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 To promote legal excellence, high ethical standards and professional conduct in the practice of law; to improve access to legal services for all people in Ventura County; and to work to improve the administration of justice.

# CITATIONS

A P R I L - T W O T H O U S A N D T E N

## THE DONTQUITMAN OF SAN BUENAVENTURA

An Interview with Mark Kirwin

By Kate Brolan

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Dear Jack:

It was good to have a chance to talk with you today. I write to emphasize my appreciation for your good work on the cases on which you consulted with us.

I have found that your professionalism in conducting and scoring polygraph examinations is outstanding. Your reputation for integrity as a polygrapher was known while you were with the FBI and has continued into your years of private practice. Both your professional work product and your excellent reputation are particularly important to me as a criminal defense lawyer.

We do not routinely use polygraph exams but, when we do, we expect an honest confidential examination and report. Whether or not we choose to disclose the report, the examination and report are often very important to the client and often influence choices we make in strategizing with that client.

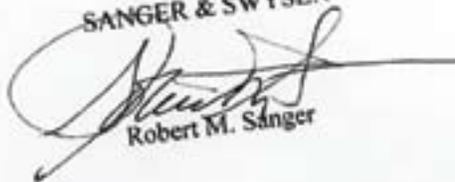
When we do decide to disclose the report in an attempt to convince a reluctant prosecutor of a client's innocence, a favorable polygraph report alone is not sufficient. The professionalism of the examination and the reputation of the polygrapher are critical.

In the recent case you worked on with us, we submitted your report along with witness interviews and other materials to the prosecutor. As you know, it was dismissed in its entirety on the day of trial. It was a felony case being vigorously prosecuted and the consequences of any conviction would have been devastating to my client's life and career. Being able to disclose your solid report backed by your substantial credentials was an important aspect of asserting our client's innocence.

Thank you again, Jack, and I will look forward to working with you in the future.

Best regards,

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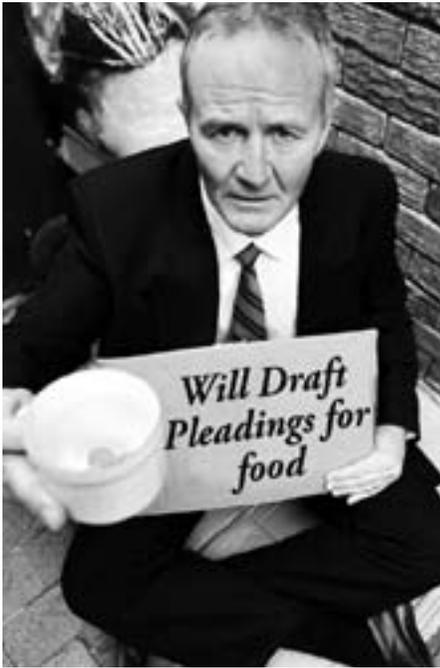
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That was the upshot of a particularly memorable conversation I had with my eldest daughter when she was about 6 or 7 years old. The conversation has come to my mind several times recently, thanks to our poor – although allegedly improving – economy. The conversation Julia and I had went something like this.

I was scheduled to sit as the judge pro-tem in probate a day or two later, and had to stop by the courthouse to drop off my tentative rulings, which were to be prepared and posted prior to my assignment date. Julia was in the car with me and we had just come from my office, my “real job.” This was one in a series of stops and errands, typical for a working mother of young children.

When she asked why we were stopping by the courthouse, I explained to her that it was something I had to take care of for work. “But I thought you worked at your office?” she asked.

“Well, I do, but I also sometimes work here, when the judge asks me to.”

“So, this is your office?”

“No, my office is where we just were, where Nita works.” Nita was our long-time secretary. “I just work here sometimes, when I need to be a judge for a day.”

“Did Grandma work here, too?” Now she’s getting seriously confused. My mom had

## PRESIDENT’S MESSAGE

*By Kendall VanConas*

retired a few years before this, and Julia knew that we had been in practice together.

“No, Grandma never worked here. She worked at my office, which used to be just her office. But when I grew up and went to law school, I decided to work with her at the office. Maybe one day when you grow up, if you decide to go to law school too, you can come to work at the office with me.”

After several moments of processing, Julia replied with a heavy sigh, “Yeah. Or I could just work at the mall.”

The trickle-down effect of the poor economy has touched all of us in some way, and it doesn’t come as news to any of us – practicing lawyers or those who support the practice of law – that we are in the same leaky boat as the rest of the world. Aside from the traditional results, such as layoffs, part-time work, reductions in benefits and the like, the economy has affected the legal field in ways that you don’t often hear about, but that cause one to consider the future of our profession.

The state of New Jersey came up with a novel way of increasing revenue without increasing their payroll. A hiring freeze prevented the New Jersey Attorney General’s office from hiring a replacement when one of their lawyers left. Seeing attorney positions in her office down about 25 percent, and knowing that lots of lawyers were looking for work, the New Jersey Attorney General created a volunteer program. While many of us have found ourselves unintentionally working for free lately, the New Jersey AG’s office has three full-time attorneys who volunteer their time for the debt recovery unit.

The volunteer attorney must commit at least 20 hours a week for three months, but most have stayed on for more beyond that commitment. The typical volunteer lawyer is a recent law school graduate who has not yet landed their first job, thanks to a shrinking pool of available positions. But the experience has paid off for both employer and employee. The volunteers are earning some valuable legal experience doing research, taking depositions, and occasionally sitting as second-chair in court, while the state of

New Jersey has increased revenue not only by increasing the collections thanks to the extra help, but also by saving loads of money on salary and benefits.

In keeping with past down economies, certain sectors of crime have recently increased, and some California attorneys have sadly been the perpetrators. The California State Bar reports an increasing number of lawyers who will be disciplined this year for wrongdoing associated in some way with the recession. Clients who in the past might have been timely and diligent in paying their legal fees have turned into slow- or no- payers, making their lawyers more desperate themselves.

