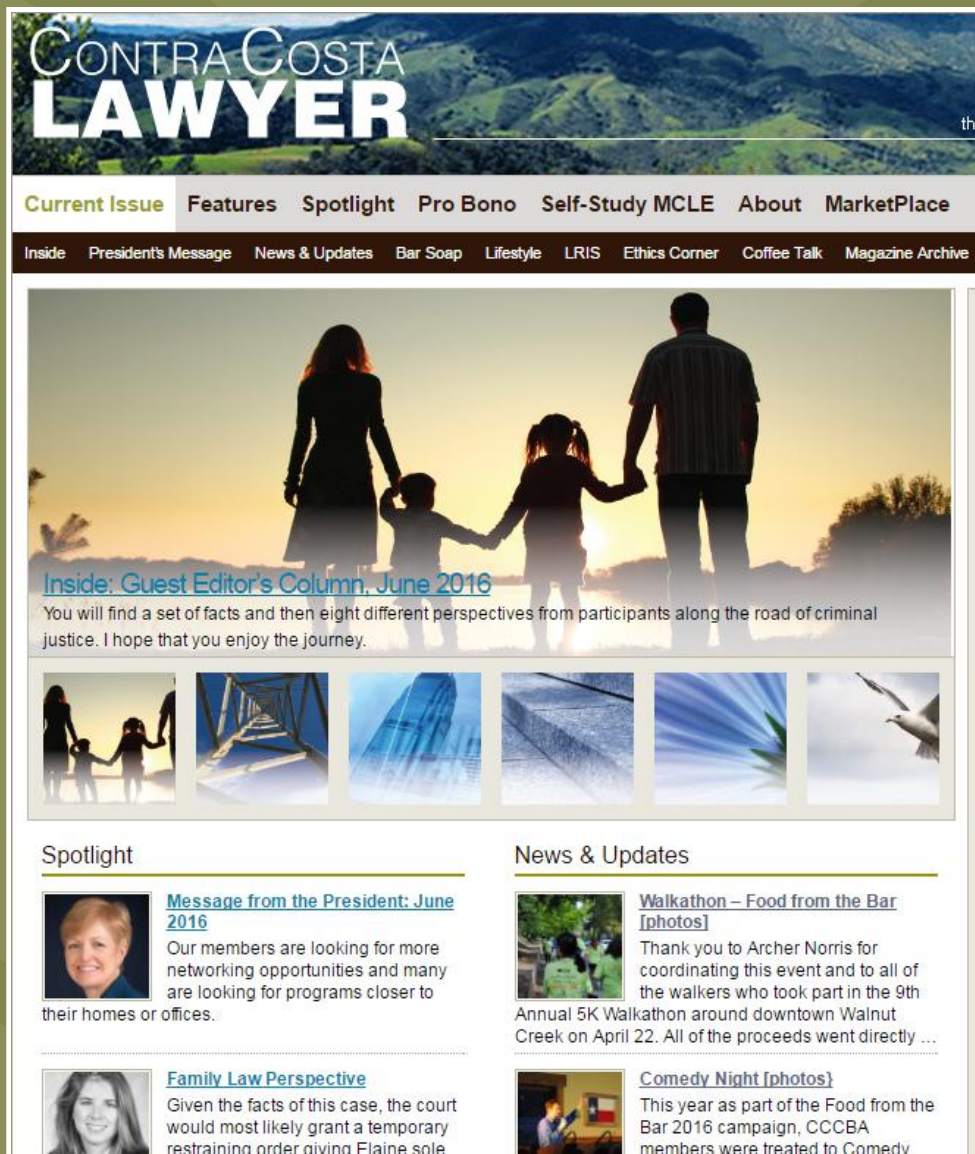


Contra Costa Lawyer Online

June 2016



The screenshot shows the homepage of the Contra Costa Lawyer Online website. At the top is a banner with the title "CONTRA COSTA LAWYER" over a landscape image. Below the banner is a navigation menu with categories: Current Issue, Features, Spotlight, Pro Bono, Self-Study MCLE, About, and MarketPlace. A secondary menu includes: Inside, President's Message, News & Updates, Bar Soap, Lifestyle, LRIS, Ethics Corner, Coffee Talk, and Magazine Archive. The main content area features a large image of a family silhouette at sunset, with a link to "Inside: Guest Editor's Column, June 2016" and a short introductory paragraph. Below this is a row of six small thumbnail images. The page is divided into two columns: "Spotlight" and "News & Updates". The "Spotlight" column contains two articles: "Message from the President: June 2016" and "Family Law Perspective". The "News & Updates" column contains two articles: "Walkathon – Food from the Bar" and "Comedy Night".

CONTRA COSTA LAWYER


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[Inside: Guest Editor's Column, June 2016](#)


You will find a set of facts and then eight different perspectives from participants along the road of criminal justice. I hope that you enjoy the journey.


Spotlight

 [Message from the President: June 2016](#)
Our members are looking for more networking opportunities and many are looking for programs closer to their homes or offices.

 [Family Law Perspective](#)
Given the facts of this case, the court would most likely grant a temporary restraining order giving Elaine sole

News & Updates

 [Walkathon – Food from the Bar](#) [\[photos\]](#)
Thank you to Archer Norris for coordinating this event and to all of the walkers who took part in the 9th Annual 5K Walkathon around downtown Walnut Creek on April 22. All of the proceeds went directly ...

 [Comedy Night](#) [\[photos\]](#)
This year as part of the Food from the Bar 2016 campaign, CCCBA members were treated to Comedy

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA) published 12 times a year - in six print and 12 online issues.

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Message from the President: June 2016

Wednesday, June 01, 2016

Mix it Up!



Summer is here and it is one of my favorite times of year to be in Contra Costa. June is warm but generally not too hot yet and Contra Costa is full of great places to enjoy the weather. So let me tell you how the CCCBA is making the most of summer.

Last year, we conducted a survey of members and I talked to our Section Leaders about how the CCCBA can support our membership. Among other things, our members are looking for more networking opportunities and many of our members are looking for programs closer to their homes or offices. With this in mind, we have scheduled a number of casual networking events around Contra Costa this summer.

The West County Section held a well-attended event in May hosted by Linda Fullerton. Judges Bowen and Goldstein joined a couple of dozen local attorneys for refreshments and conversation that lasted well into the evening.

The first bar-wide event was held at Maria Maria in Walnut Creek in April. A few dozen members attended, shared war stories, no-host margaritas, and chatted with old colleagues. It was a great opportunity to reconnect and relax.

Since almost 50% of our members are solo practitioners, it is easy to see why this kind of event is so popular. As a solo attorney, I enjoy the opportunity to meet with colleagues, bounce ideas off them and learn what is new in their practices. It is also an opportunity to build new business relationships. Our next happy hour events will be held in Danville at Revel Kitchen (331 Hartz Ave.) on June 9 and in Lafayette at Metro (3524 Mt. Diablo Blvd.) on July 14 from 4:30-7 pm. I hope to see you there.

***Elva D. Harding** is a real estate and business attorney and founder of Harding Legal, dedicated to providing efficient and effective legal service to individuals and small, mid-sized and family-owned businesses. Elva currently serves as CCCBA's Board President. Contact Elva Harding at (925) 215-4577, eharding@edhlegal.com or visit*

www.edhlegal.com.

Inside: Guest Editor's Column, June 2016

Wednesday, June 01, 2016



The classic film, *Rashomon*, takes a searing look at the nature of justice through the individual perspectives of four people each witnessing the same ghastly murder and rape. Directed by Akira Kurosawa; the 1950's film was lauded for its unconventional approach to storytelling. It stimulated thought and invited moviegoers to reflect upon their own notions of justice.

A good written story, like film at its best, can inspire an audience to examine their assumptions about the world, and be surprised by things they hadn't previously considered. Perhaps in so doing they can find their own truth.

When given the opportunity to guest edit *Contra Costa Lawyer*, I wanted to try something new; to present our members with an opportunity to engage in the kind of experience Kurasawa gave moviegoers long ago. Walk in someone else's shoes, see things from another's point of view, and determine what is your truth and what is not. Try to think about whether there is a greater meaning to the stories that confront us as lawyers, judges, and probation officers, on a daily basis. What follows in the pages ahead is my attempt to direct this exercise. As in the film, you will find a set of facts and then eight different perspectives from participants along the road of criminal justice. I hope that you enjoy the journey.

Mary P. Carey is an attorney in private practice in Walnut Creek. She chairs the Criminal Section of the CCCBA, serves on its Board of Directors, has an active Criminal, Juvenile and Civil Rights practice. She regularly serves as a mediator in Juvenile Dependency cases, and is a former Contra Costa County Deputy Public Defender.

Fact Pattern

Miles and Whitney Knight live with their parents, Elaine and Stefan. Miles is 5 years old and Whitney is 8. Stefan is a licensed contractor and works as a construction manager for a large construction company. He is originally from Ukraine, and has lawful status in the United States while he seeks citizenship here. Elaine is a permanent county

employee. The couple has been married for 10 years, own a home and each have retirement accounts. The Knights presently live in a home they purchased as a fixer upper prior to their marriage. Stefan has been working diligently on the home to improve it on weekends and nights after returning from his own job. Neither parent has a criminal history.

On July 4 after an extended family barbecue and fireworks the Knights were attempting to put Miles and Whitney to bed. During the course of the day both parents had consumed several alcoholic beverages, a keg of craft beer was emptied at the party as were several bottles of wine. Stefan and Elaine had argued loudly in front of their guests about the amount of time it was taking to finish the home renovations begun many years before. The party ended when both parents screamed at each other to shut up.

Elaine had a hard time settling Miles down after the evening's fireworks. He was an active boy, smart and energetic. He refused to go into his bedroom and told Elaine that he didn't want to go to bed nor did he have to go to bed. Hearing his refusal Whitney jumped in and threatened, "you better do what Mom says!" Miles yelled at her to "Shut up!" repeatedly. Soon both children were yelling at each other and began hitting one another. Elaine shouted at the top of her lungs for them to stop it, then strode into the kitchen and told Stephan to deal with his children; she needed a time out.

