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VCBA MISSION STATEMENT
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

NOVEMBER – TWO THOUSAND TEN

NORDMAN AWARD GOES TO MARK O. HIEPLER

By Michael L. McQueen *Page 16*

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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

PRESIDENT'S COLUMN

By Kendall VanConas

Over the course of my year as bar president, I have had the pleasure of attending many different bar events sponsored by various bar sections, affiliates or partners. The good thing about these functions is that many times alcohol is served. Please don't misunderstand: I would be just as pleased to attend these functions if they were dry events, but after a glass of wine, people tend to relax, the "masks" we wear every day sometimes come off, and the conversation veers away from purely professional and leans toward carefree and . . . well, sometimes bawdy.

It was during one of those conversations that I got the idea for this article, when another attorney and I were swapping stories about some of our less-than-stellar experiences: ignorant or 'green' mistakes, embarrassing court appearances, etc. You know – and most definitely have – one or two of those yourself. I decided to reach out to my friends, family and colleagues, and ask if they would be willing to share with me some self-deprecating humor, a memorable court experience, or one of their "green stories." Several of you did, and for that, I thank you. Unfortunately, space doesn't allow me to share every story submitted (or my own), but you can read more on the VCBA blog at vcba.org.

Wardrobe Malfunctions

One day I appeared in a busy courtroom in Simi: I think Judge Hadden was presiding. I was standing at the podium arguing a demurrer and leaned over to get my file out of my brief case when the button on the back of my skirt blew out, and then the zipper started to quickly come down as well. I almost had a coronary knowing there were a good 20 lawyers directly behind me and I was on the brink of indecent exposure. At that point, I had to drop the file and pin my arms against my sides to keep the skirt from falling down. So, I argued the demurrer without moving and without my notes. Judge Hadden then ruled and looked at me strangely as I took no notes on the ruling. Getting out of court was a major challenge, but I somehow managed to pick up my files and meander out without incident. *(**Linda Ash**, Assistant County Counsel)*

The second time I sat pro tem for Judge Reiser, I noticed a robe hanging in the closet with great silver clasps on the outside. Thinking Judge Reiser had left the cool robe just for me, I put it on and took my seat on the bench. It was a long session, and I called a recess to give the staff a break and to give some of the hotter heads in the court room a chance to cool down. As I stood up and turned my back on the court room, the bailiff hurried over to walk close behind me. He chuckled as we walked lock sync back to chambers, and he pointed out I had the robe on inside out, with the big block inside label prominently displayed outside for all to see. I turned the robe right side out–but those shiny snaps sure looked good for a while. *(**Loye Barton**, Norman Dowler)*

It wasn't my first court appearance, but I did give closing argument with my pants split up the back, which I discovered when I got back to my hotel; I also gave a closing with red dots all over my shirt from a leaky pen. *(**Jon Light**, Nordman Cormany Hair & Compton)*

Did I Just Say That Out Loud?

When my boys were small, Ed and I decided to take them to a Dodgers game. As I had a Ninth Circuit appearance in Pasadena, we decided to stay in a hotel, let the boys watch me in court, and then go to the game.

Sometime on the trip (don't recall if it was in the car or at dinner), one of my children sarcastically asked "So?" (as in "so what?") in the way only a kid can do, in response to something either Ed or I told him. Both of us jumped on him about how disrespectful that was.

The next morning I argued what I thought was a fairly simple appeal from a Rule 12(b)(6) dismissal. One of the judges asked me a challenging question, and "So?" popped out of my mouth. I immediately apologized and carried on with the argument, but my children have never let me forget. *(**Wendy Lascher**, Lascher & Lascher)*

My First Time

My first Nordman appearance was in 1985, a four year lawyer fresh out of Big Firm Los Angeles. My appearance was in front of Judge Willard, the stalwart of the probate bench for a million years. I was in a real estate dispute and a motion to compel was brought against my client. Because of some related probate issues, we somehow were in front of Judge Willard for this motion.

Not only was a Nordman senior partner there to watch, but so was the client. Over 70 matters were on the calendar, the courtroom was jammed with lawyers in every corner, including the jury box, and much to my dismay I was third on the calendar.

Judge Willard's first words were, "It might have been more appropriate for Ms. Reese or Mr. Wojokowski to have made this appearance." They were two stellar and well-known probate and estate lawyers at the firm. I sank a bit in my chair. I then wanted to crawl in a hole when Judge Willard sanctioned me $1200 for discovery abuse.

When I reported this to Janet Reese, she said, "Judge Willard has never sanctioned anybody for anything." *(**Jon Light**, Nordman Cormany Hair & Compton)*

When I passed the bar, I was practicing law in Honolulu, Hawaii. I had my first court appearance within my first week after being sworn into the Hawaii bar. I really wanted to look like a seasoned trial attorney, so I prepared mightily for the appearance, even down to asking my supervising partner to give me a map of where I needed to go when I went to the courthouse.

When I arrived at my designated courtroom, I made sure that I looked like I knew what I was doing. I was cool, calm and collected. I confidently introduced myself to opposing

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WHAT'S SO APPEALING ABOUT BUSINESS CASES?

By Matthew P. Guasco

Business litigation comes in all shapes and sizes. Whether large or small, however, business litigation tends to be document intensive, and both factually and legally complex. Thus, business cases are challenging to try. Those challenges can be managed effectively or not by trial counsel, the result often affecting success or failure in the trial court and on appeal.

Managing The Evidence and Preserving The Record

The following is a list of some of the more common challenges in the management and presentation of documentary evidence in the trial of business cases that can influence an appeal:

Witness References to Specific Exhibits

In longer trials, the lawyers, the witnesses and the judge can become so familiar with the many documents involved that they lapse into shorthand references to them. The appellate court is not likely to understand what "This," or "That," or "There" mean for purposes of your record on appeal. So, follow the familiar formula of specifically identifying each exhibit to which the witnesses refer, including any parts or portions thereof.

