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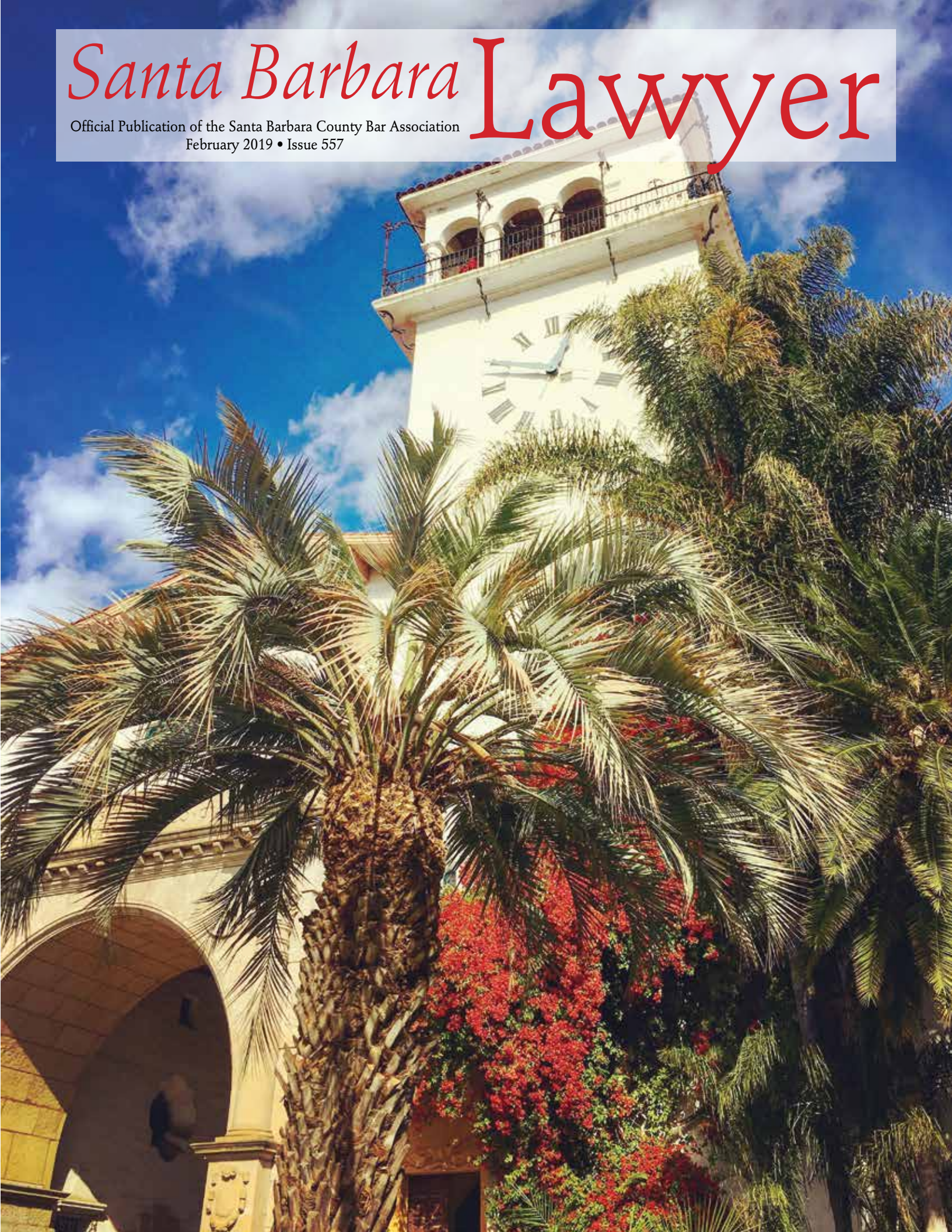

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112 Victoria Street
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dboswell@mullenlaw.com

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acalonne@santabarbaraca.gov

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831 State Street
Santa Barbara, CA 93101
T: (805) 564-2444
lconlan@cappellonoel.com

IULIA DAVIES
800 Anacapa Street, Suite A
Santa Barbara, CA 93101
T: (805) 260-9096
iuliadavies@gmail.com

STEPHEN DUNKLE
Sanger, Swysen, & Dunkle
125 E. De La Guerra, Suite 102
Santa Barbara, CA 93101
T: (805) 962-4887
sdunkle@sangerswysen.com

TARA MESSING
Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101
T: (805) 963-1622
tmessing@environmentaldefensecenter.org

CHAD PRENTICE
Maho & Prentice
629 State Street Ste. 217
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T: (805) 962-1930
cprentice@sbcalaw.com

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5290 Overpass Road, Bldg. C
Santa Barbara, CA 93111
T: (805) 692-1520 *102
michelle@sierrapropsb.com

JEFF SODERBORG
Barnes & Barnes
1900 State Street Ste M
Santa Barbara, CA 93105
T: (805) 687-6660
jsoderborg@barneslawsb.com

ROSALEEN WYNNE
Law Offices of James F. Cote
222 E. Carrillo St. Ste 207
Santa Barbara, CA 93101
T: (805) 966-1204
rosaleen@jfcotelaw.com

LIDA SIDERIS
Executive Director
15 W. Carrillo Street, Ste 106
Santa Barbara, CA 93101
T: (805) 569-5511
Fax: 569-2888
sblawdirector@gmail.com

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CONTRIBUTING WRITERS
Will Beall
Alexandra Jaimes
Mara M. Erlach
Robin Oaks
Robert Sanger

EDITOR
Stephen Dunkle

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Joe Billings
Lida Sideris

MOTIONS EDITOR
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PHOTO EDITOR
Mike Lyons

PRINTING
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Articles

Sections

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Entitled to Overtime? Confusion in Agriculture Wage and Hour Laws

By Alexandra Jaimes

The complexity of state and federal wage and hour laws in California has made it difficult for employers and employees to navigate the law. While state laws aim to provide clarity for both employees and employers through standards for specific industries, the nuances within those industries make it difficult to understand the laws. Specifically, nuances within the agricultural industry make it difficult to understand how to characterize an employee, through its inclusion of a series of exemptions and occupational distinctions. As a result, both employers and employees in the agricultural industry struggle to determine whether they must pay or are entitled to overtime.

