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RIVERSIDE LAWYER
MAGAZINE

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Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:
To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Public Service Law Corporation (PSLC), Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Inland Empire Chapter of the Federal Bar Association, Mock Trial, State Bar Conference of Delegates, and Bridging the Gap.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Annual Joint Barristers and Riverside Legal Secretaries dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

MBNA Platinum Plus MasterCard, and optional insurance programs.

Discounted personal disability income and business overhead protection for the attorney and long-term care coverage for the attorney and his or her family.

The Riverside Lawyer *is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.*

Submission of articles and photographs to Riverside Lawyer *will be deemed to be authorization and license by the author to publish the material in the* Riverside Lawyer.

The material printed in the Riverside Lawyer *does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

Calendar

January

1 **New Year Holiday – RCBA Office Closed**

7 **Civil Litigation Section**
Planning Meeting
RCBA – Small Conference Room (1st Floor)
Noon

8 **General Membership Meeting**
Speaker: David Gehring, Guardian News & Media (UK)
Topic: "Freedom of the Press, Free Speech & the Espionage Act of 1917"
Noon - RCBA Gabbert Gallery
MCLE
Members – $20 Non-Members – $40

13 **Criminal Law Section**
Speaker: Paul Grech
Topic: "Cross Examination"
Noon – RCBA Gabbert Gallery
MCLE

15 **MCLE Marathon**
9:30 am to 3:00 pm
RCBA Gabbert Gallery
Members – $25 Non-members – $95
Go to www.riversidecountybar.com for more information

19 **Family Law Section**
Speaker: Marc Kaplan
Topic: "Understanding Business Valuations"
Noon – RCBA Gabbert Gallery
MCLE

19 **Family Law Mixer**
5:30 p.m.
Mario's Place – 3646 Mission Inn Ave, Riverside

26 **Appellate Law Section**
Planning Meeting
Noon
RCBA Boardroom (1st Floor)

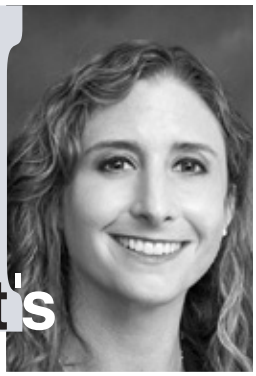
29 **Bridging the Gap**
A Free Program for New Admittees
8:00 a.m. – 5:00 p.m.
RCBA – Gabbert Gallery
RSVP: 951.682.1015
MCLE

February

3 **RCBA Night at UCR Basketball**
(see page 17 for details)

5 **Fee Arbitrator Training**
1:00 p.m. to 4:00 p.m.
RCBA – Gabbert Gallery
MCLE

President's Message



by Kira L. Klatchko

Last month, I wrote about the rule of law and our role, as members of the legal community, in maintaining it. I wrote in the immediate aftermath of the Paris attacks. I could not have imagined that a month later I would be writing a similar column in light of events in our own backyard. There are no words to describe the horror of what happened at the Inland Regional Center or the depth of sadness and sympathy we have all felt watching our friends, neighbors, and colleagues in San Bernardino struggle to confront the senseless and seemingly-random slaughter of innocent people. But now, more than ever, it is important for our community, particularly our legal community, to come together. We must come together not just to grieve, but also to resolve that we will not let our grief get the better of us.

In the past few weeks, we have all heard disturbing stories about vigilante justice and misdirected anger against the Muslim population as a whole, and against our Muslim-American neighbors. Days after the San Bernardino attack, in the City of Coachella, not too far from my office, a mosque erupted in flames. The event, labeled in the media as a possible "fire-bombing," is being investigated as an anti-Muslim hate crime. Two mosques in Hawthorne were vandalized, as was a Sikh temple in Buena Park. A severed pig's head was left outside a mosque in Philadelphia. In Toronto, a young woman walking down the street was accosted by a man who grabbed her, started shaking her, and screamed at her that she should "take off her f****n hijab and get the f**k out of his country." These are not isolated incidents.

This behavior, without qualification, is despicable. But it also demonstrates the serious consequences that arise from failing to speak out against xenophobia and speak up for the rule of law. The assailant in the Toronto case was so blinded by his generalized anger at Muslims that he accosted a woman who merely appeared to him to be Muslim; in fact the woman was not Muslim or wearing a hijab, she was just cold and had wrapped a scarf around her ears to keep warm. Little wonder that the *Los Angeles Times* has recently run stories entitled "Muslims' anger about Trump's proposal is tinged with fear" and "Since shootings, area Muslims fear unfounded suspicions and reprisals."

As a society built on laws, and the rule of law, it seemed obvious that no one, certainly no one of substance or consequence, could possibly condone this kind of behavior. But then I turned on the news only to hear arguably serious people suggesting obviously unconstitutional and clearly Islamophobic religious tests and bans. I am sure I am not the only one who heard the terms "national registry" and "internment camps" bandied about. To any person, but especially to a Jewish person like me, the idea of "national registry" for any religious or ethnic group is beyond disturbing. The idea of a "camp" no less so, particularly as there are still many people alive who can recall being interned here in California during World War II because of their Japanese ancestry.

That these terms and proposals are being discussed, even in a semi-serious context, is cause for concern among all people concerned with the rule of law and with upholding our Constitution and way of life. This is not a left-right political issue, it is a legal one, and it reflects on our legal community more than on any other group because we are collectively charged with upholding our system of laws. In fact, taking an oath to uphold our laws and our Constitution is a part of being sworn-in as a member of the Bar. Obviously fear, grief, and politics are powerful drivers of behavior, but if we do not want to relive some of the most shameful parts of our American history, we lawyers, as a group, need to become part of the conversation and embrace our role as defenders of the rule of law.

Kira Klatchko is a certified appellate law specialist, and co-contributing editor of Matthew Bender Practice Guide: California Civil Appeals and Writs*, she is also a vice chair of the appellate practice at Lewis Brisbois Bisgaard & Smith, where she is a partner.*

Barristers President's Message

by Christopher Marin

"When I was a boy and I would see scary things in the news, my mother would say to me, 'Look for the helpers. You will always find people who are helping.' To this day, especially in times of 'disaster,' I remember my mother's words and I am always comforted by realizing that there are still so many helpers – so many caring people in this world."

-Fred Rogers

Like many of you, I grew up watching *Mister Rogers' Neighborhood* on public television. It wasn't until later in life that I would realize the profound impact his message would have on me. As we reflect on the mass shooting that happened in San Bernardino last month, I feel it is especially important to recall this man's wisdom that sprung from a deep and abiding concern for all of humanity, especially children.

Mister Rogers was very adept at using the medium of television to guide young children through the scary, amazing, funny, and sometimes sad process of developing their own identities. And while he tackled difficult topics like disasters, divorce, death and other major life events with frankness and compassion, he included the same message in these episodes that he included in his happier episodes: "I like you because you are you."

It is this message that I would like to reflect on as we move further away from the events of December 2, 2015. Between media coverage of those events and Donald Trump's (likely un-Constitutional) proposal to "ban all Muslims," we move farther from Mister Rogers' core message by defining some group of people out there as some "other" that we need to fear and distrust. It was probably a sense of alienation and "otherness" borne out of this fear and mistrust that led the shooters to abandon their roles as parents, spouses, children, co-workers, and human beings in order to inflict some of the pain that they carry inside onto those around them.

As attorneys, we usually end up in the deep end of the negative emotions that our clients have against opposing parties. It is important, then, to remind ourselves and our clients that we are dealing with human beings on the other end of counsel table, and we should afford them the dignity and respect inherent to their humanity because that is what endures even after the litigation goes away. We must be zealous advocates, for sure, but we must also be goodwill ambassadors because it reflects upon our profession, our community and – most importantly – our own humanity.

As for upcoming events, we do not have anything currently scheduled for January, but I encourage you to follow us on Facebook or visit our website (there's a link on the RCBA's webpage at www.riversidecountybar.com) for all of the latest news and happenings.

Christopher Marin, a member of the Bar Publications Committee, is a sole practitioner based in Riverside. He can be reached at christopher@riversidecafamilylaw.com.

Environmental Laws and Human Health

by Melissa Cushman

The United States and the state of California together have dozens of laws enacted with the primary purpose of protecting the environment and human health. Most of these laws are designed to require consideration of or to protect a single aspect of the environment. For example, the Clean Air Act[1] regulates air emissions in order to reduce or prevent air pollution. The Clean Water Act[2] regulates the discharge of pollutants into waters of the United States and regulates quality standards for surface waters. The Resource Conservation and Recovery Act[3] regulates the generation, transportation, treatment, storage, and disposal of hazardous waste.

Despite the existence of some of these single-issue environmental laws, Congress recognized that agencies have a tendency to overstress the benefits of proposed actions without exploring or disclosing all of the potential environmental costs of the action.[4] Finding protection of the environment, including human health and welfare, of paramount importance,[5] Congress enacted the National Environmental Policy Act[6] ("NEPA") in 1969.

NEPA is a federal statute that requires preparation of an environmental report for all "proposals for legislation and other major federal actions significantly affecting the quality of the human environment."[7] This report is referred to as an "Environmental Impact Statement," or EIS, and it requires disclosure and comprehensive evaluation of the potential environmental impacts of a proposed action. NEPA's regulations emphasize human health as an important aspect of the physical environment and require evaluation of such impacts to human health as air quality, water quality, aesthetic resources, noise, public services, risk of damage from natural disasters, risk of exposure to hazardous materials or activities, and the risk of spreading diseases.

Despite its environmental focus, NEPA is largely a procedural statute that requires that a particular process be followed rather than any particular result, including environmental protection, be achieved. Moreover, NEPA has a fairly limited reach because it applies only to actions needing federal approvals, such as actions occurring on federal land or for which federal permits are required. Due to this limited reach, approximately half of U.S. states have enacted "mini-NEPAs," or have comparable regulations or executive orders, that require environmental review of certain types of projects being contemplated within their jurisdiction. Perhaps not surprisingly, California's mini-NEPA, the California Environmental Quality Act[8] ("CEQA"), is among the most rigorous. While it, like NEPA, does not prevent environmentally harmful actions from being approved, it requires disclosure and evaluation, and it contains some substantive protections that NEPA lacks.

