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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

JUNE – TWO THOUSAND TEN

Spotlight on Judge Kevin DeNoce

By Valerie Gregson
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October 12, 2009

Jack Trimarco & Associates
Polygraph/Investigations Inc.
9454 Wilshire Boulevard, 6th Floor
Beverly Hills, CA 90212

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,

SANGER & SWYSEN

Robert M. Sanger

SHARING THE BALANCE

By Kendall VanConas

Life is a delicate balance. "They" constantly inundate us with dos and don'ts, and it seems impossible to make the right decisions to maintain the balance: Eat healthy, but red wine and dark chocolate are OK; get plenty of exercise, but don't overdo it; a good night's sleep is good for you, but too much is linked to diabetes and heart disease. Keeping the proverbial balls in the air is an acquired skill, and one that increases in difficulty as we take on more in life.

Perhaps nobody understands the challenges of maintaining balance better than the working mother. And before you roll your eyes and flip the page, no, this column isn't going to be a Helen Reddy-I-am-woman-hear-me-roar anthem to the working mother. I can bring home the bacon and fry it up in a pan as good as the next girl, but God knows I couldn't do it alone. I know there are plenty of sleep-deprived, devoted working fathers out there, and I am blessed to be married to one of the best of them. And I know it's not just dads either. There are grandparents, aunts and uncles, siblings and lots of loving, kind people who step up every day to care for children.

But the working mother's journey is different and special, quite simply because we are women. And despite the amazing advances we've made in just a generation, traditional, societal precepts still consider the child-rearing duties to fall on the mom. This is the ultimately "either/or" choice for us: Be a mother, but have a career. Every working mother has felt the tug.

So when I hear about women finding a way to keep the work-home balance in check, I'm intrigued. And when I hear about their employer making the right choices to help them keep that balance, I'm impressed.

Maureen Byrne and **Tricia Koenig** are both Deputy District Attorneys in the Family Protection Unit of the Ventura County District Attorney's Office, and they are job-share partners. Job-sharing isn't a new concept, and I have heard about successful job-sharing arrangements before in other professions. Lots of teachers job-share, and so do many other technical, administrative and clerical positions. But I had never before heard of a job-sharing arrangement between lawyers, and I certainly wouldn't have guessed that it would have been with two prosecutors. (*Ed. Note:* ***Laurel McWaters*** *and* ***Julia Snyder*** *also job-share in the District Attorney's Office*).

It wasn't the practice of law that brought Maureen and Tricia together as job-share partners. It was motherhood. Both were working as prosecutors in the office of then-District Attorney **Michael Bradbury**, and both were mothers of young twins. They felt a need to work less so they could be at home with their children more. So, like other good lawyers, they did their research, investigated, and came up with a proposal that was approved by the office. That was more than 10 years ago, and Maureen and Tricia have been successful job-share partners ever since. They have paved the way for other women lawyers in the office who also job share and have part time arrangements.

They work exclusively in the Domestic Violence court, and handle a busy calendar that includes arraignments, violations of probation, sentencings and other duties that relate to felony and misdemeanor charges of domestic violence and child abuse. They currently split their week, one working Mondays, Tuesdays and every other Friday, while the other picks up Wednesdays, Thursdays and the alternate Fridays. Their individual hours together constitutes one full-time Deputy District Attorney position, and all elements of their employment are split right down the middle.

Obviously, the biggest benefit that both women gain from their job-share arrangement is more time at home with their families. They are acutely aware of how fast time goes by, and appreciate the additional time they have with their growing children. That's no surprise to hear, and as any working parent can tell you, we have all had moments when we want to be at home more than we want to be in the office. But it was a surprise to hear that the children of these working mothers also appreciate the additional time mom has at home. Maureen and Tricia have each had experiences over the years when they could have returned to a full-time position. But when faced with that prospect, they both told me that their children (two 13-year-olds and an 11 year old for Maureen and two 15-year-olds for Tricia) were against the idea, and wanted mom to keep the part-time work. Very impressive, particularly for middle school aged children, who will typically go to great lengths to avoid being seen with their parents, let alone express a desire to spend time with them.

But the benefits of their job-sharing arrangement go beyond the obvious. Less work means less stress. Less stress leads to less burnout and more longevity in the position. This is particularly true for Maureen and Tricia, who are assigned to a hectic courtroom, in which they regularly see the worst of humanity. Burnout is a real issue for many lawyers, particularly among district attorneys and public defenders in these kinds of assignments. After being away from the courtroom for several days, Maureen and Tricia can approach it feeling renewed and refreshed, and both told me that it has kept them in the position longer than they naturally would have, had they been doing it full-time.

They both have a very high level of job satisfaction, more than a lot of attorneys I know who have been practicing as long. Their part-time schedule forces them to be efficient with their days, and they are both very appreciative of the support they have received for their arrangement over the years. Their position – which renews every two years under a written contract they have with the office – has been supported over the years not only by Mr. Bradbury's successor, **Gregory Totten**, but also by their managers and supervisors over the years. They both are also grateful for the support they get from Judge **Colleen Toy White**, the presiding judge in Department 37.

Continued on page 6

STRAUSS LAW GROUP APC

Strauss Law Group is excited to announce that David L. Cunningham has become Of Counsel to the firm.

David brings over 35 years of experience in business law, real estate transactions and estate planning. Dave's experience will be a perfect addition to Strauss Law Group's expertise in employment law and litigation, business litigation and real estate litigation.

Tony Strauss, Bruce Crary and Mike Strauss are delighted to welcome Dave aboard!

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SHARING THE BALANCE *Continued from page 3*

Judge White is "very, very supportive" of the job-sharing arrangement that Maureen and Tricia have. As a single mother, Judge White knows the challenges they face. She recalls the difficulties presented with juggling work and home – even getting out of the door in the morning can be a challenge, let alone tackling a demanding job. In her court, Judge White will schedule hearings for each individual on days she knows will be a "Tricia" day, or a "Maureen" day, and is willing to lend support to help them succeed in their arrangement. But such assistance has never really been necessary, and it only makes sense, Judge White says, to support an arrangement that will help keep two bright, talented prosecutors in the District Attorney's Office.

