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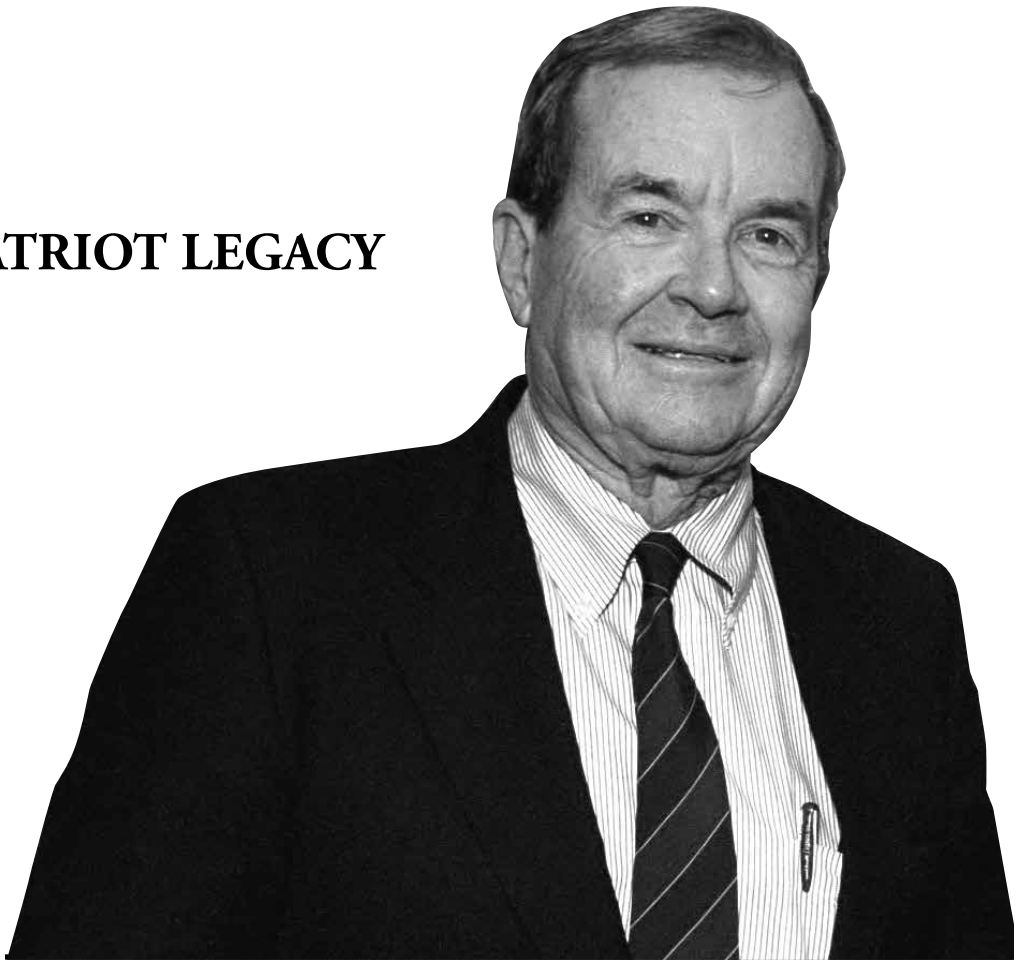

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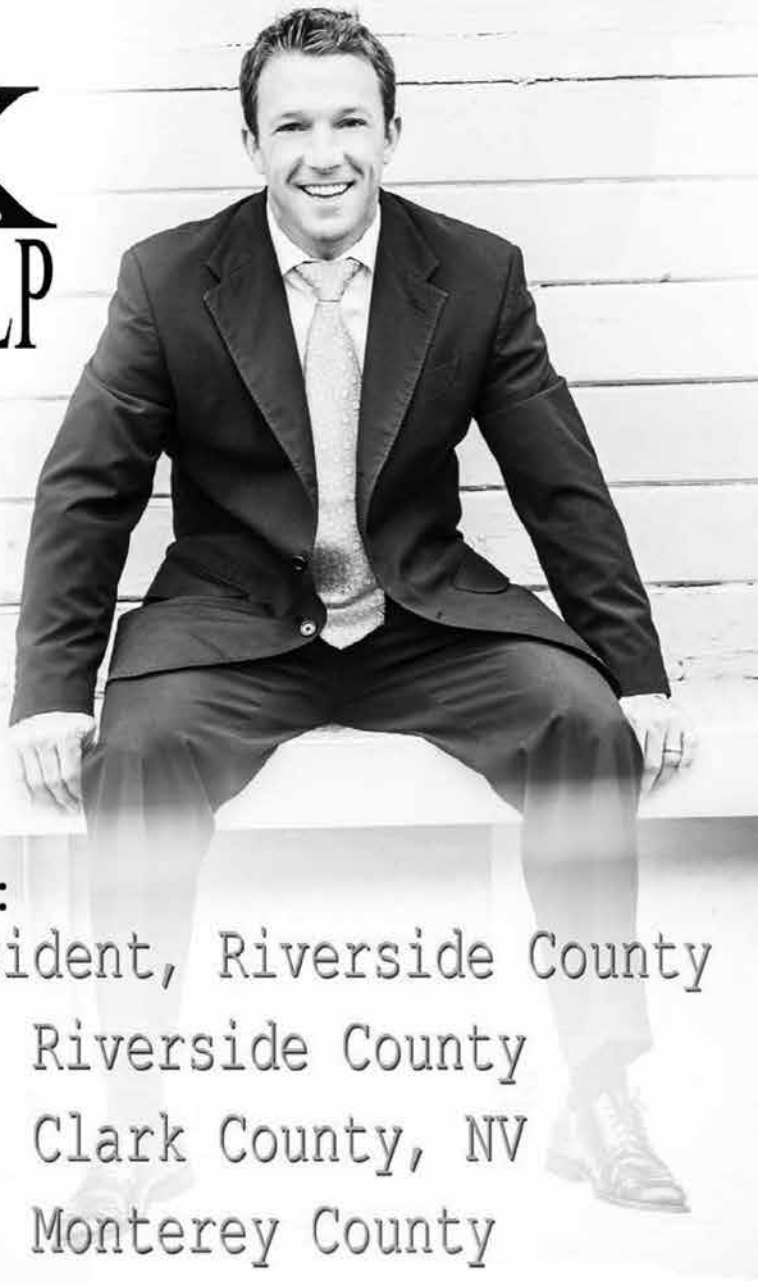

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PRESIDENT'S MESSAGE: WHAT FIFTY YEARS BRINGS

by Laura Bartels

Fifty years ago we watched the assassination of a president. Iconic still-frames are etched in the memory: Jackie lunging over the trunk; Lyndon Johnson being sworn in as President on Air Force One; and John John in his short blue jacket saluting the casket of his dead father. The Kennedy assassination and the tumult of the 50s and 60s was the culture of "The Warren Court" that framed much of how we as attorneys practice today.