Stefan hurried back to the hallway his boots pounding on the floor. He loudly demanded that Miles and Whitney stop fighting and get into their rooms. For the third time Miles yelled, "You shut up!" Stefan grabbed Miles by the shoulders forcibly spun him around and kicked him in the rear end pushing him into his room. Miles screamed and Stefan closed the bedroom door.

Elaine, who told authorities she had taken a walk around the block to get away from the sibling rivalry, came home to hear Miles' sobs. Inquiring as to what was wrong, Miles told her, "Daddy gave me a bad time out." He complained of pain to his backside. Elaine took Miles to a nearby emergency room. She informed the doctors that she did not see what happened. Miles told the doctors that he got a time out from his dad. Hospital notes indicate alcohol on Elaine's breath.

An X-ray of the child reveals a fractured femur. Child welfare workers and the police are summoned to the hospital. Elaine and Miles repeat their statements and Stefan is arrested at his home. He is given his Miranda rights; tearfully waives them and explains that he had no intent to injure his child; but was frustrated and unaware of his own strength. Child welfare workers interview both children who state they were afraid when their father got angry.

Stephan posts bond at the jail. He contemplates what comes next.

District Attorney's Perspective

Wednesday, June 01, 2016

Note: All articles in this edition refer to the Guest Editor's column found here.



The Contra Costa County District Attorney's Office prosecutes criminal acts and protects victims that cannot protect themselves. Children are some of the most vulnerable victims in the community, and the District Attorney's Office participates in the investigation and prosecution of cases involving children from early in the investigation through the entire criminal process.

When a crime is reported to law enforcement that involves children, a countywide protocol mandated by the Welfare and Institutions Code is immediately invoked. This protocol allows a multi-disciplinary team to investigate any incident that involves a child with as little impact on the child as possible. The multidisciplinary team includes the police agency, Child Protective Services, and the District Attorney's Office. When a police agency receives information that suggests a crime has been committed against a child, they make an appointment for any children with information about the incident to be interviewed by a trained forensic interviewer at the local children's interview center. The District Attorney's Office, Child Protective Services, and the police agency's detective are present to watch the interview. All interviews are videotaped and copies of the interviews are maintained as evidence by the investigating police agency.

In the case against Stefan Knight, the police agency investigating the case will be tasked with completing their investigation before the District Attorney's Office makes any filing decision. The agency will be responsible for obtaining all of the interviews associated with the case and all of the physical evidence, including the medical records and photographs of the injury. The medical records will have documentation of statements by the family and children at the hospital and also a description of the fractured femur. The detective will confirm that the injury to Miles could be caused by a kick from Stefan Knight to the back of the child. After the investigation is complete, the detective will make an appointment with a specially-trained prosecutor who oversees all child abuse cases in Contra Costa County.

When the case is presented to the District Attorney's Office for filing, the prosecutor reviewing the case must objectively review the case and only file charges if she or he believes that the case can be proven beyond a reasonable doubt. In making a filing decision, the prosecutor is evaluating all exculpatory evidence (evidence that points to innocence), all evidence that inculpates the defendant (evidence that points to guilt), and ensuring that the defendant's constitutional rights have been protected throughout the entire investigation. In the case against Stefan Knight, the fact pattern is very minimal in statements provided by the children. In an investigation against Stefan Knight, the interviews from the interview center will be at least 30 minutes long and include details from the children of exactly what happened during "the bad timeout." These facts will be imperative to the prosecutor to make a filing decision. In addition, the allegation of a kick to the back causing a broken femur will be scrutinized and possible pediatric experts will be consulted to confirm that the kick could cause that type of injury. Assuming that the statements of the children and all other witnesses to the crime, support the allegations and the experts confirm that the kick can cause the injury, Stefan Knight could be charged with felony or misdemeanor child abuse. The decision on the severity of the charge will be based on the actual facts as they develop throughout the investigation about the force of the kick and the actual cause of the injury, as well as, take into account the suspect's lack of criminal record and other mitigating factors.

A victim in a criminal case has constitutional rights protected by the California Constitution. The District Attorney's Office must protect these rights, as well as, ensure the safety of the child. In this case, the prosecutor will make sure the mother of the victim is protecting her children, not dissuading the children from disclosing the events that occurred at the home, and cooperating fully with Children and Family Services. In addition, the prosecutor will request that a complete stay-away order be issued against Stefan Knight for the duration of the prosecution of this case. The protective order will be requested to prevent against further abuse, and to avoid any potential undue influence by the suspect on the child during the criminal proceedings. Lastly, the prosecution will attempt to quantify any restitution owing to the victim resulting from the crime, including any therapy needed by the victim or family members of the victim. In this case, both Miles and Whitney qualify for assistance by a state agency called the Victim's Violent Crime Board. This is a program that reimburses victims for certain out of pocket expenses incurred as a result of the crime and pays for therapy up front for victims and their families. Both children will be assisted by a victim advocate to receive the services from the Victim's Violent Crime Board.

In the case, the People v. Stefan Knight, the District Attorney's Office filed child abuse charges after objectively evaluating the evidence discussed above. The criminal prosecution begins with an arraignment of Stefan Knight. At that arraignment, the prosecutor would request a criminal protective order restraining the accused from contacting the victim. The case would be assigned to a prosecutor to handle the case from the initial appearance all the way through trial. The prosecutor would appear in court at all court appearances and make appropriate arguments regarding any issues raised during the pendency of the case. In addition to appearing in court, the prosecutor will meet with Stefan Knight's attorney to discuss a negotiated disposition. A negotiated disposition is a change of plea by the defendant to terms that have been agreed upon by the District Attorney's Office and the defendant that contemplates the aggravating and mitigating circumstances of the crime itself and of the defendant. The California Rules of Court provide for the appropriate circumstances to be considered to determine appropriate sentences, terms, and periods of probation. If the defendant, through his attorney comes to discuss a negotiated disposition, the information presented to the

prosecutors will be considered, and an offer will be made. The defendant may accept the offer, and the case may plead in court short of a trial. If there is no negotiated disposition, the prosecutor assigned to the case will go to trial and a jury will determine the guilt of the defendant. If the jury finds the defendant guilty of the charged crimes, the Judge presiding over the trial will determine the appropriate sentence and sentence the defendant accordingly.

The District Attorney's office has committed to the community and the People of Contra Costa County, that we will seek justice, serve justice, and do justice. This mission includes ensuring that the Constitutional rights of the defendant are protected, the Constitutional rights of the victim are protected, the case is charged appropriately, and the resolution is appropriate for the circumstances relating to this case and this family while also serving to protect the community.

***Alison Chandler** graduated from the University of San Francisco, School of Law in 2004. She has worked as a prosecutor in Contra Costa County District Attorney's Office since December 2004. During her career at the Contra Costa County District Attorney's Office, she has prosecuted misdemeanors, juvenile related crimes, and all types of felonies. She spent three years specializing in domestic violence between 2006 and 2009, worked in white-collar crime between 2009 and 2012, and between 2012-2015 Alison worked in the Sexual Assault Unit prosecuting sexual assault crimes and child abuse. Currently, Alison works as a felony filer in the DA's Office. Outside of the office, Alison teaches evidence as an adjunct professor at the JFK University School of Law. She also teaches at the Contra Costa County Law Enforcement Training Center since 2010.*

Defense Attorney's Perspective

Wednesday, June 01, 2016

Note: All articles in this edition refer to the Guest Editor's column found here.

Motion for Bail Reduction or Own Recognizance

The first step in this case is that counsel needs to try to get Stefan Knight out of custody. This means a hearing on a bail reduction or OR (release on his own recognizance, without having to post a bond) motion. Counsel would emphasize the golden fact that Stefan has no criminal record.

Character letters from upstanding persons in the community can be very influential. These letters should avoid any opinions about the merits of the case – no protestations that client is innocent or that this all must be a big misunderstanding. For a bail motion, the judge must assume that the charges are true. The judge will focus on whether the client poses a danger to the community, and whether the client is a flight risk. So, the letters should emphasize that, if the charges are true, that this incident would have been completely out of character for this gentle, respectable man.

Unlike most public defender clients – who are either homeless and completely alone, or, whose most respectable acquaintances tend to be drug addicts or people with long records – Mr. Knight has strong community connections. Ideally, we'll have letters from: (1) client's employer (to extol client's reliability, maturity, and steadiness); (2) a minister/pastor (to describe client's virtue, charity, generosity, clarity, respectability, and fatherly manner); (3) other parents (client is always a kind, sensible caregiver, and these parents would not hesitate to have him take care of their children); (4) Little League or soccer coaches (client is always at the games, and is always calm and the voice of reason); (5) family members (client's avuncular, peaceful manner is the best influence on the family kids); (6) other family members (client's discipline style is firm but restrained; and even when in his cups, client remains good-humored); (7) teachers (client has always seemed even-tempered and kind; Miles and Whitney have expressed nothing but adoration for their dad and complete relaxation and comfort in his presence). Maybe there's a councilperson, or a chain restaurant owner among the Knights' acquaintances who can write impressive letters.

Even better than letters: many of those community pillars may be sitting in the gallery in court. Counsel will have to contact some of the letter-writers to present a strong showing of community solidarity with Stefan.

Another front to shore up for the bail motion is proactive, preemptive remediation. Get Stefan signed up in an intensive alcohol abuse program. Also, sign him up for both parenting classes and anger-management treatment. We'll want to bring in letters from all three of these programs stating that Stefan is already enrolled. "But won't that be equivalent to an admission that he's a mean angry drunk who beats his kids?", you might ask? No. First, these classes will address any concerns on the part of the judge and DA that client has a problem and the kids are in danger. Second, the California Evidence Code precludes the use of corrective measures against a party in court. This rule is based upon the public policy that we want to encourage, not discourage, any party from taking measures to improve safety. Third, Stefan's approach will be that he never intended to cause an injury to his beloved son, and that he's horrified and ashamed at the

mere possibility that he may have done so. Stefan wants to do everything he can to prevent any harm from befalling his children, even if from him. (We could also offer that Stefan can live separately from his children for a short time) — Stefan's main objective is to keep them safe and to keep working to provide for the family.