Judge White told me that she definitely believes that the part-time schedule has allowed Maureen and Tricia to keep their passion for the job. From the standpoint of the District Attorney's Office and the court, Judge White says that Maureen and Tricia each give far more than their 50 percent to the job. She sees their job efficiency and believes that their success is due in large part to their part-time positions. She was also quick to mention that they are both excellent lawyers, which certainly has helped them make the case for continuing their job-sharing arrangement.

But, like any balance in life, the good comes with some bad, and both women recognize that there are definite drawbacks to the arrangement. Less work comes with less pay, and not everybody would be able to make the arrangement work for them financially. Both Maureen and Tricia are married – both to lawyers, in fact. A dual income household can get by with the arrangement, but a single parent household would have a much harder time making it work. And along with the reduced pay comes less retirement contribution. Tricia shared with me that she has been with the District Attorney's Office 24 years, but only has 15 years accrued toward retirement. As their children get older, both women expect to return to full-time work anyway, but as they approach retirement increased hours will be a must in order to accrue the 20 years of service required for full retirement credit.

There are career drawbacks as well. Both women believe the job-sharing arrangement can work well in many different areas of the law, particularly for government lawyers. But it is very difficult to make it work well in a trial assignment, so the calendar assignment in Department 37 was a deliberate choice. Both women say they would love to be doing trials, and that the lack of trial work has impeded their career advancement. But it's a trade-off that was well worth it, and both said that it was one they would make again.

I support Maureen and Tricia for making their choice, and I salute the County of Ventura for supporting this flexible work schedule. I give many thanks to Maureen Byrne and Tricia Koenig for sharing a little bit of their life with me, and to Judge Colleen Toy White for talking to me about this article.

President's Post-Script: Thanks to a technical error, my teaser in last month's column – designed to get you to support VLSP – failed to print. But not to fear! Participate in the fun by going to *vcba.org* and clicking "President's Trivia."

Kendall VanConas *is president of the Ventura County Bar Association.*

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ARBITRATION AFTER *BURLAGE*: A SECOND TAKE

By John Taylor

Two months ago, *Citations* ran an article by Editor **Wendy Lascher** about a recent arbitration decision, *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524. Ms. Lascher, who represented the losing parties on appeal, has graciously agreed to publish a different take on the *Burlage* decision from my perspective as appellate counsel for the prevailing party, Martha Spencer.

Presiding Justice **Arthur Gilbert**'s majority opinion began: "It is not often that a trial court vacates an arbitration award and an appellate court affirms the order." *Burlage*, 178 Cal.App.4th at 526. The opinion then detailed an arbitration process that appeared so patently unfair that, in the court's view, "should the award be affirmed, arbitration itself would be suspect." *Id.* at 530. Far from undermining arbitration as a useful means of alternative dispute resolution, the Court of Appeal reinforced the integrity and utility of arbitration by approving a principled construction of a narrow statutory exception to the general rule against judicial review of arbitration awards.

The Facts That Made The Court of Appeal's Decision Easy

The Burlages purchased a house from Spencer, but later discovered that the pool and fence encroached on unusable hillside property abutting the adjacent country club's golf course. The title insurer worked with the country club to correct the encroachment, purchasing the affected property for $10,950 (at no cost to the Burlages) in exchange for a lot-line adjustment that gave the Burlages clear title to the encroached-upon land.

Problem solved? No, the Burlages pursued a claim against Spencer for alleged diminution in value and construction costs they ***might*** have incurred had the encroachment not been fixed.

In the ensuing arbitration, the Burlages moved in limine to exclude evidence of the lot-line adjustment, which showed the Burlages were not damaged by the encroachment. Without offering any legal reasoning or explanation, the arbitrator granted the motion, excluding evidence regarding the financial effect of the lot-line adjustment on the Burlages' damages. Ultimately, he issued a $1.5 million award that was almost as much as the $1.75 million the Burlages paid for the house.

Ventura County Superior Court Judge **William Liebmann** granted Spencer's motion to vacate the award, and the Court of Appeal affirmed, noting that by refusing to hear "crucial evidence" that "the problem was 'fixed' and there are no damages," "the arbitration assumed the nature of a default hearing in which the Burlages were awarded $1.5 million in compensatory and punitive damages they may not have suffered." *Burlage*, 178 Cal.App.4th at 530. The Supreme Court denied the Burlages' petition for review, although Justice Baxter and Justice Corrigan voted in favor of review.

Did the Court of Appeal's Decision Violate *Moncharsh?*

Associate Justice **Steven Perren** dissented, urging that the majority decision was contrary to the Supreme Court's decision in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1. He interpreted *Moncharsh* to stand for the proposition that legal errors by arbitrators are absolutely insulated from review. He expressed concern that the majority decision "cuts the heart out of *Moncharsh*" and that "great mischief can and will result from the majority's holding," *Burlage,* 178 Cal.App.4th at 534, a view similarly articulated by Ms. Lascher.

But predictions that the *Burlage* decision dooms the efficiency and predictability of arbitration seem to be premature. The court implemented the plain language of a statute (Cal. Civ. Proc. Code §1286.2(a)(5)) that was not at issue in *Moncharsh,* and that will not likely be invoked in many cases. The Federal Arbitration Act contains an almost identical statutory protection, 9 U.S.C. §10(a)(3), that has been interpreted the same way the Court of Appeal interpreted California's counterpart, and yet only a handful of federal decisions have vacated arbitration awards based on that provision. None of those few decisions has weakened the efficacy of federal arbitrations.

Code of Civil Procedure section 1286.2 enumerates several grounds on which arbitration awards are subject to judicial review. The subdivision at issue in *Burlage*, section 1286.2(a)(5), provides that an arbitration award must be vacated where the exclusion of material evidence has substantially prejudiced a party. Justice Perren's dissent suggests that, after *Moncharsh,* section 1286.2(a)(5) applies only when the refusal to hear evidence was based on something other than a legal ruling. But that reading of *Moncharsh* would also foreclose review of arbitration awards for "corruption in any of the arbitrators" – another ground for review listed in section 1286.2 – if an arbitrator's corruption led to an improper legal ruling.

