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CITATIONS

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PRESIDENT'S MESSAGE

By Tony Strauss

I want to start this month's column by thanking those of you who responded so positively to my rendition of the Terry-Field-Hill saga. Among the most enthusiastic was **Bob Gallaway** who, I learned, preceded me by a year at Hastings and who actually has Professor Green's lecture on tape. Bob is also a collector of Sarah Hill trivia, as he reminded me that Irving Stone retold the story in the chapter entitled "The Rose of Sharon" in his novel *Men to Match My Mountains: The Opening of the West 1840-1900.* Bob also directed me to the article in the March 1, 1937 edition of *Time* magazine reporting the death of Sarah Hill which begins: "In a Stockton, Calif, insane asylum last week died a fat old woman with wild white hair and a lame hip. She had been locked up for nearly half a century, happily certain that she was a great, rich lady, babbling endlessly about her memories. She could never keep her story straight, sometimes asserting that she had been married to President Lincoln and General Grant, or that the King of Italy was her foster father, or that she owned the Republic of Guatemala. But the daft old crone was not to be pitied, for she had lived greatly once and her true story was almost as fabulous as her imaginings." (http://www.time.com/time/magazine/article/0,9171,757303,00.html)

But I am not going to fill another CITATIONS with 19th Century history. No. Number 45 told me before assuming the office of President that I should keep my column focused on legal issues. (This admonition was not from President Barack Obama's successor but from Past Bar President **Roger Myers**). I have tried to adhere to that course. If what follows seems to deviate, the nexus will appear at the end.

I love everything Italian. This is not news to those who know me. I drive Italian cars, wear Italian clothes, drink Italian wines, ride around town on a Vespa, have the Italian National Anthem as my ring tone and fly the Italian flag when Ferrari wins a race. I travel almost exclusively to Italy, love pasta and Pavarotti and Sophia Loren, play Dean Martin songs every Saturday morning, practice Italian and Latin whenever possible, et cetera, ad nauseam, infinitum. It has always been this way. (Note the picture above: When in high school I had Imperial delusions.) But with a name like Strauss, what is this all about? Here is the theory that I have come up with.

The Romans were around for a very long time. Around, that is, in Europe, the Mediterranean and the Middle East. From the period of about 250 B.C. until Rome was sacked in 410 A.D., Roman culture – including its language, money, laws (first tie in) and influence – was spread through out the "known world." Rome accomplished this not only by trade but also by building cities in the lands it conquered. Placing loyal Roman citizens on its frontiers was a means to securing its borders from the Barbarians and insuring a steady flow of goods and taxes back to the Eternal City. Who were these loyal citizens? Primarily, they were soldiers who were given land and a new city to live in as their reward for twenty or more years of service. For the first 300 or so years of this practice, these soldiers were almost exclusively from Rome or other parts of Italy, as it was not necessarily prudent to have Barbarians keeping other Barbarians at bay. What did these retired Italian soldiers do? Of course, they intermarried with the locals and their progeny spread. So, my theory is that virtually *all* of us of European descent *must* have *some* of those original Roman genes. Mine just happen to be hyperactive.

No. 45 would no doubt say, "You said that you weren't going to talk about 19th Century history. Instead it's *La Dolce Vita* and Ancient Roman. Where does the practice of law come into it?" I would respond to my esteemed predecessor by saying "Pick up a Black's Dictionary and open to any page." It is full of Latin! I just randomly opened it to find "*Conditio praecendens adimpleri prius quam sequatur effectus.*" We all know that a condition precedent must be fulfilled before the effect can follow. Here it is in Latin, handed down to us through the generations, just like Roman DNA. Who among us hasn't at some point felt a professional connection to Cicero or Cato when representing our clients, imagining that we were prosecuting the Cataline conspirators or taking Caesar to task for abusing his constitutional authority? Of course it was inappropriate for lawyers to accept a fee in those days. Fortunately, that has changed. But our legal system, including trial by jury, case precedent, even jurists wearing robes (togas), all have their origins in Roman law. Res ipsa loquitur! We are their successors, in Gucci shoes.

Ciao tutti,
Tony
(No. 62)

Tony Strauss *is the principal of Strauss Law Group in Ventura. He practices employment law and employment, business and real estate litigation with his son Mike and colleague Bruce Crary.*

LETTERS TO THE EDITOR

Editor's note: *Both these letters comment on the April 2009 cover story by Tony Strauss, "Everyone likes a story. Especially if the story involves lawyers, intrigue, murder and sex." That article prompted more favorable comments than any other item CITATIONS has published.*

Referring to Stephen J. Field, VCBA President **Tony Strauss** wrote, "...after amassing vast wealth from the noble practice ..." I am reminded of Carl Sandburg's biography of Abraham Lincoln. Abe's law practice was not extremely lucrative, as opposed to many of his fellow lawyers' practices at the time. I have the impression that Abe earned enough to pay his bills, and was more concerned with service and honesty.

Lincoln's style carried over into politics. Last night, I read a quotation from the early part of his Presidential administration: "To one applicant eager for office Lincoln said: 'There are no emoluments that properly belong to patriotism. I brought nothing with me to the White House, nor am I likely to carry anything out.'"

Robert Owens

——

The juxtaposition in last month's CITATIONS of **President Strauss's** message with the article on family law points out the folly of blindly trusting in lawyers to resolve life problems like divorce and its aftermath. Justice Terry, for example, appears to have been an extremely ethical, conscientious and well-adjusted person – not.

