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The San Diego County Bar Association (SDCBA) is pleased to announce that it has expanded its endorsement of Ahern Insurance Brokerage (AIB). AIB and the SDCBA have enjoyed a working relationship that began in 2004, when the agency became the Endorsed Insurance Broker for Professional Liability Insurance coverage. In an effort to continue providing SDCBA members with quality insurance products that are competitively priced, AIB is now offering additional lines of insurance coverage. SDCBA members have exclusive rights to purchase many of these products at discounted rates, enhanced benefit levels, and with simplified underwriting requirements.

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It’s 4:20 a.m., and I just lost a battle with my alarm clock. No matter how tightly I used the pillow to block the sound, the alarm wouldn’t stop beeping until I was out of bed. The reason I am up at this hour is that I have a deposition in El Centro, I need be in my car by 6 a.m., and I must run for an hour before I leave. The joys of being an attorney training for a marathon.

I am attempting to qualify for the U.S. Olympic Marathon trials. I am also attempting to become a successful and respected attorney. While these two pursuits are not exclusive of each other, at times they feel as if they are.

As I take the first few steps of my eight-mile run through Balboa Park, my aching feet are pleading for me to stop. My body is begging me to get an extra hour of sleep, but I can’t. A morning deposition is not an excuse to miss a run. Besides, if I skip this run I would have to run 23 miles tonight instead of the planned 15 miles.

I realize that our chosen profession sometimes requires early mornings and late nights. I’m not complaining. Unfortunately, I also realize that I have chosen an absurd pastime that requires me to run in excess of 20 miles a day. If I am awake past 9 p.m., my wife is amazed.

When people discover that I spend close to three hours a day running, they usually ask how it affects my career. The answer is simple. In such a stressful profession, running is the ultimate therapy. A run in the morning means that I will arrive at the office awake, alert and ready to tackle the most troublesome issues, no coffee required. I also know that by the time I finish my evening run, I’ll be stress free. In fact, I think an evening run should be a required appointment in every attorney’s calendar.

I am also asked why I run marathons. The answer is simple. In a society where most things are about instant gratification, I have yet to discover anything as rewarding as crossing the finish line of a marathon with thousands of people cheering for you—well, except for passing the Bar. But then again, that was just a different kind of marathon.

Matthew Stohl is an associate with Balestrieri, Pendleton & Potocki, a business litigation firm. His time of 2:27:03 in this year’s Rock ‘n Roll Marathon was the fastest for San Diego County men and 22nd overall. mstohl@bpplawcorp.com
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Does Our Leadership Reflect Our Community?

For many reasons, San Diego is a great place to be a lawyer. Not least among those reasons is that we have so many vibrant bar associations in town. There is the San Diego County Bar Association, of course. But there are also the ethnic bars, Lawyers Club and the Federal Bar Association. There are bars that attract folks from particular practice areas or those with common religious backgrounds or political or social philosophies. Whatever your background, passion or practice area, you can join a bar association (or associations) that is a match for you.

And this wide array of bar organizations reflects the wonderful fact that we are realizing an increasing diversity among legal practitioners in San Diego. Gone forever is the day when the word “lawyer” conjured but a single image.

Does the SDCBA membership currently reflect the diversity of our greater legal community? There’s no way to say, definitively. Does the SDCBA leadership reflect the richness of the profession? In some ways, yes, and in other ways, no. The Bar leadership (by which I mean the officers, board members and section, committee and division chairs) certainly includes individuals from all practice areas and many levels of practice experience, and our board selection process guarantees a certain amount of geographic representation. We have made great strides in gender balance. We also have achieved a certain level of ethnic diversity. But is it as much as we’d like? I’d say, not yet.

The SDCBA leadership is committed to making the Bar feel like a home to all attorneys in this community. Sometimes a person can feel more welcome in an organization if he or she sees that some of the organization’s leaders look like them or that they have life experiences in common.

The Bar has undertaken a number of efforts to reach out to a greater cross-section of our legal community to participate in leadership opportunities. Both our board officers and our Young/New Lawyers Division leadership have reached out to the specialty bars—having lunches, attending board meetings, holding conferences—in order to strengthen the relationship we have with our sister organizations. We have looked for more opportunities to put on joint events. We’ve also tried to increase the vocality of our diversity message by doing things like supporting the Diversity Pledge developed this year by the Bar’s Ethnic Relations and Diversity Committee. In October, we are cosponsoring a diversity event with Minority Corporate Counsel Assoc. (MCCA). Three years ago we established a Leadership Outreach Committee and included representatives from the specialty bars in order to identify and recruit candidates for the board. These efforts have resulted in increased diversity among those running for our board.

We have challenges to face. The demands of Bar leadership are great and the same people are getting tapped to step up and lead multiple organizations in multiple capacities. But we can find the leaders we seek. We will find them in current and future committee and section chairs. And hopefully we will find them among those who are finishing up their leadership commitments to some of our sister organizations, who might now be a position to share their talents with the SDCBA.

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Thank you for the insightful interview of retired General David Brahms in *San Diego Lawyer* [“A View From the Top,” July/August 2007]. General Brahms’ work on the defense of the Hamdania defendants provided good insight of why soldiers commit dishonorable acts in combat. I was especially impressed with his non-political discussion of the balance of civil liberties and national security, which was summed up in the closing remarks of the article.

Patrick E. Herman, Esq.
*Clements & Knock, LLP*

Regarding the story titled “Redesigning the Stained Glass Ceiling” by Ms. Solovay [July/August 2007], I appreciate the article. I believe that it highlights an interesting issue. I believe that a lot more could be written about the confluence of religious beliefs and those who practice all forms of law.

However, the subtitle and several references throughout the article imply that the Roman Catholic Church is the only church. While it is true that the Roman church does not permit the ordination of women, numerous other Christian denominations do, as do some Jewish sects and various other religious traditions. The Episcopal Church in the United States has a woman presiding bishop and has several (reformed) attorneys in its local corps of clergy—including at least one woman who is both an attorney and an Episcopal priest.

The lack of precision in the article makes it misleading and sloppy—otherwise distracting from a fascinating piece.

Ian G. Williamson
*San Diego*

Errata:
Carol Sonstein was the photographer for our Second Annual Pet Photo shoot. Also, Barry Carlton was the photographer for LaF-Off in our July/Aug. issue.

---

*Letters to the Editor*
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Employee References: Truth or Consequences

It's not against the law to tell the truth in references—but it can be risky business.

It's getting more and more difficult to get meaningful references, as people are fearful of going from “former employer” to “defendant.” In terms of providing a reference, you'll find yourself in one of two situations: someone you know and someone you don't. You’re also likely to be on both sides of the issue at one time or another: the one asking for information and the one being asked.

So what do you do when one of your law school classmates, now a managing partner for the local office of a national firm, calls you about a former secretary who has applied at his firm? What do you say? If the secretary was great, it’s fairly clear. If not, how much should you tell to prevent your colleague from hiring his worst nightmare? I prefer the simple truth: “She couldn’t do the job, didn’t have a grasp of Word, and rarely got to work on time. I would not rehire her.”

Conversely, you’ve just interviewed a secretarial candidate who appears to be just what you need. You notice that the candidate has worked for one of your colleagues, and you’re hopeful you can get the real scoop on this person.

When you know the person well, giving and getting meaningful feedback is generally pretty easy, and the fact that you’ll talk scares the daylights out of those of us who manage law firms. Most of our firms have specific policies in place that are routinely violated “among friends.” The truth is, administrators do it too. When we personally know another administrator, we will call about potential new hires, and we will generally get a candid response. None of us (lawyers and their colleagues and administrators and their colleagues) would share information in an illegal manner or comment on a person’s protected status such as age or ethnicity. What we will tell each other is whether the person was on time, whether he or she worked hard for us, has good skills, was dependable, had a good attitude—all the things that are meaningful in our firms’ searches for the best candidates.

In the other scenario, where you are called for a reference check from someone you don’t know, it’s best to be cautious and simply refer the stranger to your administrator or human resources director. For these situations, it’s important to have a policy in place as to what will be said about former employees. If you do decide to talk, be sure you have a signed waiver from the former employee.

There is a “stranger danger” to giving references to callers from recruiting firms and other law firms where you don’t have a personal relationship. Former employees have been known to have friends make calls to their former employer, just to see “what they’re saying.” Moreover, it’s important to be consistent when providing the reason for the separation in light of a claim for unemployment, which can also become part of a lawsuit later on. For the same reason, resist the temptation to be “nice” simply to help the person get a job.

Maximizing the interview process can help hedge your bets so that reference checking isn’t as vital to the hiring decision. In the next issue, I’ll share some tips for a successful interview.

Patti Lane is legal administrator for McKenna Long & Aldridge LLP, a certified legal manager, and past president of the International Association of Legal Administrators. plane@mckennalong.com
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I was recently introduced to my new favorite destination in Mexico, Punta de Mita (Punta Mita for short), located in the state of Nayarit. The best way to get there is to fly to Puerto Vallarta and then drive northwest for approximately 30 miles. Punta Mita has many positive virtues, but providing for a wide variety of food, drinks and "supplies" is not one of them. For those wanting to stock up, it is best to make your purchases in Puerto Vallarta where you can find just about anything you can find in San Diego. You can also find a number of U.S. franchises from McDonalds, Dominos, and Starbucks to more upscale restaurants like Ruth’s Chris.

