Santa Barbara Lawyer

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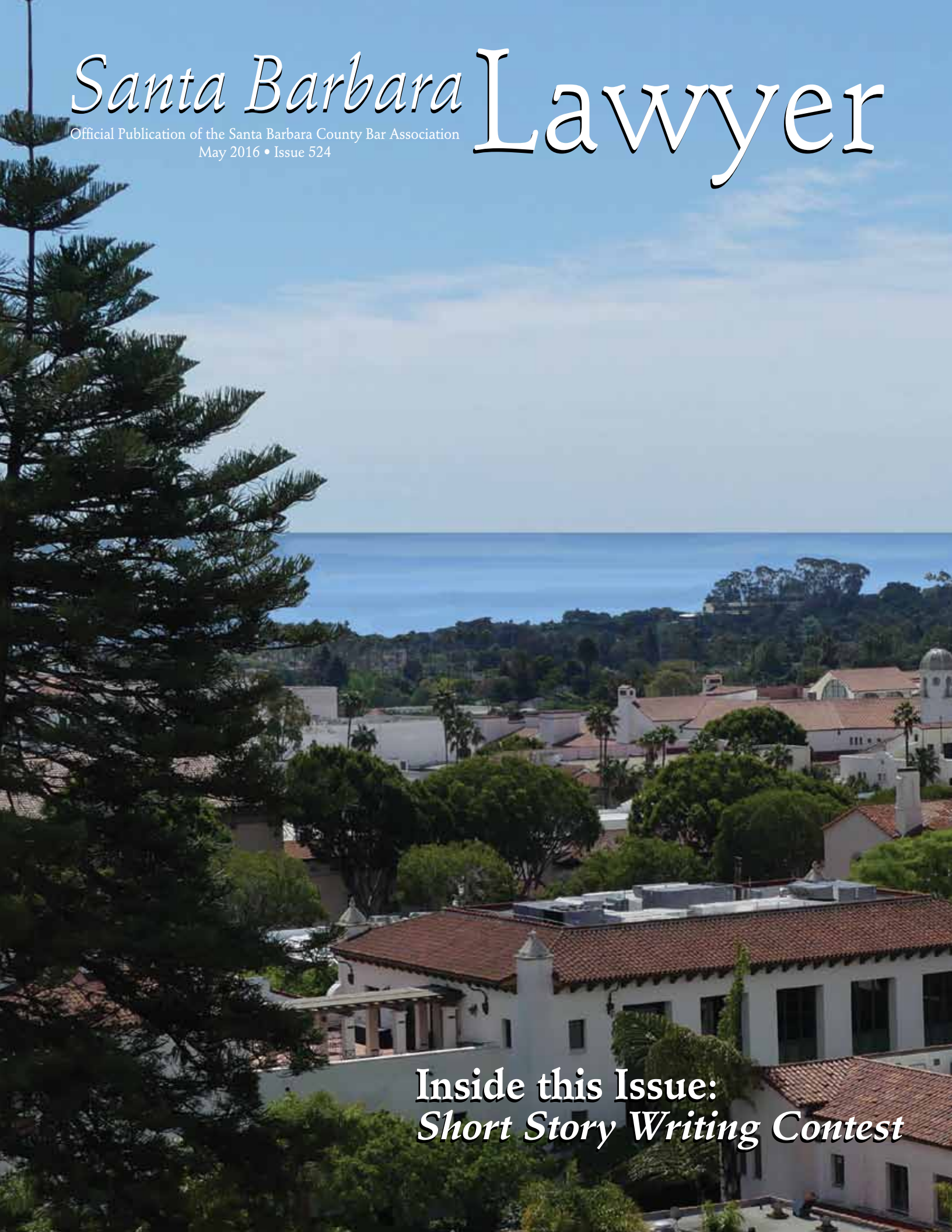

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Santa Barbara County Bar Association

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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About the Cover

See page 11 for your chance to win our inaugural short story contest. (Photo by Kathleen Baushke.)

DP Mock Trial Wins State Competition For The First Time In 29 Years

By Kelly Savio

The Dos Pueblos High School's varsity mock trial team won the 35th Annual California State Mock Trial Finals in Sacramento on Sunday, March 20th. The team brought home the trophy after winning the final round of the tournament against the highly competitive Menlo School mock trial team.

"It was just a wonderful competition to be a part of," said senior Jenny Rothman, who played a defense witness. "Thinking back to the final round and the rounds that got us to the finals, it makes me just proud to be a part of the team that we are."

This is the first time Dos Pueblos has won the State competition in 29 years, making this win an especially gratifying moment for the whole team.

"Bringing home this trophy after a 29-year gap makes this win extra sweet," said Kelly Savio, the team's teacher coach. "As a DP alumnae myself, I recognize that any time DP students do something particularly awesome, all alumni take great pride in it. We cheer for our Chargers just as enthusiastically now as we did when we were in high school. It's been great to hear from so many people I went to high school with back in the late 90s, telling me how excited they are for the team. We've even heard from members of the 1987 mock trial team – the last DP team to win state!"

The finals were held in an intense three-day competition, where the team competed in five trials against some of the state's most talented teams.

This year's case was a murder trial that focused on whether Jamie Hayes, the fictional defendant, was justified in hitting security officer Lee Valdez with lethal force. Defense argued that Hayes was acting in defense of a friend's life, while prosecution contended that Hayes' actions were murder.

DP entered the competition strong, winning the first round against Shasta High School in a trial where the team's poise and exceptional performances shined through. DP went on to win all three of their next trials, garnering them a place in the final round on the last day of the competition.

Their final round was against Menlo School's mock trial

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Legal Trends and Practical Guidance for Attorneys Conducting, Challenging and Defending Workplace Investigations

By Robin Oaks

Robin Oaks

Much has evolved in case law and agency guidance to establish clearer, and more complex, parameters for workplace investigations since decades ago when landmark cases such as *Meritor Savings Bank v. Vinson*[1] and *Franklin v. Gwinett County Public Schools*[2], and statutes and regulations, first established responsibilities, rights and liabilities for those in employment and educational environments. Court decisions in recent years and agency guidance have scrutinized an expanding list of issues involving investigations conducted in varied contexts, including employment, government, corporate, finance, education, and sports. This article highlights core characteristics of effective investigations, cites to relevant legal decisions and current trends, and offers practical tips for attorneys who are hired to conduct, challenge, defend, or may otherwise find themselves involved in, a workplace investigation.

Conducting effective investigations of harassment, discrimination, retaliation and other workplace misconduct, and making factual inquiries for compliance mandates, requires skill and knowledge. Certain legal and ethical considerations apply when the investigator is an attorney. In California, employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct.[3] Recent headlines spotlight investigation findings, such as those conducted for the NFL, U.C. Berkeley, and the APA, and report resulting courtroom or political battles, and, in some cases, lawsuits against individual attorney investigators who conducted the investigations.[4]

On April 1, 2016, new regulations regarding FEHA went into effect, expanding employers' responsibilities for harassment and discrimination prevention and correction. Changes include mandated policy provisions that employers must disseminate to all current and future employees, and added training requirements covering harassment prevention (including "abusive conduct," i.e., bullying). Policies must indicate that employers will have "qualified personnel" "conduct a fair, timely and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected."[5] Thorough and impartial investigations and training personnel how to conduct them have become necessary management practices as a result of evolving statutory mandates, new theories of liability,[6] and regulatory protections for employees who complain about misconduct.[7] Failed investigations can become compelling evidence of defamation, retaliation, emotional distress, pretext, animus, and for findings of liability.[8]

In academic settings, institutions must take appropriate steps to investigate discrimination claims, remedy any effects, and prevent recurrence of unlawful conduct.[9] Sexual assault prevention laws require that disciplinary procedures provide a prompt, fair and impartial investigation and resolution.[10]

Core Characteristics

The following have been cited in case law and agency guidance as core characteristics of an effective and defensible investigation in any context: 1) Prompt, 2) Impartial, 3) Competent, 4) Fair, 5) Reasonable, 6) Thorough, and 7) Accurate.

Almost every investigation consists of a framework for action, which includes three key stages: Plan, Process, and Conclusion. A defensible Plan involves informed decisions about whether, who, what and when to investigate. This is where the characteristics of *prompt*, *impartial,* and *competent* come into play. The Process stage reflects how the investigation is conducted, the plan in action, protecting due process rights, and following accepted industry standards. *Fair* and *reasonable* are the fundamental factors guiding how the process will be measured. The final stage is drawing a Probable Conclusion, which refers to making factual findings based on a *thorough* inquiry and *accurate* assessment of relevant evidence.

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Have You Accounted For All Your Client's Assets?

By Rich Martin

Rich Martin

You are helping a client put together an estate plan. In response to your questions, the client has given you a list that includes intangible assets, personal assets and real property. In the past, that list may have contained everything you needed to develop a comprehensive estate plan. Not anymore. You and your client may have overlooked something important: digital assets.

What are digital assets?

The Internet has become an integral part of our lives. And its use is growing. The United States has over 286 million Internet users, which is approximately 88.5 percent of our population. This number grows by approximately one percent per year. If this trend continues, in just a couple of years, almost 100 percent of the United States' population will be using the Internet.[1]

People are not just surfing the web looking for information. As a society we are quickly putting much of our life on the web. On any given day, there are close to two hundred billion emails sent, three billion Google searches, 500 million tweets, 1.6 billion Facebook users, 436 million Google + users, 304 million active Twitter users, and over 217 million photos uploaded to Instagram.[2] When using the web, individuals are storing personal information or creating content. In other words, they are producing or storing digital assets.

