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CORRECTION: In the January/February issue of San Diego Lawyer, author Alfred F. Boustany II was incorrectly listed as Mark Boustany. San Diego Lawyer regrets the error.
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THE PRESIDENTIAL LITMUS TEST

Is it necessary that the justices on the United States Supreme Court represent all the various groups of people in America? Obviously not. First, and foremost, it would be impossible. There are only nine justices and literally hundreds of different ethnic, religious, racial and special-interest groups in the country. But second, it is not necessary because what we really need our justices to be is fair and brilliant.

Caucasian males can be fair and brilliant. The Supreme Court justices were all white males when the Court integrated the nation’s schools and established the right to privacy. The Courts that decided Roe v. Wade and upheld the Voting Rights Act were all or predominantly white male. The Court has historically upheld the rights of the minority under our Constitution, even against the pressure of the majority and sometimes against popular opinion.

If diversity on the Court is not necessary, is it beneficial to the country? It is hard to argue that it isn’t. People of differing backgrounds bring richness to the decision-making process. It also fosters more respect for the Court. Our country’s population is wildly diverse. For people to respect our judicial system, they must trust the system. A Court that is not dominated by one group appears more trustworthy.

So why was President Bush unable to find a “fair and brilliant” woman to nominate to the Court? Of all the women judges and attorneys in the country, he picked Harriet Miers, marginally qualified for a trial court seat, not close to having the experience and qualifications needed for our highest court. And when she withdrew, he nominated another white male.

It is clear that President Bush has a litmus test for any Supreme Court justice nominee. The nominee must be conservative and anti-choice. Bluntly put, President Bush wants a justice who will vote to restrict (or eliminate) abortion rights. The foundation for restricting abortion rights is in religion. So the president wants a justice who will apply his or her own religious beliefs to rulings on constitutional issues. Some will scream in protest to the following remark, but in my opinion most right-thinking, highly educated women support the constitutional principles underlying freedom of choice. They may not personally support abortion, but they agree with the rationale of Roe v. Wade. They may be religious, but their religious beliefs are personal to them and do not form the foundation for legal decision making.

A woman in her forties or older who is highly educated, Republican and anti-choice is probably too much of an ideologue to pass the Senate Judiciary Committee’s scrutiny. Thus, the litmus test imposed by the president virtually guarantees that no woman will be appointed to our nation’s highest court. And the country is poorer for it.

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See what you’ve been missing.

Re-reading and hearing the current discussion on the threat to judicial independence, one might conclude that this is a new phenomenon. Yet, looking back through history, we find that criticizing the judiciary and attempting to effect political influence over the courts is nothing new.

Franklin Roosevelt’s attempt to pack the U.S. Supreme Court in the 1930s comes to mind, as does the efforts to impeach Chief Justice Earl Warren in the 1960s. In fact, calls to impeach various judicial officers through the years have always been tools of extremists and are as old as the Constitution itself. Whenever one party controls the executive and legislative branches of government, whether on the state or federal level, attacks on an independent judiciary increase.

That having been said, are we to shrug our shoulders and allow these attacks to continue without speaking out? Unless we are prepared to lose the very freedoms that separation of powers is designed to protect through the mandated system of checks and balances, we must not, and cannot, be silent.

The legislative and executive intervention into the Terri Schiavo case is a recent example of how political this issue has become. Politicians regularly press hot-button issues in order to polarize the electorate to their advantage.

The tension that naturally exists between opposing political philosophies has to be allowed to play out. That tension, although sometimes awkward, is the by-product of freedom of expression. Over time, competing views give way to consensus. Sometimes, seminal events need to occur within our society to help consensus form. The Supreme Court’s ruling in Brown v. Board of Education is such an example. Who would doubt the wisdom and justice of the Brown decision today? Yet, many a cry was heard then to impeach the justices who advanced the cause of freedom with their landmark decree.

The irresponsible attacks on individual judges in the print and electronic media, on web sites and on blogs are unacceptable. It is not unreasonable to conclude that there is a connection between these unwarranted attacks and the violent attacks we witnessed last year in Atlanta and Chicago. Once the rule of law is attacked, the cascading effect is difficult to contain.

The mischaracterization of judges “legislating from the bench” is a further example of what appears to be an escalation of the rhetoric. I automatically assume when I hear that phrase used that the speaker is really saying that he or she disagrees with a judge’s ruling. The problem is compounded by the fact that the Canons of Judicial Ethics prevent judges from commenting on cases that are before them. They are defenseless to the attacks, and so they become easy targets.

All attorneys and the Bar Associations throughout the country, no matter how large or small, must stand up and be heard on this issue. When judges are attacked simply for doing their sworn duty, the entire system is being attacked. We are the guardians of that system of justice and must serve as such.

We cannot expect to agree with every decision coming out of every court every day. There are always winners and losers. The SDCBA does its best to respond to unfair criticism of our judges and the courts. OpEds are regularly run responding whenever it is felt that judicial independence is being threatened through unfair reporting or editorialization.

My request to you is that every member of the Bar take up the cause. Explain to your friends and family the importance of the lessons we all learned in grade school. The Founding Fathers knew what they were doing when they set up the three separate and independent branches of government and established the system of checks and balances. If we lose that separation, we are back to pistols at 20 paces.

Join me in speaking out on this very important issue. If we all spread the word, we will make a difference.
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Identity theft has become an issue that businesses must address directly and rapidly. More than a year ago, California enacted a law that required notice to consumers if there was a security breach involving personally identifiable information. It was the only state that had such a law, but now 20 other states have enacted laws that require notice of security breaches, and the Office of Comptroller of the Currency has issued notice of security breach recommendations for banks as well. Recent consumer surveys have shown that customers are becoming increasingly aware of this issue and are considering online security as a major factor in deciding which companies to do business with. Therefore, there are both legal and business reasons to address security and identity theft issues, and one of the main challenges facing companies is how to deal with these new notices of security breach laws.
The compliance challenge for businesses results from the fact that there is widespread collection of data across state lines, which means companies must sort through most, if not all, of these laws in order to understand their obligations. It is helpful to consider several common concerns when reviewing compliance issues:

• When notice must be given
• The form of the notice
• To whom notice must be given
• The scope of federal preemption
• The effect of existing security policies

Thought should be given to the circumstances that require notice to be given. In most cases, it is when a company has a reasonable belief that there was an unauthorized acquisition of unencrypted electronic “personal data.” For example, Arkansas and Delaware include medical information in their definitions of personal information. In Georgia, a password is sufficient personal information to trigger notice if it would allow access to identifying information. Montana, Nevada, North Dakota, and Rhode Island also have broad definitions of personal information. One other issue of note is that North Carolina’s law requires notice of security breach regarding both electronic and nonelectronic data, a broad standard that no other state has required. A related issue that states have approached differently is whether a company can decline to provide notice if it, or law enforcement, determines that there is not a great likelihood of harm. While certain states have followed this path, the vast majority of states do not permit companies to exercise this level of discretion.

Companies must also consider the form of notice that must be used. Almost all require some type of direct notice unless giving notice would compromise a law enforcement or security investigation. The exception is Illinois, which requires notice independent of law enforcement concerns. Direct notice under most of the state laws is done via written or electronic notice, although a few states permit telephone notice to serve as direct notice. Substitute notice is also permitted under all of these laws based on the cost and number of consumers that should receive notice.

Another issue that should be closely examined is the timing of the required notice. Most states require a company to provide notice to other entities, in addition to consumers, including notice to consumer reporting or government entities. Typically these government entities are the respective state attorney generals.

The impact of federal preemption should also be factored in when determining compliance obligations. Most states recognize that federal law may preempt these laws in certain industries, particularly the financial industry, and compliance with federal law in many circumstances will be deemed to be compliance with the state laws.

Companies should also consider whether there is an independent obligation to provide notice in the case of a data security incident even if there is no statute requiring notice. The Ohio attorney general has filed litigation against a company, claiming that the failure to give notice to consumers after a data security incident, though there was no statute directly requiring it, was an unlawful business practice. While this question is currently unresolved, it is an issue that should be considered at the time of an incident.

Finally, the effect and advantages of having a security policy in place before an incident happens is an important point to consider. Companies that have a security plan in place that is consistent with the notice requirements of these statutes are generally permitted to follow their own procedures in case of a data security incident.

Having a security plan in place also permits a company to deal with these issues proactively and think through the issues before an incident has happened. The plan should identify employees and their responsibilities in case of an incident. This should include a forensic component if possible so that the company can quickly address and assess the scope and cause of the security breach.

The plan should also provide for a quick determination and repair of any security vulnerability. Addressing the circumstances under which the company will contact law enforcement should also be included. Steps should be taken to assess the type of information that has been potentially compromised.

Given the number of laws now in place, thought should be given to designating a person who is to determine the residence and number of consumers whose information has been compromised and then determine the scope of the disclosure obligation. This should include whether there is just a disclosure obligation to the consumers or whether other entities should be contacted. If the notice statute permits the company to decline to provide notice, it should take all appropriate steps to assess and document the circumstances that support its decision to decline to provide notice. All of this must be done quite quickly as the vast majority of these statutes require notice to be given soon after the incident.

Andrew Serwin is a partner at Foley & Lardner LLP, in the E-Business and Information Technology group, and the author of the Internet Marketing Law Handbook, published by LegalWorks, a Thomson Business. He may be reached at aserwin@foleylaw.com.
WHAT IS A BLOG?

Blogs have been all the rage both in traditional media and on the Internet recently. However, the word, “blog,” did not even exist a decade ago. The term, “blog,” coined in 1999, is shorthand for “we blog” and is derived from the term “web log,” which was coined in 1997. Bloggers post comments to web sites via blogs, meaning that they add content to web sites that is date tagged, thereby creating a historical Web-based record.

Early blogs were text based and
included links to other web sites. However, since the late 1990s, blogs have evolved to also include images, audio and video. The number of blogs has been increasing exponentially, much like the number of web sites has increased exponentially. One estimate puts the number of blogs at more than 60 million. There are now so many blogs that there are blogs about blogs and search engines for blogs.