We stayed at a condominium right on the beach. The beaches are relatively private, with few other tourists enjoying the warm water. A short walk from our condo was the village, which consisted of the main hub of activity for the fishermen and several restaurants catering to the tourists. You can buy fish directly from a fisherman if you want to prepare your own meal. The local restaurants also offer the catches of the day, which often include dorado (mahi mahi) or huachinango (red snapper). If you are feeling a little adventurous, try some of the grilled pollo (chicken) or a taco from one of the many makeshift street-side taco stands. In addition to fresh seafood, you can also find a large variety of juicy, ripe fruit in the smaller mercados, or markets, where some of the best coconuts, sugarcane, pineapple, limes, mangos and avocados are available.

Apparently I am not the only one who finds Mexico a good vacation destination. Resorts are under construction up and down the coast of Mexico. In addition, new condominiums are also a familiar sight and not just in Punta Mita. This is in part because many of the popular jurisdictions for foreign real estate investments, such as Costa Rica and the Bahamas, have a shrinking inventory, with prices to reflect this fact. Although the prices in Mexico are by no means the bargain they were years ago, Mexico still has a number of beachfront properties that are relatively undeveloped and private. This situation—coupled with the more friendly rules concerning foreign investment in Mexico, along with U.S. title companies now providing title insurance in Mexico—has helped boost the real estate market in Mexico.

Despite what appears to be a booming real estate market, Mexico is still plagued with a high population living below the poverty line and a minimum wage of less than US $5 per day. It is hard not to notice the stark contrast between the new luxury developments and the modest homes of many of the locals, consisting of dirt floors and flimsy roofs. The president of Mexico, Felipe de Jesus Calderon Hinojosa, has stated that his top priorities include reducing poverty and creating jobs. President Calderon took office in December 2006, so it is too early to gauge the progress on these priorities.

For U.S. attorneys interested in doing business abroad or cross border, the real estate market in Mexico provides plenty of opportunities to do just that, ranging from the large commercial transactions that involve complex financing arrangements to the single purchase of a condominium in which the individual will need advice on how to purchase the property and hold title, and how to deal with probate, tax and estate planning matters associated with owning the property.

Michelle Graham is a partner at Luce Forward Hamilton & Scripps and co-chair of the SDCBA’s International Law Section. mgraham@luce.com
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San Diego lawyers once didn’t believe plaintiffs could win construction-defect lawsuits. But that was three decades ago, before Gary J. Aguirre led an initially tiny band of attorneys who proved the skeptics wrong. Aguirre and his partner, James K. Eckmann, made recoveries for homeowners in excess of $200 million in 94 consecutive winning cases.

By 1994, throngs of lawyers were mining the rich construction-defect lode. To Aguirre, what had once been challenging had lost its appeal. Aguirre vanished from San Diego.

But recently his name has popped up in national newspapers as he engaged in what he describes as a war with the Securities and Exchange Commission, his employer for a year. Now, after a decade, Aguirre, at the age of 67, is coming home. He will practice in a different legal arena: securities law. This is his story of the years away from San Diego and what led to them.

While an undergraduate at the University of California, Berkeley, Gary Aguirre, the older brother of San Diego City Attorney Mike Aguirre, decided to become a lawyer. The Fresno County public defender’s office promised that within two weeks he would be in a jury trial if he came to work there. So he moved to Fresno and stayed a year before switching to San Diego’s Defenders Inc., the predecessor to the public defender’s office. After a year with Defenders Inc., Aguirre worked in three civil litigation firms, in two of them as a name partner, and had his own indigent defense firm.

On May 28, 1968, Kennedy sent a letter to Aguirre. The letter spoke about the special role of lawyers in bringing orderly change to the nation. Eight days later, on June 5, 1968, Kennedy was assassinated in Los Angeles. Aguirre still has the letter. “I hung onto it because it was inspirational,” he says.

But Aguirre’s goal wasn’t just to slowly climb the ladder in a major law firm; he wanted trials, and soon. The Fresno County public defender’s office promised that within two weeks he would be in a jury trial if he came to work there. So he moved to Fresno and stayed a year before switching to San Diego’s Defenders Inc., the predecessor to the public defender’s office. After a year with Defenders Inc., Aguirre worked in three civil litigation firms, in two of them as a name partner, and had his own indigent defense firm.

During those years, Aguirre handled a case that cemented his growing reputation. He represented relatives of a victim who died in
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the September 25, 1978, midair crash of a Pacific Southwest Airlines’ plane and a small private plane. In all, 144 people died, including seven on the ground when the wreckage fell over North Park. Aguirre won, successfully arguing that the PSA pilots, not air traffic controllers, were responsible for the crash.

In 1984, Aguirre won a settlement against the developers of housing in the northernmost part of San Diego after working on the groundbreaking case for seven years. The settlements totaled $6.5 million, at the time the nation’s largest sum awarded in that type of lawsuit, according to news reports of the day.

An article in the September 1992 issue of California Lawyer told of Aguirre’s role in pioneering such lawsuits. “It gave me the credit—or the blame—for starting construction-defect litigation,” Aguirre recalls.

In 1984, Aguirre and Eckmann became partners after the former courtroom foes had built bonds of respect in hard-fought trials. They took on major building companies for shoddy construction and in related bankruptcy proceedings, achieving a remarkable string of successes.

But by 1994, Aguirre says, 2,000 lawyers in California were doing construction-defect cases, and he was beginning to question the direction of his life. “I wondered how many times I would go into a courtroom and argue that flashing was not put on according to manufacturer’s specifications,” he says.

The next year Aguirre quietly stepped away from the legal world. He enrolled in UCLA’s film school. He had a film project already in mind, one that was born years earlier. In 1986, he had gone on a group trip to Russia. It was in the days following Mikhail Gorbachev’s selection as general secretary of the Communist Party. Political reform and more openness, or glasnost, was in the air.

“Toward Gorbachev, he spoke of the big lie that perpetuated the communist system. They had developed a theory that basic human nature could be changed so that people would gladly sacrifice for mass benefit, Aguirre says. At UCLA, Aguirre adapted the novel as a screenplay and it became the subject of his master’s degree thesis.

His master of fine arts degree completed, he moved to Spain in 1996. But Aguirre read

The firing of Aguirre touched off 2006 congressional hearings into potential abuse of authority, but Aguirre believes the importance of what he learned from the Pequot case went beyond any one case.

against the developers of housing in the northernmost part of San Diego after working on the groundbreaking case for seven years. The settlements totaled $6.5 million, at the time the nation’s largest sum awarded in that type of lawsuit, according to news reports of the day.

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“I was charmed with Russia,” Aguirre says. He made more trips there, making friends in the movie industry as Gorbachev promoted filmmaking as a means to openness. “The big lie that perpetuated the communist system was that it was working,” Aguirre says. But smuggled films shown secretly in
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The Kennedy letter again in 2000 and says it reminded him that lawyers can have a role beyond construction-defect cases. Aguirre returned to the United States and enrolled in Georgetown University Law Center’s LL.M. program. He began with the study of international law, but he added securities law to his program and graduated with distinction in 2003.

Four of his professors were on the SEC staff, and with their recommendations he joined the agency’s division of enforcement as a senior counsel in 2004. In one of his SEC investigations, Aguirre looked into possible insider trading at a major hedge fund, Pequot Capital Management, after stock exchange authorities noticed questionable activity.

He ran afoul of his SEC superiors when he sought to depose John J. Mack, chief executive of Morgan Stanley and a major fund-raiser for President Bush. Mack is a former chairman of Pequot. Until then, Aguirre’s superiors had praised his investigation and given him a salary increase. But he was abruptly fired in September 2005.

The firing of Aguirre touched off 2006 congressional hearings into potential abuse of authority, but Aguirre believes the importance of what he learned from the Pequot case went beyond any one case. In an 18-page letter, Aguirre told senators that largely unregulated hedge funds threatened the integrity of financial markets. Ordinary investors are not protected from the consequences of hedge-fund manipulation, he cautioned.

“Right now I’m engaged in a war with the SEC,” Aguirre says. “The SEC is doing nothing about leveling the playing field.”

Two Republican senators, the former chairmen of the Finance and Judiciary committees, were so disturbed by testimony in hearings that they continued their probe. The senators, Charles Grassley of Iowa and Arlen Specter of Pennsylvania, released an interim report on their joint investigation in January.

Investigators for the committees concluded that “the SEC’s handling of the Pequot investigation shows either inexplicably lax enforcement or possibly a willful cover-up.”

The SEC must take corrective action, the investigators said, adding that “anything less will undermine public confidence in our capital markets.”

A final report is expected in late summer.

Aguirre will be back in San Diego by then, writing a book based on his experiences with the SEC. When that’s done, he’ll be ready to take on securities cases, perhaps some dealing with hedge funds. “I know a little about hedge funds now,” he says.

Claude Walbert is a veteran San Diego reporter and longtime contributor to San Diego Lawyer.
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Thousands of judges or judicial candidates have something in common: an interview with San Diego lawyer John G. Davies, trusted adviser to two governors. Davies served as judicial appointments secretary to Gov. Wilson from 1995 to 1999 and as judicial appointments adviser to Gov. Schwarzenegger from 2004 until January of this year. Davies has now returned to spending his full week in San Diego, where his many commitments include practicing law, serving as chairman of the board of trustees of Rady Children’s Hospital, and chairing the Charter Review Committee convened by Mayor Jerry Sanders to recommend changes to the San Diego City Charter. Davies spoke with *San Diego Lawyer* by telephone about his participation in, and his views on, the judicial selection process in California.