The Defense and Preparatory Investigation

First, it's unclear how the femur fracture occurred. A kick in the rear wouldn't fracture a femur. There's no evidence of the sound either of a bone breaking or of the kind of excruciating, focused pain that a break in such a large, nerve-rich bone would cause. There's no evidence that the boy was limping or couldn't move his leg before mom took him to the hospital. No physician who treated the child opined that Stefan's rear kick was the likely cause of the fracture. And, look at what the boy said. Not, "Daddy hurt my leg," but that his butt hurt and that Daddy had given him "a bad time out." We will want to point out to the jury all the evidence showing that the cause of the fracture is questionable, at best, and certainly hasn't been proven beyond a reasonable doubt. The juror's job is not to become sleuths and determine how the fracture occurred. Rather, ladies and gentlemen, the only question before you is whether the state has proven, beyond a reasonable doubt, that Stefan committed great bodily injury on his child.

We will want to consult one or more trauma experts. Could the femur have broken much earlier in the day (or even on a previous day), during the children's roughhousing, or outdoor play, and the spinning around and rear-kicking may have exacerbated it? Could the fracture have occurred after the mom returned home? Could the kid even have walked on a fractured femur?

Nor does the evidence bear out the children's claim that they were afraid of their dad. Stefan was at home when the kids were yelling and fighting, and when the boy was sassing his mother. Stefan's presence certainly didn't put a damper on their behavior. Even so, a commanding authority figure is not only an acceptable archetype for a father — it's an idealized one. We will want to interview the children. Did the officers question the children using leading — and suggestive — questions? For instance, did the officers say, "are you ever afraid of your dad? Say, maybe, when he gets mad?" Children are very suggestible, and tend to want to give adults — especially strangers in a uniform — the answers that the adult seems to be seeking. If the children's interviews weren't recorded, but just summarized — and interpreted — in the officers' reports, there's another basis to question the children's "fear" of Stefan. In fact, there's no evidence of any prior violence on the part of Stefan — toward anyone.

On the contrary, Stefan adores his children and would never harm them. Counsel will bring in many character witnesses — probably our upstanding salt-of-the-earth letter writers (hopefully, very much like our jurors) — to testify about Stefan's patient, gentle manner, reliability, and sensible approach to kids. The jurors will be instructed that testimony about good character alone can raise a reasonable doubt. In other words, a juror may find Stefan not guilty based only upon the testimony of our character witnesses.

There's another jury instruction that will be our ally. Under California law, while a parent may not endanger or cause any major injury to his child, the parent may engage in reasonable discipline, including corporal punishment. Moreover, what's reasonable spans a wide range of parenting styles, from the Montessori time-outs and discussions, to tough love privations, to spanking and whipping. Evidence of varying cultural norms would be helpful to persuade jurors squeamish about corporal punishment. I'll have to see if the

“Tiger Mother” author is available to testify as an expert in old fashioned, old-country child rearing. In closing argument, I could mention Facebook posts that pop up in my feed: “My parents spanked me as a child. As a result, I suffer from lifelong respect for others.” I’ll want to play excerpts from comedy routines by Jeff Foxworthy and Dennis Leary: their dads wailed on them and “kicked my ass,” treatment from which all the “idiots” and “whiners” who surround Jeff and Dennis would benefit. I’ll want to show the Newsweek magazine cover from about 20 years ago entitled “Shame.” That Newsweek heralded shame and old-fashioned punishment as back in style, long needed after a generation of spoiled new-age children. And, of course, I’ll want to trot out the book, *Tiger Mother*.

The kind of jurors that we’d look for wouldn’t be the usual liberal intellectual defense-juror type. Instead, we’d want a traditional, old-fashioned juror who believes wholeheartedly in a parent’s right to govern his children as he sees fit. No “*it takes a village*” types. Conservatives would be better than liberals; creationism over evolution; men over women; and first-generation immigrants would be fantastic.

Here, we would argue that Stefan engaged in discipline likely to cause shame rather than pain. A “kick in the ass” is, quintessentially, a symbolic gesture. It means, “straighten up and fly right” and “stop being a fool.” It’s a demonstration, not meant to cause pain, but to make the child feel shame about his behavior. We’ll want to interview Stefan’s relatives. Is corporal punishment — especially symbolic corporal punishment — commonplace among Ukrainian families? Hopefully, the answer will be yes, and a few of these relatives can testify.

Boom!

Laurie Mont is an attorney in the Contra Costa County Public Defender's Office. She received her JD from the University of California Berkeley School of Law (formerly Boalt Hall). Immediately after law school, Laurie spent four years as an associate of Morrison & Foerster, where she earned several awards for her pro bono work. At the Public Defender's Office, Laurie has primarily represented clients accused of homicides and serious felonies, and clients facing commitment under the Sexually Violent Predator law.

Probation Perspective

Wednesday, June 01, 2016

Note: All articles in this edition refer to the Guest Editor's column found here.

Stefan's court order reflects he is granted felony-supervised probation for the child abuse offense committed against his 5 year old son. He has three years to complete the necessary terms of probation, which includes various fines and fees, restitution to the victim, a 52-week parenting class, and counseling as directed by his probation officer. He is sentenced to 180 days on electronic monitoring in lieu of custody, as he was able to establish himself as a permanent resident of the county, who has ties to his family, the community, and who has been independently and gainfully employed for some time. Additionally, he is expected to obey all laws, report to and adhere to the directives of his probation officer, report detentions or arrests within five days, report to his probation officer within five days of release, and use his true identity at all times. He is also subject to a warrantless arrest at any time and he is prohibited from possessing weapons.

Stefan has been placed on electronic monitoring, and he reports to probation shortly after sentencing, as expected. During his first appointment with the assigned probation officer, he appears anxious, confused and frustrated. The terms of probation are reviewed in detail, so some clarity is gained, but Stefan indicates he is overwhelmed with responsibility, and he is hoping "to move on with his life." This grant of probation is the result of his first conviction, and while he would like to be successful on probation, and certainly stay out of jail, the reality of his busy work schedule and problematic home life, leave little time for classes and appointments during business hours, and he finds reporting his every movement on the electronic monitor to the sheriff degrading. In addition, he is expected to comply with a Family Maintenance Plan implemented by Children and Family Services, as a result of the incident involving his son.

A risk and needs assessment is conducted by the probation officer, which consists of a series of questions about the offense, and all other social aspects of Stefan's life. Stefan's statements about his culture, upbringing and family make it clear that he is a hardworking, family man, who very much regrets his actions, but feels as if the situation could have been handled without police involvement. Despite his frustrations, he commits to completing the terms of probation so he can move on.

Stefan's responses during the assessment and the facts of his case suggest his recidivism risk is low. He does not have many of the high risk factors, such as a lengthy criminal history that involves theft related crimes, or that started at a young age, he does not have issues with substance abuse or regular associations with those criminally inclined, he does not lead a transient lifestyle and he is not unemployed. In fact, Stefan is relatively stable in many areas, and is relieved to learn he will not be required to report to the probation officer more than monthly should he maintain compliance, stability and sobriety.

Following the assessment and upon reviewing the details of the offense, the probation officer finds Stefan's highest area of need to be counseling. Stefan needs to address the offense itself, by attending weekly parenting classes for 52 weeks to learn how to parent his child safely, even in spite of anger and frustration. The probation officer wonders if marital issues, given the arguments that ensued beforehand, or financial issues, given the reference to delayed renovations, played a part in Stefan's anger that day, and

suggests he contact an individual therapist to begin addressing those concerns. Stefan was intoxicated when he committed the offense, so he is directed to contact an alcohol abuse treatment provider to obtain a substance abuse assessment. Should the provider recommend treatment, Stefan will be directed to comply with alcohol treatment as well.

The probation officer is concerned about Stefan's children, and wants to ensure they have the same rights afforded to any victim of violence, so the victim and the sibling witness are referred to the Victim/Witness Program. Violence that occurs within in the family and results in damages to the victim, whether it is monetary or emotional, is often difficult for probation to address. Family sometimes looks at the incident as a "family issue" and declines to pursue restitution. Restitution is ordered in this case, and the probation officer hopes counseling will be pursued, so Stefan's wife is contacted and encouraged to facilitate treatment for the children to help repair the damage caused by the offense, and hopefully mend the family. Additionally, the probation officer makes contact with the social worker assigned to supervise the Family Maintenance Plan, so that all parties are working cohesively in rehabilitating Stefan and ensuring the children's safety going forward.

Even with all of the Court's orders and the probation officer's plans in place, ultimately, as with any other case, Stefan's success does not rest upon the probation officer's diligence alone. Unlike many cases, Stefan already has many of the strengths needed to be successful, and his success depends almost entirely on his own effort and determination, as well as the importance he places on becoming a better family man and an overall productive member of society.

*After attending more than 30 schools in four states, while being raised by an often-unemployed single father, **Kiki Ingram** ended her youth in the busy streets of East Oakland, and graduated from California State University, Hayward in 2003 with a Bachelor's Degree in Criminal Justice Administration, and two young children. she began her career at the Contra Costa County Probation Department three months later.*

As a Juvenile Hall Counselor she worked on the serious offenders' unit, mental health unit and sophisticated/older boys' unit. Promoted to Deputy Probation Officer in 2007, she was assigned to West County Juvenile Supervision, West County Adult Supervision, Juvenile Placement, Juvenile Court Officer, and JJCPA High School Deputy.

Now as Probation Supervisor assigned to the East County Adult Felony unit, her specific responsibilities include supervision of six Deputy Probation Officers assigned to felony caseloads, including one specifying in Domestic Violence felonies, plus one Misdemeanor Court Officer. She also oversees the Intensive Supervision Program for drug-addicted felony offenders, and keeps the stats and data for the Domestic Violence Unit.