The blogging lexicon has also been growing and evolving with the mainstreaming of advancing technology. For example, the blogging of video content, also called “vlogging,” has been increasing and has been made possible by the decreasing cost of video devices, increasing bandwidth and increasing data rates.

Blogs became a mainstream media subject in the 2004 presidential campaign when candidates Howard Dean and Wesley Clark utilized blogs to convey their message, recruit supporters and raise campaign funds.

The use of blogs in politics can be viewed as part of a wider free-software community movement that encourages the free flow of information as well as the free flow of software. Open Source Politics, which grew out of the Open Source movement, utilizes blogs to enable and encourage people to participate more directly in politics.

Blogs come in a wide variety of forms from political blogs to personal diaries or journals to blogs that provide information on technical subject matter.

In the world of mass media, information is often shared between mass media companies, such as in syndicated columns. As a result, consumers often obtain similar information regardless of the mass media source. Adding to this effect is the trend of continued consolidation among mass media companies.

Blogs complement traditional media because they often provide news-breaking, obscure or technical information that traditional media either do not pick up quickly or do not understand. Thus, a review of blogs germane to a particular subject matter often yields information that supplements traditional research. However, it is necessary to evaluate the credibility of a blog just as it is necessary to evaluate the credibility of a web site. There are even blogs called “watchblogs” that are designed to keep traditional media honest.

Anil Dash, a blogger from the early days of the blogging medium, believes that it is “only a matter of time until some large part of the weblog realm is suffused with messages that are sponsored by commercial interests.” It is imperative to corroborate blog content to ferret out facts from mere sales puffery. Thus, blog readers should consider blogs circumspect and exercise due diligence in evaluating the veracity and reliability of a blog.

Here are some notable and simple terms used by bloggers:

- **BlogDay**—On August 31 every year, bloggers post recommendations of at least five new blogs.
- **Blogorrhea**—Excessive commentary in a weblog.
- **Blogosphere**—The blogging community consisting of all blogs.
- **Blogroll**—A list of other weblogs.
- **Blogstorm**—When a large amount of activity around a particular subject erupts in the blogosphere. Also called blog swarm.
- **Flog**—A combination of “fake” and “blog.” A blog that is ghostwritten such as by someone in a marketing department.
- **Moblog**—A combination of “mobile” and “blog.” A blog composed primarily of posts sent by mobile phone.
- **Multi-blogging**—The process of maintaining multiple blogs.
- **Splog**—A blog composed of spam or a blog whose creator does not add anything of value.
- **Troll**—A blogger who attacks the views expressed in a blog.

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So yesterday, so clichéd. This new round of associate salary hikes—$135,000 plus bonuses for first-year associates—isn’t going to attract and retain valued attorneys. The new associates the firms are trying to attract know that the bleeding edge isn’t about money, it’s about time.

Now that the economy has picked up, attorneys are feeling more selective about their legal employers and freer to change firms. Firms are well aware of the costs of high attrition: direct costs of $200,000 to $500,000 to replace a third-year associate, client dissatisfaction with high turnover, lost productivity, damaged morale and hampered recruiting. To add insult to injury, the same associates have to be replaced again and again. Attorney retention has become an economic necessity. How to “keep the keepers” is a crucial question for law firm management today.

Ironically, raising associate salaries only exacerbates attrition. It creates a generation of “cash and carry” associates who “are pocketing the financial rewards and grabbing the practical experience with little thought of investing in the long haul,” according to Debra Baker (85 ABA Journal 40 (May 1999)).

Let’s look quickly at the salary hike—attrition equation to see why this is so and then look at a cheap and effective solution. Research shows that for law students and laterals in the job market, work/life balance is one of the most important factors in choosing employers. NALP has found that more than 40 percent of attorneys leave their firms by their third year, and the inability to balance competing demands of work and personal obligations is frequently cited by attorneys as the reason they left their firms. This is true for both men and women. As Catalyst has reported, male and female attorneys report similar levels of work/life conflict. Moreover, an American Management Association survey of 352 companies found that employers reported more success in retaining employees by “giving them a life” than by offering more cash, according to Sue Shellenbarger of The Wall Street Journal. Another study by Harris Interactive and the Radcliffe Public Policy Center found that slightly over 70 percent of men in their 20s and 30s (in contrast to only 26 percent of men over 65) said they would be willing to take lower salaries in exchange for more family time.

Throwing money at associates will almost certainly mean that attorneys will have to work longer hours to cover the increase—the very thing attorneys do not want. As firms raise billable hour requirements, associates who want a life outside the office will raise up stakes and look for less-demanding pastures. Moreover, whatever competitive recruiting advantage the salary raise gave the firm will vanish as all the firms match the higher salaries—unless the firm raises salaries again.

The better way to attract and retain top talent is to offer attorneys the better quality of life they crave through balanced hours programs. Balanced hours are reduced hours that are designed to meet the business needs of a law firm while maintaining the attorneys’ ability to work and develop professionally without stigma. Balanced hours programs involve active management of workloads in proportion to reduced hours, emphasize client service, and promote the values of the firm. Thus, a balanced hours program not only can give employees more time to meet their
obligations outside of work, but also can create a climate within the firm that allows the balanced hours for attorneys to be productive and profitable.

That may sound like a part-time program, but it differs in key ways. Most firms these days have part-time policies, but few attorneys use them because they feel it would end their careers. At many firms, part-timers are viewed as part-committed and are removed from the partnership track. They get poor assignments, lose their mentors and are shut out from significant client contact. Thus, far from being recruiting and retention tools, traditional part-time programs often convince attorneys that the only way they can get a life is to leave their firms. Balanced hours programs, by definition, operate without this stigma and deliberately encourage the professional development of attorneys who have reduced their hours.

Another key difference between part-time policies and balanced hours programs is the business focus of balanced hours programs. Far from being an “accommodation of mommy lawyers,” balanced hours programs are business initiatives that will ensure the long-term viability of law firms. They maximize the firm’s capital—its legal talent—and stabilize the firm’s relationships with its clients.

Law firms that implement balanced hours programs can expect to see improvement in the following areas:

• **Business development.** In recent years, a number of companies have placed increased emphasis on diversity when hiring outside legal counsel. Among them is Shell Oil Company, which has asked firms competing for its business to report the number of female and minority employees at their firms.

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**TIP FROM THE TRENCHES**

**BY ALICE SOLOVAY**

Balance for attorneys seems to be defined similarly but achieved differently.

**Lilys D. McCoy** feels the balance issue intellectually and viscerally. “I was in trial last February. My son was six months old and I was in my first trimester with my second baby. I awoke at 4 a.m. to get to the office to finish polishing the direct examination of my expert witness. I tiptoed into the nursery to give my sleeping son a kiss goodbye and thought, ‘This is really hard,’ but I went to the office and continued working, through a bout of morning sickness, because I had to. My client was depending on me.”

But when McCoy is not in trial, she schedules life differently. If possible, she leaves home after her sons are up and gets home in time for dinner, baths, and reading together. “The approach I take is to eliminate low-priority items and focus on balancing fewer, important, commitments,” says McCoy. “A simple example: My TV is in the garage, so without an easy source of entertainment we spend more time engaged with each other in talking and projects.”

**Gary Wayne Burger** chose the marine path to balance. In 1997, Burger shut down his probate examining practice. Beneath the 66-foot mast of his 48-foot wooden cutter, Windflower, Burger and his wife and three children embarked on a 38,000-mile sailing adventure. His sabbatical included French Polynesia, the Marquesas, Fiji, the Hebrides and time living in Mexico.

“We traveled through storms, escaped from pirates off Sumatra by using evasion maneuvers, damaged the Windflower on a sandbar off Darwin, Australia, and even managed to visit courthouses and send postcards,” says Burger. In 2001, they returned. “We came back broke,” summarizes Burger, “but with renewed values and skinny bodies.”

Now back at work, Burger balances his week living four days in Borrego and three days on the boat moored off Shelter Island. His “marine sabbatical” protocol for achieving balance has worked so well, Burger intends to repeat it in the spring of 2007 by sailing from Japan to Alaska.

**Steven Brumer** serves as chief financial officer and general counsel to two real estate companies wholly owned and operated by Brumer and his wife. “There is a tradeoff to having to work hard at balancing your professional life with a partner/spouse,” says Brumer. “You get to spend far more time together than you would in a ‘traditional’ relationship. We are together all day every day.”

“The biggest problem in living with a business partner,” Brumer notes, “is drawing the line between work and personal time.” Among their solutions: maintain separate office spaces in their office suite; disagree without being disagreeable; and “make extra efforts to avoid work-related discussions during personal time—for ‘steam brain,’ those great business ideas that materialize during a shower, at which time it is permissible to bellow, ‘Hey, I just had the best idea.’”

“I believe our son is a safety valve for us,” says Brumer. Because Brumer prioritizes parenting, he regularly shifts into parent mode and maintains a good balance between working from home and relaxing at home.”

Brumer says, “I consider myself a full-time dad, although not a stay-at-home dad, because my job allows me to be flexible so I can stay home if necessary.”

Brumer thanked his prior employers, Copeland & Tierman, for being understanding and sensitive to his needs. “Soon after my son was born, the partners permitted me to take off a day a week to bond with him, while working longer hours on the remaining four days. This had a lasting effect, making us extraordinarily close.” Brumer recognizes that larger firms might have difficulty making similar flex-time arrangements.

“One of the best decisions I made to achieve balance,” summarizes Brumer, “is to work for myself. I have the ultimate control of what I do and when I do it.”

**Tracy Lynn Loughridge**, also a past president of Lawyers Club, was so enthusiastic about the necessity to maintain balance that she followed up her swamped 2005 year-end schedule with a vacation in Australia. “Because I think it’s so important to achieve balance, because I want to so much, I make it work, and my advice to others,” says Loughridge, “You’ve got to make it happen. It’s your choice.”