No one really agrees on how to define the term "digital asset." There is not even agreement on what to call them.[3] The term includes Internet accounts, domain names, websites, and emails. Most agree that a digital asset is an electronic record in which you have a right or interest.[4] Note that the term does not include the underlying asset or liability. That is because most individuals acquire their right or interest in a digital asset through a license.[5]

Physical assets are hard enough to track down, i.e., a lost will, real estate deed, or life insurance policy, so why must the estate planning community care about digital assets? One reason: they have value.

The value in digital assets

Digital assets have both emotional and extrinsic value. It is true that much of what we put on the Inter-

net—pictures, correspondence, and videos—records our day-to-day life and probably has little value to anyone else. But the loss of those items can be emotionally devastating to those left behind.[6] You know those boxes in your attic with all those old photos that you and the family love to sit and go through? Those days will be gone soon and if you don't have an inventory tool for where the next generation of photos reside they may be gone forever.

Many digital assets also have real world value. Internet businesses have value, but other things do too. Domain names, virtual property, blogs, and partnership programs—all these have real value as well. Domain names have sold for up to 13 million dollars.[7] Criminals have stolen Bitcoins.[8] Virtual property can be worth real money.[9] A recent survey found that one more follower on Twitter correlated with $1.514 US dollars more in salary for NBA players in 2013.[10]

Not having access to digital accounts can also be financially damaging. There have been cases where the death of a partner has left someone unable to access their bank accounts or pay their bills.[11] Consequently, they are dealing not only with the loss of a loved one, but also with real possibility they will be unable to meet their financial obligations.

Whether the digital asset has purely emotional or actual intrinsic value, the documentation of its location, how an agent, executor or trustee gains access to it and then helping ensure control over it is becoming a necessary part of most estate plans.

What happens to all this data when someone dies?

Providing for digital assets in estate plan can be complicated for three reasons: they are not automatically inheritable; they are difficult to identify; and they are difficult to access.

The growth of the Internet and Internet use has outpaced the ability of federal and state governments to enact legislation to control it. Currently there is no certainty as to what will happen to an individual's digital assets after they die. Everyone agrees that the information that individuals personally create on line for their own use – the content – is their property and, as such, is inheritable. However, the extent to which it is inheritable is at issue. The interaction between the user's contractual license to create the material and what may be said to the user's property rights with respect to the content is where much of the difficulty lies in the current law.[12]

Federal and state laws may impede any attempt by a fiduciary to access or manage digital property such that the fiduciary may risk civil or criminal liability.[13] Digital service providers attempt to protect themselves with terms of service and privacy policies that make access for fiduciaries difficult.[14] More important, most people do not make any provisions for their digital assets; they do not leave a list of their accounts or passwords. [15]

Complicating the matter further is that digital assets may come under the purview of many different areas of the law. The federal government has enacted legislation that imposes criminal or civil penalties for unauthorized access to digital assets.[16] In addition, contract law plays an important role as most individuals enter into a contract when they sign up for an online account. The terms of use clauses that license individuals to create digital content often include provisions that govern how and where disputes will be litigated.[17] Probate law must also be considered. When an individual dies, the laws of the state in which he or she is domiciled will be relevant.

Proposed legislation concerning digital assets

Several states have proposed statutes to help address the problem of digital assets. Few states have been able to get legislation passed. When they do enact legislation, it rarely contemplates the scope of digital assets. Often it only deals with the inheritability of email and social networking sites.[18] Others provide only for termination of all on-line accounts.[19] None fully address a fiduciary's access or responsibilities with respect to digital assets.

In 2012 the Uniform Law Commission began working on a draft of legislation to tackle the void in existing law with respect to the role of fiduciaries in obtaining and distributing the digital assets of deceased and incapacitated individuals. They approved a final draft of the Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014. The law attempted to give fiduciaries legal access to digital assets while leaving the existing law of contract, copyright, banking, agency, employment, privacy and trusts in place. Although 26 states introduced versions of the final draft act, only one passed a modified version.[20]

In response to intense opposition from the Internet industry as well as an inability to get the first draft enacted in more than one state, the Commission revised the act in 2015.[21] While the 2014 act gave fiduciaries blanket access to digital assets unless an individual opted out prior to death, the revised act changed this, requiring express authorization by an owner of his or her digital assets prior to death. As of this date, the revised act has been introduced in twenty-eight states and enacted in nine.[22]

The digital industry has also proposed an act, the Privacy Expectation Afterlife and Choices Act (PEAC). This act does not define digital assets but applies to content and electronic communication. It is an attempt by the digital industry to protect the privacy interest an individual has in digital as-

sets. As of this date, it has been enacted in a modified form only in Virginia.[23] Unlike the original or modified UFADAA, PEAC grants access to accounts only upon the finding of a probate court. As of this date, it is too early to know to what extent the revised UFADAA and PEAC will be accepted by the states and how it will impact estate planning.

Addressing digital assets in estate planning

The exponential growth of the Internet and the corresponding growth in digital assets and the uncertain state of the law make it more important than ever that estate attorneys and digital asset planners make individuals aware of the importance of providing for their digital assets. Proper pre-planning will save the estate money, as trying to gain access to online accounts post mortem can be complicated, time consuming and expensive.

Three elements must be considered when incorporating digital assets into estate planning: the location of the digital asset, the accessibility of the asset, and the ability to control the asset.

Location: Advise your client to catalogue digital assets**.** Some assets may be on personal electronics. Photographs, written communications, letters, these all may be stored on an individual's personal computer or electronic devices. Others may be stored in the "cloud" on a server accessible only through the Internet.

Access: Create a list of how to access each digital asset**.** If the material is stored on personal electronics it may not be accessible. Most online accounts have passwords. If you do not have the password, do you have the right to attempt to "break it"? In the event that you cannot, do you have the right to demand the custodian to retrieve either the password or the information and give it to you?

Control: Keep the access list and the location list in more than one place. Urge the client to put complete beneficiary designation for digital assets in wills or trusts. When drafting these provisions remember that the language must establish the scope of authority granted by the individual as well as any privacy concerns or wishes.

Include beneficiary designations for digital assets in wills or trusts. When drafting provisions addressing digital assets, remember that the language must establish the scope of the authority granted by the individual as well as any privacy concerns or wishes.

Sometime in the 2060s or the 2130s Facebook will be a digital graveyard: there will be more dead people on Facebook than living.[24] Like it or not, we are part of a digital age. It is a lawyer's responsibility to recognize that digital assets are inheritable property and help clients plan for their distribution. ■

Rich Martin is the Founder of Directives Online. Directives Online is an asset inventory tool that also provides emergency access to advance directives, healthcare POA and medical information. Rich's MCLE Presentation on the subject of digital assets has been well received by Bar Associations and Estate Planning Councils across the country. An amateur climber and explorer, he has had to "take inventory" before many trips which led to his starting the business.

ENDNOTES

1 Internet Live Stats, Internetlivestats.com. (Accessed April 4, 2016). http://www.internetlivestats.com/internet-users-by-country.

2 Internet Live Stats, Internetlivestats.com. (Accessed April 5, 2016). http://www.internetlivestats.com.

3 *Compare* definition in Fiduciary Access to Digital Assets Act, Revised, § 2(10) (2015) ("Digital asset" means a record that it electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic) *with* definition in Privacy Expectation Afterlife and Choices Act (PEACC) § 6(a), (rejecting term digital asset and adopting definition for content used in Wire and Electronic Communications Interception of Oral Communications Act, 18 U.S.C. § 2510(a).

4 *E.g., supra* n. 3; Nolo Law for All, Nolo.com. http://www.nolo.com/legalencyclopedia/ what-are-digital-assets.html (accessed April 6, 2016).

5 For example, you may store a picture on an online site like Shutterfly. While you are alive, you can download the picture, thus transforming it into its physical form. However, it also still exists in its digital form. At the same time, you do not own the place where it is stored, the software used to store it, or the software used to transmit it.

6 Walker, Rob. "Cyberspace When You're Dead." *The New York Times Magazine*, Jan. 5 2011.

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11 Milk, Leslie, "Don't Let Your Husband Take His Passwords to the Grave." *Washingtonian*, June 9, 2015.

12 Johnson, Joel. "You don't own your Kindle books, Amazon reminds customer." NCBNews.com. October 24, 2012. (accessed April 6, 2016), http://nbcnews.com/technology/technolog/you-don't-own-your-kindle-booksamazon- reminds-customer-1c6626211.

13 *See* Electronic Communications Privacy Act and the Stored Wired Electronic Communications Act, commonly referred together as the Electronic Communications Privacy Act (ECPA of 1986), 18

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SBCBA Short Story Contest

As much as we all surely enjoy writing arguments for clients, *Santa Barbara Lawyer* now offers you the chance to write creatively for yourself. This contest is open to all *SBL* readers. The rules are 1) each person may enter only once per month, 2) entries must be between 35 and 350 words, and 3) all entries this month must begin with this sentence:

"From the top of the clock tower the docent gazed south to the harbor, still not believing that every last boat could be gone."

The top few entries will be published in the next issue, and we plan to renew the contest each month. In addition to publication, **the May winner will also receive a $50 discount off the price of an SBCBA event**. The discount can be used for the BBQ, the Golf & Tennis Tournament, an MCLE program, the Annual Dinner, next January's Bench & Bar Conference – you decide! Winners will be determined by the *SBL* editorial staff in our sole, arbitrary and capricious discretion. Submit your entry to jsweeney@aklaw.net by June 1st. Enjoy!

