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JULY – TWO THOUSAND TWENTY

A BEAUTIFUL FRIENDSHIP: TRIBUTE TO BILL HAIR

by Tony Trembley

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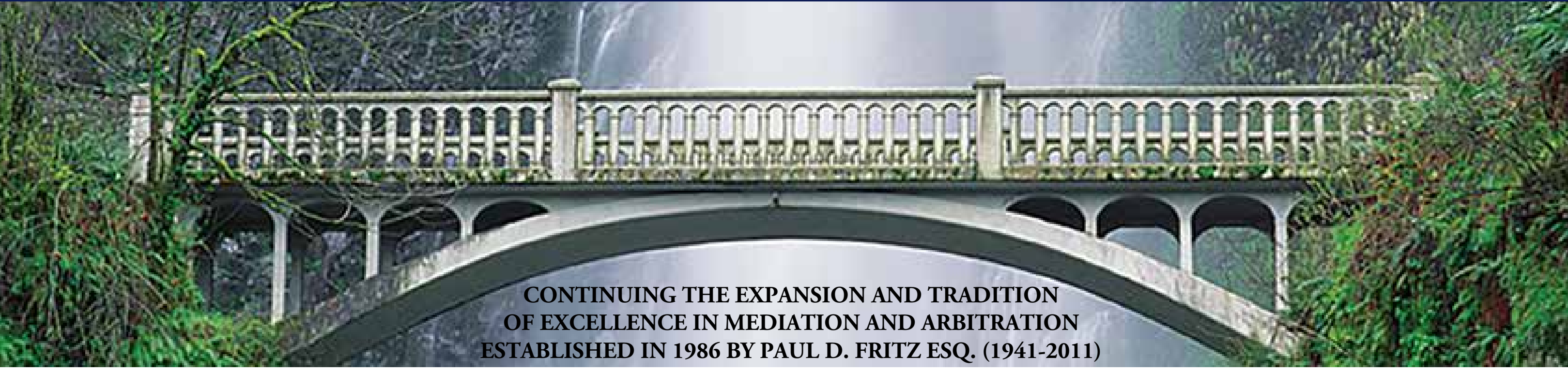

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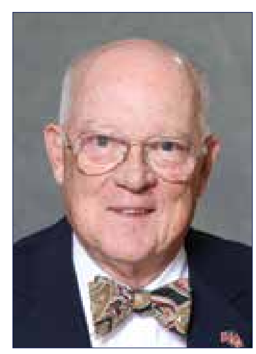

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PRESIDENT'S MESSAGE: SILENCE IS BETRAYAL

by Kathryn E. Clunen

It's now July 2020. We are more than halfway through this challenging year.

Since my last President's Message, the deaths of George Floyd, Breonna Taylor, Rayshard Brooks and other black lives lost to police brutality and racist violence show us how far removed we still are from justice for all in the 21st century.

I wanted to write about Black Lives Matter in my President's Message but was honestly having a hard time. Who am I – a white woman – to opine on this topic? What if what I want to say comes out wrong and I offend someone?

But I am committed to fighting for justice and speaking up for what I know is right. Part of VCBA's mission calls us to work to improve the equal administration of justice for all. A just society cannot accept the mistreatment of some of its members based on the color of their skin. As members of VCBA, we need to speak up and move our community forward.

You may wonder what we can do to confront racial injustices in society and the law.

I talked to a few VCBA lawyers who have stepped up in our community.

Rennee Dehesa spearheaded a volunteer group of attorneys, paralegals and law students who served as legal observers at local protests. The National Lawyers Guild (NLG) Legal Observer program was established in 1968 in New York City in response to protests at Columbia University and city-wide antiwar and civil rights demonstrations. NLG provides training for those interested.

A legal observer is a nonparticipant at the protest. The observer's role is to protect rights, by witnessing, documenting, and recording possible violations of rights. Legal observers may be called as witnesses and all legal observers must be willing to testify. "Lawyers and law students are in a unique position as legal observers as they are trained to be knowledgeable witnesses," says Dehesa. By mid-June, Dehesa signed up 35 legal observer volunteers, legal advocates and consultants.

On June 6, Dehesa and seventeen others attended the peaceful Simi Valley protest. Dehesa made neon green shirts for everyone to wear so that they stood out to law enforcement and the protesters. The legal observers stood by the police line, which Dehesa said had the best vantage point. The legal observers ask on video for law enforcement names and badge numbers and then they take recordings of the protest. Legal observers also give out their hotline number for protesters to call if assaulted or harassed by either law enforcement or counter-protesters. One legal observer stays out of the protest area to answer calls that come in.

Dehesa doesn't believe the protests will end anytime soon and said that the Civil Rights-era protests and marches went on for a year.