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Balancing Act  continued from page 15

A commitment to diversity helps to bring different viewpoints to the table and generate better solutions, and a diverse legal team can also be an asset in court, Shell general counsel Catherine Lamboley told The American Lawyer. Companies want legal teams that reflect the diversity of the jury and can think like them. Moreover, some companies consider attrition rates and billable hour requirements when they hire outside counsel. Additionally, attorneys are a key source of new business for most firms. When an attorney leaves a firm and goes in-house to try to find a better balance, is that attorney going to give business to the firm that, in the attorney’s view, treated him or her shabbily? Even if attorneys go to another firm, they are not going to want to refer business to a firm where they were not happy.

• **Improved retention.** Firms can hang on to talented, trained and experienced attorneys, who will bill at higher rates as they remain at the firm.
• **Improved recruiting.** Balanced hours programs make recruiting good attorneys substantially easier. Highly qualified applicants want to work for firms with good quality reduced-hours programs, either because they want to work part-time now or in the future or because they just want to be at a firm that has a people-first attitude.
• **Improved client relationships.** Clients spend a lot of time estab-

FOR FURTHER INFORMATION:

• **The Project for Attorney Retention** (www.pardc.org). Free research reports on work/life balance for attorneys, best practices recommendations, and information about how firms are doing with their part-time programs
• **NALP** (www.nalp.org). Statistical information about part-time work and diversity, and reports of why associates leave and where they go
• **ABA Commission on Women in the Profession** (www.abanet.org/women/home.html). Includes articles and publications about work/life balance
• **Minority Corporate Counsel Association** (www.mcca.com). Articles about alternative work programs and diversity initiatives
• **LawyersLife Coach** (www.lawyerslifecoach.com). Informative newsletter that details strategies for advancing professionally while still balancing work and life
• **JD Bliss** (www.jdbliss.com). Articles on balancing life and the law
• **Boston Bar Association** (www.bostonbar.org/prs/workfamily-challenges.htm). Report on professional challenges and family needs
• **Georgia Association for Women Lawyers**. (www.gawl.org/gawl/docs/Its%20About%20TimeFinal.pdf). Report of part-time work in Atlanta law firms
• **Cornell Employment and Family Careers Institute** (www.blcc.cornell.edu//cci/default.html). Working papers about balancing work and life
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Publishing a working relationship with outside counsel and report that they are upset by high attrition. For them, high attrition means a loss of institutional knowledge as well as the loss of all the effort they spent to familiarize the attorney with their business.

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Speaking personally, I can also vouch for the tangible rewards of balanced hours programs. I worked part-time as an associate after the birth of my first child and later, while pregnant with my second child and still part-time, was made a partner. For me, as for so many attorneys, the choice was not between working part-time and full-time, but between working part-time and no time at all. I was very loyal to my firm, gained experience as a

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litigator that enabled me to take on increasing responsibility, and began to develop business. My successful experience helped the firm recruit other attorneys who were interested in finding a firm with a good quality of life.

How does the part-time program at your firm stack up? The PAR (Project for Attorney Retention) Usability Test (www.pardc.org) will give you some data to determine if your firm’s program is a recruiting and retention tool or a professional kiss of death. Factors such as the number of attorneys, particularly partners and men, who are working part-time, the number of part-time associates who are promoted to partner, and the comparative attrition rates for part-time and full-time attorneys are key indicators. Several firms in San Diego have numbers that are worth noting: DLA Piper Marbury has seven partners locally who are part-time and has a good record firm-wide of promoting part-time associates to partner; Luce, Forward, Hamilton & Scripps LLP has five associates and five partners who work part-time; and Pillsbury Winthrop Shaw Pittman has nine part-time attorneys locally. Also noteworthy is Pillsbury’s low attrition rate for part-time attorneys. The firm’s managing partner, Marina Park, worked part-time herself for 10 years, and firm chair, Mary Cranston, insists that all partners support the part-time attorneys.

There is a limit (isn’t there?) to the amount of money firms can afford to throw at the recruiting and attrition problem. Giving associates the balance they want is much more affordable and much more effective—and will move firms into the forefront of human capital management.

Cynthia Thomas Calvert is co-director of the Project for Attorney Retention, which studies work/life balance for attorneys. She is also the author, with Joan Williams, of Solving the Part-Time Puzzle: The Law Firm’s Guide to Balanced Hours (NALP 2004). Reports of PAR’s research, best practices recommendations and more information are available at www.pardc.org.
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CAREER: Licensed in 1947 as a California bail bondsman; no one’s been at it longer.

NICKNAME: His nickname was given him by himself via an Oceanside police officer who noticed his license plate was BBK, and the cop said; “Hey does that stand for Bail Bond King?”

EARLY DAYS: Born on June 26, 1923, in Glendale, California. Served in the Navy during World War II and received the Purple Heart when his ship sank at Guadalcanal.

FAMILY: Beverly, his wife of 40 years, died in 2003; two grown kids. His father was a Los Angeles, Hollywood and Fallbrook (where he owned an avocado ranch) lawyer whose clients included Shirley Temple, Erol Flynn, Walter Pidgeon, ‘Bugsy’ Siegal and Mickey Cohen.

PASSION: Golf. Once had a 9 handicap; supports countless golf tournaments in the legal community. His other passion is work, where at age 82 he still works six days a week, and loves every minute of it. Never takes a vacation

PETS: Ace, a Golden Retriever, and two cats, Heidi and Tiger.

ADMIRES: Former President Ronald Reagan, whom he met at the Hotel del Coronado.

ASPIRATIONS: Ran for Mayor of San Diego in 1967 against Frank Curran.

THE PROFESSION: "It's fascinating. You meet some characters. I'm one myself. I relate to them."

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For more than a decade, San Diegans have been following the ongoing debate surrounding the presence of a colony of harbor seals at a tiny La Jolla beach known as Casa Beach or the Children’s Pool. The controversy focuses on a 1930 gift by Ellen Browning Scripps to the city of San Diego and a 1931 land grant from the state of California to the city.

In 1930, Scripps donated funds for the construction of a concrete breakwater on rock at the west side of the beach. Construction of the wall was completed in February 1931, and, in June 1931, the state of California granted the beach to the city of San Diego. The land grant states: “[S]aid lands shall be devoted exclusively to public park, bathing pool for children, parkway, highway, playground, and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of such purposes.”

Although the public trust doctrine would have permitted the state to narrowly limit the use of the beach to a “pool for children,” the state—significantly—structured the land grant, made just four months after the breakwater was completed, to include numerous other permissible uses, five of which are specifically enumerated.

In recent years, increasing numbers of seals have begun resting on the beach. The earliest known maps of La Jolla refer to the rock underneath the sea wall as “seal rock,” suggesting that this beach is likely the ancestral habitat of harbor seals, who are known to have high site fidelity and will return to an established rookery for generations. The beach has been federally recognized as a rookery since at least February of 2000.

The disputes between seal advocates and those wishing to rid the beach of seals have steadily escalated, and, not surprisingly, the controversy has migrated to the legal arena. In 2004, Valerie O’Sullivan, a swimmer who had been cited by National Marine Fisheries Services for harassing the seals in violation of the Marine Mammal Protection Act, sued in Superior Court, asserting that the city had violated the terms of the land grant by failing to remove the seals and restore the beach to a bathing pool. While this suit was pending, two other lawsuits were filed against the city asserting that the seals were entitled to protection under various laws, including the Marine Mammal Protection Act, the California Environmental Quality Act and Municipal Code Section 63.0102(b)(10).

In October 2005, Judge William Pate issued a ruling in the O’Sullivan case, ordering the city to return the beach to a bathing pool. The city attorney has filed a notice of appeal and has secured a stay of Pate’s order. At least two national nonprofit organizations are preparing amicus briefs to be filed in that appeal, which could well find its way to the California Supreme Court. There have also been indications that a bill may be introduced in the state assembly amending the terms of the land grant to specifically allow restricted access to the beach for purposes of marine mammal protection.

The escalation of a local turf war over a tiny strip of beach to the highest levels of state lawmaking highlights the significance of a rapidly emerging area of law called “animal law.” New legislation and case law pertaining to animals are exploding on local, national and international levels. Animal law courses are now offered at 62 law schools in this country. The American Bar As-

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sociation, in 2004, formally recognized animal law as an important emerging area of law by establishing an Animal Law Committee. Prominent legal scholars such as Lawrence Tribe, Cass Sunstein and Alan Dershowitz have jumped into the arena, writing and speaking publicly about the importance of animal law issues.

At the same time, public interest in animal-related issues has reached an all-time high, due in part to the research of anthropologists, ethologists, and behavioral scientists such as Jane Goodall, Marc Bekoff and Frans de Waal, who have provided compelling evidence that many animals, particularly those with complex brains, have personalities, sophisticated communication patterns and problem-solving abilities once considered unique to humans. The various great apes share between 96.4 percent and 98.7 percent of our DNA. We now know that animals can transmit culture between generations, and the fact that animals experience emotions is accepted as mainstream biology. Many animals demonstrate emotions that appear identical to those we call happiness, pleasure, empathy, respect, relief, embarrassment, sarcasm, resentment, jealousy, anger, fear, disgust, sadness and grief.

Animal law encompasses virtually the entire spectrum of law, including torts, contracts, insurance law, property, intellectual property, constitutional law, criminal law, trusts and estates, family law (custody) and international law, and it addresses areas as diverse as genetic engineering and cloning, patenting of living organisms, factory farming and international whaling. Animal law is often erroneously confused with “animal rights.” In this country, animals have no legal rights. Animals are classified as property in all 50 states. Koko, the lowland gorilla who uses deaf sign language and understands more than 2,000 spoken words, has the legal status of a lawnmower. In most states, farmed animals are exempt from all anti-cruelty statutes. Ninety-five percent of all animals used in laboratory research are exempt from even the minimal protections of the Animal Welfare Act.