Fortunately, *Moncharsh* does not go so far. In that case, the Supreme Court disapproved only a ***court-made*** rule that, going ***beyond*** the statutory grounds for judicial review of an arbitration award, had allowed courts to vacate awards when a legal error appeared on the face of arbitration award. In so holding, the Supreme Court went out of its way to affirm that judicial review of arbitration awards still remains available based on the statutory

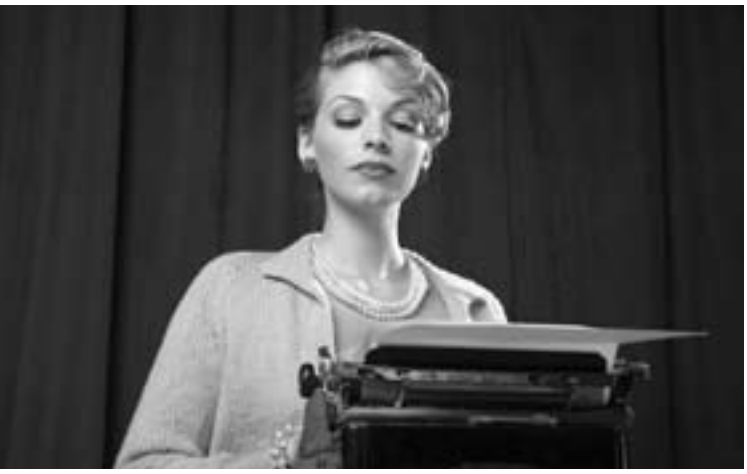
grounds enumerated in section 1286.2 – including subdivision (a)(5), the ground the trial court relied on in *Burlage. Moncharsh,* 3 Cal. 4th at 12-13.

The Supreme Court explained that the risk of erroneous arbitration decisions can be tolerated precisely because the legislature has reduced the risk of error "by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process." *Moncharsh,* 3 Cal. 4th at 12. Consequently, in *Hall v. Superior Court,* 18 Cal.App.4th 427, 439 (1993), Justice Chin (then a First District appellate justice) wrote that even after *Moncharsh,* section 1286.2(a)(5) functions "as a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case."

The *Burlage* decision thus does not represent any deviation from *Moncharsh.* Nor is the decision likely to result in the dire consequences predicted by Justice Perren's dissent. For section 1286.2(a)(5) to apply, there must be not only a refusal by an arbitrator to hear evidence, but also a finding by the trial court that the unheard evidence was *material* and the refusal to hear it was ***substantially prejudicial.*** Those criteria will rarely be met. Indeed, the fact that section 1286.2(a)(5) has been on the books for over 150 years, and *Burlage* is only the third published decision regarding its application, shows how infrequently the statutory requirements for judicial review of an arbitration award based on the arbitrator's refusal to hear evidence will ever be established.

Far from making bad law, then, the facts of the *Burlage* case show how important it is to have this statutory "safety valve" for those rare fundamental miscarriages of justice that, if uncorrected, would erode public confidence in the very concept of nonjudicial dispute resolution.

John Taylor *is a State Bar certified specialist in appellate law, and practices in Encino at Horvitz & Levy LLP.*



CUT AND PASTE

By Art Wilkof

When I arrived in California in 1961 I took a job with a law firm that specialized in tax and estate planning matters. Drafting of wills, trusts, complex letters, pleadings and other lengthy documents always began with a pencil and a yellow lined legal pad. CEB had a very extensive list of publications and was the main source of forms; updates were made on an annual basis, if at all.

The other main source of forms was a cache of documents that had been created by the firm in the past, indexed mostly by the memory system. Those documents were carbon copies created when the original was typed, so they were on tissue-like carbon paper, tended to be faint, and got fainter every time they were handled because a little more ink would rub off on one' s fingers. The process began by handwriting the document; there was no way to copy the forms from the textbooks. If one wanted to use material from the firm' s carbon copies, one could cut the desired section from the carbon copy and staple it on the yellow pad at the desired location.

We didn't cut and paste – we cut and stapled or taped. Spell checking and editing was done by another member of the firm. Simple editing would be done by interlineating, but major revisions required handwriting the new text, cutting the written document at the place of insertion and then stapling the new section in place. The tools of choice were a wooden No. 2 pencil and a soap eraser which was soft when new, but quickly became brittle and hard to use after a short period of time. When completed, it was not unusual to have a handwritten document which had pages that were two, three or even four feet in length!

The completed document was then given to the secretary. The secretary began by making a sandwich consisting of a piece of bond stationery, a sheet of black carbon paper, a sheet of tissue copy paper, often marked with the word "Copy" in red on the right, and additional sheets of carbon paper and copy paper as desired. There were no copy machines. If one wanted the original and four copies, one created a sandwich which would consist of nine sheets – the original bond paper, four tissue copy sheets and four pieces of carbon paper. Just getting the entire sandwich into the platen of the typewriter and have the top of all sheets line up accurately was no easy task.

When an error was made, the secretary would stop, get her erasure template out (a metal card the size of a credit card which had openings of various shapes cut out of it; i.e., an opening for a single character, an opening for a short word, an opening for a long word, etc.), erase the characters on the original and each of the copies, being careful to put a backup sheet of paper behind the erasure before starting so that the copies didn't get smudged. If the document got too messy, or, if, after it was proofread by the author it was deemed unacceptable, the secretary started all over again, grumbling at a level consistent with the mood, the time of day or the amount of pressure. Proofreading entailed not only reading the document for punctuation, spelling and grammatical errors, but comparing it to the handwritten document to make sure that all sections were included and properly presented.

Correspondence and memos or other short documents could be dictated, usually accomplished by having the secretary sit in front of the attorney' s desk with her spiral-bound dictation pad and pencil and take down everything the attorney said – in Gregg Shorthand. It was labor intensive, to say the least, and secretaries with good shorthand and typing speeds were in demand.

The word processor of choice was the IBM Selectric Model C typewriter; even the quietest ones made a distinct whirring noise. An innovation in the early 1970s brought us a typewriter with memory, but it had certain limitations: It could only memorize one line of type, and it had no display. The typist would type the desired line and commit it to memory and then call it up when desired, hoping that it would insert the text in the proper place. Nonetheless, we were excited because we knew that change was on the way. That typewriter was soon replaced by another innovation, one that had a one-line display. The typewriter, known as a QYX, was manufactured by Exxon Information Systems and was described as "the intelligent typewriter" with the description reading "it has electronic modules that let you add memory, display or communications, so QYX gets smarter without getting bigger." Exxon soon went out of the word processing business.