Dehesa's future goal is to work with local law students to open a local NLG chapter and fundraise for reusable neon green vests and hats, and water and snacks for legal observers.

If you are unable to go to protests, there are other ways you can fight for justice.

Vanessa Frank has volunteered to guide non-citizens on potential immigration consequences for civil disobedience.

Other lawyers participated in Defending Protesters training, which provides an overview of the important issues relevant to representing clients who face criminal charges in connection with their participation in political protests.

Women Lawyers of Ventura County came up with a multi-step plan, which includes meeting with legislators, choosing a cause for donation, working with other legal groups, and meeting with law enforcement.

The California Lawyers Association (CLA) created a Racial Justice Group that is open to all California lawyers. The ABA started a 21-Day Racial Equity Habit-Building Challenge to assist lawyers to become more aware, compassionate, constructive and engaged in the quest for racial equity.

Along with joining the Racial Justice Group and starting the 21-Day Challenge, I have suggested that VCBA make Juneteenth a holiday that will give Executive Director Sandra Rubio and her staff a day off as a way to celebrate black culture and history. I'm also working with the VCBA MCLE committee to provide more elimination of bias MCLE events to our members.

The time has come to act for justice. Please take a moment and think about what you can do as an individual, and what VCBA can do as a whole, to confront racial injustices in our local community, society, and the law. As Dr. Martin Luther King, Jr. said, "A time comes when silence is betrayal."

Kathryn E. Clunen *is of counsel at the Dion Law Group, APLC and practices family law. She can be reached at KatieC@dionlawgroup.com or (805) 497-7474.*

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MESSAGE FROM THE VCBA BOARD OF DIRECTORS

We, the VCBA Board, believe black lives matter. We mourn the deaths of George Floyd, Breonna Taylor, Rayshard Brooks, Ahmaud Arbery and others. We join the numerous county, state and national bar organizations, and local law enforcement agencies, in speaking out against systemic racism. VCBA's mission, in relevant part, calls on its members to work to improve the administration of justice. A just society cannot accept acts of brutality against black adults and children, or any other form of racism, oppression or xenophobia.

Throughout Ventura County, we have seen peaceful protests. We have seen lawyers and law students volunteer as legal observers at protests. We stand with the peaceful protesters and legal observers who demand accountability and justice.

But we need to do more than just demand accountability and justice. VCBA needs to collaborate with other bar organizations and community partners to determine how we can advance the goal of equal justice for all. Please join us in this important work.

17 Support, 1 Oppose, 2 No Position, 2 No Replies

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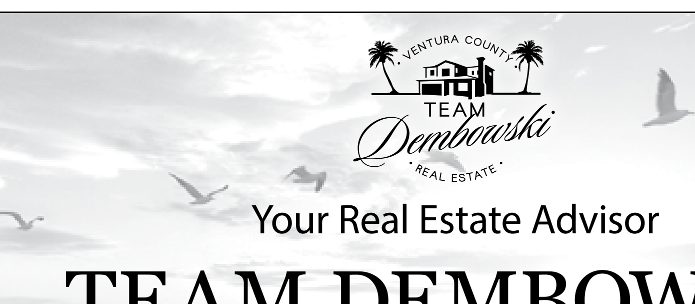

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HAVE YOU HEARD?

Retired Ventura County Municipal Judge **Lee E. Cooper** passed away May 19, 2020, at the age of 88. He retired from the bench in 1991. A UCLA law school graduate, Cooper was employed as a deputy district attorney in Ventura, law partners with Senator **Robert Lagomarsino**, a Ventura County Municipal Judge, a mediator in alternative dispute resolution, interim Presiding Judge for the Inyo County Superior Court, and legal advisor to the Ventura County Civil Service Commission. His proudest case was the settlement in *Sierra Club and Owens Valley Committee v. LADWP*, in which he facilitated the largest riverine restoration project in U.S. history by forcing LADWP to restore water to all 63 miles of the Lower Owens River, which had been dry for almost a century. Former Ventura Superior Court Judge **Edwin Osborne** recognized Cooper for his ability to settle cases. The late Judge **John Hunter** praised Lee Cooper as "one of our most dynamic and resourceful judges."

The Santa Barbara and Ventura County Colleges of Law are proud to hear from students who are using their legal skills to stand in the fight against injustice. Student Stacie DeHaro recently participated in a Ventura County protest as a legal rights observer. She shares her experience: "I learned about the legal observer role through a faculty member. Protestors were kind and grateful to have us present. As a legal observer, it was nice to know we were there to ensure that protestors' legal rights were being secured, specifically allowing them to exercise their First Amendment rights to the fullest extent possible. I encourage all lawyers and law students to use their special skills to assist the Black Lives Matter Movement."