The California legislature enacted CEQA only a few months after NEPA was enacted and for many of the same reasons.[9] CEQA applies to any activity undertaken in California: (1) that has the potential to cause a direct or reasonably foreseeable indirect physical impact to the environment and (2) that is being undertaken by a public agency in California, that is supported by such a public agency, or that involves the issuance of a permit or other entitlement by such a public agency.[10] Even when CEQA applies, the action may still be exempt from CEQA and require little or no environmental review if it is a type of action explicitly listed as exempt in the State CEQA Guidelines[11] or elsewhere. However, if CEQA applies and the proposed action is not exempt, an environmental review document will be required that examines, analyzes, and discloses the action's potential environmental impacts.

Like NEPA, CEQA's concern about environmental impacts has a significant focus on human health. For this reason, an environmental report prepared pursuant to CEQA is similarly required to analyze a proposed project's impacts relating to air quality, greenhouse gases, hazards and hazardous materials, water quality, water supply, and noise, among others, as well as the potential to expose people to earthquakes or landslides. Air toxics are often analyzed in a separate health risk assessment that is used as the basis for an environmental report's conclusions regarding the significance of air quality impacts. Some of the substantive provisions in CEQA that differentiate

1 42 U.S.C. § 7401 et seq.
2 33 U.S.C. § 1251 et seq.
3 42 U.S.C. § 6901 et seq.
4 Daniel R. Mandelker, NEPA Law and Litigation 1-4 (2d ed. 2010).
5 42 U.S.C. § 4321.
6 42 U.S.C. § 4321 et seq.
7 42 U.S.C. § 4332(2)(c).
8 Cal. Pub. Resources Code, § 21000 et seq.
9 Cal. Pub. Res. Code, § 21000(b), (c).
10 Cal. Pub. Resources Code, § 21065.
11 Cal. Code of Regs., title 14, § 15000 et seq.

Stress Relief in Stressful Times

by Juanita E. Mantz

For this issue of the *Riverside Lawyer*, I was tasked with writing an article about stress relief. I was going to suggest yoga, meditation, and some form of hobby. Get your sleep, exercise and eat right. The usual mantras. Do as I say and not as I do and all that.

Then on December 2, 2015, the attack in San Bernardino happened and the stress was all too real. The attack at Inland Regional Center ("IRC") could not be called too close to home because it was home. We were attacked in our own backyard.

Walking down the street in front of the Riverside courthouse that afternoon, everyone looked unhappy and stressed out. I know I was. As a deputy public defender attorney who works hand in hand with IRC, I was worried for the caseworkers and clients and I live in unincorporated San Bernardino (outside city limits). I drove home on the 215 freeway going north that day, right past downtown San Bernardino, listening to the news on the radio. Tears streamed down my face. Driving while crying is never a good idea, especially for those drivers like me who are bad drivers on even good days, but I couldn't help it. The horrific nature of the attack created a stress that was all too powerful. Our trust was violated and the pain ran deep.

How does one deal with the kind of stress when a city is on high alert? When our colleagues are being attacked? When our friends are killed? When we no longer feel safe? How do you even breathe while watching a video that tells you what to do in the event that an active shooter walks into our offices? It is the worst of times in some ways. The truth is, I don't know how to de-stress in these stressful times. Especially as lawyers, we deal with high stress every day. But this stress is different. It is not stress about our jobs but about ourselves. And there is sadness mixed in too. Always sadness.

Prayer perhaps? But what about those who have every right not to pray? Don't they need stress relief as well? Maybe therapy? But what about those people who don't know or trust or maybe can't afford a supportive psychologist? How about a pet? Pets are amazing for stress relief in my opinion, but some people are allergic to animals.

It comes down to this, communication. Talk about it. Read about it. Write about it. Open up and share your fears with others. And try to laugh as much as possible. Humor can work miracles in unfunny times (as a deputy public defender, I already knew this; people who work in the criminal justice system have the most twisted sense of humor). Joy and laughter bonds us together. The mere act of smiling can make one feel happier. Finally, remember to breathe. Just breathe. Then breathe again. And, of course, love. Love always makes everything better. Hate only makes bad things worse.

As a great band once said, love is really all you need. In these stress laden times, it is the only thing that works.

Juanita E. Mantz ("JEM") is a Riverside County Deputy Public Defender in Mental Health Court where she handles incompetency proceedings under Penal Code section 1368. She is a copy editor and a member of the Bar Publications Committee. In her free time, she loves to write nonfiction and her most recent story "Winding Roads" was published by The James Franco Review. *You can read her Life of JEM blog at http://wwwlifeofjemcom-jemmantz.blogspot.com/.*

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it from NEPA include the enforceability of mitigation measures that reduce or eliminate a project's significant impacts and, if the project will result in significant and unavoidable environmental impacts, that findings be made detailing the benefits that make the project worthwhile despite the resulting environmental harm.

Neither NEPA nor CEQA prevents actions from going forward that may adversely affect the environment or human health. However, both statutes at least require decision-makers to understand and disclose those impacts to the public prior to the action's approval. While imperfect and subject to much criticism, these and other environmental laws have resulted in great strides being made towards a cleaner and safer local environment and better human health.

Melissa Cushman is a deputy county counsel with the County of Riverside, and she specializes in CEQA, NEPA, and land use.

Civil Law and Health…An Amusing Update

by Boyd Jensen

Each year I am invited to prepare an "Amusement Industry Legal Update" for clients and peers including hard ride and water parks, fairs, carnivals, shows, manufacturers and government regulators. Always the safety and health of the patrons is foremost, but with more aggressive designs, a less agrarian society, greater ease of travel and a patent sensitivity for the rights of individuals to experience life and to protect their products, "civil" collisions are bound to occur. Ignoring the drones, bumper cars, go-karts, foul balls, coin-operated machines and polluting of the Santa Clara River, what follows are a few examples:

ADA: In 2011 a double amputee died falling out of a Six Flags **roller coaster** in Darien Lake, New York, designed to exceed 200 feet (taller than any building in Riverside County.) Therefore a Six Flags park in New Jersey, in compliance with ride manufacturer safety recommendations requiring at least one arm and one leg, prohibited a 14-year-old amputee (both legs and one arm) from riding park rides. In *Masci v. Six Flags Theme Park, Inc.*(2014) WL 7409952, Federal District Court Judge Joel Piscano ruled Six Flags may have been discriminating against the 14-year-old, not for safety reasons, but "based on the appearance of the disability?!?" (?!? added.)

Assumption of the Risk: A California Court of Appeal affirmed summary judgment for the Defendant in *Griffin v. Haunted Hotel, Inc.*(2015) WL 6440765, holding that being scared in a **"haunted" attraction** then running and falling are inherent risks assumed by the terrified patron; and in *Mehr v. Federation Internationale de Football Association*(2015) WL 4366044, seven **soccer players** sued FIFA, an international soccer organization, five national/regional soccer organizations, including the USSF, USYSA, CYSA and AYSO, in a California federal court, that the soccer organizations did not have **concussion management protocols**. However the Court in dismissing the actions, stated that heading the ball and collisions by players were an inherent part of the game, and the dangers are "an integral part of the sport itself."

Premises Liability: In *Rogers v. Magic Mountain, LLC*(2015) WL 3456063, a paraplegic (paralyzed from the waist down) alleged that the forces of the **X2 roller coaster** caused a fracture of his right femur. A few days after riding the X2 the Plaintiff's right leg was amputated because of blood clotting. There was testimony at trial that the fracture occurred because his hip was dislocated, stemming from a 1996 accident. The jury found that Magic Mountain was negligent, but that the negligence was not a substantial factor in causing harm to the Plaintiff. The California Court of Appeal affirmed.

Security: The Plaintiff in *Cheatam v. Cedar Fair L. P.*(2015) WL 4273266 admitted that she was arrested and charged with assault after an incident at Kings Island Amusement Park in Ohio, near the entrance to the park. She was bumped in the leg by an eight-year-old, and she reacted by **slapping the girl in the face**. The imprint was still visible when park security/police officers arrived. Despite the fact that there was no dispute that Cheatam slapped the child, she filed an action against the park and six park officers. The park moved for summary judgment, but failed to persuade the judge that the slapping as presented was sufficient probable cause for the arrest and detention.

Releases and Waivers: Schlumbrecht-Muniz v. Steamboat Ski and Resort Corporation(2015) WL 5534923, was a United States District Court action for injuries sustained while participating at a **ski racing event** when the Plaintiff ran into a snowmobile parked near the ski lift. The court felt the race was all that was covered by the release and waiver and thus the action was not barred by an "**exculpatory release**." The full extent of participation was not defined in the release and running into a snowmobile properly parked was not an inherent risk of skiing. On the other hand in *McDonald v. Whitewater Challengers, Inc.* (2015) 116 A.3d 411, a teacher tried to defeat an exculpatory release of liability she signed by alleging economic duress imposed by her employer requiring her to **chaperone school children on a field trip**. She claimed this duress and her injury were caused by her **rubber raft striking a rock**. The Superior Court of Pennsylvania ruled that the exculpatory release was valid and enforceable.

In *Eriksson v. Nunnink* (2015) 233 Cal.App.4th 706, an equestrian **rider's parents** sued the equestrian rider's coach for wrongful death after the **rider fell from a horse in a competition and was killed**. The mother had signed a release of liability for her minor daughter, which the trial court and appellate court found to be in full force and effect, and the trial court's granting a motion for entry of judgment after Plaintiffs' presentation of their case at trial was proper. The trial court in *Bagley v. Mt. Bachelor, Inc.* (2014) 340 P.3d 27 granted Defendant's motion for

RCBA Establishes Charitable Foundation

by Brian C. Unitt

You may have noticed the mission statement of the RCBA that appears near the beginning of each issue of this magazine. The second of the three goals expressed in that statement is service to our community. At its October 2015 meeting, the RCBA Board of Directors took an important step to further that part of our mission by establishing a tax exempt (501(c)(3)) nonprofit corporation to be known as the Riverside County Bar Foundation, Inc.