The Fair Labor and Standards Act ("FLSA") was enacted by Congress in 1938 as the first widespread federal wage and hour law.[1] The FLSA's intention was to establish minimum wage, overtime pay requirements, and restrictions on the use of child labor. Since its inception, Congress has amended the FLSA to increase minimum wage standards and modify standards for particular industries. Today, the FLSA continues to govern most businesses.

California wage and hour laws, however, are also applicable to employers and employees within the state. California's wage and hour laws have become more prominent since the formation of the Industrial Welfare Commission ("IWC") in 1913. Similar to the FLSA, the IWC regulates hours, wages, and working conditions in specific industries and occupations within California.[2] The IWC established its first minimum wage requirements in 1916, and subsequently issued Wage Orders regulating the working conditions of women and minors in numerous industries.[3]

The IWC expanded its authority in 1972 and 1973 to include the regulation of wages, hours, and working conditions of men in numerous industries.[4] This new authority was first exercised in the 1974 Wage Orders. Since their establishment, the seventeen industry and occupation wage orders have governed California employees. The IWC is not currently in operation but the Division of Labor Standards Enforcement ("DLSE") continues to enforce the provisions of the Wage Orders.

Alexandra James

The enforcement of both California and federal laws has created a muddled system for employers and employees to adhere to. Employers have difficulty understanding what they must do to remain compliant with wage and hour laws, and conversely, employees do not understand whether they are being paid correctly.

When a conflict exists between state law and the FLSA, or the FLSA and another federal law, the law establishing the higher standard applies.[5] By way of example, the FLSA requires that an employee be paid overtime if he works more than 40 hours in a week. Pursuant to the FLSA, the amount of hours worked in a day does not entitle employees to overtime compensation. The FLSA focuses solely on the hours worked in a workweek.

Conversely, the majority of California Wage Orders, with the exception of personal attendants and select agricultural occupations, entitle an employee to overtime compensation after eight hours in a day or forty hours in a week. Thus, if an employee worked nine hours in a workday, California's stricter standard would apply, and the employee would be entitled to California's time and a half overtime requirement.

Although the standards differ, they simultaneously coexist. Many provisions within California's wage and hour laws are patterned on federal statutes and federal cases construing the statutes. Although not binding authority, federal decisions have been reliable to demonstrate the interpretation of California laws, which parallel federal statutes.[6]

The IWC has also implemented federal guidelines in the interpretation of state law found in the Wage Orders.[7] Since its inception, the Wage Orders have applied many of FLSA standards, including those governing the executive, administrative, and professional exemptions related to work hours and overtime compensation.[8] In doing so, the IWC expressed its desire to promote uniformity in the enforcement of state and federal laws.[9]

In essence, the goal for both state and federal wage and hour laws has been to establish requirements pertaining to the wages, hours, and working conditions of covered employees.[10] While state and federal wage and hour laws

may subtly differ in their implementation and standards of the laws, their end goals are consistent. In order to do so, the employee must establish it is entitled to certain protections, and apply relevant laws to protect those established rights.[11] To evaluate which wage orders and laws are applicable to a particular employee, the following must be assessed:

1. **FLSA Coverage:** Whether the employee is covered by the FLSA.[12]
2. **Labor Code and Wage Order Coverage:** Whether the employer is covered by the California industrial or occupational Wage Orders in addition to the provisions of the California Labor Code.[13]
3. **Industries Subject to Specialized Regulation:** Whether the employer is engaged in a business subject to specialized federal wage and hour legislation. (i.e. railroad, merchant, marine, motor carrier, or civil aeronautics industries.)[14]
4. **Government Contracts and Relationships:** Whether the employer is covered by specialized state or federal laws because it employs workers in state or federal public works or is a government contractor or subcontractor.[15]
5. **The Relationship with the Worker:** Whether an employer-employee relationship or some other relationship (i.e. volunteer or independent contractor), exists between the employer and the worker.[16]
6. **Employer Exemptions:** Whether the employee is subject to a whole or partial wage and hour exemption.[17]
7. **Employee Exemptions:** Whether a particular employee or group of employees is wholly or partially exempt from the wage and hour laws or certain aspects of such laws.[18]

Once the employee establishes what wage and hour laws govern his employment, he will be able to determine how to be paid accordingly. Similarly, by making this determination, employers will have a better sense of their legal obligations as it relates to the employee.

If an employee determines it is governed by California's Labor Code and Wage Orders, then the applicability of a specific wage order must be determined. California wage and hour laws are governed principally by the Labor Code and a series of eighteen Wage

Continued on page 13

Ineffective Assistance of Counsel and the United States Supreme Court

By Robert Sanger

Robert Sanger

This *Criminal Justice* column will examine a fundamental principle that may be under attack underlying the Sixth Amendment right to the effective assistance of counsel in a criminal case. It is not terribly controversial that a person accused in a criminal case is entitled not just to counsel but to effective counsel under the Sixth Amendment to the United States Constitution. It is well established that a warm body with a law license (someone egregiously incompetent) does not satisfy the requirement of counsel. The standards of the Sixth Amendment are higher.

If an accused is convicted and the lawyer failed to meet the standard of competence, then the question becomes whether or not the accused suffered prejudice as a result. This is the two prong test of *Strickland v. Washington*.[1] In other words, an accused is not entitled to a perfect trial, but a fair one. From case to case, the deficiencies of counsel—across multiple errors or in the case of a single error—are measured in terms of whether, but for the failure of counsel, the result would have been different.

We will consider a version of this fundamental analysis upon which a decision is currently being sought from the United States Supreme Court. The State of Connecticut has filed a petition for writ of *certiorari* with the Court that, as of this writing, has not been granted or denied.[2] Although the debate between the parties in that case does not address it, we will discuss whether recent Supreme Court jurisprudence, if this petition is granted, will have an effect on the outcome.

The Skakel Case

Justice Oliver Wendell Holmes, Jr. observed that "great cases, like hard cases, make bad law."[3] He followed this with the observation that, "great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[4] Those who have handled "great" cases within that meaning know that all of the participants tend to be influenced by the larger than life aspect of the moment.

So it might be that the participants in the *Skakel* case are suffering from the same effects. As many will remember, Michael Skakel is a nephew of Ethel Kennedy, widow of Robert Kennedy. Skakel was finally convicted in Connecticut court in 2002 of the 1975 murder of a teenage girl. The murder with a golf club occurred when Skakel and the girl were both in their teens in 1975. In 2013, a Connecticut court overturned Skakel's conviction.