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A BEAUTIFUL FRIENDSHIP: TRIBUTE TO BILL HAIR

by Tony Trembley

Bill Hair saw something in me that I didn't see in myself.

We met in 1978. I was a postgraduate fellow in the California Legislature, handling legislation for the late Assemblymember **Chuck Imbrecht**, who represented Ventura County.

Bill had come to Sacramento to represent a client in an administrative agency hearing. He stopped by the Capitol Office to introduce himself and ask for Chuck's assistance on a separate political matter.

With apologies to Humphrey Bogart for misusing a quote, that was the beginning of a beautiful friendship.

Bill was responsible (some would say to blame) for encouraging me to attend law school, and in 1983, to find my way to Oxnard and to Nordman Cormany Hair & Compton (NCHC) as a first-year associate.

Thirty-seven years later, I am enormously grateful for Bill's confidence in me and our friendship. I am one of those lucky few who, early in their career, is fortunate to meet someone transformative as a role model and true professional and personal mentor. That was Bill.

We worked together closely over most of the last four decades, particularly in representing public agency clients. Bill possessed an encyclopedic knowledge of California codes with an extraordinary ability to analyze statutory provisions and understand the intent behind the law. He very kindly enjoyed telling us as young associates to "Read the ******* code" in response to our questions.

Better than any other lawyer with whom I have worked, Bill had the innate ability to frame issues, see the big picture in a case, and to then thematically explain the case to a client and to a court.

Bill was a lawyer's lawyer. Just a sample of his many professional accomplishments: Deputy District Attorney for the County of Ventura; City Attorney for the City of Port Hueneme; President of the Ventura County Bar Association; member of the State Bar Commission on Judicial Nominees Evaluation.

Bill was also a man of humility, grace, humor and absolute integrity. He was dedicated to his family, his clients and his community. Listing all of his charitable and public service activities would take far too long. However, his well-deserved 2001 receipt of the **Ben E. Nordman** Public Service Award speaks volumes, as does his 2019 Lifetime Achievement Award from the Association of Water Agencies of Ventura County (AWA). Bill made a significant and lasting contribution to our quality of life in Ventura County.

I'm just one of many who celebrate Bill's life.

In a moving Facebook tribute, Diane Hair wrote, "I remember wanting to be just like my grandfather from a very young age. When we spent Christmases in Ventura I always slept in his office surrounded by books about law and science and so many things I didn't understand, but I still woke up early and stayed up late just to sit at his desk and pretend I was not half, or a quarter, but just a smidge as smart as he was. … My grandfather was a brilliant, strong, funny, charismatic, generous man full of love for his family and for life."

Bill had a similar positive impact on many of my former partners and colleagues at NCHC. Just a sample of their eloquent praise of Bill:

In a 2019 AWA accolade, **Marc Charney** wrote, "Since I joined [NCHC] in 1967, I have known Bill Hair as a teacher, mentor, role model and friend. He is a smart, thorough and skillful lawyer. More than that, he is an insightful and compassionate counselor, who combines his legal ability and knowledge with an innate sense of what is right and what is practical, and a piercing (if not always politically correct) sense of humor. Bill has brought these qualities to bear, not only for his clients, but as a leader and trusted advisor in his community."

Larry Hines recalls, "When I joined the firm as a law clerk in 1969, Bill Hair and **Bob Compton** were my mentors. Bill in particular showed me how to be a 'trial lawyer,' which law school fails to include. … Perhaps I am old-fashioned, but to me being a law partner is something special. It is far more than making money (and we all did well). It involves loyalty and friendship among the partners, and a commitment and willingness to support each other, and Bill did all of this. He was a great lawyer and I am proud to say he was my partner. Bill also had a number of other lawyers in the county as his clients and this shows how everyone viewed his expertise (it is called a 'Lawyer's Lawyer').

Our colleague Tami Cook describes Bill in this way, "Bill Hair was much more than just a partner at NCHC. He was a true man of the people, including staff…[he] did not care if you had a million acronyms or numbers after your name. Protective and nurturing of all who passed through the NCHC halls, he valued each individual. We weathered many a storm together, personally and professionally, and in the epicenter of the storms, Bill's calm strength and resilience were guiding lights."

Jon Light remembers, "My favorite Bill Hair line was when I asked him about how he interviewed prospective associate attorneys and would ask them whether they ate tofu. He told me that was his way of 'weeding out the Democrats.' Good thing I didn't mention Yoga."

Lou Cappadona's praise for Bill: "I lived and worked in East County until I joined Nordman in 1998. It was a learning experience for me that Bill was not only of the big four that built the law firm, but they were also part of building West County."

