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*The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.*



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## Articles

- 6 Spotlight on Santa Barbara Superior Court Judge Von T. Deroian
- 8 Shero Dolores Huerta Honored for her “Courage in Dangerous Times,” *By Teresa M. Martinez*
- 10 Time’s Up for So Cal Stip, *By Po Waghalter*
- 14 Forensic Science—The Beat Goes On, *By Robert Sanger*
- 18 Landlord-Tenant Update: Intersection of City of Santa Barbara’s Mandatory 12-Month Lease Term Law and California’s New Just Cause Eviction Law, *By Kevin P. Nimmons*
- 20 How to Correctly Value the Community Property Interest In a Public Retirement Plan Such As SBCERS, CalPERS or CalSTRS, *By John C. Madden*

- 24 San Marcos High School Wins 2020 Mock Trial Competition
- 29 The Gift of Self-Reliance, *By Joseph R. Weiland*

## Sections

- 25 Motions
- 26 Verdicts & Decisions
- 30 Classifieds

## On the Cover

Santa Barbara Superior Court Judge Von T. Deroian. Photo by Gina Kim/Daily Journal.



*San Marcos High School 2020 Mock Trial Champions. For more coverage, see page 24.*

# Spotlight on Santa Barbara Superior Court Judge Von T. Deroian

**V**on T. Nguyen Deroian served as deputy district attorney at the Santa Barbara County District Attorney's Office from 2006 to 2017. During her time as deputy D.A., Judge Deroian handled a variety of cases that ranged in specialties from juvenile to gang crimes to sexual assault cases. Prior to her judgeship, she served as a commissioner at the Santa Barbara Superior Court in 2017 and has been an adjunct professor at the Santa Barbara College of Law since 2013.

## ***How long you have been on the Bench?***

Just about three years. I served as the Family Court Commissioner for a little over a year and then was appointed to a judgeship by Governor Brown in June 2018.

## ***Tell us about your education:***

I attended high school in Riverside County and Fresno County. I obtained my AA from Allan Hancock and my law degree from the Santa Barbara College of Law. Prior to passing the bar I was a litigation paralegal for approximately eight years specializing in the area of insurance defense and public entity law.

## ***What advice would you offer to a new attorney?***

Be professional and courteous to your opponent at all times, even when it does not seem deserved. Treat everyone with respect – including Court staff (bailiffs, court clerks, court reporters). Develop cordial relationships with your peers and more experienced counsel. And, above all, be prepared.

## ***If you could change one thing about the judicial system what would it be?***

Although I consider our judicial system to be the best in the world, I'd strive to develop greater diversity on the Bench and in the Bar that is more reflective of our society, including race, gender, life and professional experience.

## ***Wisdom gleaned from the Bench:***

I have learned the potential dangers of making assumptions and the importance of keeping an open mind.

## ***Describe your style in the courtroom:***

I strive to maintain an atmosphere that helps litigants and the public feel comfortable that I am listening, processing the information and giving thoughtful consideration to the facts, applying the law and working efficiently.

## ***Who were/are your mentors? What were important lessons they taught you?***

I have been fortunate to have crossed paths with many people who have been valuable mentors, and I hesitate to single out any in particular. The most important lesson I have learned is that my goals are achievable.

## ***What do you love about your job?***

Everything. It is a joy to serve as a judge of the Superior Court.

## ***What do you do in your spare time? Hobbies?***

I enjoy spending time with my husband, our children and my pug, Pancake.

## ***Do you have advice for attorneys trying a case before your bench?***

Arrive on time and prepared to proceed. If you anticipate a delay, make sure you notify the court staff and opposing counsel.

## ***Are there any changes in the legal community you're excited about?***

As an adjunct professor at the Santa Barbara College of Law I interact with many law students. I have learned that many are there to effect real change in different areas of society and are motivated to make a difference in the areas of criminal justice reform, immigration and the environment. That's exciting and wonderful for our community.

## ***What do you believe is the biggest difference between practicing law and presiding as a judge?***

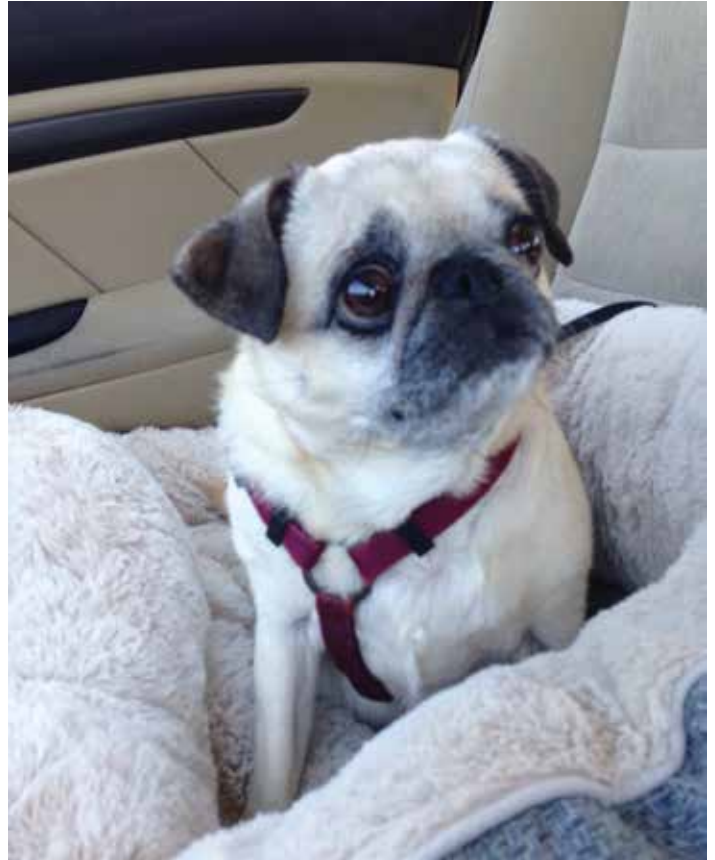
I am no longer an advocate. I am a neutral trying to make just and fair decisions for the parties.

## ***Who is your legal heroine?***

California Supreme Court Chief Justice Tani Cantil-Sakauye, the second woman to serve in that position and the first Asian-Filipina. She's an amazing public speaker and

knows her stuff. She has enormous responsibilities as Chief Justice and seems to perform them effortlessly. In addition to juggling the Court's caseload, she has the duties associated with overseeing hundreds of trial and intermediate appellate courts throughout the state and makes numerous public speaking appearances. She has spearheaded great changes on important subjects, only one being expanding access to justice. She led the courts through a tough budgetary crisis and works tirelessly to ensure adequate funding. Moreover, the Chief somehow makes time for her family. She has been an inspiration for me, and if I ever get the chance, I will ask her how she is able to do it all and make it look so easy. ■

*Judge Deroian describes her pug named 'Pancake' as "one of the loves of my life".*



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# Shero Dolores Huerta Honored for her “Courage in Dangerous Times”<sup>1</sup>

BY TERESA M. MARTINEZ

In January 10, 2020, labor leader, civil rights activist and shero Dolores Huerta was in Santa Barbara to accept an award for her lifelong work for social, economic and environmental justice on behalf of marginalized communities.<sup>2</sup> The event was attended by Santa Barbara’s elected officials, including State Senator Hannah Beth Jackson, Assembly Member Monique Limon, and Santa Barbara City Mayor Cathy Murillo; community organizers; and admirers of Ms. Huerta.

Ms. Huerta, born in New Mexico on April 10, 1930, grew up in Stockton, California where she taught elementary school until she could no longer stand to see her students, many of them the children of farmworkers, come to school hungry and bare foot.<sup>3</sup> This inspired her journey of working to correct economic injustices through community activism.<sup>4</sup> Ms. Huerta became an activist with the Community Service Organization (CSO) in 1955 and co-founded the National Farm Workers Association (UFW) with Cesar Chavez in 1962. Her successes have had tremendous impacts on the lives of immigrants, farmworkers, children, and women, which are still felt today.

Ms. Huerta’s work includes mobilizing Latino voters since the 1950s to elect officials who legislate for the benefit of Latino and farmworker communities; securing Aid For Dependent Families (“AFDC”) and disability insurance for farm workers in California; organizing the nationwide grape boycott to protest the dangers of pesticides on grape pickers, which resulted in the entire California table grape industry changing its practices<sup>5</sup>; enacting the Agricultural Labor Relations Act of 1975, which granted farm workers in California the right to collectively organize and bargain for better wages and working conditions<sup>6</sup>; and helping to

get the Immigration Reform Control Act of 1986 passed, to name a few.