Fifty years ago was also the landmark *Gideon v. Wainright* ruling which forever changed criminal justice in our country by providing every person charged with a felony the right to counsel as guaranteed under the Sixth Amendment ("In all criminal prosecution, the accused shall…have the assistance of counsel for his defense.") Before *Gideon*, defendants had the right to an attorney only in the prosecution of federal felonies. *Gideon* applied the right to state felonies.

Fifty years later, 2013 will be remembered for the landmark Supreme Court case regarding the Defense of Marriage Act decision in *Windsor v. United States*. Justice Kennedy invoked the due process clause and the equal protection principles of the Fifth Amendment ("No person shall…be deprived of life, liberty, or property, without due process of law…") holding that states have the power to define marriage, not the federal government, and if a state marriage is valid, then it is legally recognized by the federal government. California is one of seventeen states legally recognizing same sex marriage.

Fifty years after the passage of the Voting Rights Act, 2013 saw the Supreme Court strike down a key part of the act, removing a critical tool to combat racial discrimination in voting. In *Shelby v. Holder*, plaintiff Shelby County had a history of racial discrimination in voting and because of its history needed "preclearance" from the federal government before it made changes to its voting procedures. Ruled unconstitutional, Congress now holds the keys to enact legislation addressing voting access and barriers to guarantee the 15th Amendment protections.

Fifty(ish) years after the Warren Court's *Miranda* decision gave us the ubiquitous "right to remain silent," in 2013, the Supreme Court decided *Salinas v. Texas*, which contemplated whether one can invoke these "rights" without actually stating them. The Fifth Amendment does not actually contain a "right to remain silent." Rather, this right is extrapolated from the Fifth's privilege against self-incrimination: "No person shall be…compelled in any criminal case to be a witness against himself…" In *Salinas,* the defendant voluntarily walked into a police station, answered questions, and then when asked about the murder, looked down at the floor and went silent. The government used his silence as an indication of guilt. The Supreme Court opined that if the defendant wanted the protection of the Fifth Amendment when he walked in and talked to police, he should have spoken up and actually invoked it.

Fifty years from now, it will be interesting to see if pop culture will have popularized *Salinas* the way it did *Miranda*. How will people know they must invoke this right? What about: people without TV; people unfamiliar with the culture; people who speak languages other than English; different linguistic usages of invoking the right ("Yo, I know my right about that silence stuff"); or even technological changes? Can one text: "i have a rt 2 b silent?" How would a newcomer to the United States know they had a right to remain silent if they hadn't seen reruns of *Law and Order*?

Fifty years ago, I grew up without television in a house perched on the side of Oregon's Neahkahnie Mountain 500 feet above the Pacific Ocean with a view 50 miles down the coastline. Ours was the first home-site on the newly platted "development," and the power company told my father that in order to provide electricity to the lot, Edison would be putting the power pole in the center of his view of the ocean. My father declined the impact to our view and so we built the house by hand and lived without electricity until I was 12, when all power was

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PRESIDENT'S MESSAGE:
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undergrounded. We had kerosene lamps and candles for light; a wood stove for heat; and a propane water heater, refrigerator, and range. After high school, I received a degree in history from Mount Holyoke College in Massachusetts. With my husband, Bill, we migrated to Fillmore in 1986 to learn his grandfather's orange business, and two years later I started working for **John Scoles** of Taylor & Scoles. Ventura College of Law allowed me to work and attend school. After the bar, I started my transactional practice in Fillmore in estate planning, probate and trust administration. I am also the Director of the Santa Clara Valley Legal Aid, which is open to all needy people every Thursday evening in Fillmore and staffed by all volunteer attorneys. The orange orchards that brought us here have now been replaced by fields of jalapeño peppers which we grow for Sriracha Chili Sauce. Our children are the fifth generation growing up in our historic home in Bardsdale.

Fifty years ago, the last Ventura County Bar president from Fillmore was selected after allegedly drawing the short straw at a raucous, generously scotch-filled annual county bar meeting in Ojai. Thirteen years before that in 1950, Fillmore's **John Galvan** became Ventura County Bar's first president. Mr. Galvan's office is the one I have occupied for the past couple of decades. Also in the fifties, Supreme Court Chief Justice Earl Warren penned a thank you note, hanging on my wall, to our founding partner, Art Taylor, reminiscing about their times as roommates at Berkeley. I honor the connections of our heritage and thank you for the honor of being your president, fifty years after the last president from Fillmore.

***Laura Bartels** practices in Fillmore at Taylor Scoles & Bartels.*

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BILL CLARK'S PATRIOT LEGACY

by Richard Regnier

On August 10, 2013, a member of the Ventura County Bar went to his eternal reward. He was the senior partner in the Oxnard law firm of Clark, Cole and Fairfield when Gov. Ronald Reagan appointed him to the San Luis Obispo County Superior Court bench in 1969. In his ensuing extraordinary public service career, **Bill Clark** proved to be an outstanding American.

Two years ago my wife Georgie and I visited Bill at Shandon, his 1,000 acre ranch near Paso Robles. He was confined to a wheelchair as a result of Parkinson's disease. Bill's two caregivers, Maria and Tosca, lifted up the tall, determined crusader for freedom, then eased him into an armchair in his modestly-sized ranch home. Many memorabilia were evident, including an impressive commendation from Secretary of Defense Caspar Weinberger for Bill's four years of service as Assistant Secretary of Defense. For the next hour and a half we reminisced. Cheerful and displaying the visage of a wise man, his mind remained sharp, his handshake firm.