In a down real estate market, it doesn't surprise me to read that 85% of family law cases involve one or more self-represented litigants. After all, if you can't sell the house and divide up the proceeds among the parties and their counsel, where does the money come from? In addition to the matter of private and state economics, however, I question putting more and more state resources into family courts, as opposed to something like family counseling and mediation. After all, with lawyers like Terry as models of proper behavior, who says that lawyers are the best choice to help hurting people put the pieces back?

Mark Hancock

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RE-THINKING DISCOVERY:
OUTRUNNING *GREYHOUND* WITH MICRO-TRIALS

By Rafael Chodos

In *Greyhound v. Superior Court* (1961) 56 Cal.2d 355, our Supreme Court offered a Grand Interpretation and theodicy of what was then the new Discovery Act, which had been enacted in 1957. That Act enlarged discovery rights and sought to accomplish ten objectives that the Court identified – four of them having to do with "simplifying" and "expediting" the resolution of civil disputes and one over-riding objective being to eliminate the "game-playing" element from litigation.[1] Although the Act has been amended over the last fifty years, most recently with the addition of the e-discovery rules, the basic ideas have not changed.

That Dog Won't Hunt.

The Act has conspicuously failed to achieve at least half of its objectives. After about fifty years of living under the Discovery Act and after indoctrinating seventeen generations of lawyers in *Greyhound's* dogma, we have been reminded by a recent report[2] how conspicuous the failure is. We are led to conclude that something must be wrong with *Greyhound*: There must have been some mistake in its thinking.

There are indeed mistakes – but they are not easy to spot. They are deep-lying mistakes, having less to do with the specific arguments and holdings of the opinion, than with its underlying biases and assumptions.

Mistake No. 1: Confusion of what happens in the courtroom with what happens in litigation. The opinion talks about making the proceedings more streamlined and efficient but what the justices were really thinking of was the proceedings in the courtroom. This was the result of a bureaucratic prejudice. The courtroom is just one of the venues that come into play during litigation. What goes on in lawyers' offices and conference rooms is every bit as much a part of the "user experience" as what goes on in the courtroom.

Courts tend to focus first and foremost on their own workflow and on what happens in front of them. To the extent that rules control the activity in the courtroom itself they "squeeze" litigation activity into the venues outside the courtroom. Discovery and out-of-court proceedings relating to discovery now account for a huge fraction of the total cost of litigation and it is that cost which has to be reduced, not just what goes on in front of the judge.

Mistake No. 2: Persistence of Victorian notions about the nature of legal truth-seeking and the purpose of discovery. The rise of science and engineering in the nineteenth century made legal thinkers want to characterize the law as a form of science. This led to the idea that the court is like the scientist who gathers all the evidence on his laboratory table before coming to any conclusions at all: The facts would be ascertained first and then the law would be applied. Discovery was seen principally as the fact-gathering process which must be somehow "completed" before the "trial" can begin. In this way, "legal truth" was going to be ascertained in the same way as "scientific truth."

But the "truth" of a case is not quite the same thing as the "truth" of a scientific proposition; it is something closer to artistic truth, or literary truth, or psychological truth. The fact is that every party who comes before the court has two messages to deliver: (1) "[T]his is what I say happened;" and (2) "this is what I say the court ought to do about it." If the whole procedure is to be "streamlined," discovery has to probe both those messages.

The Solution Lies in Micro-Trials.

I propose that courts should require the parties to participate in short "micro-trials" which would be held at various points throughout the life history of a case. In these micro-trials, the parties would be required to argue their cases before a referee (probably under Code of Civil Procedure §638), using offers of proof or "virtual testimony" – that is, testimony by the lawyers role-playing the parts of the witnesses in place of the live witnesses. These trials would last no longer than a single day, and they could be non-binding unless both parties agreed that they should be binding. Clients would be required to attend so that they would see the strengths and weaknesses of their cases and also of their counsel. The referee would be required to submit a written opinion after each micro-trial, so that the parties and the court might identify issues that could be eliminated without further dispute. The micro-trials could focus on separable "modules" of the whole case. For instance, there could be a micro-trial on damages even before liability was established; or on the existence *vel non* of a partnership; or on the fair use defense in a copyright claim.

Because these micro-trials would be limited to one day, they would be far less expensive than depositions and would replace and drastically reduce the cost of discovery. In such a micro-trial, the parties would be forced to disclose both their view of the facts and their view of how the law should be applied. Such micro-trials would go quite far to eliminate the "surprise element" at trial.

My own experience of thirty years litigating business cases has convinced me that there is no better method of trial preparation. Just as the violinist who is going to play a recital at Lincoln Center needs to rehearse the music before the real performance, the micro-trial process would allow the parties to "hear the music" before the ecstasy of the trial – and it might even encourage them to "face the music." It is the best way I can think of to outrun *Greyhound*.

---

[1] *Greyhound, supra,* at 376.

2 Published March 11, 2009 by the American College of Trial Lawyers March 11, 2009, in collaboration with the Institute for the Advancement of the American Legal System.

Rafael Chodos is a business litigator in Los Angeles. He is the author of The Law of Fiduciary Duties (Blackthorne Legal Press, 2000) and has recently founded RentA-Judge.com, an alternative dispute resolution service.

COLLABORATIVE CORNER

SEVEN DOOMSDAY WORDS

By Ed Buckle

We are all familiar with the seven words that George Carlin could not say on TV or radio. But did you know that there are seven words that should never be uttered in a collaborative family law proceeding?