Ms. Huerta has received numerous awards and honors for her tireless activism including The Presidential Medal of Freedom, the highest civilian award in the United States, presented to her by President Obama in 2012 and the Eleanor Roosevelt Award for Human Rights presented to her by President Clinton in 1998.<sup>7</sup> Ms. Huerta was inducted into the Department of Labor’s Hall of Honors in 2012.<sup>8</sup> Recently, Governor Gavin Newsom issued a proclamation declaring April 10, 2019 the first annual “Dolores Huerta Day” in California.<sup>9</sup>

Ms. Huerta, at 90 years young, continues her activism through the Dolores Huerta Foundation (DHF) which advocates for low-income and other marginalized communities through grassroots organizing, the political process, and litigation. Recently, the DHF was successful in keeping a citizenship question off of the 2020 census. The DHF was one of many plaintiffs challenging the addition of the citizenship question as a violation of the Enumeration, Apportionment, and Equal Protection clauses of the U.S. Constitution and a violation of the Administration Procedures Act (5 U.S.C.

§ 706(2)).<sup>10</sup>

The DHF’s complaint alleged that such a question would lead to noncitizen households responding to the census at lower rates than other groups, causing them to be undercounted, resulting in the diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources.<sup>11</sup> Officials at the Census Bureau have also said that including

the question would lead to an undercount of noncitizens and minority residents.<sup>12</sup> According to the Public Policy Institute of California, a substantial undercount of undocumented persons in California could result in the loss of one seat in the House of Representatives.<sup>13</sup>

In July 2019, the Trump Administration announced that it was ending its fight to add the citizenship question to the 2020 census after the United States Supreme Court found the Secretary of Commerce’s explanation that the Department of Justice had requested the question be added to better enforce the Voting Rights Act was pretext and could not be adequately explained in light of the evidence presented.<sup>14</sup>

Additionally, the DHF obtained a favorable settlement with the Kern High School District in the case *Sanders et al. v. Kern High School District et al.*<sup>15</sup> to reduce school suspensions and expulsions which disproportionately affect

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....“every moment is an organizing opportunity, every person a potential activist, every moment a chance to change the world.”

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2020 SBCBA President Elizabeth Diaz, Monique Fierro, Dolores Huerta, Raquel Naranjo, Teresa Martinez

Latino and Black students and perpetuate the school to prison pipeline.<sup>16</sup>

In true Dolores Huerta fashion, at the event, Ms. Huerta was garnering support for the “Schools and Communities First” initiative which would require commercial and industrial properties to be assessed at fair market value, instead of on the property’s purchase price, resulting in billions of additional funding for California’s public schools.<sup>17</sup> As Ms. Huerta put it, “every moment is an organizing opportunity, every person a potential activist, every moment a chance to change the world.” ■

*Teresa M. Martinez is a Deputy County Counsel with the County of Santa Barbara and serves on the Board of Directors for the Santa Barbara County Bar Association. Any opinions expressed are solely those of Ms. Martinez and do not express the views or opinions of her employer.*

## ENDNOTES

- 1 Unless otherwise noted, with apologies, the author of this column is the author of the articles cited in the *Santa Barbara Lawyer* and the other publications mentioned.
- 2 Reflecting the now accepted singular pronoun for indefinite antecedent or gender unspecified, unknown or nonbinary. See, Merriam-Webster, “they pronoun,” at: <https://www.merriam-webster.com/dictionary/they>.
- 3 *The Principle of Uncertainty*, Santa Barbara Lawyer, September 2019, Issue 564, p. 8, <https://sblaw.org/wp-content/uploads/2019/08/564.pdf>; *The New Rules for Admissibility of Expert Testimony: Part I*, Santa Barbara Lawyer Magazine Issue 493 (2013). Selected Works at: [http://works.bepress.com/robert\\_sanger/22/](http://works.bepress.com/robert_sanger/22/); *The New Rules for Admissibility of Expert Testimony: Part II*, Santa Barbara Lawyer Issue 494 (2013). Selected Works at: [http://works.bepress.com/robert\\_sanger/21/](http://works.bepress.com/robert_sanger/21/); *Science and Wrongful Convictions*, Santa Barbara Lawyer Magazine (April, 2009)
- 4 See also, *The Forensic Community Can Educate Lawyers, Judges*, Forensic Magazine, 14, on-line, (June 23, 2017), <https://www.fo->

Continued on page 12

# Time's Up for So Cal Stip

BY PO WAGHALTER

The end is near in the life of the Southern California Stipulation, aka “So Cal Stip.” Sometime in August 2019, and unbeknownst to many unsuspecting depositing attorneys, Southern California court reporters united and collectively decided to take a stand against the (infamous) So Cal Stip. All of a sudden, attorneys throughout So Cal were (mostly politely) told by court reporters that they would not comply with the So Cal Stip, and an all-too-accepted-without-question custom that reportedly dates back to the 1970s<sup>1</sup> would quickly begin to disappear.

Support came quickly in the form of a Court Order in Kern County: Presiding Judge Judith K. Dulcich specifically issued an Order indicating rejection of Southern California stipulation for submission of unsealed original deposition transcripts on October 3, 2019.<sup>2</sup> This Order mandates strict compliance with Code of Civil Procedure section 20.25.550 and goes into effect for all depositions noticed after November 1, 2019.

The specific text of the Order reads:

\*\*\*

By Order of the Presiding Judge:

There has been a past practice of allowing attorneys to submit unsealed original depositions transcripts to the Court under what is known as the Southern California Stipulation (SoCal Stip), in which the court reporter is relieved of his/her duty under Code of Civil Procedure § 2025.550 and the original transcript is sent directly to the witness or the witness’ attorney for reading and signature. When deposition transcripts are handled properly per Code Civ. Proc. § 2025.550, the physical original transcript is retained by the court reporter throughout the entire production process, safeguarding its integrity until the reading and signature period has elapsed for the deponent. At the appropriate time, the court reporter must produce an original sealed transcript with attached corrections, if any, and deliver it to the noticing attorney. The transcript is then preserved for filing with the court in its sealed form.

With all the advancements in technology since the SoCal Stip’s initial development, including electronic transfer and signature capabilities, as well as document and communication security, the rationale for the SoCal Stip no longer exists. Accordingly, the Court will no longer allow unsealed original transcripts to be submitted to the Court under the SoCal Stip. Rather the Court will require attorneys to comply with Code Civ. Proc. § 2025.550, which will safeguard the integrity of the original transcript and exhibits and prohibit the potential opportunity for a party to tamper with the physical original transcript or exhibits when court reporters are relieved of their duties.

This order shall be effective, and Code Civ. Pro. § 2025.550 shall apply, to all depositions noticed on or after November 1, 2019.

IT IS ORDERED.<sup>3</sup>

\*\*\*

Considering the swift support in an entire County, other Southern California Courts may soon follow.

The “So Cal Stip”—generally foreign to all attorneys outside of Southern California—amounts to the attorneys’ stipulated decision to relieve the court reporter of his or her duties under the Code of Civil Procedure (section 20.25.550) such that the court reporter would mail the original deposition transcript (and exhibits) to the witness’ attorney, and the witness’ attorney would handle any corrections and maintain the (now unsealed) original.

In simpler terms, the attorneys’ stipulation to waive the court reporter’s duty under Code of Civil Procedure section 2025.550 means that the security mechanism inherent in the Code—placing the duty to ensure a sealed original transcript to the neutral court reporter, instead of obviously non-neutral witness’ attorney—is disregarded. This arguably compromises the integrity of the original transcript and any and all exhibits, as it completely disregards the court reporter’s codified duty to maintain the original for a specific time and purpose, before mailing the sealed original to the party noticing the deposition, who is required to “protect



Po Waghalter



it against loss, destruction, or tampering.”

In support of the position to refuse to comply with the So Cal Stip, Regional Vice President Nina Kirsch of Veritext Legal Solutions, asserts the court reporters’ desire to protect the integrity of the record: “Court reporters are rightfully honoring their responsibility to protect the integrity of the record, by refusing to abide by the SoCal Stip.”<sup>4</sup> This concern effectively suggests that the record may be compromised if unsealed and in the hands of the attorney maintaining the record—a disappointing reflection of lack of faith in attorneys, also officers of the court, but of course, is the prerogative of the individual.

Vincent Altadonna, whose wife is a court reporter, more interestingly and hilariously states that the So Cal Stip is “That B.S. practice that devalues my wife’s work product and makes her lose money! BOO-HISS!”<sup>5</sup>

Specifically, Code of Civil Procedure section 2025.550, subdivision (a), states: “ ... the deposition officer shall securely seal that transcript in an envelope or package endorsed with the title of the action and marked: ‘Deposition of (here insert name of deponent),’ and shall promptly transmit it to the attorney for the party who noticed the deposition. This attorney shall store it under conditions that will protect it against loss, destruction, or tampering.”<sup>6</sup>

It appears that the Court reporters are right. Specifically, the operative and mandatory word is SHALL, not “may.” Moreover, there is no subsequent section or legislative comment related to this Code section indicating that the parties, attorneys, or any other individuals may outright stipulate to the disregarding of a clear mandate of the Code. More disconcerting, however, was the expectation of court reporters to comply in light to the clear wording of the Code. Arguably, a long-standing and generally unchallenged custom (until now) continued on, until court

reporters decided they had enough.