It is no surprise to learn that there has been an uptick in the traditional culprits that land attorneys before the State Bar Court, such as mishandling of client trust funds. In 2008, the State Bar’s Office of Chief Trial Counsel filed in State Bar Court 369 notices containing more than 650 different disciplinary charges – from the prior year, this represents a 15 percent increase in the number of notices filed, and 21 percent increase in the total number of charges contained in those notices. As of this writing, 2009 figures were not yet available.

But the recession itself spawned its own cottage industry – loan re-modifications. And sadly, there are dishonest attorneys always at the ready to assist. Under investigation are more than 1,200 loan modification cases where consumers have complained that their attorney promised to help and did nothing. In February, a Southern California lawyer gained the distinction of becoming the first California lawyer arrested due to alleged illicit loan modification activities. Christopher Lee Diener was charged with more than 100 felonies, including grand theft by false pretenses, conspiracy to commit grand theft, and perjury. If convicted, he faces up to 70 years in prison. But it’s not just licensed attorneys who find themselves out of work and out of options. In 2008, Harvard Law School launched a tuition waiver program for third-year students who

*Continued on page 4*

## PRESIDENT'S MESSAGE

*Continued from page 3*

agreed to commit their practice to public interest law for five years after graduation. For the first two years that the program was in operation, the university forgave partial tuition for participating students, and waived the full \$40,000 tuition during the final two years. Late last year, Harvard announced that the program was suspended indefinitely to incoming students.

Harvard suffered an almost unfathomable loss in its endowment fund, down to \$11 billion in 2009 from a high of \$36.9 billion. The \$25 billion loss coincided with a larger-than-expected turnout in students looking for public interest jobs, many of whom were no doubt interested in the field because the big law firms have cut back on hiring students, or postponed their start dates.

Self-described legal tabloids *AboveTheLaw.com* and *LawShucks.com* have teamed up to keep track of the layoffs since January of last year. According to those sites, since Jan. 1, 2008, more than 14,000 people, lawyers and staff, have been laid off by major law firms. The biggest hits came during the first quarter of last year, when about half of the total layoffs occurred. About 250 were laid off in the first two months of this year.

So what does all this mean? For one thing, Julia's well-thought out plan for her future employment might not come to pass. She is now 14-years-old, and our average month sees us make multiple trips to the mall. Each time we walk through we see more and more empty storefronts. It sounded so simple, didn't it? "I could just work at the mall." I sadly suspect that the retail jobs in the local mall are now being sought after by some of the approximately 15,000 lawyers and staff who have lost their jobs in the last couple of years. Maybe she'll have to go to law school after all.

*Kendall VanConas is a partner at Arnold, Bleuel, LaRochelle, et al., practicing probate and estate planning law.*

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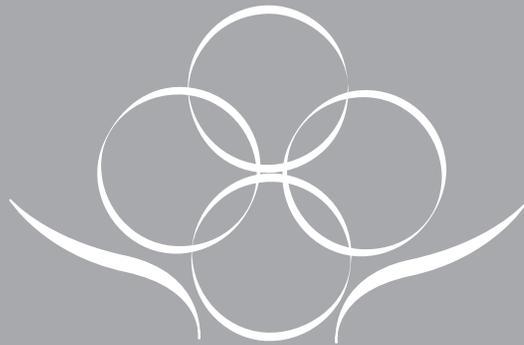
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# THE DONTQUITMAN OF SAN BUENAVENTURA: AN INTERVIEW WITH MARK KIRWIN

By Kate Brolan



Just days after **Mark Kirwin** was interviewed for this article, an earthquake devastated the small impoverished nation of Haiti. Within hours of getting this news, Mark and Angela Kirwin began making contacts and gearing up Kirwin International Relief Foundation (KIRF) to join the relief work in Haiti.

On Feb. 7, Kirwin and two volunteers arrived in Port-au-Prince, Haiti.

“We are in the middle of a huge city. About 1.2 million people are displaced and over 200,000 are dead. No one is sure how many,” Kirwin said. “There are tent camps everywhere. Driving into Port-au-Prince was like trying to drive a van through the Ventura County Fair – or like driving in Gaya, India but without the cows.”

A KIRF volunteer with Mark had a former business partner located in Port-au-Prince. He took them to the encampments of homeless earthquake survivors desperate for food and water. “There are several distribution centers inside Port-au-Prince, but the aid is not reaching many areas where people have fled the disaster zone and have no transportation,” Kirwin said. “The inadequate distribution is similar to what I witnessed had after Hurricane Katrina in Mississippi and Louisiana. The lack of road access and lack of transportation has made sourcing food and water exceedingly difficult. There is also a shortage of petrol, further inhibiting distribution. However, the Haitians are working hard dealing with a horrible situation.”

Kirwin says he has not observed any aggression. He has heard and witnessed countless small acts of kindness, neighbors helping neighbors, strangers helping strangers.

Kirwin is a partner of Haffner, Haffner and Kirwin, and a principal of 11th Hour Mediation. In practice for over 19 years, Kirwin is a certified mediator, litigator and arbitrator. Mark is married to Angela Kirwin, the father of two, an avid surfer, martial arts black belt and one of the most life-engaged persons I have ever had the pleasure of meeting. Mark and Angela Kirwin are the Founders and Co-directors of KIRF, a project that brings aid directly to disaster survivors.

Kirwin was born and raised in the Bermuda Islands. He immigrated to the U.S and became a citizen while he was attending California Western School of Law. Becoming a U.S. citizen was an extraordinary event for Kirwin, magnifying the significance of his law studies. One of five children, his instinctive commitment to helping others is a natural extension of his upbringing.

“Helping our neighbors was a part of family life, to pitch in and lend a hand,” Kirwin said. “My parents often took in international students or provided help to poorer families living in our neighborhood. It was just a matter of doing your part.”