First a primer on collaborative family law: It is a process by which divorcing parties sit down with collaborative family lawyers who are trained to work with the parties to resolve their marital estate, and dissolve the marital state with a minimum amount of economic and emotional disruption. It is the express intent of the parties to stay out of court, and come to an agreement that recognizes and satisfies the best interests of the family and each other in the process. The collaborative lawyers assist the parties in shaping and implementing a settlement. All of this culminates in their deal. Sometimes, one party recognizing an interest that should be met will voluntarily commit more to a settlement than would seem the norm. He/she recognizes a need and acts accordingly.

Having said all of the above, what are these seven small words that a collaborative lawyer should never utter, these doomsday words that can bring the process to its knees? "I CAN'T LET MY CLIENT DO THAT." Why? Because when an attorney says those seven words, it forces the process into advocacy, and encourages and enables the parties to become positional. Given the intent of the collaborative process to keep the parties out of court, to foster communications in an emotionally charged and stressful period, and to arrive at a settlement that recognizes and harmonizes the best interests of the family, these seven words are the antithesis to a best interests settlement.

By the way, here are seven more words to add to the list of doomsday words never to be uttered by collaborative lawyers: "THIS IS WHAT THE COURT WOULD DO."

Ed Buckle *is a Collaborative Family lawyer in Ventura.*

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PUNISHMENT BY INTEREST:

Rejecting Reasonable Statutory Offers to Compromise

By Craig A. Roeb

In today's uncertain economic times, plaintiffs are increasingly turning to expedient and economical settlements by means of Code of Civil Procedure §998 offers to compromise. Defendants must therefore promptly analyze the reasonableness of such offers to adequately protect against potentially substantial assessments of prejudgement interest in favor of prevailing plaintiffs.

Section 998 is intended to encourage the settlement of litigation and avoid trial.[1] Consequently, a prevailing party who makes a valid pretrial section §998 offer to compromise is eligible to recover certain specified costs after trial.[2] One of the costs recoverable by a prevailing plaintiff is prejudgment interest under Civil Code §3291.

Section 3291 serves two purposes. It encourages settlements by creating an incentive for recalcitrant defendants to accept reasonable settlement offers in a timely manner.[3] Section 3291 also has a compensatory purpose: "To provide just compensation to the injured party for loss of use of the [damage] award during the prejudgment period – in other words, to make the plaintiff whole as of the date of the injury."[4]

In higher exposure cases, interest can be substantial. That accords with the statute's purpose to penalize a party who fails to accept a reasonable offer to compromise.[5] In a particularly illustrative case out of Los Angeles County, *Saakyan v. Modern Auto, Inc.* (2002) 103 Cal.App.4th 383, plaintiff issued a §998 offer to compromise totaling $820,000. The offer was rejected. At trial, the plaintiff was awarded damages in excess of $12 million, upon which plaintiff submitted a cost bill that included prejudgment interest of almost $8 million.

To be valid, an offer to compromise under §998 must be made in good faith, that is, to be "realistically reasonable under the circumstances of the particular case."[6] It must carry with it "some reasonable prospect of acceptance."[7] Accordingly, a good faith determination requires an examination of the circumstances that existed at the time the offer was made, including what information was available to evaluate the offer.[8] The offeree must have reason to know the offer is a reasonable one.[9] The validity of the offer does not depend on information actually known to the offeree, but rather, on information that was known or reasonably should have been known.[10]

Given the potential effect of a §998 offer the courts have placed the burden on the offeror. The offer must be "sufficiently specific to permit the individual defendant to evaluate it;" therefore, a §998 offer that fails to identify allocations between multiple defendants, or clearly state the amount of damages, will not be enforced by the courts.[11]

Although a prevailing party in litigation or trial may seek the recovery of costs, he or she cannot request costs until after judgment has been entered and notice served. "Prejudgment costs... shall be claimed and contested in accordance with rules adopted by the Judicial Council."[12] "A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment...or within 180 days after entry of judgment, whichever is first."[13] "The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory."[14]

It is noteworthy that when a statutory offer to compromise is rejected and the final judgment (exceeding the offer) is extended for any period of time, the offer continues to operate to accrue prejudgment interest. In *Saakyan*, the defendant received a defense verdict at the conclusion of the trial. However, the court granted a motion for a new trial. The jury in the second trial found for plaintiff. The trial court ruled that the §998 offer was extinguished by the first judgment. The Court of Appeal disagreed, holding that a §998 offer was valid even if the first judgment was vacated.[15] Therefore, the time lapse between the §998 offer and the second, effective judgment significantly increased the defendants' total prejudgment interest liability.

Every litigant faces the potential of an adverse

judgment. Where the plaintiff serves a defendant with a statutory offer to compromise, the offer must be carefully evaluated. Among the factors to consider are the reasonableness of the offer, the amount of damages a court or jury may award at trial, any potential time lapse between the offer and final judgment, and the likelihood of the plaintiff's success on the merits in excess of the offer. Any failure to thoroughly analyze these factors could expose a defendant to substantially increased damages – not to mention lot of explaining to the client.

