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# CITATIONS

SEPTEMBER – TWO THOUSAND NINE

## HOW EMPLOYERS CAN AVOID MAKING COSTLY HUMAN RESOURCES MISTAKES DURING DIFFICULT ECONOMIC TIMES

*By Polina Friedland Bernstein, Esq.*

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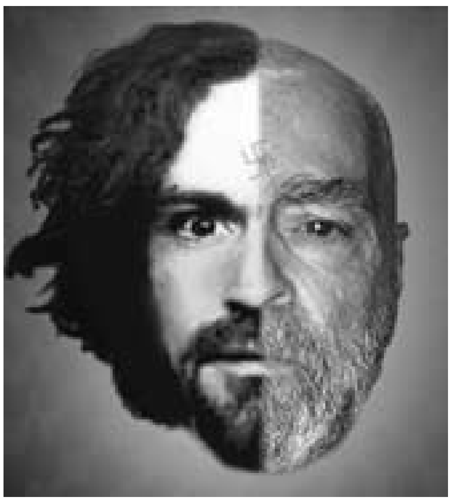

# PRESIDENT'S MESSAGE:
## *Five to Die: The Book That Helped Convict Manson*

*By Tony Strauss*

"It was 20 years ago today..." We immediately associate that with the beginning track of *Sgt. Pepper's Lonely Hearts Club Band*, the Beatles' ground breaking 1967 album. But it was 40 years and about three weeks ago today that lyrics from the *White Album* were written in blood at crime scenes in Benedict Canyon and Los Feliz and came to be associated with one of the most gruesome and sensational murders in California's history. August 9, 2009 was the 40th anniversary of the brutal murders of Sharon Tate and her four house guests by Charles Manson and his "family." Rosemary and Leno La Bianca were slain by them the following day.

The memory of these events and the bizarre trial that followed were brought back to me by my good friend Ivor Davis, who co-authored the book *Five to Die* with Jerry Le Blanc. The book is about the Tate and La Bianca murders and the Manson cult family. It was published in January 1970, seven months before the trial began. Years later, Aaron Stovitz, the original lead prosecutor in the case, told Ivor that the book served as the blueprint for the prosecution. However, the book contained nothing about the trial or what had since become of all its various participants. Having sat through the trial and having his own run-ins with Charles Mason and the "family" in the forty years since, Ivor decided to supplement the book for a re-release on the 40th anniversary. The book is now titled *Five to Die: The Book That Helped Convict Manson*. When Ivor told me his plans earlier in the year, my own reexamination began.

I have always had a fascination with what took place that August. I am certainly not alone as Vincent Bugliosi's book *Helter Skelter* remains the best selling true crime book of all time. I was on my Grand Tour of Europe after high school during the Summer of '69 when I caught a glimpse of the *International Herald Tribune* headline about "Cult Murders in California." At the time, being from California was "cool." But there was nothing cool about this. I still remember having to explain to other travelers that not everyone in California was crazy. I left those thoughts behind until that fall when, during my first quarter at UCSB, I saw the face of my neighbor and friend Leslie Van Houten on the news. I knew Leslie and her family well. They lived across the street from us in Monrovia, and she was two years ahead of me in school. In elementary and middle school I used to hang out at her house. They had a swimming pool and her younger brother and sister were playmates. I had not seen Leslie since she graduated from Monrovia High in 1967. To see her charged with these horrific crimes was an incredible shock.

Ivor was the West Coast correspondent for the *London Daily Express*. Among his gigs, Ivor had traveled with the Beatles for five weeks on their first North American tour and had ghosted a weekly column for George Harrison. Ivor had serious reporting credentials as well. In fact, he covered Robert Kennedy's 1968 presidential bid and was in the Ambassador Hotel the night Kennedy was assassinated. On the morning of August 10, 1969, he got a call from his editor in London assigning him to the Tate story. Ivor teamed up with veteran freelance reporter Jerry Le Blanc to investigate this celebrity murder.

The pair quickly found that they were often several steps ahead of the police investigations. When Manson was arrested in Death Valley, Ivor rented a small private plane and flew to Independence where Manson was being held. His intent was to interview Manson, who was booked as "Charles Manson, aka Jesus Christ God." However, Manson would not talk to him unless he paid $350 for the interview; Ivor declined. The following day Ivor went to the Spahn Ranch, near the Santa Susana Pass, and began interviewing the family members who still lived there.

Over the course of the next two months, Davis and LeBlanc learned how the Manson cult operated. Manson was a modern Rasputin, a Svengali character capable of ordering his followers to do anything he would command. For the girls, it was usually sex. Occasionally, he would send them down into town to seek out men to sleep with so that they could steal their credit cards. Or he would send them to sleep with the supermarket manager to get first dibs on food being thrown out. For the men, their preferred non-violent pastime was stealing cars. It was also their job to recruit wayward girls to return to the ranch. Of course drugs, primarily LSD, were the mainstay for all of the family members.

Through their interviews, Davis and Le Blanc discovered the reason why the Beatles' lyrics, including "Piggies" and "Helter Skelter" had been written in blood at the crime scenes. Manson believed that the *White Album* was a message sent to him by the Beatles to incite a war between the races. At first, the prosecution did not buy this race war theory. It later became the theme of the trial.

The original *Five to Die* chronicled the pretrial investigations. However, the story did not end with the arrest of Manson and four of his followers: Charles "Tex" Watson, Susan Atkins, Leslie Van Houten and Patricia Krenwinkel. The trial lasted nine months and included a revolving door of defense counsel and antics by Manson and his family that disrupted the process. It was not out of the ordinary for Manson to suddenly stand up in court, turn his back to the judge and have the others immediately imitate his actions. He would also get up and stretch his arms to show that he was Jesus reincarnated, ready for crucifixion.

The array of lawyers also bordered on the ridiculous. With the exception of former Public Defender Paul Fitzgerald, there was very little criminal or trial experience among the defense counsel. Manson's lawyer, Irving Kanarek, slept in his car outside the court house. One of Leslie Van Houten's early lawyers, Ira Reiner, apparently had little criminal experience. He got out of the case early on and later on ran successfully for Los Angeles County District Attorney. Ronald Hughes, Reiner's replacement as Van Houten's counsel, wore the same suit everyday until it literally fell off. He also slept on a mattress in a friend's garage which served as his office. Just prior to closing arguments, Hughes went missing after a weekend camping trip to Sespe Hot Springs. His remains were discovered four months later.

*Continued on page 5*

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# PRESIDENT'S MESSAGE:
## *Five to Die: The Book That Helped Convict Manson*

*Continued from page 3*

Charles Manson at Spahn Ranch wearing vest embroidered by his girls

Ivor's re-publication of *Five to Die: The Book That Helped Convict Manson* contains not only information about the trial and its lawyers, but also reveals the personal side of writing the book. During and after the trial, Ivor and his wife Sally received telephoned death threats. Their daughter was then an infant and in one anonymous call Sally was told "Take good care of that baby of yours." Squeaky Fromme (who was later convicted of trying to assassinate Gerald Ford and was to be released from prison last month) yelled at Ivor outside the courthouse, "Do you know how it feels to have a long sharp knife pushed down your throat?" The new book also recounts Ivor's interviews with many of those whose names came up as the Manson story unfolded. These included Roman Polanski (Sharon Tate's husband), Paul McCartney, Doris Day, Terry Melcher (Doris Day's son who had previously lived in the Tate house and may have been the intended victim), Dennis Wilson (of the Beach Boys), and virtually all of the lawyers involved. Deputy D.A. Stephen Kay, Bugliosi's assistant in the trial, was a major source of information for the new book. He recounted his own traumas in having been involved. Squeaky had told Kay, "They're going to do to your house what they did to the Tate house."

