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ATTENTION: On October 27th, the San Diego Press Club held its 32nd Annual Excellence in Journalism Awards. We are proud to announce that San Diego Lawyer picked up three awards during the evening. Associate Editor Christine Pangan won second place in the Single Story in a Trade Publication category for her story on self-represented litigants, “In Propria Persona” (Jan/Feb). For his look at local politics, “The Mayor’s Race: The Politics of Shifting and Spinning” (May/June), Claude Walbert won second place for Hard Feature in a Magazine. And finally, San Diego Lawyer took home the blue ribbon for first place as Best Internal Publication. Congratulations to all and may this next year be even better!
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[PERSPECTIVE] BY SAHYEH S. FATTahi

PROGRESSING TOWARD PEACE IN THE MIDDLE EAST

Is peace achievable in the Middle East in 2006? To some, this question may sound more like the philosophical musing of an optimist rather than a realistic expectation for the coming year. The political, economic and social turmoil in the Middle East seem like wildfires, though a portion of it may be put out from time to time, new flames are constantly fanned by the winds of conflict. However, there are many reasons not to abandon hope for peace in the Middle East. Although there is great urgency to see immediate signs of a “peaceful” Middle East, perhaps the question should not be whether peace is achievable in this next year but how we can continue to nurture the hope and resolve of the Middle Eastern people, which will ultimately lead to peace.

As a first-generation American with familial roots in Iran, I have personal ties to that region that give me a unique perspective on the people, the culture and even perhaps how peace may come about in this troubled region. Despite years of social, political and ideological oppression by their governments, despite economies that have left the new generations with seemingly little prospect for advancement and prosperity, despite the perpetual conflicts amongst the Middle Eastern countries and despite radical religious militants who foster an environment of fear and intimidation, the people of the Middle East remain optimistic. They strive for those things that are virtually universal desires among all people: love, family, friendships, economic prospects, autonomy, freedom and a future. Despite living in conditions that appear to you and me, safely tucked inside the comforts of our democracy, to be insurmountable, the Middle Eastern people manage to remain hopeful and to live happy, productive and fulfilling lives.

Of course, that is not to say that they accept the problems that permeate their countries. To the contrary, there is a sense that these circumstances are passing and that peace and freedom are impending and inevitable. In other words, there is hope and the shear will of the Middle Eastern people (not their government and not ours) will be the impetus for peace. To this end, the people must continue to be empowered through, for example, increased political openness and economic opportunities. When people have a chance to get involved in running their countries, they have less incentive to turn to violence to force change. When people are not struggling to make ends meet, they will not become targets for radical militant groups that prey on the disenfranchised. Cultivate hope among the people, and peace will inevitably follow.

Sahyeh S. Fattahi is an attorney in the San Diego office of Foley & Lardner LLP. She is a graduate of the University of San Diego School of Law (J.D. 2002) where she was comments editor for the San Diego Law Review. She received her B.A., summa cum laude, at the University of California, Los Angeles, in 1999.
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LET THE WORD GO OUT

W e are a community of lawyers and judges. We share a common bond. We are the most important component of the greatest experiment the human race has yet to attempt. It is called freedom.

Without the judicial system and the lawyers, the judges and the laws that comprise it, there would be no freedom. The judiciary is our most important and most irreplaceable institution.

A free society cannot exist without a means to settle differences among its citizens peacefully. Pistols at 20 paces is not an acceptable alternative, nor are vigilantes. We must control the criminal and antisocial conduct that is inevitable. The society in which we have agreed to live together cannot work without a dependable and predictable system of laws and the process to enforce those laws.

And yet, the importance of what we do is not fully appreciated by most people. In fact, we ourselves do not fully appreciate what we do.

The Constitution is the clearest expression of all that is good with the human spirit. It speaks of right. It speaks of freedom. Yet the Constitution it is not a self-executing document. Without lawyers to speak for the many who cannot speak for themselves, without judges to protect those who cannot protect themselves, the Constitution does not work.

Many of us have been troubled by the public debate over the place that the legal system should play in our society. Our detractors are not bashful. They pull no punches.

Talk of an explosion of lawsuits belies the fact that fewer cases are filed every year despite a growing population. Certain talk radio show hosts and extreme media outlets whip their audiences into a frenzy for the sake of ratings. The politicians who most loudly criticize the justice system seem to do so for political reasons.

We must respond. We need to go into our community, and let Let the Word Go Out people know who we are, what we do and how important that is. We cannot allow our detractors to define who we are. We must define ourselves.

We are mothers and fathers, leaders in our churches and synagogues, youth sports coaches, volunteers in homeless shelters and in shelters for battered women. We volunteer in our children’s schools and we donate to every imaginable cause within our community. The legal community is as generous as any, more generous than most, if not all.

we are out in the world doing the things that have nothing to do with our role as lawyers and judges, we should take the opportunity to remind those who only hear one side of the story what it is that we do. The battle for public opinion needs to be fought one person at a time.

There are 12,000 lawyers in San Diego County. We need to mobilize these many voices. And when we do, we need to let everyone we meet know how proud we are of what we do and why what we do is so important. If we were as proud as we deserve to be, that more than anything else would define who we are in the most positive of ways.

I have always been proud to be a lawyer, proud that my job is to represent the people and the ideas in which I so deeply believe. I am proud beyond words to be the president of the San Diego County Bar Association. I try to let everyone I meet know just how proud I am to be a lawyer. Please join me in spreading the word!
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ON THE CROSS

This letter is written in response to the article in the November/December 2005 issue of San Diego Lawyer titled, “What’s Driving the Fight Over the Mount Soledad Cross?”

Legally, Mr. Frye assumes that the “Lemon test” applies and is dispositive in this case. Yet, in the recent United States Supreme Court case of Van Orden v. Perry (2005) 125 S.Ct. 2854, 2861, the Court stated:

Whatever may be the fate of the Lemon test in the larger scheme of the Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capital grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.

Similarly, in the present case, in which we are dealing with a passive monument on top of Mount Soledad, a court again could find the Lemon test “not useful,” instead focusing on the nature of the monument and finding the memorial as constitutional as the Ten Commandments display in Van Orden. Moreover, even if analyzed under the Lemon test, a court could find the cross in its present context, with the walls, plaques and other secular symbols to be as constitutional as the famous creche in Lynch v. Donnelly (1984) 465 U.S. 668.

The article is wrong that Proposition A was not the result of a spontaneous outpouring of public sentiment to maintain the memorial intact. After San Diego voters were misled into believing that a “no” vote on Proposition K would enable them to “save the cross,” they felt betrayed when they learned that the opposition’s disingenuous idea of “saving” the cross meant moving it half a mile down hill to a local church. When Proposition K failed last November, local citizens inundated their Congresspersons asking them to do something to maintain the integrity of the memorial. That interest led to the federal statute making the memorial a national veteran’s memorial and authorizing the Department of the Interior to accept a donation of the memorial from the city of San Diego. When the San Diegans were fully informed about the issues involved, more than 100,000 county residents signed the referendary petition, and an overwhelming 76 percent of voters approved Proposition A, directing the city to make the donation.

Contrary to statements in the article, the Thomas More Law Center was not the driving force behind Proposition A. The referendary petition drive was initiated by Philip Thalheimer and Myke Shelby, both practicing Jews. They founded San Diegans for the Mount Soledad National War Memorial and asked me to join that committee because of my prior activities. Other than speaking out in favor of the issue, however, I had very little involvement in the successful petition drive. Rather, the great majority of that work was done by dozens of volunteers.

As West Coast regional director of the Thomas More Law Center, I had previously become involved in the federal case over a year ago at the encouragement of the then city attorney. At that time, the alliance forged by Mr. McElroy and Mr. Berwanger left no one to speak for the interests of the people of the city of San Diego to maintain the memorial as it is, where it is. But even if the Thomas More Law Center had not been interested in supporting the matter, I would have personally gotten involved in this case. As a native San Diegan, I have been going up to the Mount Soledad Cross for over 30 years. Like most people who have lived in this town for a long time, I have come to view the memorial as an important cultural and historical landmark, as well as a religious symbol that is being used in a fitting way to honor our nation’s war veterans. I believe that the fight to save the memorial is well worth the thousands of pro bono hours and thousands of dollars that my firm has put into it.

Finally, the article is way off base in concluding that the fight to save the Mount Soledad Memorial is some kind of evangelical conspiracy. I am not even an evangelical; I am a Roman Catholic. And, as mentioned earlier, the founders of the San Diegans for the Mount Soledad National War Memorial are practicing Jews. That committee represents a broad cross section of the community and is made up of people of different faiths. Since my involvement in the case began not only before the latest Supreme Court vacancies but also before the last presidential election, it is ridiculous to suggest that my involvement in this case was somehow intended to influence the selection of the latest Supreme Court justices. Even if I had that foresight more than a year ago, I certainly do not have any type of influence in that regard. Rather, the issue concerning the Mount Soledad Memorial is first and foremost a local issue, albeit one with broader national implications.
Most people have come to realize that we are fighting to determine whose vision of America is going to prevail.

Sincerely,
Charles S. LiMandri
Law Offices of Charles S. LiMandri

Author’s reply:

Mr. LiMandri writes that I assume the Lemon test, but the article makes no predictions about what standard the Court will apply in the Mount Soledad cross case. The Lemon test is highly relevant to evaluating the constitutionality of the cross, as LiMandri implicitly acknowledges when I quote him on the significance of the U.S. Supreme Court’s application of the Lemon test in Perry.

The article presents the views of Messrs. McElroy and Berwanger, the attorneys representing the plaintiff and the Mount Soledad Memorial Association, that “Prop.A was not the result of a spontaneous outpouring of public sentiment to maintain the memorial intact”; it does not state this view as a fact.

The article nowhere implies that the fight to save the Mount Soledad Memorial is some kind of “evangelical conspiracy.” The primary definition of the term “evangelical” is, “of or pertaining to the Gospels or Christianity”; and while the fight over the Mount Soledad Memorial is a local issue, it is also part of a national debate over the appropriate place of religion in government. The fact that the referendum petition drive was initiated by “two practicing Jews” doesn’t change the fact that the vast majority of those who want the Court to revisit the constitutionality of permanent Christian symbols on government land are themselves Christian, and that the primary strategic goal of such groups is to exert pressure on elected officials to appoint and confirm like-minded judges.

I intend to use the Mount Soledad Cross dispute as a case study in a book I am now researching on the Establishment Clause, so Jason Frye’s article, “What’s Driving the Fight Over the Mount Soledad Cross?” in your November/December issue, was particularly welcome and informative.

Apparently, the self-styled “evangelicals” (a term co-opted by the religious right from the mainline Christian churches, who also call themselves “evangelical” but do not support the legal agenda of the right) argue for the “original intent” of the framers of the First Amendment’s Establishment Clause, but they are barking up the wrong tree.

First, the debates in the federal convention and state ratifying conventions indicate that most of the Federalists, who supported the new Constitution, believed that a bill of rights was not only unnecessary but dangerous. Unnecessary because Congress was given no power in the first place over matters such as religion or the press, and dangerous because an enumeration of rights might imply that rights left out of a bill of rights were unprotected. A bill of rights was promised as a priority of the first federal Congress in order to appease the anti-Federalists, who used the lack of a bill of rights as a reason to oppose the new Constitution. The framers drafted the Bill of Rights then, without much enthusiasm and little debate over the meaning and content of the rights protected. The precise meaning of “an establishment of religion” is, therefore, elusive.

