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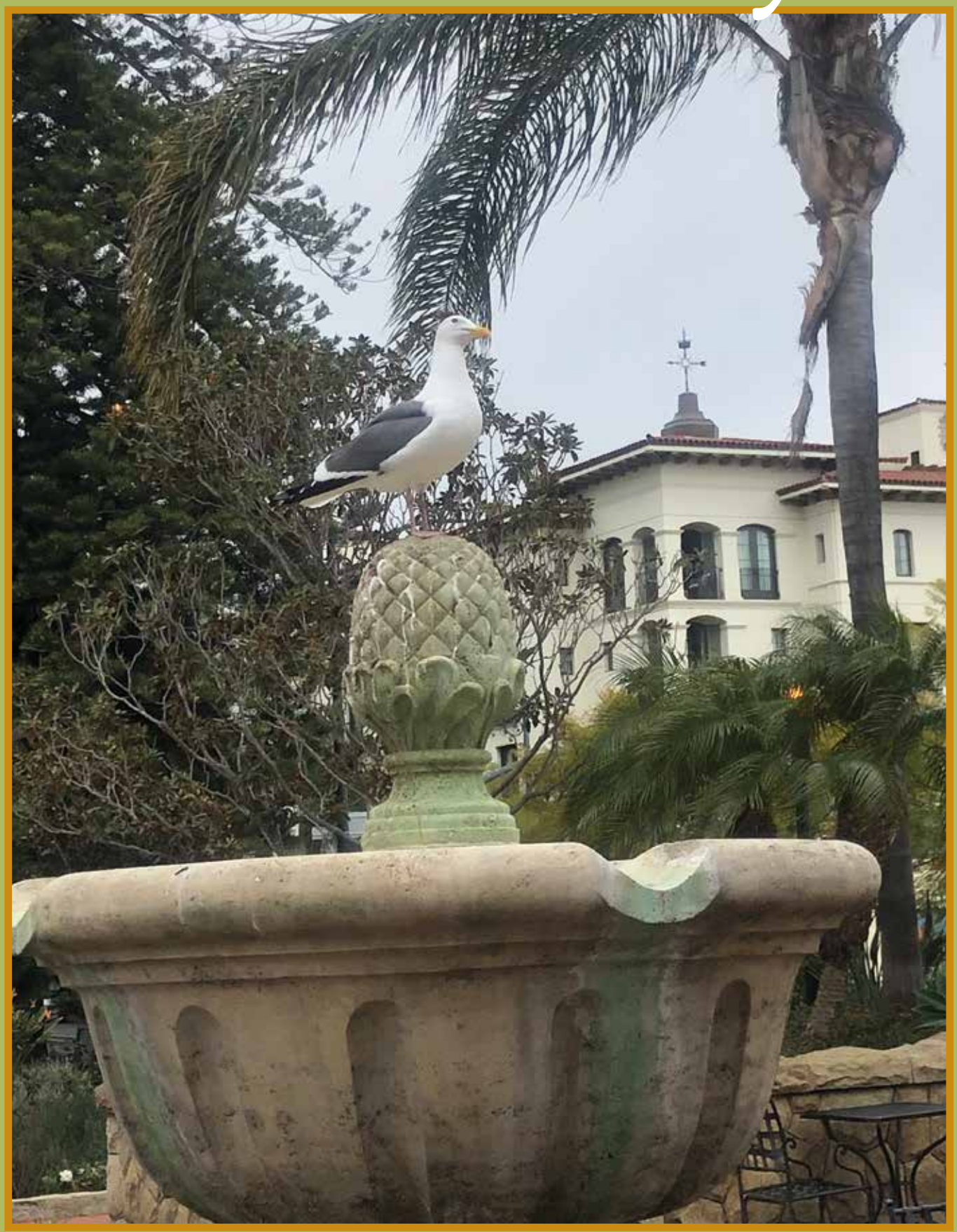

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Santa Barbara County Bar Association

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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Santa Barbara County Bar Association

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Evolution of California's Lemon Law

By Liz Gayle

In 1970, California enacted the groundbreaking Song-Beverly Consumer Warranty Act, designed to provide remedies to consumers who purchased a defective product. In 1983, the Tanner Consumer Protection Act was adopted to enhance the Song-Beverly Act to deal with special problems consumers experience when trying to enforce warranties on their vehicles. Those sections of the Song-Beverly Act have come to be commonly known as the Lemon Law.

In 1979, when Rosemary Shahan, a 29-year-old recent California transplant from Ohio, began having problems with her Volkswagen Dasher station wagon, she took the vehicle to a local San Diego dealership for repair.

After three months, when she learned that the dealership had not even ordered the needed parts, Shahan asked the dealership to give her back the car so she could take it to another mechanic. The shop refused and told her that the parts had not even been ordered. They went on to tell her that if she complained, they would "repair" the car with bad parts.

Incredulous and angry, Shahan, an English teacher, began picketing the dealership. Five months later, the dealership finally returned the car to her. During her time picketing, Shahan heard numerous stories from other car owners about how they had been similarly treated by dealerships.

In turn, the newly-minted activist began campaigning to California legislators to pass a bill that would protect owners of defective vehicles.

At hearings, despite data being presented which showed that each year more than a million defective vehicles were being sold to unknowing consumers, the car manufacturers defended their practices, with heated arguments presented by both sides. When the hearings concluded, the state legislature passed the bill and it was signed into law by Governor Jerry Brown in 1982.[1] In short order, the new law became known as the "Lemon Law."

Early Regulation of Consumer Goods

The United States began enacting laws to protect consumers more than a century ago when Theodore Roosevelt became president in 1901. Immigrants were flocking to American cities to work in flourishing factories. And with that migration came many of the problems common to industrial societies of the time, such as poor working conditions, great economic disparity, and the political dominance of big business.

As Americans looked for ways to address these issues, Roosevelt saw regulation as the avenue to address some of these problems in order to help ensure the welfare of society as well as maintain economic opportunity.[2]

Thus, after reading Upton Sinclair's classic novel, *The Jungle*, which described the unsanitary practices in the meatpacking industry, and hearing the public outcry, Roosevelt pressed for passage of the Meat Inspection Act and the Pure Food and Drug Act of 1906. At the same time, he also began enforcement of the Sherman Antitrust Act, which showed the business community that it would not be able to operate without considering public welfare. Throughout Roosevelt's presidency, he continued pushing through other consumer protection laws to further his belief that the government should use its resources to help achieve economic and social justice.[3]

During the same time period, in an attempt to unify American sales law and regulate commerce, Harvard Law Professor Samuel Williston drafted the Uniform Sales Act, a precursor to Article 2 of the Uniform Commercial Code (UCC), which between 1906 and 1947 was adopted by 34 states.[4] The UCC then itself emerged in 1952 and was adopted in California in 1963 and took effect in 1965.

Song-Beverly Consumer Warranty Act

In 1970, California enacted the groundbreaking consumer warranty protection law, the Song-Beverly Consumer Warranty Act.[5]

The Song-Beverly Act was a milestone in consumer warranty law, designed to provide remedies to the average consumer who purchased a defective product. It was not designed to replace the UCC, but rather to complement the California Commercial Code and other remedies.[6]

Legislators saw the need to put consumers on more equal footing with manufacturers and retail sellers by clarifying their rights under the warranties that accompanied the consumer goods they were purchasing. They wanted to do away with sales gimmicks so that purchasers knew exactly what warranty terms they were receiving and were aware of their options if the products they purchased were defective.[7]

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ANAB Guiding Principles for Forensic Providers and Personnel

By Robert Sanger

The guidelines and standards for forensic science continue to improve. As we have reported here in the *Criminal Justice* column, the forensic scientists and experts themselves have been making great progress in improving the scientific nature of forensics. Lawyers and judges, regrettably, are often behind but are trying to keep up.

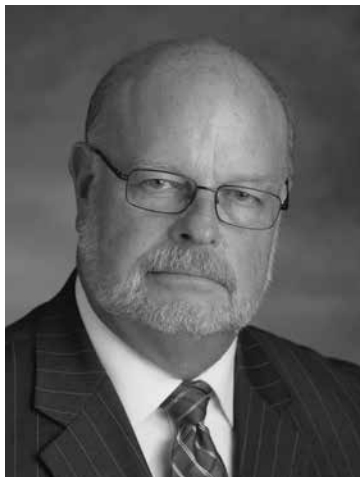
In addition to the scientific disciplines themselves, there is a concurrent effort to improve forensic laboratories and personnel by way of guidelines, standards and accreditation. This is the sort of a top-down approach to increasing scientific rigor. In the past, an organization of laboratory directors, ASCLD/LABS, was largely responsible for setting guidelines and standards and for accrediting forensic laboratories and personnel. This had the appearance of a conflict of interest.