Juvenile Law Perspective

Wednesday, June 01, 2016

Note: Note: All articles in this edition refer to the Guest Editor's column found here.



It is a virtual certainty, given this factual scenario, that the county's child protective services agency ("CPS") has determined to commence juvenile dependency court proceedings. First, a Juvenile Dependency Petition would be filed, alleging jurisdiction over both Miles and Whitney on several different grounds. Specifically, the bureau would allege facts which if found true would allow the court to find that each of them either has suffered, or is at risk of suffering, abuse or neglect by a parent, either by means of abuse inflicted non-accidentally by a parent (Stefan upon Miles), the inability of parent to protect both children from abuse by the other parent (Elaine), or the inability of the parent to provide proper care of the children due to the parent's substance abuse (Elaine). It is also a near certainty, that CPS already

has detained (taken custody of) both children from the home of their parents, given the severity of the injury inflicted upon Miles by Stefan, and the evidence of potential substance abuse and failure to protect on Elaine's part.

The law governing juvenile dependency court proceedings in California is set forth in Welfare and Institutions Code sections 300, *et seq.*, and the California Rules of Court (Title V, rule 5.500, *et seq.*) If the juvenile court determines, based on the evidence presented at a hearing or by admission or no contest plea by the parent, that the child is a person described by any one or more of the provisions set forth in section 300, subdivisions (a) through (j), then the court is required to assume jurisdiction over the child, and to conduct further proceedings and issue orders to ensure that the child's health and safety are protected.

Juvenile dependency courts typically preside over matters formally alleging, by way of a petition filed in the juvenile court by a social worker, that a child has suffered abuse or neglect, or is at substantial risk of suffering abuse or neglect, either as a result of (a) serious physical harm or injury inflicted non-accidentally by the child's parent or parents parent(s), (b) the inability of the parent or parents to supervise or protect the child adequately from serious harm or illness, or (c) the inability of the parents to provide proper care of the child due to the parent or parents substance abuse. A dependency case normally commences when someone (e.g., the child, a health care professional, a school teacher) reports to the police or a social worker that a child is being abused or neglected. An investigation ensues, after which the social worker will determine to do one of the following, based on results of the investigation:

1. Take no action, if there the evidence is insufficient to establish the alleged abuse or neglect;
2. Offer the parent a program of voluntary services (e.g. parenting classes, counseling) designed to help the parent properly care for the child;
3. Determine that the child can safely remain in the parent's care and custody, and file

- a petition in the juvenile court formally alleging that the child has suffered, or is at substantial risk of suffering, abuse or neglect because the evidence is sufficient for the juvenile court to assume jurisdiction in order to protect the child's health and safety; or
4. Remove the child, at least temporarily, from the parent's custody (and, at least temporarily, place the child with an approved relative or licensed foster home), and file a petition in the juvenile court alleging that the parent has abused or neglected the child.

As his dependency attorney I would advise Stefan as follows:

First, he should expect to be charged in criminal court with child abuse (either misdemeanor or felony, depending on the district attorney's review and charging decision); Miles suffered a broken leg in the family home, while in his parents' custody, and Stefan admitted to the police that he caused the injury (albeit not intentionally). Accordingly, I would advise Stefan to immediately consult with a criminal defense attorney, and I would further advise him not to discuss or make any more statements to anyone, particularly the police or social workers, about how Miles' injury occurred or the surrounding circumstances that led to Stefan's conduct, as these statements could be used against him in the impending criminal prosecution. I would tell Stefan that I will contact his criminal defense so that the attorneys can exchange updates on the status of the proceedings in the dependency and criminal matters.

Second, as to the juvenile court dependency case itself, at the initial dependency court hearing, CPS (represented by county counsel) will ask to issue an order detaining Miles and Whitney from his and Elaine's custody, based on the allegations in the petitions and review the social worker's detention/jurisdiction report, which sets forth the evidence in support of the allegations. The court very likely will order the children detained, since only "*prima facie*" evidence is needed for the court to find that the children come within dependency court jurisdiction and that there are no reasonable means to protect their health and safety, at this early stage of the proceedings, other than by removing them from parental custody.

Third, I would strongly advise Stefan to move out of the family home, at least for the near future, to convince CPS, and, if necessary, the court, that it is safe to place the children back in the home, in Elaine's custody, because the father and alleged perpetrator of the physical abuse, is no longer in the home. In the event that CPS does not agree to return the children to Elaine's custody after he has moved out, I would advise Stefan to immediately provide CPS with the name(s) and contact information of a relative or relatives (the children's grandparents, aunts or uncles) with whom the children could be placed, so that the children would not remain in foster care.

Fourth, Stefan should immediately engage in services designed to address the conduct and problems that led to CPS and court intervention. The court will likely order him to comply with a family reunification case plan, submitted by CPS, setting forth things he must do if he expects to reunify with his children and return to the family home. Accordingly, he should immediately enroll in an anger management counseling (or even a certified child-abuse prevention program that works with alleged perpetrators) and a parenting education class. If he candidly admits that he has a problem with alcohol or illegal drugs, he should voluntarily submit to random testing for alcohol and drug use, and/or attend AA or NA meetings, or, at a minimum, agree to undergo an assessment by a specialist to determine whether he has a substance abuse problem.

Fifth, he should visit his children regularly while they remain out of parental custody, whether these visits are supervised or unsupervised, and that the visits will likely remain supervised until he demonstrates his active and successful engagement in services.

Sixth, in light of the evidence that Elaine may have a drinking problem, he should encourage her to engage in services immediately, including parenting education, counseling, and alcohol abuse treatment and/or an assessment regarding whether she has a substance abuse problem.

Finally, I would candidly inform Stefan that barring unforeseen circumstances pointing to his lack of responsibility for the infliction of Miles' fractured femur, he can expect that the court will take jurisdiction over his children, and ultimately adjudicate them as dependents of the juvenile court. The law requires that, absent statutory exceptions not applicable in this case, he is entitled to receive 12 months of reunification services designed to minimize or eliminate the circumstances that gave rise to the intervention of the juvenile court (i.e. his anger and his physical abuse of Miles). If he successfully engages in services and follows the court's orders, he should be optimistic about the likelihood of reunifying with his children and his wife, and living at home together with them.

If he fails to comply with his services case plan or otherwise fail to adhere to the court's orders, the court, after a hearing, likely would terminate reunification services as to him and Elaine, if she also fails to comply with her own case plan and court orders, and proceed by scheduling a hearing (under W&I Code section 366.26) to determine a long-term plan for the children, in their best interests, that could result in the court ordering termination of parental rights.

Richard S. Horn is an attorney in private practice in Lafayette. He is a former Contra Costa County Deputy Public Defender. He has been a member of the California State Bar since 1981. Richard received a Juris Doctor from the University of San Francisco and graduated magna cum laude from the University of California, Los Angeles. He practices Juvenile Dependency, Criminal and Appellate law.

The Judge's Perspective

Wednesday, June 01, 2016

Note: All articles in this edition refer to the Guest Editor's column found here.



Stefan Knight will likely find himself not only facing felony charges as a result of the injuries sustained by his son Miles when Mr. Knight gave his son a “bad time out,” but the Knight children are very likely to be the subject of petitions filed in juvenile dependency court by Children & Family Services (CFS) under Welfare & Institutions Code, Section 300. Miles has suffered a substantial injury inflicted non-accidentally when his father disciplined him. This poses a risk not only to Miles but potentially demonstrates a substantial risk to Whitney as well. Additionally, there are potential allegations of both substance abuse and domestic violence, depending on facts gathered by CFS during its investigation.

At the initial appearance in the juvenile dependency proceeding, the court will address the issue of whether Miles and Whitney should be detained from one or both parents, or whether there are services that if offered to one or both parents would negate the need to detain the children.

The court will consider potential red flags that this event is not an isolated incident of a domestic disturbance in the household. For example, the children reported being afraid of their father when he got angry. The children also engaged in behaviors with one another and with their mother that was similar to behavior exhibited by the parents earlier in the day and leading up to the incident. The history of any domestic violence or police contacts at the residence is a significant factor to be considered and, if there is a history, what if any steps the non-aggressor parent took to protect the children from exposure to this violent behavior (i.e., seeking a restraining order, engaging in therapeutic services). In addition, insofar as both parents consumed a significant amount of alcohol and engaged in a loud verbal dispute with the children present in the home, substance abuse appears to have played a factor in the incident. The court will consider this as well.

Given the age of the children, the severity of the injuries and issues of substance abuse, the court would consider whether the children should at a minimum be detained from their father pending a finding of jurisdiction and, if found, disposition. Any court-ordered visitation between the father and the children may depend on whether a criminal protective order has been issued in a related criminal proceeding. Such an order would have a significant impact on any court-ordered reunification services. If there is coordination between the two proceedings, the terms of the criminal protective order would be made subject to any order issued in the juvenile dependency proceeding.

With respect to the mother, depending on what is discovered regarding the history of domestic violence and substance abuse issues with this family, the court will consider whether the children may be able to be safely maintained in the home. Certain factors may weigh in favor of detention from the mother as well: although she immediately sought medical care for Miles, she also smelled of alcohol at the hospital. If she drove

Miles to the hospital while impaired, there are concerns of risk to the children. In addition, if she had knowledge of any prior violence by the father, her actions in leaving the children in his care, with directions that he impose discipline, all the while knowing that he was under the influence of alcohol, the circumstances could militate in favor of detention. Absent these circumstances, the court may consider leaving the children in the mother's care under certain conditions to be imposed. For example, the court would consider ordering that the father vacate the residence (since he has posted bond on criminal charges), and require that the mother demonstrate a capacity and willingness to protect the children from the father, abide by any no-contact order, and engage in immediate services relating to substance abuse and domestic violence.

