bono Award. Whether it is consultations or actual representation, VLSP would be a lesser organization without his valuable assistance.

Dear Mr. Dion:

I just wanted to thank you for the time you spent taking me step by step through a difficult and emotional divorce filing. You answered all my questions and gave me the confidence to go into mediation and court without any hesitation. And because of that I now have 100% legal [and] physical custody of my children. I cannot thank you enough. You have been available to answer my questions and you always promptly return my phone calls. I would not hesitate to recommend you to anyone in need of courteous and professional legal assistance. Your staff was welcoming and kind and put me immediately at ease. Thank you again for all your help.

Marc:

Interestingly enough, while I was waiting in court, I was sitting next to a woman who was raving about her wonderful attorney. When she said he was located in Thousand Oaks/Westlake Village I had to ask who it was. Turns out she is a client of yours! She gave your card to a woman there and we both highly recommended you to her. So you definitely have some satisfied clients. My grandfather was one of the few attorneys I knew who was kind, ethical, and considerate of his clients. He was a wonderful man and a great attorney. It is rare to hear people say nice things about lawyers these days. So it was nice to hear another person say such good things about their lawyer – and have him be you! You really did give a big boost to my confidence that I really needed. Thanks again for your time – and patience with me.

Verna Kagan is VLSP Senior Emeritus Attorney.



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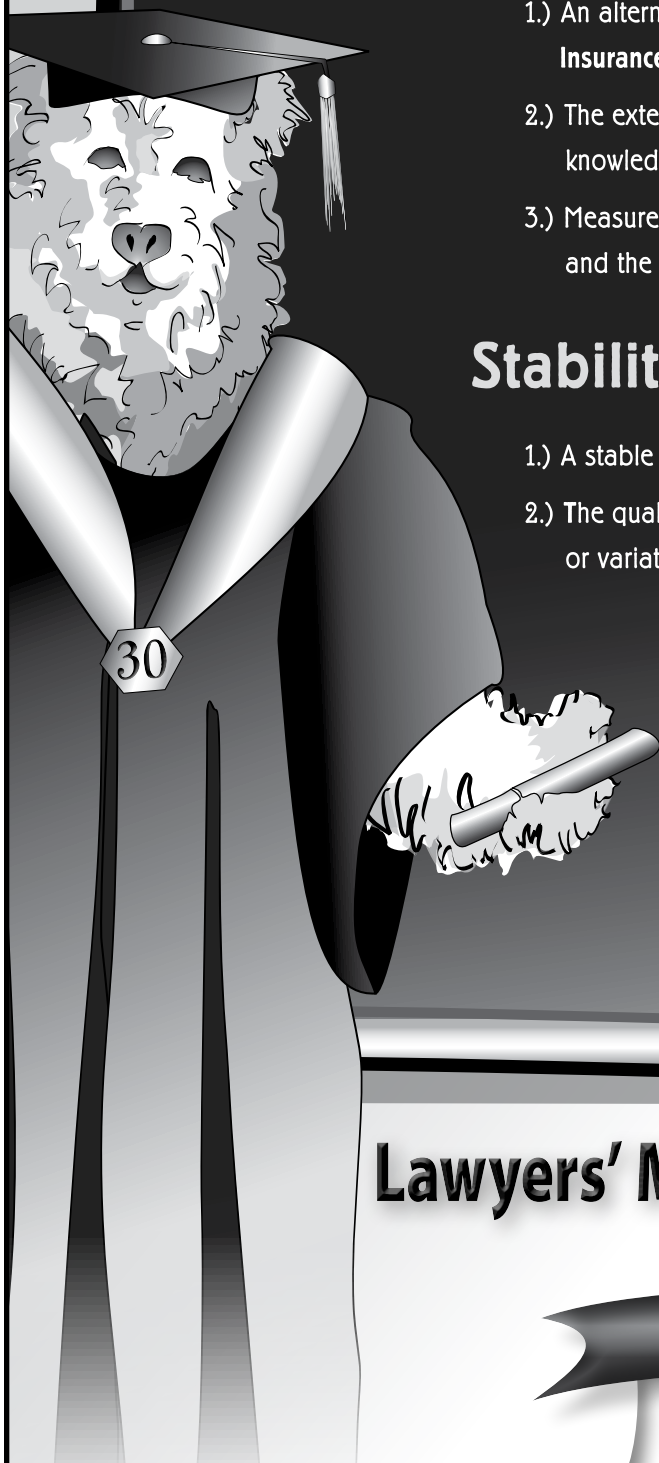
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The Unintended Consequences of Law: How Changes in Domestic Partnership Law Affect the Rights of our Older Citizens

By Carla Hartley

History of Domestic Partnership in California

California's Legislature appears to have forgotten that domestic partnership law initially derived in large part from the wishes of elderly widows and widowers to legalize their current relationships without entangling their estates, as well as from the wishes of same-sex couples to publicly legitimize their relationships.

