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CITATIONS

S E P T E M B E R - T W O T H O U S A N D T E N

VENTURA COUNTY PIONEERS ELDER ABUSE COURTS



By Hon. Colleen Toy White
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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.

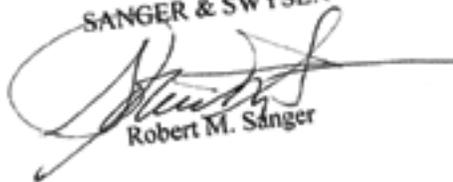
When we do decide to disclose the report in an attempt to convince a reluctant prosecutor of a client's innocence, a favorable polygraph report alone is not sufficient. The professionalism of the examination and the reputation of the polygrapher are critical.

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,

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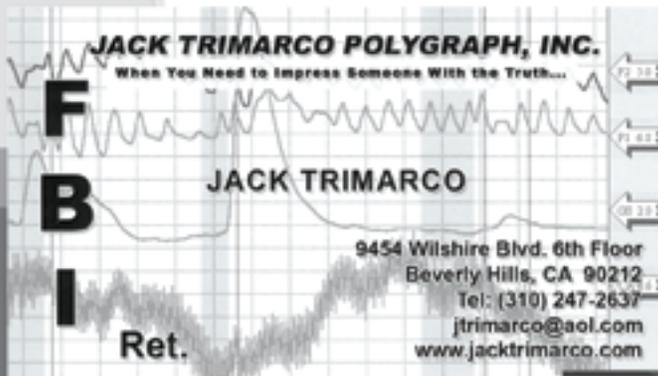
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FAMILY ADVENTURE

By Kendall VanConas



Every year at this time, as summer approaches and parents start to say good-bye to their departing college students, I'm reminded of how my family sent my older sister off to college. After a few years, long enough for the scars to have healed and the nightmares to have ceased, my dad wrote a story about our family adventure. All of what you will read is true, and even I find it hard to believe that anyone could have talked my father into this trip – a true testament to my mother's considerable powers of persuasion.

Over the years, we talked about this adventure, and always laughed about it, or at least most of us laughed. We also suggested my dad send it in somewhere to get published, but he never did. This seems the perfect time and place. As the lazy days of summer wind down and my life continues at high speed, I decided to go the easy route and plagiarize my column this month from my dad [*the late Phil Cohen – ed.*].

It really wasn't that long ago, but I cannot pass an RV without suppressing a shudder. Goose bumps appear, I break out in a cold sweat, and the memory of a weekend forever encapsulated in our family folklore emerges as a reminder that RVs are not for everyone.

It all began when Melissa, our eldest daughter, graduated from high school and opted to enroll at UC Davis. "I have a great idea," announced my wife. This questionable idea, of course, provides the genesis of what

follows. The idea was that we rent an RV and drive to and from Davis "en famille," so to speak. Our family consists of myself (a lawyer whose ambitions for camping or discomfort achieve the highest limits of enthusiastic empathy); my wife (also a lawyer whose spirit of adventure, however limited, exceeds mine, and at the time of this narrative on crutches due to a broken ankle); of course, my daughter Melissa, who was excitedly looking forward to going away to college; my youngest daughter Kendall, then a sophomore in high school who, being a UCLA aspirant, was totally indifferent to her sister's preference for Davis. In addition, we have my mother-in-law, whose unparalleled saving grace in living with us for these 30 years or more is to regard our various family differences with a studied and bemused tolerance, and then go to bed. Lastly, we must not overlook Angus, our Cairn terrier, who will not, or cannot, assimilate commands, but is much loved anyway.

After having triumphantly negotiated the RV rental, I was given the keys and a few instructions, and drove home to load up for the forthcoming journey. Leaving from the parking lot went off without a hitch, and I negotiated the vehicle to the vicinity of our residence without much difficulty. I must hasten to add that prudence dictated this be done when traffic was at its lightest, and I carefully acceded to the dictates of prudence. The major problem arose when I attempted to make a right turn into our driveway. My first attempt obliterated the rose bushes, and my second attempt left me perilously sprawled in the driveway, with the rear of the vehicle protruding midway into the road. I did not attempt a third try. Instead, I ruminated for a few seconds, backed out into the road, drove to a cul-de-sac at the bottom, drove back up the road and made a perfect left turn into our driveway. I then made a Loretta Young entrance into our living room and nonchalantly informed the family to load the vehicle.

We left home late in the evening and headed for our first night rest stop. A reservation had been made and no problems were foreseeable. What was not foreseeable however, was that the space assigned to me was much narrower than our vehicle (or so it seemed). After

two attempts, my wife (rather forcefully, I thought) suggested she park the vehicle. I smiled in a patronizing sort of way, handed her the keys and got out. Of course, she parked with no problem.

My primary job was to connect the electricity and the water, but these efforts were of no avail since the cord and plug from the vehicle did not fit the park connection. When I drew this anomaly to the attention of the park manager, he commented (rather off-handedly I thought), that I needed a "pigtail." I asked, "What is a pigtail?" He replied that all RVs needed one, but fortunately he had just one left, and he could sell it to me for \$25. I purchased it, connected the vehicle, and "Eureka!" we had light.

I encountered the same problem with the water, and by some freak of coincidence, the park manager had one water hose left. He sold this to me for \$15, and we settled down for the night taking comfort with our electricity and water.

The night was not comfortable. My bed was a double slat affair which I had to unfold. Since both sides were at an angle, I naturally slid into the middle, and spent the night lying on some sort of elongated crack. This, coupled with Angus, who spent the entire night racing up and down the RV, did not leave me in the most sanguine of humor when we resumed our trip the following morning.