Dien Le, like Bill a former president of the VCBA, salutes Bill's legacy: "As a former NCHC associate, I worked closely with Bill from 1998-2003. Bill was such a great man and mentor to me (and others who came before and after me). As a young inexperienced attorney, he taught me a lot about law and motion work and in particular representing public entities. What impressed me the most was that no matter how busy he was, he still took the time to train and teach by example. I have fond memories of frequently attending court hearings with him either where I could see him in action or where he would give me the valuable opportunity to argue the motions that I had researched and drafted. … Bill not only groomed green associates to be seasoned litigators, he also inspired those like me to be leaders in their firm and in the Ventura County community through the VCBA and other organizations. I will never forget that when I became a partner at a Westlake Village firm after leaving NCHC, he sent me a nice personal letter expressing how proud he was of me and saying 'I always hope that my small efforts may have played some part in your success.' More than he will ever know! … He was an amazing and gentle giant of our community. His passing is a tremendous loss to all who knew him and were touched by his kindness and generosity. He will be sorely missed and I feel fortunate and honored to have known him."

Retired Ventura County Superior Court Judge **Glen Reiser** pays this tribute: "Bill was the consummate California lawyer. The finest legal tactician I have ever known, thoughtful, inquisitive, kind, funny (and often silly), a great writer, a great marketer, a great mind, a great human being. Every time I issued a judicial opinion on some esoteric issue such as inverse condemnation, CEQA or water law, it was influenced both in thought and content by the finest teacher ever, William Harley Hair."

Bill saw something in all of us. He inspired us with his brilliance, his mentoring and friendship, and his devotion to our community. That is his legacy. We are all better for having Bill in our lives. We miss him and think of him often, but he also lives on through all of us.

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SOUTHERN CALIFORNIA INSTITUTE OF LAW'S ACCREDITATION TERMINATED

by Sara Peters

Southern California Institute of Law (SCIL) – one of only two law schools in Ventura County – lost its accreditation and authority to grant Juris Doctor degrees on June 1 because it failed to comply with a State Bar standard requiring a minimum cumulative bar exam pass rate of at least 40 percent.

SCIL was founded in Ventura in 1986 and became a California accredited law school in 1996. The Ventura campus was located across the street from the Government Center. Its website previously stated that it offered a "four year evening-only program for working adults."

Kathryn Clunen, VCBA President and former SCIL instructor, lamented the loss: "For local students wanting to pursue a second career in law, it's very helpful to have choices close by."

40 Percent Minimum Pass Rate Standard (MPR)

The State Bar approved the 40 percent minimum pass rate (MPR) in 2012. It requires California accredited law schools to "maintain a minimum cumulative bar examination pass rate (MPR) of at least 40 percent for the most recent five-year reporting period." (State Bar of California, Guidelines for Accredited Law School Rules, Guideline 12.1, *https://www.calbar.ca.gov/Portals/0/documents/admissions/AccreditedLawSchoolGuidelines.pdf*; Since 2015, California accredited schools have been required to calculate and report their MPRs every year by July 1. (Guideline 12.2, *supra.*)

Calculating the MPR

The MPR standard doesn't require that 40 percent of a school's graduates pass the bar within five years of graduation. It requires that 40 percent of a school's graduates **who take the bar within five years of graduation** pass the exam during that period. Apparently, a law school's MPR would not be adversely affected by graduates electing not to take the bar exam at all during the reporting period.

SCIL Not Near 40 Percent Standard

According to the State Bar, SCIL has not been in compliance with the 40 percent MPR standard since it went into effect. (Ans. to Pet. for Review, *Southern California Institute of Law v. State Bar of California, Committee of Bar Examiners*, Cal. Supreme Ct. case no. S262033 ["*SCIL v. CBE*"].)

2018 and 2019 MPRs for all California accredited schools are available on the State Bar's website. According to that data, SCIL didn't come very close to meeting the 40 percent MPR standard. SCIL's 2018 MPR was 26.4 percent, and its 2019 MPR dropped to 21.1 percent. (*https://www.calbar.ca.gov/Portals/0/documents/admissions/Education/MinimumPassRateStandardCumulativePassRates.pdf.*) Of California's fifteen state-accredited schools, SCIL was one of only two that did not meet the 40 percent MPR standard in 2018 and 2019. (*Ibid.*) The other, Pacific Coast University School of Law, has been issued a Notice of Intent to Terminate Accreditation. (*https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools* (last visited June 17, 2020).)

Most California Accredited Schools Exceeded 40 Percent Standard

In those same years, the other thirteen California accredited schools exceeded the standard with MPRs ranging from 41.7 percent to 73.9 percent.*)* Among those were Santa Barbara and Ventura Colleges of law, which attained an MPR of 58.9 percent in 2018, and 57.7 percent in 2019.