Craig A. Roeb *is a partner in the Los Angeles office of Chapman, Glucksman, Dean, Roeb & Barger, where he chairs the firm's business, employment, and product liability practice groups.*

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1. *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152.
2. *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.
3. *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 533. See also, *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663.
4. *Lakin*, at 663. Accord, *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 20.
5. *Carver, supra*, at 152.
6. *Id.*
7. *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698.
8. *Id.* at 699.
9. *Nelson, supra,* 72 Cal.App.4th at 135.
10. *Id.*
11. *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 585.
12. Code of Civil Procedure §1034(a)
13. California Rules of Court, Rule 870.
14. *Sanabria v. Embry* (2001) 92 Cal App.4th 422, 426.
15. *Saakyan, supra*, at 390.

VCTLA - JUDGE OF THE YEAR

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Photos by Craig Bates

PROBONO HIGHLIGHTS

By Verna R. Kagan

One of remarkable aspect of the Volunteer Lawyer Services Program is the generosity of our pro bono attorneys.

A case in point involves **Michael Christiano**. One day I called him and asked if he could help on an ex parte matter. Thus, he was getting less than 24 hours' notice, but he was most agreeable to be at court bright and early. I had promised that I would find an attorney to take the rest of the case. I called the next day to get some advice as to how to proceed with the matter on which he appeared, and to ask if he would accept a matter involving a military spouse. He agreed to handle the case on which he had appeared ex parte and, after only a moment's hesitation, accepted the second case as well. Two matters at once was most generous.

However, there is more than one part to the story. The military spouse had sustained a major injury to her leg. She was going into the hospital the next day for substantial surgery to place a rigid brace from her hip to her ankle. To complicate matters, she resided in a second story apartment. She had two court appearances coming up. Deciding against continuances, Mr. Chrstiano drove his van to her place, literally carried her down the stairs and into his van, and drove her to court. He had modified his van somewhat to make sure she was comfortable.

In addition to all the work he does for the applicants we sent to him, Mr. Christiano serves as a fee arbitrator for the Bar Association.

Mr. Christiano, thank you.

***Verna Kagan** is VLSP Senior Emeritus Attorney.*

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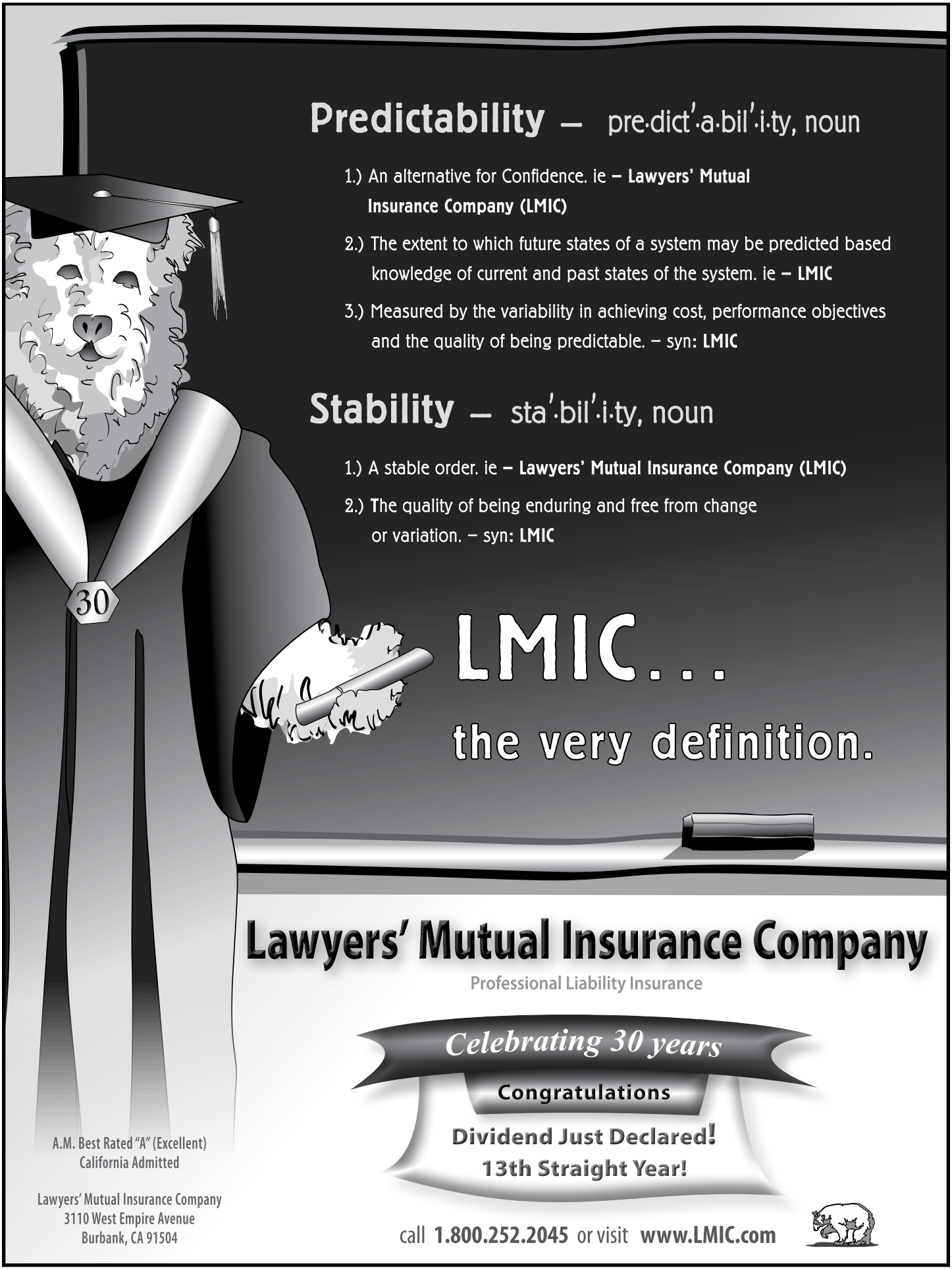
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APPRECIATION AWARDS

The Ventura Center for Dispute Settlement and the VCBA/ADR Section held their 4th annual dinner in recognition of Mediation Week in March. Superior **Court Executive Officer Michael D. Planet** and **Commissioner Mark S. Borrell** presented appreciation awards to the volunteer supervisors of the Small Claims Court mediation program, which is conducted by VCDS with about 80 volunteers.