More recently, another organization, ANAB, has taken over the accreditation of labs and personnel. It has the advantage of appearing to be a neutral organization and one committed to national and international standards. In this month's column, we will look at ANAB and its guidelines and standards. Civil and criminal practitioners should be familiar with these guidelines and standards so that they can effectively litigate the foundational validity of the proffered evidence and the validity of that evidence as applied by the laboratories and personnel.

Forensic science is science and not personal opinion or advocacy. Forensic laboratories and their personnel should comport themselves as scientific laboratories and scientists. The fact that someday they will be called to testify by one side or the other in a civil or criminal case is irrelevant. As a 19th century medical forensic expert said, "*If the law has made you a witness, remain a man of science. You have no victim to avenge, no guilty or innocent person to convict or save -- you must bear testimony within the limits of science.*"[1]

Guidelines, Standards and Accreditations

As discussed in these pages often, in the last twenty-five to thirty years, there has been a growing use of forensic science, often in civil litigation in potentially big dollar cases and also in criminal cases where life and liberty were at stake. Along with their use came increased skepticism from the academic scientific community and legal scholars. However, that skepticism, if conveyed to the court by the lawyers, was often answered by judges who would regard scientists and charlatans as being equally entitled to tell their story. The remedy often was to let the jury figure it out.[2]



Robert Sanger

In the criminal arena, crime laboratories themselves started to come under fire. As it turned out, there were no uniform standards for maintaining a forensics laboratory or for determining its proficiency. The Federal Bureau of Investigation (FBI) began to feel the pressure to professionalize expert testimony. The FBI created Scientific Working Groups (SWGs) and, following the NAS Report,[3] the work was transferred to NIST and the OSACs. The American Academy of Forensic Sciences (AAFS) became a Standards Development Organization (SDO) and created Consensus Bodies (CB's) for the different forensic areas to assess and create guidelines and standards based on the consensus of the stakeholders. We have covered this progress at the discipline level elsewhere.

Meanwhile, it became apparent that forensic laboratories and their personnel were also unregulated and were becoming the center of controversy. Even well intentioned scientists working in a setting with deficient laboratory guidelines and standards would lead to errors. As a result, in 1980, the American Society of Laboratory Directors formed its own accreditation organization called ASCLD/LABS. To some, it was little more than a device by those under criticism to create their own system in order to claim that the laboratory members of ASCLAD should be immune from criticism.[4] Accreditation was voluntary and was nominally designed to improve the quality of laboratory services, to develop and maintain criteria and a system of operational review. Ultimately, it was claimed that ASCLD/LAB accreditation would give the public and the courts and counsel a means by which to identify professional and proficient laboratories.

Protocols were put in place, a structure was devised and

ASCLD/LABS was staffed with an Executive Director, senior staff, and a board comprised mostly of laboratory representatives and law enforcement. Eventually ASCLD/LABS created teams of volunteer inspectors and assessors and technical advisory committees resulting in accreditations starting in 1982. Hundreds of laboratories were eventually approved under a program of ASCLD/LABS own standards that were enforced in a less than rigorous fashion. To meet mounting criticisms, in the early 2000's, ASCLD/LABS began to use the international standards for forensic laboratories adopted by the international Organization of Standardization. ISO/IEC 17020 and 17025[5] were used to conform to international practice.

This helped deflect some criticism but, eventually, it was decided that the organization creating standards and charged with determining if a laboratory met those standards so that it could bestow accreditation, should not be the guild of laboratory directors. Furthermore, the fact that these laboratory directors were seeking to use the ISO standards, gave additional reason to suppose that a more neutral industry organization would take over.

In the United States, Standards Development Organizations (SDO's) are supposed to be non-governmental consensus bodies that consider the perspectives of all stakeholders. They are to create and, in some cases, enforce standards in the interest of the public, not the industry. The American National Standards Institute (ANSI), initially formed to create engineering standards in 1918 after the First World War, is now considered the leading standards organization in the United States. The accreditation arm of that organization is the ANSI National Accreditation Board (ANAB).

This is all to say that in the last few years, since ASCLD/LABS began to interpret the ISO laboratory standards, ASCLD/LABS began to turn its accreditation program over to ANAB. ANAB is not run by laboratory directors and has the advantage of appearing neutral as a part of ANSI. It relies on consensus bodies to suggest standards and guidelines for best practices in any area of expertise or industry. Of course, ANAB does also provide training for laboratories so that the laboratories can pass accreditation, but they do not do consultations with the laboratories. They, therefore, have a certain aura of neutrality when they do the inspections, assessments and accreditations.

The Significance of Guidelines, Standards and Accreditation to Admissibility

Whatever the status of ANAB as a truly independent institution, lawyers and judges have to be ready to evaluate laboratories and forensic personnel under the guidelines of ANAB, the requirements of ISO/IEC 17020[6] and 17025[7] and then look at related specific standards such as, for instance, NFPA 921[8] for fire cases. It has been argued, in this column and elsewhere, that there is a large gap in the education of lawyers and judges that should be filled in law school itself. Nevertheless, it is no less incumbent on lawyers and judges to educate themselves when and if forensic issues arise in cases. Ignorance is no defense to a lack of legal or judicial competence in analyzing or ruling on such issues – although it may be the cause in fact of wrongful convictions, erroneous civil judgments and the admission of junk science in general.

The PCAST Report[9] talks about the difference between foundational validity and validity as applied when analyzing forensic comparison evidence. In other words, both foundational and validity as applied questions have to be addressed at an Evidence Code Section 402 *in limine* hearing. There the *Daubert* concerns will be addressed as to whether the subject matter is addressed by a science or expertise that is falsifiable, whether it is based on peer reviewed research, whether it has proficiency review and established error rates, whether it is subject to standards

that are maintained controlling the forensic operation and whether it has attracted widespread acceptance in the scientific community.[10] In addition, the *Sargon* concerns will also be addressed as to whether the purported expert has expertise in the field and whether the expert's opinion is a proper scientific conclusion based on reliable data.[11]

As summarized by PCAST in their cover letter to the President, "PCAST concluded that there are two important gaps: (1) the need for clarity about the scientific standards for the validity and reliability of forensic methods and (2) the need to evaluate specific forensic methods to determine whether they have been scientifically established to be valid and reliable."[12] This, in turn, is based on whether or not the particular laboratory and forensic personnel meet accreditation or other scientific foundational requirements, including maintaining the accepted standards and being subject to their own testing for error rates and proficiency.

Guidelines, Standards and Criteria for Accreditation

So what are these guidelines, standards and criteria for accreditation? First, ANAB has promulgated a remarkably concise and clear document entitled, "Guiding Principles of Professional Responsibility for Forensic Service Providers and Forensic Personnel."[13] This document should be read by lawyers and judges and, in conjunction with case law and individual standards for individual forensic disciplines, they should form the bedrock of foundational validity and validity as applied for any forensic laboratory or personnel.

In summary[14] the Guiding Principles are designed for the management of laboratories and the personnel. Personnel are directed to "incorporate the principles into their daily work." Hence compliance with the principles should be the basis for admissibility of any testimony or opinion and should be the subject of deposition, motion *in limine* or cross-examination at trial. The principles are important enough to set out in full:

Professionalism

Ethical and professionally responsible forensic personnel . . .

1. Are independent, impartial, detached, and objective, approaching all examinations with due diligence and an open mind.

2. Conduct full and fair examinations. Conclusions are based on the evidence and reference material relevant to the evidence, not on extraneous information, political pressure, or other outside influences.

3. Are aware of their limitations and only render conclusions that are within their area of expertise and about matters which they have given formal consideration.

4. Honestly communicate with all parties (the investigator, prosecutor, defense, and other expert witnesses) about all information relating to their analyses, when communications are permitted by law and agency practice.

5. Report to the appropriate legal or administrative authorities unethical, illegal, or scientifically questionable conduct of other forensic employees or managers. Forensic management will take appropriate action if there is potential for, or there has been, a miscarriage of justice due to circumstances that have come to light, incompetent practice or malpractice.