My only connection after Leslie's arrest was through my mother who was good friends with her mother Jane Van Houten. Jane sought tirelessly to seek her daughter's parole, and I think that my mother once wrote a letter of support. However, it seemed that no matter what Leslie did in prison, there was and remains an insurmountable wall to her release. One has to wonder whether, if this had not been such a sensational case, she would have been paroled by now. Leslie was 19 or 20 and probably on LSD when Manson took her to the home of Rosemary and Leno La Bianca and she plunged the knife into Rosemary La Bianca's back. She now has to be about 60, having spent two-thirds of her life in prison. But then again Leno and Rosemary La Bianca were never given the opportunity to live that long.

*Continued on page 27*

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# WINE TREASURES OF VENTURA COUNTY

*By Antonio Verdiny*

Few know that Ventura County has grown wine grapes since the 1800s. County wines do not yet enjoy the celebrity of Napa and Sonoma, or northern neighbors Santa Barbara and San Luis Obispo. That may soon change.

Early production in Ventura County was more for local consumption than commercial sale. Any town with its share of Spanish, French, Basque, Portugese and Italian immigrants had to have a few winemakers, right? The San Buenaventura Mission and other churches required wine for communion, and local synagogues needed it for shabbat and the Passover seder.

At one time, Rancho Camulos at the eastern end of the County produced wine and brandy in such volume that it sent barrels south to Los Angeles. Flash forward to the present and you find the Giessinger Winery off Highway 126, just east of Fillmore (look for the signs announcing "WINERY"). Stop in for a sample or visit their website at www.giessingerwinery.com.

Few people know a top-notch boutique wine, *Sine Qua Non*, is produced on Ventura Avenue in Ventura by Austrian-American

*Continued on page 23*

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# DOORS CLOSED

For anyone who missed it, the courts were closed Wednesday, August 19, 2009. This was not a court holiday and filing deadlines were not extended. Drop off bins were available at the clerk's office for anything that needed to be filed that day.

From September 2009 through June 2010, the courts will be closed the third Wednesday of each month. These closures **will** be deemed court holidays, according to and by direction of the Judicial Council, and filing deadlines will be extended.

We do not know what will happen after June 2010, but we will keep you posted as we find out more information.

The Superior Court is looking for feedback as to how these closures affect us, our practices and our clients. *Please feel free to send any comments directly to Michael Planet at Michael.planet@ventura.courts.ca.gov.*


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# HOW EMPLOYERS CAN AVOID MAKING COSTLY HUMAN RESOURCES MISTAKES DURING DIFFICULT ECONOMIC TIMES

*By Polina Friedland Bernstein, Esq.*

With the ranks of the unemployed growing larger, the number of employment-related lawsuits has also seen a dramatic upward shift. According to the Equal Employment Opportunity Commission, discrimination claims filed with the agency rose fifteen percent in 2008 to 95,402 (from 82,792 claims filed the year before). This number is expected to increase in 2009 due in part to the fact that discharged workers face greater difficulty in finding new jobs; the current economic realities may lead some of them to consider litigation against their former employers as a means of financial survival. Accordingly, the way employers implement layoffs may end up costing them significantly more in the way of litigation related expenses.

There are, however, steps companies can take to reduce the risk of employment litigation and better defend themselves in the event a lawsuit or claim is filed.

**Reevaluate Employee Job Duties to Ensure Proper Payment of Wages.**
In order to decrease expenses, companies may choose to eliminate certain positions or change the duties of some employees. These changes may result in certain employees losing their exempt status thereby entitling them to receive overtime pay for hours worked in excess of eight per day or 40 per week. For example, an employee's duties may have qualified her for the executive exemption under California law, i.e. she customarily and regularly directed the work of at least two subordinates, exercised independent business judgment, had the authority to hire and fire, and met the remaining requirements of the executive exemption. If, however, individuals supervised by this employee are discharged, then the company will need to evaluate whether it would be proper to continue to classify her as exempt from receiving overtime pay.

Similarly, the company's financial needs may require employees to perform different and/or additional duties that were previously assigned to employees whose jobs have been eliminated. For example, a manager who previously oversaw a retail company's business operations may need to spend a great deal more time performing the non-exempt duties that the employees supervised by this manager perform, i.e. helping customers, working at the cash register, etc. Depending on the types of duties performed by this manager, the manager may be entitled to overtime pay because with the change in duties he no longer qualifies for an exemption from being paid overtime wages.

Given that it is the employer's affirmative obligation to establish that it has properly designated employees as exempt, employers should review positions on an on-going basis to ensure that employees are properly classified.

**Make Sure To Pay All Wages Owed Upon Termination.**
The Labor Code specifies that an employee who is discharged is owed all final wages, including accrued but unused vacation, at the time of termination, irrespective of whether the termination is the result of misconduct, performance issues, or a reduction in force. Failure to timely pay all wages and unused vacation may result in the employer having to pay costly penalties equal to the employee's daily rate of pay for each day that the overdue final wages remain unpaid, up to a maximum of 30 days. Therefore, even if financial constraints require employers to act quickly in implementing layoffs, it is important to accurately calculate in advance the amount of all wages and unused vacation owed to employees upon termination.

**Take the Time to Properly Implement a Reduction In Force.**
Companies desperate to reduce expenses may not take the time necessary to properly plan, implement and document a reduction in force. Employers must use a fair method and defined criteria for selecting among employees in affected positions or departments and to make sure that improper selection criteria do not result in discriminatory or retaliatory layoffs or have a disproportionate impact on women, minorities, older workers or other protected groups. Employees who implement layoffs should be trained to provide consistent and accurate information in a respectful manner to employees impacted by the reduction in force. Employers should also be prepared to discuss the reduction in force with retained employees in a way that will address their concerns without making any guarantees of future job security. Lastly, there may be important legal requirements applicable to a reduction in force, including but not limited to the Worker Adjustment Retraining and Notification Act and state law equivalent, and the Older Workers Benefit and Protection Act if severance pay is offered.

**Make Sure To Keep Employee Handbooks Current.**
Solid employee handbooks may provide support regarding employee discipline and discharge decisions and demonstrate to plaintiff's counsel and to the court that the employer understands its legal requirements, communicated those requirements to employees, and took proactive steps to comply with the law.

Employment laws change often and employee handbooks should be reviewed and revised to be current. Recently, Congress made significant amendments to the Federal Medical Leave Act and the Americans with Disabilities Act. There were also many important California Supreme Court and appellate court decisions. For example, last year the California Supreme Court in *Edwards v. Arthur Andersen* (2008) 44 Cal.4th 937 determined that most non-solicitation and non-competition covenants are not enforceable in California, even if they are narrowly drawn, unless they fall within one of the statutory exceptions relating to a sale of a corporation or partnership interest. Employers whose handbooks

continue to contain non-competition or non-solicitation provisions may risk being sued for interference with contract or interference with prospective economic advantage by former employees who claim that these policies discouraged potential employers from hiring them. Therefore, it is important that employers regularly audit their handbooks rather than have their out-of-date policies be used as proof in a lawsuit that an employer did not know the law or applied obsolete laws or regulations.