VCTLA "TRIAL LAWYER OF THE YEAR" HONOR ON TAP FOR MAY 26 DINNER

By Bill Grewe

The Ventura County Trial Lawyers Association will announce the recipient of its 2008 Trial Lawyer of the Year award at its May 26 dinner meeting. This year's nominees are **Matthew Haffner, Jon Light, James McDermott, James Procter** and the team of **Alan Templeman** and **Dean Hazard**.

VCTLA is the only chapter of state-wide Consumer Attorneys of California open to members of both the plaintiff and defense bar. The trial lawyer award recognizes accomplishment from either side of the table.

The VCTLA Board votes on the nominees, considering noteworthy trial results, contribution to the legal community and civil justice system, and commitment to a high ethical standard of advocacy.

Please join us on May 26. A reservation form is inserted in this issue of Citations.

INSURANCE LAW UPDATE

By Mark E. Hancock

When can a health insurer properly rescind? Is mold remediation after a water loss covered? What constitutes an accident? These are insurance law issues the California courts have grappled with over the last year or so.

An HMO may not rescind unless it shows willful misrepresentation or reasonable underwriting efforts to ensure the application was accurate.

Insurance companies have increasingly resorted to the practice of rescinding health insurance policies as a way to avoid responsibility for paying large claims. Investigations by the Los Angeles City Attorney's office (Borzo, "*Coverage in Tatters*," California Lawyer (February, 2008)) have helped bring to light the alleged health insurer practice of partially basing employee bonuses on the number of policies rescinded, and have helped some insureds regain coverage.

In *Hailey* v. *California Physicians' Service* (2007) 158 Cal.App.4th 452, the court provided some insureds with ammunition to combat such rescissions. In that case, Cindy Hailey applied for and obtained health coverage for her family through a Blue Cross HMO. On the application, she only provided her medical history under what she claimed was the mistaken impression that the application did not seek information about other family members. After her husband incurred medical bills exceeding $450,000 as a result of stomach problems and injuries sustained in a car accident, the HMO rescinded the policy on the grounds that the Haileys had failed to disclose Mr. Hailey's prior history of obesity, hypertension, and GERD (gastrointestinal reflux disorder).

The Haileys challenged the rescission. The Court of Appeal, citing Health and Safety Code §§1340-1399, held that an HMO could not rescind coverage by engaging in "postclaims underwriting." Rather, the HMO must demonstrate that the insured made a willful misrepresentation on the application. Upon reviewing the Haileys' case, the court concluded that the application form was unclear and that there was a triable issue as to whether Cindy Hailey intentionally omitted her husband's health history. The upshot of *Hailey* is that a health care service plan cannot blithely collect premiums but then launch an investigation after the fact, a practice that is obviously tempting when a big claim arises. The HMO must show either that it made efforts to discover the facts in the initial/pre-loss underwriting process or that the insured purposefully misrepresented.

I believe this is good law; insurers should not be allowed to wait until a catastrophic loss to do their underwriting. It certainly is not fair to the insureds, who could possibly have obtained coverage elsewhere. Instead of facing rescission, the GERD sufferer might simply have paid a higher rate. Further, doing underwriting after a catastrophic loss and trying to avoid that loss adversely affects everyone: the hospital, the doctors, the patient and the public. The holding in this case is also consistent with *Barrera* v. *State Farm Mutual Auto Ins. Co.* (1969) 71 Cal.2d 659 in the area of auto insurance.

Be advised that this particular case involved an HMO and the Knox-Keene Act. The Insurance Code, on the other hand, contains a section permitting rescission for unintentional concealment. See Insurance Code §331. While other sections of the Insurance Code – for example §§10380 and 10384 – arguably prohibit postclaims underwriting, an insurer may still be able to rescind a policy if a statement made without intent to deceive materially affects either the acceptance of the risk or the hazard assumed See Insurance Code §§10380 and 359. There is case law to the effect that if the insurer basically says it is material, it is. To make good rescission law uniform for all types of health coverage, revision is necessary. Governor Schwarzenegger recently vetoed AB 1945, an attempt to address the rescission problem.

Mold grows, but insurance coverage for it does not.

If insurance companies could only defeat mold as readily as they seem to have defeated mold coverage, the world would be a better place for all of us. Mold often grows after water losses, but for insurance purposes it may as well not exist.

When dealing with mold exclusions, insureds have often relied on *Howell* v. *State Farm Fire & Cas. Co.* (1990) 218 Cal.App.3d 1446, in which the court held that Insurance Code §530 does not allow insurers to exclude losses proximately caused by covered perils. If a covered sudden water discharge is the efficient proximate cause of a loss, the insurer cannot exclude coverage for the loss, including any resulting mold. It sounds reasonable enough.