Yet, on all levels, new laws are being enacted and common law is being broadened to create more humane conditions for animals. To the surprise of many, this is no longer solely the cause of liberals and fringe activists. Advocates for more stringent laws protecting animals increasingly cross party lines. In 2002, George Bush’s special assistant and senior speech writer, Matthew Scully, a fundamentalist Christian, left the White House to publish an expose on factory farming, Dominion: The Power of Man, the Suffering of the Animals, and the Call to Mercy. In May 2005, Pat Buchanan’s magazine, The American Conservative, published “Torture on the Farm,” a cover story discussing why conservatives should support animal protection. For many years, Republican Senator Robert Dole was the animals’ strongest advocate on Capitol Hill; Dole was the driving force behind the enactment of the 1985 amendment strengthening the Animal Welfare Act.

The impetus for the changes that we are beginning to see in animal-related laws may, in part, be traceable to our love of our companion animals. A 2004-2005 survey by the American Veterinary Medical Association reported that 93 percent of the individuals surveyed said

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they would be likely to risk their own life for their pet, 83 percent refer to themselves as their pet’s “mom” or “dad,” 59 percent celebrate their pet’s birthday, 90 percent of single individuals would not consider dating someone who was not fond of their pet, and, if deserted on an island and could choose only one companion, 50 percent would choose a dog or cat over a human. Americans spent $31 billion on their pets in 2003. Yet, while many Americans treat their pets like family members, most never give a thought to the billions of animals slaughtered each year for food, science and cosmetics.

While, in this country, we have yet to see any significant reform of the laws regulating the treatment of animals used in food production, the European Union has recently enacted stringent legislation banning, as cruel, many farming practices now commonly employed in the United States. The European Parliament also recently enacted a law banning the use of animals in most cosmetics testing in the European Union. In 2000, New Zealand, the first country in the world to give women the right to vote, passed legislation making it illegal to experiment on great apes (chimpanzees, bonobos, gorillas and orangutans) unless the research was proven to be beneficial to the individual animal or its species. Great apes are no longer used in research anywhere in the European Union, and Great Britain, Sweden and Japan have legally banned experimentation on them. Although research on primates, including great apes, is still flourishing in the United States, public sentiment on this issue is divided. A 1999 Zogby poll reported that 51 percent of Americans believe that chimpanzees should have rights “similar to children with a guardian to look out for their interests.”

Matthew Scully’s Dominion states: “Animals are more than ever a test of our character, of mankind’s capacity for empa-

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thy and for decent, honorable conduct and faithful stewardship. We are called to treat them with kindness, not because they have rights or power or some claim to equality, but in a sense because they don’t; because they stand unequal and powerless before us. . . . Whenever we humans enter their world, from our farms to the local animal shelter to the African savanna, we enter as lords of the earth bearing strange powers of terror and mercy alike. . . . And it is true that there will always be enough injustice and human suffering in the world to make the wrongs done to animals seem small and secondary. The answer is that justice is not a finite commodity.” In deciding how existing laws might best be applied or new laws crafted in cases involving factory farming, laboratory vivisection or an occupation of a La Jolla beach by a harbor seal colony, this passage seems worthy of consideration.

Kristina Hancock is senior counsel at Holland & Knight LLP in Rancho Santa Fe. She is the incoming chair of the American Bar Association’s TIPS Animal Law Committee and is an adjunct professor at California Western School of Law where she teaches animal law. She may be reached at kristina.hancock@hkllaw.com.

1 More recent statistics document that harbor seals have been present in the vicinity since at least the 1930s.
2 In 1994, a marine mammal reserve was created by local ordinance, protecting the waters and large rock structure to the north of Casa Beach. The reserve expired in August 1999.
3 Both of those lawsuits were eventually dismissed. One of them, filed by the Humane Society of the United States, is currently on appeal.
4 In 2004, San Diego’s California Western School of Law made history by hosting the first ever International Animal Law Conference. Legal practitioners and scholars attended from all parts of the globe, including Russia, China, India, Africa, Australia, New Zealand, Britain, the European Union and Poland.
5 The Animal Law Committee is a general committee of the 35,000-member Tort Trial & Insurance Practice Section.
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When Justice Sandra Day O’Connor announced her intention to retire last June, few believed that the replacement process would drag on for seven months. But, then again, few believed that Chief Justice William Rehnquist would die quite so suddenly or that President George W. Bush would nominate John Roberts, the man he had originally named to replace O’Connor, to take Rehnquist’s place instead. And surely no one predicted the Harriet Miers debacle. If all goes well, however, the vote on Supreme Court nominee Samuel Alito—which at this writing is expected in late January—will be the end of an extraordinarily long process.

Supreme Court nominations did not used to take so long. As recently as the 1920s, it was still possible for a member of the Supreme Court to resign on a Monday, the president to nominate his successor on a Tuesday, and the Senate to confirm the nominee later that afternoon. One, two, three. The process couldn’t have been carried out with any more deliberate speed.

POLITICS AND THE COURT

The Long and Often Bitter Confirmation Process

BY GAIL HERIOT

Part of the reason for the change is the Senate hearing itself. It was not until 1925 that the Senate Committee on the Judiciary held its first hearing on a Supreme Court nominee. And it was not until the 1950s that hearings became routine—perhaps not coincidently around the same time many Americans were buying their first television set. When Harry Truman nominated Sherman Minton in 1949, Minton actually refused to appear before the Senate committee. He considered it undignified and unnecessary given his record of judicial service. The Senate confirmed him anyway.

The Senate’s willingness to confirm Minton despite his refusal to appear speaks louder than any words. Senate hearings occasionally help to clarify issues about a nominee’s fitness for judicial office. But those occasions are rare. Most hearings are just glorified photo opportunities. And on those occasions when they are used as a “gotcha”—an opportunity to catch a well-qualified nominee in some innocent mistake or unfortunate turn of phrase—hearings are worse than a frivolous use of time.

But it isn’t just the addition of the hearing that has caused the judicial confirmation process to be so time con-
suming. Even the real work of the Senate—done behind the scenes—has grown exponentially over the past few decades. These days, no hearing is held until the members of the Senate Committee on the Judiciary and their staff members have pored over the FBI reports and the nominee’s written answers to committee questions. They meet informally with the nominee and scrutinize every word he or she has ever published in an effort to divine what sort of justice the nominee will make. As always, the committee members as well as many of their Senate colleagues hear from their constituents and other interested parties, who often themselves have done a good deal of homework. By the time the hearing rolls around, it would take a lot to divert the committee members from the opinions they have formed based on the record. And that is the way it should be. A nominee should be judged on a lifetime of achievement rather than his or her performance during a day of grilling under the glare of television lights. Great judges are not always great television performers.

None of this means that in centuries past winning Senate approval for Supreme Court nominations was easy. A quicker process did not mean that the nominee was always confirmed. Of the 154 nominations to the Supreme Court between 1789 and 2004, 34 failed confirmation; 11 of those were rejected outright and the rest were withdrawn by the president or never completely acted upon by the Senate. Contrary to popular belief, however, those failed nominations occurred disproportionately in the 19th, not the late 20th, century. John Tyler, for example, made nine Supreme Court nominations, only one of which was confirmed. He might have increased his average had he refrained from nominating John C. Spencer twice, Edward King twice and Reuben H. Walworth three times, none of whom ever managed to get confirmed. Tyler was extraordinarily stubborn when it came to the exercise of his appointments power, and the Senate was not inclined to be cooperative.

But even George Washington had to suffer the indignity of a

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Politics and the Court  continued from page 31

rejection, although oddly enough, Washington himself may have been secretly pleased. Back in those days, it was seldom possible for the president to interview potential nominees from distant states before the nomination. Communication was too difficult. But when Washington nominated John Rutledge of South Carolina to be the second chief justice in American history, he thought he knew the man well. Rutledge had served on the Court from 1790 to 1791, before resigning to become chief justice of the South Carolina Supreme Court. During his years back home in South Carolina, however, Rutledge had gotten, well, a little cranky, some say as a result of the death of his much-loved wife. Shortly after he received word that Washington had nominated him, he made a speech condemning Washington’s management of foreign affairs and particularly of the Jay Treaty. He said he’d rather see Washington dead than the Jay Treaty successfully ratified. When word of this reached the nation’s capital in New York, the Senate, which had recently approved that controversial treaty, was not amused by Rutledge’s indiscretion and rejected his nomination. It’s hard to believe that Washington took the rejection hard.

Nevertheless, the perception is that over the past few decades, the process of confirming members of the Supreme Court has gotten more ideologically partisan as well as more rancorous. That perception is probably correct. Many of the controversial nominations in centuries past were fights over issues of political patronage or paybacks for perceived personal insults. Looking back on them, they may seem petty and small. In comparison, the more controversial confirmation battles of the past decades—for example, Robert Bork and Clarence Thomas—underneath the surface were struggles over the ideological direction of the Court. In addition, they were ugly. While a dignified debate about competing judicial philosophies would arguably be a good thing for the country, no one who lived through them imagines that those very public brawls were in any way good. Ugly battles do harm to our constitutional order, not the least by discouraging qualified and talented lawyers from agreeing to be nominated.

Even the relatively uncontroversial nominees were sometimes put through an unduly rancorous process. It’s not simply that their private and professional lives were put under a Senate mi-
That's appropriate enough provided that it is conducted with the kind of fairness and dignity that befits the Senate's constitutionally mandated task. But sometimes it hasn't been. Instead it's been done against a background of special-interest groups hysterically insisting that the nominees are wildly unfit for consideration. They have been called jack-booted fascists, racists, sexists, imbeciles and idiots. Rather than rising above such inflammatory rhetoric, some members of the Senate stoked the flames, while others stood by mutely, doing nothing to raise the tone of the debate.

Alas, few observers of the situation are optimistic that the confirmation process can be made quick and pleasant. Indeed, just keeping it civil and focused on the nominee's qualifications and judicial philosophy requires a kind of leadership that is rarely exhibited on Capitol Hill or elsewhere. That's because there's a reason that fights over Supreme Court appointments have become more elaborate and acrimonious over time: More is at stake. When hot-button issues—like abortion, the death penalty and same-sex marriage—are made the province of the Supreme Court rather than the Congress and the state legislatures, voters (and the elected officials who represent them) are going to take a keen interest in who is sitting on that Court. After all, those men and women in the black robes will be governing their lives.