Chances are high in this author’s non-expert opinion, that most attorneys—like this author—have never bothered to read this particular Code section. Admittedly, this author has only done so recently, when confronted with this united stand and progressive movement by court reporters, but



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mostly, out of curiosity. Since practicing in Southern California for the past decade, this author robotically adopted this learned So Cal Stip, and regurgitated it at each and every deposition, as has been the custom, and it simply appeared to be the courteous thing to do. Moreover, it was always expected and likely most appreciated by plaintiffs' and witness' counsels, who stood to benefit by not having to bear the cost of ordering a potentially costly transcript. Upon thoughtful and unfortunately, only recent reflection, this stipulated courtesy among lawyers completely disregards the interests of Court reporters and the Code of Civil Procedure section 2025.550.

## Takeaway

When we know better, we should do better. It is time Southern California attorneys do away with the So Cal Stip, completely. And may all court reporters properly collect the fees they rightly earned and deserve. ■

- 1 Koller & Kramm, *The End of the SoCal Stip*, Attorney at Law magazine (Aug. 13, 2019), <https://attorneyatlawmagazine.com/end-socal-stip>.
- 2 Miscellaneous Order No. STO-19-0003, IN RE: COMPLIANCE WITH CODE OF CIVIL PROCEDURE § 2025.550 AND REJECTION OF SOUTHERN CALIFORNIA STIPULATION FOR SUBMISSION OF UNSEALED ORIGINAL DEPOSITION TRANSCRIPTS.
- 3 *Id.*, emphasis added.
- 4 RE: THE SOCAL STIP, Veritext Legal Solutions, [https://www.veritext.com/images/2019/07/Veritext\\_SoCal-Stip\\_-July-2019-1.pdf](https://www.veritext.com/images/2019/07/Veritext_SoCal-Stip_-July-2019-1.pdf), emphasis added.
- 5 The Deposition Reporter (Fall 2016), <https://dra.memberclicks.net/assets/newsletters/dra-2016-q3.pdf>, emphasis added.
- 6 Code Civ. Proc., § 2025.500, subd. (a), emphasis added.

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- *The California Public Records Act: A Valuable Discovery Tool*
- *The Context of Speech Matters for Purposes of Anti-SLAPP Analysis*

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- *Security Guards Not Always Required*
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Martinez, continued from page 9

- remsicmag.com/article/2017/06/forensic-community-can-educate-lawyers-judges; SSRN at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2992303](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992303); Bepress at: [https://works.bepress.com/robert\\_sanger/40/](https://works.bepress.com/robert_sanger/40/); and *The New PCAST Report to the President of the United States on Forensic Science*, California Attorneys for Criminal Justice Forum, Vol. 44 (Parts I and II, 2017-2018)
- 5 *The Admissibility of Bayesian Likelihood Ratios*, Santa Barbara Lawyer Issue 491 (2013) Selected Works at: [http://works.bepress.com/robert\\_sanger/24/](http://works.bepress.com/robert_sanger/24/)
- 6 *The Jury and Forensic Evidence—Part I: Jurors and the Folk Heuristic*, Santa Barbara Lawyer Magazine, No. 544, p. 16 (January 2018), <https://sblaw.org/wp-content/uploads/2017/12/January-2018.pdf>; *The Jury and Forensic Evidence—Part II: Jurors and the Folk Heuristic*, Santa Barbara Lawyer Magazine, No. 545, p. 16 (February, 2018), <https://sblaw.org/wp-content/uploads/2018/02/February-2018.pdf>.
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- 12 *Epigenetics*, Santa Barbara Lawyer Magazine (October 2011); see also, *Close Test Scores and Epigenetics in Atkins Cases*, 39 CACJ Forum 24 (2012) at: [https://works.bepress.com/robert\\_sanger/13/](https://works.bepress.com/robert_sanger/13/).
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- 14 *In re Robert Lewis, Jr. – A Strike Against "Ethnic Adjustments" to IQ Test Results*, Santa Barbara Lawyer Magazine, July 2018, Issue 550, p.25, <https://sblaw.org/wp-content/uploads/2018/07/July-2018.pdf>.
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- 16 AB-2512: Introduced by Assembly Member Mark Stone, Coauthors: Assembly Members Bloom, Bonta, Chiu, Kalra, Mullin, Quirk, Ting, and Wicks, *Death penalty: person with an intellectual disability*, to amend Penal Code Section 1376.
- 17 *Forensics: Educating the Lawyers*, 43 Journal of the Legal Profession 221 (University of Alabama, 2019).

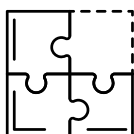




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# Forensic Science— The Beat Goes On

BY ROBERT SANGER

I attended the four-day Capital Case Defense Seminar (CCDS) in San Diego over President's Day Weekend which was immediately followed by the week-long American Academy of Forensic Sciences (AAFS) Annual Meeting in Anaheim. CCDS does not publicly publish its materials and, while AAFS publishes Proceedings, both conferences prohibit recording of the sessions and both limit the release of program materials and PowerPoints.<sup>18</sup> The following is general information and not a disclosure of any particular presentations.

While attending these conferences and, also, having a chance to talk with colleagues, a number of forensic themes emerged. Of course, there were countless other forensic topics at both conferences and, at CCDS, many non-forensic topics as well. Looking only at the forensic topics, several had appeared in the *Criminal Justice* column, recently and over the years. This suggested that an update might be in order. With apologies for self-reference<sup>19</sup> and with the hope that this nevertheless will be of interest, here is the update on some of those forensic issues.

## ***It is Not a Match***

The CCDS conference is attended by criminal defense lawyers and related professionals primarily focused on capital cases. The AAFS conference is weighted toward forensic experts who are employed by governmental agencies or who help investigate crimes and often testify for the prosecution. Nevertheless, in both conferences, the forensic community and lawyers knowledgeable in forensic science agree that the old methods of testimony are obsolete. The question discussed in several sessions at both conferences was, "How does the scientific or expert witness explain their<sup>20</sup> opinion to the trier of fact?"

As previously discussed in this column,<sup>21</sup> it is now well accepted that "look and see" testimony is not appropriate and that, in source comparison cases a witness should never say, "It is a match."<sup>22</sup> The challenge under discussion is whether to allow mathematical expressions (frequentist, Bayesian or otherwise) or to only allow verbal characterizations. If the latter, is it permissible to voice confidence levels and, if

so, is that not just a verbal proxy for a mathematical conclusion in the mind of the trier of fact?

These issues are far from resolved and are a matter of contention, particularly in some disciplines. There are technical issues with single subject DNA results and the overall issue of how to factor lab error, contamination or planting of evidence into a mathematical result.<sup>23</sup> But there are also questions raised about using a mathematical result at all with a lay jury.<sup>24</sup> In other non-DNA areas that are aspiring to frequentist results or likelihood ratios, those questions persist, but so do the issues of whether there is a robust enough data base for, for instance, fingerprints or firearms, to allow quantification at all.<sup>25</sup> The discussions at both conferences indicate that there is a long way to go to gain consensus.

## ***The Inaccessibility of Proprietary Material in Scientific Testing***

Another subject in both conferences was related to certain testing procedures which are automated, primarily in the area of DNA testing. The manufacturers of the testing instruments are refusing to release data concerning the operation of the instruments including the algorithms used in arriving at automated results.<sup>26</sup> Manufacturers of the competing instruments have refused to give up information about the software used to do the analysis of DNA samples or the comparison with other samples. The scientists representing the manufacturers argued in opposition to those who felt that transparency was required in a forensic context.

Another point of contention in both conferences was the use of rapid DNA testing machines to analyze a detainee's DNA sample and to compare that sample before the subject would be required to be released or, if arrested, could make bail. While a person is being detained following arrest, the person's DNA can be collected and run against CODIS and against "arrest" data made available through other law enforcement sources. If there is a hit, the person can be detained on the other unsolved crimes even if the DNA source for the other unsolved crimes is a mixture or degraded. On the one hand, this was heralded as a great crime fighting innovation and, on the other, it was regarded



*Robert Sanger*



as a Big Brother form of government intrusion. Litigation is pending, particularly when the alleged results are used in “cold case” prosecutions with little or no corresponding evidence of involvement in the crime.