However, the fight did not end there. The overturning of the conviction was appealed by the State of Connecticut and eventually came before the supreme court of that state. The Connecticut Supreme Court ruled that Skakel's counsel was ineffective under state law and the Sixth Amendment to the United States Constitution because they failed to interview or call a possible alibi witness who would have said he talked to Skakel at his house around the time of the murder some miles away.

For obvious reasons, the case has generated a great deal of publicity from the arrest through trial and periodically thereafter. The case proceeded through petitions for new trial, direct appeal and eventually a petition for writ of habeas corpus decided in favor of Skakel by the Connecticut court of appeals.[5] That decision was appealed by the government to the Connecticut Supreme Court which reversed the relief granted.[6] However, rehearing was granted and, with a change in court personnel, the lower court habeas decision was affirmed.[7] That led to a petition for writ of *certiorari* being filed in the United States Supreme Court on August 9, 2018.[8] The issue in *Skakel* as framed by the State of Connecticut is whether a court must "evaluate counsel's overall performance in determining whether a single error is sufficiently egregious to render counsel's representation constitutionally deficient? " In other words, under the first prong of *Strickland*, a reviewing court must first determine whether counsel met the standard of competence. If counsel did not meet the standard of competence, the burden is on the defendant to show that she or he suffered prejudice as a result of that lack of competence.[9] If it was prejudicial, even if it was a single error during the course of the overall con-

duct of counsel, was it grounds to set aside the judgment?

From a "Farce and a Sham" to the Strickland *Standard*

When some of us started practicing, the standard for reversal on appeal (and arguably for grant of relief on a *habeas* petition) was whether "counsel's lack of diligence or competence reduced the trial to a 'farce or a sham.'"[10] That standard was based on a due process analysis and not on the Sixth Amendment right to effective assistance of counsel. Although there were inroads into the "farce and sham" standard, it was not until 1979 and *People v. Pope*[11] that the California Supreme Court abandoned that due process standard and adopted a Sixth Amendment standard that looked to whether the counsel had provided "the kind of legal assistance to be expected of a reasonably competent attorney acting as a conscientious, diligent advocate."[12]

Then in 1984, the United States Supreme Court decided *Strickland* which required that, first, counsel's representation fell below the standard of reasonableness and, second, that there was prejudice in that there is a reasonable probability that, but for the unprofessional errors, the results of the proceedings would be different. To some, this seemed to be unduly deferential to the conduct of counsel and it seemed to place an undue burden on the defendant to show prejudice. Nevertheless, that has been the law now for decades.

The Connecticut Gambit

In *Skakel*, Connecticut seeks to have the United States Supreme Court make it even harder for a defendant to prevail. It is already the rule that even where counsel committed an error that fell below the standard of reasonableness, the defendant must show prejudice. That is, in light of the entire case, can the defendant establish that, but for the unprofessional conduct, the results of the proceedings would be different? This has led to innumerable decisions that have found the professional standards were not met, but evidence of guilt was otherwise overwhelming and, therefore, there was no prejudice. But it has also led to some decisions where a course of conduct or a single error was found to be prejudicial.

In *Skakel*, the government wants to invoke a new rule[13] that would eliminate as a matter of principle the failure of counsel to meet the professional standards which actually caused prejudice (a different result) if it was a single error, but if overall the lawyer was otherwise competent. In *Shakel*, they sing the praises of the trial lawyer and his team and urge that the United States Supreme Court grant *certiorari* to announce a new rule that, even though the defendant was wrongfully convicted, the lawyers should not be punished for making one outcome determinative error.

The Gambit in Light of the Supreme Court's Current Jurisprudence

However, the government in *Shakel* is approaching a Supreme Court that just found that a single error of counsel was so fundamental that it was structural error – in other words, as if there were no counsel at all – and required reversal without a factual showing of prejudice. That happened in May of last year in the *McCoy* case.[14] In other words, the Court found that the failure of counsel was so fundamental that it amounted to a *per se* violation of the right to counsel. As a result, it was not necessary for the defendant to show prejudice. Even though it was a single error in *McCoy*, the failure of counsel to meet the standard of professional conduct was such that the second prong of *Strickland* was not relevant. In *McCoy* the failure was to honor the defendant's position that he was not guilty even though counsel thought it better to admit the murder in order to avoid the death penalty.[15]

McCoy was a six to three decision with Justice Ginsberg writing the opinion, joined by the Chief Justice, and Justices Kennedy, Breyer, Kagan and Sotomayor. The dissent was by Justice Alito, joined by Justices Thomas and Gorsuch. Taking a simplistic view, if the same case were back before the Court, there would still be five votes for the opinion following the retirement of Justice Kennedy. Justice Kavanaugh's views on criminal justice issues are conservative based on memos he prepared while clerking for Justice Kennedy and on a limited sampling of lower court opinions. Nevertheless, it is important to remember that the Federalist Society and other conservative organizations have been more aligned with progressives recently on core legal protections for the accused. Therefore, he might have voted with the majority in *McCoy* but, even if he did not, he would have joined a four vote minority.

Having said that, neither side in the *Skakel* case cited *McCoy*[16] apparently not seeing this recent case as having any jurisprudential value. Skakel's lawyers emphasized, I think correctly, that the government misconstrued the facts of the case to make the finding of prejudice seem illusory. Skakel also argued that the lower courts and the Supreme Court are not in conflict in that there should not be a special rule for "single error" cases. Skakel asserted that a constitutionally deficient performance that results in prejudice is sufficient whether it is based on one instance or several. There should be no additional rule that there be an egregious overall failure of counsel. Although, understandably, no one cited

Continued on page 11

Sanger, *continued from page 9*

the California case of *People v. Pope* [17] which overruled *People v. Ibarra*,[18] the requirement of an egregious overall failure of counsel would seem to harken back to the "farce and sham" standard.