Unreported Side Bar Discussions

During trials, especially long ones, there may be numerous side bar discussions with the judge and counsel. Many of them are on minor points, so they don't need to be reported. Others, however, concern material issues, such as evidentiary rulings. Any discussion between the court and counsel on a material evidentiary objection should be reported. An unreported side bar discussion is not part of the appellate record.

Accounting Reports and Financial Records

Often, an exhibit may consist of two inches of *Excel* spreadsheets or *QuickBooks* summaries and ledgers. An economist or CPA may analyze these documents or use them as the basis of damages opinions. For the benefit of both the trier of fact and the appellate court, the trial lawyer should have the witness identify each such document and specifically refer to each specific portion thereof as necessary to support his or her testimony. *Power Point* can be used effectively to excerpt and magnify specific portions of such documents, provided that a copy of each slide is marked and retained for the record.

Organization, Identification and Admission of All Relevant Documents

It is surprising how often documents are either lost, or not marked, or not received in the course of a three-week trial involving 20,000 pages of documents. There are many ways of managing large document cases. Use one or more of them.

The importance of preserving a clean, user-friendly record for the appellate court cannot be overstated: The appellant and cross-appellant bear the burden of preserving a record adequate for review, and the failure to do so may result in the waiver of issues on appeal, such as a challenge to the sufficiency of the evidence. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

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PRESIDENT'S COLUMN

Continued from page 3

counsel, told him I couldn't agree with his position, and marched into the courtroom.

As soon as I walked into the courtroom, I saw a friendly face—my law school classmate, who was now the judge's law clerk. She saw me enter the courtroom, squealed with delight, and jumped up from her seat, screaming, "YOUR VERY FIRST COURT APPEARANCE! I'M SO EXCITED! I HAVE TO GET A PICTURE!" She pulled out a Polaroid camera, made me stand with my opposing counsel in front of the judge at his bench, snapped our picture, and posted it on the bulletin board behind her desk, where she had created a commemorative wall of the "newbies" in the courtroom.

So much for looking like a veteran, right? But, I still won the motion! *(**Karen Gabler**, Nordman Cormany Hair & Compton)*

I had barely landed in Sacramento in the fall of 1969 after a tour of duty in Vietnam when I landed a job with the Sacramento District Attorney's Office. I went into the Navy straight out of law school, but as a line officer, not JAG, and had absolutely no experience. I had not been with the office for more than two days when my supervisor handed me a file and told me the misdemeanor case was going to jury trial the next day and I should handle it. Witnesses were under subpoena and basic jury instructions had been pulled. To that point I don't think I had even seen a trial outside of Perry Mason shows.

I think the case involved a petty theft, but the underlying facts had to do with a Sacramento madam and her prostitutes, with two of the prostitutes getting out of line and somehow ending up the defendants in this prosecution. I had the opportunity to talk to all of my witnesses before the trial, but by the time we picked a jury the only witness within shouting range was a police officer who took the report.

I put the cop on while I had an investigator go out and round up the other witnesses. I was about 30 minutes into the examination when the judge looked down and said, "Isn't this an awfully lot of hearsay?" The public defender said he didn't object. I didn't know it, but he had some hearsay he wanted to get out of the officer as well when it was his turn. With my dragging out the testimony of the officer and a tremendous amount of leeway by the judge tolerating my stalling, it wasn't all that long before my witnesses showed up again—the madam herself and one of her prostitutes. I guess they had some quick business to take care of.

What a circus that was!!! And of course, being very new and very raw, I had no idea how to handle it. To say that they led me around by the nose is probably putting it generously. Later, after about 6 months in the office, I learned just how notorious these folks were, but I was naive at the time and I am sure the judge was having a very difficult time controlling her laughter. I was so raw that I started by handing exhibits to the court reporter instead of the clerk for marking, with very shaky foundation by my hearsay witness. I learned in virtually two minutes about laying a foundation, and I thought I was rather cool in smoothly shifting from the reporter to the clerk when the reporter pointed in that direction.

After more hours of this insanity than I would like to think about, the PD (who was not a great deal more experienced than I was) and I rested and submitted the case to the jury with rather terse arguments. Mercifully, they were back in record time with a not guilty verdict. I was actually feeling a bit guilty about prosecuting these fine defendants by the end–but, you know, it was my first case and I had not yet learned about requesting a dismissal myself. While the defendants were prostitutes themselves, they were looking a heck of a lot better than my witnesses–almost saintly by comparison.

I thought I would be in for a rhubarb from my office when it was all over, but it turns out they were totally relieved that they had some stooge to foist the case onto at the last minute and were not about to criticize.

I had about 20 jury trials during my tenure with that office, many of them colorful, but none as memorable. *(**Bart Bleuel**, Arnold Bleuel LaRochelle Mathews & Zirbel LLP)*

CITATIONS is published monthly by the Ventura County Bar Association. Editorial content and policy are solely the responsibility of the Ventura County Bar Association.

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WHAT'S SO APPEALING ABOUT BUSINESS CASES?
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Statement of Decision

Court trials are common in business litigation. The process of finalizing a statement of decision and judgment following a court trial, however, is Byzantine, to say the least. Code of Civil Procedure sections 632 and 634, and California Rules of Court, Rules 3.1590 and 3.1591, are complicated and hold many traps for the unwary or inattentive. For anyone keen on mastering the process, however, a great starting point is the decision in *Marriage of Arceneaux* (1990) 51 Cal.3d 1130.

The following is a quick and dirty checklist of points to remember in finalizing the statement of decision and judgment in business cases.

Timing Is Everything

Become familiar with and follow the process outlined in Rule 3.1590. Pay particular attention to the time deadlines. Failure to follow this process can result in a waiver of a statement of decision or of objections thereto. (*Marriage of Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134.)

Bifurcated Trials

Many business cases, particularly complex ones, are bifurcated. Rule 3.1590 applies to the court's tentative rulings in each phase of a bifurcated trial if a timely request for statement of decision is made by any of the parties. (Rule 3.1591, subd. (a).) The court, however, must not enter a judgment based on the finalized statement of decision as to bifurcated issues or causes of action except in the case of proper interlocutory or separate judgments (e.g., family law, probate, partition, corporate dissolution orders and judgments). (Rule 3.1591, subd. (a).) This avoids the multiplicity of non-appealable judgments and orders; only a single final judgment disposing of all issues between the parties may be appealed. (Code of Civ. Proc., § 904.1, subd. (a)(1)(A); *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744.)

