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California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA

From the Section Chair

Preparing for Transformation

By Kathleen Brewer

Kathleen Brewer

The State Bar Sections are energetically preparing for their transformation from a component of the State Bar into an independent corporate entity. In their new form, the Sections will continue to serve the lawyers of this state and to promote the public's interest in maintaining a principled bar and a trustworthy, accessible judicial system. The new entity will also foster a close and mutually supportive relationship with the State Bar. My primary goals as Chair of the Litigation Section's Executive Committee during this transition are to increase your member benefits and to present the new entity with a distinctly robust Litigation Section. So far, we're on track.

New Standing Committees

Four longstanding and prestigious State Bar Standing Committees are now part of the Litigation Section: The Committee on the Administration of Justice, the Appellate Courts Committee, the Federal Courts Committee, and the Committee on Alternative Dispute Resolution. Each of these committees brings to the Litigation Section a team of gifted, hardworking volunteers whose contribution to our Section will be invaluable. We look forward to numerous programs and webinars on federal practice, appellate practice, and ADR, in addition to updates on rule changes. The Litigation Section enthusiastically welcomes these well-run, highly productive groups.

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California Litigation is pleased to review original articles submitted for publication. Articles should be 1,000-2,000 words. Please submit proposed articles – and Letters to the Editor – to Benjamin G. Shatz, at Bshatz@Manatt.com.

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Save the Dates

JOIN US IN SAN DIEGO THIS SUMMER!

Mark your calendars for the State Bar Sections Convention, August 17-19 in San Diego. Plan to join the Sections as we commemorate our decades of service to the attorneys and judges of this state and reaffirm our continuing mission. Enjoy an array of CLE classes, special events, and opportunities to gather with fellow Section members.

LITIGATION SUMMIT OCTOBER 17

Don't miss this year's Litigation Summit in San Francisco! A full day of stimulating classes, networking and discussions—plus lunch with our Chief Justice. Stay tuned for details.

Editor's Foreword

Ch-ch-changes

By Benjamin G. Shatz, Editor-in-Chief

Benjamin G. Shatz

The late, great David Bowie exhorted us to "turn and face the strange ch-ch-changes." Well, if ever that time has come, it's now: in our nation, in our State, and in our Bar. We have a unique administration in Washington to keep us glued to our news sources of choice. Closer to home, our Golden State has essentially legalized marijuana. But put those concerns about stoned drivers at ease: self-driving robot cars are just around the corner!

For a look at the future that is here right now, this issue offers Ray Johnson's article bringing us up to speed in *Robot Vehicles and the Real World*. So many drivers already seem like they're not paying attention to the road, perhaps self-driving cars will help. But then there are the drivers who simply can't pay attention, not with all the groovy colors to dig and Cheetos to munch. Reefer madness has nothing to do with scuba diving and much to do with legalized marijuana. Joaquin Vazquez lays out the latest in *Joint Laws Transforming California*.

Returning to more pedestrian litigation issues, we have a pair of articles on everyday bread-and-butter lawyering: John Conti gives us *The Opening Statement for the Defense*, and Alison Buchanan presents *Identifying and Avoiding the Unauthorized Practice of Law in a Global Economy*.

Next, Marc (that's with a 'c'!) Alexander returns with a book review—despite your abashed editor-in-chief misspelling his name wrong in the last issue's foreword. (Because it is written last—and often at the last moment—the foreword is really the last-word, and receives the weakest editing.) Marc (still with a 'c') analyzes UCI's Professor Catherine Fisk's book Writing for Hire: Unions, Hollywood and Madison Avenue, a tale filled with law, show business, and the real "mad men."

We conclude with some personal reflections. Bowie said, "You would think that a rock star being married to a supermodel would be one of the greatest things in the world. It is." Well, Bowie never graced the pages of California Litigation, but we have some stars of our own to spotlight. Yen-Shyang Tseng shares insights gleaned from his First Appellate Argument. And we close with Trial Lawyer Hall of Famer Ephraim Margolin, who shares such interesting tales that the editing process trimmed this piece with little more than a haircut. Indeed, you may notice that this issue contains somewhat fewer (yet longer) articles than usual. This was a conscious choice, because this issue's submissions were just so gosh darned good at their full lengths, we went with the directors' cuts. We hope you can handle the ch-ch-change.