McCoy, on the other hand, seems to be a renewed commitment from just last term by the United States Supreme Court on the right to effective assistance of counsel under the Sixth Amendment. It is to be taken more seriously and not less. In light of this commitment it seems problematic that a new majority would be found to significantly undermine the *Strickland* standards. It seems to be a matter of settled constitutional principle that a failure to meet the standards of practice that prejudices the outcome is ineffective assistance even if the counsel can be lauded for the remainder of the case. But then, "We are under a Constitution, but the Constitution is what the judges say it is."[19]

Conclusion

If logic prevails, there is a good chance that *Strickland* will not be further diluted. In addition, it seems that the constitutional jurisprudence of the Supreme Court further supports that logic. But only time and the Justices themselves will tell us if the Sixth Amendment still means what it seems to mean at the moment. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for 45 years. He is a partner in the firm of Sanger Swysen & Dunkle and Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law. Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization, and a Director of Death Penalty Focus. Mr. Sanger is also an elected Member of the American Academy of Forensic Sciences (AAFS) and an Associate Member of the Council of Forensic Science Educators (COFSE). The opinions expressed here are his own and do not necessarily reflect those of the organizations with which he is associated.

Endnotes

1 *Strickland v. Washington*, 466 U.S. 668 (1984).
2 *Connecticut v. Skakel*, No. 18-185 (petition filed August 9, 2018).
3 *Northern Securities Co. v. United States*, 193 U,S, 197, 400.
4 *Id*.
5 *Skakel v. Warden*, 2013 WL 5815007.
6 *Skakel v. Commissioner of Correction*, 325 Conn. 426 (2016).
7 *Skakel v. Commissioner of Correction*, 329 Conn. 1, A.3d __ (2018).
8 On July 30, 2018, Justice Ginsburg extended the time within which to file a *certiorari* petition to and including August 9, 2018. Although the case was calendared for conference on January 4, 2019, as of this writing, no decision has been made by the Court on the petition for *certiorari.*
9 *Strickland v. Washington*, 466 U.S. 668 (1984).
10 *People v. Ibarra* 60 Cal. 2d 460, 464 (1963).
11 *People v. Pope*, 23 Cal. 3d 412 (1979).
12 *Id*. at 427.
13 In their Petition, they claim that the rule has been hinted at by the Court in other opinions and that lower courts have sometimes opted for their interpretation.
14 *See*, *McCoy v. Louisiana* 584 U.S. ___ (May 14, 2018)
15 That did not work either as the jury found the defendant guilty and rendered three death verdicts.
16 The *Amicus* brief filed on behalf of the Attorney general of Utah and joined by 10 other states does mention *McCoy* once but not in recognition of the Court's commitment to the standard of care in a single-error case but, instead, creatively argues that the autonomy of the defendant recognized in *McCoy* could somehow be impaired by counsel thoroughly investigating a defense.
17 *People v. Pope*, 23 Cal. 3d 412 (1979).
18 *People v. Ibarra* 60 Cal. 2d 460 (1963).
19 Speech before the Chamber of Commerce, Elmira, New York (May 3, 1907); published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), p. 139.

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Jaimes, *continued from page 7*

Orders, which include sixteen industrial and occupational regulations, one regulation applicable to employers not covered by an industrial or occupational order, and one general minimum wage regulation. The California Legislature has authorized the IWC to issue rules and regulations that establish the minimum standards pertaining to wages, hours, and working conditions for all covered employees in the state.[19]

California's Wage Orders are contained in Title 8 of the California Code of Regulations. The IWC is required to provide each employer with a copy of the Wage Order applicable to its industry, or employees so that the employer can post the applicable Wage Order and comply with its provisions.

When an employer is governed by an industry-wide Wage Order, the order applies vertically to every classification of the employee within the industry regardless of the type of work performed by the employee.[20]

If an employer's business does not fall within the scope of any industry-wide Wage Orders, then occupational Wage Orders may apply. Normally, only one Wage Order applies to an employer; however, some employers may be subject to more than one Wage Order. Moreover, there may be even more confusion when it is unclear what Wage Order governs specific employees, as most commonly seen in the Agricultural field of work.

Evidently federal and state laws surrounding wage and hour regulations are multifaceted. The biggest variables are the industry and job duties of an employee. Presently, California employs a substantial number of agricultural workers—some are entitled to overtime, while others are not.

Wage Orders 4, 8, 13, and 14 are potentially applicable to agricultural employees. Wage Orders 8 and 13 are industry orders and Wage Orders 4 and 14 are occupational Wage Orders.[21] The rules in the wage orders differ, including the overtime compensation requirements. For example, Wage Orders 8 and 13 require overtime for work in excess of eight hours per day, 40 hours per week, and the first eight hours on the seventh consecutive day of work in the workweek.[22] On the other hand, Wage Order 14 requires overtime pay for work in excess of ten hours in a workday or six days in a workweek.[23] Wage Order 14 also contains an exemption for irrigators who satisfy certain standards.

To determine what Agricultural Wage Order applies to an employee, the Wage Orders must be analyzed more closely. Wage Order 8 applies to "industries handling products after harvest."[24] This governs employers who operate establishments that handle farm products produced by another employer. This can include, for example, commercial establishments that clean, dry, sort, pack, dehydrate, slaughter, ferment, or pasteurize.[25] Wage Order 13 applies to "industries preparing agricultural products for market on the farm."[26] Wage Order 13 regulates wages, hours, and working conditions of employers who pack, process or otherwise prepare only their own farm products on their own premises.[27] Thus, the principal distinction for coverage purposes is whether the employer handles only products produced on its own farm and subject to Wage Order 13, or whether it also handles another farmer's product and is consequently subject to Wage Order 8.

Wage Order 14, on the other hand, is an occupational Wage Order rather than an industry order. Agricultural occupations that are covered by Wage Order 14 include those engaged in the preparation of land for planting, caring for or harvesting crops, or raising and managing livestock, poultry, fish, or insects.[28] Employers who merely grow or harvest their own crops, or who raise and manage their own animals, poultry, fish, or insects and who do not pack, process, or otherwise prepare their farm products for market are subject to Wage Order 14 and not Wage Order 8 or 13.

Due to the inevitable overlapping of work in the agricultural field, an agricultural worker may be covered under two different Wage Orders. Either Wage Order 8 or Wage Order 13, but not both can cover a business that specializes in agriculture. An agricultural business can also have employees covered by both Wage Orders 8 and 14, or by both Wage 13 and 14, since Wage Order 14 is an occupational Wage Order. Generally, a business is classified according to the main purpose of the business. While large businesses may conduct a variety of operations, and it may appear that different industry orders could apply, when those operations are part of the main business, only one order will apply.

The fact that an employee's job duties may fit in more than one Wage Order adds a level of complexity in determining applicable wage and hour laws, which could subject the employer to legal liability if it is non-compliant. Conversely, if an employee does not understand that the nature of his work is governed by two wage hours, he may not be aware that he is entitled to overtime compensation.