**Follow Your Policies and Procedures for Terminations.**
There is a significant risk in having personnel policies but failing to consistently apply or enforce them. Although the existence of a well-written and current handbook may provide proof that the employer knew the law, the employer's failure to comply with its own policies and procedures, or comply for some employees but not others, could be just as damaging as not having a handbook at all.

**Conduct Performance Evaluations and Document Performance Problems.**
Employers should conduct regular performance evaluations of their employees at least once per year. If an employee is discharged because of poor performance but the employer did not conduct any evaluations or the employee's evaluations did not reflect areas where improvement was needed, a jury may be more likely to believe that the termination was actually the result of an illegal employment practice. Employers should also document any performance-related counseling and even verbal warnings, which can serve as proof in an employment lawsuit regarding the reason for a termination, demotion, or decision not to promote. Furthermore, employees who are not given regular feedback and are then suddenly discharged on the basis of their performance may believe that their employment was terminated for an illegal reason and may be more likely to seek legal redress as a result.

*Continued on page 13*


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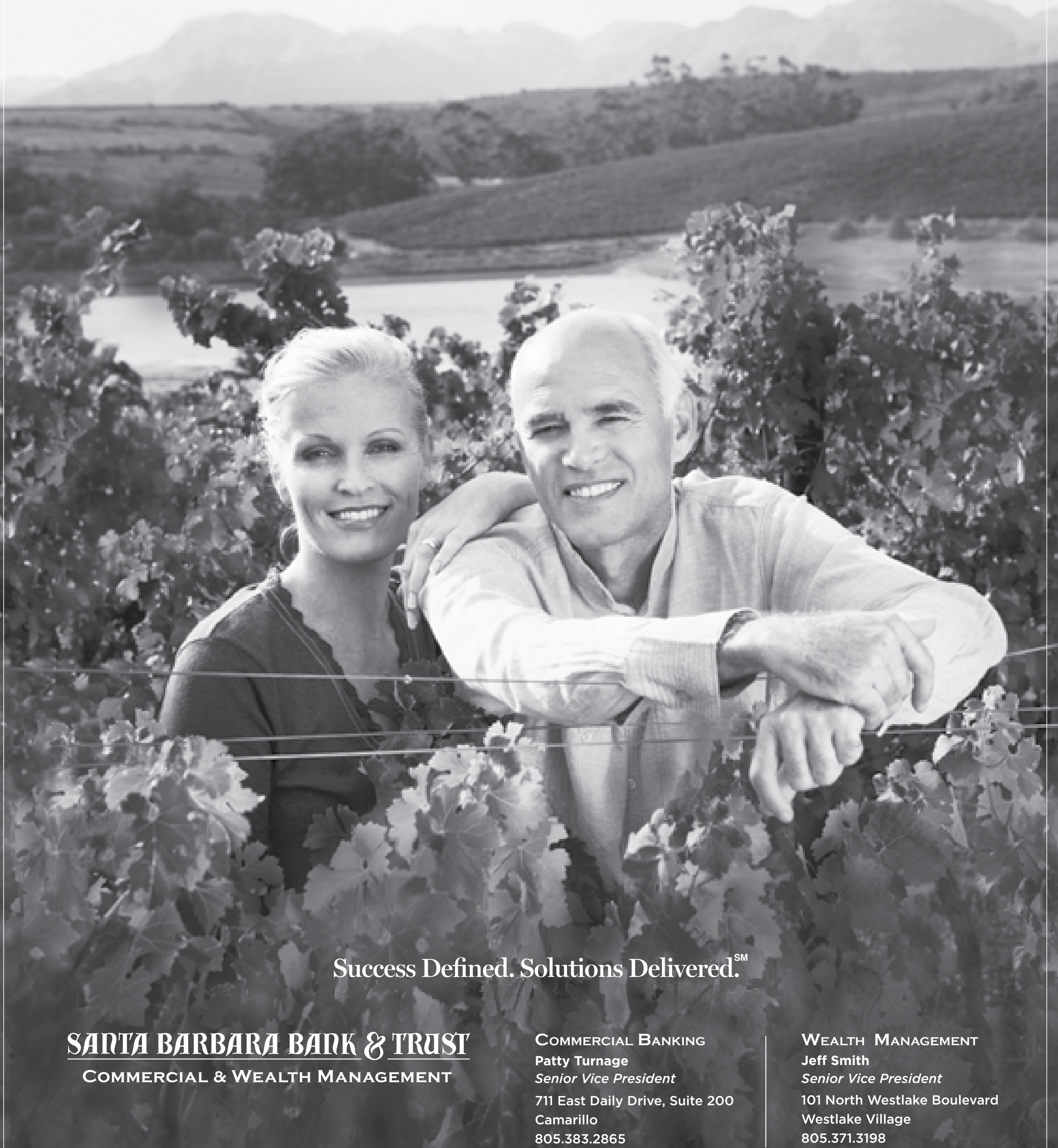

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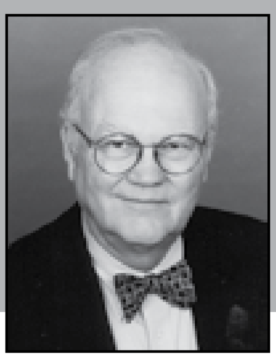

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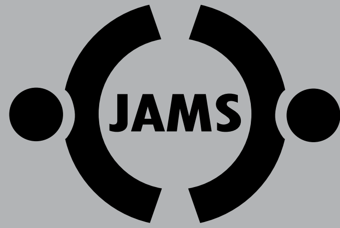


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## HOW EMPLOYERS CAN AVOID MAKING COSTLY HUMAN RESOURCES MISTAKES DURING DIFFICULT ECONOMIC TIMES

*Continued from page 11*

**Provide Equal Employment Opportunity Training**

California employers with 50 or more employees and/or independent contractors are required to provide supervisors two hours of interactive sexual harassment training every two years. However, employers with any managerial employees would be wise to provide their employees with training to prevent harassment, discrimination, and retaliation without limiting the scope to sexual harassment. Such training may greatly decrease the likelihood of illegal employment practices, increase employee morale and productivity, and reduce an employer's exposure to liability in employment related lawsuits.

**Treat Employees With Respect**

Employees who are treated with respect and are allowed to leave the workplace with dignity are less motivated to sue their employers. Discharged employees should be allowed to gather their things and say good-bye to co-workers unless there is a reason to suspect that an employee will react violently or try to take confidential information. To the extent an employer can help provide an employee with the means to gain alternative employment, such as by way of training, job search counseling, or referrals to other positions, this can significantly decrease the hurt feelings and fear associated with a lay-off.

*__Polina Friedland Bernstein__ is the founding attorney of Bernstein Law, P.C. She represents clients in employment-related litigation and provides advice, counseling and training to employers. She can be reached at (818) 817-7570 or polina@laemploymentcounsel.com.*

# Scraping Off a Second Mortgage Still Possible, Even Under Current Bankruptcy Law

*By Michael H. Raichelson*

One of the key provisions in President Barack Obama's foreclosure prevention plan would have allowed bankruptcy judges to modify home mortgages secured by a first trust deed. However, strong forces lined up against this provision, most notably the American Bankers Association. As a result, distressed homeowners were left holding the bag.