Documents that had to be printed, appellate briefs and offering circulars for securities issuance, for example, required a different approach. Those documents were prepared by printing houses such as Jeffries and Stuart F. Cooper. The attorney would take the draft of the document, staples and all, to the printer's office, where a special room was set up with food, coffee and candy to accommodate long sessions of editing, going over proofs and final versions. Those sessions frequently lasted into the wee hours of the morning because there was usually a deadline looming. I have firsthand knowledge of those long nights. After having been in practice for less than two years, I accepted an engagement to do a public issuance of stock of a startup company which had a patent for blood flow transducers. At the time, I was in an office shared by another attorney who was also doing a public issuance and graciously guided me, both at the office and at the printing house. The underwriting for each of the companies was successful, but mine was short-lived – it was technologically ahead of its time. On the other hand the company my associate took public is still in business under its original name – Taco Bell.

The first copy machine we saw was the Thermofax, which came along in the mid-60s. It was able to copy documents, one sheet at a time, by placing the original on top of a piece of specially coated paper, putting the two of pieces of paper in a carrier, and slipping them into the machine, which belched, smelled, and eventually produced a copy. However, the heat process sucked all of the moisture out of the paper and it soon became dry, faded, and unusable. Not only that, but the

heat process brought out a terrible taste which one soon learned if one had to moisten one's thumb to leaf through the pages produced by the machine. Turning out one or two pages a minute was considered to be a blazing pace.

The research tool of the day was not Westlaw or Google, it was more like the Dewey Decimal System. If you could not find an answer in the office law library, you would go to the county law library and search through the card files and the stacks. No matter how large the library, it had a miniscule amount of information available as compared to the iPhone I carry in my pocket.

As I probed my memory for items to include in this article, it occurred to me that the only two pieces of office equipment in today's environment that we would have recognized 50 years ago are the stapler and the scissors. With no word processors, spreadsheets, copy machines, faxes, e-mails, laptop computers or cell phones the amount of documentation that we were able to produce was extremely limited. Because making any changes was so torturous and because we could not create multiple copies, litigation was simple and straightforward. Briefs were really brief and matters were brought to trial quickly. Typically, all the material we needed to conduct a trial could be contained in a single briefcase. While I pride myself on being technologically up to date, I can't help but wonder whether we weren't more efficient, or if I am just nostalgic for "the good old days."

Oh, I almost forgot - when I was admitted in 1967, there were approximately 30,000 lawyers in California. Maybe that fact should be taken into consideration in such a comparison.

Art Wilkof *is an attorney based in Westlake Village. He has experience in securities law, tax law, civil litigation, transactional situations, family law and as a certified public accountant.*

Spotlight on Judge Kevin DeNoce

By Valerie Gregson

I was recently given the opportunity to sit down with Judge **Kevin DeNoce** and ask him a few questions. Here is a portion of that interview:

Valerie Gregson: Before taking the bench, you practiced criminal law, first as a prosecutor with the Ventura County District Attorney's Office for nine years and then in private practice on the defense side for eleven years. What made you decide to become a criminal lawyer?

Kevin DeNoce: I didn't even think of going to law school until my third year of college at the University of Colorado, Boulder. I had considered teaching as a career, but I changed my mind when my application was accepted by Pepperdine Law School. At the end of the first year I stumbled into a clerkship at the U.S. Attorney's Office Department of Justice Organized Crime and Racketeering Strike Force in Las Vegas, and was assigned to work on organized crime cases. One of the first cases I worked on involved Tony Spilatro from Las Vegas, who was killed and buried in a cornfield; the story was portrayed in the movie *Casino,* which fairly accurately followed the facts. That was my first experience with criminal law and it triggered an intense interest in search and seizure law. I knew I wanted to work on the prosecution side, and by the end of my third year I had two interviews, one with the Los Angeles District Attorney's Office and the other with the Ventura County District Attorney's Office. I canceled the interview with Los Angeles District Attorney at the last minute because I didn't want to deal with the commute. I was actually interviewed for the Ventura County District Attorney's Office by **Colleen Toy White**, who was second in command of the office at that time and is now a fellow bench officer.

VG: What led to your decision to "jump the fence" and specialize in criminal defense?

KDN: Economics. At the time, the pay at the District Attorney's Office was quite low, and my efforts as the first president of the District Attorney's Office Union to raise the salary schedule were unsuccessful. I had extensive experience handling DUI cases at the DA's office, so the transition was a natural.

VG: Are there any cases that you handled for the prosecution or the defense that you are particularly proud of?

KDN: While employed as a prosecutor in the Ventura DA's Office, I briefed and successfully argued before the Court of Appeal as *amicus curiae* for the admissibility of the results of the Alco-Sensor portable handheld breath testing device that was first introduced to California through a program in Ventura County. I also assisted in the drafting of legislation regarding the use of preliminary breath tests such as the Alco-Sensor. On the defense side, I filed a petition for writ of habeas corpus alleging that a defendant who had already served four years in prison was wrongly convicted. After a four-month long evidentiary hearing, which I did pro bono, the original trial judge concluded that the wrong man had been convicted and ordered that he be released from prison.

VG: As a judge who has practiced on both the prosecution and defense side, do you have any concerns about our adversarial system of law?

KDN: I think that one of the casualties that I see in the adversary system is that sometimes people lose their objectivity on either side; sometimes people need to make an effort to keep their objectivity. Advocating doesn't mean that you take on a myopic view of the world, and I think the better attorneys are the ones that have the ability to keep their objectivity. This is an important issue for me.

VG: How would you like to be perceived as a judge by attorneys?

KDN: Objective, fair and, balanced. I think that probably the thing that distinguishes me most is that I will go out of my way to cite law whenever I rule on an issue, and I appreciate it when attorneys do the same. I always have Lexis running on my bench. I'm constantly citing cases whenever I'm making a ruling and constantly inviting counsel to provide me with case authority, and I hope that I would be known as a judge who loves the law. I appreciate an attorney who comes into court with case authority prepared. Furthermore, I empathize with private attorneys and their problems. I had to run my own law office, hire staff and deal with clients. I have firsthand experience in drafting retainer agreements, advertising, deciding which cases to accept and all of the other aspects of running a private practice that you don't have to deal with if you just work for a governmental entity.