### **Genomic Testing and Genetic Genealogy**

Related to this is the issue of genomic testing. This is not just the testing of short tandem repeats (STR’s) but is the comparison of extended comparison of base pairs. Commercial sites have exploited this to “find” potential relatives, to identify potential susceptibility to disease and to determine “ethnicity.” There is even a potential for creating more meaningful “libraries” from mitochondrial DNA samples that provide a better basis for comparison to collected samples.

Just reported recently in this column,<sup>27</sup> the technology has led to the use of commercial DNA banks for police investigations using those data banks to locate suspects in cold cases. Particularly at AAFS, there was quite a bit of discussion regarding the legal and ethical issues involved in obtaining the data and whether individuals should have to “opt out” of having their DNA used for these purposes or whether they should be required to opt in. There will be more on this to come.

### **The OSACs and the AAFS Academy Standards Boards**

Again at both conferences (and as chronicled herein from time to time<sup>28</sup>), the mandate to improve scientific standards in forensics, issued by the National Research Council in 2009, was facilitated by transferring the development of forensic science standards to the Department of Commerce, National Institute of Standards and Technology (NIST) which, in turn set up the Organization of Scientific Area Committees (OSAC – with the individual committees being called OSACs). Shortly thereafter, AAFS created the Academy Standards Board (ASB)<sup>29</sup> as a non-governmental standards development organization accredited by American National Standards Institute (ANSI). As reported previously, the National Commission on Forensic Science, was also created by the Department of Justice to “work with”

NIST, but was disbanded by Attorney General Sessions. That means that the mandate to provide a path forward for forensic science is now in the hands of the government NIST OSACs and the NGO AAFS ASB.

The concern voiced at both CCDS and AAFS is that the funding for NIST to maintain the OSACs is going to expire in 2021. The OSACs may or may not be transferred to another governmental agency and may or may not be funded at all. In addition, the ASB and its consensus bodies require

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private funding to continue. All are agreed that the work of these bodies in preparing standards for forensics is critical to maintaining improvements in forensic requirements and best practices in the future. Despite the lack of funding in place for either the OSACs or the ASB, the mood was somewhat optimistic that they would be funded in time to continue.

### ***Epigenetics, Gene-Expression and PTSD***

In both conferences the general topic of gene-expression and post-traumatic stress disorder (PTSD) was discussed. In general, there is an acceptance of this phenomenon that was only observed in laboratory rats when the first *Criminal Justice* column discussed the potential for adverse consequences of gene-expression for human beings who were exposed to abuse, poverty and neglect.<sup>30</sup> Now, it is a given, and effects and remediation are the topics of conversation.

This topic came up in another context. Epigenetics played a part of the subject matter of a law review article in 2015.<sup>31</sup> The article exposed the practice of prosecution witnesses making “ethnic adjustments” to IQ scores in order to make people of color eligible for execution. The California Supreme Court then ruled in 2018, while rejecting death for our client, that the prosecution could not introduce such evidence without an adequate foundation.<sup>32</sup> This last year, a group of psychologists used the original article as a basis for a professional indictment of the “expert witnesses” who gave such testimony nationwide.<sup>33</sup> Finally, this year, it was a topic of discussion at CCDS that legislation has been introduced in California to prohibit the practice of “ethnic adjustments.”<sup>34</sup>

### ***Criminal Justice and the JD Curriculum***

As discussed several times in this column (and the subject of a law review article just published<sup>35</sup>), education of lawyers and judges is critical to the increase of scientific standards of forensics as actually practiced in the courts. Several presentations at both conferences emphasized the need for lawyers to understand the basics of science and to use the foundational tools available to challenge proffered testimony that does not meet the criteria. There is no question that legal education in the law schools, as well as remedial professional and judicial education in practice, is needed to keep up with the good faith advancements among forensic scientists themselves.

While there have been exhortations by federal judges and academics to include serious forensic education in the law school curriculum, there is still little progress being made in changing the system. I met with several professors who have taught forensics either as law school electives or in

graduate classes outside of law school. I also met with one of the principal authors of a legal textbook on forensic education. They were encouraged by the upward trend in forensic science itself and the occasional enthusiasm for teaching forensics as a part of the JD program. However, they remained guarded about the entrenched law school establishment being that innovative. Nevertheless, there is discussion and we will continue to urge the point both there and here.

### ***Conclusion***

These are just some of the topics related to forensics that are still of current interest at the CCDS and AAFS conferences, which also happened to be topics that loyal readers of the *Criminal Justice* column have read about over the years. Future columns will continue to cover forensic issues (of use to civil and criminal practitioners) with the hope that they reflect, and sometimes presage, leading edge discussions. ■

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### ***ENDNOTES***

- 1 Disclaimer: I am the Co-Chair of CCDS and Chair of the Jurisprudence Section of AAFS.
- 2 Unless otherwise noted, with apologies, the author of this column is the author of the articles cited in *Santa Barbara Lawyer* and the other publications mentioned.
- 3 Reflecting the now accepted singular pronoun for indefinite antecedent or gender unspecified, unknown or nonbinary. See, Merriam-Webster, “they pronoun,” at: <https://www.merriam-webster.com/dictionary/they>.
- 4 *The Principle of Uncertainty*, *Santa Barbara Lawyer*, September 2019, Issue 564, p. 8, <https://sblaw.org/wp-content/uploads/2019/08/564.pdf>; *The New Rules for Admissibility of Expert Testimony: Part I*, *Santa Barbara Lawyer Magazine* Issue 493 (2013). Selected Works at: [http://works.bepress.com/robert\\_sanger/22/](http://works.bepress.com/robert_sanger/22/); *The New Rules for Admissibility of Expert Testimony: Part II*, *Santa Barbara Lawyer Magazine* Issue 494 (2013). Selected Works at: [http://works.bepress.com/robert\\_sanger/21/](http://works.bepress.com/robert_sanger/21/); *Science and Wrongful Convictions*, *Santa Barbara Lawyer* (April, 2009)
- 5 See also, *The Forensic Community Can Educate Lawyers, Judges*, *Forensic Magazine*, 14, on-line, (June 23, 2017), <https://www.fo->

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  - 8 *Quantification of Expert Opinions – NCFS Contributes to the On-Going Saga*, *Santa Barbara Lawyer*, (February 2017) No. 533, p. 19, <https://sblaw.org/wp-content/uploads/2017/01/February-2017.pdf.pdf>
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  - 12 *he Academy Standards Board for Firearms and Toolmarks*, *Santa Barbara Lawyer*, Issue 529, (September 2016)
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  - 14 *IQ, Intelligence Tests, "Ethnic Adjustments" and Atkins*, 65 *American University Law Review*, 87 (2015), SSRN at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2706800](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2706800); Westlaw: 65 Am. U. L. Rev. 87.
  - 15 *In re Robert Lewis, Jr. – A Strike Against "Ethnic Adjustments" to IQ Test Results*, *Santa Barbara Lawyer*, July 2018, Issue 550, p.25, <https://sblaw.org/wp-content/uploads/2018/07/July-2018.pdf>.
  - 16 Shapiro, D. L., Ferguson, S., Hernandez, K., Kennedy, T., & Black, R., *Ethnic adjustment abuses in forensic assessment of intellectual abilities*. 4 *Practice Innovations* 265–281 (2019).
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  - 18 *Forensics: Educating the Lawyers*, 43 *Journal of the Legal Profession* 221 (University of Alabama, 2019).

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## Landlord-Tenant Update: Intersection of City of Santa Barbara's Mandatory 12-Month Lease Term Law and California's New Just Cause Eviction Law

BY KEVIN P. NIMMONS

On April 16, 2019, the Santa Barbara City Council approved an ordinance requiring landlords to offer a minimum 12-month lease term in certain residential leases of "rental units." Subsequently, California enacted Civil Code section 1946.2, which took effect on January 1, 2020, and prohibits termination of certain residential leases for statutorily defined "just cause." The application and intersection of these two new laws is confusing for landlords, tenants, and even attorneys hired to enforce them.

### ***Santa Barbara's New Minimum 12-Month Term Requirement***

The City of Santa Barbara's new 12-month minimum term lease ordinance is codified in Santa Barbara Municipal Code section 26.40.010, which became effective June 7, 2019. Even for a lawyer, this law is not a model of legislative clarity. Under the new law—with some exceptions for single family dwellings, condominiums, and other exceptions—landlords must annually offer (in writing to tenants) leases with a minimum term of 12-months. The tenant may either accept, or reject the 12-month lease offer in writing. The landlord has the obligation to prove the tenant's rejection using a form rejection to communicate the rejection. If the tenant accepts the offer, then under the City's new law, at the end of the fixed term, the landlord is not obligated to continue leasing to the tenant.