Ms. Nicole Ricotta, a Managing Partner for Anticouni & Associates, recognizes the intricacy in California's wage and hour laws, and the difficulty it poses for employers and employees. In advising employers, one of her principal recommendations is that employers ensure they characterize employees correctly.[29]

These distinctions may be even more difficult for em-

Continued on page 18

New Changes to Sexual Harassment Laws Well-Being in Legal Work Environments

By Robin Oaks

Robin Oaks

New legislation going into effect on January 1, 2019, will impact the legal standards and requirements applied to claims of harassment and discrimination in the workplace.[1] The "#Me Too" movement and recent events have raised public awareness about certain practices that enable workplace harassment to continue. In recent years the DFEH has issued further clarification in the form of guides and publications aimed at educating employers about what constitutes "reasonable" and "fair" investigations, who should investigate complaints, and what response actions must occur when harassment and discrimination claims arise.[2]

This fall California Senator Hannah-Beth Jackson authored several Senate bills that were intended to address gender inequities in corporations and ensure appropriate action is taken to combat unlawful discrimination and harassment in employment settings. One, SB 826, will require gender diversity on corporate boards. Another, Senate Bill 1300,[3] includes a number of significant changes that clarify what constitutes unlawful discrimination and sexual harassment, and addresses certain practices and legal interpretations that, as a result of these laws, will no longer be accepted.

Some of the changes included in SB 1300 are:

A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile or offensive working environment. (The legislature expressly rejected the *Brooks v. City of San Mateo*[4] decision and stated that this opinion should not be used in determining what kind of conduct violates FEHA. In the *Brooks* case a single incident of forcibly groping a female employee under her sweater was held not to constitute a hostile environment because it was deemed a single event that was not "extremely severe.")

A non-decisionmaker who makes discriminatory comments, and even when the comments do not occur in the context of an employee decision, may be circumstantial evidence of discrimination. (The legislature expressly affirmed the decision in *Reid v. Google, Inc.*[5] and the court's rejection of the "stray remarks doctrine.")

Employers cannot require employees to sign as a condition of employment, including a raise, or bonus, a non-disparagement or confidentiality agreement that will prohibit parties from disclosing information about unlawful workplace conduct. This does not apply to negotiated settlement agreements.

It is an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Nothing in this provision requires that any underlying conduct that occurred must constitute actionable discrimination or harassment.

Employers may also provide "bystander intervention training" so that employees can recognize problematic behaviors and gain the necessary skills and confidence that will "motivate bystanders to take action," and intervene as appropriate when they observe problematic behaviors. See SB 1343 mandating that non-supervisory employees receive harassment prevention training.[6]

This past year, Resolution 302 was passed by the ABA House of Delegates at the ABA Midyear Meeting in Vancouver, British Columbia, and sets forth new provisions for enforcing policies and procedures prohibiting harassment and retaliation in the workplace based on gender, gender identity and sexual orientation.[7] The resolution urges "all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity."

"Achieving Long-Term Careers for Women in Law" is an initiative by former ABA President Hilarie Bass. It focuses on increasing the number of women lawyers who pursue long term legal careers while exploring the causes contributing to the fact that a disproportionate

number of female attorneys never become equity partners, and there is a mass exodus of many talented and capable female attorneys from the legal profession. "Ultimately, the clients bear the brunt of the gender gap…a limited ability to recruit and retain skilled women lawyers at all levels… [creates] serious challenges to an organization's future growth and revenue."[8] "As a profession, we lack broad-based, reliable information about the reasons why there is a marked gender gap."

Efforts are being made to address these issues through national summits this past year aimed at surveying legal professionals, gathering research, and identifying best practices to ensure equitable treatment and employee well-being.[9] Locally, what might you do in your work environment to begin dialogues that explore issues of explicit or implicit bias? What keeps you from speaking up regarding what you have observed or experienced that may constitute unfair treatment or practices leading to burnout? In the words of a soulful Tracy Chapman's song, "If not now, when? If not today, then why make your promises…? "

No doubt, legal professionals will be advising clients and be active in determining how the new laws will apply to cases that arise. As legal counselors we should not be passive bystanders in our own work environments. Men and women together need to recognize that fostering equitable treatment in all settings is crucial to lawyer well-being and ultimately, the sustainability of the legal profession. ■

Robin Oaks has been an attorney more than thirty years, and for over twenty years has focused her legal practice exclusively on conducting independent workplace investigations and mediations in public and private sector work environments. She has studied a wide range of mind-body techniques and healing arts that foster health and well-being, and offers confidential sessions utilizing these strategies to help professionals thrive personally and professionally. She provides workplace training on harassment prevention and conducting defensible investigations, work environment climate assessments, and witness preparation stress-reduction support. Contact her at: Robin@RobinOaks.com or 805-685-6773.

ENDNOTES

1 B 1300 and SB 826.
2 See DFEH-185 Publication, and Workplace Harassment Guide for California Employers available at www.dfeh.ca.gov.
3 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1300
4 *Brooks v. City of San Mateo* (2000) 229 F.3d 917.
5 *Reid v. Google* (2010) 50 Cal. 4th 512.
6 SB 1343 mandating "employers with five or more employees, including temporary or seasonal employees, to provide at least two hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 2020, and every two years thereafter."
7 Feb 5, 2018, Resolution 302; cited at https://www.americanbar.org/news/reporter_resources/midyear-meeting-2018/house-of-delegates-resolutions/302/
8 https://www.americanbar.org/content/dam/aba/administrative/office_president/Initiative_Overview.pdf
9 The ABA and American Bar Foundation conducted focus groups this past year to uncover what participants, including women practicing law after fifteen years and those who dropped out, like and dislike about the practice of law. Many noted some form of discrimination, including: paternalism, lack of "face-time," cultures rewarding competition over teamwork, sexual harassment and implicit bias, problems with credit allocation. See also ABA January 2018 report, https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authcheckdam.pdf

Jenn Duffy, Alan Fenton, Betty Jeppesen

The SBCBA Joint Board Meeting

with 2018 and 2019 Board Members, along with MCLE Section Heads and various committee members.