VG: How would you like to be perceived as a judge by the public?

KDN: I enjoy working with jurors both in my courtroom and in the jury assembly room, which the judges do on a rotating basis. I consider my utilization of PowerPoint presentations unique among criminal judges. I take time to explain the history and evolution of our jury system and how important of a role these citizens play in maintaining the integrity of our judicial system. I have received many favorable comments on my presentations; for many people it is the most information they have ever received on the topic and they are truly appreciative.

VG: What comments you have about your management style?

KDN: I try to maintain an easy-going judicial temperament. I try not to restrict the attorneys but to give them more flexibility in presenting their case.

VG: What are your interests off the bench?

KDN: Hiking, reading, and spending time with my family.

VG: Any other comments?

KDN: The people that walk through the door of my courtroom are not stick figures; they are plaintiffs, defendants, prosecutors or defense attorneys. They are real people and as a judicial officer I feel it is important to understand them and work with them to the best of my ability. I truly believe that it is an honor to be a judicial officer and I do not take that responsibility lightly.

Valerie C. Gregson *works at The Law Office of Arthur Wilkof in Westlake Village.*

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PRO-BONO HIGHLIGHTS

By Verna R. Kagan

After some difficult instances, I asked my superiors and committee members for permission to refuse out-of-state applicants.

Primarily such cases were quite costly both monetarily and in time consumption. The out-of-state applicant is frequently hard to locate for follow-up and is hard to satisfy with outcome. Those of you who have been kind enough to accept such matters in the past are probably quite familiar with the problems.

In the process, I made a discovery that took a long time coming. It appears that legal services agencies receiving federal funds are required to give reciprocity. Therefore, assuming that VLSP was one such agency, they expected that I would accept the matter. Some callers became argumentative when I said that, as a matter of policy we do not accept out-of-state applicants. They explained that their applicants had "pre-qualified" and that I was under obligations to accept. I have finally learned that I must explain that we do not receive public funding. I also learned that accepting funds from a public resource diminishes our autonomy.

In one instance, I was called on behalf of a woman living in a battered women's shelter. She had a restraining order against her husband and was awarded custody of their minor child. Husband picked up the child ostensibly for a visit, got drunk, drove with the child in the car and was arrested. For reasons unknown to me, the child was turned over to an aunt. She, in turn, picked up the husband the following morning, gave his car back, gave him the child and off he drove to Ventura.

He immediately filed an action for dissolution of marriage and for custody of the child. He had left his former state while his criminal action was still pending.

One of our wonderful attorneys went in to contest jurisdiction. Though the case seems simple on the surface, many hours were spent bringing the matter to conclusion.

A local woman had her children stolen from her and removed to Nevada by family members. They then filed for custody.

God help anyone trying to deal with Nevada. They don't believe in the Uniform Child Custody Jurisdiction Act. If someone removes a child to Nevada even for a day, Nevada will take jurisdiction. It cost us many hours, lots of long distance calls and some help from the child abduction and recovery unit before the matter was resolved.

It is these kinds of struggles which keeps this old lady active and somewhat youthful.

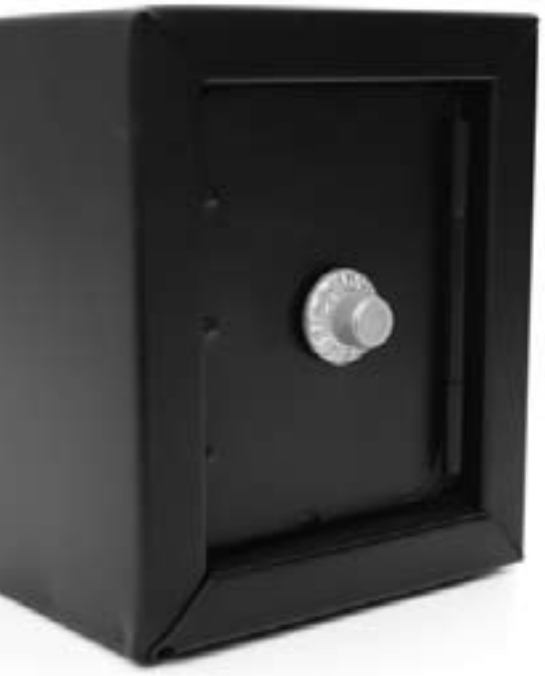
Verna Kagan *is the VLSP Senior Emeritus Attorney.*

CHILD SUPPORT ORDERS: MANDATORY LANGUAGE

The Ventura Superior Court has asked CITATIONS to remind attorneys that every child support order and child support agreement approved by the court must have the following language printed on the document pursuant to Family Code section 5616:

"In the event that there is a contract between a party receiving support and a private child support collector, the party ordered to pay support must pay the fee charged by the private child support collector. This fee must not exceed 33 1/3 percent of the total amount of past due support nor may it exceed 50 percent of any fee charged by the private child support collector. The money judgment created by this provision is in favor of the private child support collector and the party receiving support, jointly."

Beginning immediately, self-drafted marital settlement agreements, stipulated judgments, etc. containing child support orders which do not include the required language may be rejected by the clerk's office for correction.



The Perils of Serving as Mediation Counsel following *Porter v. Wyner*

By Gregory W. Herring

True story: Some time ago a prospective client walked into my office, explaining that she previously settled her family law case through a "mediation" conducted by the couple's financial manager. Husband had received a certain community asset, which she did not previously perceive as being "that" valuable, and which had never been formally valued. Mere days after the settlement agreement was inked, the wife read in the newspaper that husband had just licensed the asset for over a *billion* dollars. It appears that the manager, knowing who was buttering his bread, secretly sided with the husband in manipulating the prospective client into a "mediated" deal that awarded him the asset.

The "Black Box" of Mediation Confidentiality

The doctrine of mediation confidentiality presents a major challenge for those trying to escape unfair results generated through mediation. Evidence Code section 1119 makes inadmissible and undiscoverable anything said, any admission made or any writing prepared in or pursuant to a mediation. Unless the parties agree otherwise, section 1121 prevents a mediator or anyone else from submitting to a court or other adjudicative body, and prevents a court or other adjudicative body from considering, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation. *Foxgate Homeowners' Assn., Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1. Any non-statutory loopholes potentially remaining after *Foxgate* (for instance concerning issues of criminal constitutional rights or waivers from the parties to mediation) should be extremely limited. *Eisendrath v. Super. Ct. (Rogers)* (2003) 109 Cal.App.4th 351, 361.