If landlords fail to comply with the new law, they may be prevented from evicting a tenant even if the tenant breaches the lease, if the tenant's month-to-month lease expires, or if the tenant fails to pay the amount for rent increases. The effect of the new law on month-to-month is unclear. Yet nowhere does the new law mention month-to-month tenancies, even though there are thousands of month-to-month tenancies in Santa Barbara. This author believes that the new law requires all landlords to have previously of-

fered 12-month minimum term leases to tenants with *written leases* no later than June 30, 2019, and for month-to-month leases *not in writing*, no later than September 5, 2019, and then annually thereafter. If a landlord did not comply by these deadlines, then the landlord should thereafter offer 12-month minimum term leases to tenants. See Santa Barbara Municipal Code Section 26.40.010-26.40.030 for additional information and requirements.



Kevin P. Nimmons

### ***California's New "Just Cause Eviction" Laws***

California's Tenant Protection Act of 2019 requires that a residential real property owner *must not terminate* the tenancy of a tenant who has *continuously and lawfully* occupied a residential real property for *12 months* without "just cause," as stated in the written notice to terminate. (Civ. Code § 1946.2(a).) Condominiums, non-corporate owned single family residences, and other residential properties are exempt from the "just cause" termination law. For "at fault just cause," such as the tenant's non-payment of rent, material breach of the lease, waste, nuisance, and a host of other bases for at fault just cause, the landlord may terminate the tenancy without having to pay re-location payments to the tenant. However, for a "no-fault just cause" basis to terminate the tenancy, the landlord must make re-location payments to the tenant or offer a rent waiver. The law contains many other requirements and limitations not discussed here.

Under both Santa Barbara's 12-month minimum term lease law and California's just cause eviction statute, can a landlord in the City of Santa Barbara evict a tenant at the end of the 12-month minimum term? Strictly viewing the question under the City's 12-month minimum lease law, the answer is yes, with the requirement of potential mediation. But, under California's just cause eviction law, because of the language adopted by the California Legislature, the answer is unclear. The "just cause" eviction law provides that "**the owner** of the residential real property **shall not terminate the tenancy** without just cause..." (Civ. Code § 1946.2(a).) The statute uses the term "terminate" not "evict" or "eviction" or "recover possession," or similar terms concerning recovering possession of a unit.

Rather, under the statute, an owner cannot “terminate the tenancy.” Termination of a tenancy is not the same as actually evicting a tenant or recovering possession from a tenant. This distinction has legal significance. At the end of a fixed term lease when the term expires, the tenancy automatically terminates. No more notice is required by the landlord and the landlord need not do anything to terminate the tenancy. When a fixed term lease automatically expires at the end of the term, then the owner is not terminating the tenancy; rather, it automatically terminates because the term ended (see, Civ. Code § 1933) so long as the lease has not been converted to a month to month tenancy by the landlord’s acceptance of rent, or a term in the lease converting it to month to month, or an automatic renewal of the tenancy. There are other bases for termination of a tenancy other than termination by the owner such as the tenant’s death, destruction of the leasehold, mutual consent to terminate the lease, or if the tenant acquires title superior to the landlord. Therefore, according to Santa Barbara’s new law, if a fixed term lease that includes a 12-month term expires on its own terms, then the tenancy terminates automatically, as a matter of law. In this scenario, the owner has not done anything to terminate the tenancy. Thus, because the fixed term lease automatically terminated, the owner has not actually terminated the tenancy (as Civil Code section 1946.2 contemplates), which means that the owner has not violated Civil Code section 1946.2.

Did the California Legislature intend to permit tenant evictions without just cause when fixed term leases expire? The answer is unclear. However, the language the Legislature adopted does not seem to prevent a landlord from evicting a tenant when a fixed term expires, so long as the landlord does not convert the lease to a month-to-month lease by accepting rent for a period after the expiration of the fixed term or cause a renewal of the lease. Compare California’s just cause eviction statute to San Francisco’s equivalent. San Francisco’s law, Municipal Code section 37.9, provides that “A landlord shall not **endeavor to recover possession** of a rental unit unless” there is just cause. The language “shall not endeavor to recover possession” is broader than California’s “shall not terminate the tenancy.” Under San Francisco’s law, a landlord cannot evict a tenant (i.e. recover possession) unless there is just cause. California adopted more limited language: “shall not terminate the

tenancy.” As a result, it seems that a tenant may be evicted if the tenancy automatically terminates when the fixed term expires, even without just cause. However, it is not clear if a landlord would be successful in court defending an eviction of a fixed term tenancy, without just cause, due to the apparent intent by California’s legislature to bar such evictions. But, the language of the statute does not expressly bar such evictions.

Also, as part of California’s Tenant Protection Act of 2019, California adopted Civil Code Section 1947.12 to limit rent increases annually to five percent plus the applicable Consumer Price Index amount. There are also exemptions to this new law, similar to California’s just cause eviction law. Like California’s just cause eviction law, Civil Code section 1947.12 contains many other requirements and limitations.

Clearly, due to a low supply of affordable housing and rising rents, Santa Barbara and California desire to do away with (i) month to month leases, and a landlord’s ability to evict a tenant on thirty or sixty days’ notice and (ii) a landlord’s ability to increase rents. As a result of Santa Barbara’s 12-month minimum term lease law and California’s just cause eviction law, landlords must now prove the tenant’s breach of the lease or just cause for eviction in court,

which requires hiring an attorney and possibly preparing for trial—costs that have been typically avoided with evictions based on the traditional thirty and sixty-day notices. All other non-just cause evictions will either be prohibited or will require landlords to offer relocation assistance payments to tenants.

These are sweeping and serious changes to Santa Barbara’s and California’s landlord tenant laws. Both landlords and tenants will need to understand how these laws apply, and not only learn how to draft leases in order to comply with the laws, but also to create a lease that is favorable. ■

*Kevin R. Nimmons is an attorney and partner at Reicker Pfau Pyle & McRoy, LLP*

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As a result of Santa Barbara’s 12-month minimum term lease law and California’s just cause eviction law, landlords must now prove the tenant’s breach of the lease or just cause for eviction in court....

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# How to Correctly Value the Community Property Interest In a Public Retirement Plan Such As SBCERS, CalPERS or CalSTRS

By JOHN C. MADDEN OF MOON, SCHWARTZ & MADDEN

Often clients wish to consider offsetting the community property interest in a Santa Barbara County Employees Retirement System (“SBCERS”), CalPERS or CalSTRS pension against another marital asset such as the equity in a home or former spouse’s 401(k) plan. While this approach may not always be appropriate due to the access of liquidity or economic/actuarial assumptions, should the parties wish to proceed in valuing a public retirement plan for purposes of offset or buyout, it is extremely important you obtain an actuarial present value calculation from a qualified expert.

California Public Retirement Plans are considered contributory defined benefit plans, meaning members are required to pay a portion of their income each year into the retirement system. However, this represents only a small portion of the total amount required to fund a member’s future pension obligation. On average for every \$1 spent on public pensions, funding comes from the following three sources: member contributions (approx. 13%) + employer contributions (approx. 29%) + investment earnings (approx. 58%) which makes up the total value of the pension as illustrated below.

The majority of a member’s pension is funded by their employer and future investment earnings, and not by the member directly. This fact is typically noted on the Mem-

ber Statement issued annually by the retirement system. The amount a CalPERS member is required to pay into the retirement system (which can be as high as 15% of their pay) depends on the employer’s bargaining agreement with CalPERS. The amount a SBCERS member is required to pay into the retirement system is based on their age at entry and membership class. As these two illustrations



John Madden

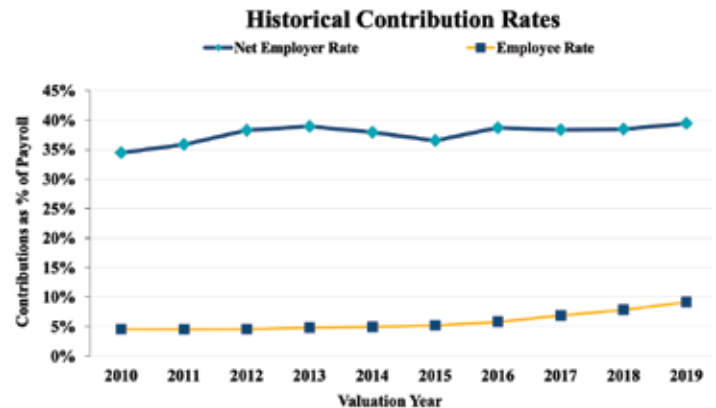


Illustration from [www.sbcers.org](http://www.sbcers.org)

show, member contributions clearly only cover a small portion of the overall funding requirements.