Widows and widowers, bereft of their lifelong spouses, many without children and grandchildren nearby, fill their days by volunteering and by spending time at senior-centered social events. Others find themselves in assisted living or nursing homes. Not surprisingly, seniors often turn to one another for support, comfort, and companionship. Many choose not to marry, perhaps not wishing to betray the memory of their departed

spouse, or not wishing to subject their property – which they intend to leave to their own children – to community property laws.

Because they were not willing to marry, these seniors, often in loving and exclusive relationships for many years, were legally precluded from visiting their loved ones in the hospital, and from sharing medical insurance with one another. Running concurrently with the need of the elderly to have basic rights with their sunset partners was the growing demand of many same-sex couples, similarly involved in long-term, loving and exclusive relationships, for the same type of benefits.

California's first municipal domestic partnership law was passed in 1984. Similar statutes sprouted up in various municipalities over the next decade. Most represented the confluence of interest of these two groups: seniors and same-sex couples.

When the California State Legislature passed the Domestic Partnership Act of 1999 ("Act"), the Legislature stated that this law superseded all existing municipal laws dealing with domestic partnerships. The 1999 Act defined a Domestic Partnership as consisting of "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Fam. Code, §297(a). The Legislature also set forth standards of eligibility to become "registered domestic partners." The pertinent requirement for purposes of this article is that *either* one partner must be over the age of 62, *or* both partners must be of the same sex. Fam. Code, §297(b).

The Act, hailed by senior citizens' groups and the gay/lesbian lobby, granted limited rights to registered domestic partners: the right to visit the partner in hospital; the right to provide health insurance for the partner; and the right to deduct the partner's medical expenses for tax purposes.

Married with a Wave of the Legislature's Magic Wand

This brief convergence of interests quickly faded. The Act of 1999 subsequently became a springboard for AB 205, the Domestic Partner Rights and Responsibilities Act of 2003. Signed into law by then-Governor Gray Davis, the 2003 Act imposed upon *all* domestic partners the same rights and responsibilities "as are granted to and imposed upon spouses... upon former spouses... [and] upon a widow or widower." Fam. Code, §297.5 (a)-(c).

These "rights and responsibilities" include, but are not limited to, ownership rights in real property; inheritance rights; responsibility for each other's debts; and a duty to pay support to the partner with a lower income in the event of dissolution. Fam. Code §297.5(k)(1).

Effective January 1, 2005, these rights and responsibilities were imposed retroactively on all persons registered as domestic partners before January 1, 2005, with no differentiation between elderly and same-sex couples. The Legislature provided a small escape clause: They could immediately dissolve the partnership by sending a form in to the Secretary of State, or else they could execute "an agreement... that the partners intend to be governed by

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the requirements set forth in Sections 1600 to 1620, inclusive... if that agreement was fully executed and in force as of June 30, 2005." Fam. Code, §297.5 (k)(2).

Family Code §§1600-1617 sets forth the standard for enforceable premarital agreements. Section 1620 deals with contracts between married persons.

Problems with the Escape Clause

Family Code §297.5(k)(2)'s escape clause creates four problems. First, upon receiving notice of the change, seniors who elected domestic partnership over marriage were faced with telling their loved one that the partnership must either be dissolved, or that the parties must enter into a premarital agreement conforming to §§1600-1620. This would be, at best, an awkward conversation to initiate. Dissolving the domestic partnership would place these seniors in the same position they were in before 1999 – unable to visit their loved one in hospital, unable to share medical insurance, and so forth.

Second, parties cannot enter into a prenuptial agreement where they have already unwittingly enjoyed what turned out to be their nuptials. Family Code §297.5(k)(1) states: "[A]ny reference to the date of a marriage shall be deemed to refer to the date of registration of a domestic partnership with the state." Furthermore, §1615 requires that the agreement must be signed no less than seven (7) days *prior* to the union. The Legislature imposed a method of escape that appears to be legally and factually impossible to perform.