As far as Mark’s international work, surely the apple doesn’t fall far from the tree. Soon

after Idi Amin, “the Butcher of Uganda,” was deposed and exiled in the 1980s, Mark’s mother set out for Africa. Mrs. Kirwin assisted in helping women and children of Uganda piece their broken lives back together following years of horrific violence and atrocities. Back in the States, the entire Kirwin family became involved by sending care packages, not to mention supporting their mother’s absence. Kirwin’s father has also influenced his work. “My father was an orphan but he managed with even minimal support to change his life and raise his own family,” Kirwin said. “Both of my parents were examples of what one person could do to affect lives.”

Kirwin’s inspiration for KIRF was his upbringing, but the organization’s inception was actually prompted by the Kirwins’ own serendipitous survival of a natural disaster. In December of 2004, Mark, Angela, and their two children were vacationing in Thailand. Having spent a few nights at a popular tourist resort, the Kirwins decided to move to a quieter island. Twenty-four hours later the large resort the Kirwins had left was pulverized by a gigantic wall of water, the infamous Thailand tsunami. In a second fateful incident, the Kirwins had made reservations to take a boat tour departing the next morning. The family accidentally slept in and missed the departure. Hours later, the same boat was swallowed into the upheaval, leaving no survivors.

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To this day Kirwin shakes his head in disbelief, “Things could have turned out very differently, not just once but twice. You don’t come through something like that without taking something away.”

Not the kind of people to sit back, the Kirwins immediately began helping survivors. They assisted foreign tourists to contact their families, made alternative arrangements for them to travel home, and found clothing to give to those who had lost all of their personal effects.

“Our children saw a lot of things young ones in our culture don’t see, but they have learned a lot about life, we have become closer as a family because of this experience. We all pitched in as we could.” Mark reiterates, “It was just what you did under the circumstances.”

For five years KIRF has provided on-the-ground response and support to survivors of natural disasters, man-made disasters, political upheavals, and the results of life’s inequities. Kirwin and other volunteers finance their own travel expenses; all donations to KIRF are used for supplies or transportation. KIRF has been extremely successful in getting medical supplies, living supplies, food and water into devastated areas where other organizations have not. KIRF projects have also rebuilt schools, assisted orphanages in remote areas, provided educational materials, and given university scholarships to children orphaned by disaster. I asked Kirwin how

KIRF manages to move through the obstacles and intricacies of the culture, and politics of foreign landscapes.

“It is surprising what a single person can do, not that it’s easy,” he said. “We work in a way that gains trust. We show up and do what we say we are going to do. Being an attorney from the U.S. has been very helpful. My legal training and experience gives me some amount of credibility and the capability to solve problems quickly. While other relief agencies have been stymied by government bureaucracy, or their own incompetence, KIRF has been able to bring immediate help and ongoing support to people in distressed areas in the U.S. and abroad. “We work closely with the locals and collaborate with organizations who directly work to benefit survivors. Because KIRF has no other agenda our work has gained a lot of respect, securing consistent contacts as well as public support. People drop what they’re doing and leave their jobs for the day to help us, when they know we are only there to help their people.”

In Haiti, KIRF found homeless encampments unknown to the international aid organizations and delivered over 15,000 pounds of food in three days. They purchased food and supplies from local businesses in order to help sustain Haiti’s slim to non-existent economy. KIRF distributed “new and almost new” children’s shoes donated by Oak Grove School in Ojai. In addition, they have supplied water

*Continued on page 20*



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# ESCAPE FROM SELF-INFLICTED EDUCATION: REALITY IN THINKING AND ACTION

By David C. Peterson

As mediators we witness the best and worst negotiators. This article focuses on preventing errors which arise out of miscalculations in judgment stemming from insufficient preparation, unproductive reactions and myopic vision. The primary culprit seems to be one's ego. While it is required for success, too much of it will suffocate or push aside the wisdom, experience, practical thought, calm reflection, clear-mindedness and other necessary brain functions required to take effective action and make optimum decisions for one's client. The untamed mind and ego cause distortions in thinking and remove one's drive to prepare effectively.

There is obvious risk faced by a client when a matter is not settled. Experienced litigators know there is never a sure thing. Those slow to learn this truth will acknowledge that their education in this regard was self-inflicted. Michael Caro, after he became one the best poker players in the world, attributed his belated success to repeated mistakes. It is not necessary to be educated by a succession of miscalculations.

You will find that experienced mediators are able to assist attorneys and parties most effectively during the mediation process when the attorneys understand and apply the suggestions outlined below. These principles and practices have been written and taught extensively by the world's most experienced negotiators, including successful trial lawyers.

## **1. When in mediation or negotiation, listen closely and seek to learn.**

We seem afraid to learn from the other side. The more we understand about the other side, however, the better we are able to grasp the entire picture and see clearly the landscape that must be negotiated. Better decisions are made out of more complete knowledge.

## **2. Accept the reality of what is.**

The inability to see things as clearly as we should is a part of being human. *Heuristics and Biases, The Psychology of Intuitive Judgment* (Cambridge, 2002). No one is immune from interpretations of circumstances and events which are most favorable to them. It is a

powerful, self-protecting mechanism that we are born with. We need to see things in a way that best suits our needs and desires. Argue with reality, however, and you will lose every time. As Kathleen Casey Theisen puts it, "Acceptance is not submission; it is acknowledgment of the facts of a situation, then deciding what you're going to do about it."

## **3. Maintain focus, don't get sidetracked by the immaterial.**

Too many times we are distracted by inconsequential matters or events arising during interactions or exchanges. It may be a rude remark or a fact or issue raised by the other side which is immaterial but nevertheless results in a negative emotional reaction. Our focus can easily be lost when this occurs. We know from war history that significant battles were lost when attention was diverted from the main battle by small skirmishes started intentionally by the opposition.