Also of note, our fearless Section leader bring us up to date on the latest developments transforming our State Bar. Our unified Bar is engaged in a form of mitosis, separating regulatory functions from trade association functions, with the latter offspring housing the Sections, including your Litigation Section. This is no "Space Oddity"; this is how many state bars nationwide are structured. But this is a huge change for California. Bowie said, "I don't where I'm going from here, but I promise it won't be boring." That applies here too.

Don't sit idly by in "strange fascination" at what's happening. Now more than ever is the time to get involved with your Section. "Changes" was originally released on Bowie's 1971 album *Hunky Dory*. If our State Bar and other ch-ch-changes are to make for a hunky dory future, we need the full participation of lawyers like you.

Benjamin G. Shatz, Editor-in-Chief of this journal, is a Certified Specialist in Appellate Law and co-chairs the Appellate Practice Group of Manatt, Phelps & Phillips, LLP, in Los Angeles. BShatz@Manatt.com

No, 42 is Not the Answer!

By Editor-in-Chief-in-Error, Benjamin G. Shatz

In the classic novel The Hitchhiker's Guide to the Galaxy by Douglas Adams, pan-dimensional, hyper-intelligent beings create a supercomputer called Deep Thought to figure out the answer to the ultimate question of life, the universe, and everything. After seven and a half millions years to compute and check the answer, Deep Thought finally presented its answer, which was the number 42. This answer was rather disconcerting.

Similarly disconcerting was how our last issue presented a chart on page 14 accompanying Professor Uelmen's article on the California Supreme Court that inexplicably contained numerous errors, including the astounding figure that Justice Corrigan had supposedly published a large number of dissenting opinions in the 2015-2016 fiscal year: 42 dissenting opinions, according to the table, to be precise. And that's precisely—and obviously—wrong, of course.

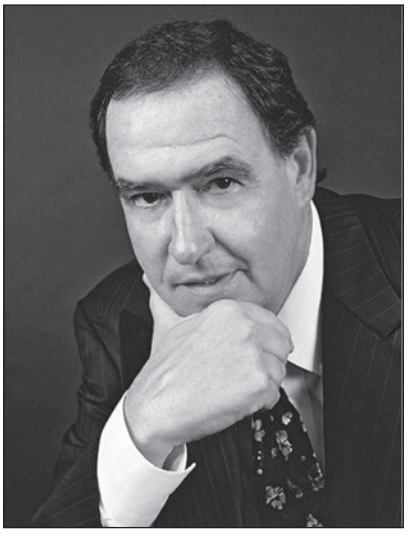
Accordingly, recognizing that 42 is not always the answer—and can be a disturbingly wrong answer—we present the correct figures below, and hope that our 42 was not nearly as upsetting as Deep Thought's.

***Corrected* TABLE I: OPINION PRODUCTIVITY (FY 2015-16)**

Justice	Majority Opinions	Concurring Opinions	Dissenting Opinions
Cantil-Sakauye	12	1	4
Chin	12	0	5
Corrigan	12	2	4
Werdegar	13	1	2
Liu	11	7	1
Cuéllar	8	3	1
Kruger	9	1	2
TOTALS	77	15	19

Robot Vehicles and the Real World

By Raymond Paul Johnson



Raymond Paul Johnson

Think back. Remember the science fiction movies where robots rebelled and took control of the world? Well rest easy, we're not there yet. But robot cars, on the other hand, are an integral part of our here and now.

Google, for example, has been testing pod-like prototypes on open roads for almost two million miles. Ford, Renault-Nissan, Volvo, Tesla, Mercedes, VW-Audi, and GM are all in the fray to be first and best. Apple is rumored to have an iCar in its think tank, and Uber and Carnegie Mellon University recently partnered to open a robotic research center. Some work is complete; other work is in progress, but the central questions remain: How and when will driverless vehicles integrate safely into the real world?

This article covers the short history of autonomous vehicles; recent technology advances; pending, proposed and existing legislation; the effects of self-driving cars on worldwide industries; and real-world safety and liability issues, such as hacking vulnerabilities, winter driving, urban traffic challenges, and vehicles programmed to kill their occupants.