Rosaleen Wynne

Amber Holderness, Lida Sideris

Joe Billings, Jeff Soderborg, Steve Dunkle

Michelle Roberson, Ariel Calonne, Annie Fenton

Lauren Udden, Tara Messing, Amber Holderness, Joe Billings

Jaimes, *continued from page 13*

ployees to understand. If an employee is unsure of whether he is receiving overtime correctly, Ms. Ricotta suggests they review their itemized wage statements to determine whether overtime hours are reflected in the statement.[30] The statement serves as an initial indicator of the characterization of an employee, primarily based on the employee's overtime rate.

Determining when an employer must compensate an employee for overtime, and when an employee is entitled to overtime proves, to be a tedious task. While the laws continue to make it increasingly difficult for the layperson to understand, there are tools available to simplify California's wage and hour laws. Employers should tread with caution and refrain from making assumptions of the characterization of an employee before conducting research into the possible applicable occupation. Conversely, employees should research what wage order they belong to, based on their day-to-day job duties within the industry. In doing so, they will be able to ensure that overtime hours are being paid pursuant to their applicable wage order. If confusion still exists consulting with an employment attorney will help both employers and employees ensure that the employer is complying with California wage and hour laws. ■

Alexandra Jaimes is a third-year law student at the Santa Barbara College of Law. She works as a Law Clerk for Anticouni & Associates, an employment litigation firm. While working as a law clerk, she has had the opportunity to learn the intricacies of wage and hour laws in California and has developed a special interest in Agricultural Wage Orders. She is an active student member of the Santa Barbara Bar Association and the California Employment Lawyers Association. Upon completion of her studies and after passing the bar examination, she has accepted an offer as an Associate Attorney for Anticouni & Associates.

ENDNOTES

1 (Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage* (June 1978) United States Department of Labor <https://www.dol.gov/oasam/programs/history/flsa1938.htm#1> [as of Nov. 28, 2018.)
2 (*DLSE Glossary,* <https://www.dir.ca.gov/dlse/Glossary.asp?Button1=I> [as of Nov. 28, 2018].)
3 (*History of California Industrial Welfare Commission* <https://www.dir.ca.gov/iwc/archives/iwc.archives.index.pdf> [as of Nov. 28, 2018].)
4 (Stats. 1972, ch. 1122, §§ 2-6, pp. 2153-2155; Stats. 1973, ch. 1007, §§ 1.5-4, pp. 2002-2003.)
5 (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 567.)
6 (Wage and Hour Manual for California Employers (2018), ch.1 p. 9.)
7 (Wage and Hour Manual for California Employers (2018), ch.1 p. 5.)
8 (Wage and Hour Manual for California Employers (2018), ch.1 p. 5.)
9 (Wage and Hour Manual for California Employers (2018), ch.1 p. 5.)
10 (Wage and Hour Manual for California Employers (2018), ch.1 p. 48.)
11 (Wage and Hour Manual for California Employers (2018), ch.1 p. 48.)
12 (Wage and Hour Manual for California Employers (2018), ch.1 p. 48.)
13 (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th. 833.)
14 (Wage and Hour Manual for California Employers (2018), ch.1 p. 48.)
15 (Wage and Hour Manual for California Employers (2018), ch.1 p. 48.)
16 (Wage and Hour Manual for California Employers (2018), ch.1 p. 49.)
17 (Wage and Hour Manual for California Employers (2018), ch.1 p. 49.)
18 (Wage and Hour Manual for California Employers (2018), ch.1 p. 49.)
19 (Lab. Code, § 1183.)
20 (*Harris Feeding Co. v. Dept. of Industrial Relations* (1990) 224 Cal. App.3d 464.)
21 (*Harris Feeding Co. v. Dept. of Industrial Relations* (1990) 224 Cal. App.3d 464.)
22 (Cal. Code Regs., tit. 8 §11080, 11030.)
23 (Cal. Code Regs., tit. 8 §11140.)
24 (Cal. Code Regs., tit. 8 §11080.)
25 (Cal. Code Regs., tit. 8 §11080.)
26 (Cal. Code Regs., tit. 8 §11140.)
27 (Cal. Code Regs., tit. 8 §11140.)
28 (Cal. Code Regs., tit. 8 §11140.)
29 *Entitled to Overtime? : Nuances in Agriculture Wage and Hour Laws* (interview with Nicole K. Ricotta, Esq.) (Nov. 2, 2018)
30 *Entitled to Overtime? : Nuances in Agriculture Wage and Hour Laws* (interview with Nicole K. Ricotta, Esq.) (Nov. 2, 2018)

Leveraging Private Loans to Preserve Inherited Real Property

By Mara M. Erlach

Trustees, executors, private fiduciaries, and estate and trust attorneys routinely encounter common problems when administering cash-poor trusts or probate estates after someone passes away. These problems include how to equalize the trust distribution between children so that everyone gets an equal share; how to pay expenses when there is little or no cash in the estate; how to pay off a reverse mortgage a parent or grandparent has taken out on the home; or how to structure the trust or estate administration so that one beneficiary receives real property while ensuring that the other beneficiaries receive an equal share. Often, there is too little cash in the estate to achieve these goals, and the trustee or executor is forced to sell real property, assets in the course of the trust or estate administration in order to raise the money needed.

Banks and credit unions offer little help in this regard, whether out of risk-averse policies or simple lack of knowledge regarding trust or estate administration. And wealthier beneficiaries cannot lend the trust or estate money because valuable property tax savings would be lost. Private loans provide trusts and estates with the cash needed to achieve the family's goals without having to resort to selling the family's real estate assets.

This advantage becomes even more important when considering the property tax advantages of retaining family real estate. Proposition 58, adopted in 1986, and codified in California Revenue and Taxation Code Section 63.1, provides that a transfer between parents and children of a principal residence, as well as an additional $1 million of the full cash value of all additional real property, is excluded from the definition of a "change in ownership," which would ordinarily necessitate property tax reassessment. Proposition 193, adopted in 1996, and included in California Revenue and Taxation Code Section 63.1 by an amendment, further expanded this definition to include certain transfers between grandparents and grandchildren, but only if the grandchild's parent is deceased. This law saves heirs thousands of dollars in property taxes each year.

Note that these exemptions are not automatic, and must be claimed by filing a "Claim For Reassessment Exclusion" and a "Preliminary Change of Ownership Report" with the applicable County Assessor's office. These forms may be found on each County Assessor's website.