6. Report conflicts between their ethical/professional responsibilities and applicable agency policy, law, regulation, or other legal authority, and attempt to resolve them.

7. Do not accept or participate in any case on a contingency fee basis or in which they have any other personal or financial conflict of interest or an appearance of such a conflict.

Competency and Proficiency

Ethical and professionally responsible forensic personnel . . .

8. Are committed to career-long learning in the forensic disciplines which they practice and stay abreast of new equipment and techniques while guarding against the misuse of methods that have not been validated. Conclusions and opinions are based on generally accepted tests and procedures.

9. Are properly trained and determined to be competent through testing prior to undertaking the examination of the evidence.

10. Honestly, fairly and objectively administer and complete regularly scheduled:

relevant proficiency tests;
comprehensive technical reviews of examiners' work;
verifications of conclusions.

11. Give utmost care to the treatment of any samples or items of potential evidentiary value to avoid tampering, adulteration, loss or unnecessary consumption.

12. Use appropriate controls and standards when conducting examinations and analyses.

Clear Communications

Ethical and professionally responsible forensic personnel . . .

13. Accurately represent their education, training, experience, and area of expertise.

14. Present accurate and complete data in reports, testimony, publications and oral presentations.

15. Make and retain full, contemporaneous, clear and accurate records of all examinations and tests conducted, and conclusions drawn, in sufficient detail to allow meaningful review and assessment of the conclusions by an independent person competent in the field. Reports are prepared in which facts, opinions and interpretations are clearly distinguishable, and which clearly describe limitations on the methods, interpretations and opinions presented.

16. Do not alter reports or other records or withhold information from reports for strategic or tactical litigation advantage.

17. Support sound scientific techniques and practices and do not use their positions to pressure an examiner or technician to arrive at conclusions or results that are not supported by data.

18. Testify to results obtained and conclusions reached only when they have confidence that the opinions are based on good scientific principles and methods. Opinions are to be stated so as to be clear in their meaning. Wording should not be such that inferences may be drawn which are not valid, or that slant the opinion to a particular direction.

19. Attempt to qualify their responses while testifying when asked a question with the requirement that a simple "yes" or "no" answer be given, if answering "yes" or "no" would be misleading to the judge or the jury.

These guidelines are remarkable in their simplicity but also their moral force. All forensic experts and their laboratories should be held to these guidelines. Aspects of ANAB's Guiding Principles are not new. Many have been found in ethics guidelines propounded by AAFS, in forensics publications and by ASCLD/LABS itself.

To implement the Guiding Principles, ANAB uses its Accreditation Manual for Forensic Service Providers.[15] In turn, the substantive standards are promulgated by ISO, including ISO/IEC 17020 and 17025 and then standards for various disciplines, through their professional organizations, the SWG's or the emerging standards promulgated by NIST through the OSACs and by AAFS through the Consensus Boards. For deposition, *in limine* and trial purposes, this requires research by the lawyers and inquiry of consulting and testifying experts to determine what is applicable. Then, through discovery, the lawyers should obtain the compliance certificates, proficiency testing data, lab protocol manuals and documentation regarding complaints, non-compliance and corrective action.

Forcing adherence to the ANAB Guiding Principles should eliminate a lot of the shenanigans by purported experts, including (or, perhaps, especially) those regularly called by prosecutors or by one side or the other in litigation. Once the ANAB and ANSI/ISO/IEC guidelines and standards are exhausted from "above," then the guidelines and standards of NIST OSAC, AAFS CB recommendations can be consulted.[16] Ultimately, there are discipline specific promulgations, such as, for instance, NFPA for fire investigations. NFPA 921 has extensive guidelines and standards that are modeled on the scientific method and NFPA 1033 has the industry "Standard for Professional Qualifications for Fire investigator." If the laboratory, the investigation process or the investigator do not meet all of these guideline's standards, it is a basis to object to the testimony.

Conclusion

There is a tremendous amount of scientific material out there to be researched and consulted to do justice to scientific evidence in deposition, in *in limine* motions or in trial whenever laboratory results are offered or the testimony of a forensic scientist or expert is proffered. Forcing experts to comply with the ANAB Guiding Principles and calling experts on it when they do not, is a large step toward enhancing the role of science in forensics. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 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 a Fellow 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. ©Robert M. Sanger.

[Editor's note: Robert Sanger's promotion to Fellow occurred at the 71st AAFS Annual Scientific Meeting held in Baltimore in February of 2019.]

ENDNOTES

1 Quoted and attributed to "Dr. P.C.H. Brouardel, a 19th Century French Medico-legalist," by the American Academy of Forensic Science web page, https://www.aafs.org/home-page/students/choosing-a-career/what-do-forensic-scientists-do/, and by the ANSI National Accreditation Board, https://anab.qualtraxcloud.com/ShowDocument.aspx?ID=6732 but attributed to "Paul H, Broussard, Chair of Forensic Medicine, Sorbonne, 1897," in 20 THE AMERICAN JOURNAL OF FORENSIC MEDICINE AND PATHOLOGY 17 (1999).

2 *See, e.g.*, Peter W. Huber, GALILEO'S REVENGE, Basic Books (1991).

3 National Research Council, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES, A PATH FORWARD, The National Academies Press (2009);

4 Skeptics asserted that ASCLD/LABS was designed to clad the laboratories from subsequent criticism as a sort of CYA mechanism. The unfortunate acronym did not help dispel this criticism.

5 In English it is called the international Organization for Standardization and in French, it is the *Organisation internationale de normalization* which would be IOS or ION respectively. As a result the "founders decided to give it the short form ISO. ISO is derived from the Greek isos, meaning equal." See the ISO webpage; https://www.iso.org/about-us.html#2012_aboutiso_iso_name-text-Anchor. The IEC is "The International Electrotechnical Commission."

6 Relating to Inspection Bodies.

7 "General requirements for the competence of testing and calibration laboratories."

8 National Fire Protection Association, "Guide for Fire and Explosion Investigations." There are also sometimes legacy and, rarely, active guidelines and standards under the Scientific Working Groups' websites, such as SWGFEX for Fire and Explosives.

Continued on page 26

Gayle, *continued from page 6*

Being that a motor vehicle is the second most expensive purchase that the average consumer will ever make, most lemon law attorneys focus their practices on motor vehicles. However, the Song-Beverly Act applies to the sale of most consumer products if the consumer goods that were purchased or leased in California came with a manufacturer's express warranty and are not repaired to conform to the applicable express warranties. Under the Song-Beverly Act, if the manufacturer or its representative in California does not service or repair the goods after a reasonable number of attempts, the manufacturer shall replace the goods or reimburse the buyer for the purchase price minus the amount attributable to use by the buyer before discovering the nonconformity.[8]

Consumer Goods

For the Song-Beverly Act to apply, certain elements must be met. First, the product must be a "consumer good" which is defined as "any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables."[9] Clothing and consumables are separately defined in the statute, new and used assistive devices such as hearing aids are included as "consumer goods," and the Act contains separate sections that apply to wheelchairs and electronics and appliances.[10]

This is a subjective test that focuses on how the consumer actually uses the product, not how the product is commonly used. When a motor vehicle is involved, consumers usually will have no problem proving that they operated a vehicle primarily for personal use, but if a vehicle is primarily or exclusively used for business use it may not be protected by the Song-Beverly Act.

Express Warranty and Timing

The required express warranty must be either a "written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance" or a sample or model must be involved, meaning that "the whole of the goods [must] conform to such sample or model."[11]

The Song-Beverly Act further specifies that if goods are nonconforming, the manufacturer or its representatives must begin repairs within a reasonable time with 30 days to complete the repairs unless a delay is beyond their control.[12]

Implied Warranties and Waiver

Additionally, the Song-Beverly Act protects consumers by specifically providing that the implied warranty of merchantability accompany all goods sold at retail. It also specifies under what situations the implied warranty of fitness for a particular purpose applies.[13]

To make it difficult for manufacturers to disclaim these warranties, the Act makes a warranty waiver only permissible with "as is" goods if a writing is attached to the goods. Such a writing informs the consumer that the goods are being sold "as is," that "the entire risk as to the quality and performance of the goods is with the buyer," and that if they are found to be defective, the buyer—not the manufacturer, distributor or retailer—is responsible for any and all repairs.