The specific purpose of this Corporation is to serve the communities in which the Riverside County Bar Association members work. It will oversee official philanthropic projects of the bar including:

The Elves, which provides holiday gifts and meals for families in need;

Project Graduate, which provides assistance to Riverside County foster youth to graduate high school with a plan for the future;

Good Citizenship Awards to acknowledge the achievements of local high school students; and

Adopt-a-High School which educates students about the legal system.

If you attended the October general meeting, you heard about some of these programs, and you can learn more about them on our web site. In November, the impact of our new 501(c)(3) began to be felt. The Elves and Project Graduate both began raising funds for their programs under the new structure and for the first time were able to offer their donors the opportunity to claim a charitable deduction for their donations.

The officers and directors of the new nonprofit will be the officers and directors of the RCBA, so that its actions are aligned with the policies and mission of the RCBA. The RCBA board will remain responsible for establishing the official charitable or educational projects of the bar. Those projects will then be overseen by the foundation board, which will be responsible to receive, invest and utilize funds and property acquired through the solicitation of contributions, donations, grants, gifts, bequests and the like for the benefit of those projects.

The board will be advised by a steering committee composed of the RCBA President-Elect, and four members appointed by the RCBA President to serve staggered two-year terms. It will assist the board in reviewing the financial activities of the existing projects, and in developing fund-raising strategies for existing and later established projects.

The number of ways that RCBA members give back to our community is a continuing source of collective pride for our organization. The fact that the RCBA is so committed to developing projects to benefit the communities in which we all live and work is a tribute to our profession. The establishment of the Riverside County Bar Foundation will strengthen those efforts, and broaden our ability to secure the financial support those projects desperately need to fill the needs for which they were created.

Brian Unitt is a shareholder with Holstein, Taylor and Unitt, a Professional Corporation, specializes in civil writs, appeals and motions, and is chair of the steering committee for Project Graduate.

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summary judgment against the claims of a **snowboarder** who was injured while going **over a man-made jump**, on the basis of a **release on the ticket**. The Court of Appeals affirmed. However, the Oregon Supreme Court reversed, holding that the two parties to the release were not equals, and the Plaintiff was given no opportunity to negotiate its terms. The Court also stated that the snowboarder did not assume responsibility for unreasonable conditions created by the course operator. But the bottom line was "permitting defendant to exculpate itself from its own negligence would be unconscionable."

Boyd Jensen resides and practices in Riverside since 1979 and has worked for most of the above operators or their sister organizations. He sits on the Global Safety Committee of the International Association of Parks and Attractions, and F-24 Amusement Rides and Devices, Executive Committee of the American Society of Testing & Materials-International.

David Pasternak Tackles Bar Presidency While Battling Cancer

by Laura Ernde

This article originally appeared in the October 2015 California Bar Journal and is reprinted with permission.

When he is sworn in this month as the 91st president of the State Bar of California, David J. Pasternak plans to introduce a special guest without whom he would not be holding office. That person: his oncologist.

"I have cancer," Pasternak says in a matter-of-fact tone, reminiscent of Jimmy Carter when the former president revealed his cancer in August. "I haven't kept it a secret. I believe in transparency."

David Pasternak received a Bruins T-shirt signed with get-well wishes from Supreme Court justices and fellow State Bar trustees.
photo by Stephanie Diani

When Pasternak shared the news of his diagnosis with his State Bar colleagues last April via email, he said it was like being "hit between the eyes by a couple of Kenley Jansen fastballs." Jansen pitches for the Los Angeles Dodgers, one of Pasternak's favorite sports teams. Pasternak's cancer, like Carter's, started in the kidney and was removed. But while Carter's malignancy spread to the brain, Pasternak's went to the lungs.

Pasternak said he received his doctor's blessing before he stood for election. Experimental treatments have shrunk the lung tumors. He continues to undergo monthly infusions at City of Hope every three weeks that thankfully don't carry harsh side effects. He says he feels well and is more bothered by a bum knee than he is by the cancer.

But he is realistic about the uncertainties in his future. He's already talked to Vice President James P. Fox and Treasurer Danette E. Meyers to make sure they are willing to make some public appearances on his behalf if needed.

When Pasternak, 64, joined the board in 2012 it was as the first California Supreme Court appointee. Under governance reform enacted by the Legislature in 2011, the court gained five appointments to the board.

In addition to his State Bar responsibilities, Pasternak heads Pasternak & Pasternak, A Law Corporation, in Century City. He's one of only a few dozen lawyers in California who are full-time receivers – those appointed by the court to hold money or property in a dispute.

About three times a week you can find him at the Stanley Mosk Courthouse in downtown LA or another court. On a typical morning this summer, he appeared before Judge Joanne O'Donnell in Department 86 to wrap up a case in which he handled the assets of defendants who were sued by the state for violating corporate securities law. Pasternak said he was able to salvage about $600,000 from the defendants, although the extent of the fraud was estimated at more than $7 million.

The scheme centered around a warehouse call center that targeted the elderly, urging them to invest in technology purported to protect credit card investments. However, the defendants never created anything of value. The case's closure allowed Pasternak to write checks to the fraud victims. Any that aren't cashed will fund legal services at Public Counsel, a charitable purpose under the *cy pres* doctrine.

Justice Douglas Miller, RCBA President Kira Klatchko, Presiding Justice Manuel Ramirez and State Bar President David Pasternak.
photo by Jacqueline Carey-Wilson

State Bar President David Pasternak speaks at the Joint RCBA/SBCBA General Membership meeting on December 3 at the Court of Appeal.
photo by Jacqueline Carey-Wilson

The State Bar, in partnership with other state agencies, has been warning the public about such scams at town hall workshops across the state.

"This is exactly one of those scenarios," Pasternak said.

It's satisfying work for Pasternak. He enjoys receivership work not only to help people get their money back, but because of the variety each case brings. He describes the time he joined federal marshals in a search of a defendant's high-rise condo. The marshals unearthed $10,000 hidden under a planter but they only later discovered that the man had managed to stuff $50,000 cash into his shorts.

In some cases, Pasternak oversees the day-to-day operations of various kinds of businesses. All kinds. Recently, he found himself unexpectedly having to learn the ins and outs of running a medical marijuana dispensary. In other cases, Pasternak manages real estate, a role which often forces him to decide whether it makes more financial sense to fix dilapidated buildings or tear them down.

That role often makes him a thorn in the side of defendant property owners, who have brought pickets, threats and lawsuits against him. But the experience has given him a thick skin.

"It doesn't mean you did anything wrong. In fact, it probably means you're doing something right," he said.

On a recent day driving back to his office from court – expertly maneuvering his red Audi sports car through traffic as a Bruce Springsteen-themed radio station played in the background – an associate calls him about the hearing, and he allays some of her concerns.

When he arrives, a caller is waiting to discuss a potential building sale, and another associate stops by to talk about another case involving the recovery of assets that wound up in India.

Later, the other half of Pasternak & Pasternak arrives: his wife, Cynthia. The two are a recognizable pair in Los Angeles area legal circles, and both have been involved in local bar association activities. Cynthia Pasternak recently received a lifetime award from the Beverly Hills Bar Association.

"She's very supportive," including his decision to assume the responsibilities of the State Bar presidency, he says.

Cynthia Pasternak practices mediation and, according to her husband, is the more social one. She describes her husband as driven and an avid reader whose idea of relaxation is playing poker.

They have been married since 1988 and raised three sons together, the oldest of whom is from her first marriage. Greg, 33, is an actor and singer preparing for a career change: law school. Kevin, 24, is already a law student at Loyola School of Law. Their youngest, Matthew, 21, studies industrial design at Syracuse University in New York, the state where Pasternak was born.

David Pasternak was born in New York City but raised in the San Fernando Valley. Rubin Pasternak, his late father, was a Holocaust survivor who learned to sew and went into the fur business. His father wouldn't discuss the horrors of war with his son or the rest of the family much, although he did agree to a videotaped interview with the Shoah Foundation as part of a history project. Still, it's a difficult topic for David Pasternak – he still hasn't seen it.

"I haven't brought myself to watch [it]," he said. "It's unimaginable."

It was Pasternak's father who encouraged him to pursue a career outside the fur business. From an early age, Pasternak knew that he wanted to pursue a career in law, even though he never actually met a lawyer until entering Loyola Law School in 1973.

After graduation, his first jobs were with the government – the Department of Corporations enforcement division and the business and tax section of the California Attorney General's Office. In 1980, he joined the Century City firm of Tyre & Kamins as an associate. A few years later, he took his first receivership case on referral from a former supervisor at the Department of Corporations.

That first case grew into a specialty. He formed his own firm in 1993 and was a founder of the California Receivers Forum, a statewide practice group.

Michael Wachtell is a longtime friend who has served with Pasternak on the boards of the receivers forum, Bet Tzedek and Stephen Wise Temple. He said Pasternak has somehow figured out how to balance his work life with an active volunteer and social life.

"He's a hard worker. He never stops. He goes 24 hours a day," Wachtell said. "He's just a good human being."

Holly J. Fujie, who served as State Bar president in 2008-2009 and went on to become a Los Angeles County Superior Court judge, described Pasternak as "one of the most kind, ethical and hardworking lawyers I know."

Pasternak was Fujie's mentor and encouraged her to get involved with bar activities. "I don't know I'd be where I am today without David," she said. "He was always my biggest cheerleader."

In his spare time, Pasternak enjoys attending plays, concerts and sporting events, his favorites being Dodgers baseball and UCLA basketball and football.

Displayed prominently in his home office is a keepsake that recalls both his State Bar service and his passion for UCLA sports. It's an orange Bruin's T-shirt signed with get-well messages from justices of California Supreme Court and State Bar trustees. Trustee Miriam Krinsky knew he was upset that his illness prevented him from attending an annual event with the Supreme Court and arranged for the gift.

"Miriam knows I'm a loyal Bruin, and the combination of personal get well messages from the Supreme Court justices and board members on a UCLA shirt meant a lot to me," he said.