In *De Bruyn* v. *Superior Court* (2008) 158 Cal.App.4th 1213, the insured came home from a short vacation to discover that a toilet had overflowed, causing water damage and mold contamination. Mr. De Bruyn's policy covered sudden and accidental water discharges from the plumbing system, and he made a claim with his homeowner's insurance company for the loss, including the mold.

Unfortunately, his policy excluded coverage for mold, even if it resulted from a sudden and accidental discharge of water. The court held that as long as the policy language is sufficiently clear that a reasonable insured can readily understand what is covered and what is not, an insurer may limit coverage to some (but not all) manifestations of a risk. In other words, as long as the insurance company was not cutting off coverage for all damages caused by a covered peril that was the efficient proximate cause of loss (just some of those damages), and did so in a clear manner, the efficient proximate cause doctrine was not violated.

The holding suggests that if you artfully define your risk, you can shave off certain results of covered perils – another apparent triumph of contract and insurance company draftsmanship over public policy. Attorneys for insurers argue that there is currently no public policy prohibiting the exclusion of some manifestations of water damage, but not others, i.e., no public policy that mold has to be covered, though attorneys for insureds say this is inconsistent with *Howell* and with Insurance Code §530. Please note that this case arguably supports "absolute" mold exclusions by its result. Given this decision, some insurers may feel emboldened enough to eliminate their other line of defense, i.e., the sublimit for mold. Attorneys may someday longingly remember the days of the penurious $5,000 sublimit for mold remediation. That, of course, would not pay for space suits and High Efficiency Particulate Air (HEPA) filtration, but it would at least pay for a handyman, a cutting tool and some detergent.

Like Charlie Tuna, insurers never stop trying.

With insurance, like politics, to be disengaged is to be bypassed. The process never stops and insurers never stop trying. Take for example the definition of "accident": Is it the act or the consequence(s) that make something an accident?

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INSURANCE LAW UPDATE

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Insureds generally argue that an accident encompasses not only unintended acts, but also unintended consequences and cite cases such as *Meyer* v. *Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, for the proposition that:

> The fact that an act which causes an injury is intentional does not take the consequence of that act outside the coverage of a policy which excludes damage unless caused by accident for if the consequence that is the damage or injury is not intentional and is unexpected it is accidental in character.

Such a definition provides coverage for, among other things, injuries from driving drunk and reckless driving (where driving and/or speeding was intended, but contact with other cars and injury was not) and unintended damages caused by intentional well drilling or baseball hitting.

Given this logic, it would seem that injuries suffered as a result of someone intentionally throwing (or trying to throw) another into a pool – for the purpose of getting them wet – would be an accident. While the person intended to throw his friend into the pool, he did not intend anything bad to come of it. He did not intend, for example, that his friend fall short. But do not go away feeling confident. The opinion in *State Farm Fire and Casualty Co.* v. *Superior Court* (2008) 164 Cal. App.4th 317 shows that it is a daily struggle for insureds. After years of jurisprudence, the court in *State Farm* still proclaimed: "The meaning of the term 'accident' in insurance law is not settled."

In *State Farm*, the "thrower" stated, "If I wanted to hurt this guy...I would have just hit him, but I didn't want to hurt him." He explained that he intended "[j]ust to get him wet." Nevertheless, State Farm argued that "accident" does not cover volitional acts, even where the damage is unintended, and that there was no coverage for this loss.

The Court of Appeal rejected State Farm's position:

> Taken to its logical conclusion, State Farm's argument that we should apply "fortuity" solely to the act causing the injury without reference to the injury, would result in no coverage at all...there could never be a covered event because [for example] all batters deliberately seek to hit baseballs and therefore engage in intentional acts, regardless of whether the property damage, namely, breaking windows, was intended.

The Court of Appeal distinguished the cases cited by State Farm as primarily involving allegations of sexual molestation. In that area, courts have held that the act is so bad that the intent to harm will be inferred from it. The Court refused to extend that principle to the kind of conduct in this case.

Despite this, do not expect insurers to stop trying.

Mark E. Hancock *is a Ventura attorney who handles property and casualty insurance coverage disputes for insureds and represents insureds as CUMIS counsel.*

SUNSHINE CLEANING

By Bill Paterson

The preview for "Sunshine Cleaning" is somewhat misleading. No doubt seeking to draft behind the success of "Little Miss Sunshine," the trailer would lead you to believe you are in store for another idiosyncratic offbeat comedy. While "Sunshine Cleaning" has its quotient of humor (much of which is unfortunately given away in the trailer), behind the humor is a more poignant story, the ups and downs of two sisters who have come up short in life.

Rose (Amy Adams) is a former high school teen queen. The object of female envy and male lust, like many high school luminaries Rose's moment in the sun had a short shelf life. Now a chambermaid and single mom, her life consists of minimum wage drudgery and repeated trips to her son's school, where his errant behavior makes her a regular at the counselor's office. Her romantic life is similarly down market and not destined to make the cover of a Harlequin Romance. Her Prince Charming is ex-flame Mac (Steve Zahn), a married local cop who prefers cheesy motel rooms to candlelit dinners.

While Rose may be on a treadmill to nowhere, she is a roaring success compared to her younger sister Norah (Emily Blunt), a morose emotional train wreck for whom even a minimum wage job presents too high an occupational hurdle. However, just when things are at their bleakest, Rose and Nora's lives take an apparent turn for the better when Rose puts her room cleaning talents to work in a new field – crime scene clean up.