Taken together, sections 1119 and 1121 put mediations into a "black box" (partner **Jim McDermott** coined the term) of confidentiality that will prevent a party from mounting a successful motion to set aside an unfair judgment through evidence of how the mediation was improperly conducted. It will stand up to the presumption of undue influence in marital transactions. *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56. As a dramatic example, it would, on the face of things, even exclude from evidence in further proceedings a discovered memo from the mediator to the other party about how they are going to "screw" the victim with an unfair settlement.

Only limited ways might still exist for the victim of a tainted mediation to try to illuminate the box. She could potentially argue that the proceeding was not an actual "mediation." Under Evidence Code section 1115, "mediation" means a process in which a *neutral* person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

In a relatively rare case, as in the above example, where the so-called "mediator" was also a fiduciary of the victim outside of the mediation, another line of attack could be that he breached his fiduciary duties independent of the mediation. The family law disclosure rules could also come into play. Fam. Code §2100 *et seq.* Regardless, mediation confidentiality would remain a formidable challenge.

Attorney-Client Communications Can Fall Outside the Box

Porter v. Wyner (2010) 183 Cal.App.4th 949 held that communications between an attorney and client during mediation are *not* protected by mediation confidentiality and are thus admissible in a follow-up action by the client against the attorney.

The Porters filed an action against attorneys who had represented them in a lawsuit that was resolved through mediation, asserting that they had given bad advice during the mediation. The attorney-client communications were not privileged by virtue of Evidence Code §958, but the attorneys initially asserted that the doctrine of mediation confidentiality cloaked the communications. They dropped this argument just before trial, evidence of the advice came in, and the clients prevailed.

Soon thereafter, the Supreme Court issued its opinion in *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582 which held that mediation confidentiality statutes must be strictly enforced "except in cases of express waiver or where due process is implicated " Wyner seized on this as a basis for again changing its position, and the issue made its way to appeal.

The Court of Appeal reviewed the ". . . purpose, policy and intent behind mediation confidentiality . . ." and determined that it was never intended to extend to the attorney-client relationship or to ". . . communications or agreements between a client and his own counsel should a conflict arise between them." (*Porter*, at 960.)

As such, a party aggrieved in relation to a mediated settlement would still be allowed to attempt to establish through communications admissible under Evidence Code section 958 that her attorney failed to meet his standard of care during the mediation. These communications could end up being the *only* evidence that might fall outside the mediation's "black box."

Conclusion

Since mediations are typically free-flowing, emotional and wearying, they present fertile fields for negligence claims. "Mushroom" spouses or business partners (those who have been kept quiet and in the dark concerning pertinent business and finances) first need initial investigation, discovery and disclosures. Emotionally abused or otherwise weak parties first need to strengthen. Especially as mediation confidentiality would severely limit or completely preclude "set-aside" motions and also actions against the mediator, mediation counsel should carefully consider the goals and parameters of the process lest his client receive an unfair result–with him remaining as the only person realistically standing as her ultimate source of relief.

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.*

IF YOU POUR IT THEY WILL COME

Help VCTLA kick-off summer

Wine tasting and hors d'oeuvres at the Channel Islands Harbor – *and MCLE, too* – are on tap for Wednesday June 23 at 6:00 p.m. as VCTLA welcomes summer at its monthly meeting open to all.

Noted entertainment lawyer Scott Brisbin, whose clients have included The Rolling Stones, Mick Jagger, CSN&Y, Stephen Stills and other celebrities, will share experience, stories, insight and wisdom as the sun sets over the Pacific and behind a complimentary selection of fine wines.

Heck Estates, known for its Sonoma County wines, will host the tasting. Its labels include Kenwood Vineyards and Valley of the Moon Winery.

The location is Pacific Corinthian Yacht Club, 2600 Harbor Blvd., Channel Islands. Please see the insert in this issue of Citations, or click VCTLA.org to join us. The cost is a low $40 for current and new members, and $50 for non-members. See you there!

EAR TO THE WALL

The Law Office of **Lynn Ryder** has moved to 5700 Ralston St., Ste. 202 in Ventura. A graduate of Ventura College of Law, Ms. Ryder specializes in elder law and estate planning. She is also of counsel to Employer's Legal Advisor, where she brings her 25 years of personnel management experience to bear on employment law issues. Learn more about the practice at *http://ryder-law.org* or call (805) 644-4707.

ELDER ABUSE ... TRUST YOUR INSTINCTS

By J.C. Hodgdon

It can come in various forms – a bruise, missing money, rashes – and it is more prevalent than you may think. More than half a million reports of elder abuse reach authorities each year. Millions more go unreported. Watching for the signs in your clients can save not just heartache and finances, but potentially a life as well.

Elder abuse is best defined as action or lack of action by a person in a position of trust which causes harm to an older person. While most people think of elder abuse as mainly physical, there are typically six forms:

- Physical
- Neglect
- Financial
- Healthcare fraud and abuse
- Emotional/Psychological
- Sexual

More than two-thirds of elder abuse perpetrators are family members of the victims, typically those serving in the care-giving role. Abuse situations can arise due to caregiver burnout and stress and the nature of the care-giving relationship. To alleviate stress on family members, a credentialed geriatric care manager, specialized in assisting seniors with care, acts as the eyes and ears by providing ongoing oversight and monitoring, allowing family to interact in a healthier manner.

At first you may not recognize certain signs of abuse. They may appear to be symptoms of dementia or signs of frailty, or a caregiver may explain it away. Many times, patients with dementia are unable to physically or verbally report abuse and/or they are too afraid or ashamed. The difficult position in which an attorney may be placed is identifying and taking action on a situation that may be abusive. Trust your instincts. You provide a critical link between victims and protective service.

Some general signs of abuse include:

- Frequent arguments or tension between caregiver and the elderly person
- Changes in personality or behavior in the elder

Legal professionals may be exposed to any of the typical elder abuse issues, but most often will encounter physical, financial and neglect abuses when dealing with clients and their caregivers.