None of this will change so long as judges are perceived as policy-makers. From time to time, the public's interest in judicial officeholders will boil over and give rise to another ugly confirmation battle, and there are only two solutions. The first is essentially to surrender: Concede that it is the proper role of the Supreme Court to act as a policy-making body and amend the Constitution to provide for the election of its members, since in a democracy policy-makers ought to be elected by the people. The second is to cultivate a legal culture in which judges defer more readily to the political branches and are careful to distinguish their own policy preferences from the law. If neither solution is adopted and implemented, the problem of long and sometimes rancorous confirmation processes will continue.

Gail Heriot is a professor of law at the University of San Diego and a former counsel to the Senate Committee on the Judiciary.
WHERE THE WIL

LIFE AND LAW IN RAMONA

BY DEAN A. SCHIFFMAN
LD THINGS ARE:

There is no other place I’d rather be than Ramona. My screensaver is a photo of the lush green valley of Ramona taken from my wee airplane. The photo has Main Street, a chicken farm, and then beyond, Mount Woodson and the ocean. We are a close group, and our judges let us use the courthouse for all our CLE activities.

—Samuel Jefferson Frazier III, president of the Ramona Bar Association

Mr. Frazier is a pilot, sailor, black belt and founder of Clown Ministries International.

Being on the Ramona bench on Fridays is a refreshing change from El Cajon. My only concern is becoming a CHP radar victim on Highway 67. Be sure to check out the judge’s chambers in the Ramona courthouse; one just can’t find drapes like that anymore.

—Superior Court Judge Allan J. Preckel

After 24 years, I moved my practice to Ramona. My wife opened her

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RAMONA FACTS


Distance to Courthouses (miles): Downtown: 37; El Cajon: 24; Vista: 30; Chula Vista: 43. El Cajon judges visit Ramona weekly for court business there.

Attractions: Guy B. Woodward Museum (Old West theme); wineries (Ramona Vintners Cellars, Schwaesdall, Pamo Valley Vineyards & Winery; Salerno and Lenora); Mountain Valley Ranch; Ramona Airport (home of the Ramona Air Attack Base fire fighting squadron); refurbished Mainstage Theatre; thousands of horses. Ramona’s annual rodeo draws top cowboys.

History: The area was first inhabited by Diegueno Indians. The stagecoach line to Julian’s gold rush spurred Ramona’s growth in the late 1800s. By 1920, Ramona was the “Turkey Capital of the World” (President Truman received a Ramona turkey). “Old Town Ramona” spans 3rd Street and 10th Street. Ramona’s lawyers are helping restore the community since the 2004 wildfires.
Where the Wild Things Are continued from page 35

business in the same building. The courts are not as close, but the short commute, no traffic, and the laid-back atmosphere make it worthwhile.

—Gary Kreep

Ramona is a great place to live and practice. I drive or fly to clients in many locations. Technology lets me work out here. I feel blessed to live and work in Ramona.

—Don S. Kovacic

Here I get back to basic lawyering, with quiet, friendly people and old-fashioned values. I travel a two-lane road to work. I’m home in minutes for my children. My practice is busy but not overwhelming. I enjoy my frequent trips “down the hill” to see old friends.

—Brian J. Stolliker

I practiced for over 30 years in different places, but I enjoyed Ramona the most. The members of the Bar are good people, and my Ramona clients were the type to have as friends.

—LeWiss N. Cole

I have practiced in San Diego and Ramona for 17 years. Ramona clients appreciate having their attorney nearby, rather than “down the hill.” Not having to drive to San Diego every day is cool too.

—Barry A. Pasternack

I have lived in matorral country east of Ramona where scrub brush and wild animals abound. Coyotes howl at night and hawks soar. I have horses and goats. It’s peaceful except for the occasional wildfire roaring through.

—Grant Eddy

I have been here since 1978. My wife, Katie, is my secretary, office manager, paralegal and bookkeeper. We raised two children on 12 acres, with horses, donkeys, chickens, llamas and dogs. My clients use me instead of driving 40 miles “down the hill.”

—Jeremiah F. Reid

Ramona is quiet and beautiful, like Long Island where I grew up. I love the animals everywhere, no parking meters, a one-room court, little businesses, having a well at my place, seeing my pups grow up in the country, and how happy my Ramona clients are to be here in two minutes.

—Lynne Costigan

Practicing here allows me to raise four grandchildren in a safe place. Ramona has longtime farmers, small-town folk and commuters looking for the perfect place for children, horses and all manner of critters. For me, Ramona works!

—Clytie Kochler

This is where I raised my two sons. Their sense of small town will last a lifetime. My youngest says he will return to Ramona if he has children. That about says it all!

—Ellen Swaim

I have enjoyed Ramona’s country living for 15 years. My children loved their school and their teachers, who showed a genuine interest in their future.

—Walt Pinkerton

Being from New York, Ramona is satisfying. My six-mile commute has mountains, fields, wildlife and livestock. Yet Ramona is big enough to have life’s conveniences.

—Robert E. Krysak

Dean Schiffman is a San Diego attorney and expert witness. He can be reached through his web site, www.LAWandNUMBERS.com.
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Private Dispute Resolution from a Name You Know and a Reputation You Trust.
BITING THE HAND THAT JUDGES YOU

BY WENDY PATRICK MAZZARELLA AND DANNY EATON
Noted San Diego animal law attorney Judah P. Benjamin, great-great-great-grand-nephew and namesake of the Confederate attorney general, was livid. He had just reviewed the ruling of the California Court of Appeal affirming summary judgment against his client Robert E. Lee IX, who had sued U.S. Grant IX for negligently killing Lee’s dog, Traveller, thereby depriving Lee of Traveller’s companionship. Benjamin thought he had established the need to recognize such claims and was dumbfounded that Presiding Justice Abraham Lincoln and the other panel members ducked the merits on what Benjamin considered a technicality to affirm the judgment.

Benjamin filed a petition for reconsideration with the court. Oblivious to identical language in a reconsideration petition filed by the attorney in In re Koven (2005) 35 Cal.Rptr.3d 917, Benjamin wrote: “This Court’s rulings against Lee in this appeal, each of which had no basis whatsoever in fact or law, were merely a reaffirmation that the ‘fix’ was proceeding full bore. . . . This Court purposely concocted a flimsy excuse not to rule on the merits of this issue, because it knew that to do so would have required it to reverse” (id. at 921-22).

Benjamin wasn’t finished. “When this Court chose to engage in a betrayal of the fundamental values and principles of the law, in order to defeat the interests of a ‘Lee,’ it undertook an ‘ends-justifies-the-means’ approach. The ‘ends’ was to eliminate Lee from the judicial system, whatever the cost—the cost being this Court’s integrity and continuing viability as a depository of the public trust” (id. at 922-23 [italics in original]). “The bottom line is: this Court refused to apply the governing principles and law to its analysis of the facts in order to manipulate an affirmation on this issue in favor of a litigant with whom the Court had a personal relationship and against a litigant it views with disdain” (id. at 923 [italics in original]). For good measure, Benjamin attacked the integrity of trial judge William Sherman, Grant’s attorney Edward Bates, and Grant’s expert witness.

Justice Lincoln was appalled at this latest example of attorney incivility toward judges. The court issued an Order to Show Cause Re: Criminal Contempt. Benjamin’s rebel temper having cooled, he apologized, in words that also echoed those of the attorney in Koven, “for the improper statements in the petition [ ], [and] expresses deep regret for impugning the [integrity of this] Court, and accepts the embarrassment he has brought upon himself” (id. at 919.)

The apology convinced the court not to jail Benjamin, but still to find Benjamin guilty of two counts of direct contempt, fine him $2,000, and refer him to the State Bar for investigation and, if appropriate, discipline (id.).

Direct contempt is contempt “committed in the immediate view and presence of the court, or of the judge at chambers” (id. at 923). “[I]t is the settled law of this state that an attorney commits a direct contempt when he impugns the integrity of the court by statements made in open court either orally or in writing. Insolence to the judge in the form of insulting words or conduct in court has traditionally been recognized in the common law as constituting grounds for contempt” (id.). “The judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounded duty to protect the integrity of

continued on page 40
Biting the Hand That Judges You continued from page 39

his court. However willing he may be to forego the private injury, the obligation is upon him by his oath to maintain the respect due to the court over which he presides” (id. at 924). Contempts arising from attacks on a court’s integrity are regarded as criminal proceedings and are punishable by five days in jail and/or a fine of up to $1,000 (ibid. [citing Code of Civ. Proc. 1218(a)].

Benjamin’s apology wasn’t enough for seven reasons: (1) counsel had 15 years of experience; (2) not only were the charges false, they were “outrageous”; (3) there was a lack of any factual support to the charges; (4) the allegations were “spiteful and malicious”; (5) Benjamin’s false allegations were deliberate and made, by his own admission, with a clear head; (6) Benjamin had previously attacked the integrity of the trial judge; and (7) opposing counsel and his expert witness (id. at 926-28).

An attorney’s duty to represent clients vigorously does not include the right to attack judicial officers contemptuously in violation of our duties as officers of the court. A dog that can’t control his barking and growling may wind up in the pound. A lawyer who can’t may wind up in jail. ■

Disclaimer: The information in this column is intended to be informational only and does not constitute legal advice.

Wendy Patrick Mazzarella is a deputy district attorney and co-chair of the San Diego County Bar’s Ethics Committee; she may be reached at wendy.pati cks@sdca.org. Danny Eaton is past chair of the Bar’s Ethics Committee and a partner of Seltzer Caplan McMahon Vitek; he may be reached at eaton@scmv.com.
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In the past several years, the Department of Justice (DOJ), the Securities and Exchange Commission (SEC) and other regulatory agencies have taken increasingly aggressive stances toward the naming of corporations (as well as individual officers and employees) as defendants in criminal and civil cases for securities violations and other violations of federal law. Due in large part to the spectacular abuses at Enron, WorldCom and other large, publicly traded companies, these federal agencies have levied increasingly large fines and other penalties, which, in combination with losses of business and investor confidence, can be crippling to the company.\(^1\)

In this hostile climate, corporations are forced to react quickly to signs of corporate malfeasance, whether the first sign of trouble comes in the form of red flags waved by an auditor or whistleblower or in the form of a government subpoena, search warrant or target letter. The SEC and DOJ, in particular, have set up significant incentives for corporations to investigate and root out illegal activities of their employees and significant penalties for corporations that are perceived as either not cooperating or downright shielding wrongdoing.