Don't Assume the Trial Judge or the Lawyers Will Follow Rule 3.1590

I once became involved in a complex surety

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SHORT TAKES

SWITCHING JUDGES
The Ventura Superior Court recently announced that as of October 22nd, **Judge Kent Kellegrew** has left the probate bench to take over a civil calendar in Courtroom 40. **Judge Glen Reiser** is returning to the probate court in Courtroom J6.

ATTORNEY SURROGACY
The State Bar Attorney Surrogacy program provides a model agreement for the designation of an attorney to administer a lawyer's law practice in the event that the lawyer becomes disabled or incapacitated. The agreement details the typical responsibilities of the lawyers involved in an "Agreement to Close Law Practice in the Future" and is intended to facilitate compliance with Business and Professions Code Section 6185 and relevant provisions of the Probate Code. http://ethics.calbar.ca.gov/AttorneySurrogacy.aspx (Reprinted, with permission, from the October 2010 *California Bar e-Journal*).

PERMISSION OMITTED
In October's CITATIONS, we neglected to mention that the article by Judge Judy Holzer Hersher about juror nullification (p. 16) was reprinted, with permission, from the November/December 2009 *Sacramento LAWYER.*

Family Law Case Coordinator: Caron Smith

By Valerie Gregson

I recently had the pleasure of interviewing Caron Smith, Family Law Case Coordinator Attorney for the Ventura County courts:

Exactly what does a Family Law Coordinator Attorney do?

In collaboration with judicial officials, I develop and maintain the court's family law case flow system and oversee a case management calendar designed to track case status and help guide self-represented litigants through the system.

This is more than just a job to you, isn't it?

Yes, it's a passion. Every day in this [family law] courtroom I get angry because I have people who stand in front of me and look at me and they don't understand why they're not divorced yet. And it's not because there's a fight going on. It's because they don't understand the forms. They don't understand the legal words that we all use. The best explanation I can give them is: "It's a system designed by lawyers for lawyers to use." The problem is that lawyers are not the end users.

When I first started here, I tracked every single case for two and a half years. I had my own *Excel* spreadsheet tracking how many cases involved one attorney, two attorneys or no attorneys. It was pretty consistent: In 70 percent of the cases no attorney was involved. In 15 percent there was one attorney, and in 15 there were two attorneys.

I am convinced that this is an accurate depiction of the system as it exists today and that is why I focus so much on the pro pers. I don't want anybody to have to pay expenses needlessly because of the inefficiency. I truly believe that if we make the process simpler and get rid of a lot of the extraneous stuff it is going to benefit those who need the court system to litigate actual controversies, as opposed to taking up court time by those who shouldn't even be in front of the judge.

What path led you to this job in this county?

I was raised by a single mom and we were poor – very poor. When I was 16, my mom and I went to the library to try to figure out how to get her divorced, because she could not afford a lawyer. As we sat poring over the books, I remember thinking "This is so hard. What do people do who aren't as smart as me?"

When we went to court to obtain a final judgment I remember the judge yelling at my mom because she hadn't done the forms right. She stood there quietly and listened, but when we walked out in the hall she was crying. That was my "Popeye moment." By that, I mean "I can't takes no more." I swore that I would do whatever I could to make sure that other people would have to endure that trauma.

Fast-forward several years. I graduated from law school at USC and immediately began to work at Legal Aid in Los Angeles County. I was part of the team that went in and set up the first domestic violence clinics. I eventually became the family law supervising attorney and in 2000 set up the first nonprofit self-help center in Los Angeles County. We were not welcomed in Los Angeles County so I came out to Ventura County and met [Judge] **Gay Conroy**, who was running the self-help center here. She is like an icon in the self-help movement.

We studied everything she did and took it back to Los Angeles and started the first self-help center in Van Nuys. We ended up opening seven self-help centers, getting funding not from the court system, but from the Los Angeles County Board of Supervisors. I loved my job! By the time I left, our caseload was 5,000 per month. The only reason I left was that I met my husband and he lived in Ventura County. When we first started dating he said he would never leave Ventura County, so I started packing.

What did you find when you got here?

Judge **[John R.] Smiley** had already started a groundbreaking program for case management. Ventura County is the only county in the state of California that does case management in family law, so mine is a brand-new position. My job was to sit down with the bench officers and the staff and a seemingly endless series of meetings to come up with and design some kind of structure to handle family law cases. Judge Smiley draws the analogy to air traffic control: We have all these flights circling and we need to keep the flow moving smoothly, so that everybody gets to their destination as quickly and safely as possible.

What changes have you instituted?

We have developed a basic two-track system: The A track, for the simplest of cases, and the B track, for attorney cases. We feel that most pro per cases can be done in six months and attorney cases should be done in a year. There are additional tracks: the C track, which is a complex case that will take over a year and the D track for mediated cases, which take the least amount of oversight. However, we are faced with a dilemma – we can't treat pro per cases differently; it's a whole due process argument. You can't have a separate set of rules for attorney cases and a separate set of rules for pro per cases, so we just call them the A track and the B track, with the proviso that everybody starts out on track A and those that want to can move into track B. The goal is to have everybody on a timeline and have consequences for not proceeding in accordance with that timeline.

How is that working out?

I personally track the cases and send notices when the timeline is not met. Also, I make it a point to call in every case to try to locate the person to find out what is happening if the case is not on track. In many pro per cases, I find that the parties do not want to proceed with the action, so they just don't do anything. At that point I can work to dismiss the case and reduce the court's caseload. We justify this by following our local court rule that says that we can impose sanctions for failure to follow our rules, including dismissing the case.

If you had a magic wand and could wave it over the system, what changes would you make?