The $250,000 Recovery Limit of the Medical Insurance Compensation Reform Act: A Curse or a Benefit?

by DW Duke

Attorneys who practice in the arena of medical malpractice are all too familiar with the limitations on recovery of non-economic damages imposed by California Civil Code § 3333.2, which provides in pertinent part:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages.
>
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

The Medical Insurance Compensation Reform Act (MICRA) was enacted in 1976 as a direct response to the malpractice insurance crisis that was facing the health care industry at the time. In an effort to reduce the escalating judgments against health care providers, with resulting skyrocketing of insurance premiums, on May 16, 1975 Governor Jerry Brown, issued a proclamation calling for a special session to address the crisis. On September 23, 1975 Governor Brown signed MICRA into law. Since its inception, MICRA has served as a model for other states seeking to reduce the high cost of health care.

After the enactment of the Act, questions soon arose concerning the application in specific situations. In *Yates v. Pollack* (1987) 194 Cal.App.3d 195, the Court of Appeal held that, in wrongful death actions, the heirs would share the $250,000 in contrast to each receiving a separate $250,000 cap. However, in *Schwarder v. United States* (9th Cir. 1992) 974 F.2d 1118, the Ninth Circuit Court of Appeal held that the $250,000 cap applicable to heirs was separate from the $250,000 cap applicable to the injured party, or the injured party's spouse, who had sued and settled the action before death. In addition, in *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, the Fourth District Court of Appeal held that where a spouse's claim for loss of consortium is joined with a spouses claim for physical injuries, each is entitled to a separate $250,000 cap on noneconomic damages.

The $250,000 limit on noneconomic damages has been a source of controversy particularly in light of inflation over the last 40 years. The amount of $250,000 in 1975 would be worth more than $1 million today. The limit withstood a challenge on constitutional grounds 10 years after its enactment when the California Supreme Court refused to hear a case challenging its limits. Over the years there have been numerous attempts to increase the $250,000 cap to bring it in line with the current value of the dollar. The most recent effort was California Proposition 46 that would have increased the MICRA cap to $1.1 million with period adjustments occurring thereafter. The health care industry campaigned vigorously against this proposal which was defeated on November 4, 2014 with 67% of California voters opposing the measure.

Given the failure of efforts to increase the MICRA cap from $250,000, combined with the high cost of prosecuting medical malpractice actions, fewer and fewer plaintiff attorneys are willing to accept these cases. Moreover, many potential plaintiffs are discouraged at the outset and choose not to undertake the risk and expense associated with such cases given the limitation on recovery. In 1993 Governor Brown was asked to comment on the use of California's MICRA as a guide for other states to follow. In issuing a strong statement against this suggestion, Governor Brown said the following:

> "We have learned a lot about MICRA and the insurance industry in the seventeen years since MICRA was enacted. We have witnessed yet another insurance crisis, and found that insurance company avarice, not utilization of the legal system by injured consumers, was responsible for excessive premiums. Saddest of all, MICRA has revealed itself to have an arbitrary and cruel effect upon the victims of malpractice. It has not lowered health care costs,

HITECH's Impact on Health Care Defense Litigation: Two Common Scenarios

by Marissa Warren

As an attorney representing health care entity clients, you likely encounter on a regular basis one or both of these common scenarios:

> Scenario 1: You represent a hospital in a medical malpractice case and you're contacted by the attorney for a physician co-defendant who has not yet appeared in the case requesting a "courtesy copy" of the plaintiff's medical records from your client's facility. Does sending a "courtesy copy" of your client's record violate HIPAA?
>
> Scenario 2: You need to send your healthcare provider client's records to a retained expert in a medical malpractice case for a "quick review." Can you provide those records to your expert under HIPAA? What steps do you need to take to transmit the records in electronic form to your expert and remain in compliance with the requirements under the Health Information Technology for Economic and Clinical Health Act (HITECH)?

In order to answer the questions presented in the scenarios above, some background on HIPAA and HITECH is necessary.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), creates privacy and security regulations to ensure the confidentiality of protected health information ("PHI"). PHI includes an individual's past, present or future physical or mental health conditions, payments for the provision of health care to the individual, or any information for which there is a reasonable basis to believe it can be used to identify the individual, including common identifiers such as name, address, birth date and Social Security Numbers.[1]

1 45 CFR §160.103.

(continued from previous page)

> only enriched insurers and placed negligent or incompetent physicians outside of the reach of judicial accountability. For these reasons, MICRA cannot and should not be a model for national legislation."

In addition to the limitation imposed on recovery of noneconomic damages, MICRA set a statutory attorney fee structure limiting recovery to certain percentages that diminish as the amount of recovery increases. See California Business and Professions Code §6146. The statute of limitations was reduced to one year from the date of discovery with a three year outside limit that is tolled upon proof of fraud, intentional concealment or presence of a foreign body with no diagnostic or therapeutic purpose in the body of the person.[1] Defendants have a right to make period payments in some instances.[2] There is no collateral source recovery of insurance paid for medical care of the injured as a result of the injury, except in certain cases.[3] Finally, a plaintiff's attorney in a medical malpractice action must serve a 90 Day Notice of Intent to Sue before filing a lawsuit against a health care provider for medical negligence.[4] Notwithstanding the other provisions of MICRA, the greatest controversy arising from this statutory scheme remains the MICRA limit of $250,000 for noneconomic damages. The unsuccessful efforts to increase this amount have failed miserably to date in this author's opinion, in large part due to the amount of increase proposed. It seems that a more moderate increase in the cap, such as raising the cap to $500,000, would have a much better chance of success. However, at the present time, with efforts to quadruple the MICRA limits with each effort to increase the amount, it appears that the $250,000 cap will remain with us for many years to come.

DW Duke is the managing attorney of the Inland Empire office of Spile, Leff & Goor, LLP and the principal of The Law Offices of DW Duke.

1 See California Code of Civil Procedure §340.5.
2 See California Civil Procedure §667.7.
3 See Civil Code 3333.1.
4 See Code of Civil Procedure §364.

Originally, HIPAA applied only to health care organizations and providers, referred to as "covered entities." In 2000, the U.S. Department of Health and Human Services ("HSS") issued the Final Privacy Rule, requiring covered entities to enter into Business Associate Agreements ("BAAs") with any third parties (e.g. law firms) who may need to access PHI.[2] Thus, if you are a law firm or lawyer representing a covered entity, you have likely entered into a BAA, thereby contractually obligating you to protect PHI.

The HITECH "Final Rule," effective as of January 17, 2013, makes business associates of covered entities, including law firms representing covered entities ("covered law firms"), directly liable for violations of the Security and Privacy Rules under HIPAA for impermissible uses and disclosures of PHI. HITECH imposes compliance obligations through the HIPAA Privacy Rule and HIPAA Security Rule on covered law firms.[3]

Generally speaking, the HIPAA Security Rule requires implementation of administrative, physical and technical safeguards to protect PHI, as well as organizational requirements, and documentation of processes relative to the HIPAA Privacy Rule. HITECH also mandates that covered law firms comply with the Breach Notification Rule. Further, HITECH requires that business associates, such as covered law firms, also have BAAs with their own sub-contractors, such as expert witnesses.[4] (The HITECH scheme for oversight and safeguards is multi-level and this article is not meant to address all aspects of compliance with its regulations.)

Keeping in mind the requirements of covered law firms under HITECH, how do we answer the questions presented in our two scenarios?

> Scenario 1: Providing your hospital client's records to an attorney representing a co-defendant who has not yet appeared in your case, and therefore cannot send a formal discovery request or subpoena, without consent from the patient, would violate HIPAA. It is likely that any BAA between you and your client also restricts the informal provision of medical records to another party as well. It should be noted that HIPAA only regulates disclosures by covered entities of their own records, and by virtue of BAAs, by their counsel. Medical records or other PHI obtained in the discovery process, are not subject to HIPAA regulations. So the next time, the attorney of a co-defendant requests a "courtesy copy" of records from your covered client pre-litigation, politely decline, and suggest that the attorney send a request for production of documents once their client has appeared in the case.
>
> Scenario 2: If you are defending a healthcare provider who has medical records regarding the plaintiff in a case, the plaintiff's medical records maintained by your client can be transmitted to an expert under both HIPAA and HITECH, provided that certain conditions are met: 1) You must have a BAA in place with your healthcare provider client, before your client can send you the plaintiff's medical records; and 2) The covered law firm, must have a BAA with its subcontractor, in this case the retained expert. As a practical matter, since only one BAA is necessary per expert, and you may use the same expert in multiple cases, when providing records to an expert witness with whom you already have an existing BAA, it may be wise to include a letter to the expert reminding the expert of his or her responsibilities under HIPAA concerning handling and maintaining PHI, including directions regarding destruction or return of materials upon conclusion of the case.

Additionally, if you are providing medical records in an electronic format, e.g. email or CD, take reasonable steps to protect the PHI from unintended disclosures by encrypting the records using a password or encryption software, and providing the password information separately from the transmission of the records (i.e. verbally, or in a separate email or letter). If available, you can also utilize a secure email format (which requires a login and password in order to open the email or attachments). The goal is to limit exposure, and potential monetary or criminal penalties, related to the viewing of transmitted records by an unintended recipient.

In conclusion, while it may be more convenient to provide that "courtesy copy" to a co-defendant's attorney pre-litigation, or quickly email an expert a set of medical records to review, the HITECH Final Rule extends civil and criminal penalties (up to $50,000 per violation, and up to 10 years in prison dependent upon the degree of culpability) directly to covered law firms for noncompliance. Therefore, complying with the requirements of HIPAA and HITECH are a necessity when practicing health care defense litigation.

Marissa Warren is an attorney at the Orange County office of LaFollette, Johnson, DeHaas, Fesler & Ames specializing in medical malpractice and health care related defense litigation.

2 78 Fed. Reg. 5598.
3 78 Fed. Reg. 5591.
4 45 CFR §164.308(e); §164.314(a); §164.504(e).

Capitalists Make for Lousy Pharmacists

by Christopher Marin

By the time this issue comes out, Martin Shkreli will hopefully be fading out of the media cycle. For those of you who don't know, Martin Shkreli is a hedge fund manager, corporate executive, and now federal defendant who purchased the manufacturing license for a low-demand drug and then proceeded to raise the price by over 5000%. You read that correctly – five thousand percent.