Second, by the time of the drafting of the Bill of Rights, there were no longer...
any legally supported single-church establishments in the States, though by force of numbers the Congregationalists dominated New England and the Anglicans (reborn as Episcopalians) dominated the Mid-Atlantic and Southern states. The “establishment of religion” with which the framers were then familiar was the prevalent state scheme where multiple denominations enjoyed legal and even tax support, so long as they were Christian and Protestant. Jews and Roman Catholics enjoyed no such protection, except in religiously open states like Pennsylvania and Rhode Island. Thus, to the framers, “establishment” meant a general establishment of the Protestant Christian religion, not the British or European model of a single-church establishment.

Third, the Establishment Clause by its own language applied only to the national government (“Congress shall make no law...”). In the historical context in which it was adopted, it was as much, if not more, a protection of states’ rights than a guarantee of individual liberty. Many states did not want the national Congress messing with their state establishment schemes, and, other than James Madison, few founders wanted to. Therefore, what state and local governments could do in the face of the Establishment Clause was simply not on the framers’ radar screens. Jews and Roman Catholics might have a few things to say, though, about our going back to that early “states can do anything they want about religion” situation.

Finally, and most importantly, the relevant “intent” for local disputes is that of the legislators who in the 1870s adopted and ratified the Fourteenth Amendment to the Constitution, through which the Establishment Clause has now been deemed incorporated and made applicable to the states. The post-Civil War amendments have a whole history unto themselves, but that history includes the fact that the most revivalist and evangelical denominations—the Methodists and Baptists from whose ranks most of today’s fundamentalists arose—grew by leaps and bounds through the Civil War period, while the formerly state-supported established churches, the Congregationalists and the Anglicans, declined. This occurred largely because the national government stayed out of religious affairs, and most states eventually followed its example, and that of Virginia, which, even before the First Amendment was drafted, had disestablished the Anglican Church and defeated Patrick Henry’s bill for the general support of Christian ministers.

Interestingly, the prime mover in both the drafting of the Bill of Rights and the Virginia disestablishment efforts was the framer James Madison, who, like Jefferson and other founders, was a Unitarian deist who believed governments should not be involved in religion in any way.

In conclusion, harkening back to the “original intent” of the framers’ of the Establishment Clause is not helpful in resolving current legal disputes over the display of religious symbols on state or local land. Those who engage in this vain attempt must have flunked their history lessons!

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ON BECOMING A JUDGE

THE STEPS TO THE BENCH

BY FRANCIS DEVANEY

On January 26, 2005, the Honorable Timothy Taylor and I were sworn in as Governor Arnold Schwarzenegger’s first appointments to the San Diego Superior Court. As I stood in the Presiding Department in a borrowed robe, stumbling upon the oath administered by Presiding Judge John Einhorn, I gazed out at my family, friends, colleagues and future colleagues on the bench and grinned as a line from an old Grateful Dead song popped into my head: “What a long, strange trip it’s been.” How did I get here? Why did I want to be a judge? Why me? I was 50 years old and had practiced law for more than 20 years, and here I was a rookie once again. I trembled as I promised to uphold the Constitution, not out of fear but from adrenaline, and smiled broadly as Judge Einhorn congratulated Tim and me and introduced us to the crowd as the newest members of the Superior Court bench.

Well, why did I want to be a judge? That’s a question that’s been asked of me by many people, including the curious, the admiring and the baffled. For some reason, I’ve wanted to become a judge since I began practicing law. Many of my attorney friends thought I was crazy, claiming that it would be boring or bothersome, while many others wondered if I, as an enthusiastic trial attorney, would miss the fight, the competition of advocacy. I seriously pondered that, but nevertheless still had the desire to sit on the bench, not as a means of retiring from the litigation battles but as a way to do some good for society. I don’t mean to sound Pollyannaish, but “doing good” is really what initially interested me in being a judge.

Over the years, my idealism was replaced by pragmatism, but I still wanted to be a judge, not only because I began to think I would be good at it, but also out of a hierarchical-based, career advancement desire. Just as I wanted to make the JV after playing on the freshman basketball team in high school, and then the varsity, and then play in college, I viewed being a judge as the next step forward in my legal career.

So how or why was I appointed? I had previously applied years ago to Governor Gray Davis and had twice been through the application and interview process for a federal magistrate position, so you would think I would have a ready answer to this question. Sorry, I really don’t know how or why I was appointed. The process is relatively simple—you submit your application, provide letters of recommendation from judges, lawyers and whomever else you think may have a positive effect on your chances, search for “insiders” who might “have a connection” to give your application an extra boost, and wait to see if you clear the first hurdle in the process by having your name submitted to the JNE Commission. However, along the way, you receive absolutely no feedback except a form letter from the governor’s office acknowledging receipt of your application. There is no checklist of things you need to do, no requests for additional information, no notice that your application is complete, nothing until someone tells you that they have received a JNE evaluation from you. That is the only indication that you’ve cleared the first hurdle and gotten off the allegedly large stack upon which most applications permanently reside and die, and into the process of potential appointment.

What does it take to get off that stack? Again, I don’t know. No one told me beforehand what it would take, and no one has told me since why my application was moved forward. Over the years, I’ve heard that applicants need a mix of criminal and civil experience, law enforcement support, support from attorney organizations like the Lawyers Club, La Raza, etc., perhaps some political connections, and the support of the local committee (which apparently does exist, although how it operates and who is on it are not clear to

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me), but, again, I’ve never been officially told that any of this is true. I tried to work all of these angles in my application and was very lucky to have law enforcement and political support from my years of representing police officers and political officials in the city of San Diego. I have since learned that I also had the support of the local committee and would like to thank its members here, whoever they may be. Whatever it is that I did, or was done by others on my behalf, worked, and I found myself entering the next phase of the process—review by the JNE Commission.

Now all of us have, over the years, received those multicolored recommendation forms from the JNE Commission. I learned that I had been moved forward in the process not by notification from the governor’s office or from the JNE Commission, but from telephone calls and e-mails from friends, advising me that they had received forms on me and jokingly asking me what I would pay for them to not tell the truth about me. Soon thereafter, I did receive a call from one of the two local JNE commissioners assigned to my application, advising me that I was being investigated and would soon be interviewed, and requesting additional information, such as lists of attorneys and judges with whom I had worked or in front of whom I had appeared, writing samples, and any performance evaluations that may have been prepared on me during the course of my employment. My contact JNE commissioner was very helpful and kind, guided me through the process and finally scheduled my interview with him and his co-commissioner.

I then received my appointment letter, which contained notice of the negative comments that had been received and that I would have to address in my interview. Ouch! How could anyone say that about me?! Who would say such things? How dare they sabotage my application, my aspirations? What had I done to offend them so? These are the thoughts I had when I read my appointment letter, which contained a few vaguely worded negative comments, which at the time seemed absolutely devastating but which now, upon reflection, were not that overwhelmingly bad. I wondered if I could keep my cool in responding to them in my interview, if I would appear judicious in the face of them, but was really very convinced that I was finished, all because one or two anonymous individuals harbored this never-before-expressed dislike of me.

Then the phone rang, from the governor’s office, seeking to schedule an interview with Appointments Secretary John Davies. But, I explained, I haven’t yet had my JNE interview. No problem, I was told, the order of interviews was immaterial. I chose the earliest available date and flew to Sacramento. As I sat in the waiting room in the governor’s office, I thought I heard his unmistakable voice and smelled a cigar, and wondered if I would be interviewed by “Arnold” himself. I wasn’t, but I had a very pleasant, comfortable talk with John Davies, who is from San Diego and with whom I spoke mostly about local politics. I had heard about a litmus test for being appointed—including my views on abortion and the death penalty—but I don’t really recall discussing those issues. I very well may have, but in the swirl of things racing through my head at that time, I don’t recall being tested as much. I do recall Davies pointing to what was apparently my file and saying that they had plenty of information on me, and that the main purpose of his meeting with me was simply to determine if I was relatively normal. I apparently passed that test.

Of course, I still had to have my JNE interview. My friends, being the cognoscenti that they are, assured me that my original fears and concerns over the negative comments should be set aside, since, after all, I had already met with John Davies, which was a clear indication that I would be appointed. I wanted to believe them, but I didn’t (or couldn’t) and still looked forward with trepidation to my interview. The day finally arrived. However, my commissioners were very kind and professional and assured me that I had received many more positive comments than negative ones, but that it was, unfortunately, their task to pursue the negative comments. We discussed them at length, and I felt my control slipping away as I got more and more defensive, indignant, and desperate (not the judiciousness I had planned). We eventually ended the recorded interview, and the commissioners graciously assured me, as they did on a number of occasions, that the lopsided focus on the negatives was necessary to prepare them to present my application to the full JNE Commission. My commissioners informed me that I would only hear from the commission if my application was turned down; otherwise, it would be forwarded to the governor’s office without notification to me.

So I was once again in a holding pattern, wondering where I was in the process and whether I would ever be appointed or even informed that I would not be. I turned to the Internet, checking the governor’s web site four or five times a day, reading about appointments to various agricultural boards and water commissions throughout the state. I watched and waited...
until Thursday, January 20, 2005, when I received “the” phone call from John Davies, advising me that I was being appointed but instructing me to keep quiet until Monday when the governor would return from the presidential inauguration and officially sign off on the appointment. So we somehow kept the secret over the weekend (I was allowed to tell my wife and kids, parents and even my mother-in-law), and my appointment was announced on Monday.

Here I am about nine months later, enjoying life on the bench immensely. I’ve been through a six-week tour of various departments, including arraignment, traffic, small claims and unlawful detainer; enjoyed a week of orientation in San Francisco; endured two more weeks of judicial college in Berkeley; and am now assigned to Department 25, dealing with a mixed bag of cases ranging from restraining orders to law and motion and case management of limited jurisdiction matters, to civil writs and petitions. The work is fun and challenging, exciting and rewarding, and frequently very difficult. There is an immense behind-the-scenes system of backup support in the courthouse that makes the process go a lot smoother than I ever appreciated as an attorney.

My courtroom staff—clerk, calendar clerk, reporter and bailiff—is a great help, as are the numerous judges on my back hallway. It’s funny, but one of the hardest things for me was learning to be comfortable being called “Judge” or “Your Honor.” I frequently tell my staff, “Oh, don’t call me ‘Judge,’” only to be told, “But, Your Honor, I have to.” Even more difficult is the reverse: calling some of the more senior judges by their first names. I’ve known my nextdoor neighbor on the third floor of the old courthouse, Judge Link, for years, and I now call him “Fred” at his request, but it was very awkward to do that at first.

I could go on and on about what it’s like to take the bench for the first time, but I’ll leave that for another time. For now, if you have aspirations for the bench, I commend it to you and hope this article might provide some insight in the process of being appointed. Good luck. This court is in recess.
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The recent case of Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd. (MGM v. Grokster) has once again thrown peer-to-peer file sharing into the limelight.1 Perhaps no other recent technology has garnered as much popularity, fear and disdain as peer-to-peer file sharing. Harnessing the power of millions of ordinary personal computers into a vast, distributed network, peer-to-peer systems enable instant user access to digital media files without reliance on any central network or organization. While peer-to-peer systems are often used to legally distribute authorized digital files, a substantial number of peer-to-peer users illegally trade copyrighted works.2

PEER-TO-PEER FILE-SHARING
Evolution versus Copyright Law
The first widely popular peer-to-peer system was Napster, which relied on a central server to list digital files available on the network. This central server proved to be Napster’s undoing as the Ninth Circuit upheld (but narrowed) a district court preliminary injunction against
Napster in the *A&M Records Inc. v. Napster Inc.* (*A&M Records v. Napster*) suit brought by numerous copyright owners. The Ninth Circuit found the plaintiffs had demonstrated a likelihood of success on the merits for contributory copyright infringement and vicarious copyright infringement claims largely because Napster’s central server gave Napster knowledge of, and the ability to supervise and block, direct copyright infringement by Napster’s users. Subsequently, Napster shut down its entire file-sharing network and entered into settlement agreements.