*San Diego Lawyer:* Can you describe the judicial selection process in California and the role of the judicial appointments secretary?

**Davies:** People apply to the office of the governor. Those applications are put through the governor’s screening process, which involves, first, sending them to local screening committees that the governor appointed, to make a recommendation on which applications should be given a more in-depth evaluation. The recommendations come back to the appointments secretary, and in most cases, they are followed.

The candidates who make that cut are then sent to the Judicial Nominees Evaluation Commission (JNE) for the State Bar, to County Bar associations with which the governor’s office has a contract to do an evaluation, and also back to the governor’s own screening committees. The results of that screening process come back to the judicial appointment secretary, and based on those results, the appointments secretary decides whom to interview.

The results of the interview, all the evaluations, and any other information relevant to the appointment are put on a memo to the governor. In the case of Gov. Schwarzenegger, the memos are also
reviewed by the legal affairs secretary and chief of staff. When the governor is ready to talk about it, the judicial appointments secretary meets with the governor to discuss the memos, and the governor makes the appointments.

SDL: How many judicial candidates have you interviewed over the course of your career?

Davies: (laughs) I'm afraid to count. I probably interviewed at least three candidates, maybe more, for each one who was appointed. I would say it's something like 3,000.

SDL: How did you get the job?

Davies: Gov. Wilson had asked me to be a statewide adviser for judicial evaluation when he became senator in 1983. We were longtime friends and law school classmates and had practiced law together. I'd done the city planning commission job for him, and so he had confidence in me.

When Wilson went to the governor's office, Terry Flanagan, for a while, then Chuck Poochigian were his appointment secretaries for the first term. They not only covered judicial appointments, but all appointments. Then when Poochigian at the end of the first term was elected to the assembly, I was talking to Gov. Wilson on the phone and he was saying he didn't have anybody to replace Chuck as far as the judicial appointments. So I volunteered. The understanding was that I would do just judicial appointments, even though it had not been separated like that before, so I could do the job without moving to Sacramento. I commuted three days every week to Sacramento.

Gov. Schwarzenegger was elected, and after six months or so, they had not found anybody to do the judicial appointments. I heard from the chief of staff that they would like me to consider coming up and doing the job for a while to get the process started. That was in June '04. I went up and interviewed with the governor and decided that he would be interesting to work for, so I agreed to do it for a while. It turned out to be two and a half years. I did it on the same basis and with the same understanding I had with Gov. Wilson, that I could do it from San Diego and commute to Sacramento three days each week.

SDL: Did the governors you served have certain judicial philosophies?

Davies: Yes. They had certain qualities they were looking for in judges. I don't think there's any great difference between Gov. Wilson and Gov. Schwarzenegger, as far as what they were looking for in the way of judicial philosophy. They both wanted candidates who believed in judicial restraint, respected separation of powers and saw it as the limited role of the judiciary to enforce the law and not make it. The only difference between the two in this regard is that...
Gov. Schwarzenegger didn’t consider what a candidate’s party registration was. As a result, he appointed a much higher percentage of candidates of the opposite party than any previous governor that anybody whom I’ve talked to knows about.

SDL: Do you think that diversity should play a role in judicial appointments?

Davies: I think diversity is an important result of the process. There should be diversity on the bench. There should be no discrimination against any group on the basis of race, gender, religion or any other basis that violates the Constitution and policies of the state of California, so diversity should be the result of a merit process. And, of course, it is. The disagreement comes over how you measure what the appropriate diversity is.

SDL: What do you think should be the benchmark for diversity?

Davies: The way we were determined to improve the diversity of the appointments was by recruiting and doing everything we could to increase the diversity of the applicant pool. The State Bar is trying to increase the number of minorities who attend law school. The problem starts way back there. Those are long-term fixes. But there’s a lot of political pressure from minority groups, and there always has been at least since the Wilson administration, to appointment more minorities, and that really can’t be done unless you have a much more diverse applicant pool.

There are people out there who think that somehow the bench should reflect the general population, but to me that’s not possible and it would take gross discrimination in favor of minorities to achieve because there are just not those numbers in the candidate pool. For example, under 2 percent of State Bar members are African-American. If you’re in a county where the population is 20 percent African-American, you can’t expect to have 20 percent of the appointments be African-American. You just don’t have the candidates available to do that.

SDL: Do you see any areas for improvement in the current system of judicial selection?

Davies: In San Diego, the County Bar has always refused to sign a contract with the governor’s office to give us that third rating in San Diego. From a local perspective, I think it would be an improvement if the County Bar would change its mind and sign on, as has every other major county in the state, and agree to do confidential evaluations in the JNE mode for the county. This would help the governor’s office to get a local view, and compare it with the JNE results and the results of the governor’s own local screening committee.

The reason I was given when I talked to the County Bar about it was that so many people who have been active in the Bar were judicial candidates, the County Bar was afraid they would get into divisive issues over the evaluations. Maybe that’s right. But that does not seem to have been a problem in other major counties.

SDL: What is your advice to somebody who wants to become a judge?

Davies: Start preparing for that ambition early in your career by doing the things that qualify you. If you can, get extensive civil and criminal trial work. If you can’t get both, get as much of one or the other as you can. Failing that, you can get experience sitting pro tem for the Superior Court, acting as an arbitrator or mediator, or in any other dispute resolution. Teach at a law school; teach civil procedure, evidence or other things that judges need to know to gain a mastery of those subjects. Those are all good substitutes if you can’t get the trial work.

Be active in the community. Governors look for good citizens who have been constructive and contributed to the welfare of the community. Stay out of trouble. Try to conduct yourself in a way that you think judges should. You can be a very tough, combative lawyer and still have a judicial demeanor. Be fair and reasonable.

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Lawyers and Judges Working (and Playing) Together to Ensure Quality and Civility in Our Courts

BY DEAN A. SCHIFFMAN

While ABTL is acclaimed for its dinner programs, annual seminars, “Meet the Judge” brown bag lunch programs and the ABTL Report, its most important function is to foster cordiality, professionalism and civility among our membership.

—Hon. Jan M. Adler (President)

After 15 years, ABTL San Diego still amazes me. Whether it is Sandra Day O’Connor giving her insights on the law on a balmy night in Maui, watching our best lawyers perform flawless cross examinations or relaxing with judges, I always feel lucky to participate.

—Claudette Wilson

ABTL San Diego has grown from 500 to 800 members in just a few years. Members enjoy our annual seminars at outstanding resorts, with opportunities to meet other California business trial lawyers.

—Hon. Richard Haden (Ret.)

ABTL allows business litigators and our judiciary to interact. Our annual meetings are incredible, with top names in the profession, and even opportunities to snorkel with six-foot turtles or to watch an adversary avoid stingrays.

—Robin A. Wofford

ABTL has provided me with opportunities to give back to the legal community and to witness the many others who freely give of their time and talents to improve the practice of the law.

—Frederick W. Kosmo

The ABTL provides interchange between the bench and bar in a fun, out-of-court setting. The programs offer blockbuster speakers and topics ranging from legal history to Guantanamo. I get a chance to be a student, not a judge.

—Hon. M. Margaret McKeown

Our first program, featuring Chief Justice Lewis and presiding judges from the San Diego courts, drew 525 lawyers and judges. Fifteen years later, ABTL San Diego is everything we hoped it would be.

—Mark Mazzarella

ABTL is a leading bar group, here and across the state. The dinner programs and annual seminars draw top presenters such as Justice O’Connor. It is an outstanding organization for anyone who handles litigation.

—Mark C. Zebrowski

ABTL provides cutting-edge programs, and its members are among the best state and federal judges and trial lawyers.
Excellence, ethics, integrity and civility are core values. As a bonus we have some great times together.

—Hon. Maureen F. Hallahan

I think back 15 years to the inception of our chapter and how it has grown. Among our important accomplishments is a code of ethics and civility, and continuing interaction between bench and bar.

—Michael Duckor

The ABTL is a wonderful organization of practitioners and judges. Lawyers who do business litigation in San Diego should be members of ABTL, and after they join they will be happy they did so.

—Monty A. McIntyre

ABTL San Diego was started for litigation professionals to promote communication, civility and camaraderie. It is a wonderful way for me to be involved with a diverse group of lawyers virtually none of whom practice in the bankruptcy court.

—Hon. Peter Bowie

ABTL of San Diego provides quality programs for the bar and bench in a collegial setting. It all comes off flawlessly due to the service of its officers, board members and staff.

—Hon. Jeffrey Miller

Through ABTL I have met many lawyers and judges, in our community and throughout the state, in a personal setting. I am impressed by and appreciate the top leadership at ABTL.

—Kent M. Walker

ABTL features the finest business litigators in California, and puts on outstanding dinner programs. ABTL also provides an opportunity for lawyers to exchange valuable experiences and ideas that benefit the justice system.

—Hon. Steven Denton

Our group has many fine programs that enrich each of us. I enjoy serving on the Board of Directors, ABTL’s many activities, and working with these outstanding members of the bench and bar.