My wife, in view of her earlier demonstrated driving expertise, suggested she start out the morning drive. I growled my concurrence and off we went. The drive was pleasant enough, until we heard a loud screeching and grinding noise to the right of the vehicle. I looked out saw a most depressing sight, a crying driver, sitting in his imported two-door coupe, gazing into my eyes with a woebegone expression. We made our way to the parking lot of an adjacent shopping center and all trooped out to survey the damage. It didn't take long. Our two-door coupe driver took one look at the RV, and said, "Let's forget it, your damage is worse than mine," and with that, he took off at high speed.

Continued on page 7



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FAMILY ADVENTURE

Continued from page 3

At this point in time, I adopted my superior male demeanor, and advised all and sundry that I would drive the rest of the way. Our journey toward Davis then resumed until suddenly we found ourselves at a toll bridge. In my ignorance, I didn't even know toll roads existed in this area, but I thought, "This isn't the first surprise on this trip – I could easily handle this one." Sensing my apprehension at the narrow approach, the toll collector left his booth and carefully guided me through. For my part, I was most carefully watching the wall on my left side and was most pleased at my skill when all at once (you guessed it), I experienced a loud screeching and grinding noise to the right of the vehicle. Because of the line of traffic to the rear, I had no choice other than to go forward. Once over the bridge, we stopped for a survey and found that both right fenders had gone, and a large gash which had not been there before was now in full and embarrassing view. I can only say our drive to Davis continued in explosive silence.

It was with some relief we pulled in and parked at the facility where I had with foresight made a reservation. After all, I had a pigtail and the correct size water hose, and "nothing could go wrong now," I announced with pride. I cheerfully connected the sewage disposal and my wife prepared to take a shower. A few moments later, she called out and told me the water was rising in the shower and the sink was backing up. All I needed at this stage was a sewage back up, so I raced to the park management to locate a serviceman. After a two-hour wait during which we all, including Angus, filled the time by glaring at each other, and a Sunday service call charge, I was informed that there was absolutely nothing wrong with the system. I had merely neglected to "open the gate." "What gate?" I asked in my innocence, only to be shown a small flap at the rear underside of the vehicle which must be opened in order that the sewage can flow. It was time for a family meeting.

Melissa felt it would serve everyone's best interests if she completed her college check-in by taxi. We all agreed, and after checking Melissa in decided we would return home immediately rather than, under the

circumstances, stay any longer. To do so would only invite further unforeseeable, yet certain, disasters. I did not demur to my wife's suggestion that she drive, and we wended our way to the I-5 South and home.

Things were progressing smoothly. We were cruising at 55 MPH with my wife at the wheel, and I was sitting by a table midway down reading the paper. Without warning, there was a screech of brakes, and I took a swan dive straight through the table, ripped it completely off its hinges, and ended up lying on my stomach in the co-driver's seat next to my wife. She was quite impervious to my predicament and somewhat weakly explained that a car had swerved in front of her and she was merely taking "evasive action."

About 2 hours north of home, and counting the minutes to that delicious time when I could return this self-inflicted torture chamber on wheels whence it came, we all noticed a steady and ever widening swerving from side to side. "Don't worry," I called out with confidence, it's only the wind." Within seconds, a trucker pulled up alongside and with a panic-stricken look on his face, motioned us to stop. We did, and to our chagrin, disgust, hysteria or whatever, found ourselves faced with a flat tire, right side rear. We limped along to a service station, installed the spare, and arrived home very late at night and very tired.

The next morning, I returned the RV to the dealer who, after having inspected the vehicle, commented that I had "returned less than I had rented." I fought hard and succeeded in making no response.

Over the years, the family in toto (with my exception) found the trip a laugh – not a big one, true, but nevertheless a laugh. I've never been able to find much humor in it, and simply ask, wouldn't it have been better if Melissa had chosen a college a little closer to home?

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AB INITIO: MORE FROM DICK HANAWALT

In February **CITATIONS** introduced the first of many reflections on Ventura County and the practice of law here from Richard Hanawalt, a criminal defense attorney who got his start as an assistant D.A. before switching to his current criminal defense focus 36 years ago. When **Wendy Lascher** and **Al Vargas** interviewed Hanawalt, one of his most fascinating recollections described a burglary allegedly set up by police in 1968 in which an informant's life was threatened, an incident that prompted Hanawalt to seek the removal of then-Ventura Police Chief David Geary, who resigned in 1971 after a grand jury investigation into other claims of police misconduct.

Richard Hanawalt:...[in] '68, our police chief at that time was talking in the squad room, noting from reports in Los Angeles that burglaries died out wherever anybody was caught and shot in the course of a burglary.

And the only reason I know this was [that] the chief of police had a practice [that], if anybody went out looking for another job, and if that agency called back, or wrote back, they would end up getting a really nasty letter from the chief about the performance of that individual.

One of the detectives, Roy Peebles, happened to come to me with some other problems about three years later. He had tried to hire on with U.S. Customs and the same thing happened to him. Customs got a nasty letter from the Chief of Police. One of the other detectives tried to hire on somewhere else and also got a nasty letter. Finally he went out to Watertown, New York, to get a different job and sure enough he told them in advance, "You're gonna get a nasty letter from the police chief." And they did, but they hired him anyway.

V.P.D. morale was down and employees were grousing. There was a rumble around that the chief was not liked. We felt this in the D.A.'s office.

Al Vargas: **Dan Palay** would have loved that case.

RH: By 1970 I ended up with a detective (new client) telling me about this. What it amounts to is the chief was telling the detectives to set up a snitch to lure a "dirtier" snitch to do a residential burglary.

One snitch, Leon, was a bartender at the Ban-Dar [a now demolished bar in Midtown Ventura]. He came to me for some other problem. And he said "Ricky, yeah, they told me to set him up with this residence on the hill on Skyline, just off of Foothill Blvd. And they wanted me to tell him that the guy had a coin collection in the house and to get him on a certain night – the family was going to be away – and it would be a perfect time for 'Dickyboy' to hit the place."