Numerous articles have examined the perceived flaws in the government’s framework of incentives and disincentives to corporations faced with possible criminal activity by their employees. This article sets out the legal framework as it stands today and explores the practical issues that arise from that framework.

**The Seaboard Decision**

In October 2001, the SEC issued a report of investigation related to its investigation of Seaboard Corporation for improper accounting entries that overstated Seaboard’s assets and understated expenses. In the end, the SEC reached settlement with the former controller of the Seaboard subsidiary who had caused Seaboard’s books and records to be inaccurate. Significantly, however, the SEC declined to bring any action against Seaboard, and in its October 21 report, the SEC set out its reasons for not bringing an action against the corporation itself.\(^2\)

The reasons set out in the Seaboard decision were quite consciously meant to serve as a guide for corporations who wished to avoid action by the SEC. The reasons set out in the Seaboard decision were quite consciously meant to serve as a guide for corporations who wished to avoid action by the SEC.
volved upper management, and how long the misconduct lasted before it was detected. Another point listed was the extent of the damage done to shareholders and other corporate constituencies.

In addition, many of the points raised dealt with how the corporation reacted to the discovery of misconduct by one or more of its employees. Specifically, how the misconduct was detected, how long between discovery of the misconduct and internal response, what steps the company took after learning of the misconduct, whether the company completed a prompt and thorough review of the misconduct, and whether the company made the results of its review available to the SEC (including waiving the attorney-client privilege if necessary).3

The Thompson Memorandum
In January of 2003, then-Deputy Attorney General Larry D. Thompson issued a memorandum titled “Principles of Federal Prosecution of Business Organizations” (the “Thompson memorandum”). In that memorandum, the deputy attorney general laid out a list of considerations that federal prosecutors should use when deciding whether or not to charge a corporation. These factors were as follows: (1) the nature and seriousness of the offense; (2) the pervasiveness of the wrongdoing within the corporation (including whether upper management was involved); (3) the corporation’s history of similar conduct; (4) the corporation’s timely and voluntary disclosure of wrongdoing and cooperation (including waiver of the attorney-client privilege if needed); (5) the existence of a corporate compliance program; (6) the corporation’s remedial actions; (7) the collateral consequences of prosecution (including harm to shareholders); (8) the adequacy of the prosecution of culpable individuals within the company; and (9) the adequacy of remedies such as civil or regulatory enforcement actions (an SEC action, for example). In addition, the Thompson memorandum indicated that another factor to be weighed is whether the corporation “appears to be protecting its culpable employees and agents” by “advancing legal fees, retaining the employees without sanction for their misconduct,” or “providing information to the employees . . . pursuant to a joint defense agreement.”

The American Bar Association, the American College of Trial Lawyers and other legal associations have raised objections to several aspects of the guidelines outlined in both the Seaboard decision and the Thompson memorandum.

Practical Implications for Corporate Counsel
Putting aside policy concerns, the guidelines set forth by the SEC and the DOJ, both individually and as a complete framework, raise a number of practical implications for corporate counsel once they become aware that there has been potentially actionable conduct by one or more of the corporation’s employees. The first and most basic point is to have in place compliance and control programs that will either prevent the misconduct or catch it at an early stage.

Once there is an indication that misconduct has taken place, whether that indication is by way of internal control mechanisms or notice that the government has opened an investigation (by way of a grand jury or administrative subpoena, the receipt of a target letter, or the execution of a search warrant), the overarching message from the Seaboard decision and the Thompson memo is that the corporation in most cases must move swiftly to investigate the possible misconduct internally if it wishes to avoid a civil or criminal penalty.4 In addition, corporate counsel should take into account the likelihood that the government at some point may request the results of that investigation and a waiver of the corporation’s attorney-client and attorney work product privilege.

Structuring and Implementing an Internal Investigation
The first basic and immediate step a corporation must take upon learning of possible illegal activity is the implementation of a document “freeze.” This simple step to “freeze” documents is an obvious and immediate showing of cooperation, and few things look worse than the shredding—continued on page 44
MCLE Self Study continued from page 43

even unintentionally—of potentially relevant documents.

Next, a decision must be made as to who will direct the internal investigation. Both the SEC and the DOJ put a premium on having an independent entity conduct the investigation.\(^5\) At a minimum an outside law firm should be hired, preferably one that has not done significant work for the corporation in the past.\(^5\) Depending on the size of the corporation and breadth of the investigation, it may also be necessary to set up an independent “special committee” to whom that law firm would answer and take direction. Again, it is essential that the members of the special committee be seen as independent.

During the course of the investigation, outside counsel should make clear to interviewed employees that counsel represents the corporation, not the employee. The corporation should also be prepared, if needed, to condition an employee’s continued employment on his or her willingness to cooperate fully. The corporation should decide whether to advance legal fees to employees—an action that may be viewed negatively by the government.\(^7\)

Before the investigation is initiated, a decision should also be made as to the corporation’s position should the government at some point request the results of the internal investigation and a waiver of the attorney-client and work product privileges. As noted earlier, the corporation’s willingness to waive the privilege and turn over the results of the investigation is one of the factors noted in both the Seaboard decision and the Thompson memo. And although there have been subsequent statements that turning over the results of the internal investigation and waiving privilege is not a requirement for a cooperating corporation, in practice it has become a routine request by federal prosecutors and SEC attorneys.

As a practical matter, the corporation will probably have no choice but to turn over any report generated by the investigation and waive any attorney-client and work product claims. Refusing to turn over the results of the investigation will likely be seen as a failure to cooperate and weigh heavily on the decision whether to indict the corporation (even if only on a respondent superior theory) by the prosecutor or file a civil complaint (with a heavy find at the other end) by the SEC.

A further consideration in structuring the internal investigation is that anything turned over to the government, even pursuant to a protective order, will almost certainly be discoverable in any parallel or following civil litigation. Although the law in the Ninth Circuit is somewhat unclear,\(^8\) it is fairly clear that under California law any material, possibly subject to protection as attorney-client or work product, turned over to the government loses all protection and is discoverable.\(^9\)

The SEC has written amicus briefs in several cases arguing that “selective waiver” to the government should not be seen as a general waiver to the world, but that view has largely been rejected. One suggestion that has been made to deal with this problem is to limit the written material produced during the course of the internal investigation.\(^10\) This may or may not be a practical solution depending on the size of the investigation, but it is an option to consider. At the very least, however, corporate counsel should anticipate that the results of the investigation may become public in the future and take whatever remedial steps can be taken to minimize the corporation’s exposure to civil lawsuits.

Conclusion

This general outline of some of the considerations raised by an internal investigation will be filled in differently depending on the size and structure of the company, the industry in which the company operates, and the type of suspected wrongdoing. What is not industry or company specific is that a company that wishes to avoid either prosecution or a possibly heavy administrative penalty must take aggressive, proactive steps to investigate indications of wrongdoing and to be prepared to turn over to the government the results of that investigation.

John Kirby is a former assistant U.S. attorney who is now a senior associate of counsel at LaBella & McNamara. He may be reached at jkirby@labellamcnamara.com.

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1Recent examples of fines imposed by the SEC include (1) $300 million imposed on Time Warner (SEC Litigation Release No. 19147 (March 21, 2005)); (2) $250 million imposed on Qwest (SEC Release No. 18936 (October 21, 2004)); (3) $25 million fine imposed on Lucent Technologies (SEC Release No. 18715 (May 17, 2004)); and (4) $10 million fine imposed on AIG (SEC Release No. 18340 (September 11, 2003)).

2The “Seaboard Decision,” SEC Release No. 44969 (October 23, 2001), is available on the SEC web site. It is also available on Westlaw.

3The other points raised were whether the company had since reorganized and whether the company had developed effective internal controls to prevent a repeat of the misconduct.

4Indeed, in several cases the SEC has expressly noted a company’s lack of cooperation in justifying the fine it imposed. See Lucent Technologies and AIG SEC releases, supra. See also SEC release announcing a $10 million fine leveled against Banc of America, SEC Press Release No 2004-104 (August 2004).

5In the Seaboard decision, one factor noted in determining whether the company was fully committed to learning the truth was whether the investigation was done by an outside entity and, if so, whether that entity had done other work for the company in the past. See also Stipak ex rel. Southern Ca v. Addison, 20 F.3d 398, 405 (11th Cir. 1994).

6It is also helpful if the law firm conducting the investigation involved attorneys who were either former federal prosecutors or attorneys for the SEC (in the context of a securities investigation). These individuals will have experience in conducting investigations and also be able to recognize which facts a prosecutor/SEC attorney will find important.

7Advancing legal fees is mentioned in the Thompson memo as a factor in determining whether a company is “protecting its culpable employees” (although an exception would be made if the company was required by state statute to advance attorney fees).

8See United States v. Bergonzzi, 403 F.3d 1048, 1050 (9th Cir. 2005) (violation of the concept of selective waiver an open question); Bittaker v. Woodford, 331 F.3d 715, 720 (9th Cir. 2003) (law regarding selective waiver is not settled).


10See, for example, “Junior G-Men,” 89 A.B.A.J. 46, June 2003 (describing how some lawyers have avoided submitting written reports in fear that they will fall into the hands of the government or private plaintiffs).
1. In the Seaboard decision, the SEC included as one of the factors influencing its decision not to take action against the corporation that the corporation had conducted an internal investigation and made the results available to the SEC.

True [ ] False [ ]

2. The SEC did not intend the Seaboard decision to become a template for corporations seeking to avoid having the SEC take action against them.