—Michael D. Fabiano

A senior attorney suggested that I get involved with the ABTL when I was a third-year lawyer. His promises were spot-on. The continuing education, programs and camaraderie are second to none. The annual seminar is the highlight of my year.

—Erik S. Bliss

ABTL helps define the collegiality in our legal community, providing social interaction and professional development. We owe much to the lawyers and judges who donate their time and talents to building this fine organization.

—Christopher J. Healey

The enthusiasm for ABTL can be seen in its wide participation. It provides something for all attorneys, from the newly admitted to seasoned trial veterans. As a result of ABTL’s interesting programs, participation in ABTL continues to grow each year.

—S. Christian Platt

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Hundreds from San Diego’s legal community gathered at the Spreckels Theatre in downtown last fall to honor one of the city’s most respected jurists, Senior Judge J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit, who received the prestigious Edward J. Devitt Distinguished Service to Justice Award. Justice Anthony M. Kennedy of the United States Supreme Court spoke in Judge Wallace’s honor, as did Allen Haynie of Latham & Watkins, a former clerk to Judge Wallace.

Those at the event learned—or remembered—Judge Wallace’s tremendous contributions to the jurisprudence of the Ninth Circuit and the American Inns of Court, which he helped establish with Chief Justice Warren E. Burger, and even to his international travels to confer with overseas judiciaries. One might have been amazed or inspired to hear the colorful story of Judge Wallace’s esteemed career. Or, while listening to Haynie, one might have wondered what it really would have been like to work for Judge Wallace.

Anyone pondering this question may have noticed that scattered throughout the crowd were nine of the judge’s former law clerks who currently practice or work in San Diego. Several of these former law clerks discussed their experience, including San Diego Superior Court Judge Joan P. Weber (1980-1981), attorney Joel Mack of Latham & Watkins (1984-1985), attorney Eric Isaacson of Lerach Coughlin Stoia Geller Rudman & Robbins (1985-1986), University of San Diego School of law professor Michael Ramsey (1989-1990), and assistant U.S. attorney John Owens (1996-1997).

Of these former clerks, many said that before starting the clerkship, their expectations came from what they were told by their law professors. But between working through the caseload and drafting their analytical memoranda for Judge Wallace’s review, the clerks likely could not have expected some of the extraordinary opportunities that would be presented.

For example, during Judge Weber’s clerkship, Judge Wallace was being considered for a Supreme Court nomination (which went to Justice Sandra Day O’Connor), and she was tasked with researching and briefing Judge Wallace on death penalty litigation before his initial meetings with the Department of Justice. Today she presides over death penalty trials and thinks back to her clerkship for her initial in-depth experience with the law.
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Other former clerks recalled enthusiastically assisting Judge Wallace to prepare for his overseas travels to work with judiciaries in other countries—more than 50 to date—such as China, Pakistan, Egypt and Nigeria, where he has consulted with lawyers and judges regarding the fundamentals of the rule of law. As a law clerk, Mack helped Judge Wallace prepare for his meetings and talks abroad by researching the foreign legal system of the country to which Judge Wallace would be traveling. “I have a tremendous amount of respect for that work, and it’s totally unsung,” Mack said.

Isaacson agreed, and called Judge Wallace’s devotion to the global community as inspiration for his own efforts to make positive changes in the local community through his work with the San Diego Foundation for Change, a nonprofit organization that works to advance social justice, equality and environmental sustainability in San Diego and Tijuana.

During the day-to-day work on cases, some of the clerks described their relationship to the judge as balanced and reflecting the proper position between a judge and the clerks in chambers. “He is very ‘old school,’” Owens said about his clerkship for Judge Wallace. “He made it very clear to us that he was the boss, and that’s important. Sometimes law students tend to think they know everything, and they don’t. He made it very clear that he was the one making the decisions. He was very formal—very formal chambers. But he was still very friendly, so you could also talk to him about basketball.”

Isaacson said he often fields questions from colleagues regarding the ideological differences between him and Judge Wallace, because they describe Isaacson as liberal and could not see him working for a “conservative” judge. Isaacson said he typically responds by describing the reality of his role as a law clerk for Judge Wallace. “I generally observe that political ideology or judicial philosophy were not considerations when I applied for a clerkship,” Isaacson said. “The last time I checked, federal cases are supposed to be decided by Article III judges appointed by the president with the advice and consent of the Senate—not by inexperienced law clerks fresh out of law school.”

The former clerks did more than just assist Judge Wallace, however. They observed, learned and then translated their clerkships into successful careers. “It was very helpful to me in learning how to present ideas in a crisp, clear, concise, organized fashion,” Mack said. “That served me well as a professional because the word is our inventory.”

“The essence of being a lawyer is thinking like a judge,” said Ramsey, “but that’s hard to do, especially early in one’s career, if you haven’t had exposure to how actual judges think.” Professor Ramsey’s clerkship for Judge Wallace preceded his clerkship for Associate Justice Antonin G. Scalia of the United States Supreme Court. (Judge Wallace’s chambers seem to have an inside track to the Supreme Court. Not only did Ramsey progress to his clerkship for Justice Scalia, but Owens followed up his Wallace term with a clerkship for Justice Ruth Bader Ginsberg. Similarly, Mack said that during his term, both of his co-clerks moved to Supreme Court positions, leaving him to work as Judge Wallace’s sole clerk for an entire summer.)

The clerkship for Judge Wallace gave all clerks an insight into the inner workings of the Ninth Circuit, in particular in their ability to frame appellate arguments. Isaacson referred to his understanding of the difficulty in getting an en banc rehearing and the points that must be made in order to have a “shadow of a chance.”

Others have described their gratitude for observing the highest level of professionalism at the Ninth Circuit, through the appearing attorneys and the judges. “Despite his international travels, he was always prepared,” Owens said. Observing Judge Wallace as an example, he said he learned to come to court prepared and without excuses.

Some clerks also said they carry into practice what they learned from Judge Wallace regarding their relationships with junior lawyers, staff and colleagues. Mack said he observed Judge Wallace being at times intellectually intense and individual, but also as having a collegial demeanor, good humor and patience. “Judge Wallace was respectful of the opinions of the other judges on the court, even those he disagreed with,” Mack said.

After each clerk’s term ended, most said they stayed in contact with Judge Wallace for receptions, weddings, births and other celebrations. Judge Weber, one of the coordinators of a Devitt Award reception for Judge Wallace, said she enjoys supporting Judge Wallace and his achievements at events like the Devitt Award reception. “You become very close with the judge and his staff in a judicial clerkship, and Judge Wallace and his staff were always kept aware of important events in my life, my marriage, the birth of my daughters,” Judge Weber said, adding that Judge Wallace spoke at the swearing-in ceremony when she took the bench in 1990. She said she has turned to Judge Wallace as a resource for guidance throughout her legal and judicial career.

It seems that some former law clerks receive advice and direction from Judge Wallace today, just as they did when they assisted him with his opinions. “He always asks about my wife and children, and tells me that family is what matters most,” Isaacson said. “He’s right, of course.”

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In 1981, Bell was project manager of the Radar Systems Group of Hughes Aircraft in El Segundo, California. Zacharski was in name the president of the Polish American Machinery Corporation (POLAMCO), but in reality he was a deep-cover officer of the Polish Intelligence Service. (Like Valerie Plame, Zacharski was what is officially referred to as a “NOC,” a spy with non-official cover, unknown to the host government and not protected by diplomatic immunity. In other words, if you are caught, you can be prosecuted and imprisoned.) Together, they were responsible for one of the most serious cases of espionage in U.S. history.

Fortunately, they were caught and brought to justice courtesy of San Diego’s own Robert S. Brewer Jr., currently managing partner of the San Diego office of McKenna Long & Aldridge LLP. One of San Diego’s top trial lawyers, Brewer was a former deputy district attorney in Los Angeles for two years and an assistant U.S. attorney for 4½ years (having risen to the position of assistant chief of the Criminal Division) and then entered private practice in 1982. The feather in Brewer’s cap as a prosecutor came when he prosecuted Bell and Zacharski beginning in June 1981 on espionage charges, a story featured on 60 Minutes in March 1982.

Like most espionage cases, this one, at least as far as Bell was concerned, was not about ideology.
state power or a Cold War rivalry. Rather, it was about money. Not so for Zacharski. Under the guise of business activities, and over a period of several months, Zacharski developed a close relationship with Bell, his neighbor in a Playa del Rey condo complex. For approximately two years, Zacharski paid Bell about $150,000 in cash and gold coins to photograph highly classified documents detailing Hughes Aircraft’s work on top-secret radar and weapons systems. Among other things, Bell provided access to information on the then-new Patriot and Phoenix missiles, TOW anti-tank missiles, and the experimental “stealth radar” for the B-1 and Stealth bombers, resulting in serious compromises to these sophisticated weapons systems.

The case broke in June 1981 when Bell, who had been the subject of electronic and visual surveillance for several months, was arrested. He confessed after waiving his rights and immediately agreed to cooperate with the FBI in the effort to apprehend Zacharski. It was then learned that Zacharski was scheduled to return to Poland that very night, so fast action was required. The FBI task force, working under the command of John Martin, of the Department of Justice Office of Special Investigations, was sent to see Brewer, who showed up for a regular day at the office not knowing that every case he was working on would swiftly be reassigned. Brewer, who possessed a lapsed top secret security clearance from his days in the military, quickly authorized Bell to be wired up to meet with Zacharski, in the hopes of getting him to make incriminating statements and delaying Zacharski long enough to be arrested.