"Dicky" was a heroin addict at the time. In the subsequent years I had come to know him in Ventura. He came to my office, higher than a kite on heroin and I asked him: "Do you recall such-and-such up on the hill? They tell me that you had your car on Poli with your trunk lid up in the air as if you were repairing a bad tire and that you sneaked up the hillside." And, as you know, the hillside is very steep.

He related to me that when he got inside the house, he sensed something was wrong and ran out, but in the process, about 50 bullets were flying in the air. The garden gate was demolished. A public defender named **Ed Drake**, happened to be in the cul-de-sac.

Wendy Lascher: Oh **Ed Drake**, **V. Edward Drake**.

RH: V. Edward – that's right. Well put, I had forgotten.

RH: He happened to be living right across the street in this cul-de-sac. He said it was a war zone, when the police started shooting.

WCL: He lived there?

RH: Yeah, no, not at the target house. The house that was – you could see it as your drove down below – you could see this big American flag in the back yard. The guy was a real right-winger, loved police and he was a natural for the chief to have selected

as the unknowing "victim" volunteering the evacuation of his house in order to help law-enforcement on a "very important project."

AV: They were setting him up...

RH: ...they were setting him up. You got it.

AV: Not setting him up, they were executing him.

RH: Well not – the land owner, oh what was his name? I know they ultimately had all four of our pictures in the newspaper side-by-side [see "Four Weeks to Pack Up," Ventura County Star- Free Press, Aug. 28, 1971]. The "victims" were both "Dicky" and the homeowner.

...[the police were] having one snitch set up another snitch, so the police could nail the other snitch as he came out of or went into the house. And the owner of the house was told that "something was going to be happening, he should leave – take the family, including the dogs. Go to a movie or something-or-other."

Later that night he and his family came back to the house. The walls were coated with fingerprint dust and the furniture was in total disarray, but of course the police knew who the guy was all along.

[The set-up burglar] raced out down the hill with police shooting all over the place. None of the bullets got him. He was zigzagging down the hill.

Guess where he resided? He resided in one of the cabins behind the Ban-Dar. Later that night the police came down and arrested him, knowing full well the project had failed.

And the following week, the case was dismissed by a young, new deputy called Michael Bradbury [*Editor's note: Bradbury was elected as District Attorney in the late 1970s*]. He was the one who apparently smelled a rat and ended up dismissing the case. So the case never went to trial. Dicky was turned loose. The entire incident was "forgotten" until the homeowner, in 1970, hired me to file a lawsuit, after I had left the D.A.'s Office.

WCL: What happened to the police chief?

RH: I was now in private practice. So I was a natural for a lot of oddball-type actions. But, this was my second action against a public entity and I wasn't too keen about it.

WCL: So okay, you filed a claim against the city.

RH: It was delightful – filing claims; you could “give wings to your imagination...”

WCL: So you filed a claim on behalf of this guy who lived in the cabin behind the Ban-Dar?

RH: No, initially I filed a claim for the landowner up there who had had his house ransacked and shot up by the police.

WCL: Oh, I thought that guy was the good guy who was cooperative.

RH: He was, but he wasn't after he found out what I had to tell him. And then he realized that he had been taken. Because you don't splash fingerprint powder all over the place that required repainting the house when you already know who the guy is. So he began to realize that he had been had by the police.

And then – you know it's interesting, because I filed two claims. One was on behalf of the homeowner. But my second action was in favor of “Dicky” who was about to be shot. The tweaker, as it were. He was off the dope by 1973 and now aware of his close call and wanting monetary retribution.

But the filing of the claims raised a lot of hassles. Interestingly enough, historically, grand jury investigations are limited to counties only, but I had just read the Los Angeles Daily Journal that the Los Angeles grand jury was investigating a City of Los Angeles problem.

It occurred to me this may be part and parcel of our answer: A grand jury or state attorney general investigation was just the ticket. The banter was picked up and I kept hearing, just from gossip, I hadn't seen or talked to him in years, city officials said [former County Counsel and later Court of Appeal Justice Herbert Ashby] was one of several people who stimulated the State Attorney General to investigate the case.

A state agent set up an office in the Shell Building and over a period of three months he interviewed all sorts of people. I thought the thing had kinda disappeared, but I had a full 180 days to file the actions.

Lo and behold, bingo, out on a certain day in '71 [Dec. 21], The Star-Free Press reported “Chief Geary Resigns, Detective Fired” and the whole thing hit the fan in one day. And Geary left the county. He went to teach in some school in Wisconsin and that's the last we ever heard of him.

They had all four of our pictures. Me, Roy Peebles, William Wilcox [the homeowner] and the Chief of Police David Patrick Geary. And, it goes without saying, we settled the case with the insurance companies and the two complaints were never filed. A Ventura Police detective told me it was the first time in years he could “whistle on his way to work.”

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In May 2009 the Ventura Superior Court announced the establishment of a dedicated Elder Abuse Court calendar. All criminal elder abuse matters filed under Penal Code Section 368 except trials and preliminary hearings are heard every Wednesday at 10 am in Courtroom 37 with Judge **Colleen Toy White** presiding. This pilot project is an innovative approach to adjudicating complex matters of elder abuse. Ventura is one of only three courts in California with a dedicated elder abuse calendar.

What Constitutes Elder Abuse?

Elder abuse includes neglect, exploitation and harmful physical or psychological mistreatment of anyone who is 65 or older. Cases heard in this program include financial abuse, physical violence, psychological abuse, abandonment, abduction, false imprisonment, or caregiver mistreatment. Elder abuse includes acts of domestic violence in marital, dating, or caregiving relationships. Elder abuse can include senior-on-senior crimes.

If the victim of a crime is 65 years old or older, the convicted abuser faces additional criminal and civil penalties under California law.

Cases involving financial matters are the ones heard most often in Courtroom 37, representing 33 percent of all the elder abuse cases. Financial abuse includes various forms of the unlawful taking of an older person's money or property, including grand theft, fraud or identity theft. Financial scams that target vulnerable seniors include fake lottery or contest winnings, investment, banking, real estate thefts and personal loan scams.