True [ ] False [ ]

3. The SEC in some cases has justified the fine it imposed on a corporation by noting the corporation’s perceived lack of cooperation.

True [ ] False [ ]

4. In the Thompson memorandum, the DOJ indicated that advancing legal fees to a potentially culpable employee could be viewed negatively by the department in its decision whether to charge the corporation.

True [ ] False [ ]

5. Once a corporation has an indication that illegal conduct may have occurred within the company, it is important for the corporation to adhere to its normal document destruction policy.

True [ ] False [ ]

6. Ideally, internal investigations should be conducted by inside corporate counsel, and if outside counsel is used it should be done by a firm with a long history of working with the corporation so that the firm understands the corporation’s culture.

True [ ] False [ ]

7. A corporation should never communicate to an employee that cooperation with an internal investigation is a condition of his or her continued employment.

True [ ] False [ ]

8. Attorneys conducting the internal investigation should inform the employees they interview that they represent the corporation and not the employee.

True [ ] False [ ]

9. It is only under the most unusual circumstances that an investigating agency such as the DOJ or the SEC will ask a corporation to turn over the results of the corporation’s internal investigation.

True [ ] False [ ]

10. Refusing a request by the SEC or DOJ that the corporation waive the attorney-client and work product protections will generally have no impact on the government’s decision to take action against the corporation.

True [ ] False [ ]

11. As long as the results of any internal investigation are turned over to the government pursuant to a confidentiality agreement, they are not discoverable in any subsequent civil litigation.

True [ ] False [ ]

12. In McKesson HBOC Inc. v. Superior Court, a California appeals court in 2004 held that any material turned over by a corporation to the government loses its privileged nature.

True [ ] False [ ]

13. One viable strategy to minimize the damage caused by waiving the attorney/client or work product protections is to limit the written material generated during the internal investigation.

True [ ] False [ ]

14. The DOJ encourages corporations to enter into joint defense agreements so that they can safely share information during the course of the investigation.

True [ ] False [ ]

15. In deciding whether to charge a corporation, the DOJ will consider the harm to shareholders if the company is indicted and convicted.

True [ ] False [ ]

16. Another factor considered relevant by the SEC in its decision to take action against the corporation is how long the alleged misconduct continued before it was detected.

True [ ] False [ ]

17. One important factor in the view of both the SEC and the DOJ is whether the entity that conducts the corporation’s internal investigation is truly independent from the corporation.

True [ ] False [ ]

18. A corporation wishing to avoid prosecution or civil penalties must be prepared to conduct an aggressive and proactive internal investigation of any alleged wrongdoing by its employees.

True [ ] False [ ]

19. Fines imposed by the SEC on corporations typically are not very significant.

True [ ] False [ ]

20. Ninth Circuit law concerning the concept of “selective waiver” is well settled.

True [ ] False [ ]

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LEGAL PETS
A LOOK AT SOME OF THE ANIMALS WHO OWN LAWYERS, JUSTICES
AND OTHER MEMBERS OF SAN DIEGO’S LEGAL COMMUNITY
BY REBECCA NIEMAN

COMMISSIONER GARY BLOCH
South Bay Commissioner Gary Bloch has quite the eclectic mix of animals at his house. Lola, the family African Grey parrot, was aptly named for the infamous song by the Kinks, which states, “She walked like a woman and talked like a man.” African Grey parrots cannot have their sex determined without a DNA test. As the Bloch family decided to forego the test, the name Lola seemed appropriate.

Sonia, their 12-year-old yellow Lab, has had her share of being reprimanded. Oftentimes, if she would bark in the backyard, Commissioner Bloch would open the back door and sternly yell her name. Lola observed this behavior and now when the door opens Lola yells, “SONIA!” in a stern voice, mimicking Commissioner Bloch.

The Bloch family also helped raise a dog (O’Hara) from the Canine Companions for Independence program that assists individuals with disabilities. On August 20, 2005, O’Hara graduated from the training program.

After graduation, the Blochs received a phone call informing them that O’Hara had hip dysplasia and couldn’t be placed with an individual with a disability. With much glee, O’Hara returned to her home, not missing a step.

FEDERAL MAGISTRATE JUDGE LOUISA PORTER
Not many people go on their 19th wedding anniversary and end up adopting two Potcake dogs. However, that is exactly what Magistrate Judge Louisa Porter and her husband, David, did.

“Potcake” is a Bahamian term for the thick, congealed food that remains in the bottom of a pot of peas and rice after several reheatings. Bahamians feed the potcake to the indigenous, stray dogs in the neighborhood.

On their anniversary in Turks and Caicos, Judge Porter and her...
husband met a British woman who had saved a dog from a storm drain on the island. After meeting the woman and the dog, Judge Porter could not stop thinking about him.

Upon her return to the United States, Judge Porter called the Society for the Prevention of Cruelty to Animals on the island and was shocked to find that the dog that the British woman had saved, along with its sister, was at that moment playing under the desk of the woman who answered the phone!

An American Airlines pilot kindly flew the dogs to New York, where Judge Porter picked them up. Caicos and Tassi are now enjoying lots of love and attention from their adoptive parents!

SENIOR COUNSEL MICHELLE GRAHAM
Michelle Graham, a senior counsel for Holland & Knight LLP, is an adviser to the San Diego Humane Society Board of Directors.

In Fall 2005, the San Diego Humane Society became involved in the Katrina animal rescue effort. The SDHS took in 104 Katrina animal victims. It was able to successfully reunite more than 50 percent of the animals with their families.

One of the more heart-wrenching Katrina animals Michelle knew was a Lab-mix who had a myriad of medical problems. Many veterinarians determined there was no way to save the dog and recommended euthanasia.

However, the vets at the SDHS successfully fixed his medical conditions and brought him back to health. The dog's owner was found. She was a single mother who was taking care of her disabled son and had relocated to Houston. The dog meant everything to the disabled child, and upon reunification the dog and the child were elated.

The story helps Michelle appreciate her own dog, Summer, even more and reinforce her commitment to the SDHS.

ATTORNEY KRISTEN CHENELIA
As a deputy attorney general, Kristen Chenelia is fortunate enough to be able to have time to walk her two dogs, Smokey and Hal, before work.

Smokey is a German shepherd mix, and Hal is a purebred Husky. Smokey, 11 years old, was given to Dominic, Kristen’s husband, when he graduated from college in 1996. Hal came to the Chenelia family only three months ago when Dominic’s friend found out he could not keep dog at his apartment. This information came after he had already paid a lot of money for a purebred Husky. The Chenelia family was happy to take him in.

The Chenelias notice that having a much older dog with a new puppy can actually help with the training process. Hal observes how Smokey behaves and is more apt to follow Smokey’s lead.

Kristen recognizes that “after a long day it’s nice to come home and relax with the dogs, my babies.” Kristen realizes, as most other animal lovers do, that the unconditional love of an animal is immeasurable.

Rebecca Nieman is an attorney with the Pro Bono Program at the Legal Aid Society of San Diego Inc. and is the proud adoptive mother of two shelter dogs. She may be reached at rebecas@lassd.org.

In 2001, San Diego attorney Dean Schiffman and his family adopted a wild burro—“Meshak”—from the federal Bureau of Land Management’s Wild Horse and Burro adoption program (www.wildhorseandburro.blm.gov). “He’s the son I never had,” says Schiffman, “although I would never geld a real son. He’ll con you for a carrot, easy.” Meshak’s freeze marks on his neck indicate that he was originally captured by the BLM in the Nevada desert. Wild burros and mustangs are thought to cause extensive damage by overgrazing many regions of the western U.S., and are captured and adopted to avoid the destruction of the animals. Meshak has found a good home in our own San Diego community. He recently made his first movie appearance.

Dean Schiffman’s daughters Kelley and Courtney with adopted a wild burro Meshak.
PETS AT PETCO

PHOTOGRAPHY BY CAROL SONSTEIN

SAN DIEGO LAWYER WOULD LIKE TO THANK THE PADRES AND PETCO PARK FOR THE USE OF THE GROUNDS
2006 COUNTY BAR BOARD OF DIRECTORS

PHOTOGRAPH BY DAVE SICCARDI

PHOTO GALLERY

STEPPING UP TO THE BAR

PHOTOGRAPHS BY CAROL SONSTEIN
He “wanted to help a fellow court system that needed some help get back on [its] feet and get back to serving the public.”

Imagine holding a court proceeding on a card table. Well, neither could Superior Court Judge William Pate.

In the days following Hurricane Katrina, Pate went looking for a way to help. He read on the National Center for State Courts web site about the equipment needs of the courts in the Mississippi coastal counties and got busy. Pate located furniture and equipment that had been taken out of service by the San Diego courts and was “collecting dust” in a warehouse. The district attorney’s office, the county of San Diego, the Fourth District Court of Appeals, the San Diego County Bar (which helped pay for the transportation costs), Rescues Task Force and the Corky McMillan Companies also pitched in.

In November, just two months after the hurricane devastation, Pate and court property manager Chuck Freeman left San Diego in a moving van on a 2,000-mile trek to Hancock, Harrison and Jefferson counties in Mississippi. Although offers to help had come in from all over the United States, the San Diego shipment was the first to arrive. A second semitrailer from San Diego filled with more donations, including books, arrived about six weeks later in mid-December.

The courts in the counties had varying degrees of damage ranging from flooding to complete destruction. Some were crafting makeshift courtrooms in less damaged public buildings while others were holding court in trailers and tents. Little if any money was available for furniture and equipment.

Pate, who has since retired from the bench, states that he “wanted to help a fellow court system that needed some help get back on [its] feet and get back to serving the public.” For his significant efforts to assist his colleagues in the Eighth Judicial District, Pate has received commendations from the Hancock County Board of Supervisors, the Supreme Court of Mississippi, the governor of Mississippi and several other courts and agencies.

—By Teresa Warren

Teresa Warren is a marketing professional in San Diego and a member of the State Bar’s Board of Legal Specialization. She may be reached at twarren@tw2marketing.com.
INSIGHTS

Superior Court Commissioner Alan B. Clements in 60 Seconds

Who? Street cop, police sergeant, Army captain, Bronze Star winner, successful litigator, cancer survivor, father, grandfather, highly respected 17-year family law commissioner, all-around good guy.