Estates and trusts with limited liquidity may forfeit these important advantages if the estate or trust has no resources available which would allow the heirs to keep the family home. The California Board of Equalization has specifically sanctioned third party loans to trusts to equalize the value of beneficiaries' interests in the trust assets while retaining the applicable property tax exemptions. (See Board of Equalization Letter to Assessor No. 2008/018, Q. 36

California Probate Code Section 16246 provides that a trustee may distribute property and money in divided or

undivided interests, and to adjust resulting differences in valuation, with in-kind distributions being either pro rata or non-pro rata pursuant to a written agreement. By leveraging cash from a private loan, in conjunction with an agreement between the heirs, executors and trustees, can provide a valuable service to families who otherwise would have to forfeit their valuable real estate in the course of trust or estate administration.

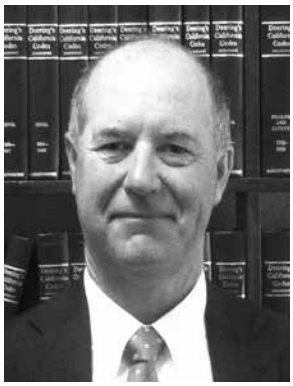
The Board of Equalization has specified that when a trustee has the power to distribute trust assets on a pro rata or non-pro rata basis, the distribution of real property to one child qualifies for the parent-child exclusion if the value of the property does not exceed that child's interest in the total trust estate. (Board of Equalization Letter to Assessor No. 2008/018, Q.35.) A trustee who elects to make a non-pro rata distribution may equalize the value of the other beneficiaries' interests in the trust assets by encumbering the real property with a loan and distributing the loan proceeds to the other beneficiaries. (Property Tax Annotation 625.0235.005.)

However, a private loan cannot be made by any of the beneficiaries of the real property to the trust in order to equalize the trust interests. Such a loan would be considered payment for the other beneficiaries' interests in the real property resulting in a transfer between beneficiaries ,rather than a transfer from parent to child, which would disqualify the transfer from the parent-child exclusion. (Board of Equalization Letter to Assessor No. 2008/018, Q.36.)

Since many banks will not make loans to trusts or estates, or make them so prohibitive that they are not worth the hassle, private loans provide a convenient (and often more affordable) solution, offering swift review and approval, no prepayment penalties, flexible terms, and availability of funds within a short time. Some private lenders also offer conventional lending services, providing a full-service resource for estates or trusts. ■

Mara M. Erlach is a Senior Counsel at Greene Radovsky Maloney Share & Hennigh, LLP, where she is a member of the firm's Trusts and Estates practice group. She wrote this article on behalf of HCS Equity. HCS provides private real estate loans throughout California and provides heirs, probate/estate attorneys, guardians and conservators specialized financing. For more information please visit the HCS website at www.loanstotrusts.com or contact ben@hcsequity.com, CA DRE # 02074311

Elings Park Foundation



Will Beall

Located at 1298 Las Positas, part of a green belt that stretches from Arroyo Burro Beach to Stevens Park, Elings Park, at 230 acres, is Santa Barbara's most diverse recreation complex, as well as one of its finest open space and natural areas.

In the late 1960's, Jerry Harwin devised a plan to obtain charitable funds to convert the City's landfill into a park, providing recreational activities for more than 200,000 annual visitors. In 1977, the Park (then Las Positas Park) was approved, at an original size of 105 acres. Elings Park is a national model for a "brownfield conversion". It opened to the public in 1985, and has been serving the community ever since. In 1994, the Park doubled in size with the purchase of "Elings Park South" from the Society of Jesus (the Jesuits). That portion of the Park is currently dedicated to passive recreation. The purchase of Elings Park South was partially funded by a generous gift from Dr. Virgil Elings, and the Park was renamed in his honor.

The Park serves numerous recreational groups. A non-exclusive list includes dog walkers, hikers, baseball and soccer players, BMX and mountain bikers, soccer, lacrosse and rugby players, runners, hang gliders, picnickers, tennis players, brides and grooms, radio controlled car enthusiasts and airplane fliers, veterans, other charitable organizations and more.

The Park is funded with a combination of user fees and charitable contributions. It is operated by the Elings Park Foundation, a charitable organization. Members of the local bar have made significant contributions to the Foundation since its inception, including A. Barry Cappello, whose generous donation funded a playground and picnic area, Fred Clough, who as president oversaw the purchase of the Jesuit property, past-president Michael Fauver and current president Will Beall. Any local attorney looking for philanthropic opportunities should contact Mr. Beall. The Foundation always needs new members of the Board of Directors, and more limited opportunities also exist. ■

Will Beall is a local attorney. He is a founding partner of Beall & Burkhardt, APC, and has practiced in the area of Bankruptcy and Creditor's Rights locally since 1982.

Motions

Jacquelyn Quinn, a professional fiduciary who specializes in trust management and serving vulnerable senior citizens, has been elected president of the Santa Barbara Estate Planning Council (http://www.santabarbaraepc.org).

Quinn, founder and owner of Quinn Fiduciary Services in Santa Barbara, has worked in estate planning and estate administration for several years.

As a licensed fiduciary in California, Quinn serves in court and non-court appointed cases acting as an agent under Advance Health Care Directives, agent under Powers of Attorney, as a conservator of both the person and estate and as trustee of revocable, irrevocable and special needs trusts.

Quinn is a member of the Elder and Dependent Adult Abuse Prevention Council of Santa Barbara County, the Central Coast Scams Against Older and Vulnerable Adults Working Group, and the Professional Fiduciary Association of California. She has volunteered with the Cancer Center, the Arthritis Foundation and the Alzheimer's Association. Quinn also teaches the Conservatorship and Advanced Health Care Directive Program at California State University, Fullerton's Extended Education Program. She frequently speaks on topics related to the care and safety of elders, including elder abuse, legal capacity and end-of-life decisions.

Brownstein Hyatt Farber Schreck is pleased to announce that **Amy Steinfeld** has been named the firm's office managing partner in the Santa Barbara office effective Jan. 1, 2019.

Steinfeld joined the firm 13 years ago and was named a shareholder in 2013. Her practice focuses on the intersection of land use and water law and she has more than a decade of experience in the permitting and development of controversial projects throughout California. She regularly advises water districts, regulated utilities, cities, developers, and agricultural interests, including nut and cannabis growers, in all aspects of water and land use law.