While the notion of two inexperienced klutzes tidying up after assorted mayhem is promising, and the film contains enough entertaining moments to raise it several notches above sitcom level, the comic premise is stretched too thin to elevate "Sunshine Cleaning" into the breakout comedy category. The film also strains a little too hard to be endearingly "quirky." Much as I admire Alan Arkin's work, as Rose's father he is that old stock movie character, the gruff and lovable curmudgeon. Rose's son's "free to be me" school problems also stray into cliche territory. While parts of the screenplay work well, other sections leave the impression that the script was self-consciously massaged to hit all the "indie" film marks.

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Ear to the Wall

Dr. Jamie Rotnofsky, Clinical Psychologist, is expanding her civil/criminal practice. Dr. Rotnofsky is an expert witness and psychological consultant appointed by both the Ventura and Santa Barbara Superior Courts. She can be found in **Deirdre Frank's** office at 1280 S. Victoria Avenue, Suite 200. You can contact Dr. Rotnofsky at 800-927-7930.

THOSE DEFINING WINE MOMENTS

By Antonio Verdiny

For me, my wine homecoming was with tempranillo from Spain. While I try to be open minded when it comes to food and wine, I still wasn't aware of how good it could get. Paco and Yolanda, our friends from Barcelona, invited us to dinner at their home. Paco and Yolanda are Flamenco virtuosos who have toured with their dance troupe all over the world. They are not only are phenomenal artists, but excellent cooks as well.

We were feasting on caldo gallego and paella while experiencing a variety of Spanish wines, savoring the moment, when out comes this bottle with a yellow label and red trim and black writing. We have had some good wines, but this – this was superb. The nose spoke of tempranillo riojano style, but this was big, muscular, full-bodied. It had finesse and elegance. It was one of those defining wine moments.

We continued the ritual of real wine tasting – sniffing and sipping and alternating with bites of paella. The bottle sucked dry of its contents, I asked Paco, "May I take this empty bottle with me?" My wife and I were going to be in Spain for our 20th anniversary, and it was now our mission to find out where we could get more of this amazing wine. Paco, with a special grin, handed us the "Remirez de Ganuza" bottle that we had just finished.

Thrilled with his hospitality, we told them what our plan was and that if we were successful, we would pay him back in kind! Four months later, on our way back to the Basque country driving up from Madrid, we checked into a hotel in Logrono. We proceeded to explore the area, where we stumbled upon a wine shop specializing in the wines of Rioja.

Much to our delight, we spied several bottles of the coveted libation on the shelf. I asked the owner of a store called "Rincon de Jelen" if he knew where we could find the winery so we could meet the man who was responsible for making such a wine. The jovial man said attentively, "Give me a second, let me call him for you!" So we met Don Fernando Remirez de Ganuza, who told us "todo empieza con la uva" – it all starts with the grape!

Upon our return home, we again had dinner with Paco and Yolanda, but this time we supplied the Remirez de Ganuza. Another homecoming. Another one of those defining wine moments.

Antonio Verdiny *is a state certified court interpreter whose father was a wine steward to the 50's and 60's Rat Pack. Mr. Verdiny has taught wine classes as well as conducted tours, and he writes a column for advice.com.*

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SUNSHINE CLEANING

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All that said, "Sunshine Cleaning" is still worth a trip to the theater for its central virtue: The performances of Amy Adams and Emily Blunt. From one of her earliest roles in "June Bug" through her star turn in "Enchanted," Amy Adams owns the current trademark on the sweet-natured innocent. If you doubt me, watch the scene in which Rose, with an elegantly simple act of kindness, befriends an elderly woman whose husband has committed suicide. On the other side of the emotional spectrum is Nora. Scarred by an event in her childhood which the film only gradually reveals, she is a haunted by long-buried memories. It is a strikingly memorable performance.

Along with the high caliber of the two lead performances, "Sunshine Cleaning" also contains some bright new (at least to me) faces in Clifton Collins, Jr. as the sympathetic owner of the cleaning supply store where Rose shops for the tools of her trade, and Mary Lynn Rajskub as a lonely and needy woman befriended by Nora.

"Sunshine Cleaning" dearly wants to "The Little Movie That Could," and while I think it comes up somewhat short of the mark, I don't think you will leave the theater unhappy.

Related DVD Picks: If you want to see Steve Zahn in a completely different role, rent "Happy Texas" (1999), where he and Jeremy Northam play a pair of escapees from a chain gang who seek to cover their tracks by posing as gay small town beauty pageant organizers. This is a comic gem which also features the ever-reliable William H. Macy as the town sheriff. (Look for the Fillmore locales).

I first saw Any Adams in "June Bug", where she played a very pregnant North Carolina naif mesmerized by her brother's sophisticated wife, an art gallery owner slumming in the South. Totally original and a critical favorite. (94% Rotten Tomato rating).