While this price gouging does not appear to be related to the federal indictment (for securities fraud), it is what has made Mr. Shkreli infamous and probably subject to closer inspection by the FBI and U.S. Attorney. This story illustrates the intersection of law with the law of supply-and-demand, and so should provide some insight into how law and policy affect our health.

Shkreli is the founder and former CEO of the pharmaceutical company Turing Pharmaceuticals AG (named in honor of the father of computer science, Alan Turing, which is ironic since it was forced hormonal therapy to "cure" Mr. Turing's homosexuality that likely led to his suicide in 1954). According to Shkreli's Wikipedia article, his model for Turing Pharmaceuticals was "to obtain licenses on out-of-patent medicines and reevaluate the pricing of each in pursuit of windfall profits for the new company, without the need to develop and bring its own drugs to market. Since the markets for out-of-patent drugs are often small, and obtaining regulatory approval to manufacture a generic version is expensive, Turing calculated that with closed distribution for the product and no competition, it could set high prices."

One of the company's first acquisitions was for the drug Daraprim, an anti-malarial and antiparasitic primarily used to treat toxoplasmosis, a disease that mostly affects the small population of people with compromised immune systems, including many AIDS patients. Although no longer protected by patent, Daraprim treats a condition so rare that no other drug manufacturer sought FDA approval to produce its own generic version. Leading up to the drug's acquisition, Turing ensured that strict distribution controls were in place to keep it from being stockpiled by regular wholesalers and pharmacies. Then, with a corner on the drug's market, he increased the price from $13.50 per dose to $750 per dose – a 5,500% increase.

Nearly overnight, Shkreli became a media sensation and social media's favorite whipping boy. He also reignited the debate over drug prices, affordable access to healthcare, and the appropriate level of blame to place on capitalists for causing the U.S. to have one of the highest per-capita healthcare expenditures, yet come up 41st in total life expectancy.[1] Of course, when your business model places the term "windfall profits" close to "life-saving drugs," you can expect prices to be high. But there are other reasons given for why pharmaceuticals are so expensive…or lucrative.

One of the primary reasons given for high drug prices is the high cost of research and development to bring the drugs to market. There is little doubt that the process of research, development, clinical trials and other bureaucratic maneuvers is not cheap, but consider that some of those costs are offset by taxpayer-funded research that comes out of our public colleges and universities. I also suspect that marketing factors into the cost more than anyone would care to admit, and that raises a whole host of other issues revolving around how much this marketing affects your doctor's independent medical judgment and ultimately corrupts the doctor-patient relationship.

In Shkreli's case, there was no R&D and no major marketing expense for Daraprim. About the only costs Turing faced was the cost of producing the drug and recouping the upfront costs of obtaining the licenses and means of production. Yet these costs were already factored in before Turing acquired Daraprim. And while pricing can be just as much art as science, a 5000% adjustment comes across as just plain greedy.

Perhaps Shkreli's antics had a more subversive intent. Such an outrageous action and reaction could provide political cover to upset the U.S. healthcare market (or at least the for-profit healthcare market) with fixes for the problems raised by Shkreli's actions. In order to prevent this from happening again perhaps we can develop price controls over pharmaceuticals, or scale up the healthcare market by providing universal healthcare (like every other advanced economy). Or perhaps we can just convict Martin Shkreli for securities fraud and call it a day.

Christopher Marin, a member of the Bar Publications Committee, is a sole practitioner based in Riverside. He can be reached at christopher@riversidecafamilylaw.com.

1 http://data.worldbank.org/indicator/SP.DYN.LE00.IN/countries

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Unmasking the Truth

by Sherry MacManes

Millions of healthcare workers are being forced to choose between accepting the annual flu vaccination or wearing a mask for the duration of the flu season (November thru March). Proponents claim the policy, known as Vaccine or Mask (VOM), is required to safeguard the public and protect vulnerable patient populations. Opponents claim the policy is punitive in nature and violates fundamental rights.

Healthcare agencies are motivated to get healthcare workers vaccinated to meet a Department of Health and Human Services (DHHS) goal of achieving 90% annual vaccination rates of Healthcare workers and 80% vaccination rates of all U.S. employees by 2020.[1] Since 2013 Healthcare agencies have been required to report their employee vaccination rates to the CDC. Many believe these rates will influence Medical and Medicaid reimbursement in the future. Since Medicare and Medicaid funding is the lifeline of many healthcare agencies there is increasing pressure on healthcare agencies to meet the DHHS vaccine goal.

However, voluntary vaccine programs produce only a 43% compliance rate. Programs that allow vaccine refusal only under limited circumstances obtain a compliance rate of only 68%. Only programs which make vaccination a mandatory condition of employment have been found to be capable of meeting DHHS's goal.[2] Yet, such programs run the risk of violating fundamental rights of employee healthcare workers.

Some employees refuse the vaccine for medical reasons because they cannot receive the vaccine without putting themselves at risk of a serious physiologic reaction. Persons with egg allergies or sensitivities to any component of the vaccine may suffer life threatening reactions to the vaccine. Other healthcare workers are unwilling to risk known side effects of the vaccine such as nerve damage, paralysis and Guillain Barre Syndrome (a Polio-like syndrome associated with the flu vaccine). In 2014 60% of the settlements paid out by the National Vaccine Court were the result of injuries related to the flu vaccine, and the number one injury being compensated was Guillain Barre Syndrome.[3]

There is a plethora of medical literature which argues the safety, risks and efficacy of the flu vaccine and which serve as a rational basis for disagreement and debate as to best practices within the medical community. The Occupational Health and Safety Administration considered and rejected a mandatory vaccination policy requirement in 2009 (at the height of the H1N1 "epidemic") and again in 2012 finding that there was insufficient evidence to make annual flu vaccination mandatory for healthcare workers.[4] With flu vaccine efficacy ranging from a low of 10% to a maximum of 60% and a median of about 40%, there is no reason to make healthcare workers risk their health and safety on this vaccine.[5]

A number of healthcare workers refuse the vaccine on religious or philosophical grounds. Title VII of the Federal Civil Rights Act, and the EEOC (Equal Employment Opportunity Commission) require employers to reasonably accommodate an employee's religious belief. Importantly, a religious belief need not be a recognized tenet of an established religion, rather EEOC's guidance requires only that it be a sincerely held belief. Since herd immunity theory (currently popular in scientific theory) states that only a certain percentage but not all members of the community (herd) need to be vaccinated in order to safeguard the population, it is not unreasonable to grant vaccine waivers to those whose fundamental beliefs prohibit vaccination.[6]

Traditionally U.S. courts have found VOM policy to be an acceptable accommodation by employers for healthcare workers who refuse the flu vaccine. Courts have given credence to the information offered by healthcare agencies purporting to show that VOM policies are in place to protect patients and the community. However, a recent case may have courts rethinking this stance. On September 8, 2015, in *Sault Area Hospital v. Ontario Nurses Association*, an arbitrator found the VOM policy to be coercive and unreasonable.[7] This was a 126 page decision issued after reviewing over 3500 pages of medical information and testimony by competing medical experts.

The arbitrator cited as factors in his decision the fact that early during the 2014 flu season when medical agencies were notified by the CDC and other healthcare report-

1 See http://www.healthypeople.gov/2020/topics-objectives/topic/immunization-and-infectious-diseases/objectives#4658.

2 See http://www.cdc.gov/flu/healthcareworkers.htm.

3 See http://www.hrsa.gov/vaccinecompensation/reportfromdepartmentjustice.pdf.

4 See http://assets.usw.org/resources/health-care-workers-council/OSHA_Position_on_Flu_Vaccine-1.pdf.

5 See http://www.cdc.gov/flu/professionals/vaccination/effectiveness-studies.htm.

6 See http://www.niaid.nih.gov/topics/pages/communityimmunity.aspx.

7 See https://www.ona.org/documents/File/onanews/OHA_SaultAreaHospitalONAAward_20151028.pdf

ing agencies that the influenza vaccine was ineffective in combating the flu (only 18-23% effective) the hospital system in question (like most others) did not require all health care workers to wear masks, or lift the requirement of wearing a mask for employees who had refused the vaccine. Furthermore, a review of the influenza outbreaks within the healthcare system showed that when outbreaks did occur, roughly 75% of those affected had in fact received the flu vaccine. Finally, the arbitrator cited a CDC report that found that wearing a mask had no discernable influence on transmission of the flu. In light of these findings the arbitrator found that requiring asymptomatic employees to wear a mask continually during their working hours for six months of the year without adequate scientific foundation was a practice that was not meant to protect patients, but to coerce employees into accepting the flu vaccine and increasing vaccination rates. This finding was supported by a review of recommendations and minutes of various committees within the hospital system. Unfortunately, this case was decided in Canada. However, the reasoning and information presented is applicable to U.S. Healthcare workers and the policies implemented are the same.

Hopefully, in the near future U.S. Courts will also recognize VOM policies as unreasonable tools designed to increase vaccination rates because they are overreaching and do not in fact protect patients or the public. Perhaps then hospitals will once again promote effective strategies for dealing with the flu and safeguarding the public. These include scientifically verified and effective universal interventions such as good hand hygiene, cough etiquette and staying out of the workplace or other public places when sick unless seeking medical treatment. These interventions that are not controversial, not disputed, and respect the rights of all healthcare workers while protecting the common good.

Sherry MacManes is a general practice attorney admitted to the California Bar in 2014. She has been a registered nurse for over 20 years. She enjoys helping others and looks forward to continued service of the medical and legal communities.

Opposing Counsel: William D. Shapiro

by Bruce E. Todd

The legal reputation of William "Bill" Shapiro has aged like a fine wine.

In 2015, the long-time member of The American Board of Trial Advocates was honored as the CAL-ABOTA California Trial Lawyer of the Year. Thus, he joined a very small fraternity of Inland Empire attorneys to achieve this honor including Donald C. Brown, Florentino Garza and Jeffrey Raynes.