First, I would like to see a court dedicated to self-represented litigants and a separate court dedicated to attorneys. It shouldn't be so hard for the average citizen to go through the process pro per. We need to change the system statewide; I think simplification of the process is critically important. It's a challenge for self-help and it's a challenge for the court to help the people who don't need or can't afford lawyers to go through the system quickly and with as little stress as possible. We owe it to them and we owe it to the courts. It's a win-win situation.

Valerie Gregson *is awaiting bar results. She is employed with the Westlake Village-based Law Office of Arthur Wilkof.*

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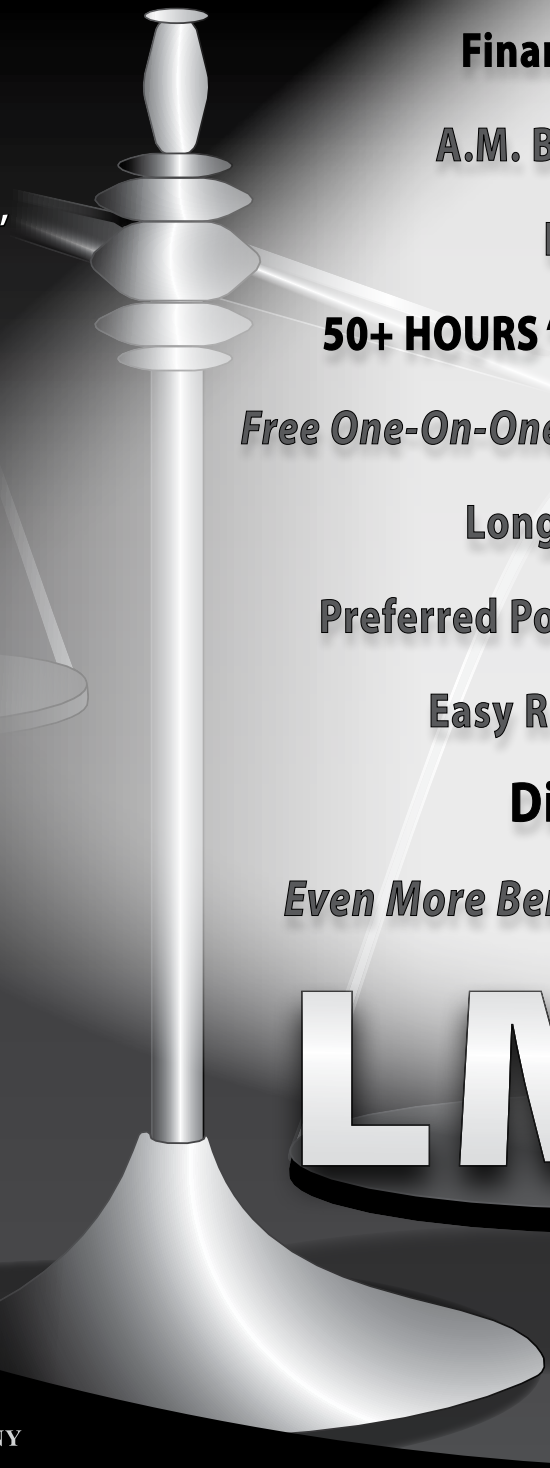

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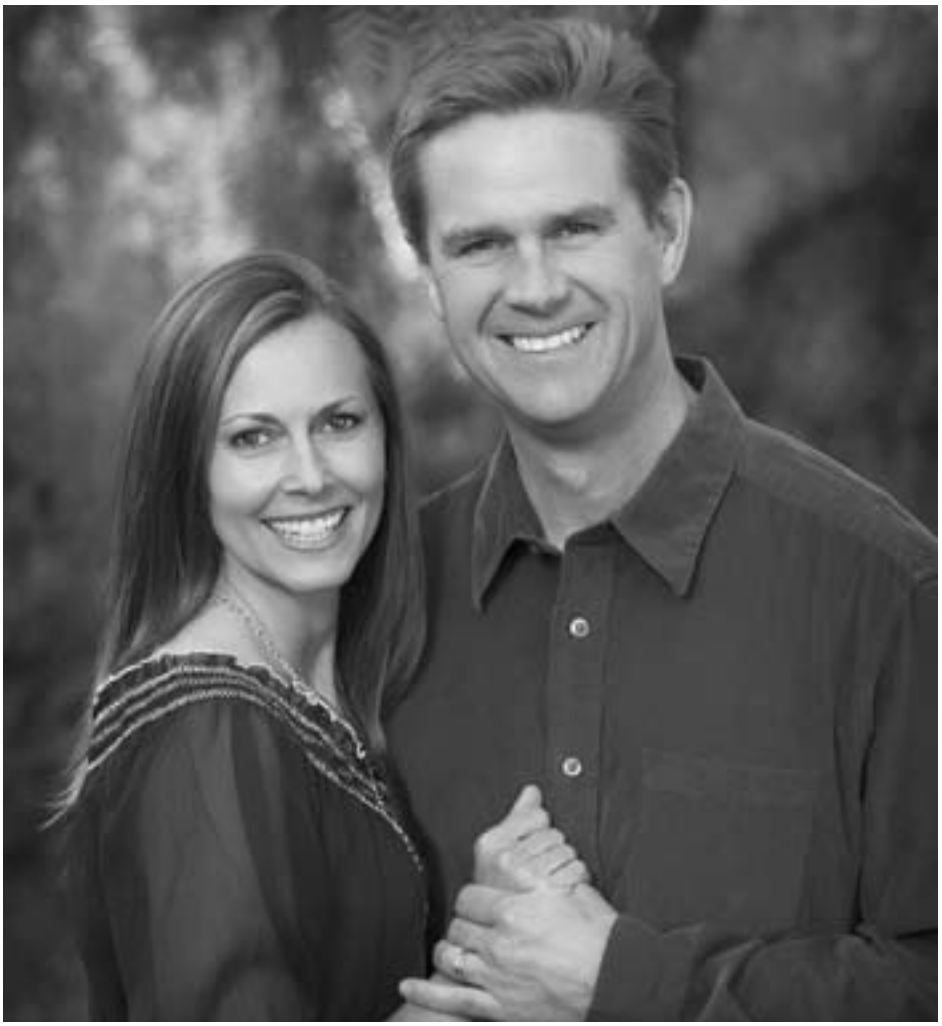
NORDMAN AWARD GOES TO MARK O. HIEPLER

By Michael McQueen



As the 2010 recipient of the Ben E. Nordman Public Service Award, **Mark Hiepler** is both honored and somewhat bemused. There is a randomness to life that can be viewed as two sides of the same coin. We can react to this randomness by concluding that it was just bad luck when we fail or that our success is a result of our abilities and skill. Identifying the various threads that join together to form the fabric of Mark Hiepler's life and his accomplishments requires recognition of both the tragedy and serendipity that has influenced his life.