Bill and I first met in 1965 as members of Oxnard Council 750, Knights of Columbus. Our law offices were just a few blocks apart on A Street. Back in those halcyon days Bill gave a stirring speech at a KC meeting about his Ventura County roots. His grandfather Bob Clark, as Ventura County Sheriff, busted the back of criminal activities centered in Oxnard's notorious China Alley in the 1920s. After President Franklin Roosevelt selected him in 1933 to be the U.S. marshal for Southern California, Bob Clark's reputation as the top lawman in the taming of the Wild West became legendary.

Bill also told the KCs about his father, Bill Sr., who herded cattle as a teenager, became a deputy sheriff, then under-sheriff for four years. But ranching and running cattle was his first love, so he returned to that until Oxnard Mayor Ed Carty offered him the job of chief of police to straighten out Oxnard's corrupt eighteen-man police department. This he did, restoring law and order to Oxnard in the process. Brimming with patriotic fervor, Bill spoke passionately about the strength, courage, and integrity of his father and grandfather. These attributes were in his genes too.

When Ronald Reagan was elected California's governor in 1966, Bill Clark became his executive secretary. He then progressed through the judiciary ranks to the California Supreme Court. Bill became known for his conservative stance and the succinctness of his judicial opinions.

After Reagan became America's fortieth president, Bill's service included roles as National Security Advisor and Secretary of the Interior. A devout, exceptionally generous Catholic, Bill had personally met Pope John Paul II. In 1982 he arranged for the president and the pope to meet. This led to weekly teleconferences involving Soviet President Mikhail Gorbachev, the pope, and Reagan. During our Shandon ranch visit, Bill told me the pope's wisdom, influential thinking, and commitment to peaceful solutions were instrumental in averting a nuclear Armageddon.

"Several times it was touch and go. Nuking was barely avoided."

Subsequently arms control agreements were reached. Steadily increasing pressure was put on the Soviet Union's economy in a strategy Bill helped to develop. Ultimately, the USSR collapsed.

"The President," as Bill respectfully referred to Reagan, shared with Bill a renowned love of ranching and horsemanship, abiding mutual trust, and love of country. Bill's role in Reagan's presidency was that of his top hand, as detailed in his biography *The Judge*. In 2008, Bill inscribed my treasured copy: "Best regards to Dick Regnier, dear and loyal friend of similar beliefs and causes – God bless him and his family! Bill Clark."

After serving as one of Reagan's closest advisers for two decades, Bill returned to ranching. He designed and had built on a Shandon hilltop a picturesque Spanish-style chapel complete with barbecue facilities to accommodate an entire community. He was a founding trustee of the Reagan Presidential Library. The Catholic Church bestowed on him its highest honor for a lay person – the Cross Pro Ecclesia et Pontifice (for Church and Pope).

Despite the onset of Parkinson's, increasing physical limitations, and the death of his beloved wife, Joan, Bill provided ongoing pro bono legal services at his Paso Robles law office. Modest, genuinely humble, soft spoken, an undaunted man of sturdy and reliable character, he played a key role in keeping our nation safe and strong, in bringing down the Iron Curtain. Because of men like Bill Clark we live the lives and enjoy the freedom with which we are blessed.

A Ventura County cowboy and lawyer, one of our own, was truly a great American.

Richard Regnier *is a personal injury attorney based in Camarillo.*

EMINENT DOMAIN, CALIFORNIA CITIES AND "UNDERWATER" LOANS

by Michael R. Sment

Most areas of California and the United States have been recovering, slowly and in differing ways, from the Great Economic Recession and related real estate loans, low home values and foreclosure problems.

With low interest rates and higher values, more residential properties have gone on sale in a normal way, without foreclosures, short sale restrictions or loss of principal. During 2012 and early 2013, Ventura County residential real property sales significantly increased over sales in 2011 and before.

But, not all of California's hard-hit regions have recovered quickly. In California, around 20 percent of home loans are still estimated to be underwater, while in Ventura County the total is about 14 percent.

Underwater loans are typically more likely to go into default and foreclosure, and lead to an abandoned or unrepaired property. Borrowers often see no realistic way out of their present loan or high payments, except to just abandon the property ("If we can't sell it or refinance it, because there is no equity, and the lender won't discount amounts owed, we will just walk away. At least we get out of that high payment, fees and interest rates…"). Resulting additional municipal expenses make things worse for already-strained city budgets. Cities may be forced to file, or at least consider, bankruptcy, as Stockton and Detroit did.

To avoid these potential underwater loan problems, some argue that a lender should agree to take a discount on old, high-rate loans; residents could then obtain a lower-payment loan from a city or new lender, and thereby stay in their homes. This would mean fewer foreclosures, fewer residents forced to move, fewer abandoned properties, and thus less abandoned property expenses for cities to pay. In 2012, a San Francisco company, Mortgage Resolution Partners "MRP", promoted that idea, suggested by a Cornell University Law School professor, to California cities (including Fontana and Ontario) by. MRP proposed that California cities create an independent agency that would buy troubled loans from lenders at a discount and refinance them into new lower payment loans for homeowners. If the lenders do not sell the loans to the cities for "far less than owed" amounts, cities would use their eminent domain powers to seize the loans/mortgages.

One example: A house worth $200,000 is in default and foreclosure. A city offers to buy the $300,000 first-priority loan on the house for $150,000. If the lender agrees, the city and MRP obtain a $150,000 loan to buy the old loan. They then offer the homeowner a new $190,000 loan with lower monthly payments. If the lender refuses to sell, the city invokes its power of eminent domain, seizes the mortgage, and offers/pays the lender "fair market value" for the mortgage.

In 2013, MRP agreed to implement that plan for the City of Richmond. MRP would receive a fee for each loan, pay necessary funds and pay the city's legal expenses. In late July, Richmond gave notice to trustees and loan servicers regarding 620 underwater loans on homes within the city, asking that the loans be sold to the city. Richmond approved the creation of a joint-powers authority (possibly to include other cities, like El Monte) to buy back the underwater loans, but it has not yet approved the use of eminent domain to actually seize loans. Other cities, including Newark (NJ), North Las Vegas (NV) and Seattle (WA), have made similar demands.