Weary of the legal implications of running a central listing server, the next iteration of file-sharing technologies aimed to insulate peer-to-peer distributors from secondary copyright liability. “FastTrack” systems, such as Grokster, rely on a file listing service provided by distributed and autonomous “supernode” servers. “Gnutella” systems, such as Morpheus, do not use any central listing service and simply search for files on other peer computers. The legality of these second-generation peer-to-peer file-sharing systems became the focus of the litigation leading up to the Supreme Court’s decision in *MGM v. Grokster.*

**GROKSTER AND MORPHEUS RISE FROM THE ASHES OF NAPSTER**

Following Napster’s legal troubles in *A&M v. Napster,* StreamCast and Grokster sought to capture Napster’s enormous user base. StreamCast touted its Gnutella-based Morpheus file-sharing program with advertisements asking, “[w]hen the lights went off at Napster … where did the users go?” Similarly, Grokster integrated “Napster” into search codes on its website and apparently even derived “Grokster” from the “Napster” name.

Not surprisingly, when Napster shut down, millions of file sharers turned to StreamCast and Grokster’s software. Also unsurprisingly, many large copyright holders brought suit in federal district court. However, in contrast to *A&M v. Napster,* the district court found that StreamCast and Grokster retained no actual control over shared files, and the respective peer-to-peer systems were capable of “substantial non-infringing uses” under the Supreme Court’s landmark decision in *Sony Corp. of America v. Universal City Studios Inc.* (“Sony”). Accordingly, in April 2003, the district court granted partial summary judgment, finding the defendants not liable for contributory or vicarious copyright infringement. The Ninth Circuit affirmed in August 2004.

**THE SUPREME COURT RESPONDS TO GROKSTER AND STREAMCAST’S DECEN-**

**TRALIZED TECHNOLOGIES WITH A NEW THEORY OF LIABILITY—INDUCEMENT**

In December 2004, the Supreme Court granted certiorari to consider whether Grokster and StreamCast could be liable for secondary copyright infringement. Before oral argument, many amicus curiae briefs argued that the Ninth Circuit upset the balance between copyright protection and technological innovation. Other technology-inclined amici argued that reversing the Ninth Circuit would significantly inhibit beneficial technological innovation.

In its June 2005 decision, the Supreme Court recognized the “trade-off” in weighing technological innovation against copyright enforcement. The Supreme Court observed that the defendants’ systems did facilitate some legal file sharing. However, the Supreme Court could not ignore the “powerful” argument in favor of liability “given the number of infringing downloads that occur every day using StreamCast’s and Grokster’s software.” The Supreme Court noted that the defendants “clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.” Although the rule in *Sony* provided the defendants some protection, the Court stated that “where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony’s* staple-article rule will not preclude liability.”

The Supreme Court promulgated an inducement rule, holding that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” Conscious of the spillover effects on developing technologies, the Court noted that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.” In light of the incriminating evidence against StreamCast and Grokster, the Supreme Court found substantial evidence in favor of the plaintiffs on all elements of inducement, vacated the judgment of the Ninth Circuit and remanded the case.

The implications of *MGM v. Grokster* for the content and technology industries still remain to be fully seen. In the near term, the content industry has clearly gained some legal ground against file-sharing networks. Cary Sherman, the president of the Recording Industry Association of America (RIAA), recently testified at a Senate Judiciary Committee hearing on “Protecting Copyright
and Innovation in a Post-Grokster World” that the *MGM v. Grokster* decision “gives us the chance to compete in a legitimate marketplace, to earn a return on our investment, to continue offering great music for fans everywhere” and has “sent a clear message to those businesses that continue to actively facilitate infringement: It’s time to go legit.”20

Consequently, the peer-to-peer industry is now under more pressure than ever. Some peer-to-peer technologies are evolving by integrating encryption and anonymity features to make wide-scale tracking of illegal file distribution exceedingly difficult. But while StreamCast has vowed to “continue our David vs. Goliath fight” at the trial court on remand,21 Grokster is presently in negotiations for its acquisition by Mashboxx, a new company formed to legally distribute music files.22 Emboldened by *MGM v. Grokster*, the RIAA recently sent out a round of “cease and desist” letters to seven file-sharing software distributors in September 2005.23 One letter recipient, eDonkey, has since notified the RIAA that it intends to comply with the letter’s request.24 In testimony before the Senate Judiciary Committee, eDonkey’s developer, Sam Yagan, noted the following:

This threat of imminent litigation from the major music labels, coming in light of the Supreme Court’s ambiguous ruling led us to conclude that, regardless of the virtue and lawfulness of our intentions and practices and our confidence that we never intentionally induced infringing activity, we did not have the resources to endure the protracted litigation that the RIAA letter presaged.25

Yagan further notes that because focus has shifted from Sony’s “substantial non-infringing uses” to inducement, peer-to-peer distributors no longer have a “bright line” to gauge their prospective secondary copyright infringement liability and are subject to the legal uncertainty and expensive discovery stemming from company e-mails, advertising and other internal documents.26 Accordingly, Yagan contemplates that developers generally will now face more litigation, risk of liability under copyright law and uncertain outcomes.

As future cases arise under situations with less damning evidence than in *MGM v. Grokster*, the scope of the Supreme Court’s inducement rule will become more apparent. In the meantime, technology companies are left facing potentially more risk when developing new and disruptive technologies. Technology companies must now pay a great deal more attention to public statements and marketing materials, as well as internal e-mails and memos, lest damaging evidence of “inducement” to infringe turns up in discovery. Moreover, companies that are aware of infringing uses of their technology must reconsider reliance on a lack of demonstrable control over the infringement or substantial noninfringing uses under Sony as a legal defense. Accordingly, companies should seek legal guidance to set marketing and internal document standards and proactively scrutinize possible sources of evidence of “inducement.” In litigation, discovery costs will most likely increase as intent to “induce” is a factually intensive issue, and new sources of documents that might yield “inducement” evidence are now fair game and more relevant to a secondary copyright infringement case.

**CONCLUSION**

The Supreme Court’s decision in *MGM v. Grokster* answers the question of whether technology distributed with the intent to induce copyright infringement can escape secondary copyright liability. Yet, at the same time, *MGM v. Grokster* raises new uncertainties and risks that technology companies must face in their normal business operations. Companies must now monitor their activities, internal communications, advertising and marketing so that they cannot be construed as promoting infringement of copyrighted works. And, even as the content industry bolsters its effort to shut down allegedly infringing file-sharing networks, peer-to-peer systems will continue to evolve technologically to avoid detection and legal enforcement. Thus, the new theory of liability and new issues posed by *MGM v. Grokster* virtually guarantee that StreamCast and Grokster will not be the last technology companies to face vicarious infringement liability as copyright law continues to develop in the digital age.

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and drafting experience focuses on software and digital technologies.

2See id. at 2772.
3A&M Records Inc. v. Napster Inc., 239 F.3d 1004 (9th Cir. 2001).
4MGM v. Grokster, 125 S.Ct. at 2773 (citations omitted).
5Id.
7Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 259 F.3d 1154 (9th Cir. 2003).
8Id. at 1046.
9Id. at 2775-76.
10Id. at 2775 (“The more artistic protection is favored, the more technological innovation may be discouraged, the administration of copyright law is an exercise in managing the trade-off.”).
11Id. at 2772.
12Id. at 2776.
13Id. at 2772.
14Id. at 2779.
15Id. at 2780.
16Id. at 2790.
17Id. at 2782.
25Id.
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BY DONALD W. DETISCH

Kelo & Eminent Domain
Eminent domain practice traditionally has been a benign activity, often punctuated by the collegial participants experiencing moments of soporific head nodding. The primary focus was and continues to be the determination of fair market value of the property interest sought to be acquired. Within the past several years, however, an additional issue is being raised more often—that is, the government's power to take private property. The focus of objection to the government's power is "public use." To take private property, the use the government seeks to make of the property must be a public use. "Public use" is defined as "a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of Government."

History

Eminent domain (Dominium eminens) is the power of the sovereign to take property for public use without the owner's consent upon making just compensation (United States v. Jones 109 U.S. 513; Gilmer v. Lane Point, 18 Cal. 229). The power of eminent domain is not a property right or an exercise by the state of ultimate ownership in the soil, but it is a power based on the sovereignty of the state. The origin of the power of eminent domain is indeed murky and was believed to have started during biblical times when King Ahab, urged by Jezebel, acquired Naboth's vineyard with Naboth being stoned to death for refusing to sell his land. (Fortunately, this practice was not continued to the present.)

With the demise of the Roman Empire, eminent domain disappeared for centuries, and during the medieval period when the demand for public improvements was small and the rights of individuals little regarded, eminent domain was neither considered nor discussed. The medieval feudal system declined and the concepts of individual ownership and the rights of private property rose, causing the eminent domain power to be recognized.

In England, common law recognized the king's right to enter private property to erect defenses against public enemies or the ravages of the sea. The king's right to seize provisions for the royal household's use for compensation was regulated by the Magna Carta. Eminent domain grew out of the ancient proceeding known as Inquest of Office. This was an inquiry by jurors concerning any matter that entitled the king to the possession of lands, tenements, goods and chattels, and it was originally involved in the case of escheat or forfeiture.

The power of eminent domain was thus well established in England by the time of the American Revolution, and the obligation to pay compensation had become a necessary incident to the exercise of the power. The founders of our Constitution shared Locke's affection for private property. In its conception, America adopted English land use law. "The supreme power cannot take from any man any part of his property without his own consent; for the preservation of property being the end of government and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it."

During colonial times, eminent domain was justified only if the land were to be reserved for public use, which in most early cases involved the building of roads. The constitutions of Pennsylvania and Virginia were the first to use the phrase "public use," which was later included in the Fifth Amendment to the Constitution (afterward included in the 14th Amendment): No person ... shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Present

In California the legislature enacted the Community Redevelopment Law (Health & Safety Code, §§33000-33013) in 1951 to provide a structure under which redevelopment agencies could engage in the revitalization of blighted areas. This was a method whereby incentives were provided to private property owners to rehabilitate and upgrade their property. To use the power of eminent domain in the context of redevelopment, several things must first exist: the area must be found to be blighted and so designated by the agency, and the owner must be first given the opportunity to redevelop his own property.

The first challenge to "public use" in the area of redevelopment was in Berman v. Parker, 348 U.S. 26 (1954). The United Stated Supreme Court sustained, against public use objections, a comprehensive redevelopment plan designed to rid a section of the District of Columbia of its slum housing. The plaintiff owned a department store, which was not in a dangerous or unusable condition in the designated area. His structure was taken over and resold to another party for private use under the master plan. With respect to the public use limitation in the eminent domain clause, the Court said: "The concept of public welfare is broad and inclusive" enough to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress, and "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." In Hawaii Housing Authority v. Midkiff (1984) 104 S.Ct. 2321, the Court further held that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers" and "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the Public Use Clause." As one commentator has noted, "Once Berman v. Parker is on the books, the question remains whether any condemnation of land can be attacked for want of a public purpose" (Epstein Takings, Harvard University Press (1985) p.179).