But all is not lost for homeowners in distress. Under certain circumstances, homeowners can still "strip off" their second mortgage. So, as part of their Chapter 13 plans, these homeowners in bankruptcy are able to treat their second mortgages identical to any other unsecured debt. As a result, the second mortgage is paid off at a rate of pennies on the dollar. And after these homeowners complete their Chapter 13 plans, the second trust deeds are "stripped off" of their homes.

**Overview**

Chapter 13 is not for everyone. It is a three-to-five year commitment. Chapter 13 requires debtors to pay their unsecured creditors, including credit card companies, medical bills, damages claims, etc., anywhere from zero cents on the dollar to 100 cents on the dollar.

But if the Chapter 13 plan is well prepared by counsel, with a corresponding motion to "strip off" a second mortgage, the debtor will be in a much better financial position once the plan is completed. This may be an option for attorneys whose clients are saddled with combined mortgage payments that are unbearable for them.

A secured claim, for example, a second mortgage, is secured only to the extent of the value of the underlying home. And unallowed secured claims are void under the United States Code. 11 U.S.C. §506(d) states that,

"To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."

The prevailing case law in the 9th Circuit holds that Chapter 13 debtors are entitled to "strip off" totally unsecured junior mortgages on their principal residence. This is so where the claims of the junior lien holders (i.e., the second mortgage) are unsecured; this assumes that, as for many homeowners in the current economic climate, the value of the principal residence is less than the balance owed on the first mortgage.

**The Mechanics of the "Strip Off"**

How does it really work for clients?

• First, counsel should do a quick on-line verification of the value of the client's home. One Internet resource is a web site such as Zillow.com. While no one can endorse the accuracy of any particular web site or the information displayed on it, it remains a good suggested starting point.

• Second, counsel should consult with their clients regarding the current condition of the home. Attorneys should ask the following practical questions:

1. Is there any deferred maintenance on the house?

• Is there any structural damage on the house?

• When did you buy the house?

• How much did you pay for the house?

• Was your house appraised recently?

• If it was appraised recently, what is the stated value?

• What, if any, upgrades have been done on the house?

NOTE: If counsel's initial research suggests that the property has special issues (those not typically picked up by the casual observer), and/or the second mortgage is wholly unsecured, the client should obtain an appraisal by licensed California appraiser. And counsel should secure documentary proof – in the form of recent mortgage statements – verifying the outstanding principals of the first and second mortgages.

**Executing the "Strip Off"**

Once the debtor's ducks are lined up, counsel should draft a Chapter 13 plan using the typical format required by the Central District of California. Attorneys should pay special attention to the following areas of the documentation:

• In the Class 2 portion of the plan, attorneys should indicate that post-confirmation monthly mortgage payments for the first mortgage will be made by the client directly to the mortgage company.

• In the Class 5 portion of the plan, counsel should lump the second mortgage together with all of the other non-priority, unsecured claims, such as the credit card debt.

• Finally, lawyers should indicate in Section V ("Other Provisions"), Subsection F ("Miscellaneous Provisions") of the plan, that the debtor intends to "strip off" the second trust deed.

Once counsel files the Petition with the corresponding Chapter 13 plan, the debtor files a motion requesting that the court enter an order valuing the house pursuant to, among other laws, Bankruptcy Rule 3012. This is often referred to as a "*Lam* motion." (Note that procedures vary from court to court. For instance, the Northern Division of the Bankruptcy Court for the Central District requires that an adversary complaint be filed against the second mortgage holder with a corresponding motion to suspend payments to the second mortgage holder.)

The *Lam* motion should be supported by a declaration of an appraiser verifying the authenticity of the appraisal and the value of the property. Counsel should attach the physical appraisal to the appraiser's declaration as an exhibit. The *Lam* motion should also be supported by the clients' declarations, providing their opinions of the value of the property. The clients' declarations should also include accurate evidence regarding the current principal balances of the first and second mortgages (ideally, the recent mortgage statements).

Although procedures vary from court to court within the Central District, counsel should file and serve the *Lam* motion at least 21 days before the hearing date. And counsel should be careful to follow each particular court's self-calendaring procedures.

Attorneys must take care that the notice specifically state that, pursuant to local bankruptcy rules, any response and request for hearing must be filed with the court and

served on the moving party and the United States trustee within 15 days after the date of service of the *Lam* motion. If no response or opposition is filed, assuming that everything is in order, the court will typically grant the motion without a hearing.

While this is not the result that most distressed homeowners were hoping for from the President's foreclosure prevention plan, it certainly will be welcome relief from the burdensome second mortgage payments.

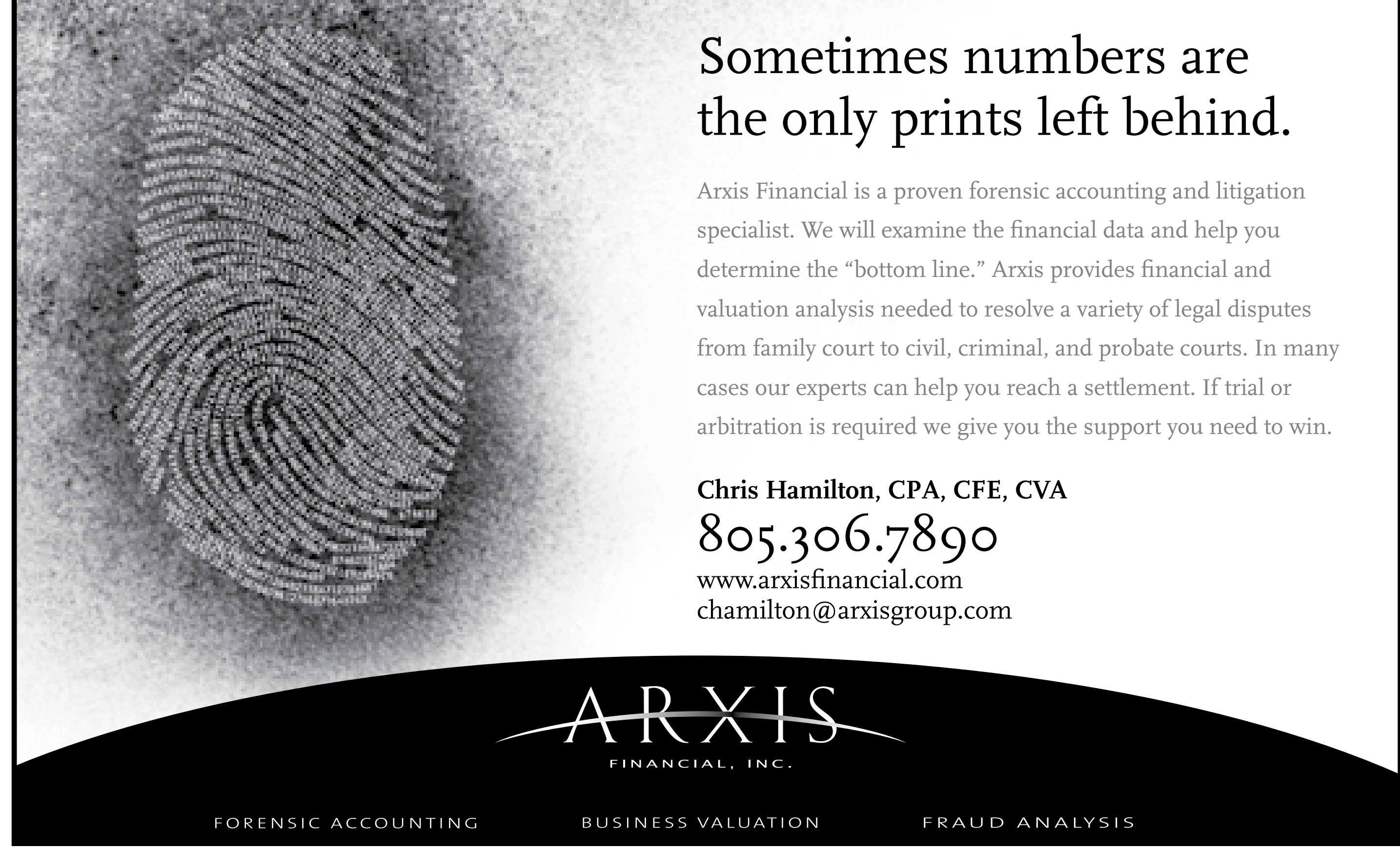
***Michael H. Raichelson** is a member of the Ventura County Bar Association, the National Association of Consumer Bankruptcy Attorneys, the American Bankruptcy Institute, the California Bankruptcy Forum, and the Los Angeles County Bankruptcy Forum. Mr. Raichelson can be reached at 1-800-BANKRUPT from the (818) and (805) area codes, or at 818-444-7770.*