Mark is bemused by this honor because he had no particular desire to practice law. In his family it was understood that you could either be a minister, a doctor or a lawyer. Born in 1961 in Inglewood, California to a Lutheran minister's family, Mark remembers accompanying his father to hundreds of funerals, weddings, and christenings. Watching his father minister to his congregation contributed significantly to a strong sense of sympathy and empathy for the suffering that is too often visited upon us. According to Mark his father really "walked the walk." He was "all in" and never wavered when it came to the needs of his flock. Just two days before our conversation Mark's father, now 90, traveled to Sacramento to preside over the funeral of a friend and congregation member. This paternal example of spiritual devotion and commitment has had quite an influence over Mark, who has clearly brought these attributes to the law and the community he serves.

Mark was a late addition to the Hiepler family. He had three older sisters, Dorene, Ilene and Nelene. There is a family joke that Mark was almost named Kerosene. He was eight years younger than his sister Nelene, with whom he was particularly close.

In 1980 his family moved to Camarillo. Mark was 16 years old and devoted to competitive sports. While attending Camarillo High School, Mark excelled in basketball, played tennis and was a pitcher on the baseball team. Mark explained his baseball participation as more a factor of a lack of players than any particular skill. This involvement in sports led to increased participation in student government.

Though Mark had no particular interest in being a lawyer, he remembers having a deep desire to make a difference in life. An eighth grade government teacher advised Mark that a law degree was helpful in politics, where one could definitely make a difference. Mark became the student body vice president and grew increasingly committed to attending law school as a stepping stone to a life in politics.

Coming from a family of modest means, it was fortunate that Mark's basketball skills led to a scholarship to La Mesa Nazarene College, where he graduated with a mixed discipline degree in speech/communication, history and political science. Mark was accepted to the Pepperdine School of Law. An intern position with a personal injury attorney, who also owned a parts business, led to the decision to take a year break from school so he could gain hands-on experience running a business. He is proud of his success in running the parts business, but after his business sabbatical Mark returned to Pepperdine and graduated in 1988.

In his last year at Pepperdine Mark met fellow law student **Michelle**, a former Miss Colorado. Michelle was a year behind Mark when they met in the back seat of a car driven by the law school Dean. Michelle graduated and joined the Los Angeles firm of Adams, Duque and Hazeltine. They were married in November 1990. When Mark and Michelle returned to Ventura County in 1992 she served as General Counsel of Pepperdine before joining forces with her husband in his Oxnard firm. Mark and Michelle live in Camarillo and have three children, Sarah (16), Ryan (13) and Paul (11).

After law school Mark continued seeking the broadest experience base he could. He received job offers from the District Attorneys office and Nordman, Cormany, Hair and Compton. Mark had already done some criminal work as an intern with the DA's office and decided to take a position with a Los Angeles insurance defense firm. Though he rarely saw the inside of a courtroom he gained useful insight into insurance defense tactics and culture.

When Mark and Michelle returned to Ventura County Mark took a position with Lowthorp, Miller, Conway & Templeton. It was during this transition to Lowthrorp that Mark's sister Nelene was refused treatment for a serious strain of breast cancer. The cancer did not respond to traditional treatment and her doctors suggested a bone marrow transplant. After reading the health insurance policy with Health Net Mark was not concerned about coverage since the language, in his opinion, was quite clear. Unfortunately, Health Net denied coverage, claiming the treatment was experimental. This was a devastating development. Without the resources for the treatment Nelene would surely die.

The Hiepler family reached out to the community and raised an incredible $250,000 in a mere three months. This was a remarkable testament to the community's appreciation for the Hieplers, but it was too little, too late.

Health Net was adamant that it did not have coverage responsibility for a treatment it considered was experimental and unproven. Little legal precedent supported the Hieplers. Mark and Michelle sought out major plaintiff firms to take the case but they refused. Mark finally had to personally represent his sister and filed suit against Health Net. Nelene died three months before the trial. At no point in time did Health Net make any settlement offer.

It is difficult to imagine the stress and doubt burdening Mark in pursuing this case. He had only been practicing three years, he had just joined Lowthorp and was fighting a corporation that had little regard for his skills or concern for the case. They never saw him coming. Mark's persistent pretrial discovery uncovered a remarkable system of economic incentives for corporate executives to deny coverage. Bonuses were directly tied to the amount of claims not honored. The more Mark learned of these unconscionable heath insurance company practices, the more outraged he became.

Mark is greatly appreciative of Lowthorp's support during the preparation for trial. Not many firms would support a three-year associate pre-occupied and perhaps obsessed with finding justice for his deceased sister. Mark is particularly appreciative of the assistance provided by **Glenn Campbell** and **Al Templeman** who gave the inexperienced attorney wise and grounding advice before and during the trial.

During deliberations the jury sent the judge a note about the calculation of punitive damages. Mark remains amazed to this day that despite this message from the jury, Health Net continued to refuse to offer any settlement. The jury ultimately awarded $89.1 million dollars in compensatory and punitive damages. Ironically, had Health Net agreed to pay for the treatment Mark would have dismissed the lawsuit.

The jury award established a precedent and opened the floodgates for HMO bad faith actions. Such a success so early in a career would be cause for celebration, but there is no doubt that Mark would trade that success and what followed for the return of his sister Nelene.