Lenders and investors should not be expected to just sell real estate loans at a discount, even to a city. In early August, mortgage trustees for institutional investors, including Pacific Investment Management, sued in the U.S. District Court in Northern California seeking preliminary injunctions against Richmond, MRP and others. Another federal action, also seeking injunctions, was filed by California's Wells Fargo Bank and other financial institutions. The lawsuits allege violations of the "takings" clauses of the U.S. and California constitutions and of California's eminent domain laws. Wells Fargo has noted that lenders do not have contractual authority to sell underwater loans, particularly as those loans have been pooled with other mortgages to back bonds sold to investors.

The federal government, through HUD, the Federal Housing Authority and Federal Housing Finance Agency, has also opposed municipal mortgage-seizing. It has said that the eminent domain plans "present a clear threat to the safe and sound operations of FannieMae, FreddieMac and the federal Home Loan Banks." The cities' plans could cause lenders to not make loans in, or to not buy loans from, those places. The federal government could also restrict lending or make the city-resident homeowners ineligible for new government-insured loans.

Some California cities have started to use other tools to deal with bad-loan properties, including court orders for abatement, destruction or receiverships. In August, Thousand Oaks asked the Superior Court to appoint a receiver to determine the fate of one home, in foreclosure, that was described as a "growing mess" and "nuisance." The receivership alternative was apparently sought instead of abatement because the city and taxpayers would have to pay for the repair or cleanup. Ventura and Simi Valley are now considering similar court requests.

California cities face many problems, including slow economies, lower tax revenues, internal issues, layoffs, and their homeowner residents' economic problems. They have been forced to increase fees and decrease services to maintain minimum standards. The added strains of dealing with underwater properties in foreclosure, disrepair or need of costly deferred maintenance or destruction and clean-up, will be too much for those local governments to handle.

But is a city's use of eminent domain the answer? Those local government efforts are admirable, but they fly in the face of a long-time standard for loans – a lender cannot be forced to accept less than the full amount of the principal owed on a debt. Without that standard, existing since Roman times, lenders would not lend. Commerce, business and home sales would stop.

Perhaps cities can follow the "buy/own-to-rent" business model followed now by many banks and investors like Blackstone Group and American Homes4Rent, which

rent out foreclosed homes. Cities' needs for rental housing, low income housing and a profitable use of underwater loan properties could be met with such a stream-lined and income-producing program.

It does not appear that California cities will be successful using their eminent domain power. Besides being contrary to long-standing commercial practices, cities face the combined opposition of the United States Government and the financial "Powers of Wall Street." Some other solution, legislative-based or profit-centered or both, is needed to help protect California cities from potential problems relating to underwater residential loans.

Michael R. Sment *is a member of the* CITATIONS *editorial board, and handles real estate, foreclosure and bankruptcy matters from his Law Offices in Ventura, California.*

EAR TO THE WALL

David Laufer plans to open shop on his own Jan. 1. His new practice, Laufer Specialty I-Risk LLC, will focus on providing risk management and insurance consulting services to businesses, professionals, insurance brokers and litigants.

Laufer can be reached at *ldavidlaufer@gmail.com* or (818)437-7096. To avoid conflicts of interest, Laufer will not have an affiliation with his previous or any other law firm.

A REPLY TO COUNTY BAR PRESIDENT JOEL MARK'S RHETORICAL QUESTION

by Lawrence C. Noble

In his November President's Message, then-Ventura County Bar Association President **Joel Mark** asks the rhetorical question: "Gun Control: Haven't we had enough?"

Mark states that "guns certainly make people more efficient in the endeavor of killing." This is true, but efficient killing is not limited to guns; cars, knives, scissors, baseball bats and letter openers will do just fine also. While the killing tool can always change, the mindset of the killer, whether malicious or mentally ill, will not.

Further, there is substantial literature showing that gun violence is responsible for far fewer deaths than auto accidents and many other non-gun-caused deaths. Thus, Mark's focus solely on guns is shortsighted if he ignores the role of the "people" who use these instruments.

So, what solutions does Mark offer for the troubling issue of gun violence? He calls for our "elected officials to return to constructive dialogue and compromise to improve all our lives." But he doesn't provide any approach for them other than by implicitly suggesting that they amend the Constitution. How? By deleting the Second Amendment? Is there a rational, achievable, less burdensome solution instead?

Let's start by asking: What death-causing objects should we eliminate from our society? Are there any arguments for eliminating cars in light of all the annual auto deaths? No. What about all the hard objects that could cause blunt force trauma: baseball bats, bottles, chairs, ordinary household objects? No one would seriously consider this as a solution for ending violence. Further, since the banning of gun ownership in the U.K., there has been a documented spike in traumatic violence by knives, bats, fists and hard objects. The British criminal element is apparently enjoying the disarming of the targeted public. Not so in Switzerland, Norway or Israel, each of which permits gun ownership.

Why not just eliminate guns? Well, Mark says that he "gets" that the Second Amendment grants the right to the "people" to keep and bear arms. He also accepts the *Heller* holding that "the amendment refers to individual rights to keep and bear arms." While there is no Constitutional proscription on eliminating cars or household items, the Second Amendment specifically bans the government from restricting the right to keep and bear arms. Why?

The Bill of Rights was added to the U.S. Constitution to satisfy the demands of many of the Framers that the government's power against the individual be limited. The Framers, who had already fought the Revolutionary War, were well aware that arms could be used for killing. Yet they especially protected the right to keep and bear arms to protect the freedoms for which they had spilled blood.

By implying the deletion of the Second Amendment, Mark states that "the Framers assumed that there always would be… compromise as we adjusted our most organic document to the changing needs of our times." But compromising recognition of this important American right would not be so easy. The Framers included two ways to amend the Constitution in Article V; either two-thirds of both Houses of the Congress or two-thirds of the Legislatures of the States shall propose Amendments. Article V is prime evidence that the Framers required more than "continuing dialogue and compromise" to amend the Constitution. But by describing the Constitution as an "organic document," Mark implies that the Constitution is a malleable instrument that easily can be changed as the public whim or a despotic ruler demands. Such easy rules-changing would surely undermine the political stability of the Republic.