Physical abuse, in actuality, can sometimes be the most difficult to determine. Clients may have injuries, but the caregiver may ultimately have an explanation for it. Many times, you can ascertain an answer by asking to see and speak to the elder alone. If you meet with resistance, further investigation may be warranted. Observations of bruises, burns, welts, scars – especially if symmetrical on two sides of the body – as well as broken eyeglasses or frames, reports of a drug overdose and a general hesitancy to engage with you can indicate abuse.

Neglect, both self-neglect and neglect by caregivers, is the most common form of abuse, constituting over 50 percent of elder abuse reports to Adult Protective Services. Many times, self-neglect is related to declining health, isolation, Alzheimer's disease or dementia, and/or drug and alcohol dependency. Self-neglect may entail the following:

- Hoarding
- Failure to take essential medications or refusal to seek medical treatment for serious illness
- Lack of awareness of safety issues
- Poor hygiene
- Not wearing suitable clothing for the weather
- Inability to attend to housekeeping; unsanitary conditions
- Dehydration and malnutrition

Recently, financial abuse scams have proliferated with criminals going so far as to call from prisons posing as destitute grandchildren to scam money from unassuming elders. Financial abuse and exploitation is more often committed by family members and can cover a broad spectrum of conduct. Family members may:

- Have substance abuse, gambling, or financial problems
- Stand to inherit and feel justified in taking what they believe is "almost" or "rightfully" theirs
- Fear that their older family member will get sick and use up their savings, depriving the abuser of an inheritance
- Have had a negative relationship with the older person and feel a sense of "entitlement"
- Have negative feelings toward siblings or other family members whom they want to prevent from acquiring or inheriting the older person's assets

Signals can include:

- Suspicious changes in wills, power of attorney, titles and policies
- Taking money or property – watch for significant withdrawals from elder's accounts or items or cash missing from the household
- Forging an older person's signature
- Promise of lifelong care in exchange for money and not following through
- Use of the elder's property or possessions without permission
- Additions of names to the elders's signature card
- Financial activity, such as an ATM withdrawal, that the elder could not have done

Recognizing and addressing elder abuse is the responsibility of everyone involved in the life of an elder. Trust your instincts. If you feel abuse is taking place, call Ventura County APS at (805) 654-3200 or the National Center for Elder Abuse hotline at (800) 677-1116.

JC Hogdon *is an eldercare consultant based in the Thousand Oaks office of LivHOME. Before joining that organization, she did education, outreach and marketing for St. John's Regional Medical Center's Geriatric Psychiatric Inpatient Unit. She can be reached at (805) 252-6674 or jhogdon@livhome.com.*

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Exec's Dot…Dot…Dot…

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

Susana Goytia-Miller shined with her performance in "Una Noche En Buenos Aires" (A Night In Buenos Aires). Susana danced the Tango with pro Jorge Visconti May 14 to a packed house in the Tower Club. She's been practicing diligently since December. Want more scoop? mmesqs@aol.com...A partner at an Atlanta law firm has been charged with placing a surveillance camera under the desk of a woman who worked there. James Tenney, 57, was charged with three counts of unlawful surveillance for allegedly recording the woman on three occasions, according to the Atlanta Journal-Constitution. Tenny, a tax lawyer, was jailed for about two hours before posting $10,000 bond. Now get this: His law firm says he his married with three children and *"enjoys photography."*… In case you missed it, and it's entirely possible considering The Star's coverage – **Rocky Baio** and **Ferdinand "Dino" Inumerable** were appointed by the judges as the court's newest commissioners. They fill the vacancies created by the Governor's appointment of **Mark Borrell** and **David Hirsch** to judgeships May 12…

Forgot to mention **Rob Sawyer** also attended the Dodgers Opening Day for the 30th consecutive time! One year ago, Judge **Tom Hutchins** let Rob out of a jury trial early so that his streak would not be broken. Maybe Rob can write about this story for a future issue in CITATIONS…Actor who played lawyer Victor Sifuentes on L.A. Law will be return to prime time in another legal role. Actor Jimmy Smits will play a U.S. Supreme Court justice who abruptly quits to return to private practice. Smits' character, Cyrus Garza, is a playboy and gambler who decides to fight for the little guy after seeing that his belief in a strict interpretation of the law was flawed. The drama, *Outlaw*, will air Friday evenings on NBC. A playboy and gambler really? Must have been appointed by Clinton. I give it one season, max…Costa Rica? **Don Hurley** at donald_hurley2008@yahoo.com... Greece? **Dennis LaRochelle** at dlarochelle@atozlaw.com