Third, Family Code §1620 makes unavailable most agreements which can be made under §§1600-1617. Section 1620 provides that "a husband and wife cannot, by a contract with each other, alter their legal relations, except as to property." Obligations of support cannot be contracted away by virtue of §1620. Further complicating matters is the requirement that married persons contracting with one another must act with "the highest good faith and fair dealing." While it appears reasonable on paper, in practice this enhanced fiduciary duty owed between spouses makes enforcement of post-nuptial agreements incredibly problematic.

Continued on page 18



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The Unintended Consequences of Law:

Continued from page 17

Fourth, those seniors who now wish to escape their de facto "marriage" face a deadline that has already passed: The agreement had to be "fully executed and in force as of June 30, 2005." Fam. Code, §297.5(k)(2). As a consequence, these seniors have no available means to avoid a "marriage" they deliberately chose not to enter in the first place.

Back Where They Didn't Want to Be

Marriage is a union to be considered seriously. It is a social contract affecting property, support, and inheritance rights. The decision to marry should be each individual's fully conscious choice, not an unforeseen consequence of a preexisting agreement.

Many seniors who entered into a domestic partnership before January 1, 2005 chose that option over marriage because they weighed the pros and cons, and did not wish to risk property in marriage which they wanted to leave to their own children. The problems created by the retroactive application of Family Code §297 et seq. may never be known to the seniors themselves, but may very well create an unintended headache for their intended heirs. While grieving for their parents, these adult children may face contested wills, probate nightmares, and the task of posthumously unraveling their parent's intent.

As for seniors today who wish to have the same courtesies previously available under the initial Act of 1999, without placing their estate and children's inheritance at risk: too bad. The options are no longer available without all the rights and responsibilities of marriage. Seniors considering domestic partnership now need an enforceable prenuptial agreement and advice of legal counsel to instruct them in the best way to isolate and preserve pre-partnership separate property assets for their children's inheritance.

They might as well get married.

Carla Hartley is an associate at Ross & Parvex, LLP, in Oxnard, where she practices family law.

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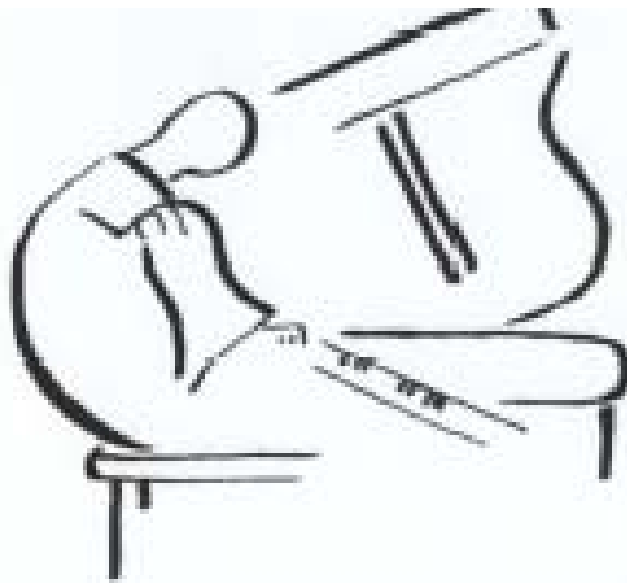
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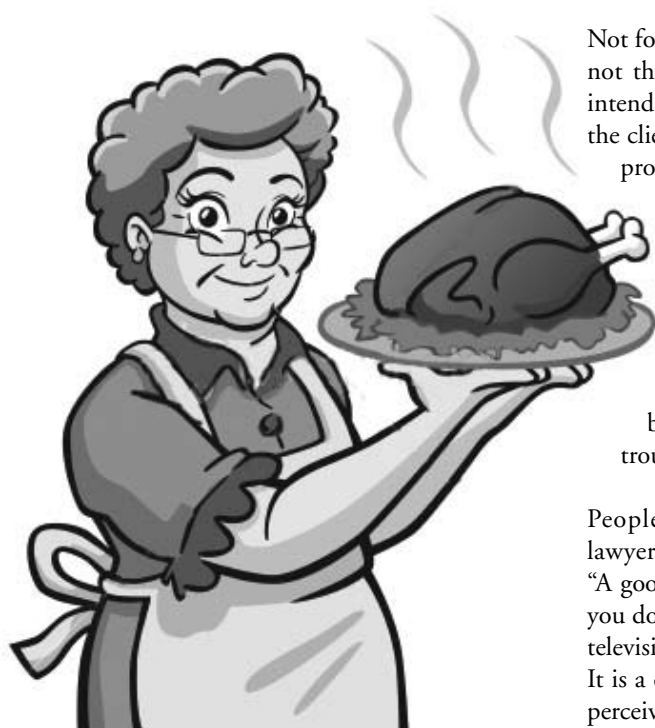
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The Chicken or the Client?