*CITATIONS editorial board member **Michael Sment** comments:*

Practitioners and borrowers should remember that the Bankruptcy Code does not allow modifying loans secured by a principal residence in Chapter 13, or most secured liens in Chapter 7. This huge political issue has been plaguing Congress since late 2007: Should the power to modify home loans be given to U.S. Bankruptcy Judges? For the most part, Congress (primarily the Senate) has answered with a fairly resounding "No."

The normal bankruptcy "strip-down" procedure, 11 U.S.C. §506d, is also not available for a lien in Chapter 7 or Chapter 13. *Dewsnup v. Timm* (1992) 502 U.S. 410, 417. However, the *Lam* procedure, based on *Lam v. Investors Thrift (In re Lam)* (9th BAP 1997) 211 B.R. 36, is allowed by some Bankruptcy Courts, particularly in the Ninth Circuit. One court has even allowed the motion to be brought after confirmation. *In re Manriki* (Bk SD Cal 2008), 08-09707-JM13, but only after notice, notice and more notice.

This type of "lien stripping" is actually a "back door" to the secured lien by challenging the value of the collateral of the allowed secured claim. ***This is a very complicated procedure, not available to all debtors or for all home loans, and is coming under increasing scrutiny by many courts and professionals for overuse and abuse. Consultation with experienced bankruptcy counsel is not only recommended but essential.***



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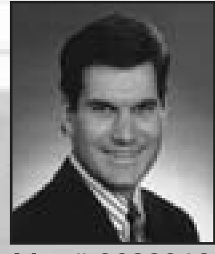

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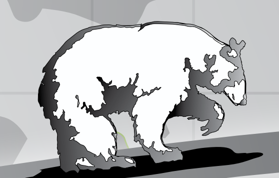

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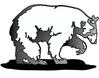

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# WATCH THAT TONE OF VOICE, YOUNG MAN!
## Gender Differences in the Use of Language

*By Michael McQueen*

At an early age we learn how to communicate subliminally using subtle shifts in tone. We learn to use that respectful tone of voice with those in authority: parents, principals and eventually judges. We fit the tone to the circumstances: the sarcastic retort; the ironic insult; the haughtiness of conveyed superiority; wheedling; contriteness. Even when words are the same and seem innocuous, the tone delivers the true intent of the message. The right "pick up" line, the right timing and rhythm, delivered with exactly the right inflection can work wonders. (Then again, so can alcohol.)
As a young lawyer I was quite surprised to read my first hearing transcript, knowing that opposing counsel had been viciously attacking my client. The transcript painted a picture of innocent repartee, the nasty insinuating tone not even hinted at in the transcript.

Having a grasp of the obvious in my youth, I could not help but notice innate differences between the sexes. Boys played in rough-and-tumble packs, alternatively kicking each others' butts and subconsciously learning how to fit into the hierarchy of the pack. Girls, on the other hand, engaged in mysterious games of wit, constantly reshuffling relationships that were indecipherable to the boys.

Since women are primarily responsible for the early socialization of children, one might conclude that boys and girls, most raised principally by women, would use language in the same way. They don't. Notwithstanding the indignant howls of the liberal "nurture" crowd, boys and girls are inherently different. Ignoring those differences results in an insidious gender blindness that can be just as damaging as gender bias. Remember, differences do not mean discrimination. Forcing identical expectations onto the sexes without acknowledging different proclivities is self-defeating. But it remains a hanging offense in the halls of academia.

No wonder law schools have avoided this subject like the plague and left us to figure it out by our own devices. When I started practice 30 years ago, there was a militant feminist emphasis on gender equality and political correctness. Perhaps this attitude was necessary to breach the male barricades to the legal profession. Faced with the feminist thought police, it is no wonder that the bar did not attempt until recently to introduce its members to simple truths about gender differences, particularly in the use of language.

As more women attended law school and started practicing law, a new dynamic was introduced to a largely male-dominated dominion. Men innately use language to establish hierarchy of relationship by assertive and adversarial statements. This wielding of language as a weapon becomes even more pronounced in the law, which uses words as weapons (understandable since the precursors to attorneys were medieval champions who resolved disputes with trial by combat).

Early in my career, I observed with increasing chagrin that adversarial language that proved successful in male negotiations were not particularly successful with women. Why were male verbal tactics counterproductive when used in female debate? Since I was being paid to close deals and avoid costly trials, why was my success rate with women lawyers so utterly dismal? Tactics that had proved successful with male attorneys more often than not resulted in a stubborn intransigence on the part of my female opponent. Initially I just blamed women. Like most lawyers I was confident in my skills of communication; perhaps that confidence was misplaced. Puzzled and frustrated, I concluded that my use of the language, tone or approach was somehow flawed. Language useful in the wolf pack was proving less than effective when dealing with women.

What was I doing wrong? Women who were bright, accomplished and articulate were not in the least responsive to my adversarial approach. It was too easy to just blame women, so I started asking around. Other friends in the profession acknowledged similar experiences. An associate recommended a book by Robert Bly entitled *Iron John*. Robert Bly is somewhat ridiculed as the founder of the nascent men's movement – you know, men drumming in the desert and pounding their chests. The book articulated the hierarchical nature of men's relationships: Boys learn early to form teams, though some call them gangs. Each boy plays a part and subordinates his personal ambition for the success of that particular group. This is mostly worked out in the neighborhood – who plays quarterback, who blocks, who gets to play end? Sometimes it is worked out with violence; there is some pushing, some shoving. A boy soon learns that certain "fighting" words will get him punched.