## **4. Be organized and prepared.**

One of the worst offenses committed during mediation or negotiation is the lack of preparedness or lack of organization. If you do not have all of your ammunition immediately available, your effectiveness is compromised. Facts, evidence, supporting law and crisp statements outlining your client's position, and support for it, need to be retrievable at a moment's notice.

## **5. If things are going south, don't pretend they aren't.**

In the words of Bobby Jones, "We must all learn to play the ball where it lies." Usually an opponent is much more amenable to a settlement better than the client will obtain at trial when terms are offered which reflect the reality of the circumstances. Pretending that what is so obvious is not true or has not occurred robs the client of the ability to gracefully get out of the problematic situation. Pushing back at the other side under these circumstances causes them to want to punish your client out of anger or frustration. Negotiate within the range dictated by the circumstances.

## **6. If your position is growing stronger, don't overplay it.**

Another mistake made is when one's position appears to be growing in strength. There is a tendency to overreach. Feeling emboldened, demands are made which are far outside the zone of reason. A stronger case does not always mean a sure thing. And a sure thing does not mean one will obtain more than what is reasonable to expect under the circumstances. Overreaching causes the other side to shrink away from the negotiation and puts your client at risk of failing to achieve a better *net* result than that obtainable through trial.

## **7. Negotiate within the "reasonable zone".**

This is one of the most common mistakes made. It's not always easy to narrow down a reasonable range. However, it is quite obvious most times what is outrageous to expect or demand. While it may be true that one sets the bar with one's opening number it is also true that attempting to set a bar that is patently ridiculous can ruin one's credibility and severely hamper or ruin the negotiation.

## **8. Approach negotiation with optimism and maintain patience along with perseverance.**

If you go into a mediation believing it will fail or if you lose hope as it progresses, odds of failure increase. Even if it seems a settlement is unreachable don't give up too soon. Be the first to leave and you will never know whether the matter would have settled. Unless you feel it best to depart first for tactical reasons, it's never a good idea to get up and go when the other side is willing to stay. You cannot know what is going through the minds of those opposing you. If they are not leaving it means they are still willing to play ball. Negotiators who settle more cases and mediators with the highest rates of settlement are those who are patient and persevere.

## **9. Propose practical terms of agreement when an understanding has been reached.**

A common error occurs when an attorney proposes settlement language which is unnecessarily harsh or presented in a way that is offensive to the other side. In their

zeal to impress their clients or to get an edge on their opponent, attorneys will propose terms that are unnecessarily harsh, offensive or which significantly alter an understanding in principle. This is usually done without considering the effect on the other side. Agreements in principle break down or the settlement process is hampered or unnecessarily delayed by such tactics or strategies. How do you know if a proposed term is inappropriate, offensive or overreaching? Put yourself in the shoes of the other side and consider how you would react if such terms were presented to you under the same circumstances.

**10. Finish strong: Don't delay preparation of a comprehensive agreement.**

It is unwise to let a matter rest overnight or longer in order to draft a settlement agreement. Too many settlements are ruined by the failure to immediately work to complete a document which contains the material terms and necessary enforcement language. While our fortitude can be tested by the end of a lengthy and difficult negotiation, the fact that it was lengthy and difficult are the most compelling reasons to get it all down in writing before anyone leaves.

The following readings are recommended to assist further in grasping the most effective principles and strategies in negotiation: *How to Argue and Win Every Time* (Gerry Spence), *How to Win any Negotiation* (Robert Mayer), *You Can Negotiate Anything* (Herb Cohen), *Smart Negotiating* (John Patrick Dolan), *Fearless Negotiating* (Michael C. Donaldson), *Mastering Business Negotiation* (R.J. Lewicki & A. Hiam), *Getting to Yes* (R. Fisher & W. Ury), and *How to Negotiate Effectively* (David Oliver).

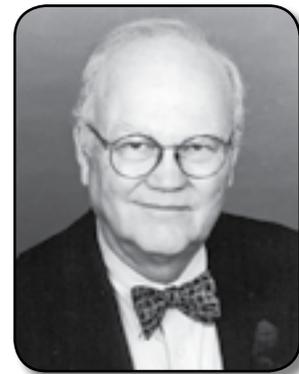
*David C. Peterson is a full-time mediator in litigated cases and frequent MCLE provider, practicing since 1995 along the Central Coast of California. He holds Masters and LL.M. Degrees in Dispute Resolution from Pepperdine University School of Law, Straus Institute for Dispute Resolution.*

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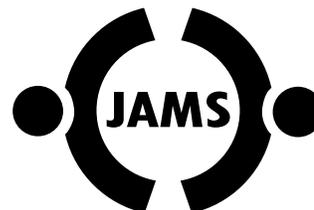
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# TIME FOR A CHANGE?

By Marc Dion

With the new year comes new reflection. I've often wondered what it means to be a great family law attorney. Does it mean "winning" cases? Does it mean being able to recite all the rules off the top of your head? Does it mean getting as much as you can for your client at the expense of the other side, or worse, your reputation? Or is it something bigger?

Recently we have had serious tragedies directly involving family law litigants. Some of those tragedies have even resulted in the death of children. That got me wondering: Did the parent who took the lives of innocent children believe that result was the ultimate "win" for him? Is there something inherent in litigating family law cases at any cost that fuels this mentality?

In addition to the tragic outcomes, there can be a financial impact as well. Some of us have made it through this recession untouched, others did not fare so well. My office was very fortunate. We do not advertise, we work exclusively off of referral, we enjoy great relationships with our clients, and the recession had almost no impact on our cases or our revenue.

I am convinced that screening out "bad" clients who are self-destructive, or only want to use the legal system to inflict some sort of pain or revenge has helped tremendously. Refusing to provide that type of service if someone does slip through our screening process further helped that stability.

The clients I do choose to help must be the right fit for the philosophy in our office. Each one gets to hear my "Orange" story at the very beginning of their case. I am sure most of us practicing family law are very familiar with that story – for those who are, please bear with me...