There may be more achievable ways of limiting gun violence without doing the violence to our Constitutional protections that Mark seems to favor. Why not pay more attention to the types of people that might misuse the protected gun rights? In almost all of the recent mass shootings, there have been disturbing reports of advance knowledge of erratic behavior and mental illness in the shooters. And yet, people who could have effectively intervened – mental health professionals and family members – did not. Gun registration would not have prevented the Sandy Hook shootings; Adam Lanza's mother provided her known, mentally-ill son with access to guns as a way of bonding with him. How does a rational society stop that? Universal prohibition of guns, one might say. But that is barred by the Second Amendment's protection of the right of free people to exercise their sovereign right of self-defense. Some advocates have argued mental health histories are protected by the right of privacy, thereby balancing in favor of possibly dangerous people and against the possible victims. A far less onerous step than amending the Constitution would be addressing how our society may reasonably treat the rights and the dangers posed by people showing behavioral signs of potential gun violence. But this can be done only after considered deliberation that encompasses the right to keep and bear arms enshrined in our Constitution.

In *Heller*, the Supreme Court ruled that the right to keep and bear arms is not absolute, but is subject to "reasonable regulations;" thus setting the groundwork for deliberation. According to the 2010 Census, California had 9 million gun owners, each one of whom had to pass a State DOJ and FBI background check. The state and federal governments have already placed many restrictions on the ownership and use of guns. This has been the response of our "elected officials" who have balanced the Second Amendment right with the need for responsible gun ownership. Even Governor Brown, a gun owner himself, vetoed the recent state bill outlawing AR-15 rifles, stating that he doesn't believe that such "blanket" legislation would enhance public safety.

But this regulatory scheme has failed to consider the population of mentally ill people who should not have access to guns. Filling this gap in the dialogue might be a big step toward answering Mark's rhetorical question.

***Lawrence C. Noble**, a sole practitioner, transacts and litigates business and real estate matters, plans asset protection, represents distressed debtors, and advises gun owners about their rights and duties.*

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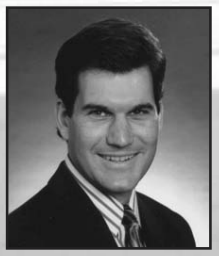

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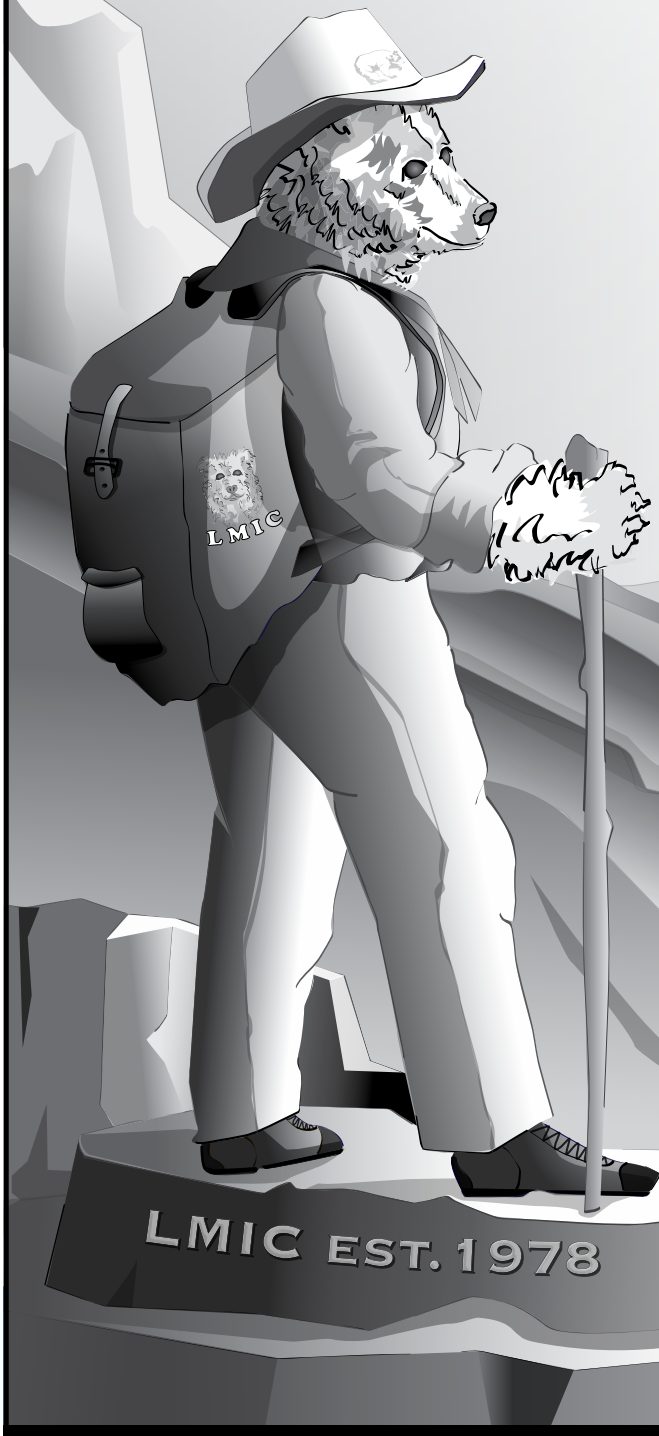

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SEPARATED UNDER THE SAME ROOF? MARRIAGE OF DAVIS EASES THE TRANSITION

by Gregory Herring

A major consideration for "separated" spouses is the final break in the marriage. "Separation" occurs only when the parties have come to a parting of the ways with no present intent to resume their marriage and their conduct evinces a complete and final break in the marital relationship. Sometimes, however, one party thinks or both parties think that they have separated, where a court might find otherwise.

Potential negative effects of failing to clarify a date of separation include an extension of the periods (1) for which a spouse could ultimately be liable for spousal support and (2) during which they could be considered to still be sharing finances (both income and debts) with the other spouse.

An obvious way to clarify these murky situations would be for one of the spouses to move out of the family residence and establish his or her own separate one.