Bill Paterson *of Ferguson, Case, Orr & Paterson has been sharing film reviews with his firm and a select group of friends for many years.*

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Exec's Dot…Dot…Dot…

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

Immediate past-president of Barristers, **Katie Pietrolungo**, reminds me that April 14 was *National Be Kind to Lawyers Day*. The day is the brainchild of non-lawyer Steve Hughes and a very clever website is all yours for the taking – www.bekindtolawyers.com. …U.S. Rep. Barney Frank, D-Mass., called Justice Antonin Scalia a "homophobe" when commenting on the possibility of a case involving gay marriages reaching the U.S. Supreme Court. In an interview with the gay website 365gay.com, Frank was questioned about legal challenges to the Defense of Marriage Act. "At some point, [the Defense of Marriage Act] is going to have to go to the U.S. Supreme Court," said Frank, who is gay. "I wouldn't want it to go to the United States Supreme Court now because that homophobe Antonin Scalia has got too many votes on this current court."… **Ryan Thelan** is a proud first-time pop. Reese Jane Thelan was born March 12 weighing in at 8 lbs., 8 oz. Mother Brandy is doing well…

Less Hess is a member of the VCBA/VLSP, Inc. advisory board and the J.H.B. Inn of Court. What you did not know was that Lee is an avid Monopoly player. How avid? Lee participated in the 2009 U.S. National Monopoly Finals Competition in Washington, D.C. It was his first National Competition after winning local championships over the years, and he placed 19th. He also runs a local Monopoly tournament to benefit the Ventura County Boy Scouts. Sponsors and players always welcome. westlakelee@yahoo.com... Speaking of the competitive nature of lawyers, **Bart Bleuel** is going to swim in a National Masters Short Course Swim Meet on May 7 through the 10th in Clovis (Clovis?). He qualified for the 1650 free, 200 free, 100 breast, and 200 breast…

Those crazy Barrister types, 20 strong, have committed a day to Habitat for Humanity May 2 in Oxnard. Barristers' leadership has also established what I believe to be the second Facebook page for a bar association in the country. Click Barristers of Ventura County… **Carmen Ramírez** has been selected by State Senator Fran Pavley as the 2009 23rd Senate District Woman of the Year. Carmen was honored March 27 at a luncheon in Malibu. Pavley characterized Carmen as "a tireless voice"…New Zealand? **Fred Tschopp** at bigbear6@aol.com...Is Eliot Spitzer making a comeback? He appeared on the Today Show and wrote a column for Slate in April regarding financial reform…An informal poll on www.bitterlawyer.com about lawyers who get breast implants has prompted a comment about ugly feminists by Rush Limbaugh (go figure). The poll asked blog readers whether breast implants can help a lawyer's career. 58% said implants can help, 23% said implants were "irrelevant" and 20% thought they were career suicide. www.legalblogwatch notes Limbaugh's reaction: "Can I redirect you to feminist truth number 24, Undeniable Truth of Life Number 24, written by me in the 1980s: Feminism was established so as to allow unattractive women easier access to the mainstream of society."…**Mike Velthoen** took over the reigns as managing partner at FCOP April 1…

The Notre Dame Club of Ventura donated a signed Joe Montana jersey for the bar's annual dinner and silent auction scheduled for 11.21**.** The bar's secretary-treasurer, **Joe Strohman**, is responsible for all the leg work. Wish to make a donation? don.hurley@ventura.org... **Sylvia Gonzales** will be participating in the LA Marathon May 25. She has worked for the County of Ventura for 25 years and is currently employed by the County Counsel's Office. She has never before run a marathon, but decided to run this year in honor of Roman Vega, who is afflicted with cerebral palsy. She's trying to raise $5K – sylvia.gonzales2@gmail.com... Three lawyers testifying in the North Dakota trial of a non-lawyer accused of practicing law said they were duped into believing he had a law license because of his apparent expertise. Prosecutors claim nonlawyer Howard Kieffer worked on federal cases in at least 10 states and appeared at seminars throughout the country to speak on sentencing…**Judge Manuel Covarrubias** was honored March 21 by El Concilio del Condado de Ventura. Those being honored are looked upon as role models and because of their leadership and involvement with the county's Latino community…

Very kool profile in The Daily Journal March 13 about **Judge Fred Bysshe**. www.thedailyjournal.com…**Jeff Johnson** started March 1 at Goldenring and Prosser after seven years as a solo. Jeff also toured with Ellison, Hinkle & Bayer and Wood and Associates…I left off another name selected to Southern California *Super Lawyers for 2009* – **Michael Wolfram** has been mentioned the last few years…Serving as the only woman on the U.S. Supreme Court is an isolating job, says Justice Ruth Bader Ginsburg. "It's lonely for me," she said at an Ohio State University symposium. "Not that I don't love all my colleagues. I do." Ginsburg says she misses her former female colleague, Sandra Day O'Connor…17-year employee of Nordman Cormany Hair & Compton, **CEO Tami Cook**, was recognized by the Pacific Coast Business Times as one of the Top 50 Women in Business. Tami is responsible for daily management and long-term strategic planning at the firm…

All Hail **Ken Yaeger**! The Lawyer Referral and Information Service panelist forwarded to the bar $10,000 from a PI case. Ken has been an LRIS panelist for many years. More info about our LRIS? alex@vcba.org...**Ellen Hirvela** was married on March 7 and you may add Russell to her name…**Gary Norris** will no longer be practicing under the name of Edsall and Norris. As of May 1, he's the Law Offices of Gary Norris in Camarillo – gary@garynorrislaw.com...Law Day 5K! Law Day 5K!! Bigger, faster, prizes, more $$$ than ever before awarded: $2,000 – www.lawday5k.com…

***Steve Henderson** has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. Defending his 1st Place Open Trophy, he'll race the Law Day 5K in under 15 minutes. Lastly, he has a couple Dodger tickets for May 10 (Sec. 4FD, Row P, Seats 7-8) to the first email at steve@vcba.org 24/7. Good luck and the tickets include admission into the Stadium Club.*

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