On a hot summer day two people began fighting over the same orange. They kept fighting and arguing over who would get the single orange. Finally, they decided to cut the orange in half and go their separate ways. As they walked in opposite directions one of them peeled the orange, threw away the peel, and ate the tasty fruit inside. The other person peeled the orange and threw away the peel, because she only wanted the peel

in order to zest a cake that was already made.

The point of telling this story to our clients is to help them begin mentally getting away from their limited "positions" and begin to explore both their own interests and the possible interests of the other side in order to potentially find a solution that will benefit both sides.

Positional based bickering certainly does not take any intellect or tact – we've all been taught how to demand our positions from the day we were born. Just watch two five-year-olds fight over the same toy. It is much simpler, and a lower form of problem solving, that takes much less skill and finesse than working on an interest-based dialogue. Doesn't watching two five-year-olds argue strikingly remind you of the typical family law case?

Positional based bickering is similar to a used car deal. Remember the last time you bought a car. Likely it went something like this – "My boss needs to get \$20,000"...and you may have replied. "Well I'll only give you \$15,000," and so on and so on. Each offer they made you would "lose" something, and each counter offer you made they would "lose" something.

Playing the "used car game" in a legal case is fine when there is no vested interest in maintaining any future relationship. Perhaps it can even be applicable in family law cases with no children where the parties can truly part ways forever.

But what about cases involving young children? What about the need for parents to eventually rebuild some sort of a relationship because they will need to continue interacting for years to come? What about the larger wounds that are cut during a dissolution or custody issue that create larger scars once the attorneys are long out of their client's lives?

During a family law case, we all have a choice to make – do we want to be part of the problem, or do we want to be part of the solution? Hopefully, we are all smart enough to know every client that comes in is telling us less than half of the story (and just the version they want us to hear).

No doubt being part of the problem pays a lot better. I guess being a part of the problem can be a good source of short-term money, but I am convinced it is a long-term loss. I believe family law clients are good people caught in a bad situation. After the dust clears, and they regain their clarity, they will look back and know if they were taken care of or taken advantage of.

Who cares? We are just doing what our clients want and hired us to do, right? We are simply "zealously" representing them, right? I propose it becomes a terrible cycle that's easy to fall into. If our clients later realize we fueled their self-destruction, sent their kids to therapy, and scorched the earth on all sides, then that attorney will soon need to begin advertising. The more clients that come through the door from advertising the less loyalty and smaller relationship they have with their legal professional. Consumers who are taken advantage of when they are vulnerable realize it after the fact and never refer their friends or family. Like a funeral home director who sells a Bose Stereo System with the top of the line casket because "wouldn't you want your loved one to have the best?" – professionals out for the quick buck usually do not fare well during hard times. All we need to do is look around at those businesses in any industry that did not fare well during this recession to know the ones without loyal customers.

Having a bad professional stop damaging people is a good thing. It's good for consumers, it's good for society, and it's good for the profession as a whole. But what about the damage left behind that cannot be undone?

As a police chief I spent years cleaning up the messes of family disputes. I can tell you first hand it is not enjoyable cleaning a teenager's body out of her Dad's closet after she put his .44 magnum pistol to her head and took her own life.

What about the father in Thousand Oaks going through a litigious divorce who recently took the lives of his children? What about one of our respected colleagues recently being physically threatened right in front of his children while dropping them off at school

## NOMINATIONS ENCOURAGED FOR 2009 TRIAL LAWYER OF THE YEAR

by his client's abusive husband, and then the husband's attorney snickering when she was informed of her client's behavior?

We are not only the gatekeepers to the legal system, but often and more importantly, we are the tone setters in how a family's tragedy is handled.

I think former Yale University Chaplain, Rev. William Sloane Coffin, Jr., once said - "Even if you win the rat race, you're still a rat".

What does being a good family law attorney mean to you?



*Marc Dion practices family law in Westlake Village.*

*This article first appeared in the February 2010 issue of the Ventura County Family Law Bar Association Newsletter.*

The Ventura County Trial Lawyers Association is accepting nominations for its annual Trial Lawyer of the Year award to be presented May 25. Plaintiff or defense counsel may be nominated.

The VCTLA Board considers the following when making its selection:

- Noteworthy civil trial results in 2009 (bench or jury trials);
- Contributions to the legal community;
- Demonstration of high standards of ethics,

civility, courage, advocacy, and dedication; and

Contribution to the betterment of the civil justice system.

The honoree must be a member of VCTLA (may join after being nominated).

Please use the nomination form inserted in this issue of CITATIONS or visit VCTLA.org. Please submit your nomination to VCTLA c/o Steve Henderson at [steve@vcba.org](mailto:steve@vcba.org) or (fax) 650-8054.



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- \*President of The Mexican American Bar Association (2007)
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# HAMBURGERS AND AUTO INSURANCE: A COMBINATION OF WHAT YOU PAY FOR AND WHAT THE SELLER CAN GET AWAY WITH

By Mark E. Hancock

Carl Pope, the Executive Director of the Sierra Club, recently wrote an editorial bemoaning political, ideological and moral rot in our society. This rot is in everything, even in hamburgers.

He reported that an investigation by the *New York Times* disclosed that mass market burgers are not necessarily ground beef, but an assortment of cattle by-products, and that there is apparently a purposeful division between grinding and blending. Companies that blend meat are not required to test it beforehand. Slaughterhouses may test, but their tests vary greatly in scope and they don't like testing, because any contamination found is supposed to be reported to the government. The implication is that slaughterhouses would prefer their "mystery meat" be blended anonymously, with the attendant problems of proof of establishing where the bad mystery "meat" came from. When asked about why the USDA doesn't require testing, an assistant administrator reportedly said: "I have to look at the entire industry, not just what is best for public health."

If this is a problem with the entire ground "beef" industry, imagine the chances that this is even more of a problem with the hamburger on the dollar menu.