Why A Specialized Calendar?

Ventura's elder abuse calendar is one step toward addressing the expected growth in the number of cases involving older adults that will increase as our population ages. The first

VENTURA COUNTY PIONEERS ELDER ABUSE COURTS

By Hon. Colleen Toy White

baby boomers begin turning 65 years old in 2011 and boomers are 25 percent of the US population. The number of people 85 or older increased by 38 percent from 1990 to 2000, and 100 year-olds increased by 34 percent. The prevalence of dementia – which includes Alzheimer's disease – is estimated to be as high as 50 percent in people 85 years or older.

Hearing criminal elder abuse cases in a designated courtroom with an assigned Elder Abuse Court team creates more opportunities for efficient case resolutions. The team is comprised of a judge, deputy district attorney, District Attorney Victim Services Advocate, deputy public defender and Probation Department representative. A Ventura County Public Health nurse currently assigned to this court can provide outreach health assessment services for seniors in appropriate cases. (In time, the Elder Abuse Court team will expand the use of community-based service providers who will assist elders as needed.)

Abuse By Caregivers

Abuse by caregivers against elders is the most frequent type of elder abuse in the community, but these abuses are often not reported, or reported by someone other than the elder victims. Such cases are complicated by relationship and dependency factors. Most abused elders know their abusers because the abuser often is a family member. Abused elders may be directly or indirectly, physically or psychologically, dependent on their abuser for companionship or caregiving. Abused elders may suffer from early stages of dementia, and have impaired judgment and memory loss from Alzheimer's disease and other related disorders. In some cases both the victim and the defendant are impaired in some way.

A 92-year-old elder victim of abuse is the caregiver of an 86 year old friend defendant.

The 86-year-old defendant accessed the 92-year-old victim's credit card and charged \$65,000 in services and cash. The defendant had severe dementia and the victim in this case was the defendant's primary caregiver for years. The victim's and the defendant's families assisted in the resolution of the case. The victim was opposed to the prosecution of defendant but no longer wanted to be the defendant's caregiver.

The court granted the parties' request for time to resolve the matters. The families of the victim and defendant were unaware of the severity of the problems experienced by the elders in this case until the case was filed. The court team organized several family members who traveled from out of the county to participate in the disposition of the matter and assist in the care plan of the victim and defendant.

An elder parent may have provided lifelong care for an adult child with chronic mental illness, a disabling psychological disorder, or a drug and alcohol addiction problem. Over the years as the parent ages and begins to suffer from a disability or impairment, he or she can start to rely on their impaired adult child for their own care as well. These impaired adult children evolve into their elderly parent's caregivers and sometimes can become financially, psychologically or even physically abusive to their elderly parents. Cases involving elders and dependent adults in mutually dependent relationships can benefit from expert evaluations and community based service providers to assist in the court resolution process.

Disabled and dependent adult attacks his conservator who is his elderly father.

The 51-year-old defendant physically attacks his 75-year-old elderly father. The defendant is a dependent adult and suffers from a disabling head injury from a motorcycle accident 10 years ago. He attacked his elderly father with a club in an argument over obtaining more money to buy street drugs. The defendant's father has been his conservator since the accident and they reside together. The defendant suffers from severe cognitive impairment, episodic angry and violent outbursts when he uses street drugs. The elderly victim strongly opposed and objected to any criminal action taken against his son even though the risk of serious injury and even death was a consideration in this case. The elderly victim wrote a letter of opposition to the proceedings for the court to consider.

In cases where isolated elders have undiagnosed dementia they are at risk for elder abuse and victimization. Persons in the early stages of dementia may have questionable legal capacity and if left unprotected are especially vulnerable to financial abuses by their caregivers and others. Scam artists will relentlessly prey on

isolated elder victims using telephone, internet or in person solicitations to engage the elderly in fraudulent services or financial investment schemes.

Historically, elder abuse is frequently unreported, especially if the victim is impaired or the perpetrator is a trusted friend or a family caregiver or the elder's adult child. A survey of people 65 or older was conducted by the Ventura Area Agency on Aging and the Ventura County Superior Court to assist in identifying the community legal issues and concerns. It found that 14 percent of the responders had been victimized by crime in the last five years. Thirty-eight percent of the victims did not even attempt to report the crime to the police.

Abusive neglectful caregiver daughter and her dependent memory-impaired mother.

The court had to remand an abusive caregiving daughter who violated the terms of her probation when she moved out of the county. The defendant continued to neglect her dependent mother. A coordinated effort was made by the elder court team to provide an alternative care plan for the 91-year-old cognitively-impaired victim who was attending a court hearing the day her daughter was led to jail. The elder abuse centered on neglect (malnourished and dehydrated victim found covered in own feces, maggots, bedsores). The matter was reported to Adult Protective Services but the victim refused APS service and repeatedly expressed fear of being separated from her daughter, her abusive caregiver. The only person the elder had allowed to provide for her care was her impaired daughter who had a history of mental illness. The victim was fearful of being separated from her daughter and placed in a residential care facility or nursing home. Fortunately alternative plans for her care were arranged so that the victim's grandson from out of state could provide care for his grandmother.

All types of elder abuses are unreported but the most frequent may be financial abuse. Even with the problem of under reporting the number of financial elder abuse, cases have increased every year for several years for both the Ventura County Adult Protective Services and the District Attorney's office.

Establishing an Elder Abuse Court calendar is an initial step taken by the Ventura County Superior Court to improve court practices today and in the future. By consolidating elder abuse cases in one courtroom, the court can provide an efficient and effective approach to adjudicating these difficult matters.



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LOCAL CONSERVATORSHIP RULES CHANGED

By Cheri Kurman

Effective July 1, Ventura County Superior Court Local Rule 10.02 was changed to require the completion of a Conservatorship Care Plan. The change incorporates the requirements of Probate Code section 2352.5 and the General Plan (found under the old local rules) into one document. The Conservatorship Care Plan is a local form (VN233). The Conservatorship Care Plan must be filed within 60 days after appointment, rather than the 90 days required under the old General Plan.