Thus, if a consumer chooses to purchase a product with no implied warranties, the consumer is aware at the time of purchase he or she is not buying the product with these protections should he or she later have any problems with the product.[14]

Attorney's Fees and Civil Penalty

The Song-Beverly Act also mandates that a prevailing buyer/lessee be allowed to recover costs and expenses, including attorney's fees "based on actual time expended." This applies to the buyer of any type of consumer goods, not just a big-ticket item such as a vehicle. In certain circumstances, the buyer may also recover a civil penalty up to two times his actual damages.[15]

Magnuson-Moss Warranty—Federal Trade Commission Improvement Act

In 1975, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, which is the federal version of California's Song-Beverly Act. Magnuson-Moss is considered not as effective for consumers as the Song-Beverly Act because it focuses on the "normal" use of a product rather than on how a particular consumer uses the product, and it does not contain a treble damages provision for willful misconduct. In addition, it only specifies that the warranty repairs must occur within a reasonable time rather than 30 days.

However, the Magnuson-Moss Act may include vehicles commonly used for personal or household purposes even if they are primarily or exclusively being used for business purposes, and it gives the U.S. Attorney General or Federal Trade Commission (FTC) the right to intervene to seek an injunction against any supplier of consumer goods that are in violation of any of the Act's provisions where the goods "affect" interstate commerce.[16]

Tanner Consumer Protection Act

Thanks in large part to Rosemary Shahan, in 1983 the Tanner Consumer Protection Act [17] was adopted to enhance the Song-Beverly Act to deal with special problems that consumers may experience when trying to enforce warranties on their vehicles. Those sections of the Song-Beverly Act—plus some additional provisions—have come to be commonly known as the Lemon Law. Subsequently, all 50 states and the District of Columbia enacted lemon laws using the enhanced Song-Beverly Act as their model.

Today the Lemon Law covers the following "new motor vehicles" sold or leased in California that come with a manufacturer's new vehicle warranty:

Cars, SUVs, vans, motorcycles, and pickup trucks

Chassis, chassis cab, and drivetrain of a motorhome (other sections of the Song-Beverly Act cover the other portions of the motorhome, such as the living area, as "consumer goods")

Dealer-owned vehicles and demos

Previously-owned vehicles that come with the balance of new vehicle warranties

Vehicles purchased or used primarily for business purposes if under 10,000 pounds and owned by a person or business that has no more than five vehicles registered in California[18]

Remedies

The Song-Beverly Act provides the same remedies for non-conforming new motor vehicles as it does for all non-conforming consumer goods—namely, if a manufacturer or its representatives fail to repair the problems with a motor vehicle within a reasonable number of attempts, the manufacturer must either promptly replace the vehicle or make restitution to the buyer or lessee.

However, the manufacturer cannot force the consumer to accept a replacement vehicle. It is the choice of the consumer, not the manufacturer, whether he or she wants a replacement or a repurchase.

If the consumer opts for a replacement, the consumer is entitled to a new vehicle that is "substantially identical" to the vehicle being replaced. But should a consumer opt for a repurchase, he or she is entitled to recover their down payment, payments made, registration, rental car expenses, and the loan payoff. The consumer is entitled to incidental and consequential damages in either situation.[19]

Usage Offset

Whether a buyer or lessee opts for a repurchase or a replacement, the manufacturer is entitled to a usage offset based on the mileage on the vehicle when the buyer or lessee first took the vehicle to a dealer for repair of the problem. The formula—purchase price x (mileage ÷ 120,000)—mandated in the statute determines the amount of the offset. If the consumer is opting for a repurchase, the amount determined by using that formula is subtracted from the amount owed by the manufacturer to the consumer. If the consumer is opting for a replacement, the consumer must pay the manufacturer the amount of the usage offset.[20]

Most states, including California, permit a buyer or lessee to continue using a non-conforming vehicle while attempting to get their vehicle repaired as it would be financially burdensome to require a consumer to obtain alternative transportation. However, unlike the usage offset in California's Song-Beverly Act, the usage offset in some states is based on the current mileage on the vehicle which penalizes the consumer for the continuing use.[21]

Tanner Act Presumption

A major problem with the Song-Beverly Act before it

was amended was that it failed to define what would be considered to be "a reasonable number of attempts" to repair a vehicle to trigger the allowable remedy provisions. The Tanner Act sets forth a presumption that is used as a guideline. It is presumed that a vehicle is a lemon if the following criteria are met within 18 months of delivery to the buyer or lessee or 18,000 miles on the odometer, whichever occurs first:

The manufacturer or its dealers have made four or more attempts to repair the same problem or two or more attempts to repair a problem that is likely to cause serious bodily injury or death if the vehicle is driven; or

The vehicle has been out of service for more than 30 days (not necessarily consecutive) while being repaired for any number of problems; and

If required by the warranty materials or by the owner's manual, the consumer has directly notified the manufacturer about the problem(s).[22]

Not every problem qualifies under the Lemon Law. The problem must be one that "substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee,"[23] and the problem must not have been caused by the buyer or lessee's abuse to the vehicle.[24] But the problem does not have to be safety related. It can range from a broken window or air conditioner to a vehicle that unexpectedly stalls on the freeway.

If the manufacturer has established a qualified third-party dispute resolution process and the buyer has received written notification of its existence, the presumption cannot be asserted until after the buyer or lessee's dispute has been arbitrated.[25] Should the consumer decide not to arbitrate, he or she cannot use the presumption and will need to prove that the manufacturer has been given the requisite "reasonable number of repair attempts."

Furthermore, a manufacturer that maintains a qualified program is exempt from a civil penalty unless it is proven that the manufacturer has willfully violated the Song-Beverly Act.[26]

More Recent Updates

Since 1983, California's Lemon Law has continued to evolve through statutory amendments and case law to resolve ambiguities in the law and to expand its coverage.

In 1995, the legislature added a "branding" provision to the Lemon Law that prevents vehicle manufacturers from reselling lemon vehicles to unsuspecting consumers and requires the Lemon Law buyback vehicle to be retitled in the name of the manufacturer and the ownership certificate to be inscribed with the words "Lemon Law Buyback."

It also requires that at the time of resale, the subsequent purchaser sign a written notice from the manufacturer that specifies the vehicle's year, make, model and VIN; declares that the vehicle was a "Lemon Law Buyback," specifies the nature of each nonconformity, and details the nature of the repairs made to try to fix the nonconformities.[27]

> "Under the Song-Beverly Act, if the manufacturer or its representative in California does not service or repair the goods after a reasonable number of attempts, the manufacturer shall replace the goods or reimburse the buyer for the purchase price minus the amount attributable to use by the buyer before discovering the nonconformity."

In 1993, after spearheading the Lemon Law campaign in California, Rosemary Shahan founded Consumers for Auto Reliability and Safety (CARS), a non-profit auto safety and consumer advocacy organization, which has organized numerous successful campaigns to enact additional consumer protection laws involving motor vehicles.

In 1998, CARS was instrumental in gaining passage of a provision that prohibits manufacturers or dealers who reacquire a vehicle by settlement, arbitration, or judgment from requiring the original buyer or lessee to agree to not disclose in any way the problems that he or she experienced with the vehicle or any of the non-financial terms of the release agreement. Prior to that law being enacted, consumers often were contractually prevented from disseminating information about unsafe vehicles that were still operating on California roads.[28]

Then in 2007, CARS helped pass legislation—the first in the nation—to expand California's Lemon Law to help military service members and their families with non-conforming vehicles that were purchased or leased out-of-state before they were relocated to California by the military.