Immediately re-locating, though, could negatively impact the "move-out spouse's" current and future custody position. If the children's "home base" is the family residence, then it could be a risky move, literally and figuratively.

Child support concerns would also be linked, as the calculations are largely based on timeshare with the children.

Further, the recent economic downturn has made it tougher than ever to create two households from one.

Thus, move-outs should be carefully considered. This can take time.

A generally unpopular Court of Appeal case, *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, held by a vote of 2-1 that "separation" in this context nonetheless requires a permanent physical separation. It noted, "[t]ypically, that would entail each spouse taking up residence at a different address." The issue of whether cohabitating spouses could still be considered "separated" for purposes of the "final date of separation" was thus unclear.

Fortunately, the First District, in *In re Marriage of Davis* (2013) 220 Cal.App.4th 1109 (petition for review pending), recently upheld a trial court's ruling that *Norviel* is not dispositive. *Davis* holds that, where the evidence demonstrates "unambiguous, objectively ascertainable conduct amounting to a physical separation under the same roof," even co-habiting spouses can accomplish and maintain "separation."

Some of the ways parties can do that, even if they might continue to reside "under the same roof," would be to ***refrain from***:

1. Maintaining any unnecessary contact with the other spouse.

2. Using the same address for mail (get a separate Post Office box instead).

3. Sending any flowers, letters or cards.

4. Saying "I love you" or similar sentiments.

5. Filing joint income tax returns without first clarifying in writing that the filing of such a return does not constitute a waiver of rights.

6. Saying or making it look like that they are not separated.

7. Maintaining joint checking accounts or credit cards.

8. Expressing physical affection for the other spouse.

9. Vacationing with the other spouse.

10. Celebrating holidays with the other spouse.

While this might sound cold-hearted, there could be serious legal and financial consequences for failing to maintain a clear date of separation. Should they wish, co-habiting parties can more "safely" re-establish a closer relationship ***after*** their case is finally over.

Of course, parties, with or without children, eventually move on to new lives in separate residences. Thankfully, *Davis* now provides some time and space for them to accomplish this in a realistic and thoughtful manner, without spouse having to prematurely rush out the door to protect the date of separation.

Greg Herring *is a State Bar Certified Specialist in family law and is a partner with Ferguson Case Orr Paterson LLP. He is the current President of the Southern California Chapter of the American Academy of Matrimonial Lawyers. CITATIONS Editor Wendy Lascher represented the successful respondent in Davis.*

LIES HAVE CONSEQUENCES: PART II

by Kate Neiswender and Mark Neiswender

In response to November's article on lying in the courtroom ("Lies Have Consequences," November, 2013), we received many phone calls and emails, all in agreement with the premise: lying has become a bigger problem, more common, more dangerous to the health of the system and the integrity of the profession.

Several judges contacted us in response to the article. To a person, they agreed that misrepresentations by counsel had become a commonplace problem. To a person, they agreed that discovery had become a game of hide-the-ball rather than the self-executing system envisioned by the legislature. But all felt constrained in what they could do about it. Most asserted that the unrelenting volume of court business – particularly given significant underfunding of the courts – leaves judges with too little time and too few resources to do in-depth evaluation of discovery disputes. Others mentioned that the training judges receive encourages them to allow all relevant evidence to go to the jury regardless of prior discovery abuses. Under the current thinking, when a judge balances the "bad" of discovery misconduct against the "bad" of not allowing cases to be tried on the merits, allowing all the evidence to go to the jury wins out.

Unfortunately, these responses, one pragmatic and one philosophical, lead to both greater waste of court resources and less fairness in the system, as well as encouraging the disturbing and growing perception among the public that the court system is rigged to benefit lawyers and wealthy institutional clients.

There are two ways one can evaluate these problems. One can take a "micro" view of how attorney misrepresentations and discovery abuses ***affect the case at hand***, or one can take a "macro" view of how attorney misrepresentations and discovery abuses ***affect the court system at large***. Under either approach, both the "press of business" response and the balancing act justification to abusive practices are counterproductive.

Inside the case at hand, the offending party's misconduct is a direct attempt to secure an unjustified strategic advantage. It drives up the cost for all parties, diminishes the chances of settlement, and slows down resolution of the case. The only weapon against such misconduct is for the aggrieved party to file a motion to compel, and such motions will proliferate in direct proportion to the amount of discovery abuse. In the short run it may seem that court resources are preserved by a *de minimis* judicial response to attorney misrepresentations and discovery abuses. However, we would suggest that it seems highly unlikely that – with more motions to compel – court time is "saved." Such a judicial response may actually exacerbate the problem. Further, there is a common feeling that the courts are unaffordable for the middle class. While the courts can't solve intractable problems with economic equality, the current sanction regimen doesn't help the perception that our courts favor the rich. For example, assume that AIG is the insurer for the defense. AIG – even after the mess they helped make of the economy – made approximately $6.6 billion after tax income in 2012. If you sanction the lawyers for that company $2,000, that amounts to 0.00003% of AIG's 2012 profit – the amount of money made by AIG in roughly ten seconds. On the other hand, consider the same monetary sanction against a construction worker who makes about $70,000 per year and sues the business that caused him grave bodily injury. To pay that same $2,000 sanction, after taxes, the construction worker would have to work for two weeks. The disincentive for AIG is obviously next to nothing; for the construction worker it is an enormous hardship. Further, it is a rare day when the actual cost of bringing the motion is reimbursed; a sanction of $1,000 after multiple discovery abuses is more common than reimbursement of the $3,000, or more, it actually cost. Even when misconduct is sanctioned by the court, the aggrieved party is damaged.

Likewise, under a macro view, there are several reasons a harsher judicial response is appropriate and in fact necessary. In one discussion we had with a judge, he emphasized that sanctions are not supposed to be punitive, but rather are designed to secure compliance with discovery law. We disagree. Sanctions in civil litigation, just as in any other area of the law, are intended not only to remedy the current situation but also to deter future bad conduct by the sanctioned party *and others*. Appropriate sanctions can be a deterrent, and should be. Under the current regimen, the dishonest party rolls the dice, tries to pull a fast one, and even if they are caught, the damage primarily falls on the innocent party. The current system encourages dishonest behavior – it makes lying economically rational.