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On June 23, 2005, the United States Supreme Court decided the Kelo case and held that the city’s exercise of eminent domain power in furtherance of an economic development plan satisfied the constitutional “public use” requirement. This economic plan was designed to promote economic revitalization within the city of New London, a state-designated “distressed municipality.” The focus of the plan was 90 acres within the Fort Trumbull area of the city and was intended to create jobs, generate tax revenue, help build momentum for the revitalization of downtown New London, make the city more attractive and create leisure and recreational opportunities. Petitioners were residential property owners whose property was not alleged to be blighted or otherwise in poor condition; rather, they were condemned only because they happened to be located in the development area. Indeed, the Court noted: “Those who govern the City were not confronted with the need to remove blight ... but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community including—but by no means limited to—new jobs and increased tax revenue.”

The Court continued: “Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.” The Court found that promoting economic development was a traditional and long-accepted governmental function. The Court noted that its ruling in favor of economic development would not extend to a situation in which the taking was designed to benefit a particular class of identifiable individuals. The “public use” requirement would not be satisfied, for example, if properties were being taken simply for the purpose of transferring them to another private party.

Four justices, led by Justice Day O’Connor, dissented and would have required some public purpose beyond simple improvement or revitalization of the property. Justice O’Connor posed this cogent question: “For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”

Supporters argue that this decision is not really new; it simply
reaffirms the *Berman* and *Midkiff* decisions. Public use is to be interpreted broadly, and deference will be allowed the legislative discretion. While the use of the power of eminent domain is subject to abuse, all such power is subject to abuse. The fact that such abuse may occur does not mean that the power should not be granted. In reaching its decision, the Court relied heavily on the fact that it was reviewing a comprehensive plan, not the separate application of the power of eminent domain. The courts will not second-guess the government’s determination as to which lands need to be acquired in order to effect a project. Even though incidental benefits may accrue to individual private properties, this does not mean the public use requirement has not been met.

Critics of the decision argue that no one’s property is safe from government acquisition; the floodgates are now open. “Any property may not be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.” The general thrust of the opposition is that *Kelo* legitimizes taking A’s land and handing it over to B, simply because B has more dollars. The critics argue that the generation of dollars is not a legitimate public purpose.

This debate has now caused reactions among state and local governments that use the power of eminent domain. That reaction and evaluation of the use of eminent domain is necessarily a good result because, as the Court noted, this power is subject to abuse and the courts should be vigilant in curbing those abuses. Finally, the Court made this statement: “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the federal baseline.”

In this regard the Court cites California law for the proposition that a city may only take land for economic development purposes in blighted areas (§§33030-33037 H&S Code, *Redevelopment Agency of Chula Vista v. Radon Bros*). That statement has indeed inspired several California legislators to promote a review of the use of eminent domain in California. Needless to say, within the near future eminent domain proceedings will be scrutinized more closely in order to make certain that the use of the power is not being abused.

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“Fear is the lengthened shadow of ignorance.” — Arnold Glasow

Critics of redevelopment and eminent domain have used the recent Supreme Court decision *Kelo v. New London* to spawn fear in the hearts of Californians over the use of redevelopment and eminent domain. Their rhetoric and exaggerations have created a tale of the Man coming to take your home to convey to a developer for private use. Yet when examined in the light of reality, these tales disappear as quickly as the monsters under our children’s beds.

People are understandably upset about the *Kelo* decision because their perception is that the Supreme Court created new law authorizing redevelopment agencies to take your home. Public reaction to the decision makes it clear that the majority does not understand the benefits of redevelopment nor the legal restrictions and requirements. In reality, the decision did not affect or extend the powers of redevelopment agencies in California.

Consider the benefits of redevelopment. In 2003 alone, redevelopment contributed $31.8 billion to the California economy and supported 310,000 full- and part-time jobs. Redevelopment-induced construction activities generated $1.58 billion in state and local taxes.

Every $1 of redevelopment agency spending leverages nearly $14 in economic activity. Between 1994 and 2004, redevelopment agencies built or rehabilitated 71,127 units of low- and moderate-income housing units, making redevelopment the second largest funder of affordable housing in California after the federal government.

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**MONSTERS UNDER THE BED**

*BY JAMES GILPIN*
HOW TO STRANGLE A CITY
THE PROBLEMS WITH RAMPANT REDEVELOPMENT
BY KAREN R. FROSTROM

Redevelopment is the savior who sold his soul to the devil. In the beginning, redevelopment powers were used to eliminate blight, then interpreted as dangerous living conditions such as lack of plumbing and electricity or very high crime rates. Today, redevelopment is a vehicle for low-cost property acquisition and downtown gentrification. What went wrong?

Redevelopment by force hurts everyone. When a property is targeted for involuntary redevelopment, the property owner is not included in the process unless she can match the developer dollar for dollar. The owner’s employees, tenants or customers become nervous and leave. This tenuous situation can and does persist for years. The business, usually a small one, continues to die a slow death from asphyxiation. While the formerly thriving business dies, the surrounding property, if it is under the control of the developer, lies unused and wasted. Eventually, the entire project area is dead.

Unless the owner can prove that his losses were due to “unreasonable” conduct, he will be unable to recover them when his property is taken. The city will value the property at the time of the actual taking, by which point the business may be in the red and nearly all of the tenants may be gone. The business owner has lost, even if he or she does not contest the taking through litigation.

The community has lost a formerly thriving business and has lived with an eyesore for years. It has no guarantee that the promised development will ever be built. In a recent study, Long Beach discovered that San Diego has a high rate of redevelopment project failures. The hypothesis for this is that cities that do not limit their projects to contractors with a good track record of completing similar projects tend to contract with developers who are in the business of real estate speculation and who will in turn flee the area if the project costs begin to appear higher than they anticipated.

The system is too easy to abuse. The developer and the city meet behind closed doors. There is no penalty if the city does not participate in good faith negotiations to avoid eminent domain. The original owners are not assisted in remaining in the area under comparable circumstances. Redevelopment areas become “Wal-Marted” as small, unique businesses are killed to make way for big names. Property rights are rendered meaningless, and communities become less special. This was not the original intention when redevelopment was

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Beyond the numbers, redevelopment agencies improve every community by (1) cleaning up blighted, rundown areas and restoring hope and pride; (2) removing toxic waste and converting polluted sites into productive uses; (3) helping to reduce crime; and (4) reducing sprawl and enhancing air quality through infill development.

Much of the criticism of redevelopment and the use of eminent domain is simply false or grossly exaggerated, such as accusations that its use is “widespread.” In fact, eminent domain is used only as a last resort. Before entities resort to eminent domain, the property has been appraised for its fair market value, a written offer of just compensation has been made to the owner and negotiated in good faith, and a public hearing at which the property owner may participate has been held to determine, by a two-thirds vote of elected officials, whether (1) the public interest and necessity require the project, (2) the project is planned in the manner that will be most compatible with the greatest public good and the least private injury, and (3) the property is necessary for the project.

A study by the California Redevelopment Agency found that over the past five years, redevelopment agencies acquired about 2,800 parcels of land—the vast number through negotiated purchases. Eminent domain resulting in court decisions was used in fewer than 3 percent of all redevelopment property acquisitions.

Another exaggeration is that “everyone’s home is at risk.” Eminent domain is rarely used in the redevelopment context to acquire residential, owner-occupied homes. Forty percent of the 771 redevelopment project area plans in the state do not authorize the use of eminent domain. Another 30 percent limit the authority to use eminent domain, such as prohibitions on taking owner-occupied houses. Over the past five years, only three owner-occupied homes statewide were acquired through a formal eminent domain proceeding.

Another falsehood is that people are paid “pennies on the dollar” for their properties. The law requires redevelopment agencies to

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How to Strangle a City
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born. It is, however, the reality as redevelopment has come of age.

Redevelopment hides the poor. When a $150,000 family home is destroyed and replaced by $300,000 condominiums, where does the owner go? Answer: Farther away from the city center, to a potentially more dangerous area. Rarely are former owners able to afford the redeveloped area.

Redevelopment also tends to decrease the average wage in the area. Light industrial is a good example. Light industrial is not popular in downtown area redevelopment because it is less attractive than a trendy retail, hotel or condominium project. However, light industrial workers make substantially more than do retail or hotel workers. While the city may have arguably improved its tax base, the citizens have not improved their salary base.

Redevelopment decreases city funds. When a property is redeveloped, the “tax increment,” or difference between the former tax value and the current tax value, is paid not to the city but to the redevelopment agency. The city becomes obligated to provide fire, police and utility services to the resultant increased density, but it does not receive the increased tax money to make this possible. The infrastructure suffers.

Finally, redevelopment punishes the people it should be rewarding. Many individuals invested in Point Loma, Little Italy and downtown long before Horton Plaza was built, and they worked hard to contribute to the community their properties. They formed community associations and kept their communities going. When redevelopment came, rather than working with these longtime owners to implement their longstanding vision for their communities, redevelopment brought wealthy developers who had never shown an interest in the area previously and were now only interested in the good deals and quick money to be had. The individuals who kept their communities running for decades were shoved aside, and the fat cats took over. And guess what? When the going gets tough again, and it will, the fat cats will run. And having driven out the longtime owners, what will result? Blight. As a result of redevelopment. Something is wrong with that picture.

Karen R. Frostrom is an attorney at Thorsnes Bartolotta McGuire. She specializes in business and real property litigation and can be reached at frostrom@tbmlawyers.com.
pay “fair market value” for property whether eminent domain is used or not, and usually they pay more—sometimes much more. “Fair market value” is the highest price that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell. Fair market value takes into account the highest and most profitable use to which the property might be put in the near future.

State law requires relocation assistance to be provided to anyone who will be displaced. One often overlooked benefit of redevelopment is that tenants living in substandard housing are relocated, at government expense, to safe and decent housing.

California law does not authorize redevelopment for “economic development,” the concept approved in Kelo. Instead, redevelopment law requires a finding of “blight.” Another falsehood is that anything can be defined as blight. Wrong. California’s definition was significantly tightened in 1993 to define “blight” as the presence of enumerated physical and economic factors that are so prevalent and so substantial that they constitute “a serious physical and economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise or government action, or both, without redevelopment.”

By pointing to aberrations as the norm, critics will empower uninformed voters to strip responsible agencies of the tools they need to continue to improve and build better communities. We have nothing to fear and everything to gain from continued support of redevelopment as a tool to breathe new life into areas in need of revitalization and new opportunity.

James Gilpin is a partner with the San Diego office of Best Best & Krieger. He has more than 15 years of expertise representing public agencies in eminent domain matters. He can be reached at james.gilpin@bbklaw.com.
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The widespread Gulf Coast destruction caused by Hurricane Katrina, especially in New Orleans, has been called the worst natural disaster in American history. This disaster destroyed one-third of Louisiana’s economy and displaced almost 300,000 people.

Among those displaced were almost 6,000 lawyers practicing in the New Orleans, Louisiana, area. The displaced lawyers represent almost one-third of all lawyers practicing in Louisiana. Lawyers lost offices, computers and clients. Hurricane Katrina crippled Louisiana’s court system.

The hurricane temporarily shut down many of Louisiana’s federal and state courts. The United States Fifth Circuit Court of Appeal, the Federal Eastern District of Louisiana, the Louisiana Supreme Court and every city, parish and district court in New Orleans temporarily shut down.

The courthouses are unusable. Three federal courthouses in New Orleans had to be evacuated, including the John Minor Wisdom U.S. Courthouse, the home of the U.S. Court of Appeal for the Fifth Circuit.

Hurricane Katrina Crippled Louisiana’s Legal System

By Mark Boustany

The Hale Boggs Federal Building, which houses the U.S. Bankruptcy Court for the Eastern District of Louisiana, is closed.