The next book I stumbled upon was *That is Not What I Meant* by Deborah Tannen. A professor of Rhetoric, Dr. Tannen observed that women use language quite differently than men. They certainly use more. It has been estimated that women use approximately 10,000 words per day compared to men's 3,000 words per day. Dr. Tannen observed that women are generally not comfortable using adversarial language. They approach issues and use language in a consensual and non-threatening fashion. They really do not want to dominate. They want to reach consensual positive solutions. They innately prefer that approach. They do not particularly like direct confrontation. Not that women aren't quite capable of unleashing a torrent of invective; the tipping point, once reached, is quite difficult to put right again.

Admittedly, I am not one who celebrates the feminization of American institutions. I am a male who is sympathetic to the "stiff upper lip" approach to life. I do not see a lot to be gained by being in touch with my inner feelings; to me, it is a weakness. But to be a more effective advocate and a more effective negotiator on behalf of my clients, taking the time to learn the subtle nuances in language between the genders has worked wonders.

I have also learned that when my wife comes to me to discuss a problem, my typical male reaction would be to attempt to solve it for her. If a man comes to me for counsel, I am elevated to a relationship of an advisor. It is a form of responsibility and raises my relative position in the pack. That is not what is going on when a woman asks for advice. For the most part, particularly with a spouse, she does not want you to solve the problem. She wants you to hear about the problem, to be sympathetic with the problem, to be a sounding board, but thank you very much, she will go solve the problem herself. By restraining myself and keeping the male inclinations in check, I have found that my relationships with women, particularly

my wife, have been greatly improved. Unless a woman specifically and expressly asks for a solution, it is best to avoid the paternalistic attitude and be as helpful but nonintrusive as possible.

This gender gap in the use of language is not just a problem for men. Women attorneys also fail to understand the impact of how they use language. As an advocate, I strive to use a slower-paced, lower octave tone of voice to convey my arguments in the courtroom, hoping that it creates a sense of gravitas that gives my arguments more authority (though some, perhaps, suspect that I actually have a whiskey baritone). But when the argument gets heated I start to talk faster and my tone becomes elevated, much to my frustration. This tendency is even more pronounced in women. When discourse devolves to disputation, the voices become shrill. I have observed, and judges have complained, that such arguments start to sound more like whining, and they irritate rather than compel. Instead of a reasoned legal discourse, the proceeding starts to resemble a domestic squabble. People who follow these things have reported that in the last generation women's voices have actually dropped an octave. I believe this is in response to women's increasing participation in authoritarian roles in society.

Using the simple techniques of applied language in a cooperative, consensual and inclusive manner has proven extremely successful in my negotiations with women attorneys, both on complex corporate disputes, complex transactions and even criminal prosecutions. I am sure that some would probably make the observation that kinder, more polite language would better serve the whole profession. The problem is that it does not work particularly well with men who are innately competitive, combative and aggressive. Thank God for that!

***Michael McQueen*** *handles business transactions and litigation, environmental and natural resource matters, and estate planning, among other areas of law, from his Camarillo offices. He is a member of CITATIONS' editorial board.*

# FAMILY LAW DISPATCH: EXTORTION-FREE ATTORNEY LIEN IN FAMILY LAW CASES

*By Gregory W. Herring, with assistance from Bret G. Anderson*

Although many have the impression that the rule was handed down from above on a stone tablet, the fact is that it was only 35 years ago that the Court of Appeal held that an attorney cannot keep client files where the subject matter of her purported lien on them is of no economic value to her. See, *Academy of California Optometrists, Inc. v. Superior Court (Damir)* (1975) 51 Cal.App.3d 999. Extortion is thus off the table as a means of gaining disputed fees from a client.

When properly accomplished, however, attorney liens can still be a legitimate ways of ensuring payment. California law recognizes at least two types of liens for all lawyers – charging liens and general retaining liens. A third, Family Law Attorney Real Property Liens, is reserved for lawyers in family law cases.

**Charging liens** can be created by contract to satisfy a lawyer's expenses and fees out of the anticipated judgment to be recovered. *Academy of California Optometrists*, *supra,* 51 Cal.App.3d at 1003. They can secure either an hourly or a contingency fee, but they cannot be created without a contract. *Fletcher v. Davis* (2004) 33 Cal.4th 61, 62.

That decision fleshed out the ethical requirements for charging liens. It held that although public policy favors such liens, because they are potentially adverse to the client within the meaning of Rules of Professional Conduct, Rule 3-300, the attorney must:

- explain the transaction fully;
- offer fair and reasonable terms;
- provide a copy of the agreement;
- give the client an opportunity to seek independent legal advice, and
- secure the client's written consent.

33 Cal.4th at 71.

A charging lien may be created in the fee agreement or in a stand-alone agreement by including language such as:

> "Attorney's Lien: A lien acts as security for payment due to Attorney by Client. This lien could delay payments to Client until any disputes over the amount to be paid to Attorney are resolved. Client hereby grants Attorney a lien for any sums due and owing to Attorney for fees and costs at the conclusion of Attorney's services.
>
> The lien will attach to [any and all real or personal property of Client's, including] any recovery Client may obtain by judgment in this matter. Client may seek the advice of an independent lawyer of the client's choice about this lien and this matter. By initialing this provision and signing this agreement Client acknowledges that he has been so advised and given a reasonable opportunity to seek that advice.
>
> Explained, Read and Approved:
> ________________ [client's initials]."

A 2007 decision clarified that, "[a]fter the client obtains a judgment, the attorney must bring a separate, independent action against the client to establish the existence of the lien, to determine the amount of the lien, and to enforce it. [Citations.]" As such, "[a]n order within the underlying action purporting to affect an attorney's lien is void." *Cal-Western Reconveyance Corp. v. Reed et al.* (2007) 152 Cal.App.4th 1308, 1321.

**General Retaining Liens**, which apply to papers and personal property of the client coming into an attorney's possession, are rare because of their limited usefulness. Although there is no specific authorization for retaining liens, the Court of Appeal has recognized them, subject to the limitation that the property retained has some monetary value to the attorney, and that the lien's value is not solely extortion. *Academy of California Optometrists*, *supra*, 51 Cal.App.3d at 1003. Although *Fletcher v. Davis* did not specifically address retaining liens, its restrictions would certainly seem to equally apply to them.

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Especially in an "up" market (which this one finally appears to be), **Family Law Attorney Real Property Liens ("FLARPLs")** provide an important means for payment in ". . . a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties." *Fam. Code* §2033. Although these liens were previously created under common law, Family Code sections 2033 and 2034 now set forth the modern guidelines.

A great thing about FLARPLs is that they provide an anti-bankruptcy shield.

Section 522 of the Bankruptcy Code allows a debtor to avoid certain liens on exempt property, such as the former marital residence. Of course, the motivations behind the statute are to protect the debtor's exemptions and facilitate his "fresh start." Notwithstanding the fundamental importance of this concept, however, it only applies to "judicial liens." While there are no published cases deciding whether a FLARPL is a statutory lien or a judicial lien, the statutory text of the Family Code and analogous cases signal that a FLARPL is a statutory lien that cannot be avoided.

Especially in this economy, liens may prove useful to any family law attorney towards gaining full payment of hard-earned fees. But, as *Fletcher v. Davis* instructs and Family Code, section 2033 specifies as to FLARPLs, any lien must be carefully perfected.