There is also a new mandatory Judicial Council Form for the Order Appointing Probate Conservator. The form is Attachment 29, Other Orders, and sets the dates the Conservatorship Care Plan, Inventory and Appraisal, First Account and Report and Petition for Its Settlement, and First Annual Status Report must all be filed. The Attachment also calendars the hearing date for the First Account and Report and Petition for Its Settlement, as well as hearing dates for the other pleadings in the event they are not timely filed. This Attachment is also a local form (VN232).

Both local forms can be found at <http://www.ventura.courts.ca.gov/localforms.htm>. For more information, please contact **Cheri Kurman** at ckurman@normandowler.com.



Cheri L. Kurman is a certified specialist in estate planning, probate & trust law and a partner at Ventura-based Norman Dowler.

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WHAT'S THE MEANING OF "MEANINGFUL USE?"

By Karen Darnall

"To err is human, but to really foul things up you need a computer." - Paul Ehrlich

Early this year when healthcare reform was the subject of noisy town hall meetings, the federal government was quietly promulgating laws to promote electronic health records (EHR). Little-known rules (that have nothing to do with healthcare coverage) will forever shape the way clinical data is collected and the way doctors relate to their patients.

The Department of Health and Human Services (HHS) has devised a *carrot-and-stick* strategy to motivate doctors to put down their note pads and use computer keyboards instead.

What Is the Carrot?

Last year Congress passed the American Recovery and Reinvestment Act of 2009. Better known as the Stimulus Act, it authorized a budget of \$27 billion to improve "health care, quality, safety and efficiency" through the Health Information Technology for Economic and Clinical Health (HITECH) Act (Title VIII).

On July 28th, 2010, HHS published *meaningful use* (MU) rules to help *eligible professionals* (mostly hospitals and doctors) purchase new EHR systems.

Next year Medicare will start paying bonuses of \$44,000 (spread over 5 years) to MU-qualified doctors. Medi-Cal providers will get \$21,250 to purchase EHR systems plus \$8,500 per year up to \$63,750 over six years. Hospital incentive payments are based on the volume of Medicare, Medi-Cal and charity patients plus other factors. Mid-size hospitals may qualify for \$6-7 million and large hospitals may receive up to \$11 million.

Health-IT vendors expect to profit from the HITECH Act and are eagerly waiting for HHS to publish *Certification* rules for EHR *Modules*.

What Is the Stick?

After 2015, professionals who decline MU systems will see their Medicare reimbursements incrementally reduced. The penalty for non-

adopters starts at 1 percent and rises 1 percent each year to a maximum 5 percent penalty in 2019. Hospitalist and Medi-Cal doctors are not subject to reductions in Medi-Cal reimbursement but they will be subject to reductions in Medicare reimbursements.

Rural areas may lack important resources such as IT consultants and sufficient bandwidth to support MU compliance. Some country doctors have already sold their practices to hospital groups as a prelude to early retirement. HHS has authority to exempt noncompliant providers for hardship, on a case-by-case basis, but the exemption is subject to annual renewal and is limited to 5 years.

What Does MU Require?

Last January when HHS published initial rules, hundreds of stakeholders complained that MU would be unachievable for most providers. Consequently, HHS relaxed the rules and took a gradual, three-stage approach to meeting its goals. Stage I specifies 15 *Core* objectives, plus each provider must choose another 5 procedures from a *Menu set* of 10 objectives specified by Medicare.

Stage I *Core* objectives requires doctors to use computerized provider order entry (CPOE) systems and e-prescribing systems; they must enter specific data required by CMS and state agencies; they must be able to provide copies of EHR to patients upon request and record clinical summaries for each office visit and send alerts for drug interactions and be capable of up dating problem lists, diagnoses, medication lists, allergy lists and changes in vital signs (including automatic calculation of BMI); they must record demographic data and smoking status; they must be able to incorporate lab results and be able to designate clinical data to exchange with medical providers (and other patient-authorized entities). Also, each EHR system must be able to implement "at least one clinical decision support rule" and be able to protect electronic health information.

What Does MU Mean to Patients?

Some people are troubled by HHS's decision to calculate everyone's body mass index (BMI) because it smacks of government meddling.

But collecting such data is probably not a civil rights violation. Calculations are what computers do best. Besides, MU rules do not specify how often patients must get weighed.

Some people are annoyed by questions about their smoking status. But knowing that *fewer than 100 cigarettes in one's lifetime* is the MU rule that defines a person who *never smoked* — could help some people report their status truthfully.

Some people are already accustomed to seeing EHR data entered on laptops during office visits. A few tech-savvy doctors already use large-screen monitors to display radiologic images to patients.

Some doctors have purchased iPads to show patients how to browse the web for appropriate information on their condition. EHR has instructional value (especially for computer geeks).

Large medical groups like Kaiser, and many pharmacies, are already emailing messages to their patients. Some facilities allow patients to view lab results on line.

What About Confidentially?

Creating rules for exchanging EHR between providers and entities will be very tricky indeed. HITECH has budgeted \$564 million to help states "rapidly build capacity for exchanging EHR." But California, unfortunately, is a lumbering giant.

For 30 years, California's Confidentiality of Medical Information Act (CMIA) has allowed providers and health plans to disclose certain health information without obtaining signed consent. Since 2003, state lawmakers have made an effort to harmonize CMIA with the federal HIPAA Privacy Act but this job is unfinished. Adding HITECH objectives to the mix will increase uncertainty about federal pre-emption.

HHS has designated a *Tiger Team* to recommend policies to protect privacy and security. Patient consent for disclosing sensitive information (such as HIV status and substance abuse treatment) is a current topic of debate. Chairman Deven McGraw

recently said, “We want to honor patient preferences from the policy perspective and determine if technology supports it.”