The Fifth Circuit Court of Appeal re-located to Houston, Texas. The Federal District Court for the Eastern District of Louisiana shut down but issued a temporary order allowing filings by fax and suspending deadlines in all matters.

A law clerk with the United States Fifth Circuit Court of Appeal reported shortly after the hurricane that the court’s web, e-mail and DNS servers were likely underwater. The Fifth Circuit’s web site redirected to the Southern District of Texas. The judges took up temporary residence in Houston, Texas, Lafayette, Louisiana, and Jackson, Mississippi. Emergency motions in such matters as death penalty and immigration cases with execution or deportation dates could not be filed.

A special problem existed for the district and bankruptcy courts. They had no jurisdiction to conduct court business outside the geographic boundaries of the district. The Judicial Conference of the United States, which makes policy for the federal courts, asked Congress to pass emergency legislation to allow those courts to operate in another judicial district. The legislation allows any court to do so during an emergency.

President Bush signed into law the Federal Judiciary Emergency Special Sessions Act of 2005, which allows fed-
eral courts to operate outside their jurisdictions in the event of a disaster. The law allows a federal appeals court to hold sessions “at any place outside the circuit” if the chief judge or the next highest ranking person available determines the court cannot operate in its jurisdiction due to “emergency circumstances.” “The court may transact any business at a special session outside the circuit that it might transact at a regular session,” according to the law.

The city, parish and state courts confront unique problems. Floodwaters destroyed court records. Criminal evidence and exhibits remain under water or float in flooded basements of the criminal courthouse. Witnesses and defendants abandoned the city, many still unable to be located.

Destroyed arrest records and overdue bail hearings resulted in innocent and petty offenders jailed for days and weeks without legal recourse. Missing witnesses and defendants will delay criminal trials for months or years.

Prosecutors in 3,000 pending cases in Orleans Parish will have to deal with missing evidence, destroyed records and absent witnesses, which may require dismissal of many criminal prosecutions.

“That’s a nightmare scenario no one in their right mind could possibly want,” said Orleans Parish District Attorney Eddie J. Jordan Jr. “I think it may very well be possible in some cases, but it’s still too early to say.”

Some small measures will assist lawyers and clients in sorting out the problems associated with closed courthouses. Although the justices of the Louisiana Supreme Court announced the court’s closure from August 29, 2005, through November 25, 2005, the justices issued an order declaring the closure period a legal holiday and ordering that all pleadings otherwise required to be filed during the holiday would be due on November 28, 2005. The State Fourth Circuit Court of Appeal, which hears appeals for Orleans and other courts in the area, closed through November 25, 2005, but declared the period between August 29, 2005, through November 25, 2005, to be a legal holiday. Louisiana’s governor issued an executive order that suspends statutes of limitations and other time limitations.

In an emergency legislative session that began on November 6, 2005, the Louisiana legislature will adopt other measures designed to ameliorate the effects of the hurricane.

Recovery will take years and many small steps. To help displaced lawyers, the Louisiana State Bar Association set up a special web site to allow attorneys and clients to reestablish contact. The Louisiana Supreme Court waived continuing legal education requirements for calendar year 2005. These small measures begin a long process of rebuilding individual law practices and Louisiana’s crippled legal system.

Mark Boustany is a solo practitioner in Lafayette, Louisiana, who has been practicing law for more than 25 years.
Friday, August 26, 2005, was a great day. I had just finished the first week of my second year at Tulane. My friends and I had returned to New Orleans after our first summer in the legal arena, and there was plenty of catching up to do. Lucky for us, the first Friday of classes also meant the first “bar review” of the year, held at the Goldmine, an infamous bar off Bourbon Street. After a late night in the French Quarter, I awoke to news that classes would be canceled until Wednesday due to the possibility of a hurricane. At this point, few of my friends had even realized that there was a hurricane in the Gulf of Mexico, let alone anywhere close to New Orleans. While most of my classmates had remained in New Orleans for prior storms, the thought of adding a few more vacation days this early in the semester was well received by all.

My girlfriend, Avery Pardee, and I promptly packed up our beach clothes and books and headed to Pensacola, Florida, where we intended to spend a few days until the hurricane had blown by and power was restored to the Garden District. Unfortunately, it’s the beginning of November and we still haven’t gone home.

Saturday afternoon, Hurricane Katrina was a Category 3 storm that could possibly make landfall near New Orleans. Experience had taught most of us that while storms along the Gulf Coast were frequent, New Orleans rarely took the brunt of the storm. Therefore, the three-hour trip to Pensacola found me more concerned with beaches and the thought of getting a jumpstart on my coursework than the impending hurricane. All of that changed Sunday morning when I awoke to CNN’s coverage of Katrina. The storm was now a Category 5 and one of the largest in recorded history. Even worse, it was headed straight for my car, apartment, neighborhood, law school and city. Sunday was a bad day.

Early Monday morning, Pensacola caught the fringe of the hurricane. The power went out at 3 a.m., and the storm continued well into the early afternoon. Soon after the storm ended, Avery and I drove into town to find a place with power where we could watch the news. Everyone who has lived in New Orleans for more than a day knows that the levees cannot withstand a Category 4 hurricane, let alone a Category 5. The scenes from New Orleans were not even close to what I imagined. True, the hurricane winds had knocked down trees and done substantial roof damage, but the massive flooding we feared had not come to pass. Yet.

The days after the hurricane were spent pouring over Avery’s laptop in a coffee shop in downtown Pensacola. Avery and I knew that there was no hope of going back to New Orleans any time soon. While we had not heard any official word from Tulane, we knew that the likelihood of a semester in New Orleans was slim to none. The school had set up a base of operations in Houston and a temporary web site on the servers at Emory Law School in Atlanta. The web site served as a clearinghouse for information. Students could post questions and trade specifics about different neighborhoods in New Orleans and faculty and students who were still in the city. Unfortunately, at that point there were more questions than answers.

With a desire to avoid a stall in our legal education, Avery and I began analyzing our limited options. As a small beach town, Pensacola offered little in the way of legal experience, and my parent’s home in North Carolina offered less. With limited options, I called a friend of mine from my days in the Navy, Lt. Mike O’Donnell and I went to Surface Warfare Officer School together and had kept in touch throughout the years. Mike had recently relocated to the 32nd Street Naval Station and purchased a condo in San Diego. When I called Mike and asked him if we could stay until Christmas, he eagerly replied, “Of course.”

Once Avery and I knew where we would be spending the academic term, we began to look for a law school that would take us in for the semester. There was also the small concern of money. With our financial aid in a state of uncertainty, we knew we needed jobs—fast. With little information to go on, Avery began calling area law schools, and I began looking up Tulane Law alumni. Avery was able to get in touch with Dean Carrie Wilson at University of San Diego Law School. Carrie informed us that not only could we come to USD Law, but that she would make it easy on us. In a conversation well after business hours on Friday night, Carrie patiently went through the course catalog and assisted in scheduling classes. Additionally, she assured us that USD was more than willing to help and that tuition and fees would be waived.

Between conversations with Carrie at USD, I was able to locate a Tulane Law alumnus named William Kammer who
worked in a firm downtown. I sent an e-mail to Bill asking if he could offer suggestions on finding legal work in San Diego. The next day, I received a call from another San Diego attorney, Knut Johnson. Knut had attended Tulane undergrad and was more than eager to help. Thanks to these two gentlemen, Avery and I were placed in a position I hope to find myself in often: people were cold-calling with job offers. Nitza Williamson from the U.S. Attorney’s Office contacted me and posed two questions: (1) was I interested in a position and (2) was I willing to fill out two dozen forms in order to get that position? I eagerly replied, “Yes!”

Shortly thereafter, Reuban Cahn of Federal Defenders Inc. contacted Avery. The fit couldn’t have been better. Avery’s career goal has always been to become a public defender. The prospect of working at Federal Defenders was so appealing that she decided not to enroll at USD so that she could devote all of her time to the internship.

San Diego is a great place to be a refugee. Less than two weeks after Hurricane Katrina devastated New Orleans, Avery and I were working at great offices, and I was enrolled in classes at USD Law. The local Red Cross and Salvation Army helped to augment our wardrobe of beach clothes, and our friends, co-workers and fellow students helped us get adjusted to living in a new city. A few weeks ago, Avery and I attended the San Diego County Bar Association’s Reception for Law Students where I eagerly applied for membership. While Avery and I can’t wait to get back to Tulane and New Orleans, our experience in San Diego thus far has been fantastic, and we both intend to return to California upon graduation.

Raymond T. Waid is a second-year student at Tulane University Law School. Questions or offers of employment will be eagerly received at rwaid@law.tulane.edu.

NOT THE YEAR I EXPECTED

BY BILL KAMMER

In July, after 10 years or so as an active Tulane alumnus, I began my year as national alumni president. Things were going well. August 27—The university welcomed students back to campus that Saturday morning. Then the evacuation began. Katrina was on its way.

The storm struck New Orleans two days later. Nothing has been the same since. But then, some things haven’t changed. A devastated city, with almost all its residents displaced; tens of thousands of residences and businesses destroyed, many uninsured for flood damage. We all watched the chaos unfold.

Katrina’s impact on Tulane was much the same. Now closed for the semester, its income stream trickled to a halt; no tuition and little research money for the duration. The school had $50 million in business interruption insurance and thought it plenty. No one, however, expected to be out of business for six months, maybe more. The school’s property insurance is subject to the same flooding coverage exclusions we’ve all read about. The economic hit may be $200 million.

Some students and faculty first went home, to family or friends; many ended up in a gymnasium at Jackson State in Mississippi. After a few days, everyone discovered a need for Plan B.

Colleges and universities agreed to accept students as visitors for the semester. Tulane continued the salaries of all full-time faculty and many key staff despite the lack of income. It started plans to reopen in January. Its athletic teams reassembled intact on various campuses to study and compete as if nothing had happened.

In San Diego, Tulane alumni and friends mobilized to help displaced students. The care and concern of our legal community was heartwarming. For instance, Knut Johnson called me soon after Katrina hit and asked how he could help. I spent hours each day on conference calls; e-mails hit my inbox from students looking for help. I asked Knut to aid the law students landing here; within days, he had placed a substantial number of them in internships and similar positions.

The university canceled homecoming; our alumni association canceled its fall meeting. Instead, we meet virtually and often. Perhaps 80 percent of the students will return in January. Tulane is the largest private employer in New Orleans, and its successful recovery may be key to the city’s recovery. Much off-campus housing was flooded, so Tulane has chartered two cruise ships for students, faculty and staff. The public schools in New Orleans won’t really be back this year, so Tulane will open a charter school for grades K–12 for children of the university community and its immediate neighborhood.

Going forward, the city and Tulane face major decisions—how to rebuild and reopen. In January, Tulane will probably resemble a small college town in a Peace Corps village. New Orleans’ overnight population in December may not exceed 75,000. There are mountains of debris, equivalent to 30 years of municipal waste. Entire neighborhoods remain closed to former residents.

Government funding, private donations, hard work, years of effort and even prayer will probably be necessary to put New Orleans and Tulane back in operation.