— A BRIEF HISTORY —

Most mark November 3, 2007 as the birthdate of today's worldwide efforts to market robot vehicles. (Chappell, *The Big Bang that Launched Autonomous* (Dec. 19, 2016) Automotive News.) On that day, at a closed Air Force base in Southern California, the U.S. Department of Defense through an organization called Defense Advanced Research Projects Agency (DARPA) conducted a contest with two million dollars in prize money to challenge private teams to complete an urban driving course with a driverless vehicle. (*Id.*) Defense Department interest in self-guided machines emanated from the belief that robots were the next great battlefield too. (*Id.*) Five teams completed that race, and the winner was a Volkswagen Touareg modified into a self-driving vehicle by Stanford University.

This DARPA-sponsored event was the first of its kind to involve ordinary passenger vehicles in an urban driving competition. It ignited industry participation and academic collaboration. Besides the VW-Stanford team, Land Rover partnered with MIT, Virginia Tech worked with Ford, and GM teamed with Carnegie Mellon. In addition, Google, Apple and Microsoft sent representatives and observers. The rest is history, and created our present.

— ADVANCING TECHNOLOGY —

In many ways, the present is analogous to the early 20th Century, when society switched from horses to horseless carriages. Today, we face the equally challenging transition from drivers to driverless cars. For example, the CEO of GM recently announced that "[t]he industry will experience more change in the next five years than it has in the last 50." (Steinmetz, *Smarter Cars are Already Here* (Mar. 7, 2016) Time.) That prediction seems assured of success.

Tesla Motors, for example, has already issued a software update around the world that orchestrates sensors, cameras, GPS and controls on certain of its existing luxury products to allow autonomous driving. Rally drivers have taken the Model S from Los Angeles to New York City in approximately two days with 96% autonomous driving. Tesla predicts its electric cars will be fully self-driving (including docking with robotic charging stations) within three years. (Vella, *Why You Shouldn't Be Allowed to Drive* (Mar. 7, 2016) Time.)

Audi also completed a trip across the nation in its self-driving car. Its vehicle travelled fully autonomously 99% of the time. The 1% gap was due to construction zones and other unusual traffic situations. (Petroski, *Why Cities Aren't Ready for the Driverless Car*, The Wall Street Journal (Apr. 22, 2016).)

So, where are we now? To help answer that question, the Society of Automotive Engineers has defined "levels" of autonomy for on-road vehicles. A Level 3 autonomous vehicle can take over complete driving functions in certain situations. A Level 4 self-driving vehicle can drive itself fully under a defined set of conditions, such as a designated highway lane. A Level 5 vehicle requires no human driver ever.

Experts predict that Level 3 will be on the market before 2020. (Burke, *Self-driving forecasts fall within 5 years* (Jan. 16, 2017) Automotive News.) Levels 4 and 5 "will be coming in a big commercial way between 2020 and 2025." (Id.) Most expect, however, that Level 4 vehicles will continue to have a steering wheel and brake pedal. (Id.) After that, who knows.

Of course, today ordinary drivers in everyday cars already have more semi-autonomous driving systems than ever before. Stability control, all-wheel drive, steer-by-wire, traction control, lane control, automatic braking, self-spacing cruise control, self-parking systems and other autonomous driving features exist, right now, on roads near you. The last

truly analog car without digital systems was probably manufactured over three decades ago. (See Vella, *supra.*)

> *'Traditionally, California has been a favorite test bed for autonomous vehicles. (Id.) The steering wheel, however, has become a hotbed of contention. Google, professing that human error is a bigger risk than the absence of human intervention, wants to remove the steering wheel and pedals from cars.'*

This progress, of course, is not limited to the United States. In 2014, a French automaker and an Indian technology company formed EasyMile, a joint venture that quickly made and tested prototypes. EasyMile has already put driverless pods in Singapore to carry passengers on streets and through parks. (Roberts, *EasyMile's driverless bus rolls-out in Singapore and California* (Oct. 16, 2015) New Atlas.) The pods travel in huge loops at speeds up to 25 mph. (Walker, *Five Cities With Driverless Public Buses On The Streets Right Now* (Oct. 12, 2015) Gizmodo.) Taxis and buses will soon be added. EasyMile also has pods in Trikala, Greece and in a Dutch college town.