So what does hamburger have to do with auto insurance? You have to watch out with both. You often get what you pay for.

You should always read your policy. In fact, a policyholder has a duty to read it (*Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645, 645). I suggest that it is more important than ever to do so with the rise of budget and "name your price" policies.

With an auto policy, two big issues are often who is covered and what vehicles are covered. You need to read your policy to figure this out.

## Who Is Covered?

Any lawyer dealing with auto insurance should know about Insurance Code section 11580.1, which deals with auto insurance and what is supposed to be and what cannot be in auto policies. If you read that section, you will note that coverage is supposed to be provided to permissive users to the same extent it is to named insureds (Ins. C. §11580.1(b)(1)). An exception is where a person is designated/excluded by name (Ins. C. §11580.1(d)(1)).

But if you didn't read your policy (all the way through), you might not notice the insurance company's attempt, in the back, to cover only named insureds with respect to collision, comprehensive and/or UM (i.e., 1st party) coverages, arguing that Ins. C. §11580.1 only applies to automobile liability insurance. Tricky, huh? So much for thinking that a permissive driver of your car, not designated by name, is "covered." Why would a company do that? I suggest it would because it thinks it can and because it is trying to create a policy that brings it a profit for its pricepoint.

If you buy this policy through a website, who is going to explain it to you and who are you going to look to for not explaining it to you?

You should also be aware that permissive user coverage is generally only applicable to the car(s) described in the policy you are looking to and the use, even by the named insured, of other, non-described, vehicles may not be covered, even where it is with permission, especially when the other car is owned by a family member living with you, you have not recently purchased the vehicle and/or the vehicle is being regularly used.

## What Vehicles Are Covered?

Another scenario that presents a potential for problems is renting a vehicle, particularly when that vehicle is a van or a truck. In an

era of cheap goods, you might reasonably want to be cautious and not blithely assume you are covered under your own auto insurance. Insurance carriers are not required to cover you for driving a vehicle not described in your own policy, so whether or not they do is a matter of what is in your policy. You have to read it to find out.

Does your policy only cover you for driving a non-owned vehicle when yours is disabled? If so, your car had better be disabled; convenience doesn't cut it. So much for coverage under such an auto policy for the vacation rent-a-car.

Even if your policy covers you for driving (some) other autos/vehicles, there is the issue of which ones you can drive. In addition to the fairly common exclusion for driving non-owned and non-described cars belonging to other resident family members, you can't blithely assume that the van or truck you rent from U-Haul is covered either, even if it doesn't take a special license. Tony Napoli, an insurance broker in Mission Hills, CA, advises that you should be especially careful when renting a vehicle with a load capacity of 2,000 pounds or more, because such a vehicle is generally considered a commercial vehicle and not a personal lines vehicle. I would also add that the likelihood for insurance problems increases when you get past four wheels and/or two axles. While insurance coverage written for "vehicles" as opposed to "automobiles" may be somewhat broader in terms of what vehicles are covered, the idea is to avoid problems and disputes by looking for them up front and being conservative. After all, rental places do often offer coverage for sale.

Now, of course, the rental places may provide you with some coverage, for no additional charge, while driving their vehicle (read your agreement with them) and it is general vehicle law in California that the vehicle owner is jointly and severally liable up to statutory limits (i.e., \$15,000/\$30,000), but if you don't have coverage in place and

you are involved in a bad accident that goes beyond that, there will definitely be even more problems.

Just as with hamburgers, don't assume that what you are being served is necessarily good for you. You get what you demand and pay for.

*Mark E. Hancock is an attorney in Ventura who handles personal injury and insurance law disputes and cases.*

#### EDITOR'S NOTE:

In January's CITATIONS, Mark Hancock reported on the Fourth District's decision in *Howell v. Hamilton Meats & Provisions, Inc.*

The Supreme Court has now granted review of that decision, identifying these issues to be determined: (1) Is the "negotiated rate differential"—the difference between the full billed rate for medical care and the actual amount paid as negotiated between a medical provider and an insurer—a collateral source benefit under the collateral source rule, which allows plaintiff to collect that amount as economic damages, or is the plaintiff limited in economic damages to the amount the medical provider accepts as payment? (2) Did the trial court err in this case when it permitted plaintiff to present the full billed amount of medical charges to the jury but then reduced the jury's award of damages by the negotiated rate differential?

When the Supreme Court grants review, an opinion is no longer considered published and may not be cited. Cal. Rules. Ct., rules 8.1105(e)(1), 8.1115.

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## PRO BONO HIGHLIGHTS

By Verna Kagan

The year 2009-10 has presented the pro bono program with some unique challenges.

Under the able leadership of **Michelle Erich** we have developed a new program of relative adoption. An article about this program appeared in a previous issue of *CITATIONS*.

Through some struggle we are still hoping to launch a Lawyer for a Day Program. Many of you have expressed an interest in the program and I thank you so much for your willing assistance.

Mortgage fraud matters continue to hit our agency as well as others. Thank heavens for **Miles Weiss** and his team at the District Attorney's office who have given us good direction and again helped us to successful outcomes.

Among the more unusual requests, we have been asked to help defend in a civil suit a mother whose son shot and killed a classmate at junior high school. Devastated as she was

when she walked into our office, we were able to assure her that things were not as bleak as they seemed.

We were asked to defend a young single mother who shared a bank account with her father against a civil suit for embezzlement.

Identity theft is always a problem. An interesting matter arose when a man registered his car in the name of our applicant at an address where she resided several years ago. Our applicant has never met this individual and has no idea who he is. Nonetheless, he became involved in a very serious accident while drunk and caused substantial damage for which our applicant is being sued. When we have consumer problems, **Greg Brose** of the District Attorney's office is our go-to person.

We have tried to avoid out-of-state cases without always being successful. Nonetheless, we have taken a couple of such cases that seemed unavoidable. I am reserving for another article fuller explanation of the

problems involved. For now, kudos to **Tom Johnson** of the District Attorney's office for his enormous help.