What does he say?

Most impressive thing about lawyers? Those who settle, have compassion for their clients, are prepared to the teeth, and are civil to their brethren.

Most important goal in family law? Settling a matter, especially when children are involved.

His stress reducer in high-pressure family law? Daily meditation, walking, travel and wife, Sue.

Stays sharp? By caring about the people who appear in my court.

Mentors other judges? I am blessed to be a part of a fabulous team of judges who all help each other.

WORKING ROOM

I don’t much like the concept of “working a room.” It sounds predatory. Sometimes, I feel like “surviving a room” is a better phrase. Walking into a room full of strangers can be intimidating. As a fairly shy and self-conscious person, it took years to learn that lots of people feel just like I do. Knowing that makes it easier. So my thoughts on meeting people in situations like these are as follows:

1. Listen more than you talk.
2. Make eye contact.
3. Be yourself, and be genuine.
4. Speak in “open” language, such as “How do you feel about that?” instead of “Can you believe that?” (Yes, it’s just like picking a jury.)
5. This is not the place to get retained. It is a place to meet people. Getting retained may or may not happen later and in a completely different context.

— By Scott Metzger

Scott Metzger is a senior litigation partner at Duckor Spradling Metzger & Wynne. He may be reached at metzger@dsmw-law.com.

MOTIONS

Julie Weber, who graduates this May from Thomas Jefferson School of Law, can skate, but she didn’t play ice hockey as a kid; yet she loves her internship with the San Diego Gulls of the East Coast Hockey League. “Sports has always been a very big interest of mine,” says this Ventura County native who grew up loving the Los Angeles Kings of the National Hockey League. “I’m a huge hockey fan.” With the Gulls, Weber has been involved in drafting sponsorship agreements, game operations and proof of performance packages. At Thomas Jefferson, she has been an active member of the Sports Law Society, one of the largest and most popular student organizations on campus. Thomas Jefferson grads include Tim Purpurra, general manager of the Houston Astros, and sports agent Randy Grossman. In addition to her internships with the Gulls, Weber has also interned at Alternate Public Defenders and Federal Defenders, and she has clerked for Superior Court Judge William Cannon.

“I’m a huge hockey fan.”

FINDING CLIENTS

To find clients, conventional wisdom directs us toward trade and Bar associations and industry groups. Another method, less direct but great fun, is to get involved in something you love!

I’m a big fan of the university I attended, so I became involved in its alumni association. I joined its board of directors as general counsel, which led to many new contacts and referrals, including a major real estate client for our firm.

Everyone loves something: theater, sports, your kids’ school, or civic causes. There’s a support group, club or board meant for you. You’ll meet and impress people who may become clients and referral sources. What could be more fun?

— By Julie Mebane

Julie Mebane is a real estate partner with Duane Morris LLP. She may be reached at jmebane@duanemorris.com.

I don’t much like the concept of “working a room.” It sounds predatory. Sometimes, I feel like “surviving a room” is a better phrase. Walking into a room full of strangers can be intimidating. As a fairly shy and self-conscious person, it took years to learn that lots of people feel just like I do. Knowing that makes it easier. So my thoughts on meeting people in situations like these are as follows:

1. Listen more than you talk.
2. Make eye contact.
3. Be yourself, and be genuine.
4. Speak in “open” language, such as “How do you feel about that?” instead of “Can you believe that?” (Yes, it’s just like picking a jury.)
5. This is not the place to get retained. It is a place to meet people. Getting retained may or may not happen later and in a completely different context.

— By Scott Metzger

Scott Metzger is a senior litigation partner at Duckor Spradling Metzger & Wynne. He may be reached at metzger@dsmw-law.com.
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Lawrence Martinez, Communications Director
The San Diego County Bar Foundation announces the Gary W. Majors Fund for the Homeless

To further its commitment to the betterment of our region, the law firm of Majors & Fox has established a fund at the San Diego County Bar Foundation. From 2006 through 2009, the Bar Foundation will award $100,000 in grants throughout San Diego County that provide legal services to the homeless.

Providers of legal services to the homeless are encouraged to submit a grant application. Applicants for the Gary W. Majors Fund and for the Foundation’s general fund are due April 1 and October 1 of each year.

The San Diego County Bar Foundation is a not for profit foundation established to improve public awareness of the legal system in San Diego County, the administration of justice and the delivery of legal services through the distribution of its funds. Supported by voluntary contributions from the San Diego community, the Bar Foundation supports, funds and encourages the creation of public service programs which promote education, citizenship and the ideals of justice.

Since its inception, the Bar Foundation has granted over $1.2 million to non-profit organizations throughout the county that provide law related public service programs. Bar Foundation grants help children, the elderly, the sick and disabled, victims of domestic violence, immigrants and asylum seekers throughout San Diego County.

To apply for a grant, establish a fund or make a contribution to the Bar Foundation, please contact Briana Wagner, Executive Director, 619-231-7015 or bwagner@sdcbf.org

To further our mission to improve public awareness and access to legal services, the San Diego County Bar Foundation is proud to have provided grants to the following organizations:

- Access Immigration Services
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- Casa Cornelia Law Center
- Center for Community Solutions
- Children at Risk
- The Community Resource Center
- The Crime Victims Fund
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- Legal Aid Society of San Diego
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For more information about the Foundation and the organizations and programs we support, please visit www.sdcba.org/bf
Justice Gerald Brown of the Fourth Appellate District, who died on December 9, was remembered fondly by many in San Diego’s legal community.

“He was a real renaissance man” whose interests included motorcycling, lawn bowling and choir singing, says Buzz Kinnaird.

Dave Niddrie, who worked for him after law school and later was a staff attorney at the U.S. Supreme Court, recalls that Justice Brown went back to Washington and visited Justice Byron White, a friend from their days on Yale’s basketball team. Former President Gerald Ford and former U.S. Attorney General Nicholas Katzenbach were also on the team. “I knew they were friends. I just didn’t know how close Justice White thought very highly of Justice Brown.”

Rick Benes describes Justice Brown as unique. One of the things the justice was most proud of was the fact that Judge Bob Baxley always said if he was stuck in a lifeboat or a desert island, he’d choose Justice Brown as his partner because he was such an interesting man with a memory unlike any other.

Steve Kelly remembers that few people knew that Justice Brown’s grandfather was on the South Dakota Supreme Court and his father, Matthew, was the first president of the South Dakota Bar Association. Justice Brown himself was the South Dakota typing champion. “You’re lucky if you meet someone like Judge Brown twice in your lifetime,” says Kelly.

Charles McCain says that the justice was “always a gentleman.”

Justice Brown was appointed to the court in 1963 and served as presiding justice from 1965 until 1985.

Knut Johnson was in Memphis for a trial and stayed at the Peabody Hotel, known as the “living room of Memphis.” While waiting for his verdict, he was on hand as the Duck Master led a five-duck parade from the Duck Palace on the roof, complete with duck fountains, down the elevator to the lobby, and up the red carpet to spend the day in the interior lobby fountain of the old ornate hotel. At 5 p.m. sharp, the Duck Master, wearing his red uniform jacket, resplendent with gold braids, led the ducks back up the red carpet to the Duck Palace.

Consumer Attorneys of San Diego named Deb Wolfe as the 2005 Trial Lawyer of the Year for the second time (the first was in 1996). Denny Schoville is the only other lawyer who has received the distinction twice, and Wolfe said she was honored to be in such talented company. She pointed out that the lawyers who received Outstanding Trial Lawyer awards this year included Sherry Bahrambeygui and her husband/partner Patrick Hosey, Alex Scheingross, Robert Francavilla, Kevin Quinn, David Semelsberger and Ken Turek.

Mary Lundberg, an expert in asset forfeiture law at the U.S. Attorney’s office, will be leaving for Pretoria, South Africa, to assist in implementing its asset forfeiture law, which was modeled on U.S. law. She previously lived in Africa as a Peace Corps volunteer in Sierra Leone. Her husband, Howard Wayne, is taking a leave of absence from the attorney general’s office to join her.

Maureen Hallahan was elected president of the Association of Business Trial Lawyers. Cindy Cipriani was named deputy chief at the U.S. Attorney’s office.

Former County Bar president Virginia Nelson recently attended the Coronado Schools Foundation Dinner at the Hotel del Coronado. Lawyers were again recognized as bringing in more monetary donations than any other professional group. Contributing to the effort were Peter Benzian, Carrie Downey, Ken Fitzgerald, Scott Harris, Tim Irving, Gary Kennedy, Frank Nageotte, Susan Rapp, Tami Sandke, Bruce Shepherd, Robert Stansell, Craig Swanson and Judge Timothy Taylor.

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In the November/December issue of San Diego Lawyer, I set out a brief tale of Justice William Arthur Sloane, who as you may recall was appointed to the state Supreme Court in 1920 and after three years ran for reelection. His campaign poster is reprinted here.

Since that column, I have heard from Robert Steiner (senior partner at Luce, Forward, past president of both ABOTA and the County Bar, and in practice 49 years this May). Bob’s father, Fred, came to San Diego in 1923 as a new lawyer looking for work. His first job was with Justice Sloane, who “took pity on my father and allowed him to have a desk in the corridor outside his office. Any odd jobs that the judge did not want to do himself migrated to my father’s desk, and so a successful law practice started.” Bob’s father formed a partnership with Judge Sloane’s son, Harrison, under the name Sloane and Steiner. The partnership lasted until the elder Steiner was killed in action in 1944, in Normandy.

As to the elder Sloane, Bob recalls that he was only 5 feet 5 inches tall but “very tough and feisty.” While Sloane was writing for the San Diego Independent, “an irate reader who was upset by Sloane’s editorial arrived at Sloane’s office, horsewhip in hand. … Sloane took the horsewhip away from his adversary and thrashed him.” That was one judge you dared not move to strike! ■

George W. Brewster Jr. is a senior deputy county counsel for the county of San Diego.
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