February 2020 Bar Exam Performance

SCIL's pass rate on the most recently administered bar exam this past February was five percent. (*http://www.calbar.ca.gov/Portals/0/documents/FEB2020-CBX-Statistics.pdf.*) Because SCIL had fewer than eleven first-time test takers for that exam, the State Bar has only made available data concerning the pass rate of repeat test takers. Of SCIL's 21 repeat test takers, one passed. (*Ibid.*)

SCIL was in good company; all California accredited schools performed poorly on the February exam this year. The overall pass rate for repeat test takers from California accredited law schools was either 9.8 percent or ten percent – depending on which page of the State Bar's report you're looking at. (The General Bar Examination Statistics graph on page one shows 9.8 percent, and the graph on page five shows ten percent.) The overall pass rate for first time test takers from California accredited law schools was eleven percent.

But even though all California accredited schools performed poorly on February's exam, the overwhelming majority of them have nonetheless managed to stay in compliance with the State Bar's 40 percent MPR standard.

Petition for Review & Request for Stay

After receiving the State Bar's Notice of Termination of Accreditation dated April 24, SCIL filed an original petition and stay request in the Supreme Court

challenging termination. (*SCIL v. CBE, supra*.) SCIL argued, among other things, that the 40 percent MPR standard violates the state Constitution's non-delegation doctrine because the Legislature did not provide principles to guide the State Bar's accreditation rulemaking. SCIL also claimed that the standard violated its First Amendment Right to free speech by forcing the school to alter its curriculum. None of its arguments were successful; the Supreme Court denied SCIL's stay request and petition.

What About Spring 2020 Graduates?

Under Accredited Law School Rule 4.176, all terminations of accreditation happen on a "specific date," and, "[u]ntil that date, students attending the law school are deemed enrolled at an accredited… law school." (*https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title4_Div2-Acc-Law-Sch.pdf*.) SCIL's termination took effect June 1, so students who graduated before that date earned a Juris Doctor degree and therefore may sit for the bar exam.

Application for Unaccredited Registered Status

At the time of publication, SCIL remained unaccredited and non-operational. But according to SCIL Dean Stanislaus Pulle, the law school has already submitted an Application for Registration with the State Bar. Although "registered" law schools are unaccredited, they can nonetheless grant law degrees so that their graduates are eligible to sit for the bar exam.

The main difference between accredited and unaccredited registered schools is that the latter need not maintain a minimum bar pass rate, but their students must take and pass the First Year Law Student's Exam (i.e. "Baby Bar") within three consecutive administrations after completing their first year of study. (The Baby Bar is administered twice per year.) According to the State Bar, a student will "receive credit for law study undertaken up to the point of passage." (*https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools* (last visited June 17, 2020).)

Students who don't pass the Baby Bar within that time, but end up passing it at a later date will be given only one year of law study credit "toward meeting the legal education requirements needed to qualify to take the California Bar Examination." (*Id.*)

SCIL's Future

Although Pulle objects to SCIL's loss of accreditation, he likes the idea of "not being subject to the fluctuations of bar pass rates" and added "the school has long resisted being a 'bar mill' school."

Sara Peters *practices family law and civil litigation in Ventura. She has a background in employment law and is a former Special Education Teacher. She can be reached at (805) 200-7418 or srp@peterslawgroup.com.*

California Accredited v. ABA Approved

In case you're not familiar with State Bar terminology concerning law school accreditation, a "California accredited law school" is accredited by the State Bar but not the American Bar Association (ABA). Does that mean "ABA approved" schools are not accredited by California? No. Law schools approved by the ABA are also accredited by the California State Bar—they're "deemed accredited" by virtue of being approved by the ABA. (Accredited Law School Rule 4.102.) Regardless, the term "California accredited law schools" is reserved solely for California accredited schools that are not also approved by the ABA.

BE SURE TO DRIVE ON THE LEFT SIDE OF THE ROAD, BUT JAYWALKING IS OK

by Keith Fichtelman

A few years ago, I gained admission as a Solicitor of England and Wales. Now, people see the notation on my business card or web profile and often ask, "Do you wear one of those white wigs?" (No, that's a barrister, not a solicitor. More about that below.) "Why don't you have an accent?" (I was born and raised in California and have never spent more than a couple of weeks at a time in the U.K.) "What are some of the differences between English and American law?"

The short answer to that last question is that there are a lot of differences (and more than a few similarities) between English and American laws and courts. The American legal system arose out of English common law, but 250 years later the courts and the laws continue to move in sometimes separate directions. That said, England and America share many common values, and even as new laws have developed, the two legal systems are often similar. Some of the differences are small and mundane (for instance, there is no law against jaywalking in the U.K.), while others are more complex and have graver consequences to unwary parties.