Courts must be open not only to monetary sanctions, but to evidentiary and issue sanctions as well. The incentive to lie – as well as the untoward effects of economic disparity – dramatically diminish when evidence or issue sanctions are a realistic possibility. And we must remember we are talking about utterly unjustifiable behaviors: direct misrepresentations by a lawyer, a sworn officer of the court, and misrepresentations in discovery responses provided under penalty of perjury. Misrepresentations by an officer of the court are inexcusable. Misrepresentations under oath are a felony, and society should not be deferential to criminal behavior. All too often, evasive and inaccurate discovery responses are followed up with last minute attempts to sneak in previously undisclosed evidence on the eve of trial. These should be summarily denied, and the case law gives judges that discretion. If a party objected and failed to answer interrogatories fully, or withheld documents, then the evidence should be excluded, period. If the dishonesty arose with the lawyers, the client has a legal remedy against them. If the dishonesty arose with the client, then the client deserves to be sanctioned.

Over the past two months, we have spoken with dozens of judicial officers, lawyers and clients, all seeking an answer to this problem. Unfortunately, we could not come up with a fix that is self-executing or that takes the burden off the already-burdened judicial system. What we heard from many is that the existing system of monetary, evidentiary and issue sanctions should be enforced more

strictly and more often. As more judges adopt a strict approach, with less reluctance to order issue and evidence sanctions, the less the lying will distort our system. At least, that is our hope.

Kate Neiswender *is a Ventura-based land use and environmental lawyer. Mark Neiswender is a trial lawyer in Riverside County who has been practicing for more than 32 years.*

PRACTICE TIP: RECOVERY AND THE INDEPENDENT WHOLESALERS REPRESENTATIVE LAW

By David Laufer

Facts:

Your client is a California corporation. It sells products manufactured in France to other wholesalers doing business in California, Nevada, Washington and Oregon. Your client has been operating under a unsigned Distribution Contract (DC) for several years. In the last 30 days, your client received a letter from the manufacturer terminating the DC. The termination letter states no commissions are due. Your client claims over $79,000 is owed for unpaid commissions and thinks other commissions were not calculated properly when each order was filled. You are presented with email exchanges outlining territory, commission rates, charge backs on orders and payments received.

The client asks: Can we sue for an accounting of the commissions that we are owed, damages and our attorney fees and costs?

You respond: I need to review all the communications including the emails, letters and DC to see if California's Independent Wholesalers Representative Law (IWR), Civil Code section 1738.10, et seq. applies to your case.

You review the statutory elements to allege a cause of action under the IWR to recover damages, treble damages and attorney fees. You document the following in a pre-litigation analysis for your client:

1. The manufacturer failed to sign and deliver the DC to your client.

2. The manufacturer refused to sign the DC after receiving a request from your client that is documented in an email.

3. Each commission payment did not contain a breakdown of each invoice, each order and a separate calculation of each commission.

4. The client did not buy the product for its own account.

5. The client did not sell the products directly to California consumers.

6. The client understands that sales in Nevada, Washington and Oregon may be covered by the IWR.

7. The client's accountant verifies that the business records maintained in accordance with generally accepted standards will support the claim for commissions not paid and damages.

8. You reviewed common law causes of action to include in the complaint and identified causes of action that may trigger a duty to defend under the manufacturer's GL, D&O and EPLI coverage.

9. You investigated the defendant's ability to pay a judgment and any enforcement of judgment issues.

10. You reviewed the sales agent laws of Washington and Oregon to see if they provide additional relief to your client.

Authority

Reilly v. Inquest Technology, Inc. (2013) 281 Cal.App.4th 536, 545-551.

The IWR was created to protect sales representatives who receive commissions from, but who are not employed by, a manufacturer. (Civ. Code, §1738.10.)

The IWR requires the manufacturer to enter into a written contract with their sales representative to provide for security and clarify the contractual relations between the parties. (Civ. Code, §1738.10.)

A manufacturer found to be in willful violation of the IWR shall be liable to the sales representative in a civil action for treble damages proved at trial. (Civ. Code, §1738.15.)

The prevailing party shall be entitled to reasonable attorneys fees and costs in addition to any other recovery. (Civ. Code, §1738.16.)

A manufacturer who is not a resident of California, and who enters into a contract regulated by the IWR, is deemed to be doing business in California for purposes of personal jurisdiction. (Civ. Code, §1738.145.)

Any provision waiving compliance with IWR is deemed void as against public policy. (Civ. Code, §1738.13, subd. (e).)

Baker v. American Horticulture Supply, Inc. (2010) 186 Cal.App.4th 1059,1073.

The definition of manufacturer must be read in the context of the entire statute, created to protect nonemployee wholesale sales representatives who are not selling to the ultimate consumer.

"Willfulness" is not a prerequisite to prevailing under the Act but it is an element required for an award of treble damages. (*Id.* at p. 1072.)

David Laufer *is the former VP and GC of a public company. He practices at Laufer Specialty I-Risk LLC, where he provides risk management and insurance consulting services to businesses, professionals, insurance brokers and litigants.*

IMPORTANT TORT AND TRIAL NEWS

If your practice includes any civil cases, plaintiff or defense, VCTLA's January 21 program is a must! To practice successfully in 2014, you need to know about last year's statutes and judicial decisions that affect tort liability and civil procedure. Please join us for comprehensive review presented by a knowledgeable panel of both plaintiff and defense attorneys. Like all VCTLA functions, this one is open to all attorneys, regardless which side of the "v" you practice on. All participants will also receive a booklet of all key 2013 cases and their holdings. Please see the enclosed flyer for sign up information or visit www.vctla.org. Earn 3 MCLE credits, including 1 for ethics.

Barristers' Corner

By Rachel Coleman

2014 Barristers Officers will be: **Rachel Coleman**, President; **Thomas Adams**,Vice President; **Melanie Ely**, Secretary and **Andrew Ellison**, Treasurer. New Members at Large are Past-President **Rennee Dehesa**; **Robert Krimmer**, **Joshua Hopstone, Lauren Sims**, **Katherine Hause Becker**, **Amy Dilbeck Kiesewetter** and **Brier Miron**. One Member At Large seat remains open. To run, please attend our January 7 meeting at the VCBA office.