Bill Kammer is a trial lawyer and partner at Solomon Ward Seidenwurm & Smith.
VISTA LAW
A MAJOR COURT SYSTEM WORKS TO MAINTAIN INTEGRITY AND COURTESY
BY DEAN A. SCHIFFMAN

Vista Law, Front row: Vista Law, Front row: Jennifer L. Lynch, Attorney at Law; Joan P. Weber, Superior Court Supervising Judge; Thomas P. Nugent, Superior Court Judge; Marguerite L. Wagner, Superior Court Judge; Marion E. Froehlich, Law Offices of Marion E. Froehlich, Attorney at Law; Rayond G. Gomez, Gomez & Associates, Attorney at Law. Back row: David W. Ryan, Superior Court Judge; Joseph P. Brannigan, Superior Court Judge; Paul Smith, Attorney at Law; Harry L. Powazek, Superior Court Commissioner; Michael M. Anello, Superior Court Judge; Richard R. Schwabe, Attorney at Law; Randall L. Winet, Winet, Patrick & Weaver, Attorney at Law; Timothy M. Casserly, Superior Court Judge; Kennett L. Patrick, Winet, Patrick & Weaver, Attorney at Law.
The Vista bench and bar could be a model for how judges and lawyers can work together professionally and ethically to improve the quality of justice for the entire community. The Vista court has a community outreach and youth education program, which I would match with any court in the state. We have a vibrant Bench-Bar-Media program, which meets quarterly for discussions. The Vista Bar donates an unparalleled number of hours for pro tem work in family law, civil, traffic and small claims.

—Judge Joan P. Weber
Supervising Judge

Although the San Diego Superior Court is one entity, I consider the North County court my home. My entire career from lawyer to judge has been here. There is a true sense of camaraderie within the entire legal community. The bench and bar share in many activities, all of which draw a friendly mix of lawyers and judges. We enjoy a unique community that fosters mutual trust and respect within the courtroom.

—Marguerite L. Wagner
Incoming Supervising Judge

I began my criminal law practice in Vista 28 years ago because it was a great place to raise a family. Now my daughter and I practice law together, and it’s great to share ideas and trial tactics back and forth and to exchange thoughts on the law. Dinner conversations can sometimes be overwhelming. Most of our clients live in or near Vista. Some are now second generation. The courthouse and jail are only a few blocks away—no morning traffic. My hope for my daughter is that 27 years from now she can say, I still enjoy the practice of law in Vista.

—Herbert J. Weston
(with daughter Tanya L. Weston)

There may be a north to each of California’s 58 counties, but there is really only one North County Superior Court. As a large trial court system, Vista is a great place to work and live, as many of our practitioners know. It still has a small town quality to it. While there are many good dining opportunities, many lawyers and judges find Nucci’s Italian Cafe & Pizza and Mama ‘n Papa’s Pizza Grotto to be the places to go to see and be seen. Parking is sometimes tight, but always available, and it’s free. Getting access to the freeway is easy. I’ve lived and worked here since 1969 and could not think of a better place I want to be.

—Judge David W. Ryan

Vista is a great place to practice law. The judiciary and bar work well together, and there is a small town atmosphere. Most lawyers feel privileged to work and live in North County.

—Randall Winet
Winet, Patrick & Weaver

Serving as a judge in the Vista courthouse has been a wonderful and fulfilling experience for me. My colleagues on the bench and the members of the North County Bar have made me feel very welcome. As the newest judge in Vista, I could not have asked for a better assignment.

—Judge Joseph P. Brannigan

In 1996, as a new attorney, I had the opportunity to choose a location for my solo law practice. I was drawn to Vista, where the attorneys I had met were supportive and friendly. I asked my father, who had served as a superior court judge downtown as well as in Vista, what he thought of my opening an office in North County. “That’s a wonderful idea!” was his response. The rest is history.

—Marion E. Froehlich
Law Offices of Marion E. Froehlich

I can recall when the Vista Superior Court consisted of Judge Dan Leedy visiting us one once a week. The courthouse was the county supervisor’s office. The judge sat behind a card table.

continued on page 40

CITY OF VISTA

Location: Between Interstate 5 and Interstate 15, along Highway 78.

Population: 94,000. The city council is the governing body of the Vista Municipal Government (four elected council members and an elected mayor).

Points of Interest: Vista Historical Museum, Antique Gas & Steam Engine Museum, Summergrass Bluegrass Festival (August 2006).

North County Court Complex: The city of Vista is the site of one of county’s major court complexes—325 South Melrose, Vista, California 92081. The complex includes nearly 30 court departments (Judge Joan P. Weber, Supervising Judge), a complete law library, a public defender’s office, a district attorney’s office and its own detention facility. Distance from other court locations (miles): Downtown (41), East County (46), South Bay (49).

Vista Law continued from page 39

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I love the Vista courthouse, and I am lucky to practice in the district attorney’s office there. Vista is a close-knit community of friendly people. Driving to court one day, I had a flat tire on the freeway. Among the six people who stopped to help was a woman. “Ann, I’ll help you. I was one of your jurors last year,” she explained. My favorite lunch spot is Panera Bread on Vista Village Drive.

— Ann Barber
Deputy District Attorney

When lawyering in the Vista Court, expect to be treated civilly by members of our profession and the court staff. We foster a spirit of professionalism, continuing education and a positive public image, which has made me proud to be a lawyer in North County for the past 22 years.

— Richard L. Duquette
Law Firm of Richard L. Duquette

I began practicing here 32 years ago. I still feel Vista has a small town atmosphere. Although our system is adversarial, I have always been impressed with the professionalism and courtesy shown by everyone here, from the court clerks, reporters, bailiffs, opposing counsel and the bench.

— Richard Muir

I relocated to North County from San Jose. I was welcomed into the legal community by my colleagues, where I quickly developed a close network. My office is five minutes from the Vista courthouse, and I work on a daily basis with the brightest legal minds in the area. And after a challenging day, my husband and I can meet for drinks or dinner at any number of intimate upscale dining spots.

— Sydney Kirkland
Kirkland, McGreevey & Insley

Dean A. Schiffman is a local attorney and expert witness. He can be reached at his web site, www.LAWandNUMBERS.com.
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ETHICS: DEALS DELAYED, JUSTICE DEFERRED?

BY DAN RODRIGUEZ

The phone rang. Hoover J. Edgar, the federal prosecutor working on corruption cases in Washington, asked, “Who’s this?”

The voice on the phone rasped, “I can’t tell you, but you can call me Deep Throat. I have some information on one of your cases, but I don’t want to get in trouble.”

“Well, we can talk about that but we’ll have to meet,” Edgar responded.

Meet they did, and ultimately, Deep Throat agreed to wear a wire, obtain incriminating evidence from, and testify against one of Edgar’s most important suspects. In exchange, following the trial of the suspect—and Deep Throat’s truthful testimony—he’d receive a greatly reduced sentence for his own crimes. Deep Throat, wearing the wire did, indeed, elicit some incriminating statements. The suspect, Richard “Tricky Dick” Nickson, was indicted.

At trial, Edgar put Deep Throat on his witness list. Once trial commenced, however, Edgar decided he didn’t need Deep Throat’s testimony and informed the court and defense that he no longer intended to call him. Nickson’s counsel decided to call Deep Throat, believing he might help their client. Deep Throat, however, “pled the Fifth.” He didn’t want to ruin his deal testifying for the defense.

The judge asked Edgar to complete his deal with Deep Throat and have him sentenced. The prosecutor refused, knowing Deep Throat would no longer cooperate if he did so.

Nickson’s counsel objected that Deep Throat was now unavailable as a witness because of the prosecutor’s unethical actions. Edgar countered that he had done nothing unethical and it was Deep Throat’s prerogative to plead the Fifth.

An ethical dilemma for Edgar? What would a judge do?

This was the situation faced by the court in People v. Woods (2004) 120 Cal.App.4th 929. Defense counsel asserted that the prosecutor was intentionally delaying the completion of a plea agreement so that the witness, Sheridan, could invoke the Fifth Amendment and not testify for the defendant. The prosecutor responded that Sheridan, a co-conspirator, was required to help the investigation and testify truthfully. He “made no bones about the fact that he was not going to execute the agreement until after Woods’ trial was over” (Id. at 934).
The trial court never directly said the prosecutor was being unethical but was clearly uncomfortable with the situation. The judge pursued a number of options presented by the defense: dismiss the case; declare a mistrial; exclude the testimony of Amos, a third co-conspirator (whose anticipated strong testimony led the prosecutor to decide he didn’t need Sheridan); grant the witness judicial immunity; or continue the trial. The judge denied all these options. He chose, rather, to “relax the rules of hearsay” and allow Sheridan’s statements through the testimony of other witnesses even though clearly hearsay with no exception.

The appellate court applied the three-prong test from People v. Lucas (1995) 12 Cal. 4th 415 to determine when a prosecutor’s actions improperly deny a defendant’s constitutional right to compel witnesses: (1) the prosecutor’s conduct must be “entirely unnecessary to the proper performance” of his duties; (2) such must be a “substantial cause” of the witness’ unavailability; and (3) the proposed testimony must be material to a defense.

The court first found that the prosecutor’s actions were a substantial cause of Sheridan’s unavailability, thus satisfying the second prong. The court then reviewed the prosecutor’s motives. The court surmised that if Sheridan refused to cooperate once sentenced, the prosecution would have no way to impeach Amos who could then testify as he pleased. This was a legitimate tactical decision not “entirely unnecessary to his duties.”

Further, the court found that, given the “relaxed hearsay” solution crafted by the trial court, Woods’ complaint was moot since he got Sheridan’s statements in any case. This approach was supported by several federal cases: Buie v. Sullivan (2 Cir. 1990) 923 F.2d 10; U.S. v. Capozzi (8th Cir. 1989) 883 F.2d 608.

The moral: Given that a cooperating witness will likely “plead the Fifth” to avoid losing his deal if you decide at trial not to call him, the prosecutor must have another reason for delaying completion of the plea agreement other than simply making the witness unavailable to the defense.

Dan Rodriguez is a deputy San Diego district attorney and a member of the San Diego County Bar Association Legal Ethics Committee. The views expressed are his own.
INSIGHTS

Cynthia H. Cwik, Partner, Litigation Department, Latham & Watkins LLP, San Diego; J.D., Yale Law School, 1987; B.A., Yale College, 1983, summa cum laude; Phi Beta Kappa

What were your high-profile cases?
I represent National Semiconductor Corporation in a toxic tort case in which plaintiffs are alleging that their health was impaired because of exposure to chemicals used in the company’s “clean rooms.” This case received a fair amount of publicity, including an article on the front page of The Wall Street Journal. Plaintiffs were also seeking to certify a class of thousands of workers to receive medical monitoring because of their employment for National. My client had a significant victory when the court denied plaintiffs’ motion to certify this class. National has reached an agreement in principle with plaintiffs to settle the remaining claims.

I represent Chevron in several large toxic tort actions involving about 1,000 plaintiffs who are alleging that their health was impaired or will be impaired because of exposure to hydrocarbons and other substances while they were attending Beverly Hills High School. Erin Brockovich is involved in this lawsuit, and it has already received much publicity, including an article in The Wall Street Journal and stories on CNN, Good Morning America, Today and 60 Minutes—Australia. I have primary responsibility for selecting and working with scientific experts. The case is scheduled to go to trial (for the first 12 trial plaintiffs) in 2006.

What’s on your resume?
In 2003, 2004 and 2005, I was named by the Los Angeles Daily Journal as one of California’s “Top Women Litigators.” The YWCA has also awarded me the “Tribute to Women in Industry” award based upon my contributions to the legal profession and to the community. I am a current member of the Executive Committee of the Yale Law School Association. I am the current chair of the Committee on Scientific Evidence of the American Bar Association’s Section of Science and Technology Law. I have served as president of the San Diego Chapter of the Federal Bar Association, a lawyer representative to the Ninth Circuit Judicial Conference and co-chair of the San Diego County Bar Association’s Children at Risk Committee.