Attorneys will immediately notice a difference in qualifications. In the U.S. we often describe ourselves as litigators or transactional lawyers, but in the end, the educational requirements are the same and we are all attorneys. There is typically nothing preventing any U.S. attorney from appearing in a court or drafting a document in a state where they are licensed to practice.

England still has a dual system: attorneys are qualified as either solicitors or barristers. Barristers are the ones that you see in TV and movies (or actual court) wearing white wigs and robes. They are pure litigators whose practices focus on appearing in court and other proceedings. Barristers are not members of firms, but rather of "chambers," which are groupings of independent barristers who pool certain resources but are otherwise independent of one another. Conversely, with a few exceptions, solicitors do not appear in court for clients. Instead, they typically draft legal documents and provide legal advice to clients. In litigation, solicitors are often the intermediary between the client and barrister and will gather and prepare the evidence for the barrister to offer in court.

The traditional route of qualification for either a barrister or solicitor includes a component of vocational training or apprenticeship with a law firm (for a solicitor) or an "Inn of Court" (for a barrister). Foreign licensed attorneys, however, also have an option to qualify by testing, which is the route I used to qualify. (See *https://www.sra.org.uk/solicitors/qlts/*.) Although the United Kingdom is not a "federal" system, there are separate court systems and separate qualifications for practice in Scotland and/or Northern Ireland than in England and Wales.

One major difference between English and American law involves the right to remain silent. Both the U.S. and England recognize a right to remain silent, with anything you tell the police available to be used against you in a criminal prosecution. In England, however, silence may also be used against a defendant in certain circumstances. The Criminal Justice and Public Order Act 1994 (*http://www.legislation.gov.uk/ukpga/1994/33*) permits negative inferences against an accused person who remained silent during trial or during questioning if that person later attempts to offer evidence that could have been provided at the time of questioning. Accused persons are allowed to first discuss their case with a solicitor, but negative inferences can thereafter be drawn if the accused:

- Fails to mention any fact to the police that they later rely on in court;

- Fails to offer any evidence at trial (except in certain circumstances, such as when the court determines that the accused is not mentally or physically fit to testify);

- Fails to explain or account for objects found on their person or in their possession at the time of arrest; and/or

- Fails to provide an alibi or explain why they were present at a particular location.

An accused, however, cannot be convicted solely on the basis of negative inferences drawn from their silence. (Criminal Justice and Public Order Act (1994) § 38, *http://www.legislation.gov.uk/ukpga/1994/33/section/38*.) The Crown still must present affirmative evidence tending to prove the guilt of the accused beyond just their decision to remain silent.

English courts also interpret contracts differently than American courts. Both legal systems begin the analysis by looking to the plain language of the contract. For instance, in a seminal House of Lords decision, Lord Hoffman observed that "[t]he 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents." (*Investors Compensation Scheme v. West Bromwich Bldg. Society* (1997) UKHL 28.) A bit

of an aside: The Supreme Court of the United Kingdom is currently the highest court in matters of English law, but, before 2009, the House of Lords was the highest civil appellate court. Lord Hope further explained that "[w]here ordinary words have been used, they must be taken to have been used according to the ordinary meaning of those words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract." (*Melanesian Mission Trust Board v. Australian Mut. Provident Society* (1996) 74 P&CR 297, P.C.)

When contractual terms are ambiguous, however, English courts take a decidedly different approach than American courts. Typically, American courts will look to the subjective intent of the parties to ascertain what they meant when they reached an agreement based on extrinsic evidence, such as the parties' pre-contractual negotiations, their actions in performing the contract, the business context, the parties' prior dealings, and customs in the particular industry.

English courts, however, look to objectively determine the intent of the parties using a reasonable commercial standard. Evidence of pre-contractual negotiations is generally excluded from such an analysis and evidence of post-contractual conduct is also not considered in construing a contract. Lord Clarke summarized that the "ultimate aim" under English law is to:

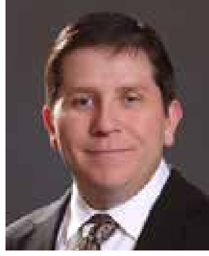
> determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant; the relevant reasonable person being one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(*Aberdeen City Council v. Stewart Milne Group Ltd.* (2011) UKSC 56.)