***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.*

***Bret Anderson** is an associate attorney with Ferguson Case Orr Paterson LLP, who focuses on business, bankruptcy, and civil litigation matters. He wrote the paragraph concerning bankruptcy and FLARPLs, and has successfully litigated issues concerning their interplay in Bankruptcy Court.*


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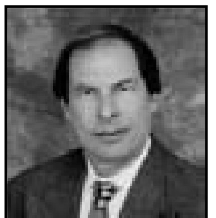
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# DISTRICT NINE

*A film review by Bill Paterson*

The production cost for the year's most exciting science fiction film was a modest $30 million. Yet thanks to a compelling story and an inventive setting, "District 9" is light years ahead of its bloated, high decibel summer competition. Like folks who can put together great looking outfits from thrift store purchases, there are talented directors who can mine the everyday world and transform it into an alternative universe. "Blade Runner" and "The Road Warrior" are the examples which come most readily to mind. "District 9" follows in their footsteps.

A huge space ship hovers over Johannesburg, South Africa. Immobile and stranded, it contains an alien race of beings which resemble a cross between a lobster and a six-foot tall shrimp. Seemingly harmless and called "Prawns" by their unwilling human hosts, they are quarantined in a fenced-off ghetto named "District Nine." At the end of more than 20 years, almost two million of them are crowded into a massive shanty town of the type which ring South African cities to this day. The Prawns' burgeoning numbers are seen as a threat and Multi National United (MNU), the private contractor the government has put in charge of the District, decides to raze it and move the Prawns to a new site. (Hmm, any historical parallels here?)

Wikus Van De Merwe (Sharlto Copley), a mid-level MNU eager beaver, is put in charge of the operation to clear the District. Armed with "consent" forms to be signed by the evacuees and backed by armored personnel carriers and troops should such consent not be forthcoming, Wikus and his military escort rumble into the District. Wikus is under the naive belief that the Prawns will happily accede to the move once he explains the comforts that await them in their new home. They aren't buying it. With his clipboard in hand and vainly pleading for cooperation, he watches his careful plans dissolve into chaos.

Before long Wikus is a fugitive; the Prawns' long-planned project to escape their captors is at risk; we learn of MSU's secret plan to appropriate Prawn weapon technology; a "Mad Max" Nigerian gun running gang makes its move; and South African Special Forces enter the fray. "District 9" not only has enough action to slake the desires of the most diehard fan but it also serves up little gems of social commentary – the cat food market in District Nine, the myths we comfort ourselves with to justify our treatment of the dispossessed and the moral blindness which governs the bottom-line corporate mind. There is something for everyone in "District 9"—the summer movie to see.

--------

Related Film: "Moon" came and went quickly. Save it in your Nexflix queue. It's a tight little tale of a man (Sam Rockwell) who has signed up for a lonely three-year hitch on a lunar mining station. His only companion is "GERTY," an attentive robot (voiced by Kevin Spacey). An accident when Sam ventures out in his lunar rover uncovers a nasty secret about his employer's unique personnel policies. "Moon" takes a little while getting under way but it slowly casts a spell.

***Bill Paterson****, a partner at 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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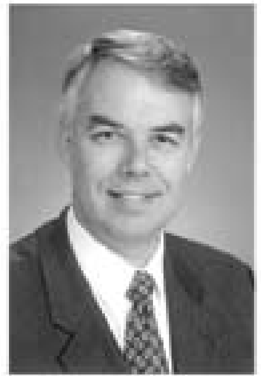

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## WINE TREASURES OF VENTURA COUNTY

*Continued from page 6*

vintner Manfred Krankle. The irony is that few of us will ever taste Mr. Krankle's local creations. *Sine Qua Non* holds cult status among wine connisseurs and demands hundreds of dollars on the open market. If you're lucky enough to get on the label's waiting list you'll share the honor with a who's who of Hollywood and the business world.

Another treasure is farther up Highway 33 in Ojai, where the Dufau family grows cabernet sauvignon and syrah grapes for their Ojai Ridge label. Don Dufau and his son Mark, a U.C. Davis-trained viticulturalist, farm the warm, dry Ojai Valley *terroir* and craft wines reflecting their family's French-Basque heritage. The team tends the grapes by hand. Come harvest, they send the fruit to their Lompoc wine ghetto for processing and two years – yes, two years – of barrel aging. The result is a wine with a complex and beautiful fragrance, wonderful balance and a delicious flavor that is good enough to drink alone or with any good meal, particularly red meats and hearty dishes. Ojai Ridge is found at the The Wine Rack (formerly Weaver Wines) on California Street in Ventura. You can also pick a bottle up at Ventura Wine Co. on Telephone and McGrath (tell Nick I sent you!). A great cabernet from Ventura County – now that's a treasure!

These are just a few wineries of many found in our backyard. A host of them sponsor the "Ventura County Wine Trail," a map and website promoting local vintners. Visit www.venturacountywinetrail.com for locations, dining recommendations, and a calendar of events.

*__Antonio Verdiny__ is a state certified court interpreter who teaches wine classes, conducts tours and writes a column for advice.com.*

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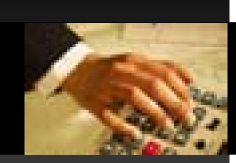

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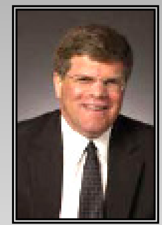

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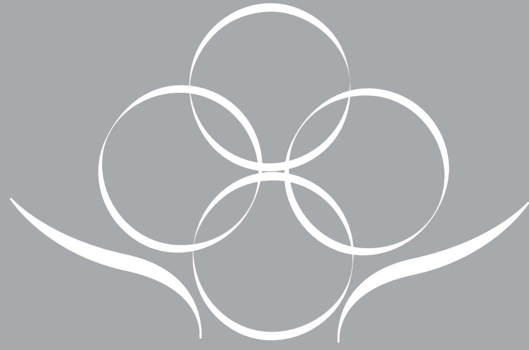

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## *Five to Die: The Book That Helped Convict Manson*

*Continued from page 5*

Susan Atkins soon after her arrest

Charles Manson is still alive and well. In fact, when Ivor "twittered" his publicist in Australia last month, Manson posted his own twitter back to Ivor within thirty minutes. Apparently he is also somewhat wealthy, selling signed pictures through Sandra Good, an original Manson family member who lives in a community close to Corcoran Prison where Manson is housed.

Fortunately for me, the *White Album* does not return me to Charles Manson, Leslie Van Houten or any of the horrible things that happened in the summer of 1969. The first track on the second disk is the *Birthday Song*. In our house, that song is played first thing in the morning on the birthday of each member of *my* family.

*__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__.*

**NOTE:** If you're interested in Ivor's re-publication of *Five to Die: The Book That Helped Convict Manson*, it can be obtained through his website www.mansonbook.com. However, if you order a copy through the Bar Office, Ivor will donate 25 % from each sale to the Volunteer Legal Services Program. Just contact Steve Henderson at steve@vcba.org) and he will make it happen.