Andrea Ordin, then the U.S. attorney in Los Angeles and now a partner with Morgan Lewis, thought Brewer was a perfect choice for the case. Unlike many assistant U.S. attorneys, who are used to spending months investigating and preparing cases as serious as this, Brewer, as a former deputy DA, was used to handling “reactive cases,” which left little time, if any, for formal investigations before trial. This experience would serve Brewer well, for Zacharski, through his attorney, the now-retired San Francisco attorney Ed Stadum, insisted upon and received a speedy trial—almost unheard of in these types of cases, given the volume of reports and intercepted communications generated over years of surveillance. Ordin recalled that Brewer was given extensive leeway by her office, the Justice Department and the State Department, even though the case was diplomatically very sensitive. She credits the “utmost confidence” placed in him by his superiors in the government to his “solid judgment” and “excellent trial skills.”

After a trial, which commenced three months after his arrest and lasted almost five weeks, with testimony from 40 witnesses (including the former deputy director of the Defense Intelligence Agency and the U.S. Representative to NATO, as well as Bell), Zacharski, the first non-Soviet spy prosecuted in the United States since World War II, was convicted of espionage. The jury (which, along with the judge and his staff, had to undergo background investigations to be cleared to review classified documents and hear classified testimony) rejected Stadum’s argument that Zacharski was merely a dedicated young businessman who while in the United States on a legitimate commercial mission simply “carried out activities which were loyal to his own government” and that “may or may not have resulted in the trans-
mission of documents advantageous to his government.” Instead, after five days of deliberations, the jury determined that the evidence corroborated Bell’s testimony and convicted the Polish “businessman.”

Brewer recalls that when the government rested on a Friday for a three-day weekend, Stadum informed the court that the defense case would last one to three weeks and strongly hinted Zacharski would testify. Brewer was well prepared to counter the defense case the following Tuesday, only to hear Stadum announce that “the defense rested.” Closing arguments, instead of a defense case, commenced that afternoon.

On December 14, 1981, Zacharski was sentenced to life in prison. (U.S. district judge David Kenyon gave Bell eight years, two years less than the government requested.) Government officials later estimated that the classified information provided by Bell and Zacharski cost taxpayers at least $1.5 billion and resulted in a two-year delay in production of the compromised weapons systems. However, in a shocking development, on June 12, 1985, Zacharski, along with two other Soviet bloc spies, was exchanged for 25 people at Berlin’s famed Glienicke Bridge, where Rudolph Abel was exchanged for Francis Gary Powers in 1962 and where former Soviet dissident and Israeli cabinet minister Anatoly Shcharansky and three other Western agents would be exchanged for five Soviet bloc agents in 1986. Brewer recalls he heard about it when Pulitzer Prize-winning columnist Seymour Hersh of *The New York Times* called him to ask his thoughts “about the trade.” Brewer, who had no idea of the negotiations, thought he was referring to baseball. When he learned of the spy swap, Brewer commented, “I hope we got a lot for him.” Only history knows.

But the story doesn’t end there. In the late 1980s, Zacharski became the director of Pewex, a state enterprise that sold attractive Western and Polish goods for hard currency. After the Warsaw Pact crumbled on August 12, 1994, Poland’s Internal Affairs Ministry appointed Zacharski to be Poland’s intelligence chief, only to see the appointment rejected by then-President Lech Walesa, who said it jeopardized relations with the United States and Warsaw’s new ties with the West. In 1996, the new government charged him with “flagrant mismanagement” of Pewex. (This charge followed shortly upon the revelation that, while still an official with the State Protection Office, Zacharski was involved in unmasking an alleged Soviet agent who was alleged to be then-Prime Minister Józef Oleksy, an event that led to the fall of Oleksy’s government.)

Despite appearances on television and many press interviews, the police “have not managed to determine his whereabouts.” Zacharski left Poland without any problems in 1996 and is believed to be living somewhere in Switzerland.

In the summer of 2006, Brewer and his wife, chief U.S. district judge Irma E. Gonzalez, were in London attending a conference at Oxford University on Cold War espionage prosecutions. After introducing himself to the conference director, Brewer inquired if he knew anything about Marian Zacharski, prompting an inquiry into Brewer’s familiarity with Zacharski. A month after the course concluded, the conference director sent Brewer Zacharski’s e-mail address. Brewer also learned that Zacharski was the subject of a documentary being pro-
duced by Polish television. Brewer sent Zacharski an e-mail, and the two soon began to correspond. Their exchanges ultimately led Polish TV to fly Zacharski to Tijuana for a filmed meeting of Brewer and Zacharski at the U.S.-Mexican International Bridge on March 9, 2007. Needless to say, they had some interesting discussions.

One footnote: In 1981, the FBI hoped to flip Zacharski and use him as a double agent for the United States. The events of Bell’s arrest precluded such a plan, but even when looking at life in prison, Zacharski never reacted to contacts that could have resulted in his cooperation. Maybe he knew something the FBI didn’t.

1Little known in the West is the fact that Poland was particularly active in the pirating of corporate data, and although the KGB got all the press, many experts considered the Polish intelligence service perhaps superior.

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MEETING MARIAN ZACHARSKI AFTER 26 YEARS was more than interesting. There was a little trepidation of how a felon I had convicted and who had spent four years of a life sentence in a high-security penitentiary would react upon seeing me. Since the entire meeting was being filmed by Polish TV and the e-mails he had sent were genuinely friendly, I did not think he would hit me, but I did wonder as I walked to the meeting spot if he would smile. I also wondered what we would talk about after the initial greeting.

My first impression upon seeing Mr. Zacharski was how old he looked because of his pure white hair. He had kind of a smirk on his face as I approached, and his handshake was more than firm. We called each other by our first names and mumbled something about how it was good to see each other. We then asked each other the same question: “How is your family?”

After awkward answers, I asked about his trip to Tijuana and how he felt. He said the trip was “long and he was tired” but interested in seeing me and discussing our mutual history together.” I was surprised at how well he spoke English, but with a strong Polish accent.

For the next 30 minutes, while the cameras were rolling, we reminisced about the trial. He made some interesting statements about the trial — that the jury’s verdict was “predictable,” that Mr. Bell was “a sad figure” who “did not tell the whole truth,” and he felt Judge Kenyon “was weak” and his rulings “government oriented.” We discussed his lawyer, who Zacharski believes now lives in Europe, and his decision to not put on a defense: “The final verdict was a foregone conclusion, and I had no interest in allowing you to cross-examine me.” I asked him if he hated me during the trial? He said, “No, we were both soldiers in a different kind of war. You were doing your job and I was doing mine. I respected what you did but don’t think you respected what I did.” I told him that I knew he was good at what he did, but I was glad we caught him.” He smiled and said, “You don’t know half the story.” When I asked him to tell me the whole story, he just laughed and said, “Buy my book when it goes on sale next year.”

After the Polish commentator shut down the cameras, we went to lunch with one of my partners and further discussed our respective lives since 1981. I found Marian Zacharski to be friendly, egotistical, happy to talk about his accomplishments and suspicious of America’s refusal to grant him a visa so we could meet in the United States.

—ROBERT BREWER
This article has been approved for 1.0 of general Minimum Continuing Legal Education credit. If you are interested in obtaining credit, read the article, answer the 20 questions on page 54, complete the form and submit it to the San Diego County Bar Association.
Identity thieves are using stolen identity data in increasingly sophisticated schemes. Easy access to the Internet and its electronic connections to banks, check-processing centers and retailers is allowing criminals to steal money from unsuspecting consumers in myriad ways.

Fortunately, the federal government, and many states including California, has enacted laws to protect consumers from most losses caused by identity theft. For example, the Federal Truth in Lending Act generally protects consumers from paying more than $50 in unauthorized charges to a credit card.¹ In a bid to crack down even harder on identity thefts, President Bush signed the Identity Theft Penalty Enhancement Act² into law in 2004. This act adds an extra two years to prison sentences for criminals convicted of using stolen personal information to commit crimes.
The California legislature also worked hard to protect consumers. In January 2003, California became one of the many states to pass a “security freeze” law, which lets consumers block all unauthorized access to their credit information unless a unique password is given to a credit reporting agency such as Equifax. This allows victims of identity theft to prevent criminals from gaining access to their credit reports or opening additional credit cards or lines of credit. Unfortunately, an account freeze can also cause some delay for legitimate consumers that want to obtain a new loan or credit card but have frozen their accounts.

Even with the changes in the law and the enhanced penalties, criminals work diligently to circumvent security measures and gain access to consumers’ credit and banking information. For example, TJX Cos. Inc., the owner of T.J. Maxx stores, announced earlier this year that a security lapse allowed thieves to download credit files for more than 45 million credit and debit cards. That is a truly monumental amount of private, confidential data that is now in the hands of criminals.

However, what is really interesting is how thieves are now using more sophisticated ploys to take the stolen information and get at consumers’ money. In the past, thieves would use stolen personal information to open fraudulent credit card accounts. Now, criminals are not only opening new credit card accounts, but they are also using electronic access to online banks to drain cash directly from consumers’ bank accounts. Take, for example, the story of Judy Peterson, a court reporter in the downtown courthouse and wife of retired State Superior Court Presiding Judge Wayne Peterson.