Prior to that law being enacted, service members who were transferred to California after purchasing or leasing their vehicles lacked any legal means to rid themselves of defective lemon vehicles under the Song-Beverly Act.[29]

California recently gave the green light to permit driverless vehicles to operate on its roads. While, in many respects, this technology reflects a potentially promising development, it also carries with it a whole host of new

regulatory challenges. Expect Shahan and CARS to monitor this new situation closely and to continue to lobby the state legislature to amend the Lemon Law as necessary. ■

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Endnotes

1 "Rosemary Shahan: from a lemon she made … lemon laws," *Consumer Reports*, July 27, 2007, https://www.consumerreports.org/cro/news/2007/07/rosemary-shahan-from-a-lemon-she-made-lemon-laws/index.htm; Scott J. Wilson, "What Motorists Should Know about California's Auto Lemon Law," *Los Angeles Times*, September 30, 2012, http://articles.latimes.com/2012/sep/30/business/la-fi-five-lemon-20120930.
2 Sidney Milkis, "Theodore Roosevelt: Domestic Affairs, University of Virginia Miller Center," millercenter.org, 2017.
3 Id.
4 Donald J. Smythe, "Transaction Costs, Neighborhood Effects, and the Diffusion of the Uniform Sales Act, 1906-47," *Review of Law & Economics*, Legal History Blog, November 26, 2008.
5 Cal. Civ. Code §1790 et seq.
6 Cal. Civ. Code §§1790.3 and 1790.4.
7 Ralph J. Swanson, "Toward an End to Consumer Frustration—Making the Song-Beverly Consumer Warranty Act Work," 14 SANTA CLARA LAWYER 575 (1974).
8 Cal. Civ. Code §1793.2(d)(1).
9 Cal. Civ. Code §1791(a) (emphasis added).
10 Cal. Civ. Code §1793.02 assistive devices, §1793.025 wheelchairs, and §1793.03 electronics and appliances.
11 Cal. Civ. Code §1791.2 (emphasis added).
12 Cal. Civ. Code §1793.2(b).
13 Cal. Civ. Code §1792 merchantability and §1792.1 fitness.
14 Cal. Civ. Code §§1792.3, 1792.4, and 1792.5.
15 Cal. Civ. Code §1794.
16 15 U.S.C. §§2301 et seq.
17 Cal. Civ. Code §1793.22.
18 Cal. Civ. Code §1793.229(e)(2) (emphasis added); *Jensen v. BMW of North America, Inc.*, 35 Cal.App.4th 112 (1995).
19 Cal. Civ. Code §1973.2(d)(2).
20 Cal. Civ. Code §1793.2(d)(2)(C).
21 *Ibrahim v. Ford Motor Co.*, 214 Cal.App.3d 878 (1989).
22 Cal. Civ. Code §1793.22(b).
23 Cal. Civ. Code §1793.22(e)(1) (emphasis added).
24 Cal. Civ. Code §1794.3.
25 Cal. Civ. Code §1793.22(c)and(d).
26 Cal. Civ. Code §1794.
27 Cal. Civ. Code §1793.23.
28 Cal. Civ. Code §1793.26 (gag); Consumers for Auto Reliability and Safety, carconsumers.org, 3/6/18.
29 Cal. Civ. Code §1795.8 (military); Consumers for Auto Reliability and Safety, carconsumer.orgs, 3/6/18.

Appellate Ethics for the Trial Attorney

By Herb Fox

As a trial lawyer, the risk of appellate malpractice and ethics violations may not keep you awake at night. But with the arrival of the new Rules of Professional Conduct, it might be wise to now pay attention to the peril.

To be sure, appellate malpractice is not new. Professional liability for failing to prosecute a meritorious appeal dates back nearly 145 years (see *Drais v. Hogan* (1875) 50 Cal. 121, affirming the liability of a trial attorney who neglected to appeal a reversible judgment).

But there is more than malpractice lurking in the appellate netherworld. Other risks include sanctions for prosecuting a frivolous appeal or writ (*In re Flaherty* (1982) 31 Cal.3d 637; Code Civ. Proc. § 907; Rules of Court 8.276 and 8.492) and for making false and misleading representations about the trial court record (*DCD Programs, Ltd. v. Leighton* (9th Cir. 1988) 846 F.2d 526, 528), and discipline for prosecuting an appeal despite a client's instruction not to do so (*In re Regan* (2005) 4 Cal. State Bar Ct. Rptr. 844) or for failing to prosecute an appeal (*Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934 ["conduct unbecoming" a member of the 9th Circuit Bar]).

Thus while there has always been appellate-level danger for trial lawyers who have little appellate experience or do not have an experienced appellate practitioner leading the way, there is no doubt that the new Rules of Professional Conduct (hereafter the "Rules") increases the exposure for discipline and/or malpractice for appellate indiscretions. With new and revised Rules that clarify and enlarge our appellate duties to clients, increased caution is the word of the day.

Here are a few of the new, beefed-up Rules and their potential impact on your practice.

Limiting the Scope of Representation and the New Duty to Refer

Trial attorneys – and particularly those handling contingent fee cases – often attempt to exclude appellate-level services from their scope of representation by adding an appellate escape clause to their legal services agreement. Typical language will purport to limit or exclude responsibility for post-judgment appeals. Such clauses may protect you from post-judgment abandonment claims (see *DiLoreto v. O'Neill* (1991) 1 Cal.App.4th 149), but otherwise have limited value because a client can reasonably expect you to protect his or her appeal rights for anything that arises *during* the litigation, such as where an interlocutory appeal or writ review is necessary or advisable (e.g., orders re: disqualification of the judge or counsel; temporary or preliminary injunctions; change of venue; expunging a lis pendens, etc.)

Under the new Rules, the efficacy of such efforts by trial counsel to limit responsibility for appellate proceedings are even more questionable. California attorneys now have an affirmative duty to "reasonably consult with the client as to the means by which to accomplish the client's objectives in the representation", and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." (Rule 1.4(a)(2,4); see also Rule 1.3(a).)

The Rules now define an attorney's "reasonable diligence" so as to require that the attorney "acts with commitment and dedication to the interests of the client and does not

neglect or disregard or unduly delay a legal matter entrusted to the lawyer." (Rule 1.3(b).)

Applied to appellate matters, a trial attorney – even one who repudiates the responsibility to prosecute an appeal or writ – may now have an affirmative duty to advise the client about the existence of appellate remedies (including interlocutory writs and notice of appeal deadlines), so as to assure that such remedies are not lost, and to advise the client about the merits of such remedies, so that the client can make an informed decision. While the new Rules continue to allow attorneys to limit the scope of representation, that limitation must now be "reasonable under the circumstances" and accompanied by informed consent. (Rule 1.2(b).)

Informed consent, in turn, now must be in a writing that communicates the "material risks" and the "reasonably foreseeable adverse consequences of the proposed course of conduct." (Rule 1.0.1(e, e-1).) In short, any attempt to wholly exclude appellate proceedings from the scope of representation, must explain in writing that the client's failure to independently pursue appellate remedies may be disastrous. Unless you have a sophisticated client who clearly understands the significance of this limitation on the scope of services – and knows how to locate and retain appellate counsel on their own – the attempt to limit the scope may not withstand scrutiny.

But the Rules provide ways to mitigate the risk. One is to assume the responsibility to advise the client about appellate remedies after acquiring the skill and knowledge necessary to do so. (Rule 1.1(c).) Another option – newly specified in the Rules – is to refer the matter to an experienced appellate attorney "whom the lawyer reasonably believes to be competent." (Rule 1.1(c).)

Avoiding Malicious Appeals Prosecuted Without Probable Cause and Warrantless Delay

Rule 3.1 continues, without modification, former Rule 3.100, that prohibits, inter alia, the prosecution of an appeal "without probable cause and for the purpose of harassing or maliciously injuring any person, or presenting a claim or defense that is not warranted under existing laws, unless it can be supported by a good faith argument for an extension, modification or reversal of existing law."

Augmenting those restrictions, however, is an entirely new Rule prohibiting attorneys from using "means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." (Rule 3.2.) Thus prosecuting an appeal or a writ petition for the sole purpose of delay – which has long been a component of appellate sanctions (Code Civ. Proc. § 907 and Rules of Court 8.276 and 8.492) – has now been elevated to an ethical violation.

Coextensive with these standards, new Rule 1.16 states that an attorney shall not represent a client or, where representation has commenced, shall withdraw from the representation if the lawyer knows, or reasonably should know that the client is, inter alia, taking an appeal "without probable cause and for the purpose of harassing or maliciously injuring any party." (Rule 1.16(a)(1).) This continues in different form the standards for accepting or continuing employment set forth in former Rule 3-200 and 3-700.

Reading these Rules together, it is now an ethical violation to prosecute – or continue to prosecute – an appeal or a writ petition that is without probable cause or cannot be supported by the law, and to do so for the purpose of delay or to inflict pain on the opposing party. And, if you know or reasonably should know that your client wants to prosecute a specious appeal or writ petition for the purpose of delay or to cause injury to the opposing party, you have an affirmative duty to withdraw.