Lawyers can't focus on their cases to the exclusion of those who bring them.

By Gerald Hecht



Not for lawyers. The client is the problem, not the lawsuit, or the indictment or the intended transaction. We have to deal with the client before we can deal with the legal problem.

When I was a young lawyer, I was petrified of saying to a client: "Give me \$1,000, and I'll solve your problem for you." No more. Not for the pecuniary aspects of the profession, but for the *pas de deux* between lawyer and client; one who is troubled and one who is a healer.

People frequently ask, "What kind of lawyer are you?" (I sardonically answer "A good one"), or "What kind of work do you do?" and my initial response is "Forget television and the movies, and I'll tell you." It is a constant battle between what we are perceived as doing and what happened on Court TV last night.

There's an old tale of a poor widow who saves for months to buy a chicken for her family for Sabbath dinner. While preparing to cook the chicken, she accidentally drops it on the floor.

She takes the chicken to the village rabbi and asks him if the chicken is still fit to eat. The rabbi thoroughly inspects the chicken, looking inside it, holding it up to the light, turning it over. After an hour of watching the rabbi do this, the widow exclaims, "Rabbi, I'm the one with the problem, not the chicken."

I repeat this story frequently to clients, friends and family members, because it succinctly summarizes what we do as lawyers. Unlike the rabbi, whose focus was entirely on the chicken to the exclusion of the troubled widow, we attorneys focus exclusively on the widow.

Doctors, dentists and computer consultants, to stretch the analogy, only deal with the chicken and its problem. The person who houses the bad knee or bad tooth is given short shrift in lieu of the professional's target goal to remedy the ailment.

The profession has taught me, or at least after 30 years I like to think I've been taught, that reality is far more "real" and interesting than the law on television. As a general practitioner, I help "real people with real problems," and I have adopted that slogan as my professional credo. And it is a great answer to the inquiry "What kind of law do you practice?"

Grappling with the client, and not the chicken, enables the attorney to deal with the divorcing mother of three, the debt-ridden restaurateur and the juvenile offender. Another lawyer once told me, "We all know what the law is—the hard part is finding out what the client is."

The public does understand this; but they just prefer to be entertained by that old razzle-dazzle (like the lawyer in the musical *Chicago*) and ignore the realities of the profession. It is said that people hate lawyers as a group but love their own lawyers.

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For me and my practice, the proof of that is in the telephone. It rings. People want advice. People send money for that advice. It's a nice system.

I have learned that the system is geared for the lawyer to assist the client, salve their wounds, remediate the problem and to obtain a goal. It's almost spiritual.

But it only works when we don't confuse the chicken with the client.

Gerald Hecht is the head of a small firm in Danbury, Conn.

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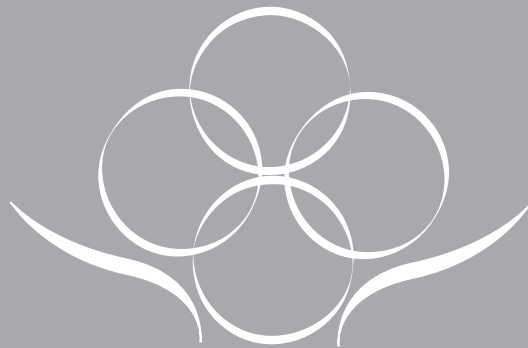
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Judge Jeffrey Bennett's formal installation ceremony will be held Friday, February 20, in Courtroom 22 beginning at 4:00 p.m. You all are invited and need to R.S.V.P. to Victoria Borjesson at 654.2965 or victoria.borjesson@ventura.courts.ca.gov... Kevin Johnson, Sacramento's new mayor and a former NBA star, doesn't expect the nation's most celebrated former player, President Barack Obama, to challenge him to a game of one-on-one. "That would be his first mistake in office," Johnson told *The New York Times*. "I'd have to skunk him."... Camarillo attorney **Kelly Berlinger** delivered twins on December 5. Brianna weighed-in at 4 pounds, 15 ounces and Chloe at 5 pounds, 1 ounce. Both girls were in NICU for two weeks but were home in time for Christmas. "They eat every three hours and I am extremely sleep deprived," said Kelly. I was doing the very same thing this time 12 years ago with Max and Megan...