If the children are detained from both parents pending resolution of the issue of jurisdiction and disposition, there may be relatives who can be considered for relative placement. It would be less traumatizing for them to be placed with a family member rather than in foster care with a stranger. Also, the children should be placed together and allowed to attend their schools of origin so as not to disrupt their sibling relationship and their education.

*Prior to her appointment to the bench in February 2010, the **Hon. Rebecca Hardie** worked for both juvenile and adult probation in San Mateo County and later as a federal probation officer for the Northern District of California. She graduated from Hastings in 1991, served as a deputy D.A. in Marin County, an Assistant United States Attorney for the Northern District of California, and then in-house counsel for Pacific Gas & Electric Company. After her appointment to the bench, she presided over misdemeanor trials, law and motion, felony arraignments and preliminary hearings. In January 2013, she was assigned as a juvenile judge, presiding over both dependency and delinquency matters. After attending the Truancy Summit in 2013 convened by Chief Justice Cantil Sakauye, she convened a local working group with various county agencies and nonprofit organizations to address the issue of chronic absenteeism and truancy in Contra Costa County. The Court has since implemented a new Parent Truancy Court to help address the issue of chronic absenteeism among children ages 6-12 in Contra Costa County. Judge Hardie presides over the Parent Truancy Court which is held two times each month.*

Immigration Law Perspective

Wednesday, June 01, 2016

Note: All articles in this edition refer to the Guest Editor's column found here.



As an initial matter it must be recognized that this is a very difficult case as Stefan Knight is not a United States citizen. Assuming Mr. Knight is a Lawful Permanent Resident of the United States, his situation could be particularly perilous if he is convicted of a crime involving moral turpitude. The immigration consequences of the possible charges against Mr. Knight include California Penal Code § 273(a), child injury, endangerment and California Penal Code § 245 (a)(1), Assault with force likely to cause great bodily injury. There are potential consequences for criminal charges that may impact his immigration status and his ability to apply for naturalization.

Pursuant to the Immigration and Nationality Act (INA) § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i), a noncitizen is deportable based upon conviction of a single crime involving moral turpitude that carries a potential sentence of a year or more, if the person committed the offense within five years “after the date of admission.” The INA defines the terms “admitted” and “admission” as the lawful entry of a noncitizen following inspection and authorization by an immigration officer.

If Mr. Knight is convicted of Penal Code § 273(a) or Penal Code § 245(a)(1) within five years of his admission to the United States, then he would be deportable.

Penal Code § 273(a) should not be a crime involving moral turpitude in the Ninth Circuit, but best practice for Mr. Knight is to plead specifically to negligently permitting endangerment rather than intentional conduct. The minimum conduct to commit PC §273(a) is not a crime involving moral turpitude and all PC §273(a) convictions are evaluated based on the minimum conduct. But a specific negligence plea will protect Mr. Knight against the risk that the definition of a divisible statute might change, or that Mr. Knight might be placed in removal proceedings outside the Ninth Circuit should he move. Based on the facts of Mr. Knight’s case, he explained to the arresting officer that he had no intent to injure his child, but was rather frustrated and unaware of his own strength. Thus Mr. Knight should plead specifically to negligently permitting endangerment in the

event he is charged under Penal Code § 273(a).

In addition, one needs to assume that §273(a) is a deportable crime of child abuse. Although PC §273(a) reaches very mild conduct, and Ninth Circuit at one point held that it is not child abuse, assume conservatively that it will be charged as child abuse. It is difficult to predict this because there is not yet a specific definition of “child abuse” for immigration purposes. When plea-bargaining on behalf of Mr. Knight, emphasize to prosecution that even misdemeanor PC §273(a) for minor conduct may well cause Mr. Knight’s child to permanently lose his or her Lawful Permanent Resident parent. Instead, seek a plea to an alternate offense that includes the required criminal punishment and probation conditions, but that will not make Mr. Knight deportable. This can include any age-neutral offense such as PC §243, Battery. In addition, as long as a minor child is not listed in the record of conviction, Mr. Knight can accept parenting counseling as a probation condition. Consider whether a PC §1001 misdemeanor pretrial diversion may be available, as this is not a conviction for immigration purposes. Also consider an informal pretrial diversion, where Mr. Knight’s plea hearing is put off while he completes certain requirements such as counseling, in exchange for an alternate plea.

Conservatively, assume Penal Code § 245(a)(1) is also a crime involving moral turpitude. It is advised that Mr. Knight’s criminal defense attorney keep the minor child’s age out of record of conviction to prevent crime of child abuse.

Mr. Knight’s Eligibility for United States Citizenship

United States immigration law requires that an applicant for naturalization be a person of "good moral character." Mr. Knight must show that he has been, and continues to be, a person of good moral character. In general, he must show good moral character during the five-year period immediately preceding his application for naturalization and up to the time of the Oath of Allegiance. In general, a noncitizen is statutorily barred from establishing good moral character if, during the time for which good moral character must be shown, he is convicted of or admitted committing a single crime involving moral turpitude. INA § 101(f)(3), 8 USC § 1101(f)(3). This ground of ineligibility applies, not only when there has been a conviction, but also, in some circumstances, when an individual admits to committing such a crime. Regardless of whether Mr. Knight, a Lawful Permanent Resident is arrested or convicted of Penal Code § 273(a) and/or Penal Code § 245(a)(1) or merely admits to committing one or more crimes involving moral turpitude during the statutory period, he cannot establish good moral character and may be ineligible for naturalization.

Mr. Knight’s arrest or possible convictions may preclude him for having the requisite good moral character for naturalization and may also prevent him from renewing his Lawful Permanent Resident card. By filing an application for naturalization or to renew his permanent resident status, Mr. Knight may trigger a referral to the immigration court for removal proceedings if he is convicted. In conclusion, the best defense for Mr. Knight is to remain on the offensive to avoid any convictions that may negatively impact his ability to apply for naturalization and worst case, possibly lead to his removal from the United States.

Spojmie Ahmady Nasiri exclusively practices immigration law. She received her Bachelor of Arts degree in political science from the University of California, Davis, and her Juris Doctor from Golden Gate University School of Law. Spojmie is a member of the California State Bar. She is a member of the American Immigration Lawyers Association and was

selected by the National Advocates Top 100 Lawyers for 2015 and the American Society of Legal Advocates Top 40 Lawyers Under 40 in 2015. Spojmie was selected as a Northern California "Rising Star" by Super Lawyers Magazine for 2015 and 2016. You can contact Spojmie Nasiri at (925) 520-5195 or spojmie@nasirilaw.com.

Family Law Perspective

Wednesday, June 01, 2016

Note: All articles in this edition refer to the Guest Editor's column found here.

ELAINE:



Elaine contacts an attorney to discuss this situation and is advised to file for a restraining order under Family Code section 6220 otherwise known as the Domestic Violence Prevention Act. Given the facts of this case, the court would most likely grant a temporary restraining order giving Elaine sole physical custody of the children and exclusive use of the family home pending the hearing on the motion. Although Elaine may explain to her attorney that they were both drinking and this only happened once and she does not really want a divorce or to kick him out of his house, her attorney would respond that the primary concern is for the safety of the children. Elaine has a duty to protect them from abuse, otherwise the court could remove them from the home if they find she is not protecting the children. In addition to the

restraining order, Elaine would likely request that Stefan enroll in anger management classes, counseling and substance abuse treatment since alcohol was a factor in this incident. Since both parents were drinking and yelling at the children and each other, Elaine would also be advised to get counseling to deal with her anger and alcohol issues and to enroll in parenting classes.

STEFAN:

Stefan is served with the temporary restraining order and retains a family law attorney to represent him at the hearing. Since criminal charges have been filed against Stefan, it is important to communicate with his criminal attorney to discuss how to proceed. Since any statements made by Stefan at the hearing, in a response filed to the TRO or in meetings with Family Court Services mediators or Child and Family Services, could be used against him in the criminal action, the best approach is to advise Stefan not to discuss this matter with anyone other than his attorneys and to continue the hearing on the TRO until after the criminal charges have been resolved. Even though the TRO will remain in effect pending the hearing, his attorney could request for Stefan to have supervised visitation with the children (assuming they are not afraid of him) so they will not have to go several weeks or months without seeing their father. Any discussion of the pending actions would be strictly prohibited and the visitation supervisor would be present at all times to ensure the children's safety. The family law attorney would need to work closely with the criminal attorney in this matter since any finding of domestic violence (including a plea of *nolo contendere*) in the criminal case or family law matter can have long term effects on child custody—Family Code Section 3044 provides that a finding of domestic violence creates a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence. In determining whether the presumption

has been overcome, the court can consider several factors including whether the perpetrator (Stefan) has completed a batterer's program, treatment for alcohol or drug abuse and parenting classes. In this case, Stefan would be advised to immediately enroll in these programs so he will have evidence to rebut the presumption against joint custody. Even if Stefan avoids a criminal conviction, since Family Code Section 3044 only requires a "finding," the incident, including the issuance of the restraining order, would probably be sufficient to trigger the presumption against joint custody.

OTHER CONSIDERATIONS: If Elaine decides to file for divorce, this incident of domestic violence has a significant impact on both temporary and permanent spousal support. In making an order for spousal support, the court must consider all relevant factors set forth in Family Code Section 4320. Family Code Section 4320 (i) and 4320(m) both include domestic violence as a factor to consider in awarding spousal support. Family Code section 4320(i) states: "Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties or perpetrated by either party against either party's child, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party." Family Code section 4320(m) provides that "the criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4324.5 or 4325." Under this situation, even if Stefan avoids a criminal conviction of domestic violence, pursuant to 4320(i), the court can consider documented evidence of the domestic violence which needs only be proven by a preponderance of the evidence. Assuming Stefan is the payor of spousal support, the amount and duration of spousal support owed to Elaine would be impacted by this incident. The court would consider the cost and time needed for counseling and the impact the domestic violence would have on Elaine's ability to work and become self supporting. Since Elaine and Stefan have been married for 10 years, this is a long-term marriage and the court would not order a termination date in this case.