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Expanding Duties of Candor Up Through the Appellate Decision

New Rule 3.3 expands the duty of an attorney to be candid and honest with both the trial court and an appellate court. As applicable to conduct before an appellate tribunal, attorneys must not

- Knowingly make a "false statement of fact or law" or fail to correct a false statement previously made (Rule 3.3(a)(1); or,
- Fail to disclose to the tribunal the existence of legal authority in the controlling jurisdiction "known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority." (Rule 3.3(a)(2).

Equally important, these duties of candor and disclosure now expressly continue until the "conclusion of the proceeding," which is defined as "when a final judgment has been affirmed on appeal or the time for review has passed." (Rule 3.3(c) and Comment 6.) Thus, it appears that we now have an affirmative duty to inform a judge or an appellate panel of the erroneous legal or factual basis for a judgment or decision even after entry of judgment or after oral argument on appeal. That the disclosure may be adverse to your client is not an exception to the new Rule!

Drilling Down on Division of Fees

It has long been the case that any division of a contingency fee between trial counsel and appellate counsel must be approved in writing by the client. (Former Rule 2-200(A).) Those standards have been tightened and modified to require that the attorneys themselves must now enter into a written agreement between them, which agreement must be promptly approved in writing by the client. To wit:

- Both trial counsel and appellate counsel must enter into a written agreement as between them to divide the fee (Rule 1.5.1 (a));
- The client must consent in writing to that agreement either at the time the lawyers enter into the agreement or as soon thereafter as reasonably practicable (Rule 1.5.1(a)(2);
- That client consent requires a "full disclosure" to the client of the fact of the division of the fee; the identity of the lawyers or law firms; and the terms of the division (Rule 1.5.1(a)(2); and,
- That the total fee charged by all lawyers must not increase solely by reason of the agreement to divide fees (Rule 1.5.1(a)(3).

Thus, it is no longer sufficient (if ever it was) for the trial attorney (or originating referring attorney) to simply include in a contingency fee agreement the general disclosure that the fee may be shared by other, unnamed attorneys, and without setting forth the terms of that division.

Note however, that it appears to be permissible for the total fees paid by the client, including appellate fees, to exceed the contingency percentage set forth in the original agreement, as that increased fee is not based "solely" on the sharing of the fee, but reflects the additional time and effort expended in the appellate proceeding.

Providing Notice to the Client of Employing Inactive, Suspended or Disbarred Attorneys

It is not unusual for attorneys to hire disbarred or suspended colleagues to conduct legal research or draft briefs. Under new Rule 5.3.1(c), it is not per se improper to do so, as long as the disbarred or suspended attorney is not engaging in the practice of law or rendering advice to a client.

However, the new Rule requires that prior to, or at the time of, employing that ineligible person, the attorney must provide written notice to the State Bar of that employment, listing all of the activities prohibited by the Rule. Further, attorneys must also provide written notice to *each client* on whose specific matter the ineligible person will work, stating that the ineligible person is providing services but shall not be providing the specifically prohibited services (Rule 5.3.1(d)).

In short, attorneys must now disclose to a client that legal research and/or drafting of appellate briefs will be conducted by a disbarred or otherwise ineligible former attorney. Whether this new disclosure requirement effectively eliminates the practice of employing disqualified attorneys to work on a case, remains to be seen.

Conclusion

It's been said that trial attorneys who prosecute their own appeals have "tunnel vision." Having tried the case themselves, they "become convinced of the merits of their cause [and] may lose objectivity…." (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449 – 1450). Such a loss of objectivity may also lead the trial attorney, blinded by zeal or inexperience, into violating the express and implied standards for appellate practice encompassed by the new Rules.

So be careful out there, and when in doubt – or even better, when just short of actual doubt – consult with an appellate colleague for a light in that tunnel. ■

Herb Fox is an appellate law specialist who has co-presented programs on appellate ethics for the California Lawyers Association and the Los Angeles County Bar Association. He can be reached at hfox@FoxAppeals.com.

Optimizing Cognitive Functioning, Attention and Resilience

By Robin Oaks

Robin Oaks

Although the authors of the Declaration of Independence proclaim that life, liberty and the pursuit of happiness are inalienable rights, as legal professionals what is sometimes painfully evident is that the practice of law does not necessarily lead to happiness or freedom, and that our cognitive, emotional, and physical health, at times, may suffer. In this article, and others to follow, I will explore some of the stressors in the legal profession and outline specific strategies suggested by experts to optimize cognitive functioning, emotional resilience, health and fulfillment.

Law is a cognitive profession emphasizing critical thinking, logic, computation, and reasoning skills. But we are human beings, not just critical thinkers. We have multiple modes of thinking and perceiving, and pathways of communication throughout our body that send and receive information to inform our "sense" of reality and maintain life. Daniel Kahneman, winner of the Nobel Prize in economics, in his book *Thinking, Fast and Slow*,[1] explains the complex inter-connection and influences on decision-making and perceptions of our varied cognitive systems.

He writes, "When we think of ourselves, we identify with System 2 [his term for effortful mental computational, sequential thinking activities, and subjective experiences of choice and concentration]. System 2 is the conscious reasoning self that has beliefs, makes choices, and decides what to think about and what to do." "The processes of mental work are deliberate, effortful and orderly – the prototype of slow thinking." This also involves a body response, as muscles tighten, blood pressure rises, heart rate increases, and pupils dilate. "You think with your body, not only your brain."

Comparatively, but just as vital to our sense of reality and survival, Dr. Kahneman describes System 1 – fast thinking – as the "effortless originating impressions and feelings that are the main sources of the explicit beliefs and deliberate choices of System 2." "System 1 mental actions involve the complex pattern of ideas, learned associations between ideas and skills, such as reading, and the nuances of social situations."

Dr. Kahneman explains how System 2 reasoning and critical thinking involves attention and energy, lots of it, particularly when the task is complex and requires heavy loading of short-term memory. "The highly diverse operations of System 2 have one feature in common– they require attention and are disrupted when attention is drawn away." To "pay attention" is therefore something that is needed for critical thinking tasks.

This is why many of the contemplative practices that build attention and awareness (such as mindfulness and yoga,) and also relax the nervous system arousal and alarm response, which hijacks cognitive functioning, are being touted as the antidote to stress, fatigue, and the ubiquitous sense of frazzle in our current culture. Such now-commonplace complaints of feeling "crazy-busy," "stressed," and "burned out," are likely a result of information overload and emotional overload. We are inadvertently wiring our brains to be distracted as we multi-task, are "lost" in thought, and let the bombardment of sense stimulation common in today's world drive where our attention goes. As Aristotle once stated, "We are what we repeatedly do. Excellence, then, is not an act, but a habit."

Psychologists, including Dr. Kelly McGonigal,[2] doctors, including Dr. Daniel Siegel, and numerous neuroscientists now confirm the wonder of our brain's neuroplasticity to change, grow, repair and adapt. Dr. Siegel, in his book *Aware,*[3] *The Science and Practice of Presence,* explained, "Where attention goes, neural firing flows, and neural connection grows."

Just like building a muscle, the more your attention capacity is increased through deliberate practices that also enlist body, breathing and emotional awareness, the capacity of the brain reservoir you can draw upon when engaging in cognitive performance is expanded and strengthened. Cognitive wellness practices that can improve brain function and also enhance our nervous system stress-reset button, i.e., the parasympathetic nervous system, can help legal professionals be more resilient and productive when calling upon their minds to do their job.

Dr. Kahneman also cites many studies that confirm self-control is lessened as our energy for critical thinking

is used up. "Another way of saying this is that controlling thoughts and behaviors is one of the tasks that System 2 performs." "Even in the absence of time pressure, coherent thought requires discipline and self-control with variants of voluntary effort." These functions are "at least partly drawn from shared pools of mental energy." Perhaps this is why when tasked with a particularly arduous and detailed writing project we are often-times uncontrollably drawn to the refrigerator to get a glucose-rich energy surge.

Law at its core is based on relationships between human beings involved in conflicts. One legal practitioner I recently met wanted to know how to avoid the harmful consequence of unavoidable chronic stress, but she also wanted help to release some of the emotional pain she felt in herself when dealing with clients who came to her with a lot of suffering. Scientists actually now know that we have "mirror neurons" that perceive and register in our own bodies the feelings we recognize in others. This suggests that building emotional resilience and fostering awareness of emotions through various mind-body practices may be essential self-care skills for legal practitioners because we deal with conflict and pain and suffering as part of our job descriptions.

"Numerous studies have shown positive effects on brain functioning, higher self-esteem and acceptance of oneself, and various physical and mental health benefits of practices such as mindfulness meditation."