A tiny dog who bit a neighbor has now become a major negligence matter including all the discovery techniques usually reserved for very large cases.

I am very proud of our pro bono program. Our Emeritus Attorneys are dedicated and concerned. They willingly put in the hours and hard work to accomplish our goals. Private attorneys who have accepted our pro bono cases have been magnificent and there are not enough honors we can heap on them for all their work. I believe we have a well deserved reputation in the community which has driven away some of the public perception of attorneys as sharks. Thank you, everyone.

*Verna Kagan is VLSP Senior Emeritus Attorney.*

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## A LESSON FROM MOCK TRIAL

By Nick Bern

“Presumed Innocent.” These two words, and the concept they represent, are what I learned in High School Mock Trial Competition.

The first year I auditioned for Mock Trial, I requested a spot with the prosecution. I was seeking an experience in which I could promote justice for the victims of crime and punishment for the perpetrators: a pre-scandal Elliot Spitzer meets Law and Order, with me playing the part of the crusading barrister. I was assigned to the defense team.

I began the year grudgingly picking apart minute discrepancies in what I assumed would be a slam-dunk for the prosecution. Hours spent reviewing the “facts” led to doubt, then a growing sense that statements of fact were skewed against the defendant. As the year wore on, I came to see our client as the wronged victim of chance who had been a sitting duck for a larger conspiracy.

My change in attitude was greatly influenced by the volunteer coaches who helped my team. Many among them were Public Defenders for Ventura County. They believed passionately in the rights of the accused. They told me stories of the innocent wrongly accused as well as of the guilty wrongly acquitted. Along the way, I stopped asking how anyone could feel right about successfully defending the guilty and started thinking about how a presumption of innocence protects us all.

I’ve learned that many people are accused of crimes in part because of their ethnic group or association, or because of flawed investigations. In a country in which felons benefit from a justice system conceived to protect the innocent, the fundamentals that prevent wrongful subjugation are more important than whether or not OJ walks. After three unbeaten years of creative and dodgy defense

of someone who could well be guilty, I know that giving the accused the benefit of the doubt keeps the innocent free – and that’s the one thing I will never mock.

*Nick Bern graduated from Cate School in 2009 and now attends Amherst College. Chief Deputy Public Defender **Jean Farley** reports on his service as a summer clerk in her office: “This unpaid volunteer showed up for work in professional business attire, and worked on whatever we assigned, including filing, organizing case files, purging data from files and also, observing courtroom presentations, assisting in preparing power point demonstrations. We had no money to pay clerks this summer and he considered himself one of the lucky people who didn’t have to earn a paycheck. Refreshing example of the future lawyers.”*

## OXNARD HIGH TRIUMPHS IN MOCK TRIAL

For the first time in its history, Oxnard High School won the Ventura County Mock Trial competition. “Supreme Coach” **Victor Salas** led the students, ably assisted by his associate **Courtney Yoder**, Senior Deputy District Attorney **Gil Romero**, and Deputy DAs **Tom Dunlevy** and **David Russell**.

Oxnard’s team traveled in mid-March to San Jose for the championships. According to **Joe O’Neill**, who himself coached a Mock Trial team and who persuaded Victor to get involved. Oxnard finished 15th out of 34 teams. This is a fabulous achievement for the Oxnard kids, their teacher liaison Keith Koch, and the attorneys whose time and efforts made the local victory possible.

The Oxnard team is asking for contributions towards its travel expenses. Your help is needed, please send contributions to:

OXHS Mock Trial Team, c/o Victor Salas  
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## AN INTERVIEW WITH MARK KIRWIN

*Continued from page 7*

filters to outlying tent camps. To support ongoing relief KIRF has created contacts and collaborations with several aid groups.

Whether strategizing on complex litigation, conducting a fragile mediation, or hand-delivering a load of lumber by motor bike taxi in Cambodia, Kirwin pursues his work in an unassuming manner coupled with a tenacious spirit for never giving up. Twitted as the DONTQUITMAN, Mark Kirwin is no doubt a kind of New Millennium, Renaissance Man.

You can read more about KIRF and follow Kirwin's most recent work in Haiti through the KIRF website, [www.Kirf.org](http://www.Kirf.org). Mark and Angela thank everyone who has contributed to make the trip possible, and who provided significant encouragement to KIRF's continuing work.



*Kate Brolan is a solo practitioner in the areas of small business, entrepreneur, and art law. Her office is located downtown Ventura.*

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## PARALEGAL TESTING AT SBBC

By Sophia Varnava

The Ventura campus of Santa Barbara Business College (SBBC) had been designated by the National Association of Legal Assistants (NALA), a nonprofit paralegal organization, as one of their testing locations for the nation's paralegal certification exam. The two-day exam is offered nationally three times a year. Previously, the nearest testing locations were Riverside or San Diego, making it difficult for some area paralegals to take this exam. Achieving certification is the final stage in the process of professional development for paralegals nationwide.

In order to take the exam in Ventura, all exam applicants must register directly with NALA and input SBBC's testing code number 219 in the designated area on the application. Paralegals interested in information regarding the location of SBBC's facilities may contact Debra Marker, Academic Affairs Manager, DebraM@sbbcollege.edu.

SBBC will also provide, for interested exam applicants, a seminar which will review the tested subjects. Applicants interested in the review seminar may contact Sophia Varnava at sophiav@sbbcollege.edu.