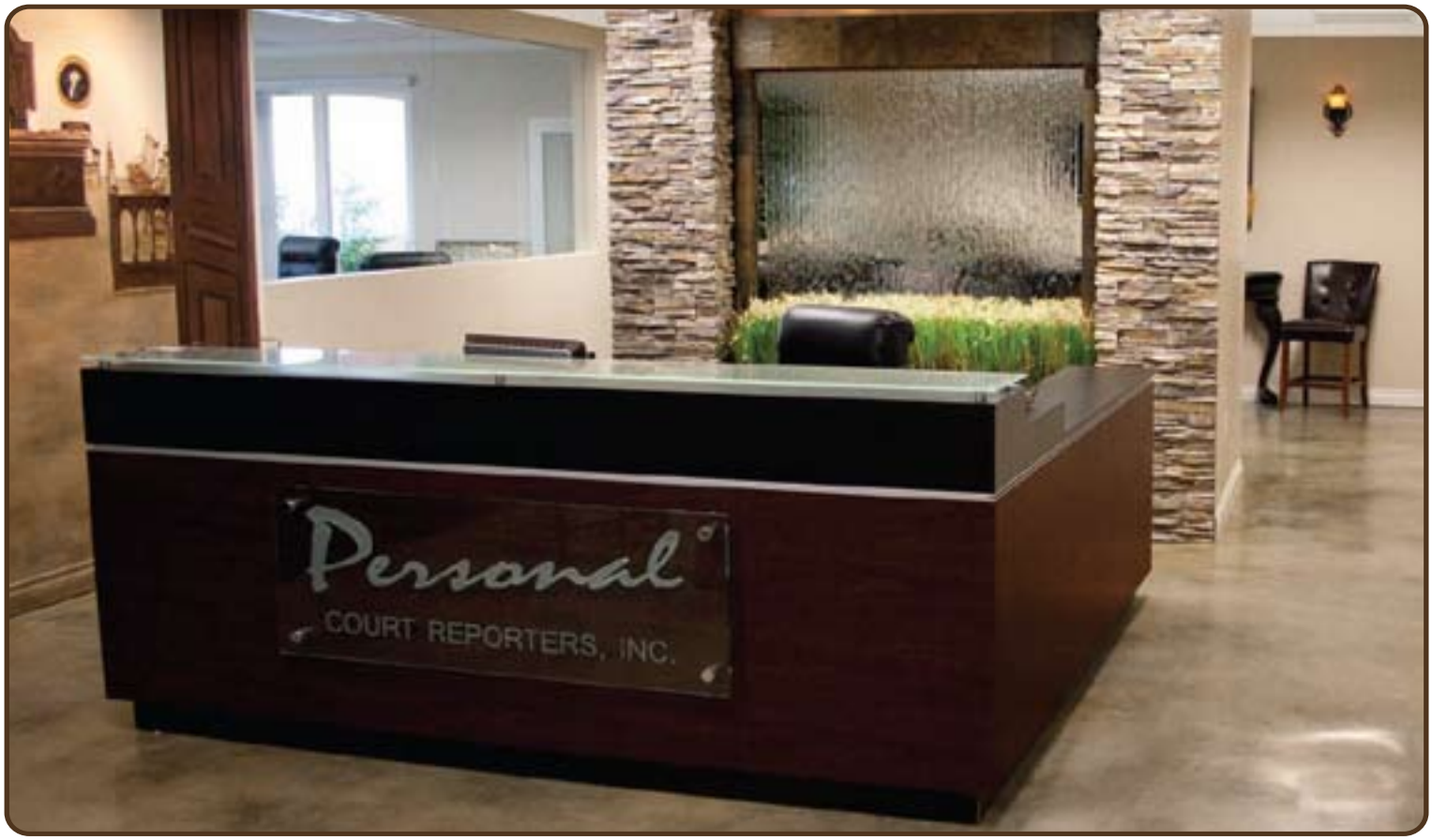
The early scouting report for the Goldwater boys, born on May 4, has Clayton Jack Goldwater starting at power forward weighing 6 lbs, 7 oz and coming in at 18 ½ inches tall, and starting point guard, Knox Melbourne Goldwater, at 18 ¾ inches tall and weighing 5 lbs. 9 oz. Mother and babies are doing well and **Doug Goldwater** was already trolling the isles at the sporting goods stores…Movie Quote of the Month: "Lookit, you're intelligent beings. Let's cut a deal. I can help you. I'm a lawyer. Hey, you wanna conquer the world, you're gonna need lawyers, right?" Confronted by a Martian invader, an attorney (Danny DeVito) pleads for his life in *Mars Attacks!* (1996)…On May 13, Inn of Court president, **Alyse Lazar**, completed her two-year term guiding the Inn to greatness. The officers and directors will be corralled by in coming president **David Lehr** to orchestrate the 2010-2011 campaign. Want to be a member? davidlehr@davidlehrlaw.com...

Nordman Cormany Hair and Compton's CEO, Tami Cook, was presented an award by Pacific Coast Times for being in the Top 50 Women in Business May 11 in Santa Barbara… Yale Law School still holds the No. 1 spot in the new U.S. News & World Report rankings this year, followed by Harvard Law School, Stanford Law School, Columbia Law School and the University of Chicago Law School in the 2 through 5 spots respectively. NYU takes sixth place in the magazine's annual rankings of ABA-accredited law schools, followed by UC Berkeley in a tie for seventh with the U of Penn, the U of Michigan in ninth and the U of V in 10th…Speaking of Yale, Read of the Month from Gretchen Rubin, a former lawyer and graduate of Yale Law School who clerked for U.S. Supreme Court Justice Sandra Day O'Connor. Rubin's NY Times bestseller, "The Happiness Project," is designed to give us all hope. She tells the reader to tackle the little things; start with your own body and daily schedule. Get enough sleep, exercise outside, and my favorite: Control the cubicle in your pocket. She wisely opined, "We all struggle to put proper boundaries on technology."

Lots of activity on Poli Street in downtown Ventura. That's because **Wendy Lascher** is working with a nonprofit, COLOR Inc. (headed by her son, John Wilner) to develop a community garden on the two lots she owns across the street from the office. **Dan Palay** made a generous contribution to the effort. In the April issue of *California Lawyer* – "Dear Crabby, My law partner recently suffered an embarrassing judicial rebuke in a state court of appeal opinion. My instinct was to pretend it never happened. But as we work together on several cases, it has started to feel like an elephant in the room. Should I say something sympathetic, or remain silent?" The answer – Hallmark makes a wonderful line of greeting cards in its Schadenfreude Collection, tailored for the legal profession. Their Boynton-esque drawings carry the most perfect message. In my favorite, a little bear waves at his tiny briefcase as it disappears over a rainbow waterfall: "Sorry you lost your case!"

To celebrate Law Day 2010, the VCBA shared the expertise of its members through the Lawyers in the Classroom program. Lawyers volunteered their time to give presentations to students at various schools and after school programs throughout the county on legal careers, the Supreme Court, workings of a criminal trial, First Amendment and current cases. These so generous with their time were **Kevin McVerry**, **Carol Woo**, **Randall Sutter**, **David Romney**, **David Shain**, **Miles Lang**, **Ben Schuck**, **Gary Shoemaker**, **Ed Duncan**, **Monique Hill**, **Rick Chaidez** and **Jill Singer**. **Deirdre Frank**, who has coordinated these efforts for the umpteenth time, wished to publicly thank them all…

Steve Henderson *has been the executive director and chief executive officer of the bar and its affiliated organizations since November 1990. He is the second to last cousin of Supreme Court nominee Elena Kagan. Henderson remains close with Phil Jackson despite the Lakers' shortcomings. Lastly, he may be reached at steve@vcba.org, LinkedIn, Twitter at stevehendo1, FB, or preferably at 650.7599.*



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