Steinfeld will join the firm's current office managing partners including Eric Burris (Albuquerque), Rosanna Carvacho (Sacramento), Marc Lampkin (Washington, D.C.), Jonathan Sandler (Los Angeles), Mike Rounds (Reno) and Ellen Schulhofer (Las Vegas).

If you have news to report—a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc.—Santa Barbara Lawyer *invites you to "Make a Motion!" Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com. If you submit an accompanying photograph, please ensure that the file has a minimum resolution of 300 dpi.*

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Real Property Section of the Santa Barbara County Bar Association Luncheon Program:

Asset Protection Planning With Offshore Trusts

Date:
Tuesday, February 19, 2019

Time:
12:00 p.m. – 1:30 p.m.

Topic:
Asset Protection Planning with Offshore Trusts. This program will include a discussion on the use of trusts in asset protection planning and why offshore planning is superior to domestic planning. In addition, discussions will also include what factors should be considered in selecting an offshore jurisdiction, their protective aspects and what the U.S. Tax consequences are.

Speaker:
Howard D. Rosen, Esq. Howard Rosen is an "AV pre-eminent" rated attorney and certified public accountant practicing law in coral gables, Florida, as a shareholder (partner) in the firm of Donlevy-Rosen & Rosen, p.a. Mr. Rosen has served as an adjunct professor and lecturer at law at the university of Miami school of law for 20 years (1991 - 2010), a guest lecturer at the university of Miami school of business administration, and is an internationally recognized authority and frequent lecturer on the subjects of asset protection, taxation, and estate planning. Mr. Rosen is also the Chairman of The Asset Protection Committee of The American Association of Attorney - certified public accountants (2004 - present).

Place:
Wells Fargo Private Bank
118 East Carrillo Street, Second Floor Conference Room

MCLE:
One hour of credit, approval pending

Menu:
Lunch will be provided

Price:
$30.00 (net proceeds going to the County Bar)

Reservations:
Must be received by February 8, 2019.
In ADVANCE please send your payment payable to:
Fell, Marking, Abkin, Montgomery, et al. LLP:
Attn: Yovana Cortez
222 E. Carrillo Street, 4th Floor
Santa Barbara, California 93101
Questions: Josh Rabinowitz, (805) 963-0755

Family Law Section of the Santa Barbara County Bar Association Presents:

Dissomaster™ and the Qualified Business Income Deduction

When:
February 28, 2019 at Noon

Where:
Santa Barbara College of Law

MCLE:
1.0 Hour of General MCLE

Speaker(s):
Kimberly M. Alvarado, CPA, ABV, CFF

About the Event:
Ms. Alvarado, a forensic accountant with CBIZ MHM, LLC, will present on Dissomaster™, including how to calculate the Qualified Business Income Deduction, for purposes of determining child support and temporary spousal support.

Price:
$35 with lunch provided.

Contact Information/R.S.V.P.:
Please provide your RSVP and payment to
Renee M. Fairbanks, CFLS
Law Office of Renee M. Fairbanks
226 E. Canon Perdido Street, Ste. F
Santa Barbara, CA 93101 no later than February 25, 2019.

Classifieds

OFFICE SPACE AVAILABLE

Private downtown office available for sole practitioner.

Spacious private office (appx 16' x 18') in historic building on Chapala Street between Micheltorena and Sola. Share reception area with two other attorneys. Interested parties please contact sblawdirector@gmail.com.

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2nd floor offices available for sub-lease in historic building, downtown Santa Barbara. Approx. 451 sq. ft. Offices are adjoining with separate French door entrances. If interested, contact Tabatha - tjones@schurmerwood.com.

LEGAL ASSISTANT/PARALEGAL POSITION

NORDSTRANDBLACK PC is looking for a highly motivated, efficient, and reliable full-time legal assistant or paralegal with at least one-year experience in Personal Injury litigation.

The position requires strong interpersonal communication and computer skills (Word, Outlook, Excel, Internet), attention to detail/organization, and the ability to multi-task and prioritize assignments. Bilingual Spanish/English a plus.

Duties include answering phones, client intakes, legal document preparation, scheduling, copying/faxing/filing, drafting letters, negotiating liens, client contact, calendaring court dates. Please email a cover letter (or include a paragraph about yourself in the body of the email) resume, and references to legalassistant2@nblaw.us and cc mm@nblaw.us. Position available immediately. No calls please.

2019 SBCBA SECTION HEADS

Alternative Dispute Resolution
Dr. Penny Clemmons 687-9901
clemmonsjd@cs.com

Bench & Bar Relations:
Jeff Soderborg 687-6660
jsoderborg@barneslawsb.com

Civil Litigation
Mark Coffin 248-7118
mtc@markcoffinlaw.com

Criminal
Jeff Chambliss 895-6782
Jeff@Chamblisslegal.com

Debtor/Creditor
Carissa Horowitz 708-6653
cnhorowitz@yahoo.com

Employment Law
Alex Craigie 845-1752
alex@craigielawfirm.com

Estate Planning/Probate
Connor Cote 966-1204
connor@jfcotelaw.com

Family Law
Renee Fairbanks 845-1604
renee@reneemfairbanks.com
Marisa Beuoy 965-5131
beuoy@g-tlaw.com

In House Counsel/Corporate Law
Betty L. Jeppesen 450-1789
jeppesenlaw@gmail.com

Intellectual Property
Christine Kopitzke 845-3434
ckopitzke@socalip.com

Mandatory Fee Arbitration
Eric Berg 708-0748
eric@berglawgroup.com
Naomi Dewey 966-7422
ndewey@BFASlaw.com
Vanessa Kirker Wright 964-5105
vkw@kirkerwright.com

Real Property/Land Use
Josh Rabinowitz 963-0755
jrabinowitz@fmam.com
Bret Stone 898-9700
bstone@paladinlaw.com

Taxation
Peter Muzinich 966-2440
pmuzinich@gmail.com
Cindy Brittain 695-7315
cindy.brittain@kattenlaw.com

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

High quality, executive office space available for sublease in a historic building in downtown Santa Barbara, two blocks from the Courthouse. Individual offices and suites available offering natural light and adjoining secretarial/assistant space. This building offers shared use of all amenities including live receptionist, three conference rooms, kitchenette, and copy room featuring a high speed color copier with fax and scan capabilities. Please contact Jeanette Hudgens, 805 962-9495, with inquires.

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