Although it is feasible to isolate highly sensitive data, there is substantial risk that unauthorized disclosures will occur when electronic data is shared with foreign EHR systems. HIPAA has standards for encrypting personal health information (PHI) but *Tiger Team* Co-chair Paul Egerman calls such protections “leaky.” To clarify the group’s mission, Egerman offered an analogy: “Imagine you were standing by a highway and saw an ambulance pass. That’s interesting, but you don’t know anything about the person in it, so it has nothing to do with PHI. But if the patient’s name is written on the outside of the ambulance, then you know something about them.”

What About Errors?

Purging EHR is problematic because, thus far, HHS has no rules to cover such procedures. (The *Tiger Team* is scheduled to vote on a series of policies in September.)

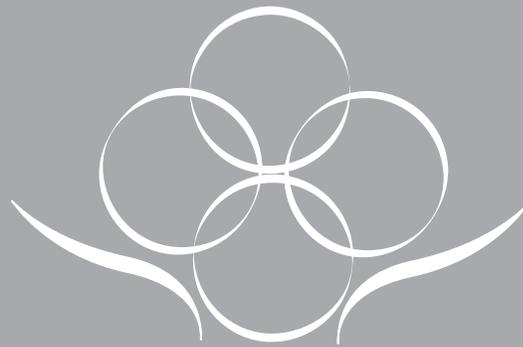
California’s CMIA gives patients the right to write an Addendum (limited to 250 words) that must be placed in the patient’s medical chart. The advantage of this remedy is that no provider can refuse to record the patient’s Addendum even if the provider strongly disagrees with the patient’s version of the facts.

Federal HIPAA gives patients the right to seek changes to PHI as long as the provider maintains such records. If PHI is sent through a network, the provider must make reasonable efforts to promptly contact everyone identified by the patient, and the provider must also investigate the audit trail to track additional recipients. For now, we must accept the bitter with the sweet. EHR has indelibly changed the medical landscape. Expect a bumpy ride while MU reveals new horizons.



Karen Darnall practices health care and civil litigation in Camarillo. She is a member of the CITATIONS editorial board.

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SOMETIMES THE GOVERNMENT DOES THE RIGHT THING

By Lou Vigorita

The Social Security Administration has had a compassionate allowance for people with any of 50 different conditions. They are eligible for medical coverage under Medicare without having to be 65 years old or having to comply with the mandatory two-year wait after becoming eligible for Social Security disability insurance. Compassionate allowances are a way of quickly identifying diseases and other medical conditions that clearly qualify for Social Security and Supplemental Security Income disability benefits. It allows the agency to electronically target and make speedy decisions for the most obviously disabled individuals.

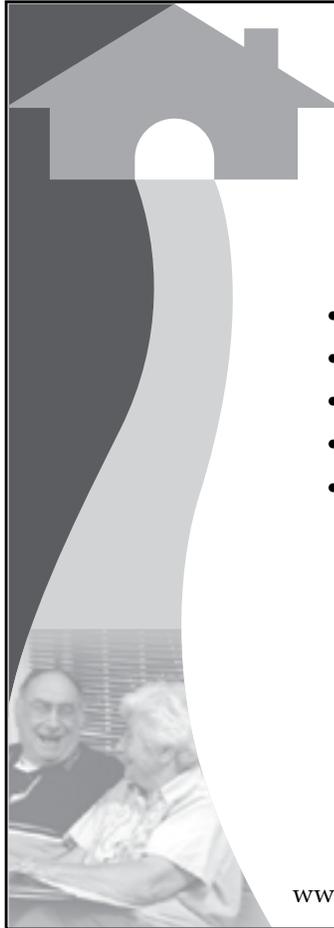
Recently, Commissioner of Social Security Michael J. Astrue announced that the agency is adding 38 more conditions to its list of Compassionate Allowances, the first expansion since the original list of was announced in October 2008.

The new conditions range from adult brain disorders to rare diseases that primarily affect children. Commissioner Astrue said that the expanded list will allow tens of thousands of Americans with devastating disabilities to get approved for benefits "in a matter of days rather than months and years." This program is being hailed as "truly innovative" by Peter L. Saltonstall, President and CEO of the National Organization for Rare Disorders (NORD). For example, people with early onset Alzheimer's are immediately eligible for Medicare now. Previously, legislation to provide for early onset Alzheimer's was defeated in Congress. Now, some patients as young as 50 are eligible for immediate Medicare coverage as of March 1, 2010.

The original 50 conditions are listed at <http://www.ssa.gov/compassionateallowances/conditions.htm>. The 38 new conditions are listed at <http://www.ssa.gov/compassionateallowances/newconditions.htm>.



Lou Vigorita practices Social Security and workers compensation law in Ventura. He is also a member of CITATIONS' editorial board.



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- ❑ Attended the Straus Institute for Dispute Resolution, Pepperdine School of Law

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LRIS TODAY

By Alejandra Varela-Guerra

The Lawyer Referral and Information Service is a community-based program which serves as a conduit, connecting the public with qualified, experienced attorneys who specialize in particular areas of the law. Depending on the nature of the client's situation, LRIS staff can arrange for an initial consultation with a participating LRIS member who specializes in the appropriate area of legal need. For instance, if a potential client calls the LRIS for a divorce, LRIS staff will schedule a half-hour consultation with an experienced family law attorney.

With 90 attorneys in 21 different areas of law, the LRIS is able, in most cases, to assist members of the community with an attorney experienced with their legal problem. In 2009, the LRIS made 3,226 referrals to people in the community.

So the next time you receive a request for services you are not in a position to provide, remember the LRIS, the reliable referral.

If you are an attorney who is interested in joining the LRIS, please contact Alex at (805) 650-7599 or via e-mail at alex@vcba.org. Attorneys are needed in various areas of law and Spanish-speaking attorneys are needed in all areas.



Alejandra Varela-Guerra is the Client Relations Manager at the Ventura County Bar Association.