William D. Shapiro

Shapiro's path was not always on course to become a first class lawyer. About the time he was graduating from high school and entering Chaffey College in the early 1970's, he was interested in pursuing a career as a stock car driver. He participated in various National Hot Rod Association (NHRA) races. He realized, however, that this was going to an expensive career.

"I got my doors blown off in some races", he said in referring to some of his better financed competitors. "I had an epiphany and decided that I would have to get my act together and find a real job."

He completed his schooling at Chaffey College and then started at Cal State Fullerton. He obtained a degree as a Physical Education major in 1974 and was all set to start a coaching job at Valencia High School in Placentia. He said that he was out for a run one day on State College Blvd. in Fullerton and observed that a tall building was under construction for a new law school (Western State College of Law). At that very moment, he decided that he wanted to go to law school. He inquired the next day about entering into the program.

"It was the single best decision that I made in my entire life," said Shapiro.

While he was in law school, he met two classmates who would become extremely influential upon the course of his legal career—Tim Peach and Bill Weathers (currently the name partners of the San Bernardino based personal injury law firm of Peach & Weathers). Peach's father's Robert was operating a firm called Hayton & Peach in San Bernardino. Shapiro and his new friends started working in 1975 as law clerks for the firm. During this time, he also eventually became the student body president at Western State—where he was eventually inducted into the school's "Hall of Fame".

After Robert Peach and his law partner Arthwell Hayton (whose daughter Terry is now Weather's wife) split their legal practice, it eventually became Peach, Shapiro & Peach in 1979. Weathers moved along to a stint as an insurance defense attorney at Thompson & Colegate in Riverside.

Shapiro remained with PS&P until 1983. He then decided that he wanted to start his own law firm. In 1983, he started the Law Offices of William D. Shapiro and he specialized in plaintiff's personal injury litigation. It was particularly during this time that Shapiro developed a reputation as one of the top personal injury attorneys in the Inland Empire, and for that matter, in California. He handled many high profile cases ranging from products liability to medical malpractice to everything in between.

He eventually decided in 2010 to merge his law firm with a highly respected Orange County personal injury law firm headed by Mark P. Robinson, Jr. The two law firms morphed into Robinson Calcagnie Robinson Shapiro & Davis and it is at this law firm where Shapiro is currently hanging his shingle.

Although the firm's main office is in Newport Beach, Shapiro operates its San Bernardino office. He has fond memories of the Inland Empire and he has developed numerous long lasting friendships with other attorneys in the IE. He prefers the area's small town collegiality. He also has great respect for the caliber of attorneys in the Inland Empire.

"I have practiced all up and down the state and I have yet to see a legal community like there is in the Inland Empire," he says. "The bar here—I have the closest of friends—my closest friends are lawyers here."

This writer has had numerous cases with Shapiro in the past and, besides finding him to be a feared but respected adversary, I have observed that he is also one of the most personable, humble and civil people that one will ever meet. He is extremely well respected by his peers in the legal community. This explains why he has received numerous awards from various legal organizations honoring his civility.

What is also refreshing about his outlook on his personal injury practice is that a trial victory is not necessarily about the money. It is also about the beneficial effects which the outcome might have on the community. For example, he recently prevailed in a trial against an Inland Empire city. His client was injured when the client's vehicle struck a metal box which Shapiro contended had been

placed too close to the roadway. After the verdict, he was approached by one of the jurors who explained that the jury was concerned that the box may present a danger to other motorists. The juror wanted to know what could be done to remove it (which was ultimately done by the city).

"The power of the jury is so important because their primary concern was that they wanted the city to make the repairs," he said.

Shapiro has now been practicing since 1979. He has seen many changes—some better and some worse—in the legal community. When questioned about what he would advise a new lawyer fresh out of law school, he had these tips.

"I would tell them the concept of fulfilling your word and protecting the relationships which you establish," he said. "Don't think that there is going to be a finish line and don't think that someone is going to think that you are weak because you are being cordial."

This advice should be taken seriously because it comes from someone whose resume reads like a "lawyer's lawyer". Besides his membership in ABOTA, he is in the International Academy of Lawyers, the International Society of Barristers and the American College of Trial Lawyers. He has been a past president of the San Bernardino County Bar Association, American Inns of Court (Joseph B. Campbell Chapter) and the Consumer Attorneys of the Inland Empire.

A kind of Renaissance man, Shapiro's interests do not solely lie in the law. He is a respected guitarist (particularly pedal steel) who was the founder member of a country-rock group called Thunder Road.

"I got into music as a kid," he said. "My mom bought me a guitar from a White Front store when I was about 12 years old."

In the 1980's and 1990's, he was member of a band called "Justice" which was well known within the local legal community. Their gigs at such places as the Cask 'n Cleaver attracted many members (lawyers, judges, secretaries, court reporters, etc.) of the legal community. The band included other notable local attorneys including Rob Nagby, Paul Burkhart, Vinnie Nolan and, of course, his old buddy Tim Peach.

When he was a member of the aforementioned Thunder Road from approximately 1996 to 2007, the band played many gigs in Las Vegas and opened for such country music luminaries as Crystal Gayle, Keith Urban and Toby Keith. For some reason, which Shapiro cannot completely comprehend, the band was more famous in Europe and even had a number one hit titled "Take It Like A Man" in seven countries. The band was once nominated as the Country Artist of the Year by the European Music Association.

Shapiro is also an avid collector of classic vehicles (particularly Chevrolets) and a sizeable garage at his law office is stocked with Corvettes, Camaros and other vintage roadsters. He even still has his old van (restored to near mint condition) which he drove in his college days.

He lives with his wife Sue and he periodically enjoys scuba diving (he even has an instructor's license). He has three boys (Matt, Brian and Kevin). Bill was the first member of his family to ever become involved in the legal profession but Brian is scheduled to graduate from law school this spring. Matt is considering the legal profession while Kevin is working on obtaining his master's degree in architecture.

The local legal community is truly honored to have someone of Shapiro's skilled, yet humble and civil, reputation as one of its members.

Bruce E. Todd, a member of the Bar Publications Committee, is with the firm of Osman & Associates in Redlands.

DRS Mediator Profile: Soheila S. Azizi

by Krista Goodman

Editor's Note: *RCBA Dispute Resolution Service (DRS) is proud to introduce you to the members of our experienced panel of neutrals who dedicate their time and legal expertise to our Riverside County public benefit alternative dispute resolution (ADR) programs. Please enjoy learning more about DRS panelist Soheila S. Azizi, whom we're grateful and privileged to have involved in our programs.*

Soheila S. Azizi

With the foundation of her legal practice built upon advocating for equality, civil rights, and social justice, attorney Soheila S. Azizi has devoted her personal and professional life to promoting peace and unity for her clients and community.

Based in Rancho Cucamonga, The Law Offices of Soheila S. Azizi & Associates has been serving the Inland Empire for nearly 20 years in the areas of family law, elder abuse, medical malpractice and personal injury. Azizi's family law practice extends to matters concerning: divorce, property division, child support, spousal support, child custody and visitation, child relocation, domestic violence law, adoptions, guardianships, and domestic partnerships. Her firm handles personal injury matters concerning negligence by hospital and health care providers, nursing home neglect, and elder abuse, in addition to providing legal document preparation services to self-represented litigants and low-income families.

Azizi began her undergraduate education at the National University in Tehran, Iran in 1976. Her studies were interrupted shortly thereafter by the Iranian Revolution, which resulted in the closure of the university. She then immigrated to the United States to escape the warring factions that did not tolerate people of her faith. In 1979, she completed her Bachelor of Arts in Economics at Hofstra University in Hempstead, New York.

Later, she completed an Associate of Arts degree in Design and Merchandising, with which she built a lucrative fashion business in manufacturing and merchandising her own line of clothing.

"It wasn't until my return to college as a second career that I chose law as a vehicle that could empower me to do what I wanted to do," she remembered.

Azizi chose the University of La Verne, School of Law to continue her studies. While attending the University of La Verne, she became a member of *The Law Review*, *Journal of Juvenile Law*, and dean of the Delta Theta Phi International Law Fraternity. She also interned with the Riverside Public Defender's Office, representing defendants on non-felony charges, and the San Bernardino District Attorney's Office, conducting preliminary hearings and research. In 1993, she completed her Juris Doctorate and was admitted to California State Bar.

At the beginning of her legal career Azizi worked part-time as an associate with a Los Angeles-based firm as well as maintained her own independent practice. Four years later, she opened her own firm in Rancho Cucamonga, where her practice has been based ever since.

"It wasn't originally intended to be a family law practice. It was intended to be the voice of the victims of injuries," she remarked. "What started out as a serious injury law firm evolved into us helping families struggling with their conflicts. That coincided with my pursuit of mediation and conflict resolution as an alternative to litigation."

With a heart for building unity and peace among people, conflict resolution became a major focus of Azizi's legal practice. She is always actively working toward refining her skills as a neutral by participating in continuing legal education with an emphasis on advance family law and mediation training.

Amongst her comprehensive training, Azizi has completed: "Advanced Family Mediation Skills," and "A Systematic Approach to Mediation Strategies (STAR)," at the Pepperdine University School of Law, Straus Institute for Dispute Resolution; "Mediating the Litigated Case," at the Inland Valley Justice Center (IVJC) in 2010 (she served as a co-presenter on mediation in litigation the following year); a 32-hour training program on advanced family law mediation through the Center for Understanding in Mediation; and last year was a participant in a full-day workshop entitled "Conflict to Consensus." Also in 2014, she completed 18 hours of intermediate mediation training through the Collaborative Divorce Professionals of the Inland Empire (CDPIE), wherein she has also been a member since 2010.

Azizi is affiliated with and serves on the panels for several specialized ADR organizations and programs. She is currently on the panels for three court mediation programs administered by DRS in conjunction with and for the Riverside County Superior Court. These include the Family Law Voluntary Settlement Conference (VSC) Program at Riverside, the Probate Mediation Program, and the Trial Assignment Mediation Program (TAM) at Riverside, which are all funded by the Dispute Resolution Programs Act (DRPA) through the County of Riverside.