After the decision, Mark reluctantly began talking to health organizations and other groups, not so much for business promotion but to educate the public and those in the health industry of their responsibilities. Six months after the decision Mark left Lowthorp and established his own practice with Michelle in Oxnard.

Despite the demands of a successful practice Mark remains committed to his community. He often has to interrupt weekend office meetings to teach Sunday school. After two knee surgeries and several shoulder operations, Mark's competitive basketball days are behind him. But he has coached youth basketball for the last 23 years. Steve Henderson has watched Mark's coaching efforts over the years and had observed that Mark is always the gentleman despite questionable treatment by referees. I have had several opportunities to observe Mark's professional comportment over the years. My son's best friend suffered severe brain trauma in an auto accident. I witnessed first hand the family's desperation when the insurance company denied home care coverage. Mark stepped in and made a huge difference in obtaining coverage, saving the family from further financial devastation. I also opposed Mark's firm in a catastrophic auto accident claim. I found Mark and his associates to be firm, focused but always polite and professional.

Recently I have been working with Mark as co-counsel on the Metrolink cases. Mark has been the lead counsel on the "Zap the Cap" political initiative to lift the artificial and unfair liability cap applied to railroad accidents. Again, Mark's demeanor is calm, assured and earnest. For Mark it is all about what is the right and fair thing to do. Like his father, Mark is committed to being "all in" for his clients. Mark finds it amusing that he does not fit the common perception and generalization of a plaintiff's personal injury attorney. He is a conservative, religious, registered Republican who is an advocate for those who have been treated unfairly.

When asked why he continues to practice law, Mark smiles and says it is the challenge of obtaining as much as he can for his clients. That innate competitive streak from his athletic days has not abandoned him. Though he has left the basketball court the courtroom obviously meets these continuing competitive proclivities. His clients have become his flock; an extended family of people he cares for and who he has helped under dire circumstances. His sister's case has given Mark a pulpit from which he makes, and continues to make, a difference.

Michael McQueen *practices law in Camarillo and is a member of the Citations Editorial Board.*

FAMILY LAW PROBLEM SOLVERS SOUGHT

by David R. Masci

As a legal community it is very easy for us to talk about other attorneys whom we do not like, such as the attorney who will not provide discovery timely, who fails to file until the last minute, who will not continue a hearing just to be difficult. But how often do we as a legal community talk about the attorney who is a pleasure to work with while being an effective counsel for their client? The attorney who picks up the phone to discuss procedural and substantive issues, and listens? The attorney who really works hard at a MSC to find resolution, not just middle ground.

In the family law court, the level of professionalism that an attorney demonstrates is often a major factor in the probability of peaceful resolution. Talented attorneys can refocus frustrated spouses, and move them towards being cooperative parents. If an attorney is always trying to resolve the issues in dispute with creative solutions that benefit the parties and their children, while working in the litigation system, that attorney is a problem solver.

The Ventura County Family Law Board of Directors is going to acknowledge one attorney who is the "Problem Solver of the Year." The board will honor an active family law attorney who creates solutions and builds consensus in their family law matters to address the needs and interests of the parties and their children. The family law bar has been asked to confidentially nominate individuals who meet those criteria. The honoree will be chosen by the awards committee. This honor will be awarded at our December meeting.

We will announce the winner in *Citations*. If you see the "Problems Solver of the Year," in the hallways of the courthouse, please congratulate them, but don't take too much of their time, they're working.

David R. Masci *practices family and probate law in Thousand Oaks at Masci & Masci.*

WHEN "GUIDELINE" CHILD SUPPORT IS TOO MUCH: EXTRAORDINARILY HIGH EARNERS AND "THE DICK WOLF EXCEPTION"

By Greg Herring

Child support in California is routinely calculated under the algebraic equation stated in the Family Code and commonly computed through software programs such as "Dissomaster."™ This "Guideline" calculation is intended to be presumptively correct in all cases. But in special circumstances child support orders can fall below the Guideline. One of those is when the payor spouse has "extraordinari;y high income."

The Family Code's Foundation

Although the Dissomaster,"™ and other programs ensure that virtually no one actually has to know it, the "Guideline" child support equation is no mystery. Family Code section 4055 states it as: CS = K [HN – (H%)(TN)]. Of course, the Code also defines the variables. California adopted the equation to ensure compliance with federal law, which requires that states establish uniform guidelines to be eligible for ADFC funds. (See, *In re Marriage of Fini* (1994) 26 Cal.App.4th1033, 1040 (citing 42 U.S.C. §667)).

Section 4053 provides that, in implementing the Guideline, a court must take into account each parent's actual income and level of responsibility for the children. It also states that the Guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below its levels.

Under section 4057, the presumption can be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in a particular case. This includes where (1) the payor has an extraordinarily high income ***and*** (2) the amount determined under the formula would exceed the needs of the children.

Keeping the courts honest is section 4056, which ***always*** requires a judge who intends to deviate from the Guideline to make a written finding of the amount of support that would have been ordered under the formula. *At the request of either party*, it also requires the court to state the net monthly disposable income of each parent.

Thus, the Code requires *without exception*: (1) Full disclosure of income and expense information, and (2) calculation of Guideline support *before* a court may even *consider* potentially deviating from it.

Accordingly, the recent line of published appellate cases has required support obligors to "show their cards." The Court of Appeal, in 2001's *In re Marriage of Hubner* 94Cal.App 4th175 (*"Hubner II"*), expressed that "absent a stipulation between the parties as to the appropriate amount of support, [the wife] and the court are entitled to know [the husband's] actual income, regardless of his admission he can pay any reasonable child support order." This is because the parent who invokes the high income exception has the burden of proving that "application of the formula would be unjust or inappropriate..."

Who Qualifies?

None of the statutes or reported cases provides a bright line definition of who qualifies for the exception. But, it is an exclusive club – for instance, the reported cases start at annual income of about $1,400,000. One Southern California judge who was interviewed for this article made a "SWAG" (Scientifically Wild Ass Guess) that, in Los Angeles County, it might start at approximately $3,000,000 a year. Another estimated that consideration of the exception might be triggered for someone earning $1,200,000 in Ventura County or $1,800,000 in Santa Barbara County.