Judy’s story begins in mid-February of 2003. On that day she happened to go online to review her checking account at San Diego County Credit Union (“SDCCU”). Curiously, she noted that an approximately $2,500 bank check had been issued from her checking account that day. Then, when she checked that day’s mail, she found that a letter had come from the United States Postal Service, thanking her for signing up with its online bill-paying service. Of course, she had neither authorized the check nor signed up with the Postal Service’s online bill-paying service.

It’s unsettling to know that your Social Security number, address and mother’s maiden name are floating out in cyberspace with no real way to reign them back in again.

Judy immediately called the U.S. Postal Service and discovered that it had begun a new online service called the USPS Online Payment Services Business Edition. This service allowed companies to process and send checks by setting up an account with the U.S. Postal Service. The Postal Service account was linked to a user’s checking account so that payments made through the Postal Service site would be deducted as bank checks from the user’s linked bank account. The service thus acted much like the bank’s own bill-paying service, with the exception that you didn’t have to log into the bank’s web site to get access to the checking account.
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Cost: $110 (includes breakfast)
Instructor: Walter Dutton, J.D.

extension.ucsd.edu/law
If the thief is ever arrested, he or she uses the fake documents during the booking process. Then, when the thief does not appear for an arraignment, an arrest warrant is issued for the victim of the identity theft.

Judy discovered that an account had been set up on the U.S. Postal Service Web site that was linked to Judy's SDCCU checking account. According to Judy, “the person that set up the account had every imaginable piece of my confidential information.” Judy remarked with amazement that “they had my correct Social Security number, my home address and SDCCU checking account number, my birth date, and even my mother’s maiden name, which is very unusual.” They also knew where Judy worked at the Superior Court and her office and home telephone numbers. Judy had no idea how the person who opened the account could have discovered all this information.

In her conversation with the U.S. Postal Service, Judy discovered that the check was made out to a woman we will call Jane Doe who resided in Redwood City in Northern California. (Judy was hesitant to reveal the thief’s real name because investigations are ongoing.) Fortunately, the check that had been written from her SDCCU bank account had not yet cleared the bank, so Judy was able to issue a stop payment on the check.

Judy contacted the Redwood City Police Department and gave a detective the name and address from the check that had been issued from her SDCCU account. Apparently, Jane Doe was an unwitting victim of her roommate’s scheme. The roommate had asked Jane Doe to open a joint bank account at the Redwood City Bank of America. The roommate said she was going to be traveling through Europe but was expecting some checks to come in; she asked if Jane could please deposit them into the joint account. Jane did as she was asked, without thinking there was anything unusual with this plan. Jane ended up depositing more than $100,000 into the joint bank account in a little over a month’s time. Obviously, Judy was not the only victim of the roommate’s criminal activity. Fortunately for Judy, because of her diligence, her check was not one that had yet been deposited to the joint Bank of America account.

Soon thereafter, Judy discovered that someone had been using her eBay account. She saw notices in her account stating that she had been bidding on a variety of items. However, she wasn’t receiving any e-mail notifications of the bidding activity, as is

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normal with eBay. She checked her account and discovered that her user e-mail had been changed to a false e-mail account that she did not control. She immediately contacted eBay to have her account closed. Unfortunately, eBay kept the account open, and the unknown party continued to change the account information for several months until Judy finally convinced eBay to permanently close the account. To this day, Judy does not know what happened to the items that the identity thief bid on when using her account.

Judy says she has no idea how the roommate, who is apparently still at large, discovered all of her personal information and opened the U.S. Postal Service account. She also doesn’t know if the roommate is the same person who was hacking into her eBay account. “The link to eBay is interesting,” says Judy, because “although they bid on items using my account, they didn’t use my linked PayPal account to send checks or pay for any items.” It’s possible that the thieves were planning to use Judy’s eBay account to start selling stolen goods or that they somehow gained access to Judy’s personal information through their access to her PayPal records. However, PayPal only contained some, not all, of the stolen personal information.

Most troubling for Judy is the fact that the actual identity thieves still have all of her information. Although she can, and did, change her bank account and credit card information, it’s virtually impossible to change Social Security numbers. And your mother’s maiden name doesn’t change over time. Moreover, most fraud alerts or credit report freezes expire in six months. It’s unsettling to know that your Social Security number, address and mother’s maiden name are floating out in cyberspace with no real way to reign them back in again.

Some identity thieves will use that personal information to make completely fake driver’s licenses and passports that have the thief’s photo but all of the stolen information from the victim. If the thief is ever arrested, he or she uses the fake documents during the booking process. Then, when the thief does not appear for an arraignment, an arrest warrant is issued for the victim of the identity theft. This can result in identity theft victims being arrested for crimes they didn’t commit.

HOW DO THIEVES GET YOUR DATA?

• Capture your information in a data-storage device by attaching the device to an ATM machine or credit-processing terminal.
• Pose as landlords or potential employers to get information that allows access to your credit report.
• Rummage through your trash, the trash of businesses, or public trash dumps.
• Steal personal information they find in your home.
• Steal your mail, including bank and credit card statements, credit card offers, new checks and tax information.
• Complete a “change of address form” to divert your mail to another location so that you don’t see credit card statements that show their fraud.

Taken from the Federal Trade Commission Web site at www.ftc.gov.
Although it may be impossible to completely prevent an identity theft, the risk can be reduced by carefully managing personal information. There are an almost endless number of ways that identity thieves gain access to private information and try to steal money. Thus, it is important to be alert for people who impersonate representatives from legitimate companies and claim you have a problem with your account. This practice is known as “phishing” online or “pretexting” by phone. No banks will ever contact customers by e-mail or phone and ask for Social Security numbers or banking information.

The primary way to keep from becoming an identity theft victim is to keep a close eye on all your personal financial information. That means actually reviewing your bank statements each month to look for suspicious activity and then shredding those statements so they cannot be retrieved from the trash. Also, it is a good idea to monitor your credit report at least every year to check for unrecognized bank accounts, credit lines or new credit cards. Free copies of credit reports can be requested every 12 months from each of the three nationwide consumer reporting companies at annualcreditreport.com.

And don’t just look for the obvious indicators of identity theft. Judy was fortunate in that she happened to review her bank account on the day that the check issued and that the check was for a noticeably large amount. Some thieves will start drawing checks for relatively small and unique amounts, such as $56.92, in the hope that most people will miss the charge or think it was authorized.

Identity thieves get smarter and savvier every year, and it’s looking as if they are winning the war to get our confidential information. As consumers, banks and retailers become more connected through the Internet, they also become more susceptible to security lapses, which allow confidential information to fall into the wrong hands. Consumers need to be vigilant to protect their money and their identity from being used against them. While it’s unlikely that consumers will bear the financial brunt of an identity theft attack, the time and energy it takes to straighten out the mess caused by such a theft is enormous. In this case, an ounce of prevention really is worth a pound of cure.

115 USC 1601 et seq.
218 U.S.C. §1028A.

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Sharon Majors-Lewis is not the stereotypical Newt Gingrich Republican.

The first woman and person of color to hold the position of California’s judicial appointments secretary, Majors-Lewis joined the Grand Old Party in the 1990s after her oldest son, Los Angeles attorney Dennis Sean Ellis, called his mother “a closet Republican” and asked her when she was going to change parties.

Majors-Lewis says she has since seen political shifts within the GOP. “Although I still see conservative views about public safety, it seems the views regarding social issues are more moderate. …Republicans have always cared about the environment but are taking a more active role in protecting it for future generations. I support this trend because I respect and appreciate our natural resources. I would also like to see more underrepresented groups become involved with the Republican Party.”

That commitment to diversity and independent way of thinking led to Majors-Lewis’s selection as judicial appointments secretary. “When I interviewed with [Gov. Arnold Schwarzenegger], he knew I was not a political insider,” says Majors-Lewis, 58. “He listened to my thoughts about the judicial process and ways to improve it and restore confidence in it. … He showed his commitment to think outside the box by hiring me, someone who had the experience and skills to look at the system with fresh eyes and without strong political ties to any individual or group.”

Her vision made a believer out of Schwarzenegger, who announced her appointment in February. “Sharon’s legal expertise makes her a great asset and a fantastic addition to my administration,” says Schwarzenegger.

Already Majors-Lewis has been allowed to implement some of the technological changes she envisioned and work in a vir-
tual world as she travels from her home base of San Diego to Sacramento and other parts of the state.

Majors-Lewis took over as judicial appointments secretary after working for the San Diego County district attorney’s office for 20 years. Among her goals are to analyze the judicial selection process to identify and correct any systemic problems that prevent qualified and diverse applicants from being appointed to the bench. “Based upon what I have learned so far, the process is a good one that can be improved to make it even better,” she says. “The most important thing I hope to accomplish, with the help of many people, is to ensure we place the best and brightest judges on the bench and that they reflect the diversity that exists within the state.”

Majors-Lewis works with Schwarzenegger, chief of staff Susan Kennedy, legal affairs secretary Andrea Hoch and appointments secretary Timothy Alan Simon to continually update the judicial appointment process and screen judicial appointment candidates.

“There are unique and wonderful applicants from different ethnic, religious and philosophical groups and genders that will add richness and depth to our bench,” she says. “Diversity is important because it helps people know they have equal access to justice. More importantly, I truly believe that the more we are exposed to different groups of people, the sooner [we realize] we are more alike than we are different.”