If Elaine is determined to be the payor of spousal support in this case, the criminal conviction of an abusive spouse, in this case, Stefan, would create a rebuttable presumption affecting the burden of proof that any award of temporary or permanent spousal support to the abusive spouse that would otherwise be awarded, should not be made, or should be reduced. (See Family Code Section 4235.) Thus, a criminal conviction in this matter would have an impact on Stefan's ability to receive any spousal support from Elaine.

Suzanne Boucher is a certified family law specialist. Her practice, located in Walnut Creek, focuses on complex property, support and custody issues in dissolution proceedings.

Employment Law Perspective

Wednesday, June 01, 2016

Note: All articles in this edition refer to the Guest Editor's column found here.



Most private employers do NOT have the right to request an employee's criminal history. In fact, unauthorized use of an employee's private information is a crime. However, there are exceptions. Depending on the construction work Stefan does for his company, there are some important exceptions to this rule found in Penal Code § 11105, the most common:

- Law enforcement personnel, police officers or parole and probation officers, may see criminal history if it is necessary for their jobs. People involved in a criminal case, such as court officers, judges, prosecutors, and defense attorneys, may see criminal history if one is a party or a witness for a case. Government employers, such as a job with the city or state, may view criminal history in considering application for a job if authorized by law or regulation. (Labor Code § 432.7.)
- Public utilities, such as nuclear power facilities, may be able to request criminal history.
- Some organizations are considered "agencies of the state," and can see records if permitted by law or regulation. This may include applications for licenses or certifications, such as entrance to the California Bar or an application for a concessionaire's license. **This may apply to Stefan.*
- Some laws expressly allow employers, such as schools or eldercare agencies, to see criminal history information to screen job applicants. To have access under this exception, the law must (1) explicitly authorize the employer to see criminal history, (2) refer to specific criminal conduct (i.e., specific crimes, not just any convictions), and (3) require the employer act on the existence of such information.
- Employers can also get access to some records through a general background check, using public record and databases kept by courts, news reporting agencies, or for-profit information-gathering services.

It is important for Stefan to keep in mind that should a position he is in or if he is seeking a promotion require a background check including his criminal history, this will include arrests even if Stefan was not charged and/or not convicted.

As Stefan is a Licensed Contractor he should be aware of special provisions in relation thereto. Pursuant to California law, all Contractors State License Board (CSLB) license applicants are required to submit a full set of fingerprints for criminal background check.

Fingerprints are compared to the records of the California Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) to determine if the applicant has a criminal history. http://www.cslb.ca.gov/About_US/FAQS/Fingerprint_Q_And_A.aspx.

Under California Labor Code § 432.7, in applying for a job, or being considered for promotion, termination, or placement in a job training program, an employer cannot ask about any arrests that don't result in a conviction, or any arrests that led to participation in a diversion program (such as drug rehabilitation) – something which ultimately may apply to Stefan. Further, an employer is also prohibited from trying to find out from other sources whether one has been arrested. If an employer somehow learns of the arrest record, § 432.7 prohibits it from considering any arrest that did not lead to a conviction, or any arrest that led to a diversion program, in making decisions regarding hiring, firing or promotion. There are some important exceptions to this general rule: Arrests pending trial; law enforcement positions; and, health facility positions.



It is legal for an employer to ask about all convictions, including misdemeanors as well as felonies. However, employers normally ask only about past felonies. If a conviction was *sealed*, an employee does not have to tell the employer about it. An employer will not have access to the sealed information. If a conviction was , it is up to the employee whether or not to tell future employers. Keep in mind that, if an employer runs a background check, it may see a conviction and that the conviction was dismissed. To avoid having a potential employer question whether someone was truthful in their application regarding the previous conviction, one may consider answering any questions about whether had any past convictions with “Yes—conviction dismissed.”

There are many manners in which this arrest may or may not impact Stefan in the workplace, he must stay well informed and consider his options carefully.

Employment Law implications for Ms. Elaine Knight

Elaine Knight is a full time county employee. Though the hospital noted alcohol on her breath it does not appear she was arrested. Thus, at this time, the concerns which face Elaine are that of a mother and wife who may need to take time off work for court appearances and the like.

California Labor Code Section 230(b) protects an employee who is a victim of a crime or who takes time off to appear in court to comply with a subpoena or other court order as a witness to a judicial proceeding.

Further, California Labor Code Section 230.5 protects an employee who is a victim of a listed offense for taking time off from work, to appear in court to be heard at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue. A victim is any person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term "victim" also includes the person's

spouse, parent, child, sibling, or guardian. (The complaint must be filed within *one year* from the date of occurrence of the violation.)

There are a great many additional rules, codes and/or regulations permitting time off work for the child and/or the spouse, it simply depends which path Elaine decides to take time off work in this matter, as a mother and/or wife.

***Beth W. Mora** is the managing partner and owner of Mora Employment Law, dedicated to representing employees in employment law matters. Beth is committed to aggressively pursuing her clients' best interests while treating each person she serves and litigates against with integrity, compassion and maintaining the utmost confidentiality. Beth can be found at www.moraemploymentlaw.com.*

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A Matter of Life or Death

Wednesday, June 01, 2016

Judge Raymond Carlton stroked his graying mustache as he reflected on the opinion, just received, affirming the judgment in his death penalty trial of Ralph Jackson, a jury verdict he would never forget.

Five years before, on a Tuesday afternoon the lingering bay fog left an ominous pallor over Parchester Village, an older enclave in northwest Richmond, built for African American ship workers after World War II. Edna Mae Washington died too soon that afternoon in Parchester Village. Edna Mae, an attractive, kindly 74-year old, was the beloved, generous godmother to many neighborhood children. The front screen door of her well-kept home was shoved back, the door left wide open, and her body lay on the kitchen floor. None of her neighbors heard anything or saw anyone leave the home. The street had been characteristically quiet, but now was filled with inconsolable neighbors and friends who rushed to be near after learning the news of her death. Ubiquitous yellow crime tape prevented them from pressing any closer.

The homicide team and county criminalists confronted a hideous scene. Edna Mae had been raped and strangled to death with her pantyhose, a crime so horrible that it was incomprehensible to even the most hardened officers. The house was carefully processed for evidence, but there were no finger prints, no hair samples, no shoe marks, seemingly scant trace evidence anywhere. Articles of clothes and other items were carefully put in evidence bags and labeled for identification, and the scene memorialized with a multitude of photographs.

The investigation became personal because the officers knew the victim well from her community work, admired her, and felt as if someone evil had ripped a family member from them. Some officers volunteered to work overtime without pay to try to find any lead, tediously review records of sex offenders, and canvass the neighborhood again for anyone who was at home that afternoon. A break came when a criminalist was able to find a small trace of a semen stain on a piece of clothes, and develop a useable DNA sample that was sent to the DOJ laboratory in Berkeley for follow-up analysis. But after months of exhaustive investigation, the case went tepid, then cold, and into a seemingly dead end cul-de-sac.

Some steeped in criminal law have felt a god of justice hovers over certain crimes that merit punishment, often leading to fortuitous developments. This happened in the Washington homicide.

Eighteen months later, Joanne Dirkson, having earned dual degrees in chemistry and forensic science, started her new job with the DOJ laboratory that was months behind in processing DNA evidence. To help catch up she worked late most nights and doggedly examined images of known and unknown DNA samples for comparison purposes. After several weeks of methodically reviewing samples from the central data base, she paused one night, looked again, and as if revealed by a burst of



divine light, realized she hit upon a reference sample from convicted sex offender Ralph Jackson that matched the crime scene DNA with similar alleles at 8 loci, the first cold hit ever in Contra Costa County. The Richmond Police Department was ecstatic at the news.

Investigators learned 43-year old Ralph Jackson was on parole for a violent sex offense at the time of Mrs. Washington's death and had been living nearby in San Pablo.

A nervous Ralph Jackson was detained and questioned about what he was doing on the afternoon of Edna Mae Washington's death. Jackson remembered working as a laborer on a roofing job in Parchester Village. The detective told Jackson an elderly woman was killed about that time. Jackson teared up, biting his lower lip. The questioning officer asked Jackson if he wanted to talk about what happened that day and Mirandized him about his rights. Jackson waived his rights, began to cry, and then struggled to explain. He could not purge from his memory what he had done that afternoon, as if a tormenting hound of heaven snapped at his conscience. The detective, in disbelief, listened as Jackson related a lifetime of being unable to control certain sexual impulses that led to a number of rapes and attempted sexual assaults. He explained he went for a walk during a noon time break at work. Some blocks later, an older women in her front yard asked him if he would like a cup of coffee and invited him in. While in the kitchen, he was overcome by urges to have sex with her, forced himself on her, killed her, and ran out. Jackson retreated within himself, did not want to discuss anything further, and was booked at the Martinez Detention Facility

The District Attorney sent investigator Ken Curtis, the office's most accomplished interrogator, to the Detention Facility to question Jackson further. Curtis introduced himself and explained he was interested in some of the details of what happened on that Tuesday afternoon. Jackson was slumped down, his hand partially holding and hiding his face. Curtis, a master at probing an accused's psyche, in a soft conversational voice asked Jackson if he wanted to talk. Curtis said he too had done some bad things in the past and talking about them helped him relieve the pain and find remorse. Jackson was placed in a poorly lit room like a scene in a noir film, with dark shadows on the floor and walls that held video recorders. Curtis quickly explained Jackson's Miranda rights to him. Jackson said he attended some group therapy sessions at a church to try to understand the evil of his actions. With tearful responses Jackson told Curtis generally what had transpired. Jackson repeatedly sobbed he was sorry for what he did and asked for forgiveness. Finally, he asked to rest during the lunch hour.