**Example:** Assume a SBCERS Safety 3% at 50 (Plan 6A) member is retiring with 20 years of service, final average salary of \$8,000 per month and \$300,000 in their member contribution account. The member will receive a lifetime benefit of \$4,800 per month ( $20 \times \$8,000 \times .03 = \$4,800$ ), plus cost-of-living-adjustments. The actuarial present value of this income stream is approximately \$1.5 million, not the \$300,000 in contributions and interest from the member. It would take only 5.2 years of receiving \$4,800 per month to fully deplete the \$300k member contribution



Illustration from [www.calpers.ca.gov](http://www.calpers.ca.gov)



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## 2020 Bench and Bar Meetings

As Presiding Judge, the Honorable Michael Carrozzo has set the schedule for the Bench and Bar Meetings that will take place as follows:

May 21, 2020 • August 27, 2020 • November 19, 2020

Each meeting will be held at the Santa Barbara Court Video Conference Room in the Figueroa Division of the Santa Barbara Courthouse.

These Bench and Bar Meetings provide a forum for local members of the Bar to engage in an informal dialogue with the presiding judge as a means of raising issues and concerns that may not otherwise be addressed. All attorneys and paralegals are welcome to attend.

For any practitioners wishing to submit agenda items for consideration before any of the scheduled meetings, please email those items to Ian Elsenheimer: [ielsenheimer@aklaw.net](mailto:ielsenheimer@aklaw.net)

account (excluding interest), and yet the benefit continues for the member's lifetime.

**Practice Tip:** Many judgments in California erroneously rely on only the member contributions and interest (which is approximately 13% of the total value) instead of the full actuarial value of the public retirement plan. Such errors in disclosing the full value of the pension can result in an inequitable division of community property, oftentimes leading to an omitted asset, setting aside the Judgment or requiring a recalculation of spousal support.

While "best practice" means relying on actuarial value to determine the full value of a member's public retirement system benefit, this does not mean the family law attorney is required to value the pension for purposes of buyout or offset. On the contrary, if the parties prefer to divide the community property interest equally by Domestic Relations Order (DRO), then no actuarial valuation is required. HOWEVER, the nonmember spouse must understand that even with a properly prepared DRO in place, in almost all cases if the nonmember elects a lump sum from the retirement system, the non-member spouse will only receive approximately 13¢ out of every dollar payable with respect to the nonmember's awarded interest.

**Practice Tip:** Many public retirement systems do not adequately inform the nonmember spouse that an election of a lump sum means only a refund of the member contributions and interest (the 13¢ as noted in the CalPERS Pension Buck illustration). With the exception of the University of California, Public Retirement Plans do not pay the actuarial equivalent of the monthly retirement benefit (the full \$1 in the illustration), but rather a refund of the member contributions and interest only.

Both the member and nonmember must leave their share of the member contributions and interest on deposit with the retirement system in order to receive a monthly benefit equal to the full actuarial value of the pension (provided that the member is vested).

If the nonmember chooses to take a refund of their awarded interest in the member's contribution account and forfeits the nonmember's share of the employer contributions and investment gains thereon, this is the nonmember's right pursuant to §21292 of the California Government Code. Although in almost all circumstances, electing a refund of member contributions will yield a considerably lower payout to the nonmember versus what they would have received as a lifetime monthly pension, should the nonmember choose to refund, then the member spouse should contact their retirement system to redeposit the amount refunded to nonmember (see §21294(e) of the California Government Code which reads:

"§21294(e) The member has no right to purchase the community property interest of the nonmember of the service credit unless the nonmember has permanently waived all rights in the system by effecting a refund of accumulated contributions pursuant to Section 21292.")

Essentially this allows the member to redeposit the 13¢ of every dollar the nonmember elected to refund, and, in doing so, the member reinstates the full \$1 of benefit previously awarded to the nonmember.

While calculating the actuarial value of a member's pension for purposes of a complete buyout may be inappropriate in some circumstances, obtaining an actuarial valuation from a qualified expert may still prove extremely useful to the family law attorney and client. For example, what if the clients have agreed for the nonmember to retain the family home and wish to partially offset the nonmember's interest in the SBCERS pension against the equity in the home? It is possible to award the nonmember less than 50% of the community property interest in a Domestic Relations Order (e.g. 43.50% of community), whereby the 6.5% reduction is actuarially equivalent to one-half of the equity in the family home. Perhaps the parties have been separated for a long time and the member has been collecting their pension without paying a portion to the nonmember? It is possible to actuarially value the prospective pension and increase the nonmember's percentage share as reimbursement for past pension payments in arrears.

Regardless of whether the parties are entertaining the idea of a complete buyout or partial offset of the nonmember's community property interest in a public retirement plan, obtaining an actuarial valuation is a quick and cost effective way to ensure all parties understand the true value of what is commonly the most valuable asset in a divorce. ■

*Moon, Schwartz & Madden have been qualified as experts in California in the actuarial valuation and division of retirement plans, including survivor benefits, since 1993. We are members of the "QDRONEs" which is a national educational society of lawyers, actuarial consultants, and other QDRO professionals, as well as co-founders of QDRO Counsel™, a legal services company providing online preparation of QDROs and valuation reports. [www.msmqdro.com](http://www.msmqdro.com)*



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# San Marcos High School Wins 2020 Mock Trial Competition

Six teams from five public and private high schools competed in the 37th annual Mock Trial competition which takes place over two weekends at the Santa Barbara County Courthouse. Participating schools this year were Carpinteria, Dos Pueblos, Laguna Blanca, San Marcos, and Santa Barbara high schools.

On February 29, after a closely contested final round, San Marcos High School emerged the winners, narrowly edging out Dos Pueblos High School. The Mock Trial competition, sponsored by the Santa Barbara County Education Office with the support of the Santa Barbara County Superior Court, provides an educational opportunity, immersing high school students in key concepts of the law, the legal process, and our justice system. High school teams simulate a civic or criminal trial with attorneys and witnesses, learn how to construct a convincing and compelling case, and respond to legal arguments with competence and confidence.

"The Mock Trial program is a unique, irreplaceable high school learning experience for participants. The County Education office, local bar, teachers, and parents collaborate to produce one of the absolutely top programs in California. The Santa Barbara Superior Court applauds these efforts and is committed to supporting this important educational activity," said Judge Brian Hill, who presided over one of the final round trials. Judge Hill, along with SBCEO Assistant Superintendent Ellen Barger, presented the trophy to the winning team. "The intense preparation, critical analysis, and reasoned arguments demonstrated by our students is inspiring," Barger said. "Listening to their carefully crafted statements, testimony, cross-examinations, and motions citing case law, it's easy to forget that we are watching high school students, and not experienced attorneys."

"We are proud of each of the students who participated for their commitment, dedication, passion, and composure during the competition," said County Superintendent Dr. Susan Salcido. "We are fortunate to have students, parents, coaches, and professionals who support this engaging and intense learning opportunity."

The San Marcos team was coached by Luke Ohrn, Hilary Dozer, and Jim Krieger. Dos Pueblos' teams were led by Hannah Krieschok, Lisa Rothstein, Christine Voss, Glenn Miller, Addison Steele, Greg Cameron, and Lina Somait.

The Santa Barbara County Bar Association donated a check for the winning team to travel to the state competition. The law firm, Rogers, Sheffield, and Campbell, LLP, donated medals that were awarded at the end of the first round of competition to 28 students for their exceptional performance.

Judges of the Santa Barbara County Superior Court who volunteer to serve as presiding judges for the competition include Judge Thomas P. Anderle, Judge Clifford Anderson, Judge Von Deroian, Retired Judge George C. Eskin, Judge Donna Geck, Judge Brian Hill, Judge Kay Kuns, Judge Monica Marlow, and Commissioner Steve Foley. Additional presiders included Stephen Amerikaner, John Thyne III, and Michael Hanley. Training for Mock Trial Scoring was provided by Retired Judge George Eskin and Danielle DeS-meth. Nearly 60 local attorneys from local private practices, the County of Santa Barbara, the District Attorney's Office, and the Public Defender's Office volunteered their time to serve as scorers. ■



Judge Brian Hill and Ellen Barger, Assistant Superintendent, SB County Education Office, announce the winners at the awards ceremony.

# Motions

## ***Trusted Legal Grows into a New Office***

With expansion in mind, innovative business attorney **Naomi Dewey** has moved her **Trusted Legal** law firm to a new, larger Santa Barbara office.

Trusted Legal, A Professional Law Corporation, is now open at 21 E. Carrillo St., Suite 130, in Santa Barbara. Serving the Central Coast, the firm also has an office in Santa Ynez, at 3630 Sagunto St., A-1.