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

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

Longtime Ventura attorney **Lindsay Nielson** (SB#66989) states unequivocally, "stupidity runs in my genes. I tripped over a magazine rack and landed on my right hip and busted the femur. Six screws and an 8 inch titanium rod later, I'll be in rehab for a few weeks. Can't wait to get back in the saddle." Lindsay is on the board of the Jerome H. Berenson Inn of Court and a founding member in 1994... *Movie Law*: "The justice system works swiftly in the future now that they've abolished all lawyers." – Doc (Christopher Lloyd), *Back to the Future II*. P.S. Lloyd lost his \$11 million dollar home in the Tea Fire... From Thomas Jefferson: "Our ancestors who migrated hither were laborers, not lawyers."... Among the 640 graduates at CSUCI last May was **Dick Regnier** (SB#33610), who received a BA degree in English literature and creative writing. As an engineering major at West Point he only had two courses in English, so he completed 21 courses at CSUCI during the last four years, all as a prelude to a master's degree program. President Richard Rush referred to him as "our most seasoned graduate."

The Ventura County Trial Lawyers Association new slate of officers includes **John Futoran**, president; **Jim Prosser**, president-elect; **Becky McCarthy**, secretary; and **Matt LaVere**, treasurer. **Dennis Jones**, **David Shain**, **Bill Grewe**, **Deirdre Frank**, **Alan Templeman**, **Susan McCarthy** and **Brook Carroll** will comprise the board. All were voted in unanimously at the January 27th meeting... From W.C. Fields: "The only thing a lawyer won't question is the legitimacy of his mother."...VCBA board member **Katie Pietrolungo** works for **Wood and Bender** who in January merged with **Anderson Kill & Olick**. Katie used to work with **Bill Slaughter** too. That's from Slaughter to Kill! Katie is the immediate past president of Barristers...

The East County Bar Association has elected their new board and **Bret Anderson** will lead the charge as president, replacing **Roberta Burnette**. **Marge Baxter** will serve as secretary-treasurer. Roberta, **Matt Hicks** and **Dien Le** will also serve. They convened their first meeting January 9. Contact Bret at banderson@fcoplaw.com if you'd like to assist... Strange But True: "In his will, German poet Heinrich left his entire estate to his wife, provided she remarry, because "then there will be at least one man to regret my death."... **Brian Nomi** weighs-in from Iraq – "Mr. Charles Dickens indeed did write that "The law is an ass." (my January '09 column) "But, F.W. Maitland wrote that the law is "a seamless web." "I think they are both

right and to reconcile the two views, I've heard it said that "the law is a seamless ass." Brian may be reached at brian.nomi@iraq.centcom.mil... From Abraham Lincoln: "In law, it is good policy to never plead what you need not, lest you oblige yourself to prove what you can not."...

An interesting decision from the Fourth Appellate District, Division III December 19: "Cohn's counsel sent a complaint to the Angels bemoaning the fact Cohn did not receive a Mother's Day tote bag, and the Angels responded by sending four tote bags, one for Cohn, his counsel, and the friends that were with him on game day. J. O'Leary finds that Cohn incorrectly claimed that the Angels' Mother's Day giveaway unlawfully violated the Unruh Act by giving tote bags to women. "We fail to see how the denial by a physician of medical services to a patient on the basis of sexual orientation is analogous to the denial of tote bags to men attending a sporting event." *Cohn v. Corinthian Colleges* (2008) 169 Cal. App.4th 523... A Danish Proverb: "Virtue in the middle' said the Devil, as he sat down between two lawyers"... More babies: **David Lehr's** sixth child, a son named Patrick, and **John Negley's** fourth child, also a son, both arrived in early January. Both Moms and all the sibs are doing great.

Lastly this month, a federal judge in Brooklyn, N.Y., has rejected a Liberian woman's religious reasons for smuggling endangered monkey meat into the country. U.S. District Judge Raymond J. Dearie riled that Mamie Manneh's faith didn't preclude her from applying for permits to import exotic food or explain why she misled officials. Ms. Manneh was charged with smuggling the meat three years ago after customs agents seized a shipment of primate parts as it passed through Kennedy Airport on the way to her home in Staten Island. Ms. Manneh's lawyers claimed a First Amendment right, arguing that some Liberian Christians eat monkey meat for spiritual reasons...

Steve Henderson has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. He will be attending the Super Bowl in Tampa Bay and is in possession of two additional tickets. Additionally, his son, Max, will be participating in a club basketball tournament in Anaheim on Valentine's Day. Lastly, Henderson did have to evacuate his home, but all is well. He thanks everyone for their concern.

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