Thus, where a contractual term is open to multiple interpretations, English courts generally adopt the interpretation which the court determines "is most consistent with business common sense." (*Rainy Sky S.A. and others v. Kookmin Bank* (2011) UKSC 50.) English courts may, however, look to post-contractual conduct to determine if the equitable remedy of estoppel by convention should be applied. (E.g., *Mears Ltd. v. Shoreline Housing Partnership Ltd.* (2015) EQHC.) Essentially, if the parties have been conducting themselves contrary to the contractual terms, they could be estopped under English common law from later trying to enforce the terms of the agreement. This is an equitable remedy, however, rather than a principal of contractual interpretation.

In taking an objective approach to contract interpretation rather than the more subjective approach employed by U.S. courts, English courts have acknowledged the risk that parties will be bound to a contract which neither of them may have intended at the outset of the relationship. (*Chadbrook Ltd. v. Persimmon Homes Ltd.* (2009) UKHL 38.) English courts have reasoned, however, that this risk is justified by the greater interest of predictability in outcomes and economy in adjudicating disputes. As Lord Hoffman reasoned in *Chadbrook Ltd.,* "[T]he law of contract is an institution designed to enforce promises with a high degree of predictability and the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable the outcome is likely to be." Put another way, "English commercial law . . . seeks to serve the business community by providing certainty." (*Enka Insaat ve Sanayi A.S. v. OOO "Insurance Company Chubb," et al.* (2020) WLR(D) 256, EWCA Civ 574.) In practical terms, this often leads to far less discovery (and expense) in English contract disputes than American ones.

If you (or your clients) find themselves traveling to England, do not assume that the laws will be the same as the U.S. just because we share a common language and history. Similarly, if negotiating a contract under English law, do not assume that the laws will be "close enough" to American laws. It is always best to consult with a solicitor or other legal professional.



Keith Fichtelman *is dual-qualified as a United States (California & New York) attorney and Solicitor of England and Wales. He is a partner with the Ventura County firm Nelson, Comis, Kettle & Kinney LLP. His practice focuses on civil litigation, including international arbitration and dispute resolution, and providing outside counsel services to clients. Fichtelman can be reached at (805) 604-4116 and kfichtelman@calattys.com.*

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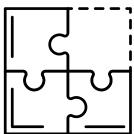

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BARRISTERS' CORNER ATTORNEY SPOTLIGHT: CHIEF ASSISTANT DISTRICT ATTORNEY CHERYL TEMPLE

by Tatiana DeVita

As the Chief Assistant District Attorney, **Cheryl Temple** holds the number two spot in the Ventura County District Attorney's Office. Her career with the VCDA started in 1995 as a summer intern, and by 1997 she was hired as a post-bar law clerk. After she passed the bar, Temple was assigned to the misdemeanor unit, as all new attorneys are at the VCDA.

During that first year, she was asked to help with a death penalty case (a position reserved for the most exceptional trial attorneys). Within just two years, she began trying the most serious death penalty cases – something that takes the average Deputy District Attorney five to ten years to achieve. Thereafter, she spent over a decade trying homicide cases in the Major Crimes unit. It is therefore no surprise that despite having shifted her out of the courtroom and into management, District Attorney **Gregory Totten** chose Temple to represent the County on the multi-county team of DAs prosecuting the Golden State Killer.

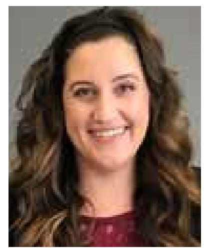
Before becoming the Chief Assistant District Attorney, Temple supervised several units in the District Attorney's Office. Over the course of her tenure in management, she says that, when working with attorneys who truly know their craft, "It is best to get out of the way and help get them the investigative and administrative support they need."

Trying homicides was Temple's favorite assignment because the DA's role in such cases is so profound. She says, "Families on both sides are forever altered, if not destroyed, and emotion and chaos churn like in no other crime. I've always viewed a Major Crimes prosecutor as the one who restores some semblance of order to the world for the people involved in homicides; we restore faith in the notions of truth and fairness, personal responsibility, and community values." She feels absolutely privileged to represent the People in those cases, and she remembers each victim and every parent of a victim she ever met because those meetings were life-altering experiences.

When asked what advice she would give to young attorneys, Temple says, "Prepare, prepare, prepare." She says to never believe your first impression of a case because there is always more to consider. Temple advises young attorneys to start with a constitutional, big picture analysis of issues. Next, study the relevant statutes and question their applicability. Welcome others' perspectives by discussing and arguing factual scenarios and legal points with peers, spouse, and friends. Finally, spend time in solitude to think about your case—what is the right thing to do and what arguments should be made. Ultimately, if disciplined and informed, you will be able to trust your instinct.