Specializing in business law, employment law, litigation and risk management, Trusted Legal is based on the “trusted advisor” model of exceptional knowledge and targeted service, and Dewey is an experienced courtroom advocate and trial attorney who’s focused on resolution. “I pride myself on being a deal-maker, not a deal-breaker,” Dewey said, “by helping clients manage risk and make strategic decisions that fit with their long-term planning.”

The president-elect of California Women Lawyers and a former president of the Santa Barbara County Bar Association, Dewey serves as counsel to businesses, nonprofits, private families and entrepreneurs engaged in everything from manufacturing, healthcare and real estate to cryptocurrency and cloud computing.

A native of England, Dewey earned a Bachelor of Arts in journalism from the University of Sheffield and spent the first years of her career as a news editor and a marketing professional. Ultimately landing in Santa Barbara, she attended the Santa Barbara College of Law and earned her Juris Doctor there in 2007.

\*\*\*

## ***Benjamin Feld and Russell Ghitlerman Recognized as Super Lawyers***

Ghitlerman, Ghitlerman & Feld’s Managing Partner, Benjamin Feld, was recognized as a Super Lawyer for the first time this year. Russell Ghitlerman, another partner at Ghitlerman, Ghitlerman and Feld was also recognized as a Super Lawyer for his 14<sup>th</sup> year.

Super Lawyers are selected on an annual basis, with the

mission of recognizing attorneys who have been recognized by their peers for distinctive and remarkable professional achievements.

Feld attended law school at the Santa Barbara College of Law. After graduating in 2002, Feld became an attorney at the Ghitlerman firm and a managing partner at the firm in 2005. Feld is also the President of the SB County Bar Foundation.

Ghitlerman obtained his Juris Doctorate from the University of West Los Angeles is also an AV rated lawyer by Martindale Hubbell.

\*\*\*

**Hollister & Brace** is pleased to announce that **Karen K. Peabody** has become associated with our firm.

Karen K. Peabody is a litigator and appellate attorney who has been practicing in Santa Barbara since 1997. Since joining Hollister and Brace in 2019, she has practiced in the areas of Probate and Trust Litigation, Estate Planning, Family Law, and Civil Litigation. At Hollister and Brace, Karen has handled a number of trust litigation matters and probate proceedings and has represented clients in resolving family law matters.

Prior to joining Hollister and Brace, Karen had a solo practice, Peabody Boris Law, emphasizing Probate and Trust Litigation and Estate Planning. Prior to that, Karen was a partner in her former law firm, Nye, Peabody, Stirling, Hale & Miller, LLP, where her practice focused on civil litigation and appellate work in both state and federal courts. When she retired from the firm, Karen specialized in counselling and defending public entity clients in matters involving a wide variety of legal issues including employment law, civil rights, government tort liability, constitutional law, qualified immunity, administrative law and mandamus, criminal law, and retirement and pension law. Karen also represented the County of Santa Barbara, the City of Simi Valley, and the City of Lompoc in litigation involving civil rights and employment law. After retiring from her firm at the end of 2013, Karen served as a workplace investigator



*Karen K. Peabody*

*Continued on page 30*

# Verdicts & Decisions

## *Michele Siegan v Taylor Rae Person*

Santa Barbara Superior Court, Department 3

**Case Number:** 19CV01710  
**Type of case:** Auto  
**Type of proceeding:** Jury  
**Judge:** Thomas Anderle  
**Length of trial:** 7 days  
**Length of deliberations:** Afternoon on November 20 and Morning of November 21.  
**Date of Verdict or Decision:** November 21, 2019  
**Plaintiff:** Michele Siegan  
**Plaintiff's Counsel:** Christopher Light and Michael Miller of Light & Miller, LLP.  
**Defendant:** Taylor Rae Person  
**Defendant's Counsel:** Marvin P. Velastegui and Nykeemah McClendon of Law Offices of Marvin Velastegui [GEICO]:  
**Insurance Carrier, if any:** GEICO  
**Experts:** Retained  
Defense retained - Martha Singer, M.D. (orthopedic surgeon)  
Plaintiff retained – None.  
Non-retained/ Treating Physicians  
Defense subpoenaed to testify at trial - John Anis, M.D.  
Defense subpoenaed to testify at trial - Alpana Kharkar, M.D.  
Defense subpoenaed to testify at trial - Srinivas Ganesh, M.D.  
Defense subpoenaed to testify at trial - Damian Mafnas Raymund, M.D.  
Plaintiff subpoenaed to testify at trial - Jeffrey James Sasser-Brandt M.D.

**Overview of Case:** This case involved a motor vehicle accident which transpired on April 24, 2018. The complaint was filed on April 2, 2019 in the Santa Barbara Courthouse. On July 30, 2019 the Court granted Plaintiff's Motion for Preference setting trial for November 12, 2019. Trial commenced on November 12, 2019 and concluded on November 20, 2019. Jury deliberations began on November 20, 2019 and ended on November 21, 2019.

**Facts and Contentions:** This lawsuit arises out of a motor vehicle collision that occurred on April 24, 2018, at approximately 8:52 p.m., at the intersection of Cathedral Oaks Road and Patterson Avenue in Santa Barbara, California. Plaintiff, Michele Siegan, was wearing a seatbelt driving a 2014 Toyota Camry. Defendant, Taylor Rae Person, was driving a 2007 Volkswagen Rabbit. Both parties were the only occupants in their respective vehicles.

Plaintiff was traveling southbound on Patterson Avenue approaching the intersection with Cathedral Oaks Road. Defendant was traveling northbound on Patterson Avenue approaching the intersection with Cathedral Oaks Road. Defendant came to a stop at the intersection in response to a red light. Once the light turned green, Defendant made a U-turn



with the intent of traveling southbound on Patterson Avenue, thereby leading to a collision between the two vehicles. Defendant admitted negligence for being the sole cause of the collision prior to trial.

Plaintiff alleged that she injured her neck, lower back and both knees as a result of the collision. Defendant disputed the cause, nature and extent of Plaintiff's injuries. Plaintiff was 75 years old and had a long well documented history of arthritis in her knees, chronic back pain and chronic neck pain. Additionally, Plaintiff informed the Emergency Room Physicians that she had injured her neck, back and knees earlier on the date of loss as a result of lifting heavy boxes.

**Summary of Claimed Damages:** Plaintiff waived her past economic damages of about \$5,000 and was not making a claim for any future economic damages. The sole issue was plaintiff's past and future non-economic damages. The plaintiff had ER treatment, followed-up with her primary care physician and 10 physical therapy appointments over the course of four months. Plaintiff attempted to paint the picture that there was more ongoing medical treatment as a result of the accident. However, the medical records did not support that position. During closing arguments, plaintiff requested \$465,000 total for past and future noneconomic damages. Defendant requested in closing arguments that the jury should award \$10,000 for past noneconomic damages only.

Plaintiff only called one treating physician who saw the plaintiff one time about three weeks after the accident. Plaintiff also called her son to support her claim of damages and a witness to the incident, but liability was stipulated to and she didn't see the accident. Plaintiff failed to designate a retained expert in this matter.

Defendant called their retained orthopedic surgeon expert who reviewed over 5000 pages of medical records. She testified that the plaintiff had a long history of chronic pain and that after 12 weeks she was back to baseline. The plaintiff failed to take her deposition prior to trial. Defendant also testified on her behalf in terms of the accident and called four (4) of plaintiff's treaters to establish plaintiff's medical history.

**Summary of Settlement Discussions:** On October 21, 2019, Plaintiff served Defendant with a C.C.P. 998 for \$100,000. On October 29, 2019, Defendant served Plaintiff with a C.C.P. 998 in the amount of \$65,000 which Plaintiff denied the same date.

**Result:** The jury awarded Plaintiff \$33,000 in past non-economic damages and \$0 in future non-economic damages. Jury polling revealed that 11-1 jurors agreed with the past damages and 10-2 agreed with future damages.

## *Taylor v. Houston, et al*

Santa Barbara Superior Court / Anacapa Division Dept 5

<b>Case Number:</b>	16CV03526
<b>Type of case:</b>	Fraud / Financial Abuse of an Elder
<b>Type of proceeding:</b>	Jury
<b>Judge:</b>	Sterne
<b>Length of trial:</b>	2 ½ weeks
<b>Length of deliberations:</b>	2 days
<b>Date of Verdict or Decision:</b>	May 17, 2019
<b>Plaintiff :</b>	Merle and Marilyn Taylor
<b>Plaintiff's Counsel:</b>	Lacy Taylor (not related to Plaintiffs) and Justin Fox of the Law Offices of John J. Thyne III
<b>Defendant:</b>	Robert Houston, Linda Lukas, Any Kind Loan Funding, Inc, Andrew Dioli, FMC Lending, Inc., Rushmyfile, Inc., West Coast Private Investments (West Coast settled before trial, but proceeded on their cross-complaint against Houston, Rushmyfile, and FMC Lending

**Defendant's Counsel:**

Edward T. Weber (Dioli, Rushmyfile, & FMC Lending)  
David Bartelstone (West Coast Private Investments)  
Houston and Lukas did not show up to the trial—although they answered the complaint

**Insurance Carrier:**

None

**Experts:**

Joffrey Long, hard money lending for Plaintiffs

**Overview of Case:** Merle and Marilyn Taylor are an elderly couple (90 & 87 years old) who took out a hard money loan against their Mesa home. The loan was brokered by defendants and funded by West Coast. The Taylors filed a lawsuit alleging fraud and wrongful foreclosure. The Taylors settled with the lender, West Coast, and proceeded to trial against the loan brokers involved in the transaction.