Numerous studies have shown positive effects on brain functioning, higher self-esteem and acceptance of oneself, and various physical and mental health benefits of practices such as mindfulness meditation.[4] Dr. Spencer Sherman,[5] a local clinical psychologist, teaches Positive Psychology at Santa Barbara City College and has been coaching professionals and instructing about mindfulness for over two decades. He outlines five immediate benefits of mindfulness practice: calmness, clarity, control, choice, and compassion. He often has to undo people's misconceptions about what mindfulness involves. Mindfulness is not about getting rid of your thoughts. It is not about chilling, blissing or spacing out. "Rather, it is about paying attention to inner and outer experiences without becoming absorbed in and governed by them." It can be practiced while sitting, walking, lying down, eating, or doing simple tasks, and for any duration.

Dr. Sherman explains that through mindfulness practices we become "aware of what's going on inside us. Since we also better notice what's occurring around us, we accurately and fully perceive situations and how we're reacting to them. We are more in touch with ourselves and what's actually happening. Since we know what we're feeling, we don't automatically and unconsciously react. Rather, there's a pause between stimulus and response, and in that space, we have control of when and whether to act. We can, in the pause before responding, consciously decide on the best response. Because we act with discernment and intelligence, we are most capable of accomplishing our goals." There is more choice and intention in our actions, creating more connection to others.

Current findings from research centers such as Stanford University Medicine Center for Compassion and Altruism Research and Education, and Greater Good Science Center at UC Berkeley [6] confirm the importance of connection and compassion as antidotes to stress. Positive emotions are being studied in their complexities as more than mere effects of pleasure. Emotional intelligence, which includes the capacity to sense what other people are feeling and wise decision-making, leads to work environments of connection, care and meaning, and a resulting increase in employee productivity, engagement, and well-being. Many corporations including Apple, Yahoo, Proctor & Gamble, Nike and Google[7] have created mindfulness centers and trainings because of the many benefits.

In August 2018, a Well-Being Toolkit was published by members of the ABA Presidential Working Group, led by Anne Brafford,[8] J.D., MAPP, also the editor-in-chief and co-author of the National Task Force on Lawyer Well-Being Report issued in 2017. [9] This Toolkit includes nearly one hundred pages (plus hundreds of hyperlinks throughout) of ideas, worksheets, assessments, activities, guidance, research, and resources for supporting well-being efforts in the legal profession. Brafford writes, "We are interdependent in that our organizational and institutional cultures – to which we all contribute and which, in turn, shape us all – have a huge impact on our individual well-being."

It is only by searching within ourselves to seek assistance when needed, and by actually practicing these skills and interventions personally and institutionally, that positive change will occur. Expecting otherwise is like going to a gym website and reading about all of the high-tech equipment and evidence-based health training programs offered, but never stepping through the door and getting on the machines.

Congressman Tim Ryan writes in his book *Mindful Na-*

tion about his personal experiences attending a mindfulness retreat, and learning from various experts throughout the nation studying the benefits of mindfulness in all walks of life. He writes, "It helps you harness more of your energy and focus and allows you to relax and pay better attention to what you're doing and to those around you. My football coaches would have loved it. It's the kind of performance enhancer any athlete would be eager to have and it's definitely all natural…" "If more citizens can reduce stress and increase performance – even if only by a little – they will be healthier and more resilient. They will be better equipped to face the challenges of daily life, and to arrive at creative solutions to challenges facing our nation."

I conclude this article with a simple instruction to slow down and pay attention to this present moment. For just one minute, make the time to sit in a relaxed position, and close your eyes or look down with a softened gaze. To produce more alpha waves in your brain, imagine looking into a space behind your eyes. Relax any areas of tension you feel in your body, particularly softening the area around your eyes, jaw and neck. Then follow these simple steps:

Pay attention to your breathing - the air moving through your nose and/or your abdomen rising and falling. You can imagine breathing with your whole body, or focus on your breathing as if it were coming from your heart area. Gently breathe in a slow, steady rhythm. Do whatever feels comfortable. Just let your breathing happen without trying to change it. Use your breath as a tether to bring you back to the present if your attention wanders to a thought, sensation or feeling you are having.

When you become aware that your attention may have wandered from your breathing, gently, and with great care and regard, simply return to noticing your breath. Just accept what is, with an attitude of alert, kind, non-judgmental inclusion. Just as you notice the clouds in the sky, moving and changing, treat whatever you notice as the passing weather.

Continue for a few minutes, just watching. Return to your breathing when you become aware that you are lost in thought. Each time you notice that your attention has wandered and

then bring it back to your breathing, you build your capacity to stay focused.

When you decide to end the practice, open your eyes, rub your hands together, and massage your face gently. Notice what you sense and feel. Every moment that you experienced being aware that your attention had wandered, and chose to intentionally move your focus to breathing, was strengthening your brain connections. When you are aware of your thoughts, feelings and sensations, but not absorbed in them, this is mindfulness - and being present. ■

Robin Oaks has been an attorney for thirty-three years. For more than twenty years she has focused her legal practice exclusively on conducting discrimination and workplace complaint investigations, and providing workplace mediations and conflict resolution consultation. She has studied a wide range of mind-body and healing arts interventions geared towards fostering health and well-being. She provides well-being coaching and healing arts sessions for professionals in a confidential setting to foster awareness, and empower and enliven individuals on their personal and professional paths. Contact her at: Robin@RobinOaks.com or 805-685-6773.

ENDNOTES

1 Daniel Kahneman Thinking, Fast and Slow (2014).
2 The Upside of Stress, Why Stress is Good for You and How to Get Good at It, Kelly McGonigal (2016)
3 Aware, the Science and Practice of Presence, Daniel J. Siegal, (2018)
4 See research cited in ABA National Task Force Report on Lawyer Well-Being; The Science of Meditation, How to Change Your Brain, Mind, and Body, Daniel Goleman & Richard Davidson (2017)
5 https://drspencersherman.com
6 http://ccare.stanford.edu/; https://greatergood.berkeley.edu/
7 Search Inside Yourself, The Unexpected Path to Achieving Success, Happiness (and World Peace), Chade-Meng Tan (2012) Google's director and developer of the Mindfulness Program at Google
8 Positive Professionals, Creating High-Performing Profitable Firms Through the Science of Engagement, Anne Brafford (2017)
9 Well-Being Toolkit For Lawyers and Legal Employers, August 2018 https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.authcheckdam.pdf

Motions

Robert Sanger, senior partner at **Sanger Swysen & Dunkle**, was promoted to Fellow in the American Academy of Forensic Sciences (AAFS) at the 71st AAFS Annual Scientific Meeting held in Baltimore in February of 2019. AAFS is a multidisciplinary professional organization that provides leadership to advance science and its application to the legal system. Its objectives are to promote professionalism, integrity, competency, education, foster research, improve practice, and encourage collaboration in the forensic sciences.

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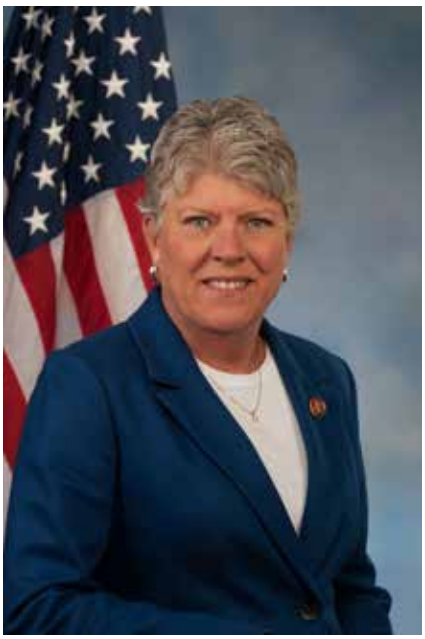
The **Honorable Julia Brownley**, member of the United States House of Representatives, will receive an honorary Doctor of Law degree and address **The Santa Barbara & Ventura Colleges of Law**'s (COL) 45-member graduating Class of 2019 at the COL's commencement ceremony on Saturday, March 30, 2019.

Rep. Brownley will be honored for her more than 25 years of public service and leadership in the local community, spanning from local school board member, to the California State Legislature, and later to Congress, serving the California's 26th District, which includes the cities of Ventura, Oxnard, Ojai, Santa Paula, Fillmore, Camarillo, Newbury Park, Moorpark, Thousand Oaks, and Westlake Village. On Capitol Hill, Rep. Brownley serves on the House Veterans' Affairs Committee, including as Chairwoman of the Subcommittee on Health, and also sits on the House Transportation and Infrastructure Committee and the Select Committee on the Climate Crisis.