Temple cautions young attorneys to not mistakenly inject their own ego or that of opposing counsel into their cases. While attorneys should care about the issues and outcome, they need to remember their roles. The case is about the parties, not the attorneys, and she advises young attorneys to maintain empathy for those involved. Temple says, "Whenever a court case exists, no matter what the charge or claim, remember that it only exists because a conflict occurred so great that the power of the State has been summoned to resolve it. This can be frightening, humiliating, infuriating, expensive, and painful to the people involved. No one comes out unscathed." With that in mind, she says to be strong when you represent your client, but always be honorable in your work.

As a young female attorney aspiring to climb the ranks in the VCDA Office, I look at Temple as a wonderful role model who has paved the way for women like me. With strong family values, extraordinary work ethic and fierce trial skills, Temple truly embodies the qualities of an experienced attorney that people across the legal community can (and should) appreciate.



***Tatiana DeVita** is a Deputy District Attorney at the Ventura County District Attorney's Office and serves on the Barristers Board as a member-at-large.*

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AT THE RECEIVING END

by David B. Shea

We have all heard the term "receiver" and know in the simplest sense that the appointment of one is an equitable remedy that is available when necessary to preserve or sell an asset, enforce a judgment or carry out orders of the court. The list is long with respect to when and for what types of matters receivers may be appointed. (See Code Civ. Proc., § 564.)

A receiver is a court representative who acts under specific orders to do a variety of things, including but not limited to managing a business, selling and leasing property, collecting rents and accounts receivables, and taking control of assets to avoid unauthorized transfers. In the appropriate case, this remedy may more efficiently streamline the litigation process. This may be especially true when applied in the context of family law cases.

The court is empowered to appoint a receiver to enforce its own orders during the pendency of marital dissolution proceedings. (Fam. Code, § 290; Code Civ. Proc., § 564, subd. (b)(9).) Fairness and the preservation of assets are paramount.

Many such cases involve a family-run business, typically one of the most valuable assets of the marital estate. Often one or both of the spouses are engaged in the day-to-day operation of the business, an arrangement that may not work smoothly during dissolution proceedings. If the spouses are unable to conduct business as usual, the obvious approach is to reach an agreement with respect to who will continue to operate the business and under what guidelines. Not surprisingly, many times an agreement cannot be reached because of the inherent distrust that each spouse has for the other. Given that the value of the business may be significantly impacted by a material disruption in operations, the court may choose to appoint a receiver to operate the business or oversee its financial affairs. This oversight may include controlling the income stream to ensure that all receipts are deposited into a business bank account and that proper business expenses, not personal ones, are being paid. The goal of the receiver is to sustain the value of the business during the turmoil of the dissolution proceedings, so that it can be appropriately divided or allocated as ultimately ordered by the court.

Most orders appointing a receiver include a mandate to turn over the books and records of the business to the receiver to promote transparency between the parties. Once in possession of this information, the receiver should provide each party with, among other things, bank statements, income and expense reports and payroll and tax reporting records, unless a compelling reason exists to withhold such information. Equal access to information should avoid contentious and expensive discovery battles.

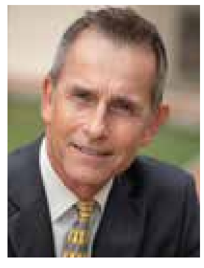
A receiver may also act as a facilitator gathering information that a business valuator will need to accurately assess the business. This too may avoid costly delays.

One of the first issues presented in dissolutions proceedings is support, which is mostly determined by the respective incomes of the spouses. If a family-run business is a primary source of income, accurate profit reporting is critical to the court's issuance of appropriate support orders. During the marriage, the spouses may have been liberal when reporting business expenses relating to automobiles, entertainment, travel and food. They may have often said, "Let's put this one on the business credit card." That attitude may change throughout the course of a dissolution proceeding. Although many charges may be appropriate business expenses to which the parties agree, a receiver can help to stop or reduce potential abuses when they do not. More expenses inherently equal less profit and thus potentially less support.

The cost-benefit analysis of utilizing a receiver must occur before entertaining the remedy. It comes as no surprise that receiverships, the cost of which is hourly, are expensive. This expense impacts all parties since the costs and fees are generally paid from the receivership estate, unless otherwise ordered by the court.

If the analysis militates a receiver, the parties should attempt to contain the costs at the outset by finely crafting the order with the help of the proposed receiver, aiming to provide clear directions and minimize further court intervention.

Although this article has focused on family law matters, a civil or probate court may appoint a receiver in many other types of matters involving corporate dissolutions, foreclosures, sale of real property and collection of rents, and resulting/constructive trusts. The receiver steps into the fray whenever appointed by the court to help carry out its orders, with an eye to fairness and asset preservation.



***David B. Shea**, a partner at Ferguson Case Orr Paterson, LLP, is a trust and estate litigator and a court-appointed receiver.*

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