**Facts and Contentions :** Houston and Lukas forged the Taylor signatures on documents (including a listing agreement for their house) and fraudulently secured a signature on a transfer deed, transferring title of the Taylor's home to Robert Houston as a joint tenant. Andrew Dioli's companies Rushmyfile, Inc. and FMC Lending, Inc. brokered the loan transaction that was funded by West Coast Private Investments. The loan was a \$950k loan at 11.99% interest with payments over \$9,500 per month and a balloon payment due in one year. The loan contained a 17.99% interest rate on default. The loan paid off \$791k in debt. The remaining amount went to loan fees, costs, and prepaid interest.

The Taylors alleged they were only looking for a \$400k loan to pay off a high interest rate loan. Houston and Lukas did not allow the Taylors to read the loan documents before signing them. Dioli and his companies drafted the loan documents that contained false and misleading information. Further, the loan was illegal because it was unlawfully classified as a non-consumer purpose loan.

After learning that Houston put himself on title to their home, the Taylors reached out to the police and contacted several attorneys in town. Unfortunately, they were unable to find an attorney willing to take their case. Eventually, Houston and Lukas were arrested and pled guilty. Houston went to jail (was released, then violated probation, and currently has a pending warrant for his arrest), and Lukas is on probation.

Before his arrest, Houston sued the Taylors to partition the property and to take the Taylor's equity. Because the Taylors could not find an attorney willing to help them, a default was entered in favor of Houston. The Taylors moved to set aside the default, and on the eve of the hearing (a tentative had been issued against the Taylors), the Taylors hired Lacy Taylor and John Thyne.

The Taylors filed a lawsuit against Houston. The lawsuit was later amended to include all of the defendants, after West Coast foreclosed on the Taylor's home.

**Summary of Claimed Damages:** The Taylors alleged they were damaged due to the lost equity in their home, for loss of rental income from the home, and emotional distress.

**Summary of Settlement Discussions:** Shortly after filing the lawsuit, the Taylors offered (via a 998 offer) to settle with Dioli's companies for \$50,000. There was no counter offer. Shortly before trial the Taylors offered to accept \$400,000 from Dioli and his companies. There was no counter offer. While the jury was deliberating, Dioli and his companies offered \$300k to settle with both West Coast and the Taylors. The Taylors and West Coast countered with a joint offer of \$850,000. Defendants did not counter the offer.

**Result:** The jury found in favor of the Taylors and against all defendants on all causes of action including: Fraud, Breach of Fiduciary Duty, Financial Abuse of an Elder, and Negligence. The jury found that all defendants acted with fraud, oppression, or malice. The jury awarded the Taylors \$455,827 in economic damages, and \$100,000 for non-economic emotional distress damages. The jury also awarded pre-judgment interest on the economic damages. The Taylors would be entitled to attorney fees under the Financial Abuse of an Elder statute. The jury awarded West Coast approximately \$505,000 for its damages based on Negligence against Rushmyfile, FMC Lending, and Houston. The case was set for the punitive damages portion of the trial. With the potential for large punitive damages, the parties settled the case with respect to Dioli, Rushmyfile, and FMC Lending for an undisclosed sum of money.

# The Gift of Self-Reliance

BY JOSEPH R. WEILAND

I was at party last evening with a group of fascinating people from varied backgrounds. The conversation was lively, from art and architecture to jokes and tricks. At one point, it came up that I am a Certified Financial Planner™ and one of the guests wanted to know my perspective on his conundrum. He has two very different sons with different needs (both successful) and he wanted to know how to balance the gifts or assistance that he offers each of them.

Many parents face this question. How do I treat my two (or more) children fairly when they are so different? The quick answer comes from my mother. She raised six kids. No two alike. I quote, "it is not possible to treat them the same, they are not the same." My mother is failing now, but still wise in her own way.

That is the short answer. Here is the practical answer. Do as little for each of them as you can. The more that you give them the more you take away from their abilities and self-esteem. Anyone that is self-made in this world knows that they put in the long hours, worried the late nights, fretted the possible failures and came out standing on their own two feet. They know how they did it and what it would take to do it again. They can look around their home and possessions, no matter how meager or grand and say to themselves, "It is mine and I did it." That is well earned pride which is one of the deepest senses of satisfaction a person can have in this world. If someone handed this to them on a platter, the house or possessions may be the same, but they will never have the pride and satisfaction that only comes from personal productivity and success.

I gave my new friend the cocktail conversation version of what you just read. It opened his eyes to something that he now found obvious and he related the following anecdote. He grew up in an affluent Chicago suburb surrounded by families with wealth and options. He thought of five of the friends that he grew up with who received family help

and money at most turns. In their 20s they traveled, in their 30s they changed careers and tried different things and in their 40s they watched as their friends who had spent the last 20 years grinding on their careers, professions and businesses enjoyed financial success. Meanwhile, they were dependent upon what the family could afford. Mostly it was less than what they needed. It turned out the family purse was not the endless resource it had appeared



Joseph R. Weiland

and certainly it was not something that filled them with pride.

As we spoke, the conversation shifted to his situation and sons. What does make sense? The quick answer is simple. Nothing that supports their current lifestyle. Nice birthday or Christmas presents are fine. For people that want to move wealth to the next generation, I like seeing them fund IRAs or 529 plans for grandkids. Both of those are working towards long term stability so the child can concentrate on providing for their current needs which will require a career and an ability to stand on their own two feet.

The biggest gift that anyone of us can give our kids is the gift of self-reliance. It is a gift that will allow them to be content and self-confident, whether they are sitting at home or out at a party with accomplished people talking about art and architecture, jokes and tricks. Don't give gifts that take this opportunity away from your kids. ■

*Joseph R. Weiland, CFP® is the managing partner of Arlington Financial Advisors in Santa Barbara. A graduate of University of Wisconsin, Weiland has held the Certified Financial Planner® designation for over 25 years. In addition to his client responsibilities, Weiland is responsible for developing best practices to employ in managing the firm's client relationships.*



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Motions, *continued from page 25*

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The Santa Barbara County Bar Association will be postponing its April social events in compliance with Governor Newsom's order "to prohibit ALL gatherings of any size, effective immediately."

This will include the  
Past Presidents' Luncheon.

For information on upcoming MCLE events, visit SBCBA at <http://www.sblaw.org//>

## 2020 SBCBA SECTION HEADS

### Alternative Dispute Resolution

Dr. Penny Clemmons 687-9901  
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cindy.brittain@kattenlaw.com

## REICKER, PFAU, PYLE AND MCROY, LLP IS PROUD TO ANNOUNCE THAT KEVIN NIMMONS JOINED THE FIRM AS PARTNER IN JANUARY 2020

**Reicker Pfau** is delighted to welcome Kevin Nimmons as a partner. Kevin is pleased to bring his litigation, real estate and business transaction practice to the firm, where he represents landowners, business owners, commercial tenants, and others in their business interests and resolving their legal disputes. Prior to joining Reicker Pfau, Kevin was a partner at the Santa Barbara law firm of Hollister & Brace P.C. where he practiced law for eleven years. He graduated *cum laude* from Syracuse University College of Law. Kevin is active in the community and sits on multiple boards. He, his wife and two children reside in Carpinteria.



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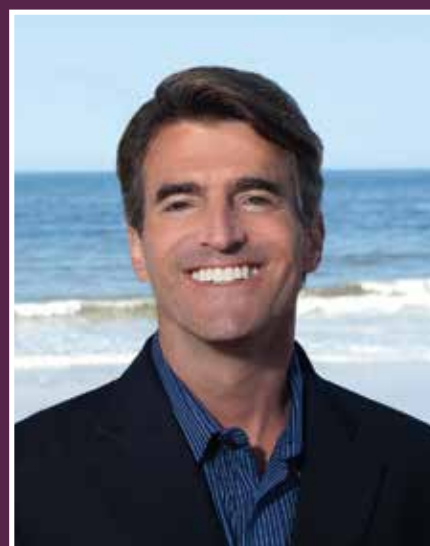
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