Oil Spills and Santa Barbara – Then and Now

By Linda Krop, Chief Counsel,
Environmental Defense Center

Linda Krop

April 22nd marked the forty-sixth anniversary of the first Earth Day, which was inspired by the devastating 1969 Santa Barbara Oil Spill, and May 19th will mark the first anniversary of the Refugio All-American Pipeline Oil Spill. Both oil spills put Santa Barbara on the map and confronted our nation with the risks that are inherent with offshore oil and gas development.

Both spills also led to new environmental protection laws, with the 1969 oil spill leading directly to the National Environmental Policy Act ("NEPA"),[1] and ultimately contributing to other laws such as the modern Clean Air Act,[2] Clean Water Act,[3] Endangered Species Act[4] and Coastal Zone Management Act ("CZMA"),[5] as well as state laws including the California Environmental Quality Act ("CEQA")[6] and the California Coastal Act.[7]

The recent Refugio oil spill quickly led to three new state laws that will help prevent oil spills by requiring more frequent pipeline inspections[8] and better technology (including automatic shutdown systems),[9] as well as provide more immediate and effective oil spill response.[10]

In addition to the laws resulting from these two Santa Barbara-based oil spills, the Exxon Valdez spill led to the enactment of the federal Oil Pollution Act ("OPA"),[11] which imposed new requirements for oil spill response, clean-up and restoration.

The first new environmental protection law to follow the 1969 oil spill—NEPA—addressed the fact that the Bureau of Land Management ("BLM") had not adequately considered the potential consequences of granting a waiver allowing Unocal to operate Platform A (offshore Santa Barbara) without casing the entire well. When the well blew out, the absence of the casing led to a spill that spewed more than 4,000,000 gallons of oil onto our coast.[12] Had BLM independently studied the issue, and sought input from the interested public and other agencies before approving the waiver, the risks would have been disclosed and the request for the waiver may have been denied. The devastating oil spill could have been averted.

Today many people take this law and CEQA - our state's equivalent - for granted. And yet these laws have helped protect our air, water quality, and the natural resources that make up the fabric of our community.

These laws continue to play a significant role in oil issues in our region. In *State of California v. Norton*, 311 F.3d 1162 (9th Cir. 2002), in response to a legal challenge conceived by EDC and brought by the State of California with support from EDC and the Counties of Santa Barbara and San Luis Obispo as Intervenors, the 9th Circuit Court of Appeals ruled that the U.S. Minerals Management Service ("MMS") violated NEPA when the agency failed to conduct environmental review before renewing forty oil leases (defined as "lease suspensions" under the Outer Continental Shelf Lands Act, because the expiration of the lease is suspended) offshore Santa Barbara, Ventura and San Luis Obispo Counties. MMS claimed, post hoc, that the lease suspensions were "categorically excluded" from environmental review on the grounds that the suspensions would not impact the environment.

The court noted that "NEPA requires that federal agencies take a 'hard look' at the environmental consequences of their action." *Id.* at 1175. In this case, the court found that further oil leasing off our coast could result in several adverse impacts, including impacts to endangered and threatened species (including the threatened southern sea otter), the Channel Islands and Monterey Bay National Marine Sanctuaries, and "highly controversial environmental effects" caused by the risks of an offshore oil spill. *Id.* at 1176–77. Accordingly, the court found that the categorical exclusions were invalid and directed the agencies to conduct proper environmental review.

In addition, the Court held that MMS was required to submit the lease renewals to the state for review under the CZMA. Under this law, federal agency activities that affect "any land or water use or natural resource" of a state's coastal zone must be reviewed by the state for consistency with the state's certified Coastal Management Program.[13] MMS had argued that the lease suspensions should not be subject to state consistency review because the state would be afforded the opportunity to review future exploratory plans ("EPs") and development and production plans ("DPPs")

prior to conducting any actual activities, and thus review at the leasing stage would be "duplicative." *Id.* at 1171-72.

The Court rejected this argument, relying on the fact that Congress had amended the CZMA in 1990 to explicitly require early state consistency review of oil leasing proposals. Accordingly, the Court directed MMS to submit the proposed lease suspensions to the California Coastal Commission for review. *Id.* at 1172–73. The result of this ruling was that the California Coastal Commission objected to the lease suspensions[14] and the leases were ultimately terminated. Today our coastline is free from the threat of development from these forty offshore oil leases.

Refugio Oil Spill

EDC has been engaged at several levels in response to the Refugio oil spill. Our first task was to ensure compliance with all applicable laws and regulations. On May 20th, the day after the oil spill, the Governor issued an Emergency Proclamation that, among other things, suspended the applicability of the California Coastal Act.[15] The alleged purpose of the suspension was to avoid any delays that would be caused by requiring the responding entities to apply for coastal development permits prior to undertaking any clean-up activities. In fact, the Coastal Act provides for issuance of emergency permits as well as waivers to ensure prompt action in such situations.[16] In this case, the Coastal Commission staff was prepared to issue a waiver on May 20, the same day the Governor issued the Emergency Proclamation.

On behalf of twenty-six organizations, EDC submitted an official request to the Governor to rescind the suspension, which would have set a precedent throughout the state.[17] Soon thereafter, the Governor restored the Coastal Commission's authority to issue an emergency permit under Public Resources Code § 30600(e).[18]

EDC also opposed ExxonMobil's application to truck oil during the period within which the All-American pipeline was shut down. Exxon had applied to the County of Santa Barbara for an emergency permit to send just under 200 trucks per day on local streets and highways stretching along our pristine coastline. EDC helped convince the County that the pipeline shutdown did not constitute an emergency and that ExxonMobil should have to go through the normal permit application process to ensure adequate public and environmental review.

Our next effort came into focus a few weeks after the oil spill when we learned how incredibly corroded the All-American pipeline had become. This alarming news inspired us to submit Freedom of Information Act ("FOIA")[19] requests to PHMSA and the Bureau of Safety and Environmental Enforcement ("BSEE"), seeking documentation pertaining to the history of operations and inspections on the All-American pipeline as well as other onshore and offshore oil pipelines in Santa Barbara and Ventura Counties. Due to the failure of the agencies to respond in a timely manner, we filed two separate lawsuits in federal district court.[20] We intend to use information received from our FOIA lawsuits to improve both state and federal regulatory oversight of crude oil pipelines.

Refugio Spill (Photo courtesy of Maggie Hall)

Finally, EDC is leading the effort to ensure full clean-up and restoration in the aftermath of the Refugio oil spill. The spill affected 150 miles of California coast, covering public beaches with oil, killing hundreds of seabirds and marine mammals, polluting coastal watersheds, closing two State Parks and 138 square miles of fisheries, and interfering with coastal tourism and recreation. Many private interests have filed class action lawsuits for economic damages.[21] EDC, as a public interest law firm, is focused on environmental harm pursuant to OPA's Natural Resource Damage Assessment ("NRDA")[22] process.

The purpose of NRDA is to assess the environmental harm caused by an oil spill, and identify and implement projects that will restore the environment to a pre-spill condition.[23] The NRDA process for the Refugio oil spill is overseen by the National Oceanic and Atmospheric Administration ("NOAA") and involves the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, California Department of Fish and Wildlife, California State Lands Commission, California State Parks, and the University of California.[24]

As the first step of the NRDA process, the trustees are conducting a damage assessment, which will be followed by the issuance of a public Notice of Intent to Conduct Restoration Planning.[25] The trustees will then prepare a Draft Restoration Plan and either a Draft Environmental Assessment or Environmental Impact Statement under NEPA.[26] The public will have an opportunity to comment on the Draft Restoration Plan and associated environmental review. The trustees will then finalize the Restoration Plan and prepare a demand to the Responsible Party (in this case, Plains) to either implement the Final Restoration Plan or provide funding to cover the trustees' costs of restoration.[27] If Plains does not agree to the demand, the trustees may file a judicial action or submit a claim with the Oil Spill Liability Trust Fund.[28]

The NRDA process provides a unique opportunity for the public to participate in the restoration planning and selection process. To facilitate the public's engagement in this important process, EDC prepared a Public Guide which is available on our website at http://www.environmentaldefensecenter.org/refugio-oil-spill-next-steps-public-participation-is-critical/.

From 1969 to the present, our community has been reminded of the inherent risks of living in an area rich with oil and gas reserves. Although laws are in place to help mitigate such risks, we, as citizens, must remain vigilant and active in enforcing the laws and regulations that exist, and in seeking new protections to address the changing tactics of the industry. ■

1969 Oil Spill (Photo courtesy of Robert Duncan)

Linda Krop, Chief Counsel of the Environmental Defense Center ("EDC"), is a graduate of the Santa Barbara College of Law and has practiced environmental law at EDC since 1989. She has served as Chief Counsel of the organization since 1999. EDC is a non-profit public interest environmental law firm that protects and enhances the local environment through education, advocacy and legal action. Linda specializes in energy law, open space and natural resource protection, and coastal law. She also teaches environmental law at UC Santa Barbara in the Environmental Studies program and has taught courses at the Santa Barbara College of Law. (Photo page 12 courtesy Laura Bailey.)