MOTIONS

[HURRICANE RELIEF]
At California Western School of Law, students raised more than $2,000 through fund-raising events at the Local Eatery and Drinking Hole in downtown San Diego. “Members of Phi Alpha Delta and Amnesty International worked very hard on this project,” says Seyed Kazeroonian, president of Phi Alpha Delta. “We are thrilled with the great response we received for such a good cause.” Additionally, the California Innocence Project raised $3,000 from its annual Hike for Freedom for the Innocence Project New Orleans.

At Thomas Jefferson School of Law, a student fund-raiser and raffle at La Fiesta in the Gaslamp raised more than $2,500, while student and faculty also participated in a blood drive and set out boxes on campus for food and clothing.

Six students from Tulane Law School are spending the fall semester at the University of San Diego School of Law until classes resume in New Orleans. Hurricane Katrina caused “complete devastation,” says Ray Waid, a 2nd L and one of the six. “We knew the semester was probably a wash.”

BAR BLOG

Do you know that there are more than 50 boards and commissions in the city of San Diego for which you might serve? The San Diego County Bar Association and Lawyers Club of San Diego continue to encourage their members for appointment to these boards and commissions.

SDCBA member Marc T. Nemer of Latham & Watkins LLP says, “Serving on the Science and Technology Commission of the city of San Diego has provided me with a unique opportunity to interact with local business leaders and discuss, analyze and shape issues that directly impact the science and technology sector in San Diego.”

The County Bar and Lawyers Club act as liaisons among city, county, state and non-profit organizations to assist in generating the most qualified applicants for these important positions. If you wish to learn more about these opportunities, attend “The Inside Story: Boards and Commissions—How and Why You Should Serve.” The event, co-sponsored by the SDCBA and Lawyers Club featuring speakers Donna Frye and Judge Lisa Foster, along with representatives from various agencies, will be held on February 23 from 5:30 to 7:30 p.m. at the Bar Center and will include one hour of Ethics MCLE credit.
PHOTO GALLERY

BENCH-BAR RECEPTION
PHOTOGRAPHS BY BARRY CARLTON

Debbie Hurst & David Danielson
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Marvin Mizell
Robert Rice
Anton Gerschler & Janelle Boustany
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Erika Lindberg
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Charles Limandri
Joy Paeske
Michael Borazio, Jr., Nancy Henderson, & Richard Salpietra
Sterling Stires
PHOTO GALLERY

LAVEN D A R L AW C ONFERENCE
PHOTOGRAPHS BY GRAHAM BLAIR

GOLF TOURNAMENT
PHOTOGRAPHS BY CAROL SONSTEIN
San Diego lawyer-mediator Gregg Relyea and U.S. Magistrate Judge Leo Papas traveled to India in 2005 on Institute for the Study and Development of Legal Systems (ISDLS) projects. Funded in part by the U.S. State Department, ISDLS is a non-profit NGO that was asked by the chief judge of the India Supreme Court to help institute a pilot mediation program in New Delhi. Relyea has been traveling once a year to India for the past several years to assist in mediation training for Indian judges and attorneys. Papas was invited to work for two weeks (September 27 to October 9, 2005) with the judges of the Thees Hazari court in Delhi to coach, participate in and evaluate performances during ongoing mediations, the first ever performed in India. The pilot mediation program would serve as a model for a nationwide mediation program to be implemented in India by the end of 2006.

LANGUAGE

Papas: While the official language of India is English, virtually everyone also speaks Hindi.

Relyea: All judicial proceedings are conducted in English. They speak “proper” English with a variety of regional Indian accents.

ATTR ACTIONS

Relyea: You have to go to the old part of New Delhi. In the Old Market, they have spices in huge burlap sacks and loose tea of every kind. There are spices and tea and wonderful smells you have never even dreamed of. Also, Bombay. It’s like San Francisco times 100 — ultra modern and extremely vibrant.

COWS, MONKEYS

Relyea: When cows lay down in the street, traffic stops. They have the right of way.

Papas: Monkeys would periodically come into the courthouse as people vacated at the end of the day.

TRAVEL

Relyea: Traffic looks like a snake winding down the road. You learn to stop looking at the roadway—you’re missing each other by inches! There are less than 50 percent cars, lots of three-wheeled taxi-type cars, trucks, motorcycles, mopeds and bicycles all mixed in. Sometimes there are five family members on a moped!

CULTURE

Relyea: Indians place a great deal of importance on age, seniority and status. You have to make sure you are respecting station first. Indians stand in closer physical proximity to you. There is no lack of clarity; they come right out and say exactly what they mean.

EATING

Relyea: Paan—an after-dinner “digestive” made of spices, twigs, coconut shavings, bark and nuts wrapped in a palm leaf. You put the packet in your mouth between your cheek and teeth and leave it there.

GIFTS

Relyea: [Particularly northern India] The gift they love to receive is whiskey, a good special reserve bottle.

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Jyoti Bihanga Restaurant, 3351 Adams Avenue
Monsoon, 729 Fourth Avenue, in the Gaslamp District
Ashoka the Great, 9474 Black Mountain Road

Christine Pangan is a San Diego attorney and associate editor of San Diego Lawyer.
Bias is defined as “A preference or an inclination, especially one that inhibits impartial judgment.” This article explores the first definition as viewed by the public in general and committed by nursing homes and the Department of Motor Vehicles (DMV) in particular. The second definition, “an unfair act or policy stemming from prejudice” highlights how DMV policies are generated from this bias.

California law allows nursing home contracts to be signed by a self-proclaimed “legal representative” who need not have any particular relation to the senior.

The first and more insidious is what seniors face in nursing homes where the bias against them manifests as a total disregard of their input in decisions related to their own care. Nursing home residents are often forced to accept the decisions of third persons who have no legal authority to decide for them.

A paternalistic attitude toward seniors is usually established from the very outset of the residency in a nursing home. California law allows nursing home contracts to be signed by a self-proclaimed “legal representative” who need not have any particular relation to the senior. The admission agreement invariably purports to bind the nursing home resident to a substantial financial commitment in paying for his or her care. The contract can also waive critical rights by including arbitration agreements and advance relinquishments of a seven-day bed-hold if the resident is temporarily hospitalized. During the admission process, the senior is often simply not recognized as a sentient decision maker. The senior is usually not asked if he or she even consents to placement in the home in the first place. Any objections to placement are discounted because they are so common. There is no due process for nursing home placements; pleas to “go home” do not trigger any response within the nursing home or within the legal system.

Once the senior is placed in a nursing home, health care decisions are omnipresent and are again often made by someone without legal authority to act. Under California law, the resident is supposed to make all health care related decisions unless a legally recognized surrogate decision maker has been appointed. The factors for determining capacity are listed in Probate Code §811 but are rarely considered by nursing home staff.

If the resident has lost capacity, the law recognizes four methods for substitute decision making. The first method
is the legal agent under a Power of Attorney for Health Care or Advance Health Care Directive. Typically, the agent's authority is not immediately granted; rather, loss of capacity, as defined in the document, is a condition precedent. The power has to be “triggered,” usually by a doctor's statement. The second method for surrogate health decision making is provided in Health & Safety Code §1418.8. In this scenario, the resident has no willing and available surrogate so a nursing facility interdiscipli


dent rate per driver does not begin to equal what might be expected for the size of their population until after the age of 85. Teens, on the other hand, are nearly four times as likely to be involved in a crash as is a senior. According to the DMV, correlational evidence shows that an increased probability of crash involvement is associated with being young, being male, holding a commercial driver license and having several crashes or traffic citations.

The nursing home staff is quite comfortable in accepting directions from surrogates who do not have legal authority to act, particularly when the decisions are consistent with what they perceive as the client’s “best interests.” Attorneys can fall into the same trap.

All surrogate decision makers, save conservators with informed consent or dementia powers, can provide informed consent but cannot override a resident's refusal of care.

A lawyer with a client in a nursing home must be constantly vigilant against adopting the pervasive paternalism found in facilities. The nursing home staff is quite comfortable in accepting directions from surrogates who do not have legal authority to act, particularly when the decisions are consistent with what they perceive as the client's “best interests.” Attorneys can fall into the same trap. Most attorneys with nursing home clients are contacted initially by someone other than the nursing home resident. The attorney must be sure to visit the client right away to ensure that the client, not any third party, directs the attorney-client relationship. The key is to zealously advocate according to the client's wishes, even if they may appear to be unusual.

If the resident is unable to express their wishes or participate in decision making relevant to the issue(s) or the potential case, the attorney must be careful to ensure that neither the attorney nor the nursing home are accepting direction illegally from someone without the legal authority to give it. In this case, the client's wishes/decisions rule the day. If the client has clear mental impairments or persists in an absolutely unobtainable goal, the attorney may want to petition for the appointment of a guardian ad litem to protect the client and the attorney.

The next type of equally discriminatory and far more encompassing bias is that applied to the senior driver. There is a presumption that seniors are unsafe drivers. While it is a rebuttable presumption, it is a presumption nonetheless. More than 1.7 million licensed drivers in California are 70 and older. Seniors as a whole have extensive driving experience, and many have spotless driving records. They are more careful and cautious and pose the least risk to others on the road; in fact, the accident rate per driver does not begin to equal what might be expected for the size of their population until after the age of 85. Teens, on the other hand, are nearly four times as likely to be involved in a crash as is a senior. According to the DMV, correlational evidence shows that an increased probability of crash involvement is associated with being young, being male, holding a commercial driver license and having several crashes or traffic citations.

Drivers over 70 years old cannot renew their licenses by mail. This is blatant age discrimination; there is noth-
MCLE Self Study  continued from page 49

ing required such as a referral, officer observation, ticket, accident or doctor’s report that warrants a preclusion to renew a license by mail. This requirement forces seniors to go to the DMV where they might be viewed as frail and therefore unable to drive safely. Based on that observation, the senior may be compelled to take a driving test. A self-fulfilling prophecy is set into motion and the unwritten, unspoken bias contributes to senior’s apprehension and potential test failure.

Senior bias is also fueled by media frenzy and the thirst for sensationalism. The highly publicized case where a senior driver lost control and killed 10 people in Santa Monica is an excellent illustration. Horrific as this tragedy was, it was an isolated case. Furthermore, statistics do not support this fervent theory. In 2004, drunk drivers were the cause of nearly 40 percent of all crashes.9

The following stories personify the rampant bias seniors face:

• A 70-year-old man fainted and was taken to the hospital. Because he was treated by a doctor who is mandated to report lapses in consciousness, the doctor made a report to the DMV regarding his patient. The senior was required to get a medical clearance and take a driving test. He got the medical clearance and passed the driver’s test, yet he had a mark on his record, which significantly increased his insurance rate.

• A 72-year-old woman was unable to renew her license by mail. While at the DMV, she truthfully admitted she had diabetes. That admission triggered a requirement for a medical clearance by her physician stating her condition would not impair her ability to drive safely. Her license was suspended because she missed the restrictive 10-day deadline for the medical clearance. Once she got the clearance and her got license reinstated, her insurance rate doubled.

• An 80-year-old woman who had recently lost her husband to Alzheimer’s went to her doctor, fearful that she might also be afflicted with the same disease. Because Alzheimer’s is on the list of conditions that doctors must report, the doctor reported to the DMV. While the woman did not have the disease, she was required to obtain the medical clearance, took and passed the driving test, but the mark remained on her driving record. Unfortunately, but not surprisingly, her insurance rate also skyrocketed.