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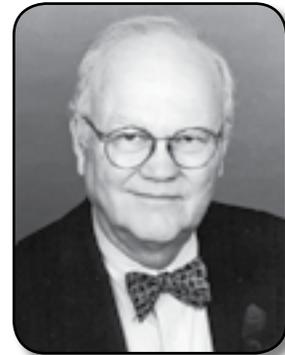
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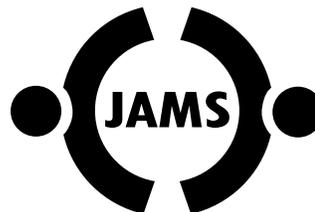
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The Thousand Oaks Law Office of **Robert M. Triplett** is pleased to announce that attorney **Jeanne L. O'Brien** has joined the firm. A native New Englander and graduate of Vermont Law School, O'Brien brings almost 25 years of law practice experience, and is admitted in Hawaii as well as in California. 223 E. Thousand Oaks Blvd., Suite 320, Thousand Oaks, California 91360. (805) 496-4681.

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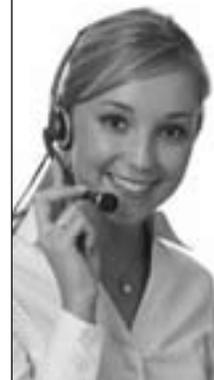
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UCLA LAW DEAN MORAN TO HIGHLIGHT MABA DINNER

By Jessica Arciniega

The Ventura County Mexican American Bar Association (VC MABA) hosts its annual scholarship dinner on Friday, Oct. 29 at 6 p.m. at the Courtyard Marriott Hotel in Oxnard. Tickets are on sale for \$50 per person.

Keynote Speaker Is UCLA Law's New Dean

VC MABA is proud to announce this year's keynote speaker, Rachel F. Moran, dean-designate at the UCLA School of Law and formerly a Boalt Hall law professor. Moran will be the first Latina dean of a top-ranked U.S. law school. Moran, who teaches torts, education law, and race and the law, will assume the role of dean and professor of law on October 15.

Moran served as president of the Association of American Law Schools in 2009. She has published and lectured extensively on education law and policy, family law, and civil rights and antidiscrimination law. Following her undergraduate education at Stanford and law school at Yale, Moran clerked for Chief Judge Wilfred Feinberg of the U.S. Court of Appeals for the 2nd Circuit.

"The selection of Rachel Moran as the next dean of UCLA School of Law is a great triumph for our law school," said Stephen C. Yeazell, UCLA Law's interim dean. "Rachel Moran is a respected and accomplished legal scholar, an excellent and dedicated teacher and a terrific institution builder."

Judge Conroy to Be Honored

This year's dinner will honor Judge **Gay Conroy** with the Access to Justice Award. Members of MABA recognize Judge Conroy for her leadership in establishing the Family Law Self-Help Center, among her many achievements, and her commitment to all litigants having access to the legal system.

MABA Scholarships

The annual dinner raises money to provide scholarships to students pursuing a career in the legal field. This year, VCMABA expects to award four \$1,000-dollar scholarships.

VC MABA has existed for over 30 years. Membership is comprised of attorneys who practice in a wide variety of fields, law students and community members. VC MABA is committed to the advancement of the legal profession and the empowerment of the Latino community through advocacy and the promotion of equal justice.

For information about scholarship applications, how to donate to the scholarship fund, or to purchase tickets, contact **Jessica Arciniega** at (805)988-0285.

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LINDSAY F. NIELSON
Attorney at Law

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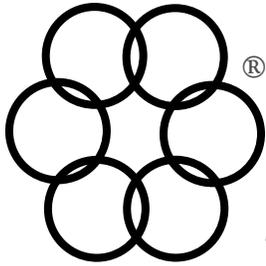
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Tel. (805) 485-2700
Fax (805) 485-2751

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- *Bilingual (English & Spanish)
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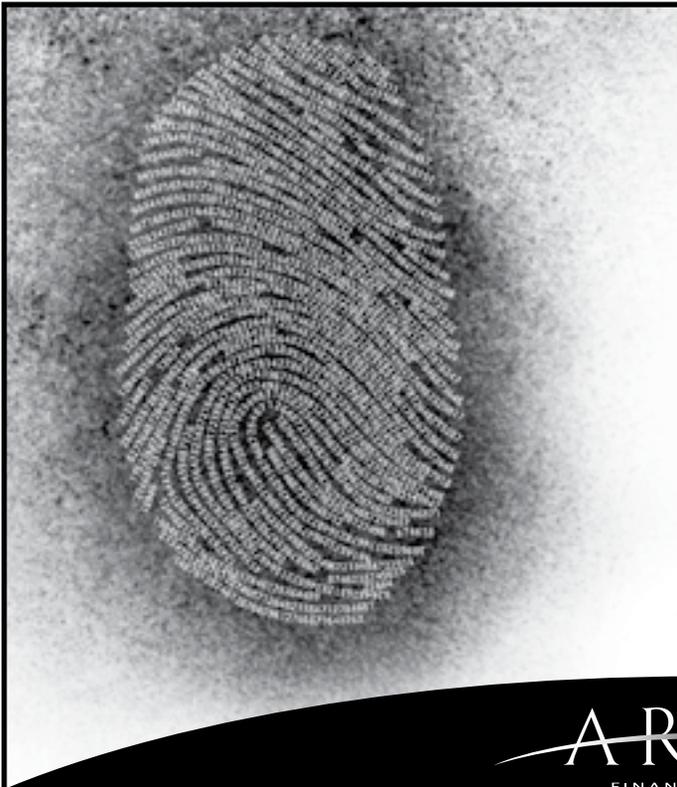
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LOST WILL

Last Will and Testament of James Yee - The Law Office of Hilary Shankin is seeking information from any attorney who might have worked on the Last Will and Testament of James Yee. Mr. Yee was a resident of Oxnard who appears to have died intestate. His family has retained the Law Office of Hilary Shankin to handle the probate of this estate. If you have any information on this matter please contact Ms. Hilary Shankin or her paralegal at (805) 650-7847.