But even then, it would depend on how the money gets spent. For instance, a deviation might be unwarranted if the extraordinarily earner otherwise spends more than he earns. Contrarily, the exception could arguably be triggered in a lower income case, where the payor has high savings and does not otherwise pay spousal support. Either way, discovery remains just as important on relevant expenses.

In advocating for or against "high earner" status, look to resources like the U.S. Department of Labor, Bureau of Labor Statistics: www.bls.gov. If your client is in the top half percentile of all earners in the county, argue "how *couldn't* he be an extraordinarily high earner?"

Strategies If The Payor Asserts or Is Expected To Assert The Exception

Litigating the issues on behalf of either party is technical and full of strategic possibilities, and potential pitfalls. For ***payors,*** considerations include:

- In an effort to avoid the intrusion and hassle of discovery, offer a stipulation as to income for the sole purpose of the Guideline calculation. Later, this could also come in handy regarding fees arguments: The payor could potentially argue that the payees's discovery was ultimately unnecessary and wasteful.
- Insist on a protective (confidentiality) order. Perhaps even push for "attorneys eyes only" provisions.
- Have your own "child's needs" analysis ready for the opposition papers.

On the other hand, ***payees'*** considerations include:

- In an effort to avoid the fees and costs of discovery, offer the same kind of income stipulation as suggested above

for payors. For the payee, this could also come in handy regarding eventual fees arguments.

- While still primarily arguing for Guideline support, establish, as part of the alternative case-in-chief, the facts and an analysis of the child's reasonable needs.

"The Dick Wolf Exception"

I recently represented the ex-wife of Dick Wolf, the creator of the "Law and Order" television franchise, in child support modification litigation. In defiance of the above authorities, he, an undisputed "extraordinarily high earner," refused to produce any income or expense documentation, except on "attorneys eyes only" terms that were unacceptable to my client. He then limited his "disclosures" to a stipulation that his annual income "vastly exceeds" $25,000,000. After unsuccessfully demanding the information under section 3664, my client filed a motion to compel.

The trial court joined Mr. Wolf in defying the above authorities, and denied the motion. In then refusing to generate a Guideline calculation on its way to analyzing the child's needs, it unilaterally created "The Dick Wolf Exception" to the Family Code, *Hall*, *Hubner II* and *Wittgrove*. Its express rationale was that Dick Wolf's income is so stratospheric – over twice that at issue in *Hubner II*, for example -- that the law simply should not apply to him.

Conclusion

By definition, "extraordinarily high earners" are rare. But when encountered, counsel on both sides must be prepared to creatively argue issues of children's needs and parental lifestyles in addition to "the income numbers" for the usual Guideline calculation. "Dick Wolf Exception" or not, this is a risky and high stakes area of family law practice.

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, a Fellow of the International Academy of Matrimonial Lawyers and a past Chair of the Executive Committee of the State Bar's Family Law Section.*

REQUEST FOR MOCK TRIAL ATTORNEY COACHES

By Honorable Kent M. Kellegrew

During the 2010 Mock Trial Competition, I met a young man in a borrowed suit. He and his team had invested everything they had and were eliminated early. He kept asking, "What could they have done better?" I wouldn't say he was despondent, but he was definitely down. For him, Mock Trial was not just a game. This young man was determined to be a lawyer.

His high school advisors had done their level best. These teachers had read the problem, learned the rules of the competition, and dedicated the time. They could only guide this young man and his team so far.

The rules of evidence, principles of trial strategy, and constitutional law are not core subject matter to get a teaching credential. What is second nature to those of us with a license to practice law is a foreign language to kids in high school and advisors armed only with enthusiasm and hearts of gold.

Last year, Ventura County fielded 24 teams. We actually would have had 26 teams but we lost schools because they just didn't have attorney coaches. This year, 27 teams have requested to compete and many high schools are fielding two teams.

Every year, I ask for help from the Ventura County Bar. Every year, you answer the call. This time I'm asking for something that requires particularly heavy lifting. We need attorney coaches.

Coaching takes many hours, lasting over many months. It is challenging. Teaching, like advocacy, is an art. Lawyers need to learn from teachers about teaching just as teachers and students need to learn from us about the law. Teaching/coaching will stretch you beyond your comfort zone. These young students will learn a lot from you and you will learn from them, too. Just ask the attorneys who have coached.

It is my goal to provide each high school team with two attorney coaches. To meet this goal, we need ten more coaches. Please consider volunteering your time as an attorney coach.

Thank you all again for everything you have contributed to this wonderful program. We have great students in our community. We have wonderful parents, teachers, and schools to support this program. Ventura County's Mock Trial competition thrives because the lawyers in our community selflessly give of their time and talent. Remember, reserve Monday, February 28, Tuesday, March 1, and Thursday, March 3, 2011, for Mock Trial. This year's program will be our best yet.

WHAT'S SO APPEALING ABOUT BUSINESS CASES?
Continued from page 9

case after the tentative decision had gone badly for my client. I timely requested a statement of decision. The trial court directed the prevailing party to prepare a proposed statement of decision. The prevailing party's counsel did so, filing a document entitled, "Statement of Decision," not "Proposed Statement of Decision."

I timely filed objections to the *proposed* Statement of Decision, requesting a hearing. Nothing happened. We checked the court's web-site for weeks thereafter: no sign of any new activity of any kind. We called the clerk: she knew nothing. Finally, I wrote to the judge with a copy to opposing counsel. A month later, we received a minute order in the mail indicating the proposed statement of decision filed by the prevailing party had been signed by the trial judge and filed as the final statement of decision before the time for objections had run; the court simply had never served us with notice of that event and it was not reflected on the docket. The court overruled the objections in their entirety and took no further action. Surprisingly, this is not reversible error, so long as the court rules on the merits of the objections at some point. (*Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 292.)

The moral of this story: do not assume that opposing counsel or the court will follow Rule 3.1590. Be vigilant, even to the point of being a pain, if you must.