Curtis came back early in the afternoon to pin down some details. This time Jackson seemed spent and reticent. He had not slept for over a day. Jackson wanted to rest. With careful coaxing, Curtis asked Jackson if he wanted to pray with him about forgiveness. He guided Jackson to his knees and prayed a bit of the Our Father, emphasizing "forgive us our trespasses," and then asked questions about additional facts surrounding the crime. With sobbing answers Jackson slumped on his knees, responded, and filled in details. Curtis extracted information from a halting Jackson as Curtis reminded him about the power of religious forgiveness.

The District Attorney's capital punishment committee reviewed the case and found it easily met the criteria for the death penalty, special circumstances of murder during the course of a rape, with a heinous criminal history. The case was assigned to Assistant District Attorney Charles Bradley, an experienced sexual assault, death penalty prosecutor with a no-nonsense attitude. He had obtained death verdicts in both capital cases he previously tried.

The Public Defender's office was abuzz about who would handle the problematic defense of Jackson. Because of the gravity of the case and the distinct possibility of the death penalty being imposed, Assistant Public Defender Michael Lopez took it upon himself to shoulder the case and asked Karen Lawler to be his second chair. Lawler was one of the most promising younger lawyers in the office, noted for her tenacity, hard work, and jury appeal. Lopez had defended several death penalty cases, but none with the dire history presented by Jackson.

Counsel agreed the case could be assigned for all purposes to Judge Raymond Carlton in Department 47 of the Bray Building. Judge Carlton, now close to retirement, had presided over ten death penalty cases, with two resulting in death sentences. With his self-assured manner and thorough knowledge of capital cases, he kept control of proceedings with a rein not too firm that allowed counsel to be zealous advocates.

Karen Lawler filed a detailed motion to suppress Jackson's statements to investigator Curtis on due process grounds, asserting Jackson did not understand his rights, they were the product of overly coercive questioning, and in a setting and manner that unfairly coerced Jackson's will. Judge Carlton viewed the videotapes, listened to defense counsel's impassioned argument, and ruled that the first interrogation by Curtis was admissible, but not the second in the afternoon with its appeal to religion, and set forth reasons for his decision, citing recent cases and what he saw on the videotape. Losing part of the motion produced an unperceived silver lining for the defense that became clearer during trial.

During the following months, Judge Carlton heard a number of pretrial motions, ruled on disclosure of witnesses, resolved discovery disputes, and finalized the lengthy jury questionnaire that was a composite of what the prosecution and defense proposed. The questionnaire asked each prospective juror personal questions about their work, family, involvement with the justice system, and their experiences and attitudes concerning issues that would come up in the trial. It particularly probed a juror's willingness to keep an open mind about voting for or against death as a punishment based on the evidence despite one's personal beliefs. It also focused on a juror's willingness to follow the instructions on the law given by the judge during the proceedings.

Because of the nature of the case and because each side was entitled to 20 peremptory challenges, 300 jurors were summoned. Judge Carlton explained to the prospective jurors that the jury questioning process was called "voir dire," which means to speak the truth, under oath about one's qualifications to serve. Lopez and Lawler knew this was the critical phase of the trial. The prosecution's evidence for the guilt phase and the penalty phase held no surprises. The guiding jury instructions for death penalty cases were well established. But it was crucial for the defense to select jurors who were open to life in prison as punishment instead of death, jurors who valued the defendant's genuine remorse, jurors who would assign extraordinary mitigating weight to defendant's remorse such that it could outweigh the multitude of aggravating factors supporting death as punishment. CALCRIM 766 would instruct each juror to assign whatever moral or sympathetic value the juror would find appropriate to aggravating factors supporting death or mitigating factors supporting life without possibility of parole. To return a judgment of death, the jury had to find the aggravating factors outweighed the mitigating circumstances and also were so substantial in comparison that a sentence of death was justified. A juror could give a mitigating factor whatever weight he or she believed appropriate.

Counsel spent five days in jury selection, culminating in a jury of eight women, one Latina, and four men, one African American, and four alternates, winnowed after the prosecution exercised 12 peremptory challenges and the defense nine. Between the answers from an exhaustive jury questionnaire and Lopez' probing questions about personal feelings concerning the death penalty, a rigid belief in the principle of an eye for an eye, and how life in prison could be a just punishment, the defense was satisfied it had an open minded jury that was not predisposed to a death sentence in a case that clearly seemed to call for it. From a side seat in Department 47, a defense jury selection psychologist also watched the jurors' facial expressions, demeanor, and evaluated the content of their answers. She quietly advised defense counsel during recesses on her findings that were factored into excusing jurors. Defense counsel knew the case essentially ended with selection of this jury who hopefully "spoke the truth" about their feelings about capital punishment.

The guilt phase of the trial went as expected. Prosecutor Bradley confidently called witnesses who testified about the crime scene, the arrest of Jackson, autopsy findings, and the determined investigation. Joanne Dirkson, wearing double helix shaped earrings, testified about the DNA match and the extraordinarily high statistical probability that the semen stain came from the defendant. Cross examination scarcely blunted the expert testimony.

Bradley felt Curtis's video recording of Jackson was his piece de resistance. The jurors intently watched the prosecution's video as Ralph Jackson struggled, sobbed and staggered through his interrogation while continually asking for forgiveness, as he all but admitted the special circumstances of murder during the commission of a rape.

The jury returned a guilty verdict on the special circumstances charge after deliberating only two hours.

Trial on the penalty phase resumed three days later, giving Lopez and Lawler time to refine their defense. Prosecutor Bradley put on aggravating evidence of the extensive criminal history of Ralph Jackson, previous attempted and successful sexual assaults, and emphasized the circumstances of the brutal murder of Edna Mae Washington, a crime committed while on parole for another violent sexual offense. Bradley used the evidence of overwhelming aggravating circumstances as a powerful closing argument for the only punishment that could satisfy a community's sense of justice for a horrendous crime – death.

Karen Lawler called a highly regarded, retired warden from San Quentin Prison who testified about the harsh reality of imprisonment, the structured environment where Jackson would recall daily the evil of his actions, and experience the lack of any meaningful social interaction. The testimony would be used later to argue that under the law the jury must assume that life without possibility of parole would indeed be carried out, without any hope of release from a dark existence.

Lawler also presented witnesses regarding Jackson's parentless youth, repeatedly moving from foster home to foster home without any moral guidance, and his dropping out of school to live alone. She later explained this evidence was not an excuse for depraved behavior but provided a small insight into defendant's lack of a moral compass.

Finally, Michael Lopez replayed portions of his client's admissions in which Jackson remorsefully begged for forgiveness, that Lopez argued was akin to a confession seeking

God's forgiveness for his sins. And so the ruling allowing the partial use of defendant's interrogation statements proved to be a slender silver lining for a desperate defense.

In closing argument, Lopez reviewed the mitigating evidence with special emphasis on his client's genuine remorse, an uncontrived remorse elicited by one of the district attorney's most skillful investigators. As if staring down a life-threatening precipice, Michael Lopez looked into each juror's eyes and tried to deliver a life-saving summation of why Ralph Jackson's tortured remorse was sufficient for a verdict of life in a maximum security prison. He reminded the jury Judge Carlson's instructions would allow each of them to consider sympathy for the defendant as a mitigating factor when weighing aggravating and mitigating circumstances. The concept of sympathy, he argued, involved each juror's understanding Ralph Jackson's character, and then imposing a punishment appropriate to him.

The jury deliberated four days over the penalty and returned the unexpected verdict of life without possibility of parole. Afterwards, the foreperson explained the conflicted jury arrived at a bitterly fought consensus that allowing Ralph Jackson to live with his anguish and guilt, removed from civilized society in prison, provided long term retribution for a terrible crime that could never be adequately punished. The jury reasoned death provided instant punishment. But life in prison provided years of soul searching torment, a perpetual death knell. Judge Carlton did not disagree with the jury's rationale, although he felt the crime was as unforgiveable and horrible as those in the two prior trials that resulted in capital punishment.

In a reflective mood, the judge wondered if the same god of justice that uncovered the perpetrator also had a hand in deciding the punishment Ralph Jackson would endure the rest of his life. He recalled the words of former New York Police Commissioner and felon Bernie Kerik, "Going to prison is like dying with your eyes open."

Note: For other Judge Carlton stories, search "Stories from the Bray Building," in the Contra Costa Lawyer Magazine online site.

Bar Soap: Judge Arnason Celebration Tops them All

Wednesday, June 01, 2016

Every time I report on an interesting local event, I keep thinking nothing can top it. Recall my mention of the MCLE Spectacular, the Annual Installation Luncheon, Contra Costa County Mock Trial Competition and other Bar Association events. Well, I do believe the **Celebration to Honor the Life of the Honorable Richard E. Arnason** topped them all. The ceremony took place in the Supervisors' Chambers, with a reception afterwards at the Classic Courthouse. I must say it was a truly wonderful event. Unknown to many, Judge Arnason was a private man, and his funeral was a very private invitation-only ceremony. Because he was such a remarkable, respected and beloved man in our legal community many thought there should be a public ceremony to celebrate the life of Judge Arnason. Many thanks to all who worked so diligently to put the program together, particularly our Bar Association Executive Director Theresa Hurley.

The Judge Arnason program started out with an honor guard from the Martinez Police Department. The master of ceremonies was our presiding judge, The Honorable Steven K. Austin. Speakers included Judge Arnason's long time court clerk Virginia Nelson, Public Defender Robin Lipetzky, District Attorney Mark Peterson, Attorney William Gagan, and the Honorable James J. Marchiano. Each one of the speakers had something interesting to say about Judge Arnason and his record-breaking term on the bench. Incredibly Judge Arnason spent just short of 50 years on our local bench. That is a record in the State of California. After he left the bench, Public Defender Robin Lipetzky found a spot for Judge Arnason to hang his hat at her offices in Martinez. I love that fact, as she obviously recognized Judge Arnason could not just hang it up, but needed a place to read his "advance sheets" and to continue his lifelong legal mentoring of attorneys.

The history of Judge Arnason's life is one of the truly feel-good stories. He certainly will be missed.