Majors-Lewis earned her Juris Doctorate and a bachelor of arts degree in business administration from National University. She pursued a legal career after some bad experiences with businesses that treated her unfairly. “As an undergrad I completed a class taught by [Judge Boelhauf-Quinn] that further piqued my interest in the law,” she says. “I wanted to be an attorney to be able to protect my rights and those of my friends and family.”

Majors-Lewis’ first job was in public service, working for the Department of Defense from 1968 to 1987. “I enjoyed working for the Department of Defense and took pride in what we were doing for the country,” says Majors-Lewis, who adds that the position provided her family relative stability, flexibility and the ability to transfer to other locations if she desired.

Majors-Lewis joined the district attorney’s office in 1987. Later, as chief deputy district attorney, she oversaw the North County branch in Vista, the East County branch in El Cajon and the South Bay branch in Chula Vista, in addition to the juvenile division and the district attorney’s office travel budget.

“I have always felt it was an honorable way to give back to my country and community to be a public servant,” she says. “Regarding my legal career, I wanted to be a trial attorney and was very interested in protecting the community and providing support to victims. The district attorney’s office was the perfect way for me to satisfy all of those desires.”

A member of the California Bar since 1985, Majors-Lewis is very active in the community and belongs to several organizations, including Lawyers Club of San Diego, the San Diego County Bar Association, the Earl B. Gilliam Bar Association and National College of Prosecutors. She also serves on the board of directors for the Young Women’s Christian Association.

She readily admits that spirituality is an integral part of her life. “I have always believed in the old-fashioned things my mother taught me beginning with the Golden Rule: Do unto others as you would have them do unto you. I had many struggles early on and know I could not have overcome them without faith in God,” says Majors-Lewis.

“‘The most important thing I hope to accomplish, with the help of many people, is to ensure we place the best and brightest judges on the bench and that they reflect the diversity that exists within the state.’

Those struggles have inspired her sons to follow in their successful mother’s footsteps and to take her work ethic cues. Ellis was named attorney of the year by California Lawyer magazine after winning a $2.8 billion judgment in a civil case.

‘I am bursting with pride every time he tells me about something new,’ Majors-Lewis says of Ellis’ accomplishments. “The $2.8 billion award he obtained in the New World case was phenomenal. He saw my struggles and learned from them.”

She is equally proud of her youngest son, Devin Gabriel Majors, who opted to stay out of the legal field. “He and his wife both work very hard to provide a loving home for themselves and my four beautiful grandchildren,” she says.

“We are a very close-knit family and often get together to discuss family problems or just to have fun,” says Majors-Lewis. “For instance, after I divorced and finances were difficult, I could not afford to buy Christmas presents for my entire family. Instead, I prepared a huge home-cooked meal on Christmas Eve and had everyone over as my gift to them.” To this day, Majors-Lewis’ family continues the holiday tradition, only now, she adds, “they get gifts, too.”

Genevieve A. Suzuki is a student at California Western School of Law and law student editor of San Diego Lawyer. gasuzuki@yahoo.com
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WHO IS THIS PROMINENT MEMBER OF SAN DIEGO’S LEGAL COMMUNITY?

E-mail your answer to mkruming@aol.com to be entered into a drawing for a luncheon for two at Dobson’s. The deadline is September 15. Congratulations to attorney Jack Oatman for winning the July drawing after correctly identifying Craig Higgs. Thanks to everyone who participated.

Update: This year’s LAF-Off (featured in the July/August 2007 issue) netted (after all expenses were paid) $33,000. The 2008 date is March 13th.
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Solutions. Savings. Satisfaction.
As the final writer of this short story, San Diego appellate attorney Brian Worthington faced the toughest job of the five writers: tying up the odds and ends of the plot and its characters while leaving readers wanting more. Worthington was up to the task as he has plenty of creativity on tap, being a professional trumpet player for the New York Philharmonic.

Worthington has managed to strike a fine balance between his passion for law and music. When he isn’t working as a partner at Ryan, Mercaldo & Worthington, LLP, he plays trumpet for local churches and is on the substitute list for the New York Philharmonic.

He flew to New York last year to play with the pros and usually receives advance notice when they need extra trumpets, or someone is sick, or if a piece needs an abnormally large number of trumpets.

After graduating with a music degree from the University of Wisconsin, Worthington worked as a professional trumpet player in New York City. Based on his lifelong talent for writing, Worthington decided to enter law school and thought California would be a good fit. He received his law degree from the University of San Diego and has called San Diego home ever since.

With aspirations of authoring a book in the future, Worthington says he tries to write fiction whenever he can. “The more I’m writing fiction, the better my legal writing becomes,” Worthington says. “The most persuasive legal brief is one that states something in a very simple and conversational way.”

— Sarah Van Cott

CHAPTER 5

Giddle stood paralyzed, his jaw hanging.
Debbie Chase gasped. “Who is it?”
Giddle knew but couldn’t move his mouth to respond. Nathan Chase knew but didn’t want to respond. Finally Vivian Morales spoke up. “It’s Presiding Judge Baldwin!”

“Is she dead?” asked Debbie. It was a dumb question. The judge’s face was ashen, her lips blue. Two sure signs of a corpse.

Herb Monroe moved toward Giddle’s desk. “We’ve got to call the police.” He picked up the phone. He got no dial tone, then noticed the cord had been cut.

“You’re not calling anybody,” came a voice from the doorway. Standing there, gun pointed, was Joyce, Giddle’s loyal court clerk.

Giddle’s paralysis lifted. “Joyce, what’s going on?”

“Everyone do as I say or you’ll leave in handcuffs. Or we can make it a body bag, if you prefer. Sit.” Like obedient dogs, they dropped into their seats. “Mr. Chase, everyone knows now about the hundred million you’ve been hiding offshore. You’re going to use Giddle’s computer to transfer it to an account number I give you.”

Nathan almost laughed. “What could possibly make me do that?”

“Let’s start with your secret fling with Judge Baldwin. Or, as you’ve been calling her, Chief.” Nathan smirked, unfazed. Herb looked stunned. No wonder Nathan didn’t want to give him Chief’s real name.
“Once you and Baldwin hooked up,” Joyce continued, “it was easy to convince her to assign this case to Giddle the Lush. Either he’d screw up the case and you’d get a mistrial, or you could blackmail him and Vivian for continuing the case without disclosing their fling. You also had her tap everyone’s phones. There were rumors that Baldwin was ex-military, but she was actually NSA, so it was easy. Tampering with the courts, illegal wire taps, fraud—they’re all crimes.”

Nathan remained unfazed. “That’s not enough to make me give up $100 million.”

“Maybe not,” said Joyce, “but one word will change your mind. Rotisserie.” Nathan’s smirk disappeared. His accountant’s office in Geneva is on Rue de Rotisserie. More important, Rotisserie is the code word for his Swiss account with another $200 million he hadn’t reported to the IRS. “Give up the hundred million offshore, and you and Debbie can split the $50 million in the U.S. accounts. Rotisserie stays between us.”

Nathan thought for a second. Better to give up the $100 million and keep Rotisserie secret. He got up and went to Giddle’s computer.

Joyce turned to Giddle. “Judge, you’re easy. You have no stake in this. Debbie pays your bill, and you keep quiet. Otherwise the cops get your boy-toy Juan’s birth certificate showing he’s only 16.” Hans’ face slumped onto the red couch, defeated.

“Hans, you’re easy. You have no stake in this. Debbie pays your bill, and you keep quiet. Otherwise the cops get your boy-toy Juan’s birth certificate showing he’s only 16.” Hans’ face fell into his hands.

“Debbie, you and Hans are in the same boat,” Joyce continued. “Sleeping with a 16-year-old boy is illegal whether you’re a man or a woman.”

“Hah!” barked Nathan, nearly doubling over laughing. “At least I bagged a spy. The best you could do is an underage, bisexual 16-year-old boy is illegal whether you’re a man or a woman.”

“Quiet!” Joyce shouted. She turned her gun toward Nathan. “Less bickering, more typing.” Nathan turned back to the computer.

“Juan’s not your biggest problem, Debbie. Take the 25 million, or the cops find Baldwin’s body with a bullet from this gun.” Joyce waved the pistol in Debbie’s face. “Your gun, the one we took from your nightstand. You knew about Nathan’s affair with Baldwin, so a jury will easily believe you wanted revenge.” Ever the socialite, Debbie remained poised, legs crossed at the feet.

Joyce eyed the lawyers. “Vivian, you’ve got enough problems without the ethics board finding out you were sleeping with the judge on one of your cases, so keep quiet and let Debbie pay your bill. Herb, most of your work comes from Nathan. He won’t need a lawyer if he’s in jail for tax evasion.”

Joyce went to check Nathan’s progress. As the transfer was completed, Giddle looked up from the red couch, confused. “I don’t get it, Joyce. How did you do all of this?”