These are just some of the many issues and challenges which affect the trial and appeal of business cases. As with everything else in the law, the devil of the trial and appeal of business cases is in the details.

***Matthew P. Guasco**, is Of Counsel to the law firm of Arnold, Bleuel, LaRochelle, Mathews & Zirbel, LLP, in Oxnard, where he is an appellate practitioner as well as a civil litigator in business, commercial, real estate, and corporate matters.*

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Exec's Dot…Dot…Dot…

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

Did I mention that I could have been mistaken? And that hasn't happened since 1995. A couple hundred brave souls attended my bash 10.7 and helped us raise raise just over $4,000 for the vcba/vlsp, inc. Shout-outs to **Kendall VanConas**, **Wendy Lascher**, **David Shain**, and **Chris Miyasaki** for coordinating the event. Did you know bar staff forked over $50 each to attend and *work it*? Thanks to **Verna Kagan**, **Alice Duran**, **Alex Varela-Guerra**, **Celene Valenzuela**, and **JP McWaters**. I'm proud to say I closed the Tower Club bar… **Patricia Herzog**, a self-taught lawyer who helped change California divorce law in 1985 by arguing that a wife who put her husband through medical school deserved to share in his future earnings after they divorced, has passed. She was 88. The very notion "blew everybody's mind," Herzog to the *LA Times* in 1994… Mexico City? **Terence Geoghegan** at tg@iswest.com... Flathead Lake, Montana? **Phil Drescher** at pdrescher@nchc...El Salvador and Zanzibar? **Andres Garcia** at agarcia@crla.com...

Boss of the Year? Why none other than **Leslie McAdam** of FCOP. Nominated by Carol Sautter, she penned the winning nomination for **Mike Case** in 2003 too. Leslie and Carol have both been with the firm since 2002. This wildly successful event started in 1960 with **Edwin Beach** walking away with the very first plaque. Last year's winner? **David Tredway**. Judging panelists? **Michael Planet** and **Brenda McCormick**… Website of the Month: www.justinconseil.fr/index.php?page=accueil#accueill–A rapping French notaire, a semi-government official who handles the transfer of property through marriage, divorce, death, etc. Very funny…

VCTLA board member **Greg Johnson** has been acknowledged as a finalist for the 2010 Street Fighter of the Year Award. The winner will be announced during the Consumer Attorneys of California Annual Convention Installations and Awards Dinner on Saturday, November 20 in San Francisco. Speaking of CAOC news–**David Shain** was elected to the 2011 board of directors…This lawyer lives among us!–A prominent Irvine lawyer has been charged with impersonating his next-door neighbors, and creating fake web pages advertising services from the neighbors' home. Franklin Casco Jr., 49, pleaded not guilty in June to 10 felonies, including one count each of conspiracy and stalking, as well as four counts of identity theft. I know, I know, due process, but yuck…**Andres Garcia**, son of long-time Ventura lawyer **Robert Garcia**, became the Directing Attorney of the Oxnard Migrant Unit of the local CRLA legal aid office October 1…

Anderson Kill Wood & Bender lawyers **Caroline Hurtado** and **Katie Pietrolungo** competed in their first triathlon on October 3. The race extended from Venice to downtown LA and included a .9 mile swim, 24 mile bike ride and a 6.2 mile run. They placed 30th out of 47 in the coed Olympic Relay Division…**Brett Drouet** is the newest fresh face inside the **Anderson Kill Wood & Bender** Ventura offices starting 9.27… **Susan Goytia-Miller** will be showing off her dance skills Tango style 11.19 at 6:00 p.m. atop the Tower Club. "The Passion of Tango," presented by Jorge Visconti and his new Argentinean Tango Show begins after dinner. Susana can be reached at 407.1587… State of California's largest law firms? Latham & Watkins at 624; Morrison & Foerster 546; Lewis Brisbois Bisgaard & Smith 501; O'Melveny & Myers 462; and Sheppard Mullin Richter & Hampton 441. These are just California lawyers, not firm wide. Latham has 2,000 firm wide and Morrison has 1,100…

William Gorenfeld had his letter to the editor published in the September issue of *California Lawyer*. A response to Gerald Uelmen's squib. Callawyer.com…State Bar President Howard Miller announced that after a nationwide search, the Board of Governors of the State Bar has selected former State Senator Joseph L. Dunn to be the new executive director of the State Bar. Joe begins his tern 11.1… Greg Paraskou, Santa Barbara County's Public Defender for the past half-decade, retired 10.1 after a long and highly acclaimed career…

An American Bar Association committee has recommended that the ABA consider accrediting law schools outside the United States according to The National Law Review. The committee, composed of law professors, attorneys, judges, and law school deans, distributed its report to State Supreme Court Justices, ABA Leaders and top law school administrators. Broadening the ABA's accreditations overseas would be in line with the globalization of the legal profession, the committee said. The panel cited figures from the National Conference of Bar Examiners that show between 4,000 and 5,000 foreign-trained lawyers sit for the bar each year in the U.S.…**Larry Hines'** novel is now on Amazon. You can go to Amazon.com books and search by author and title or http://www.amazon.com/Beneficiary-Novel-Justice-Savaged-Biased/dp0578052369. It is in paperback for now and the Kindle will be online in a few weeks…

GO to the Annual Dinner & Awards Banquet November 20th and honor **Mark. O. Hiepler** as the recipient of the Ben E. Nordman Public Service Award. **Deborah Jurgensen** will be accepting the **James Loebl** VLSP Award and proceeds go to our pro bono program. Hats off to **Eric Reed**, dinner chair and **Don Hurley**, Silent Auction coordinator. Call Celene at the bar at 650.7599 or bar@vcba.org...

***Steve Henderson** has been the executive director and chief executive officer of the bar association and its affiliated organizations 20 years as of November 14! Henderson played in the AAA farm system for the Rangers, but never made it to the big leagues unless you count a touchdown catch thrown by Brett Farve v. Cowboys in 1992. Henderson may be reached at steve@vcba.org, FB, Twitter at stevehendo1, LinkedIn, or preferably by calling 650.7599.*

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