As I often walk the halls of the Classic Courthouse, I note that civil jury trials are often taking place on the third floor. However, it seems harder and harder for me to get attorneys to report the results of those trials. Please do your best to let me know about civil jury verdicts. The Civil Jury Verdicts column is a very popular column in the Contra Costa Lawyer, but it doesn't get written without reports from those involved.

Not sure if many of you know of the delightful work done by **Justice James Marchiano** in writing "Bray Building Stories" and "More Stories from the A.F. Bray Courts Building". Get your hands on them if you can. Let me know if you would like me to help.

Last time I reported on the Contra Costa County Mock Trial Competition. We now have the results of this year's competition. Miramonte High School came in first, followed by Acalanes, Heritage and California, as the top four schools. Keep an eye out next year and be sure to volunteer some time on that program. Contact John Lance at the Contra Costa Office of Education for information on volunteering.

Interesting legal issues arise with "self-driving cars." The Yolo County California Inn of Court put on a very informative and thought-provoking program involving self-driving cars. A video of that program has been sent to the National Inns and it is available in the

national program data bank. One of my partners Will Portello is in that Yolo County Inn. A few interesting points: (1) Is someone a DUI driver if the sole occupant of a self-driving car? (2) Does one need a driver's license to occupy a self-driving car? (3) Can someone who is disabled be the lone occupant of a self-driving car? And what if that occupant is blind? (4) Does the accident avoidance program for a self-driving car choose between running into a child in a cross walk, or swerving into the oncoming lane of traffic to avoid a collision with the pedestrian? There are lots and lots of questions and legal issues. Sounds like we need an article on the topic. Who wants to volunteer?

I do recall I asked those of you who have been designated as "super lawyers" this year to let me know. Do not just limit it to "super lawyers." Brag a little and let me know if you have achieved any other honors. I am very happy to mention such honors in the column.

I often receive confidential requests regarding the evaluation of persons applying for superior court judge positions. It's nice to see friends and colleagues applying for positions as judges in the California Superior Courts. Keep an eye out for bar association programs for attorneys contemplating applying for positions on the bench. I see our own bar association is put on such an event in May.

Although he was not an attorney, **Dr. Mario M. Menesini** was a very active member of our Contra Costa community for many years. The Central Contra Costa Sanitary District recently dedicated its environmental laboratory in Pacheco in honor of Dr. Menesini. He was way out front on issues related to the environment and assisted in the drafting of legislation to protect our environment. The lab is named the Dr. Mario M. Menesini Environmental Laboratory. Dr. Menesini passed away on April 28, 2013.

I know I mentioned in the last column that **Patricia Kelly** moved her office to Walnut Creek -- just did not have the address. I do now have that address. Pat's new address is Law Offices of Patricia M. Kelly, 700 Ygnacio Valley Road, Suite 300, Walnut Creek 94596.

On a funny note, I reported in my last column that **Harvey Sohnen** had retired. Harvey reported to me he felt a bit like Mark Twain reading his own obituary. In fact, Harvey has not retired. He is still working away in the same place in Orinda. Sorry Harvey.

It's nice to see the Honorable William Kolin, Ret., has landed at Alternative Resolution Centers.

My friend Andy Port reported that Emard Danoff Port Tamulski & Walovich LLP has closed, and the members have joined Sedgwick LLP as part of Sedgwick's admiralty practice.

And now my all-too-frequent report on attorneys who have passed away recently. **Charles E. Townsend** of Orinda passed away on April 5, 2016. You might recognize the name, as he was a founding member along with his older brother of the powerhouse firm of Townsend & Townsend.

Alvin Buchignani of Moraga passed away on March 11, 2016. He practiced law for 55 years, right up until the day he died.

William H. Plageman, Jr., of Oakland passed away on April 1, 2016. Bill graduated from Boalt Hall in 1968 and worked for years as a partner at Thelen, Marrin, Johnson, and Bridges, and ultimately Plageman, Lund & Cannon.

Keep me posted on your moves, interesting verdicts, interesting settlements or just local gossip. Email me at mguichard@gtplawyers.com.

Inns of Court: Cleavers v. Kardashians

Wednesday, June 01, 2016

On April 14, 2016, Judge David Goldstein's pupilage group put on a thrilling display of Family Feud, Cleavers v. Kardashians!

On one side, you had the show of the 1950s, Leave It to Beaver. Steven Enochian played Ward Cleaver. Jill Lifter played June Cleaver. Nathan Pastor played the Beaver. David Marchiano played Wally Cleaver and Joseph Doherty played Eddie Haskell.

On the other hand, you had the show of the 2010s, Keeping Up With the Kardashians. Judge Joyce Cram (Ret.) played noted momager, Kris Jenner. Karen O'Neil played Kourtney Kardashian. Suzanne Boucher played Kim Kardashian. Erika Quintero played Khloe Kardashian. As you can imagine, there was a vast ocean of differences in the way that the Cleavers approach life compared to how the Kardashians approach life.



Judge Goldstein presented the question and then the Kardashians and Cleavers had the opportunity to provide their answer. Then, the spectators voted on whether they thought the Kardashians were correct or the Cleavers were correct.

One question was whether you can use social media to discuss your law firm. Several different options were put up on the screen. The Cleavers were confused by the nature of social media as it would not be invented for decades. This was the Kardashians' time to shine! As it turns out, you can speak about your firm and your cases on social media, but you have to be careful. California Rule of Professional Conduct 1-400 provides a significant amount of restrictions on communications by attorneys. Specifically, it limits "solicitations" and some of the proposed social media comments in the presentation fell into that category. It also prohibits the promising of results.

Another question was whether you have to inform your client of all offers received. This is very simple "usually." Rule 3-510 of the California Rules of Professional Conduct requires all terms and conditions of any offer made to a client in a criminal matter be promptly communicated to the client. However, this Rule only requires that the terms and conditions of a written settlement offer be conveyed in a civil case. Rule 3-500, though, requires an attorney to keep a client reasonably informed of significant developments, and depending on the circumstances, an oral offer might be a significant development. You have probably had situations where preposterous offers have been provided to you. You knew that your client would laugh or potentially even become enraged by the offer. However, you still have to comply with the Rules regarding your duty to communicate the offer to your client.

Of course, it is not just attorneys who have responsibilities. Judges have responsibilities, too. One of the most important of these responsibilities is impartiality to all. This specifically precludes any Judge from receiving a gift unless there is a personal or family relationship with the attorney that includes the custom and practice of giving and

exchanging gifts. This rule exists in both the Rules of Professional Conduct (5-300) and the Code of Judicial Ethics (4D5 and 4D6). Here is another question that some of you may have dealt with in real life. If you get a bad review online (i.e., on Yelp), can you respond to that review? This is like walking on a tight-rope, you can do it, but you have to be extremely careful. Rule 3-100 precludes an attorney from releasing any confidential information in regards to the case. If a former client is displeased, they may claim any information about the case is confidential, so one must tread lightly in responding. General responses that do not touch on the specific case in question are best.

The overarching theme of the presentation related to duties to clients. Judge Goldstein's group did a great job of taking many interesting questions about professional responsibilities and breaking them down for all. These rules are important, because all attorneys and Judges have to abide by them at all times.

If you are interested in applying for Robert G. McGrath American Inns of Court (RGMAIOC) membership, please contact Patricia Kelly.

Matthew B. Talbot, Esq., is an elder law attorney in Walnut Creek. His practice specializes in estate planning, trust/probate administration, trust/probate litigation, conservatorships, guardianships, elder abuse and Medi-Cal matters. Matthew is on the Executive Board of the Inns of Court. You can reach him at matthew@matthewbtalbot.com or (925) 322-1763.

Walkathon - Food from the Bar [photos]

Wednesday, June 01, 2016

Thank you to Archer Norris for coordinating this event and to all of the walkers who took part in the 9th Annual 5K Walkathon around downtown Walnut Creek on April 22. All of the proceeds went directly to the Food Bank of Contra Costa and Solano.

Thank you to the three firms that participated: Archer Norris | Buchman Provine Brothers Smith, and McNamara, Ney, Beatty, Slattery | Borges & Ambacher

Below are photos from the event. See more on our Facebook page.

[gallery ids="12059,12058,12057,12056,12055,12054,12053,12051,12050"]

Comedy Night [photos]

Wednesday, June 01, 2016

This year as part of the Food from the Bar 2016 campaign, CCCBA members were treated to Comedy Night or *Res Ipsa Jokuitor* (The joke speaks for itself) on April 21 at Back Forty BBQ in Pleasant Hill. Comedians Will Durst and Larry "Bubbles" Brown entertained us all for a memorable evening in support of the Food Bank of Contra Costa and Solano Counties.

Thank you to:

Benefactors: Robert G. McGrath American Inn of Court | Wells Fargo Bank, N.A.

Patrons: Archer Norris | McNamara, Ney, Beatty, Slattery, Borges & Ambacher | Newmeyer & Dillion, LLP | The Recorder | U.S. Legal Support

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[Inside: Guest Editor's Column, June 2016](#)

You will find a set of facts and then eight different perspectives from participants along the road of criminal justice. I hope that you enjoy the journey.



Spotlight



[Message from the President: June 2016](#)

Our members are looking for more networking opportunities and many are looking for programs closer to their homes or offices.



[Family Law Perspective](#)

Given the facts of this case, the court would most likely grant a temporary restraining order giving Elaine sole

News & Updates



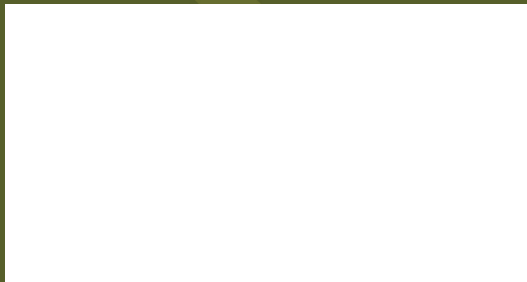
[Walkathon – Food from the Bar \[photos\]](#)

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[Comedy Night \[photos\]](#)

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Not for Resale