As commencement speaker, Rep. Brownley joins a distinguished list of local public servants invited to address a Colleges of Law graduating class. Recent keynote speakers include Calif. State Senator Hannah-Beth Jackson; the Honorable Lois Capps; Joyce Dudley, current District Attorney of Santa Barbara County; Gregory Totten, current District Attorney of Ventura County; Judge Michele Castillo, Ventura County Superior Court and COL trustee; and Justice Steven Z. Perren of the California Court of Appeal.



Representing the Santa Barbara Campus members of the COL's Class of 2019 are graduates Joseph Beck, Martin Bender, Kiley Clevenger, Evelyn Cortes, Matthew Haas (Honors), Shannon Lofft, Devonnie Mann, Tyler Potter (Highest Honors), Nicolette Reeves, Keiran Schwoerke, Stephanie Sivers, Samuel Sosa, Stacy Tolkin Lowman, Joan Vignocchi, and John Weninger.

Representing the Ventura Campus are graduates Karina Almaguer, Ashley Brown, Megan Cooper (Honors), Emily Dixon, Larissa Garcia, Maritza Garcia-Lopez, Laura Garibay, Valarie Grossman (Honors), Amy Gunderson, Jonathan Gunderson (Highest Honors), Kryztofr Kaine, Alessandro Manno, Eddie Martinez, Daniel Moore (High Honors), Viktoria Morgan, Bryan Murotake, Sergio Prado, Esther Reynoso, Veronica Romero, Dianne Seaberg, Rogelio Tuazon, and Rodrigo Yanez.

Representing the Master of Legal Studies program are Francisco Aragon, Michael Barney, Ashley Barrios, Susan Foster, Daniel Hodorowski, Renee Paige, Tyler Thompson, and Jaclyn Zaragoza.

If you have news to report - e.g. 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… - The Santa Barbara Lawyer editorial board 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 JPEG or TIFF file has a minimum resolution of 300 dpi. Please note that the Santa Barbara Lawyer editorial board retains discretion to publish or not publish any submission as well as to edit submissions for content, length, and/or clarity.

Potential Increase to Attorney Licensing Fee Fact Sheet from California Lawyers Association

I. Current Licensing Fee

The current mandatory licensing fee for active attorneys is $383. The amount of the licensing fee for inactive attorneys is different, but this fact sheet focuses on active attorneys.

The $383 is calculated by adding different components and subtracting optional deductions, as set by statutes and other authority. The detail is shown below because some of the different statutory components are relevant to the State Bar's potential fee increase.

The licensing fee is currently calculated as follows:

2019 Licensing Fee for Active Attorneys

$315 - Basic Fee (Bus. & Prof. Code § 6140)
$ 40 - Client Security Fund (Bus. & Prof. Code § 6140.55)
$ 25 - Discipline System (Bus. & Prof. Code § 6140.6)
$ 10 - Lawyer Assistance Program (Bus. & Prof. Code § 6140.9)
$ 40 - Legal Services Assistance (Bus. & Prof. Code § 6140.03)
Total: $430

2019 Optional Deductions

$ 5 - For attorneys who do not want to fund the State Bar's lobbying and other legislative activity. (Bus. & Prof. Code § 6140.05)
$ 2 - For attorneys who do not want to fund programs that address concerns of access and bias in the legal profession and the justice system. (Keller v. State Bar of California (1990) 496 U.S. 1)
$ 40 - For attorneys who do not want to fund legal services assistance. (Bus. & Prof. Code § 6140.03). This is the same $40 shown above as part of the licensing fee, but the structure of including the amount and then providing for a deduction is statutorily mandated. Under Business and Professions Code section 6140.03, the State Bar is required to increase the annual licensing fee by $40, to fund legal services, but the fee statement is also required to provide each attorney with the option of deducting the $40.
Total: $47

Total Mandatory Fee

$430 (licensing fee) - $47 (optional deductions) = $383

II. Potential Increase to the Licensing Fee

Three potential increases have been discussed:

- An ongoing increase to the basic licensing fee
- A one-time special assessment for capital and technology investments
- A one-time increase in the amount paid for the Client Security Fund

As discussed in detail below, the State Bar has identified a funding need of the following 2020 licensing fee:

2020 Licensing Fee for Active Attorneys

$415 - Basic Fee (Bus. & Prof. Code § 6140)
$122 - Client Security Fund (Bus. & Prof. Code § 6140.55)
$25 - Discipline System (Bus. & Prof. Code § 6140.6)
$10 - Lawyer Assistance Program (Bus. & Prof. Code § 6140.9)
$40 - Legal Services Assistance (Bus. & Prof. Code § 6140.03)
$250 - special assessment for capital and technology investments
Total: $862 - $47 (optional deductions) = $815

III. Ongoing Increase to Licensing Fee

As noted above, the State Bar has identified a funding need of an ongoing $100 increase to the licensing fee, with an annual CPI adjustment.

In a presentation given the day before the 2019 budget and 2020 projected budget were adopted, several key points were made, including the following:

$333 of the annual attorney licensing fee goes to the State Bar's general fund ($315 basic fee, minus $5 deduction for legislative activity and $2 deduction for elimination of bias, plus $25 for the discipline system). There has been no adjustment for inflation in this $333 general fund portion of the licensing fee in over twenty years. If there were, that portion of the licensing fee would currently be $519.

The State Bar has run deficits for over three years. Not only is the projected deficit for 2019 $10.4 million, but reserves will be down to $11.5 million, which will cover only 6.6% of annual operating costs. The State Auditor has recommended that the State Bar have reserves in the amount of 17% of operating and the State Bar has set a target minimum reserve level of 17%.

Source: CA Lawyers' Association. If you have any questions, please contact the Director of Governmental Affairs at governmental.affairs@calawyers.org. ■

CLA
CALIFORNIA LAWYERS ASSOCIATION
INTELLECTUAL PROPERTY LAW SECTION

Calling All Intellectual Property Law Practitioners!

Join us for a mixer hosted by the IP Law Section of the California Lawyers Association, featuring tastings of local small-lot wines and light bites.

DATE:
Wednesday, May 1

TIME:
6:00 P.M.

LOCATION:
Uncorked Wine Tasting and Kitchen
432 E. Haley Street, Santa Barbara
IP-curious attorneys and law students welcome!

Questions?
Contact Matthew Berger
(matthewb@mbergerlaw.com)
or Chris Kopitzke (ckopitzke@socalip.com)

Classifieds

P/T Legal Secretary or Paralegal

Santa Barbara based Environmental Defense Center, a public interest law firm, is hiring a legal secretary or paralegal to prepare and handle state and federal court filings, assist with research and case investigations. Background must include relevant experience, familiarity with local, state, and federal rules of court, attention to detail, and passion about environmental protection and EDC's mission. More info at https://www.environmentaldefensecenter.org/join-our-team/.

Litigation Associate and Business/Transactional Associate Sought

Price, Postel & Parma, a long-established Santa Barbara law firm, is seeking both a litigation associate and a business/transactional associate superior credentials with at least 2 years of significant experience. Compensation is commensurate with skills, education and experience. Please submit a cover letter and resume via email to Ian Fisher at ifisher@ppplaw.com.

Sanger, *continued from page 11*

9 See, President's Council of Advisors on Science and Technology, FORENSIC SCIENCE IN THE CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON MODELS, (September 2016) ("PCAST Report.").
10 *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993); and *see*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
11 *Sargon v. Univ. Southern Cal.*, 55 Cal.4th 747 (2012); also known as the second and third prongs of *People v. Kelly* 17 Cal.3d 24 (1976).
12 PCAST Report, p. x.
13 ANAB GD 3150, effective November 20, 2018 as amended, at https://anab.qualtraxcloud.com/ShowDocument.aspx?ID=6732.
14 The summary and all quotes are from the three page "Guiding Principles" document, *Id*.
15 ANAB MA 3033, found at https://anab.qualtraxcloud.com/ShowDocument.aspx?ID=7183.
16 The AAFS AB standards, which include consideration of the OCSAC standards, will eventually be sent to ANSI and to the ISO for codification.

2019 SBCBA SECTION HEADS

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

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