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It was a conspiracy of miraculous proportions. A coalition of ex-compadres. They went ahead without my permission. I knew it would go south immediately and crudely. So far, my photo, circa 1976, has been likened in dozens of ways and none of them flattering. My favorites include Ted Kaczynski (for those of you too lazy to Google, he's the Unibomber); a Doobie Brother (although I don't know if they were referring to the band or Mary Jane); a Buttfacer (the most accurate so far); Jeremiah Johnson (an unattractive one, not the Robert Redford one); a Caveman of some sort (considering I hadn't showered in days, I can see that one); a cross between the Unibomber and Santa (don't quite get the Santa part unless my belly was being assumed); and a labor law lawyer thought it humorous that it was unlikely I could pass a urine test. The picture of me at a base camp in the High Sierras also produced an array of photoshopped soft porn including J Lo and some stranger with a pony-tail named Tiffany. The good news? They could actually raise some serious coin for the VLSP, Inc., which is the reason I'm playing. 200 people generates \$10,000. I'm hoping for 300 friends to drop by the Tower Club and \$15,000 goes to an Award Winning community service. The question remains. Will I be in attendance?...

The **Ben E. Nordman** Public Service Award will be presented during the bar's Annual Installation and Awards Banquet November 20. You still have a brief window to submit a Nomination Form (they are due 9.10) and can easily be found at www.vcba.org. Last year's recipient, **Bob Huber**, is campaigning for Mayor of Simi Valley. The 1997 recipient? **Carmen Ramirez** is running for the Oxnard City Council...Video of the Month: www.metacafe.com "A World

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

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

Without Lawyers"...Ventura lawyer, **John Parker**, has his Letter to the Editor published in the July California Lawyer regarding the legalization of Mary Jane...

From **Lisa Spillman**: "FYI, I just read the book "Making Your Case" by USSC Justice Antonin Scalia and Bryan Garner and came across a quote from the late Ventura attorney **Ed Lascher** (p.166), "It is a pleasingly brief and ritualistic touch to open with 'May it please the Court'; it is a crashingly boring waste of time to describe sycophantically how happy counsel is to be there."...Recommended reading of the month: *The Autobiography of an Execution*. By David R. Dow. The University of Houston Distinguished Professor and Yale law school graduate is an appellate attorney who has represented more than 100 death row inmates...**Jon Light** has published an article for the May/June edition of *CA Employer* entitled, "Cheech & Chong Need Not Apply."... A to Z firm will be celebrating its 20th Anniversary 9.2

Barristers' Treasurer **John Negley** climbed to the top of Mt. Whitney, 14,500 ft., on Father's Day weekend with his 10-year-old son Matthew and his 60-years-young mother. The three generations of Negleys used ice axes and crampons to reach the top in unseasonably high snow fall. They climbed from 3:00 a.m. until 9:30 p.m. – 18 1/2 hours to reach the highest point in the continental U.S....Movie Quote of the Month: Frank: "Your Honor, ladies and gentleman, this is irrefutable evidence that the defendant is, in fact, lying. Judge: "This is a preliminary hearing. There is no defendant. There is no jury. It's just me. Son, what in the hell is wrong with you?" From Frank Abagnale (Leonardo DiCaprio) tries his hand at lawyering in *Catch Me If You Can* (2002)...On August 1, at Paradise Cove beach in Malibu, **Matt LaVere** asked his girlfriend, Alicia Monturano, to marry him. They met randomly at a club in Las Vegas last year. She resided in New Jersey, but they hit it off and did the bi-coastal commute for 6 months. She said yes and has moved to Ventura...

License Plate of the Month: JUV♥LAW on a late model Honda Accord piloted by Inn of

Court board member **Deborah Jurgensen**... These people live among us! A New Jersey couple who gave their children Nazi-inspired names should not regain custody of them, a state appeals court ruled August 5, citing the parents' own disabilities and the risk of serious injury to their children. The state removed Heath and Deborah Campbell's three small children from their home in January 2009. A month earlier, the family drew attention when a supermarket refused to decorate a birthday cake for their son, Adolf Hitler Campbell. He and siblings Joycelynn Aryan Nation Campbell and Honszlynn Hinler Jeannie Campbell have been in foster care. Oh, BTW, Heath Campbell, 37, cannot read and Deborah Campbell dropped out of high school before finishing the 10th grade. BTW #2, a Wal-Mart in Pennsylvania wound up decorating the cake...**Brian Nomi** is a new papa. Baby Mathew was born at 1:21 p.m. August 4. He weighs seven pounds, six ounces. His wife, Dream, doing great and Brian reports Matthew "eating and peeing just fine."...

The Ventura Superior Court's local rules were revised effective July 1. They may be viewed at www.ventura.ca.gov...Some happenings at the VC PD office you may not be aware of – **Howard Asher** was appointed Assistant PD in May. **Monica Cummins** was appointed Chief Deputy PD in July...Wanna box? I'm trying to find an opponent for **Dean Hazard**, who's been training for three-plus years at Ventura's KO Boxing Club. He spars once a week and trains once a week and ready for a sanctioned fight. Problem is, you have to fight someone within 5 years of either side of your age. Dean's Bar # is 105794 and can be reached at 981.8555...

Steve Henderson has been the executive director and chief executive officer of the bar association and its affiliated organizations since November 1990. He will be celebrating his 45th year on this earth 9.17 and is accepting Chimay Ale, Red Stripe, Fosters, or Pacifico. Better yet, donate a buck or ten to the vcba vls, inc. And finally Henderson will be in the Big Apple viewing the "Yanks and the Sox" 9.25. Henderson may be reached at stevehend@vcba.org, Twitter at [stevehendo1](https://twitter.com/stevehendo1), FB, LinkedIn, or preferable 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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