Endnotes

1 42 U.S.C. §§ 4321, *et seq*.
2 42 U.S.C. §§ 7401, *et seq*.
3 33 U.S.C. §§ 1251, *et seq*.
4 16 U.S.C. §§ 1351, *et seq*.
5 16 U.S.C. §§ 1451, *et seq*.
6 Public Resources Code §§ 21000, *et seq*.
7 Public Resources Code §§ 30000, *et seq*.
8 SB 295 (Government Code § 51015.1).
9 AB 864 (Government Code § 51013.1).
10 SB 414 (Amending Government Code §§ 8670.12, 8670.13, 8670.28 and 8670.67.5, and adding §§ 8670.11, 8670.13.3, and 8670.55.1).
11 33 U.S.C. §§ 2701, *et seq*.
12 Estimates of the amount of oil spilled range from 777,000 to 32,760,000 gallons; the U.S. Coast Guard estimate was 4,200,000 gallons. Robert Sollen, *An Ocean of Oil: A Century of Political Struggle Over Petroleum Off the California Coast*, page 62. The Denali Press. 1998.
13 16 U.S.C. § 1456 (c)(1)(A).
14 *See, e.g.*, CD-047-05, August 11, 2005.
15 Proclamation of a State of Emergency, May 20, 2015.
16 Public Resources Code § 30624 and California Code of Regulations ("CCR") §§ 13136, *et seq*. provide for the issuance of emergency permits, and Public Resources Code § 30611 and CCR § 13144 further provide for an even more expeditious process whereby a permit waiver can issue to authorize an immediate emergency response.
17 Letter to Governor Brown re Refugio Oil Spill – Proclamation of a State of Emergency, June 2, 2015.
18 EXECUTIVE ORDER B-31-15, June 5, 2015.
19 5 U.S.C. § 552.
20 *EDC v. PHMSA*, Central District of California Western Division, Civil Case No. 2:15-cv-09433, filed December 7, 2015; *EDC v. BSEE*, Central District of California Western Division, Civil Case No. 2:15-cv-9436, filed December 7, 2015.
21 *See, e.g., Cheverez v. Plains All American Pipeline, LP*, United States District Court Central District of California, Civil Case No. 2:15-cv-04113, filed June 11, 2015.
22 15 CFR §§ 990.10, *et seq*.
23 15 CFR § 990.10.
24 https://www.wildlife.ca.gov/ospr/nrda/refugio.
25 15 CFR § 990.44.
26 15 CFR § 990.55, § 990.23.
27 15 CFR § 990.23, § 990.62.
28 15 CFR § 990.64(a).

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Legal protection for what really matters

Oaks, *continued from page 7*

PLAN: Whether, who, what and when to investigate

There are many factors affecting whether an investigation needs to be conducted.[11] The scope or formality of an inquiry may depend on whether any party admits to the misconduct, whether the parties want to informally resolve a conflict, the severity and type of alleged conduct, and whether other informal resolution options are appropriate (such as mediation, workplace climate/conflict audits, coaching, and training). If it is determined that a fact-finding investigation is necessary, or prudent to commence, then the next step is to decide who will conduct it and define the scope.

Who will investigate: Impartial *and* Competent

The decision about who will conduct the investigation should include an evaluation of: 1) any potential for real or perceived bias, or conflict of interest, 2) competence and communication skills, 3) knowledge and experience, 4) availability/resources, 5) relationship to employees or students involved, 6) the type of issues and complexities to be explored, and 7) independence.[12] An investigator should not have a stake in the outcome. Some courts and agency guidance caution against having investigators who are subordinate to or the direct supervisors of the parties involved. Both jurors and judges heavily weigh evidence of an investigator's impartiality when assessing if an investigation is fair and reasonable, and when determining liability or damages.

An important consideration, but not always cited in court decisions, is the investigator's skill in building rapport and trust, such as sensitively and yet impartially handling emotional reactions, conducting interviews professionally and respectfully, and effectively communicating and listening, with an understanding of cultural differences. Investigators with these abilities, if called to testify about their actions at trial, will be more likely to convince jurors they conducted a professional and objective inquiry, instead of a biased and adversarial inquisition.

The determination of who will conduct an investigation, whether in-house personnel or an outside investigator, should consider if the investigator is competent to investigate the legal context and policy issues underlying the investigation. Moreover, at the outset, it is important to assess if an investigator can lawfully investigate under the California Business and Professional Code (California Private Investigator Act).

Attorney Investigators providing legal services

Sections 7520, *et seq.* of the California's Private Investigator Act control who can conduct an investigation in California. The exemption under the Act allowing an attorney to investigate states: (e) "An attorney at law in performing his or her duties as an attorney at law." The full meaning is not clarified in the code; however, investigations are a fact finding process and courts have concluded that fact finding can constitute "professional legal services" provided by a licensed attorney at law.[13]

Many attorneys who practice exclusively as independent investigators choose to provide evidentiary findings only. Retention agreements should include language clarifying that the attorney is licensed, is hired to provide specialized legal investigation services, and will conduct an independent investigation to make factual findings that are intended to be used for the rendering of legal advice. It is advisable for the attorney investigator to contract with the client directly to evidence that an attorney-client relationship exists, which addresses the exemption language: "performing duties as an attorney at law." Precautionary measures will protect all involved from potential sanctions for violating the California Private Investigator Act.[14]

Discussions with the client at the outset should clearly delineate the investigator's role, and client's expectations regarding whether or how any privileges should be preserved. Although a full discussion about protection of attorney-client communications or attorney work product privileges in the context of investigations is beyond the scope of this article, it is important to: 1) define when services begin and end, 2) label relevant communications "confidential and privileged," 2) securely protect investigation materials, 3) carefully restrict distribution of confidential materials, and 4) consistently provide guidelines to witnesses before interviews.[15]

It is both possible and probable that the employer may decide to have an (attorney) investigator testify about the investigation conducted as a defense, and any privilege would in such circumstances be waived. In the public sector, decisions may be made to disclose the investigation report in response to discipline proceedings, Public Records Act requests, or to show transparency when issues of public concern are investigated.

Several cases in recent years, including *Coito* and *Costco*, and decisions in other jurisdictions, have addressed the validity of the attorney-client privilege and work product doctrine protections involving witness statements obtained through an attorney-directed interview, witness summaries, written opinion letters containing factual information, and other investigation communications and documentation.[16]

When to investigate: Prompt

An investigation should commence promptly, and be completed without unnecessary delays. Most cases when delays were deemed unreasonable involve employers ignoring complaints, or displaying indifference or incompetence.[17] Promptness therefore is less a reflection of a rigid time schedule that applies in all circumstances, than a reference to whether the evidence suggests the response was diligent and in good faith.

PROCESS: How the investigation is conducted

Fair, Reasonable

Investigators should be well versed in the rights afforded employees and students in both the public and private sector context. Fairness will turn on whether the process was equitable. Investigations of police officers, firefighters, government employees, or in medical and academic settings, must consider due process, confidentiality, union representation, and other employee or student rights, and follow specific procedural mandates. The investigator should know internal procedures and policies, and stay current regarding decisions about employees' privacy protections,[18] employers' duties, and investigation processes.

The following have been cited in case law and agency guidance as core characteristics of an effective and defensible investigation in any context: 1) Prompt, 2) Impartial, 3) Competent, 4) Fair, 5) Reasonable, 6) Thorough, and 7) Accurate.

The NLRB in recent years has addressed numerous investigation issues and made rulings that conflict with certain longstanding employer practices originating from other agency guidance (i.e., EEOC). In the *Banner* decision, the NLRB ruled that a blanket confidentiality admonition to employees violated the National Labor Relations Act, section 7. A preliminary assessment in each situation must weigh if confidentiality is necessary considering several key factors.[19]

Investigations can also raise ethical considerations for attorneys. To what extent should an attorney investigator allow a client or in house counsel to edit the investigation report? Is it reasonable to use a false identity to "friend" a witness on social media if it might lead to relevant information? What should a witness be told if she asks for advice? Many professional rules of responsibility apply to investigation situations that may arise.[20]

Common deficiencies often identified by courts or agencies scrutinizing investigator's actions include: 1) failing to properly (or at all) interview the complainant, and/or the accused, and/or percipient witnesses, 2) unreasonable delays, 3) interviewing witnesses simultaneously, 4) not documenting interviews or having a plan, and 5) using investigators who lack objectivity, training or experience.[21]

In *Mendoza*, the court faulted defendants for limiting their inquiry to the supervisor's and complainant's interviews, without investigating more thoroughly for possible relevant evidence of "character and credibility." The court expressed concern about the "lack of rigorous investigation" by defendants.[22]

No investigation is perfect. However, with experts commonly utilized at trial to identify investigation flaws, investigators must demonstrate sound methodologies and reasonable practices for ferreting out the evidence. No longer can "he-said, she-said" be used as an excuse not to conduct in-depth inquiries or avoid making findings altogether.[23]

Long-time attorney investigator and expert witness Jan Duffy writes and testifies about HR practices and whether an investigation conforms to the requisite standard of care. Regarding workplace investigations conducted by attorney investigators, she observes: "Even more than other workplace investigators, attorney investigators are vulnerable to attacks based on their lack of thoroughness and/or accuracy in conducting the investigation. Matters such as what evidence to pursue, which witnesses to interview, when to return to witnesses for clarification, and the like are all judgment calls that must be addressed (and often re-addressed) by investigators throughout the Planning, Process, and Conclusion stages. Because of the 'special powers' that are sometimes ascribed to lawyers, attorney investigators' mistakes and misjudgment can be particularly difficult to explain or overlook."[24]

PROBABLE CONCLUSION: *Making findings*

Thorough and *Accurate*

If the investigation plan and process are the roadmap followed, then the conclusion stage is the destination reached. Generally, the standard applied is: Whether, based on a thorough assessment of the evidence, it is more likely than not that the alleged conduct and incidents occurred. In today's technological environments emphasizing documentation, most would expect that a written account of the investigation conducted should exist. Few investigators can convincingly testify about their investigation actions, particularly years later, without referring to a written record.