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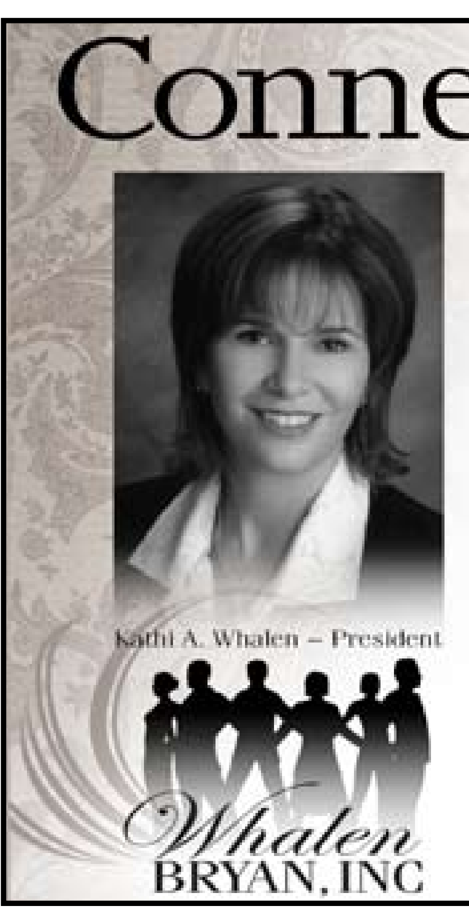


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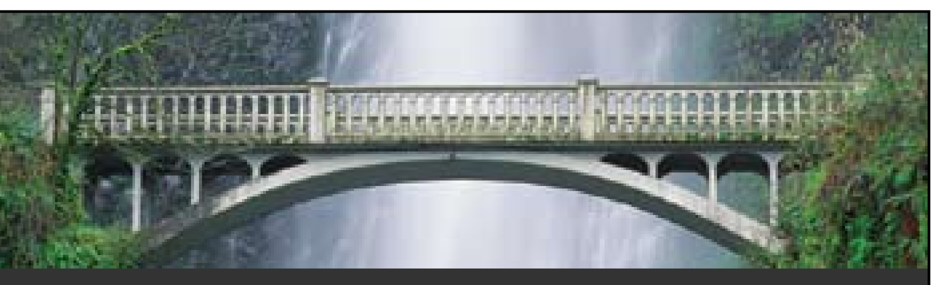

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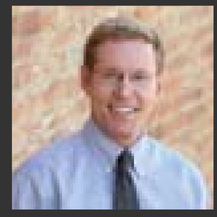

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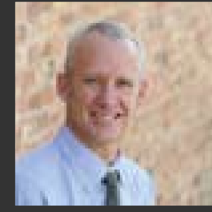

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**Justice Steven Perren** summoning The Godfather in *World Financial Group v. HBW Ins. & Fin. Svcs.* (172 Cal.App.4th 1561 (2009)): "Though couched in noble language, defendant's communications were not 'about' these broad topics, nor were they designed to inform the public of an issue of public interest. They were merely solicitations of a competitor's employees and customers undertaken for the sole purpose of furthering a business interest – As Salvatore Tessio said to Tom Hagen, 'Tell Mike it was only business.'"… **Mark Hiepler** was recently honored with a nomination to the International Academy of Trial Lawyers. Only 600 attorneys throughout the world. OAN (ask your teenager) **Marc Anderson** joined **Hiepler & Hiepler** July 25…

The officers and leadership of the Probate and Estate Planning Section are attempting to determine whether or not they should meet in different jurisdictions rather than the steadfast Wedgewood Banquet Facility. Go to SurveyMonkey.com as it takes 2 minutes to complete, or voice your concern to **Cheri Kurman** at ckurman@norman.com or 654.0911…I received a Confidential Comment Form from the Commission on Judicial Nominees Evaluation (JNE) reviewing the consideration of a local applicant. I noticed the stationery and the 38 names on it. Not one representative from Ventura, Santa Barbara, or San Luis Obispo Counties…Bumper Sticker of the Month: "Palin for President: 2012 to 20141/2"… From Brook Shields, during an interview to become spokesperson for a federal anti-

# Exec's Dot…Dot…Dot…

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

smoking campaign: "Smoking kills. If you are killed, you've lost a very important part of your life."…

Federal Judge Robert M. Takasugi died August 4. He was the first Japanese American appointed to the federal bench. He also was the keynote speaker at the 1st Ventura County Asian American Bar Association Installation/Scholarship Banquet in 2006…A recent online survey of California voters conducted by the U.S. Chamber (oy) Institute for Legal Reform (ILR) showed strong support for lawsuit reform (no kidding and there's a surprise). Thousand of people from across the state participated. Here are the results of the question, "How big of a problem do you think lawsuit abuse is in California?" – A Major Problem, 89.6%. Somewhat of a problem, 5.8%. Not a problem at all, 4.6%...Quote of the Month: "It's often a pretty impressive set of magic tricks." From Richard Briffault, Columbia University law professor, on sleight of hand used by states to balance budgets…Looking for a teaching position? The Department of Business Law of California State University, Northridge is accepting applications for a full-time tenure track position. www.csun.edu/blaw... Portland Zoo? **Anthony Cho** at acho@grancell-law.com...

**David LeRoy** checks in from his new digs in Chiang Mai, Thailand. He's keeping a local cell number if you want to run him down at 818.453.0894 or davidrleroylaw@aol.com...Mina Brees, the mother of New Orleans Saints' quarterback Drew Brees, was an attorney from Austin, Texas who died in a mountainous area 50 miles northwest of Denver. The coroner said the cause of death remains under investigation. Mina's other son, Marty, is a lawyer too. She was president of the Austin Bar Association and is being investigated for allegedly trying to dupe several area restaurants into paying her for the rights to their own names…Effective July 1, **Maureen Houska** is the newest attorney to join **Benton Orr**, et al.…

File under *You Need to Know*: All California attorneys must provide an e-mail address to the State Bar beginning February 1, 2010, under a new rule of court approved by the Supreme Court. Inactive lawyers over 70 are exempt. Under Rule 9.7, all members of the State Bar must create an online profile through the bar's secure membership system. www.calbar.org...Website of the Month: www.newseum.org – Just place your mouse on a city anywhere in the world and the newspaper headlines of this day in that city pops up. Double click the page and it gets larger…**Mary Ann Tavel** passed away July 23 in Ventura. She was **Ed Buckle's** assistant for 25 years and was presented the prestigious Legal Secretary of the Year Award. She was a good pal of the bar association too volunteering numerous times to do whatever was asked of her…

From **Bruce Crary**: The owner of a property management company sued a tenant in Chicago for defamation because she sent a tweet saying her apartment was "moldy." Apparently it is the first time someone has gotten sued for a defamatory tweet. The owner of a property management's response when asked why they are suing a tenant for an alleged defamatory tweet: "We're a sue first, ask questions later kind of organization." (See paragraph 3, third sentence)…**Michael Wolfram** has been elected a Fellow of the College of Labor and Employment Lawyers. Election as a Fellow is the highest recognition by one's colleagues…

An Ohio judge said he likely will not jail a man whose firearm possession violation cost a man a testicle. Thomas Hatfield, 30, pleaded guilty July 22 in Cincinnati to being a felon with a firearm after he accidently shot off one of his own testicles May 4 with a .38-caliber. "Because you injured yourself, that's kind of a bad enough right there, so I'll consider probation," Hamilton County Common Pleas Judge Robert Ruehlman. "Obviously," the judge told Hatfield, "you don't know a whole lot about firearms. You need to read the directions."…

***Steve Henderson** has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. Henderson will be experiencing his 40th birthday on the 15th and contributions of Red Stripe, Corona Light, and Fosters greatly anticipated. Better yet? Donate $40 to the vcba/vlsp, inc. and get a tax-deductible charitable contribution.*

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