Barristers will host a meet and greet for new Bar admittees, all local Barristers and current law students on Tuesday, January 28, 5:30 to 8:00 p.m. at Surf Brewery, 4561 Market Street in Ventura (conveniently located near the Ventura College of Law.)

On March 9 from 4:00 to 7:00 p.m. Barristers will host our first-ever Paintball Tournament at Stryker PA in Santa Paula. This event is open to everyone in the legal community as well as the general public. More details and a flyer coming soon, or you contact Amy Dilbeck Kieswetter at *ard@strausslawgroup.com.*

Rachel Coleman *practices criminal law at the Law Offices of David Lehr in Ventura.*

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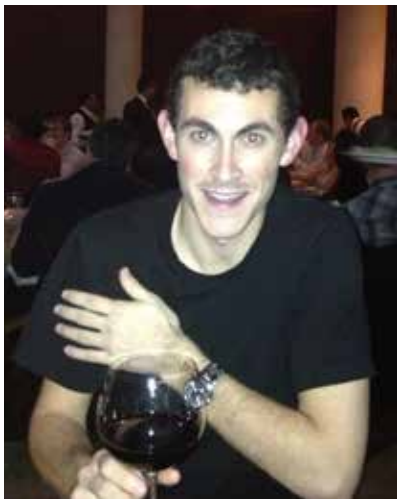
Brian Nomi Office to Lease – Camarillo Professional Office available for rent in an attorney's suite. Perfect for another attorney or any other professional. Across from Marie Callender's in Camarillo. The suite has a receptionist, bathroom, and sink/fridge. Rent $400. I'm not sure on square footage, but my estimate is it's about 200 square feet. The office includes use of the 400 square foot reception / common areas. If you are just looking for a place to occasionally meet clients and have a sign, this is also open for discussion. Please contact me for details. You are most welcome to come by and have a look any time. Brian Nomi, (805)444-5960 (215 E. Daily Dr. #28, Daily & Las Posas.)

Exec's Dot…Dot…Dot… *by Steve Henderson, Executive Director, M.A., CAE*



The Barristers held their annual Holiday Celebration Dec. 5 at the home of board member **Amy Kieswetter** in Santa Paula. The theme, "Ugliest Sweater Contest," was competitive and view winner **Melanie Ely**'s outfit right here…

Citations Editorial Board member **Rachel Coleman** now serves as President of Barristers. She may be reached at 477.0070 or *Rachel@davidlehrlaw.com*…A rape trial of a Tulsa, Oklahoma, man came to a screeching halt when the defendant repeatedly punched his court-appointed lawyer in the face. Earnest Padillow, 47, was on his way to the witness stand to testify in his own defense when he turned on his own lawyer. Mark Cagle, Padillow's lawyer, suffered a busted lip, but said he was otherwise unharmed. Cagle's co-counsel, Stephen Lee, ended the assault by placing Padillow in a headlock. Sheriff's deputies then used a stun gun to subdue the defendant. The judge ordered the trial to continue without the defendant present…

FCOP announced that **Lauren Clark Rad** has joined the Business Litigation group. After college, she worked at a juvenile detention center in Cusco, Peru. She attended Harvard Law and may be reached at 659.6800 or *lrad@fcoplaaw.com*...

If you are in need of CLEs, the Barristers are hosting Bridging The Gap™ on Saturday, Jan. 25 at the County Government Center. The activity comes just in time for those of you have waited until the last minute to pick up your continuing education. There are 6 CLEs for the day, including Bias, Substance Abuse and Ethics. 2013 Barristers President, **Rennee Dehesa**, is running the show and you may register by calling Nadia at the bar offices at 650.7599 or *bar@vcba.org*. Additionally, the event flyer is included in this issue of *CITATIONS*…

When Jack MacDonald showed up at grocery stores with an armful of coupons to buy cases of discount orange juice, employees might have expected he was a hoarder. And he was, sort of. Frugal to no fault, the Seattle attorney accumulated a vast fortune, and now, upon his death at the age of 98, he has left $187 million to benefit Seattle Children's Hospital, the University of Washington School of Law and the Salvation Army. MacDonald lived in a modest one-room apartment and wisely invested the money he received through family inheritance, but he had no biological children of his own…

Welcome to new VCBA Board Members **Charmaine Buehner**, **Mark Kirwin** and **Andy Viets**. **Bill Grewe** is our new Secretary-Treasurer, while **DDA Alvan Arzu** is President-Elect and **Laura Bartels** is the new President. They were installed at the annual dinner and their duties begin January 1. Special thanks to outgoing board members **Jessica Arciniega**, **Kata Kim** and Immediate Past-President, **Dien Le**.

The 24th Annual VCBA Strategic Planning Breakfast of Bar Leaders is scheduled for Saturday, Feb. 1, beginning at 8:30 a.m. inside the Courtyard by Marriott. All section, committee and affiliated heads are expected to attend and help us design 2014…The Florida Supreme Court has suspended a lawyer for two years for rude conduct and recommended that the case be studied "as a glaring example of unprofessional behavior." According to the court, attorney Jeffrey Alan Norkin accused a judge at being at the "beck and call" of his client's opponent in a civil case, yelled in court, and "incessantly" disparaged and humiliated opposing counsel in the litigation. The opposing counsel, Gary Brooks, was 71 years old at the time and was suffering from Parkinson's disease and kidney cancer. He was a Harvard Law grad with a "lengthy and unblemished career," the court cited. Norkin sent emails to Brooks that said Brooks was lying and disingenuous, his motions were "laughable and scurrilous," and he will come to regret his "incompetent, unethical and improper litigation practices." Other emails threatened to seek sanctions against Brooks and advised him to notify his malpractice carrier…

Steve Henderson *has been the executive director and chief executive officer of the bar association and their affiliated organizations since November 1990. His money is currently riding on Manning, Brady and Wilson. His visit with Pope Francis over the holidays was eventful. He may be reached at* steve@vcba.org*, Twitter at stevehendo1, LinkedIn, FB, or better yet, 650.7599.*

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