Evidentiary findings should be well substantiated.

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Conclusions and response actions based on them should be accurate and reasoned. When the investigation reflects the core characteristics cited in this article, and the investigator acts professionally and objectively throughout, employees and students (and triers of fact) will more likely accept the outcome, and conclude the response actions instituted were appropriate and reasonable.[25]

Robin Oaks was judicial law clerk for District of Columbia District Court Judge John Garrett Penn, who was the trial judge for Meritor Savings Bank v. Vinson. She then worked as an environmental, employment and school law attorney. For the past twenty years she has practiced exclusively as an independent workplace attorney investigator on the Central Coast and throughout California. She also offers workplace mediation, training, climate assessment, and leadership and wellness coaching services. Contact her at: Robin@RobinOaks.com or 805-685-6773.

Endnotes

1 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (S. Ct. first recognized hostile environment claim of sexual harassment under Title VII).

2 *Franklin v. Gwinett County Public Schools*, 503 U.S. 60 (1992) (S. Ct. held students subjected to sexual harassment can sue for monetary damages under Title IX of Federal Education Amendments of 1972). *See also, Gebser v. Lago Vista Independent School Distric*t, 524 U.S. 274 (1998)(damages available in teacher-student sexual harassment case if school official had notice and was "deliberately indifferent").

3 Gov. Code § 12940(k).

4 Sidley Austin's Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture, July, 2015. U.C. Berkeley failed to fire an astronomy professor who was investigated and found to have harassed female students for years, Oct. 2015. Ted Wells investigated Miami Dolphins' player Johnathan Martin's bullying claim; later-fired Dolphins' coach James Turner sued Wells for defamation, Aug. 2015. Former Penn State President Graham Spanier brought defamation and tortious interference charges against Louis Freeh who investigated child abuse allegations against Jerry Sandusky, June 2015.

5 2 C.C.R. § 11023; *See* DFEH summary on website, www.dfeh.gov.

6 *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) (discriminatory animus imputed to employer of a biased supervisor when supervisor's opinion relied upon for an adverse action, i.e., *"cat's paw theory"*).

7 Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(a); *Lawson v. FMR, LCC*, 134 S. Ct. 1158 (2014).

8 *Mendoza v. Western Medical Ctr. of Santa Ana*, 222 Cal. App. 4th 1334 (2014); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (finding employer liable for discriminatory actions of supervisor but allowing two pronged affirmative defense); *State Dept. of Health Servs. v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003) (avoidable consequence doctrine only affects remedies); Title VII Civil Rights Act of 1964, 29 CFR § 1604.11; FEHA, Cal. Gov't Code §§ 12940(j)1 and (k), requiring employers to take all reasonable steps to prevent discrimination/harassment.

9 Title IX of the Education Amendments of 1972, prohibiting sex and gender discrimination in educational programs/activities receiving federal financial assistance; 20 U.S.C. § 1681, 34 C.F.R. Part 106, 2001; OCR Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, Title IX (2001); Title 5, C.C.R. §§ 59300, *et seq.*; California Education Code, §§ 220 - 260; Title 5, C.C.R. §§ 4900-4965.

10 OCR Dear Colleague letter, October 26, 2010 (referring to bullying and harassment conduct and necessary response actions); Clery Act, 20 U.S.C. § 1092(f), 34 C.F.R. § 668.46: Violence Against Women Reauthorization Act of 2013, VAWA, Campus Sexual Violence Elimination Act, SaVE (March 2013); Dear Colleague Letters: April 4, 2011, April 24, 2013 (retaliation violation of Title IX), and April 24, 2015.

11 *Nichols v. Azteca Rest. Enterprises*, 256 F.3d 864 (9th Cir. 2001)(telling complainant to report future harassment without investigating current investigation was not adequate); EEOC Enforcement Guidance, Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999).

12 *Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95 (2004); *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256 (1998)(well-trained human resources representative, trained by in-house counsel, who had no connection with accused was appropriate investigator); *Nazir v. United Airlines*, 178 Cal. App. 4th 243, 277 (2009)(suspect investigation when one investigator inferentially had an "axe to grind and was assisted" by someone who "served him").

13 *United States v. Rowe*, 96 F. 3d 1294 (1996)(attorney's fact-finding constituted legal services); *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612 (7th Cir. 2010)(firm's fact finding of a sexual abuse allegation was performing legal services).

14 *See* Lindsay E. Harris and Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 25 Cal. Lab & Emp. L. Rev., no. 4, 2011.

15 Examples of introductory remarks include: 1) attorney has been hired by the employer (and does not represent the witness individually) to conduct a confidential and impartial fact-finding investigation of the issues, 2) the investigation is considered confidential, and 3) investigation communications and findings will be provided only to those who have a business and legal need to know. *See also* Upjohn warnings, *Upjohn v. United States*, 449 U.S. 383 (1981).

16 *Coito v. Superior Court*, 54 Cal. 4th 480 (2012) (witness statements obtained through an attorney directed interview are entitled to work product protection); *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725 (2009) (attorney's written opinion letter with witness statements contained within is protected); *See also, In re Kellogg Brown & Root, Inc.*, No. 14-5319, slip op. (D.C. Cir. Aug. 11, 2015); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014).

17 *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001) (Court accepted four months to conclude investigation because complainant was often not at work and other factors justified delay); *Bradley v. Dept. of Corrections and Rehabilitation*, 158 Cal. App. 4th 1612 (2008) (Ct. recognized "things move slowly in government" but cited lack of action in this case as "startling").

18 *City of Ontario v. Quon*, 560 U.S. 746 (2010) (search of employee's text messages was reasonable in light of circumstances).

19 *Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No.

Continued on page 24

The American Academy of Forensic Sciences – The State of Forensics, Part II

By Robert Sanger

In last month's *Criminal Justice* column, we discussed the opportunity I had to attend and participate in the week long American Academy of Forensic Sciences Annual Meeting in Las Vegas at the end of February. As was also discussed, the conference extolled the virtues of education, professionalism, and accreditation of forensic scientists and laboratories. However, the lack of sophistication among lawyers and judges was lamented during the conference but, for the most part, remedies were not systematically addressed.

In this month's column, we will discuss the inclusion of science in the law school curriculum where the education process begins for law students who will be the future lawyers and judges, and who will be faced with an ever expanding and complex process of dealing with science in the courtroom. Our own Santa Barbara and Ventura Colleges of Law has accepted this challenge by offering a class in Forensic Science and the Law this summer.[2] In addition to law students, the program will be open to auditing by members of the Bar for Mandatory Continuing Education Credit based on available space.

There are also other efforts and opportunities around the country. West Virginia University is now offering an LL.M in Forensic Justice at their School of Law and they state that it is the only such program in the country. Other law schools, now including our local Santa Barbara and Ventura law school, offer courses in science and the law but, other than WVU, none have full Science and the Law programs let alone a program offering of an LL.M degree. The Santa Barbara and Ventura Colleges of Law are looking at this model as well as others to develop a broader program to deliver science education to lawyers and judges.

Increased Professionalism in Forensics

My paper for presentation to the AAFS on "A Law School Curriculum in Science and the Law" was submitted in October of 2015, well in advance of the February 2016 conference.[3] When I arrived, I was struck by the number of presenters who referenced the dearth of structured education for law students and lawyers. Fortuitously (or, perhaps because the topic really is timely), my presentation seemed to fit right in place and was received with some positive post-presentation discussions. One interlocutor following the presentation was a professor from the forensics program at WVU. A number of professionals, including professors, a pathologist and two judges, have offered to join our ad hoc committee to study the involvement of the AAFS in promoting law school education. It is clear that the concept of providing forensic education to law students, lawyers and judges is a current topic of concern among top forensic scientists and AAFS members.

Robert Sanger

Since the conference, *Science* magazine published a special issue, "Forensics: Evidence on Trial."[4] The articles, particularly the lead article "Evidence on Trial," cover the concerns that we have raised in this column previously and which are the current concerns of the real forensic scientists and experts. The opinions of these scientists and experts have been expressed in scholarly journals, in AAFS proceedings and other forensic organizations. They are being reflected in the considerable effort now being put forth by the federal government through the National institute for Standards and Technology (NIST) and the National Institute for Justice (NIJ). The special issue of *Science* magazine exposes these concerns to a greater public.

To the surprise of the public and many lawyers and judges, for instance, real forensic experts for years have been refusing to say things we hear from forensic "expert witnesses" all the time. For instance, in the Science magazine article, four examples are set out as "**What not to say in the courtroom**:"

1. "**To a reasonable degree of scientific certainty**." This has no scientific meaning. The same would be true of the phrase, "to a reasonable degree of medical certainty."
2. "**It's a match**." The correct testimony would be to say that there are two objects that have similarities and then to point to the empirical basis for the similarities and any dissimilarities.
3. "**There is a zero error rate**." Scientists and statisticians acknowledge that there is always a chance of

error even excluding negligent analysis or deliberate manipulation of evidence.

"**Identification**" or "**Individualization**." These terms are used, again, to bolster the testimony of the "expert." There is no scientific basis to make such claims.