• Finally, a 70-year-old female driver fired her doctor because he kept pushing her to take antidepressant drugs. After he was fired, the doctor made a DMV referral for “dementia.” The senior went to a new doctor and got a clearance stating she did not suffer from any form of dementia. DMV still required the driving test, stating that no matter how unreliable a referral might be, a driving test will be required. The senior took and passed the test, but the suspension remains on her record, most likely driving up her insurance as well.

There is no argument that anyone, including a senior, who repeatedly fails a fair and objective test should have his or her driving privileges revoked; but the criteria should be driving ability, not merely age. However, the inequity applied to the senior driver is exemplified because seniors are subject to third-party referrals and are more often required to take a driving test or be medically cleared once the referral has been made. Regrettably, once it is determined that the senior is able to drive safely, the suspension remains on the person’s driving record. This is what drives up the cost of car insurance, very significant to a senior on a limited, fixed income.

The penalty attached to a senior’s insurance because of an initial suspension that is subsequently cleared is the same as for someone who has been convicted as a drunk driver. However, driving drunk and crashing is an affirmative act; being reported for something that may be unsupported by facts and eventually cleared is not. A solution to this problem lies in §1808(d) of the Vehicle Code, which states, “The department shall not make available or disclose any suspension or revocation that has been judicially set aside or stayed.” In the interest of equity, if a suspension or revocation has been cleared and a license has been reinstated by the DMV, the driving record should also be cleared.

“As we age, we change mentally and physically. These changes can and do affect our driving skills. Getting older does not automatically make us poor drivers and many people continue to be safe drivers well into their golden years.” As patronizing as this declaration directly from the DMV website sounds, it is the prevailing attitude of the public in general and the DMV in particular. It is this bias that needs to be replaced with facts. The DMV must target unsafe drivers, not seniors, especially since this malady crosses all age barriers.

Elder Law & Advocacy is a non-profit organization that has been providing free legal services and Medicare counseling and advocacy for seniors in both San Diego and Imperial counties for more than 27 years. Tony Chicotel and Karin Schumacher are staff attorneys at Elder Law & Advocacy.

2 Ibid.
3 Probate Code §4689.
4 While the California Rules of Professional Conduct say nothing about clients with disabilities, the ABA Model Rules urge lawyers to attempt to maintain as normal an attorney-client relationship as is reasonable.
5 www.dmv.ca.gov/about/profile/rd/resnotes/serving_our_seniors.htm.
7 www.dmv.ca.gov.

10 Elder Law & Advocacy.
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Private Dispute Resolution from a Name You Know and a Reputation You Trust.
1. Only duly appointed surrogates may sign a nursing home admission agreement for an incapacitated resident.
   True ☐ False ☐
2. California state law does not provide any due process rights for involuntarily placed nursing home residents.
   True ☐ False ☐
3. Probate Code §811 lists the criteria to determine a person’s capacity to make his or her own decisions.
   True ☐ False ☐
4. A nursing home staff member could make a health-care decision for a resident.
   True ☐ False ☐
5. Almost every Advance Health Care Directive provides the health care agent with immediate authority to make health care decisions.
   True ☐ False ☐
6. Only a court-appointed conservator may override a nursing home resident’s express refusal of health care treatment.
   True ☐ False ☐
7. When an attorney is confronted with an incapacitated client, the attorney should do his or her best to ignore the client wishes and opinions as much as possible.
   True ☐ False ☐
8. The California Rules of Professional Conduct clearly state that attorneys should do their best to maintain a normal attorney-client relationship when representing a client with mental disabilities.
   True ☐ False ☐
9. For clients with clear mental impairments, the appointment of a guardian ad litem may be advisable to protect their interests.
   True ☐ False ☐
10. Seniors have the most car crashes per capita.
    True ☐ False ☐
11. Drunk drivers cause nearly 40 percent of all car crashes.
    True ☐ False ☐
12. Even if a senior is deemed safe to drive, the person’s driving record is marred.
    True ☐ False ☐
13. A license suspension automatically drives up the price of insurance.
    True ☐ False ☐
14. Advanced age is indicative of a person’s inability to drive.
    True ☐ False ☐
15. A family member cannot report a senior to the DMV.
    True ☐ False ☐
16. In California, 1.7 million drivers are over 70 years old.
    True ☐ False ☐
17. Teens are three times as likely as seniors to have an accident.
    True ☐ False ☐
18. Seniors do not constitute a large number of individuals in the high-crash driving group.
    True ☐ False ☐
19. There is a general consensus that seniors should not be allowed to drive.
    True ☐ False ☐
20. Bias is a preference, especially one that inhibits impartial judgment.
    True ☐ False ☐

**MCLE Self-Study Questions**

Seniors and Institutionalized Bias

JANUARY/FEBRUARY 2006

**HOW TO RECEIVE 1 HOUR OF MCLE CREDIT**

Answer the test questions on this page. Each question has only one answer. Mail the page and the completed form below to San Diego County Bar Association, 1333 Seventh Avenue, San Diego, California, 92101. Include a check for $20, made payable to the San Diego County Bar Association, to cover the processing fee.

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- The San Diego County Bar Association certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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SAVE THE DATE: On Saturday, January 14, at 10 a.m., members of the San Diego legal community (lawyers, judges, law students, law professors, legal administrators, secretaries, librarians, paralegals, legal marketers, et al) are invited to a to-be-announced downtown location for a group photo to appear in the March issue of San Diego Lawyer. And, by the way, please bring your pet(s); this is the Animal Law issue.
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This list reflects contributions received between December 1, 2004 and November 1, 2005.
Alan Perry practiced real estate law—or “dirt law” as he called it—for 56 years, ending up with Musick Peeler & Garrett. He was also a writer and a teacher. His publications included “The General Plan of California” in the University of San Diego Law Review; “Inverse Condemnation” in the Pepperdine Law Review; two textbooks, California Cases and Materials on Secured Land Financing and Introduction to Drafting California Legal Instruments; and a pamphlet titled “San Diego’s Great Hispanic Heritage: The Pueblo Lands.” Alan created most of the forms used in real estate transactions in San Diego and then distributed them freely to colleagues and competitors alike. For more than 15 years, Alan was an adjunct professor at California Western School of Law.

“No attorney in town knew more than Alan in the area of real estate law,” says Alan Zuckerman, managing partner of Musick, Peeler & Garrett. Paul Meyer (Latham & Watkins) remembered Alan from the San Diego Chapter of Lambda Alpha International, an honorary society for the Advancement of Land Economics where he was awarded its International Fellow Award in 2000. In 2004, Alan received the Bernard E. Witkin Award from the San Diego Law Library Justice Foundation for civic excellence in the teaching and practice of the law.

Art Peinado (Kolodny & Pressman) tells how Alan credited playing bridge with saving his life. Alan was in the infantry on a troop train headed east when an officer came back asking if anyone could play bridge. Alan volunteered and played bridge the rest of the train ride. When he arrived on the East Coast, he was assigned to a supply unit.

Bill Jenkins (now living in San Francisco) says his former partner changed the face of real estate practice in San Diego for the better.

Gary Moyer, managing partner of Ferris & Britton, says the firm is providing temporary free office space and other services to an attorney-victim of Hurricane Katrina. Arthur (Fitz) Tait III hooked up with the business law firm through the ABA web site for victims of Hurricane Katrina. “Fitz, who specializes in traffic court matters, lost his house in New Orleans but plans on moving back so his ill wife can be near her family,” says Moyer.

Dale Larabee (Larabee & Gruenberg), his son Jeff and his daughter-in-law Taylor are competing in an Ironman in Australia in November. This will be Dale’s sixth Ironman. His other daughter-in-law, Tonya, is scheduled to give birth to her second son on that day.

Theresa Brehl of Post Kirby Noonan and Sweat has a horse named Rio Cuervo, which is the Southwest Pinto 2005 Reserve Champion in English Walk Trot Pleasure. (Rio’s dad’s name is RR Jose Cuervo—a top Paint sire of Western Pleasure performance horses.) Theresa hopes to learn to ride well enough to have him ready for the 2006 show season.

David Geerdes joined Procopio, Cory, Hargreaves & Savitch after leaving Heller Ehrman where he was managing shareholder of the San Diego office.

New York Attorney General Eliot Spitzer visited Jeffrey Krinsk (Finkelstein & Krinsk) in his campaign for governor of New York.

Gabriella Lopez reports that her husband’s license plate is LAWVATO, celebrating Rudy Lopez’ Mexican American heritage. Michael Shames, executive director of UCAN (and USD Law School Distinguished Alumnus 2005), drives a Toyota Prius with the license plate IDOUCAN.

Larry Huerta was selected as one of three mediators in the nation for the inaugural class of Mediation Fellows for Access ADR. He will be mediating business, commercial, insurance, real estate and tort cases around the country during the next 18 months, and he will mentor the next class of Mediation Fellows after that. His license plate is MEDE8R1.

John H. Gomez, formerly of McClellan & Gomez, started the Gomez Firm specializing in plaintiff’s work.
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On August 13, 1852, in the evening, James Robinson, alias Yankee Jim, and two cohorts, William Harris and James Loring, set out in a stolen rowboat to steal the schooner Plutus anchored in the San Diego Bay. Their intention was to sail the schooner to Mexico and sell it for a handsome profit. The captain of the schooner spotted the three as they left the shore. Harris and Loring were caught. Yankee Jim got away.

On Sunday, August 15, Yankee Jim was captured by a rancher and turned over to a posse. On August 18, in the Court of Sessions for the State of California and County of San Diego, Judge John Hayes pronounced the following death sentence: “You James Robinson have been tried by a Jury of your countrymen, selected by yourself, on a charge of Grand Larceny and found guilty of the same, and the Jury affixed the punishment of death as the penalty. You are now brought before the Court to hear the final sentence of the law pronounced by the Court. Have you anything to say why the sentence should not now be pronounced? And he having none—The Court ordered adjudged and decreed that you James Robinson be taken to the Jail of the County of San Diego and put in the custody of the Sheriff of said County there to be safely and securely kept until Saturday the eighteenth day of September next, between the hours of 10 o’clock A.M. and 3 o’clock P.M. You will be taken thence by the Sheriff of said County to the place of execution and there hung by the neck until you are dead.”

San Diegans are told of the theft and the hanging of Yankee Jim on the site of the Whaley House and how his ghost haunts the premises. That’s where the popular tale ends and the real story begins. Who was Yankee Jim, and where did he come from? The truth is that no one knows for sure, but there are some good theories.

Some suspicion persists that after the Gara Revolution (Antonio Gara led the San Luis Rey Indians in a revolt against the county’s desire to impose a tax on their cattle), many rough characters came to San Diego to fight in the uprising but finding the matter concluded were without jobs or money. It is believed by some that Yankee Jim was perhaps one of these adventurers.

Another story has it that Yankee Jim was an English convict immigrant from Australia and wished to maintain his anonymity, so he simply took the nickname and left his real identity behind. He may even have been one of the “Sydney Ducks” gang in San Francisco.

One more story was that Yankee Jim was a horse thief and quite by accident discovered gold in the corral he built to hold his stolen horses. With the discovery of the gold, a town was born and named Yankee Jim’s. It burned to the ground in June of 1852 and may have been the cause of Jim’s moving south. There is still a historical marker for the site of Yankee Jim’s and an old stage road named Yankee Jim’s Road near the town of Forest Hill in Placer County.

As a horse thief in Northern California or as a thief in San Diego, there is no doubt that Yankee Jim was a person of bad character. The truth is lost to history, but it is clear that Yankee Jim, James Robinson, was one of the rough and lawless characters that make colorful tales of the West and San Diego.

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