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**Vernelle Edwards** thrilled the assembled 80 lawyers during the March meeting of the J.H.B. Inn of Court. Prior to her team's presentation and during the meal, Vernelle belted out a couple goldies including "All of Me" and "Them There Eyes." Her father was a minister for 40 years and she sang in their church as a child. Vernelle currently can be spotted singing at Oxnard St. Paul Baptist Church...A Jefferson County, Ala. jury on March 9 found in favor of a stripper at The Furnace who claimed she was hurt in a 2007 wreck because the club failed to stop her from driving home after on-the-job drinking. The jury awarded Patsy Hamaker of Bessemer, Ala. compensatory damages of \$100,000 and no punitive damages. The amount covers the cost of her outstanding hospital bills, but it falls short of the \$1.2 million she sought. She says she can no longer dance because of her injuries, according to court documents... Tunisia? Morocco? Roma? **Byran Lawler** at [bjlawler@gte.net](mailto:bjlawler@gte.net) or 981.1021...

There was a fine opening public reception March 12—*Becoming Art at the Seams: a Juried Exhibition of Contemporary & Art Quilts*. One of the artists is **Pamela Price Klebaum** and you can see her work at the Museum of Ventura County — [www.venturamuseum.org](http://www.venturamuseum.org). It's a small world—Ariane Karakalos, wife of **Arie Karakalos**, is the curator of this exhibit and an assistant curator at the Museum of Ventura County...A Michigan man sent to prison for 15 years is getting a new trial after the judge failed to do a routine procedure — ask the jury to take an oath. Timothy Becktel was sentenced in 2008 for assault

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

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

with intent to murder. But his appellate lawyer successfully argued that the verdict should be thrown out because the jury didn't swear to return an honest decision based on law and evidence. The Michigan Court of Appeals said it must erase the verdict to preserve the fairness and integrity of the judicial system. Assistant Prosecutor David King says his office might appeal to the Michigan Supreme Court...Michael Mukasey, Attorney General of the United States from 2007 to 2009, wrote an article in the *WSJ* entitled, "Why You Shouldn't Judge a Lawyer by His Clients." Good read at [www.wsj.com](http://www.wsj.com)...Israel? **Michael Case** at [mcase@fcoplaw.com](mailto:mcase@fcoplaw.com)

**Judge Kevin McGee** gladly accepted the post of Starting Official for the 27th Annual Law Day 5K Race scheduled for May 22. He also has a story or two about evacuating Maui for the tsunami event last month...Los Angeles County Sheriff Lee Baca released hundreds of jail inmates March 5 before their terms were up, citing county budget problems. However, 70-year-old Richard Fine was not among them. Instead, on March 6 he marked the one-year anniversary of being gavelled into a small and windowless solitary confinement cell for what a local judge declared to be contempt of court. Mr. Fine is an antitrust attorney who has been a persistent critic of Los Angeles County's practice of giving judges nearly \$50,000 a year in extra pay over their state paid salaries. Read *Sacramento Bee* columnist Dan Walters missive in the March 13 edition — [www.sacbee.com](http://www.sacbee.com)...London? Paris? **Cheri Kurman** at [cukurman@normandowler.com](mailto:cukurman@normandowler.com)...

**Melissa Sayer** and **Sylvia Soto** were each promoted to Senior Partner at Nordman Cormany Hair & Compton...Blog of the Month: [www.sports-law.blogspot.com](http://www.sports-law.blogspot.com). "All things legal related to the sports world."...From Anonymous: "A judge should be about 60, clean-shaven, with white hair, china-blue eyes, and suffer from hemorrhoids so that he will have that concerned look."...The proposed changes to the Local Rules of the Superior Court of California, County of Ventura, may be viewed at [www.ventura.courts.ca.gov](http://www.ventura.courts.ca.gov). Once you get to the site, go to "What's New" and you will find the proposed rules and forms.

The judges would appreciate any comments or recommendations regarding these rules by April 12. Additional Info? Victoria Borjesson at 654.2965...

JHB Inn of Court president **Alyse Lazar** was appointed as a commissioner to the County's Civil Service Commission...I truly loved this one — On Feb. 19, business document preparation services company, We The People USA, Inc., voluntarily filed for chapter 11 bankruptcy protection. While the company had \$24 million in sales and 138 franchised locations in 2006, there are only eight remaining franchises...Sylvia Pressler, a trail-blazing judge whose 1973 ruling opened Little League baseball to girls, has died at the age of 75....

Hope you have done so! All State Bar members were required to provide an e-mail address to the State Bar Feb.1 under a new rule of court approved by the Supreme Court. Anyone who has not done so can go to [calbar.org](http://calbar.org), log on to "My State Bar Profile" in the left menu and follow the prompts...More State Bar News — Under Rule of Professional Conduct 3-410, which took effect Jan. 1, lawyers who do not carry malpractice insurance must notify their clients in writing that they are not insured. Notification must be made at the time a client hires the lawyer if it is "reasonably foreseeable" that the representation will exceed four hours...**Judge James Cloninger** has been selected to receive the Oxnard Knights of Columbus Public Safety award for 2010. The award will be presented at the group's April 12 dinner meeting in Oxnard...

*Steve Henderson has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. He correctly identified in multiple brackets Kentucky as the NCAA basketball champions earning him big dough and a keg or two. Additionally, he snagged Dodger v. Yankees tickets scheduled for June 25-27. Lastly, he will be taking somewhat of a spring break April 5-9 to hang with the rats. As usual he may be reached at [steve@vcba.org](mailto:steve@vcba.org), FB, or [twitter.com/stevehendo1](https://twitter.com/stevehendo1). Preferably however, 650.7599.*

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*Mr. Nielsen grew up in Thousand Oaks, and graduated from Westlake High School. He received his Bachelor of Arts from the University of California at Santa Barbara, and his Juris Doctorate from the Santa Barbara College of Law. He received the Witkin Award for Academic Excellence and the CALI Excellence for the Future Award in Remedies, and Academic Achievement Awards for the Highest Grade in Contracts, Legal Writing, Torts and Remedies. As an attorney, Mr. Nielsen worked in Construction Litigation and as a Ventura County Deputy District Attorney, where he received 24 hours of P.O.S.T. Certified Standardized Field Sobriety Test Instruction. Mr. Nielsen is now using his experience to help clients facing DUI charges.*

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