At the AAFS conference, we had the opportunity to hear from the Director of the United States Army's Defense Forensic Science Center who stated that the Army forensic fingerprint examiners will no longer use the terms "match," "identification" or "individualization." Instead, they will use the conclusion that there is a probability that two prints came from a common source. They are working to develop a statistical model so that they can quantify the probability but, unless and until such a model is reliably developed, they will refrain from saying any more than it is probable.

However, most lawyers and judges have not received an adequate education to distinguish what is acceptable in the scientific community and what is just gotten away with in court. But this is the job of the judge as "gatekeeper." The United States Supreme Court has said:

> "The objective of [Daubert's gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, *employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field*."[5]

....real forensic experts for years have been refusing to say things we hear from forensic "expert witnesses" all the time.

Neither a lawyer nor a judge can assure this standard without having a basic understanding of scientific evidence.

What to Do?

Our own Santa Barbara and Ventura Colleges of Law seem to be headed in the right direction by starting with the comprehensive ten week class in forensics this summer. This is not the first time they have made such an offering. Our District Attorney, Joyce Dudley, offered a very well received shorter version some years ago. Other law schools, such as Hastings, with Professor David Faigman, and UC Davis, with Professor Edward Imwinkelried, Columbia, with federal Judge Jed Rakoff, as well as many others, like New York University, Harvard, Yale and Chicago, have science classes. Some even have a special emphasis, like Vanderbilt with the MacArthur Center for Law and Neuroscience. And West Virginia University involves their graduate students in forensics with law students in a joint degree program and also offers lawyers an LL.M program.

The focus of the future has to be on educating lawyers and judges to learn how to deal with forensic evidence as a matter of legal analysis. The goal, in this regard, is not to create forensic scientists. The goal is to give lawyers and judges the ability to interact with forensic scientists and to meet the Daubert/Kumho Tire/Sargon[6] requirement of Gatekeeper. For all the improvement in forensic science at the high levels addressed by the AAFS and the federal government, the good science and good experts end up competing with the bad science and the bad experts for the attention of often under-educated lawyers and judges.

For instance, right now, how many lawyers and judges are equipped to deal with the examples above of what the real scientists agree should not be said in the courtroom? In order to enforce these and many other standards of real science and real forensic expertise, the legal professionals have to have a basic understanding of the scope and parameters of forensic science.

It can be done. The standard evidence course in law school dedicates seven weeks to hearsay and two weeks to scientific evidence. After all these years of formal law school education (from the late nineteenth century to the present), it would seem that we could really condense the "mysteries" of hearsay into a couple of weeks and spend much more time on twenty-first century science. This twenty-first century science is ubiquitous in both civil and criminal practice. Counsel and judges should be prepared to discuss admissibility of scientific evidence just as well as they are to discuss the admissibility of hearsay evidence.

The hope is that law schools will go beyond offering even these important Forensic Evidence classes and establish a curriculum that involves a fuller, structured forensics program of study. Certainly, Hastings, Harvard and others mentioned and unmentioned above have multiple courses available. None have, as yet, offered a structured certificate program within the J.D. and only WVU has an LL.M. Given the importance of the subject matter, a certificate program or a post graduate LL.M in Science and the Law will be further encouragement to students (including lawyers and judges) to deal with the twenty-first century science issues.

Conclusion

The development of a sub-committee through the AAFS, the proliferation of law and science courses in many schools, including the Santa Barbara and Ventura Colleges of Law, the establishment of an LL.M program at West

Criminal Justice

Virginia University, and the willingness of my colleagues at the Colleges of Law and elsewhere to look at progressive models is encouraging. It is an exciting time in this area of law school teaching. Time will tell where it goes. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 40 years. He is a partner in the firm of Sanger Swysen & Dunkle. Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization. He is a Director of Death Penalty Focus. Mr. Sanger is a Member of the ABA Criminal Justice Sentencing Committee and the NACDL Death Penalty Committee. He is a Member of the American Association for the Advancement of Science (AAAS). Mr. Sanger is also a member of the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS) and an Adjunct Professor at the Santa Barbara College of Law.

ENDNOTES

1 ©Robert M. Sanger.
2 I am an Adjunct Professor of Law at the Santa Barbara and Ventura Colleges of Law and have had the opportunity to work with retiring Dean Heather Georgakis, Faculty Chief Stephen Underwood, Dr. Matt Nehmer and others at the Colleges of Law to create this class.
3 The abstract of the paper I presented at the 2016 AAFS annual meeting is on page 598 of the Proceedings (F4 Scientific Evidence and the Law School Curriculum): http://www.aafs.org/wp-content/uploads/2016Proceedings.pdf. I am preparing a full scholarly version of the presentation for submission to a peer reviewed journal.
4 Science, March 11, 2016, Vol. 351, Issue 6278, pp. 1128-1146.
5 *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (emphasis added).
6 *Sargon v. USC*, 55 Cal. 4th 747 (2012), where the California Supreme Court said: ". . . the trial court has the duty to act as a gatekeeper to exclude speculative expert testimony."

SBCBA

DP Mock Trial, *continued from page 6*

team, a team that Dos Pueblos has had a positive relationship with for many years.

"When they announced Saturday night we would be advancing to the finals, we were jumping and screaming with joy," said junior Cindy Diaz, who won an award as one of the best defense attorneys at the state competition.

When it was announced that Menlo School would be the other advancing team, Diaz said, "we were so excited to be going against a team we have so much respect for, at one point both our schools were in one huddle hugging, jumping, screaming, and even crying."

The team's next step is the national competition in May in Boise, Idaho.

"This whole year has made me so incredibly proud of my team and all the hard work, sweat, and tears we've put in this year," said Nina Downey, a senior and one of the team captains. "I'm honored to be able to represent my team, my school, my county, and my state at Nationals.

Savio, who started coaching when many of the now seniors were either on the junior varsity team or just starting out on varsity, said, "to watch them [seniors] flourish over the past three years has been fantastic, and winning the state championship feels like the pay-off for all the hard work I've watched them put into this team."

The team's five volunteer attorney coaches are Tyrone Maho, Susan Epstein, Deedrea Edgar, Joel Block, and Sarah Knecht. ■

Oaks, *continued from page 19*

93, (July 30, 2012); reaffirmed, *Banner Health System d/b/a Banner Estrella Medical Center and James Navarro*, 362 NLRB No. 137 (2015)(assessment should evaluate need to protect witnesses, and danger of evidence destruction, a cover-up, or fabrication); *See also, American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB No. 139 (2015)(employers' ability to withhold confidential witness statements will depend on balancing test).
20 ABA Model Rules of Professional Conduct; State Bar of California Rules of Professional Conduct; *See also* Society of Independent Workplace Investigators, Code of Ethics (2015), available at http://siwi.us/code-of-ethics.
21 See, *Mendoza*, 222 Cal. App. 4th at 1334; *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93 (1998); *Silva*, 65 Cal. App. 4th at 256; EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisor (1999); OCR Dear Colleague Letter, April 24, 2015; *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995); *McGrory v. Applied Signal Technology, Inc.*, 212 Cal. App. 4th 1510 (2013); *Tayborn v. San Francisco*, 341 F.3d 957 (9th Cir. 2003); *Nazir*, 178 Cal. App. 4th at 243.
22 *Mendoza*, 222 Cal. App. 4th at 1344, 1345, fn. 4.
23 Although evidence rules are not strictly applied when conducting investigations, factors for credibility assessment reflect federal and state rules of evidence (i.e., bias, motive, prior inconsistent statements, corroboration, opportunity, plausibility, etc.).
24 janduffy@managementpractices.com
25 *See, Cotran*, 17 Cal. 4th at 93; *Nazir*, 178 Cal. App 4th at 277 (investigation should be thorough and unbiased); *See also* Robin Oaks, *Cultural Issues and Influences on Sexual Harassment,* Chapter in textbook SEXUAL HARASSMENT ON CAMPUS, Allyn & Bacon, 1996.

Ventura County Community College District and The Santa Barbara & Ventura Colleges of Law Announce Education Partnership

VENTURA, Calif. – Students and graduates of Ventura County Community College District (VCCCD) colleges—Moorpark College, Oxnard College, and Ventura College—have an unique pathway to law school thanks to a partnership announced by Dr. Bernard Luskin, Chancellor for VCCCD, and Dr. Matthew Nehmer, Executive Director of The Santa Barbara & Ventura Colleges of Law (COL).

Through the articulation agreement, COL welcomes any student with an Associate of Arts (A.A.) or Associate of Science (A.S.) degree from a VCCCD college to apply for admission to its Juris Doctor (J.D.) program. Accepted students may begin law school after completing a minimum of 60 post-secondary academic units with an incoming G.P.A. of 3.0 or higher and with earning an Associate's degree.

"Our collaboration with VCCCD is a win-win all around," said Dr. Nehmer. "We advance their mission by providing yet another pathway to student success, and the District advances ours by offering opportunity for an excellent legal education that is community focused, leadership oriented, and above all affordable."

"The VCCCD has developed pathways with a number of law schools, and this one is unique to Ventura County," said VCCCD Trustee Steve Blum, Esq., Ventura Colleges of Law alumni, J.D. '06. "This local law school offers another special opportunity for access for our graduates."

For more information on the partnership between VCCCD and COL , please contact: admissions@collegesoflaw.edu or call 805-765-9719. ■

CALL FOR NOMINATIONS TO THE SBCBA BOARD OF DIRECTORS

The Santa Barbara County Bar Association is seeking applications and nominations for its 2017 Board of Directors. Prospective Directors should be enthusiastic and reliable, with previous volunteer and board experience, and sufficient time to devote to a position on our Board for at least a one year term.