A few weeks later, Joyce sat on the deck of her new yacht off the coast of Mazatlan as a green-eyed man brought her another Piña Colada. “I’m glad my friends in the cartel were able to help you, my Señorita,” said Juan’s father, Miguel. Joyce gave Miguel a kiss. As she sipped her drink and baked in the sun, she smiled and thought about Giddle’s question. “You dumb drunk,” she’d answered. “Everyone knows the court clerks are truly the ones with all the power.”
ETHICS

FYI on the MFAA and CAA

The ethical implications of fee arbitration agreements

BY JERRY COUGHLAN, PHOEBE A. GARDINER AND RICHARD D. HENDLIN


The MFAA, or Mandatory Fee Arbitration Act, provides that clients have a right to nonbinding arbitration and a de novo appeal in any fee dispute with their attorney (Bus. & Prof. Code §6200 et seq.). The CAA, or California Arbitration Act, provides, however, that clients and attorneys may enter into enforceable arbitration agreements that require binding arbitration of any disputes that arise between the attorney and client without an appeal to the court system (Code Civ. Proc. §1280 et seq.). Until recently, determining when the MFAA trumps the CAA, or vice versa, was as hard to read as alphabet soup.

Who's on First: The Client or the Attorney?

Attorney Abbott has an attorney fee agreement with his client, Costello, which he modeled after the sample prepared by the State Bar’s Committee on Mandatory Fee Arbitration located online at www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf. The attorney fee agreement provides for the mandatory arbitration of fee disputes under the CAA. Costello wants to dispute the fees charged by Abbott. He goes to see a new attorney, Who, to advise him of his rights against Abbott. Who advises Costello that there are a number of issues of which he must be aware.

First, notwithstanding the CAA provisions permitting contractual arbitration of all disputes between attorneys and clients, Who advises Costello that clients have an absolute statutory right under the MFAA to bring their fee disputes to nonbinding arbitration and then seek a de novo appeal to the court system (Schatz v. Allen Matkins, supra, 146 Cal.App.4th at 686). In other words, the MFAA trumps the CAA (Ibid.). On the other hand, Who advises Costello that if a client fails to invoke the MFAA within the requisite time frame, he waives his right to nonbinding arbitration (Bus. & Prof. Code §6201, subd. (a); Ervin v. Kassel, supra, 147 Cal.App.4th at 827). Further, if Costello seeks affirmative relief in the form of damage or files a complaint in Superior Court alleging attorney wrongdoing, his rights under the MFAA to nonbinding arbitration are waived (Bus. & Prof. Code §6201, subd. (d); Juodakis v. Wölfurm (1986) 177 Cal.App.3d 587). In those cases, attorney Abbott can successfully petition the court to remove Costello’s affirmative claim to binding arbitration.
Making the Right Decisions So You and/or Your Client Do Not Strike Out

Attorneys for a client considering whether to file a legal malpractice case must learn if there is an arbitration agreement between the client and the attorney. If so, the attorney should advise the client that if the heart of the dispute involves the amount of fees charged by the attorney, the client should consider nonbinding arbitration under the MFAA. If there is a binding arbitration agreement and if the client chooses to file an action in Superior Court without first invoking the MFAA, the client could ironically end up back in an arbitration forum, but it will be binding and there will be no right to de novo review in Superior Court.

From attorney Abbott’s perspective, once the potential for a dispute over legal fees and/or attorney wrongdoing is known, he should immediately inform the client in writing of the opportunity for nonbinding arbitration under the MFAA. Abbott should also make a written record with Costello of closing the file and perform no further services to start the one-year statute of limitations (Code Civ. Proc. §340.6).

A high percentage of legal malpractice cases filed in Superior Court are really disguised fee disputes. Frequently, the client’s primary area of dissatisfaction is the amount of fees paid relative to the services or result the client obtained from the attorney. Absent the ability to prove affirmative harm (e.g., lost opportunities), it is in both the attorney and the client’s best interest to arbitrate the fee dispute under the MFAA to avoid the otherwise complicated dispute of “who’s on first.”

Jerry Coughlan is with Coughlan, Semmer & Lipman, LLP; Phoebe A. Gardiner is with Burkhardt & Larson; and Richard D. Hendlin, deputy attorney general, is with the California attorney general’s office. They all serve on the SDCBA’s Legal Ethics Committee. The views expressed in this article are their own and do not necessarily reflect the views of their offices or of the Legal Ethics Committee.
1. It generally takes six months to process a change in an individual’s Social Security number through the Social Security Administration.  
   True □  False □

2. TJX Cos. Inc. reported a security lapse in their organization that enabled thieves to download credit files for more than 45 million credit and debit cards.  
   True □  False □

3. The United States Postal Service offers a free service that allows private entities to make credit card payments online.  
   True □  False □

4. By using one of the major nationwide credit reporting companies’ “fraud alert” services, it is possible to completely prevent identity theft.  
   True □  False □

5. “Phishing” is the fraudulent misrepresentation of an individual as a representative of a legitimate company to obtain private identity information.  
   True □  False □

6. The Federal Truth in Lending Act protects consumers from paying more than $100 in unauthorized charges to a credit card.  
   True □  False □

7. Most fraud alert and credit report freezes expire in six months.  
   True □  False □

8. The single most effective way to prevent identity theft is to closely monitor all personal financial accounts and information.  
   True □  False □

9. A ploy that some identity thieves use, after gaining access to an individual’s bank account, is to withdraw funds in smaller, obscure amounts in the hopes that the account owner will not notice.  
   True □  False □

10. Because consumers, banks and retailers have become increasingly more connected to the Internet, the Federal Trade Commission has issued new guidelines for banks offering online services to consumers.  
   True □  False □

11. In January 2003, California became the first state to pass a “security freeze” law.  
   True □  False □

12. One of the most sophisticated means that identity thieves use to obtain private, secure information is to attach data storage devices to ATM machines and credit processing terminals.  
   True □  False □

13. The Identity Theft Penalty Enhancement Act adds an extra five years to sentences for criminals convicted of using stolen personal information to commit crimes.  
   True □  False □

14. Equifax is the credit reporting agency responsible for issuing passwords used to block unauthorized access to consumers’ credit information.  
   True □  False □

15. By using the “USPS Online Payment Services Business Edition,” companies can both process and send checks via an established account.  
   True □  False □

   True □  False □

17. While the unauthorized use of social security numbers, home addresses and bank account numbers is relatively common, securing passwords and/or codes, such as one’s mother’s maiden name, is relatively uncommon.  
   True □  False □

18. One of the problems with an account freeze is that it can create delays for legitimate consumers attempting to obtain loans or credit cards.  
   True □  False □

19. It has become increasingly more common for identity thieves to gain electronic access to online bank accounts to steal from unwitting consumers.  
   True □  False □

20. “Pretexting” is the advance coding of “text” messages into one’s cell phone that can be used to gain access to private online information.  
   True □  False □

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Just past Warner Springs Ranch on Highway 79 is the small Chapel of Saint Francis, constructed in 1868. Near the chapel is a small boulder on which is affixed a bronze plaque commemorating the Village of Cupa. This plaque and another at the old cemetery just a short distance away commemorate the Cupeno Indian Village that once stood on this hillside and at the hot water springs nearby. The 1903 eviction of the Indians from their village, which they called “The Removal,” resulted from two cases that were heard in the San Diego Superior Court and that reached not only the California Supreme Court but also the United States Supreme Court.

The first of the 1892 San Diego Superior Court cases was *J. Downey Harvey, Administrator for the Estate of John G. Downey v. Alejandro Barker*. The case was heard by Judge George Puterbaugh who reserved judgment until a second case, *J. Downey Harvey, Administrator versus Jesus Quevas et al.* was heard by Judge W.L. Pierce.

Judgment was entered on December 29, 1896, determining the claim to the Warner’s ranch by the heirs of former California Governor Downey, who had purchased the ranch from Warner, to be valid and that the Indians had no right to possession or occupancy of the land. The decision centered on the 1844 Mexican land grant to Don Juan Jose Warner (formerly Jonathan Trumbull Warner, a Connecticut native) and the patent issued by the United States Commission on Private Land Claims.

In their depositions, Warner and Pio Pico (the last Mexican governor of California) acknowledged that the Indians lived in their village continuously from the time they knew of the place. However, these lands had once belonged to the Mission San Luis Rey and were abandoned by the mission, leaving the grant to Warner possible.

The California Supreme Court affirmed the San Diego Superior Court decision in favor of the Downey heirs (*Harvey v. Barker* (October 4, 1899) 126 Cal. 262). The Indians brought an appeal to the United States Supreme Court (*Barker v. Harvey* (May 13, 1901) 181 U.S. 481) but without satisfaction. The Indians even argued for protection under the Treaty of Guadalupe Hidalgo without success. The Supreme Court stated: “This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, a sovereign power, chooses to disregard.”

President Theodore Roosevelt established a commission to find suitable lands for the Cupenos who would be evicted from the Village of Cupa. Cinco Moro of the village told the commissioners: “We do not know what lies beyond where the sun rises in the morning. We do not know what lies beyond where the sun goes down at night. We only know our home. We were here before the Spanish came. We were here before the Mexicans came. We were here before the Americans came. We have been here since the beginning. The good spirit gave us our home.”

Despite this plea to the commission on May 12, 1903, the last relocation of an Indian tribe in the United States took place. Indian Bureau Agent James Jenkins arrived in Cupa with 40 armed teamsters and wagons and moved the Cupenos to the Pala Reservation.

Outside the Pala Reservation, “The Removal” is a little-known event in San Diego County history, but the Cupenos consider it to be their “Trail of Tears.”

William J. Howatt Jr. is a retired judge of Family Law Court.
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