Azizi has been involved with the VSC Program at Riverside since it was first implemented in November 2010. The program commences on the first and third Fridays of every month at the Riverside Family Law Courthouse. It has

become the most successful family law mediation program in the State of California, averaging seven out of 10 cases completely resolved on the same day as the VSC.

The Probate Mediation Program works significantly different. Probate matters, primarily involving trusts and conservatorships, are referred to the program by the Court. DRS assists the parties by coordinating the assignment of a mediator and the scheduling of the mediation date. It also provides facilities for confidential use at the Riverside County Bar Association. The parties receive three hours of mediation at no cost through the program pursuant to their Notice of Referral by the Court.

"When I got my first few probate cases, I realized that these were very different. I had to use a completely different set of skills that I didn't know I had," Azizi explained. "I'd been trained how to do transformational mediation, but I hadn't really done a lot of it until I started doing the probate mediations."

"It has proven to me that when we connect with people from heart-to-heart, and we intersect the powers of love, motivation and goodness, that it takes us to a different realm." She continued, "It gives me hope and satisfaction to bring resolution to families with struggles who were once at odds with each other."

The TAM Program at Riverside commences every Friday at the Riverside Historic Courthouse. Matters on the civil trial calendar are referred to trial assignment mediation with talented volunteer mediators such as Azizi to receive one last opportunity to resolve the matter before it goes to trial the following week. The Court provides facilities for confidential use in the courthouse for the mediations.

"That program has really made a believer out of me because I never thought that you could have a chance at settling a case that late in the process," Azizi said.

"I'm a believer in early neutral evaluation. I'm a believer in trying a voluntary settlement conference at every step of the process. I've become a believer in this program because I have settled cases where the litigants and attorneys appear in court with their witnesses lined up, with their boxes of exhibits, and they are ready to start trial on Monday."

Azizi also serves the local courts as a volunteer certified temporary judge, settlement officer, mediator and arbitrator for Riverside and San Bernardino County Small Claims, Superior Court Family Law, and Civil Mediation panels.

She is a co-founder, board president and panelist for California Arbitration & Mediation Services (CAMS), and a panelist for First Resolution Services, Inc. She is a past panelist for Inland Valley Arbitration & Mediation Services (IVAMS) and past supervising panelist for the IVJC. Additionally, she has served as an Arbitrator for the Mandatory Fee Arbitration Program of the California State Bar since 2000.

"I'm hoping for a day when we can call it something different than 'alternative dispute resolution.' It shouldn't be the alternative," Azizi said. "The alternative should be litigation as a last resort, and not as the first option."

Azizi is affiliated with various legal organizations, including the Riverside County Bar Association, the San Bernardino County Bar Association, the Western San Bernardino County Bar Association, and the Iranian American Lawyers Association. She is a past member of the Consumer Attorneys Association of Los Angeles.

Outside of her legal practice, Azizi devotes her spare time to community-building and humanitarian efforts.

"Many of the organizations and activities that I'm involved with have to do with unification, bringing the community together, and creating harmonious relationships between diverse groups of people," she explained.

She is a co-founder and a past president of the Upland Interfaith Council and she currently serves as a board member of the Spiritual Assembly of Baha'is of Upland, participating in administrative, consultative, community-building and dispute resolution activities. She served as a board member for the Upland Community Partnership for Youth Development from 2005 through 2012.

In 2005, she co-founded the "Women on the Move Network," which started out as a conference and grew into a movement. "Empowerment through service became the goal of the organization," she said.

"It was a small organization working with housing projects in facilities where we could focus on young girls ages 9 to 11 and give them the tools that they needed to become the heroes in their own lives. The program was called 'Who's Your Hero?'" She continued, "Now we've expanded the program to cover ages 11 to 13, and we have other programs for older girls at foster facilities." She continues to serve in the capacity as a board member.

"It is in line with this goal and vision of equality and justice for all, and this vision for the accessibility to justice for all members of the community. This has always been very near and dear to my heart," she explained with sincerity.

Azizi has taught, guest-lectured, presented and co-presented on several topics concerning mediation, various legal matters, civil rights, justice and equality at the University of La Verne, California State University at San Bernardino, the Southern California Mediation Association, and many others. She has participated and co-sponsored the ADR Symposium (2011), the Civil Rights Symposium (2012), and the "Cause Lawyering" Symposium (2014) through the University of La Verne, College of Law.

"I think that we as human beings will reach our highest potential when we know how to overcome conflicts. Everything I do in life is aimed or focused at bringing peace to the world. If that's outside my reach, then to do so at least within the surrounding community."

Mrs. Azizi and her husband Dr. Faramarz Azizi, a medical physician, live in Upland.

For more information about RCBA Dispute Resolution Service, Inc., visit rcbadrs.org or call (951) 682-2132.

Krista Goodman is the Scheduling Coordinator for RCBA Dispute Resolution Service, Inc. She completed her Master of Arts in Strategic Public Relations from the University of Southern California and her Bachelor of Arts in Journalism & Media from California Baptist University.

U.S. Supreme Court to Review Controversial Women's Health Issues in 2016

by Alexandra B. Andreen

Women's reproductive health issues will be at the forefront of the United States Supreme Court's review in 2016. The Court will consider yet another challenge to the Affordable Care Act's (ACA) contraceptive mandate and will review a law with major implications for access to abortion.

Another Challenge to the ACA's Contraceptive Mandate

The Supreme Court received petitions for review of seven cases presenting related challenges to the ACA's contraceptive mandate. The challengers claim the Act's accommodation allowing opt-out from the mandate for religiously affiliated organizations still violates the Religious Freedom Restoration Act, which prohibits the government from substantially burdening the exercise of religion unless the burden is the least restrictive means of advancing a compelling government interest.[1] The ACA completely exempts religious groups like churches from the contraceptive mandate; however, religiously affiliated non-profits, like schools, hospitals, and charities, are instead offered an accommodation. Such organizations can opt out by providing notice to the Department of Health and Human Services or completing a two-page form.[2] In such cases, the government steps in and fills the gap in coverage. The religiously affiliated organizations argue that even the requirement to opt out violates their beliefs because doing so triggers alternative coverage for the contraceptive methods they oppose. The government stands by the opt-out process, arguing religious organizations, especially large employers like universities and hospitals, should not be allowed to prevent the government from filling the coverage gap for employees who may not share the religious beliefs of their employers.[3]

Recent reporting by Reuters indicates as many as 3.5 million people are employed by charities with religious affiliations and suggests that the rise in the use of intrauterine devices, which are viewed by some religions as life ending devices, may contribute to the organizations' opposition in some of these cases.[4] Regardless, due to the large number of individuals employed by organizations with religious affiliations, the Supreme Court's decision on the consolidated matters could have widespread impacts. Depending on the Court's ruling, such employees could find themselves without coverage for contraception and faced with covering costs themselves. The Court's decision will also resolve an emerging circuit split. While the majority of appellate courts have upheld the accommodation, the Eighth Circuit recently issued a contradictory ruling, holding that the fines faced by the organizations imposed a substantial burden and declaring that the accommodation was not likely the least restrictive means of achieving the government's interests in public health and ensuring equal access to healthcare for women.

Challenge to a Texas Abortion Law

The Supreme Court will also review a Texas law that requires physicians who perform abortions at clinics throughout the state to have admitting privileges to send patients to a hospital within thirty miles of the clinic and requires abortion clinics to have equivalent facilities to ambulatory surgical centers.[5] A district court in Texas enjoined enforcement of the law; however, the Fifth Circuit disagreed with the analysis finding the law unconstitutional. The Supreme Court will weigh in on the constitutionality of the law, which could have drastic impacts on abortion clinics. In briefing, Respondents note that "[h]alf of Texas' abortion facilities closed leading up to and immediately following implementation of the admitting-privileges

1 Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1.

2 U.S. Department of Health & Human Services Press Release, July 10, 2015, *available at* http://www.hhs.gov/about/news/2015/07/10/administration-issues-final-rules-on-coverage-of-certain-recommended-preventive-services-without-cost-sharing.html; EBSA Form 700, *available at* http://www.dol.gov/ebsa/healthreform/regulations/coverageofpreventiveservices.html.

3 Brief for the Respondents in Opposition at 13-34, *East Texas Baptist University v. Burwell* (No. 15-35), *available at* http://www.justice.gov/sites/default/files/osg/briefs/2015/10/01/15-35_etbu_v_burwell_2015-09-08_-_final.pdf

4 Jilian Mincer, *U.S. IUD use attracts new opposition from anti-abortion groups*, Thompson Reuters, Dec. 1, 2015, available at http://www.reuters.com/article/us-usa-healthcare-iuds-insight-idUSKBN0TK3CI20151201 (citing data from the National Center for Charitable Statistics at the Urban Institute and the Guttmacher Institute).

5 2013 Texas House Bill No. 2.

requirement", and almost half of the remaining clinics would face closure if the entire law is enforced.[6] The law is opposed by physicians and clinics who contend the law's requirements are not necessary to ensure services are safely performed and only act to hamper access to abortion. In contrast, proponents of the law argue it raises the standard of care for all abortion patients.[7]

There are larger implications for the Court's review of this case. The Fifth Circuit's ruling created a circuit split as to application of the undue burden standard, which has been used to evaluate laws concerning abortion since the Court's 1992 ruling in *Planned Parenthood v. Casey*. The term lacks clarity and has been unevenly applied, with the Seventh and Ninth Circuits, as well as the Iowa Supreme Court, taking one approach, which evaluates the extent to which the abortion restriction also furthers a state interest, and the Fifth Circuit disavowing this approach.[8] Clarification of the standard from the Court will have significant impacts on the future regulation of abortion and upon the access to abortion in Texas and other states that have enacted, and may enact, similar legislation.[9]

Alexandra B. Andreen is an attorney in the Municipal Law practice group of Best Best & Krieger, LLP's Riverside office, focusing on litigation.

6 Reply Brief for Petitioners at 8-9, Whole Woman's Health v. Cole (15-274), *available at* http://www.scotusblog.com/wp-content/uploads/2015/10/2015-10-16-Reply-Brief.pdf.