If you or someone you know is interested in being nominated to the Board, please contact Elizabeth E. Vogt at eevogt@vogtfamilylaw.com. Briefly describe your interest in serving on the Board and provide a current CV, including volunteer or non-profit experience.

Applications and nominations should be received by July 15, 2016.

Verdicts & Decisions

Silveria v. Soares

SANTA BARBARA SUPERIOR COURT, ANACAPA DIVISION

CASE NUMBER:	1469243
TYPE OF CASE:	Medical negligence and battery
TYPE OF PROCEEDING:	Jury trial
JUDGE:	Hon. Colleen K. Sterne
LENGTH OF TRIAL:	7 days
LENGTH OF DELIBERATIONS:	3 hours
DATE OF VERDICT OR DECISION:	April 1, 2016
PLAINTIFF:	Carmen Silveira
PLAINTIFF'S COUNSEL:	Michael McCann of The Law Offices of Michael W. McCann Inc.
DEFENDANT:	Julio Soares, M.D.
DEFENDANT'S COUNSEL:	Mark Connely of Hall, Hieatt & Connely, LLP

OVERVIEW OF CASE: On August 12, 2013, Plaintiff had a bilateral exchange of breast implants and capsulectomy by Dr. Soares at his office operating room. On August 13, 2013, Plaintiff returned to Dr. Soares' office with evidence of a hematoma. Dr. Soares took Plaintiff to the operating room and, under local anesthesia, opened the incision, evacuated the hematoma, removed the implant, electrocauterized inside and replaced the implant. Plaintiff had post-operative pain, but excellent cosmetic results.

FACTS AND CONTENTIONS: Plaintiff contended she was informed by Defendant that the follow-up procedure on August 13, 2013 would only involve placement of a drain, and she consented to local anesthesia for the surgery based on that information. She contended the procedure was not explained to her (negligence/lack of informed consent), that it was thereafter done without her informed consent or exceeded her consent (battery), and that the procedure was done through her pajamas (which allegedly were not removed for the surgery). Plaintiff contended she suffered pain and anguish.

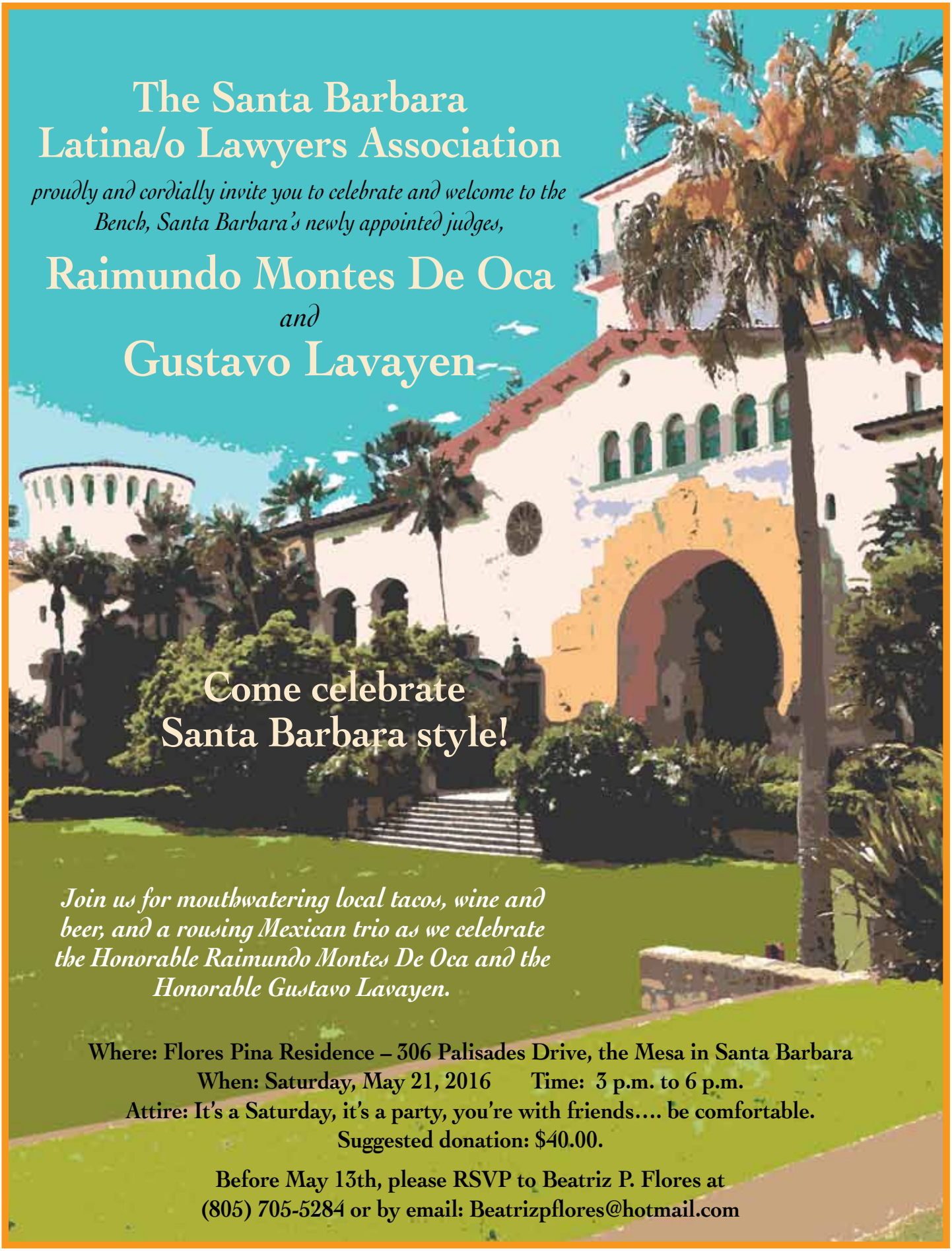
Defendant argued that all of the treatment was within the standard of care.

SUMMARY OF CLAIMED DAMAGES: General damages, pain and suffering

RESULT: 10:2 no negligence, 9:3 no battery

SAVE THE DATE!

The evening of July 8th, SBCBA will sponsor a reception for California Supreme Court Justice Mariano-Florentino Cuéllar, in the Mural Room of the Historic Anacapa Courthouse.


The Santa Barbara
Latina/o Lawyers Association
proudly and cordially invite you to celebrate and welcome to the
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and
Gustavo Lavayen
Come celebrate
Santa Barbara style!
Join us for mouthwatering local tacos, wine and
beer, and a rousing Mexican trio as we celebrate
the Honorable Raimundo Montes De Oca and the
Honorable Gustavo Lavayen.
Where: Flores Pina Residence – 306 Palisades Drive, the Mesa in Santa Barbara
When: Saturday, May 21, 2016 Time: 3 p.m. to 6 p.m.
Attire: It's a Saturday, it's a party, you're with friends…. be comfortable.
Suggested donation: $40.00.
Before May 13th, please RSVP to Beatriz P. Flores at
(805) 705-5284 or by email: Beatrizpflores@hotmail.com

Martin, *continued from page 10*

U.S.C. § 2510-22; see also Horton, David. "The Stored Communications Act and Digital Assets," pp. 1734-35, 67 Vand. L. Rev. 1729 (2014).

14 Marchitelli, Rosa. "Apple Demands widow get court order to access dead husband's password." CBCNews.ca. Jan 18, 2016. (accessed. April 6, 2016). http://www.cbc.ca/news/business/apple-wants-court-order-to-give-access-toappleid- 1,3405652.

15 Huet, Ellen. "Who Will Take Care of Your Digital Legacy After You Die? Poll Says Many People Haven't Specified." *Forbes,* forbes.com. April 21, 2015. (accessed April 6, 2016). http://www.forbes.com/sites/ellenhuet/2015/04/21/digital-assetlegacy- poll/.

16 *Supra*, n. 13; see also Federal Computer Fraud & Abuse Act, 1986 18 U.S.C. § 1030.

17 *See, e.g.,* the terms of use for Apple: *The Apple Music Service is operated by Apple from its offices in the United States. You agree to comply with all local, state, federal, and national laws, statutes, ordinances, and regulations that apply to your use of the Apple Music Service. All transactions on the Apple Music Service are governed by California law, without giving effect to its conflict of law provisions. Your use of the Apple Music Service may also be subject to other laws. You expressly agree that exclusive jurisdiction for any claim or dispute with Apple or relating in any way to your use of the Apple Music Service resides in the courts in the State of California. Risk of loss and title for all electronically delivered transactions pass to the purchaser in California upon electronic transmission to the recipient. No Apple employee or agent has the authority to vary this Agreement.* Apple.com (accessed April 6, 2016). http://www.apple.com/legal/internetservices/ itunes/us/terms.html.

18 *See, e.g.,* Connecticut pub. Act No. 05-136 (2006) (email only); Idaho SB 1044 (2011) (social media).

19 Prior to enacting the revised FADAA in 2016, Nevada only permitted a fiduciary to "direct the termination of any account of the decedent," other than financial accounts. It also specifically recognizes the internet providers' TOSAs and provides that the legislation "does not invalidate or abrogate" any of these terms. Nev. Rev. Stat. § 143.188 (rev. 2016).

20 Opposition to the Uniform Fiduciary Access to Digital Assets Act, The National Law Review, http://www.natlawreview.com/article/opposition-to-uniformfiduciary-access-to-digital-assets-act, last visited October 1, 2015. Delaware passed a modified version of the law in 2014.