7 Brief in Opposition at 2, Whole Woman's Health v. Cole (15-274), *available at* http://www.scotusblog.com/wp-content/uploads/2015/10/15-274-Brief-in-Opposition.pdf.

8 Petition for Writ of Certiorari at 13-15, Whole Woman's Health v. Cole (15-274), *available at* http://www.scotusblog.com/wp-content/uploads/2015/09/2015-09-02-Cert-Petition.pdf.

9 The Court received a petition for review of a Mississippi law with some similarity to the Texas law. Review has not yet been granted or denied by the Court for this term.

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Frazzle or Focus: How to Cope with the Unique Challenges of Legal Practice

by Richard Carlton, MPH

Ever wonder why do so many legal professionals struggle with anxiety or depression?

Though we have heard a great deal about the prevalence of substance abuse problems in the legal profession, depression may be even more common in the attorney population than substance abuse issues. A study of twelve thousand adults by a team of researchers from Johns Hopkins University discovered that among all the occupational groups represented in that large sample, attorneys had the highest prevalence of signs and symptoms of clinical depression. The rate of depression among the attorneys studied was 3.6 times the norm for all occupations.[1] What accounts for such a high prevalence of mood disorders in the legal field? Can the answer be found in the challenges associated with legal practice alone, or is something else at play here?

Is it nurture or nature that determines which of us will struggle with disorders like anxiety, depression, and substance abuse? Scientists say it is a little bit of both. Some of us are born with a particular brain chemistry which makes us more susceptible to these problems. Most of us face challenging circumstances from time to time, but only a small portion of us become anxious, depressed or turn to alcohol or drugs to cope; the factor that often determines how we react to these problems appears to be the particular brain chemistry we inherited. The brains of those of us who inherit a susceptibility to anxiety and/or depression react to challenges in life in a manner that produces or exacerbates these symptoms. It seems unlikely, therefore, that the stress of legal practice alone accounts for the high incidence of anxiety and depression among legal professionals.

Those of us who work with legal professionals who struggle with anxiety, depression and substance abuse believe that self-selection contributes to the high incidence of mental health problems in the profession. For reasons that we don't yet fully understand, some individuals who are susceptible to experiencing substance use and mood problems are also drawn to the practice of law. The same personality traits that are over-represented in the populations of adults recovering from substance-related disorders and mood disorders—high achievement orientation, perfectionism, obsessive-compulsive—are also common in the legal community.[2]

Law School Professor and Psychologist Susan Daicoff explains that the law school experience further exacerbates these tendencies, often producing increased aggression under stress, a preference for competition versus cooperation, and a failure to rely on natural sources of social support from one's peers.[3] Her study also revealed high rates of anxiety and depression symptoms in the cohort of students she followed for three years, and other studies of law school populations have produced similar results.

Lawyers are taught to anticipate and prepare for a whole range of problems that non-lawyers are generally blind to—even far-fetched outcomes need to be considered. When Professor Martin Seligman followed and repeatedly assessed the Virginia School of Law 1990 class for three years, he discovered that the most pessimistic students in that class performed the best on all the standard measures of law school performance. These traits that help lawyers to be good at their profession may make many miserable when applied to their personal lives.[4] Professor Lawrence Krieger states in *The Hidden Sources of Law School Stress*, "thinking like a lawyer is a legal skill, not necessarily a life skill."[5] Studies have shown that lawyers tend to be competitive and prefer analytical thinking over the expression of feelings (both their own and others). These traits are often effective when applied to professional practice but rarely produce positive results in personal relationships.

A Closer Look at Depression

Depression associated with a significant personal loss or bereavement is normal, and not considered a clinical condition unless it lasts for a period of months. Of greater

1 Eaton, Anthony, Mandel & Garrison, "Occupations and the Prevalence of Major Depressive Disorder," *Journal of Occupational Medicine*, 32 (11), 1079-1086 (1990).

2 S. Daicoff, *Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses,* Law and Public Policy: Psychology and the Social Sciences (2004).

3 Diacoff, note 4.

4 M. Seligman, *Authentic Happiness*, Free Press (2002).

5 Krieger, L., *The Hidden Sources of Law School Stress*, Lawrence Krieger (2014).

concern is the presence of the above symptoms in the absence of any obvious event or trigger, or symptoms that don't go away. Common forms of depression include a Major Depressive Episode, characterized by some or all of the above symptoms lasting two weeks or longer; and Dysthymia, characterized by less severe, but chronic symptoms lasting two years or longer. Dysthymia can be insidious. Many people cope with depressive symptoms for years before recognizing or acknowledging that they have a condition that isn't going to abate without help.

Depressed and potentially suicidal individuals often exhibit changes in their mood, appetite and energy level, which can be noticed by colleagues, friends and family members and should be a matter of concern. Common symptoms of depression include:

- feelings of hopelessness;
- restlessness and irritability;
- fatigue or weakness;
- inability to concentrate;
- loss of appetite; and
- diminished interest in sex and recreation.

Depression sufferers undergoing treatment typically experience a marked decline in the severity of symptoms. Treatment usually consists of psychotherapy, medication, or a combination of the two. People with depression often begin to see positive results within a month of beginning treatment.

How can attorneys cope with stress?

Absence of control over the outcome of one's efforts, inadequate time to complete work satisfactorily, constant pressures to produce faster, the adversarial nature of most legal work, the dire consequences of an error in judgment or oversight—all are common sources of considerable stress in legal practice. In a recent sample of North Carolina lawyers, 31 percent of the respondents strongly agreed or agreed with the statement "I often feel worried or anxious."[6] Still, the majority of attorneys learn to cope successfully with these challenges.

The human brain is hardwired to scan the environment for threats. This is a survival mechanism that stems from a time when predictors were plentiful. What was originally referred to as the "fight or flight" reaction in our nervous system is now referred to as the **Three Fs**: *fright, fight or flight*. We not only scan for very real threats, we also tend to worry about possible negative outcomes. When you add this evolutionary tendency to the training all legal professionals receive, namely to anticipate and prepare for all possible negative scenarios, you wind up with a lot of stress. It's no wonder most legal professionals complain about stress.

The tendency of our brains to constantly return attention to the scariest thoughts not only creates an unnecessary level of stress, it also distracts our attention from addressing the important matters at hand. The best anecdote I know of for this dysfunctional brain function is the mental discipline of "paying attention," which can be gained from devoting time to one of the many available ***mindfulness practices***.

Mindfulness is about learning to focus our attention on something that is right in front of us or happening in this very moment. Studies have shown that mindfulness practice can have a whole host of benefits including stress reduction, beneficial changes in the immune system, and enhanced memory/attention skills.

The Lawyer Assistance Program

Established by the California Legislature in 2001 (Business & Professions Code §§6140.9, 6230-6238), the Lawyer Assistance Program is a confidential service of the State Bar of California. Staffed by professionals with many years of experience assisting the legal community with personal issues, the LAP provides assistance to attorneys whose personal or professional life is being detrimentally impacted by substance abuse, other compulsive behaviors, and/or mental health concerns such as depression and anxiety.

The statute that created the program (SB 479, Burton) states that it is the "intent of the legislature that the State Bar of California seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety."

The LAP is a comprehensive program offering support and structure from the beginning stage of recovery through continuing care. It includes:

- individual counseling;
- expert assessment and consultation;
- assistance with arrangements for intensive treatment;
- monitored continuing care;
- random lab testing;
- professionally facilitated support groups; and
- peer support groups.

The program also works with family members, friends, colleagues, judges and other court staff who wish to obtain help for an impaired attorney. Attorneys may self-refer into this program or may be referred as the result of an investigation or disciplinary proceeding (B&P Code §

6 National Institute to Enhance Leadership and Law Practice (Buies Creek, North Carolina), *North Carolina Chief Justice's Commission on Professionalism, State of the Profession and Quality of Life Survey* (2002-2003).

6232). In some cases, monitored participation may result in a lower level of disciplinary action. When requested by an attorney who is facing disciplinary charges and whose practice has been impaired by personal problems, the LAP can monitor the attorney's continuing recovery for the State Bar Court's alternative discipline program and for the probation unit.

One of the unique characteristics of this program is that the confidential nature of participation in the program is mandated in the statute that created the program. The fact that an attorney is participating in the LAP is confidential (B&P Code § 6234). No information concerning participation in the program will be released without the attorney's prior written consent.

In addition to providing professional assistance, the LAP also offers free short-term consultations concerning any personal issue as well as consultations with career consultants who specialize in working with attorneys looking to kick-start or change the course of their legal career.

Getting Help

Attorneys may be less likely to take care of themselves than medical doctors and other professionals. Mental health professionals have observed that attorneys, who are trained to be impersonal and objective, often apply the same approach to their personal problems and are reluctant to focus on their inner emotional lives. Some attorneys believe they should be able to handle their personal problems just as effectively as they handle their clients' problems.

Emotional distress, if not managed or treated, can lead to adverse impacts on an attorney's professional practice, clients, colleagues and personal life. Concerned colleagues and friends, therefore, should encourage a depressed or substance abusing attorney to seek professional help from available resources such as the LAP.

Legal professionals need an assistance program specifically geared to the unique pressures of legal practice and to the unique recovery support needs of attorneys. The Lawyer Assistance Program is that resource for all legal professionals licensed by the State Bar. Call toll-free 877-LAP 4 HELP (877-527-4435) for confidential assistance for yourself, a friend, colleague or a family member. Check us out at www.calbar.ca.gov/lap or watch our videos on YouTube by searching for California Lawyer Assistance Program.

Richard Carlton is the Acting Director of the Lawyer Assistance Program at the State Bar of California.

Membership

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective January 30, 2016.

Christopher G. Beckom – Law Offices of Christopher Glenn Beckom, Corona

Christopher M. Carrillo – Law Office of Christopher M. Carrillo, Redlands

Concetta Germain (A) – Intero Real Estate, Corona

Nancy Korompis – Korompis Law Offices, Riverside

Annette Miller (A) – Annette Miller Consulting LLC, Riverside

Daniel A. Thompson – Davis Wojcik & Duarte, Hemet

(A) – Designates Affiliate Member