21 *See, supra* n. 3.

22 Fla. Stat, §§ 740.001-009 (2016) (effective July 1, 2016), Idaho Cod. Ann. §§ 15- 14-101-119 (2016); Uniform Fiduciary Access to Digital Assets Act, Ind. Pub. L. No. 137 (2016); Fiduciary Access to Digital Assets Act, Mich. 2016 Pub. L. No. 0059 (2016) (effective June 27, 2016); Revised Uniform Fiduciary Access to Digital Assets Act (2015) Or. SB 1554 (effective January 1, 2017); Revised Uniform Fiduciary Access to Digital Access Act, Tenn. Pub. L. No. 570 (effective July 1, 2016); Revised Uniform Fiduciary Access to Digital Assets Act, Wash. SB 5029 (signed on March 31, 2016); Digital Property Act, Wis. AB 695 (signed March 30, 2016); Wyo. Pub. L. 39 (2016).

23 Va. Code. Ann. § 64.2-109 (2015).

24 What If, "Facebook of the Dead." Whatif.com. (accessed April 6, 2016). https://what-if.xkcd.com/69/.

2016 AWARDS

SANTA BARBARA COUNTY BAR ASSOCIATION

The Santa Barbara County Bar Association calls for nominations for 2016 awards for recognition of outstanding attorneys, law firms and judges in our community.

Richard Abbe Humanitarian Award

A special award honoring a judge or an attorney in those years where a nominated candidate evinces exceptional qualifications that reflect the highest humanitarian principles as exemplified by the late Justice Richard Abbe.

John T. Rickard Judicial Service Award

Honoring one of our judges for excellence on the bench and outstanding contributions to the judiciary and/or the local court system.

Pro Bono Award

Recognizing an individual attorney who has donated at least 50 hours of direct legal services to low income persons during the previous calendar year.

Frank Crandall Community Service Award

Honoring a local law firm's efforts in providing pro bono services to community non-profit organizations. Factors considered in bestowing the award include:

- Existence of a firm policy encouraging pro bono services;
- Percentage of firm attorneys performing pro bono work;
- Nature and quality of pro bono work and hours per attorney;
- Leadership of community projects; and
- Services benefitting low-income persons.

Please submit your nominations to eevogt@vogtfamilylaw.com by July 1, 2016. Include specific facts to support the award's criteria.

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MCLE Course Offerings – Summer 2016 (May 23 – July 30)

All Courses $295/unit, except Restorative Justice (which is FREE)

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CIVIL LAW & MOTION PRACTICE FEE: $590*
Mondays [10 sessions] 6:30-9:30 p.m.
An overview of civil law and motion practice in California state courts. Topics covered include: notice requirements, structure of points and authorities, declarations and other supporting papers, demurrers, motions for summary judgment, and discovery motions. Special emphasis is given to local rules of practice and policies in Santa Barbara and Ventura counties.
Instructor: Chris Kroes, J.D. (Private practice, Santa Barbara)

IMMIGRATION & CRIME FEE: $295*
Tuesdays, June 28-July 26 [5 sessions] 6:30-9:30 p.m.
This course addresses the immigration consequences of criminal convictions and the legal obligation of defense counsel to advise clients of such consequences. Among the topics considered are statutory grounds for inadmissibility and removal (formerly exclusion and deportation), definitions of crimes for immigration purposes, strategies for mitigating adverse immigration consequences, grounds for relief in Immigration Court, and deportation defense practice.
Instructor: Michael Hanley, J.D. (Deputy Public Defender, Santa Barbara)

PSYCHOLOGY FOR LAWYERS FEE: $295*
Tuesdays, June 28-July 26 [5 sessions] 6:30-9:30 p.m.
This course will outline the civil, criminal, probate and family law cases where psychological or psychiatric evidence is often presented, and review the common principles and concepts necessary to understand, offer and challenge this evidence.
Instructor: Penny Clemmons, Ph.D., J.D., Certified Family Law Specialist/Special Master (Private Practice, Santa Barbara)

FORENSIC SCIENCE FEE: $590*
Thursdays [10 sessions] 6:30-9:30 p.m.
(via GTM primarily from SB campus to students at both campuses)
The goals of this course are to explore various types of forensic evidence used in criminal and civil cases, and to master the legal basis for admissibility and limitation of such evidence. The course will also provide a basis for interaction with forensic scientists and experts in the practice of law. Students will study applicable standards in numerous forensic subfields (e.g., DNA, documents, firearms, digital evidence, fire science/explosives, pathology/serology/toxicology, fingerprints, and accident reconstruction).
Instructor: Robert Sanger, J.D. (Private Practice, Santa Barbara)

INTELLECTUAL PROPERTY FEE: $590*
Saturdays, May 28-July 30 [10 sessions] 9:00 a.m.-12:00 p.m.
This course provides a general introduction to the law of copyright, trademarks, patents, and trade secrets. The areas covered include how the law applies to different types of intellectual property; the legal rights of the creators and owners of such property; the competing rights of others to use such property; and an overview of intellectual property litigation.
Instructor: Erica Bristol, J.D. (Private Practice, Encino)

Rev. *3/7/16*

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EMPLOYMENT LAW FEE: $590*
Tuesdays [10 sessions] 6:30-9:30 p.m.
A study of the legal rules surrounding the hiring, treatment, and termination of employees. The course includes Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, and other federal and state laws concerning employment discrimination and wrongful discharge.
Instructor: Gary Rattet, J.D. (Private practice, Los Angeles)

RESTORATIVE JUSTICE FEE: NO CHARGE*
Tuesdays, May 24-June 21 [5 sessions] 6:30-9:30 p.m.
Our current legal system has great strengths, but there are limits as well. Frequently, victims and offenders and their supporters in the community feel the legal process does not meet their needs. Justice professionals often agree. This class will offer an introduction into the field of restorative justice, which involves including all the stakeholders (victims, offenders, family and community members) in the legal process in order to collectively address the needs and determine how to make things as right as possible. The class covers the various historical and current restorative practices being offered in our local communities and the world.
Instructor: Christiane Hipps, J.D. (Deputy Public Defender, Ventura County)

ELDER LAW FEE: $590*
Thursdays [10 sessions] 6:30-9:30 p.m.
This course surveys the law on issues facing the elderly, such as age discrimination, elder abuse, entitlement to government benefits, guardianship, alternatives to guardianship, and health care decisions, including end-of-life decisions.
Instructor: Jeanne Kvale, J.D. (Private practice, Ventura)

FORENSIC SCIENCE FEE: $590*
Thursdays [10 sessions] 6:30-9:30 p.m.
(via GTM primarily from SB campus to students at both campuses)
The goals of this course are to explore various types of forensic evidence used in criminal and civil cases, and to master the legal basis for admissibility and limitation of such evidence. The course will also provide a basis for interaction with forensic scientists and experts in the practice of law. Students will study applicable standards in numerous forensic subfields (e.g., DNA, documents, firearms, digital evidence, fire science/explosives, pathology/serology/toxicology, fingerprints, and accident reconstruction).
Instructor: Robert Sanger, J.D. (Private Practice, Santa Barbara)

10 sessions: up to 26.5 MCLE credits
5 sessions: up to 13.25 MCLE credits

For more information or to enroll, please contact Barbara Doyle at Ventura College of Law (805) 765-9302 or email bdoyle@collegesoflaw.edu. Space is limited.

* Each MCLE auditor is charged a non-refundable application fee of $50 per Summer session, plus applicable fees for courses taken.

State Bar members may claim MCLE credit for attending a MCLE activity, such as a lecture, panel discussion, or law school class, in person or by technological means.
(MCLE Rules and Regulations, Section 2.80)

Motions

Horowitz Law has opened an office in downtown Santa Barbara. Established by the husband and wife legal team of **Sanford** and **Christy Horowitz**, the firm's practice areas include Family Law, Business Law, Criminal Defense, and Civil & Criminal Tax Litigation.

Both Sanford and Christy Horowitz are veteran prosecutors. Sanford worked for the Santa Barbara District Attorney's Office, the San Diego County District Attorney's Office, and the Criminal Investigation Division of the Internal Revenue Service in San Diego. Sanford also is an Adjunct Professor of Law at the University of San Diego.

Before serving as a Deputy District Attorney in the Santa Barbara District Attorney's Office, Christy was an associate attorney in a family law firm. During law school, she clerked for the prosecution team in the Michael Jackson criminal trial.

Horowitz Law is located at 1032 Santa Barbara St., Santa Barbara, CA 93101. For more information on Horowitz Law, call (805) 452-7214 or visit horowitzforlaw.com. ■

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.

2016 Annual Bar BBQ

The Santa Barbara County Bar Association invites

Members, Guests & Family to our Annual Bar BBQ

When: 5 pm, Friday, June 17, 2016

Where: Tucker's Grove

Celebrate the beginning of summer! With its special oak woodland environment, Tucker's Grove is the perfect location for our Annual Bar BBQ. A delicious BBQ will be prepared by master chef-attorneys Rusty Brace and Mack Staton and beverages by expert bartender Will Beall! Outstanding red, white and rose wines donated by Joe Liebman! Mingle with fellow attorneys and judiciary.

$40 per SBCBA Member/ $50 per Non-SBCBA Member
(After June 10: $50/$60)
$20 per Law Students, New Attorneys (0-3 years), & Public Interest Attorneys (After June 10: $30)
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