In Sweden, Volvo has launched its pilot "Drive Me" program, which provides 100 XC90s equipped with autonomous technology to customers. (See Burke, *supra.*) Previously, Volvo's testing involved only employees. These new tests allow ordinary citizens to enter driverless cars and shuttle around the city. Norway will be next. And later this year, Volvo will be doing similar tests in the United Kingdom, which has been paving the way with legislation and funding to change the infrastructure of its roads.

Speaking of roads, as everyone knows, road conditions are always changing, and so present a safety challenge for robot cars as well as human drivers. Today, map providers such as Google and Apple deploy fleets of lidar-equipped vehicles to drive around creating highly accurate road maps. (Sedgwick, *Suppliers tap millions of cars to improve maps* (Jan. 9, 2017) Automotive News.) Lidar is a laser-radar system tied to Global Positioning Satellites that develops a three dimensional map of the environment. But the fleets cannot update those maps day-to-day. Seeing a need, BMW, Intel, and others recently teamed up to develop maps, called "crowd-sourcing maps", that can be updated each day through camera images collected from millions of vehicles. (*Id.*)

Each vehicle will upload its camera data to the cloud using the new 5G modem capa-

bility that Intel is developing. (*Id.*) In turn, that data will be analyzed to update maps that will then be downloaded overnight to each self-driving car. With this new technology, the future of accurate road mapping may have just begun.

— LEGISLATION AND REGULATION —

— State Laws —

With the transition from testing self-driving cars to open-road use around the corner, officials are now scurrying to properly legislate and regulate safe expansion of the technology. (See, e.g., Johnson & Bennion, *Tomorrow today: Autonomous vehicles and robot car safety*, CAOC Forum, March 2015.) California, Nevada, Arizona, Texas, Florida, Connecticut, New Jersey, and Tennessee have all passed laws that allow for at least testing of driverless cars.

Traditionally, California has been a favorite test bed for autonomous vehicles. (*Id.*) The steering wheel, however, has become a hotbed of contention. Google, professing that human error is a bigger risk than the absence of human intervention, wants to remove the steering wheel and pedals from cars. California's Department of Motor Vehicles, however, has thus far insisted that driverless cars must have steering wheels in case onboard computers or sensors fail, and a licensed driver must be in the driver's seat ready to seize control in an emergency. (See, e.g., *Ensuring self-driving vehicles are safe*, Los Angeles Times (Jan. 20, 2016); see also *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?billid*=201520160AB1592.)

Despite Google's criticisms, keeping steering wheels, brakes and drivers behind the wheel is critical to traffic safety, at least where self-driving vehicles mix with traditional driver-operated cars and trucks. A recent survey by J.D. Power found that mistrust of fully automated cars is widespread and spans all age groups. (*Hiltzik, Is the World Ready for self-driving cars?*, Los Angeles Times (May 6, 2016).)

'With respect to self-driving cars, some commentators have called for the preemption of state tort laws (through NHTSA regulation and federal legislation) to accelerate development of the technology and its use on the open road.'

Yet Michigan has gone where no State has gone before. (Mitchell, *State rules for driverless cars stall*, Los Angeles Times (Jan. 29, 2017).) It recently passed law that permits driverless cars—not just test cars—on state roads with minimal restrictions. (*Id.*) That law "allows autonomous vehicles

on any road at any time for any reason," said Kirk Steudle, director of Michigan's Department of Transportation. (*Id.*)

But is the world really ready for that? Right now it's "public relations" talk more than a safety threat because no one is marketing robot vehicles in the U.S. But, within a few years, that will change, and hopefully by then Michigan will have fully vetted its new law and its impact on public safety, before it's too late.

Last year, of course, there was the fatal crash in Florida of a Tesla Model S on "autopilot." Specifically, on May 7, 2016, a big rig made a left turn in front of the 2015 Tesla which failed to apply brakes because, according to Tesla, the "autopilot" could not notice the "white side of the tractor-trailer against a brightly lit sky." (*A Tragic Loss,* June 30, 2016, www.tesla.com/blog/tragic-loss.) As a result, the Model S passed under the side of the tractor-trailer, smashing the windshield and killing the occupant. Two things seem clear: An "autopilot" for a car should never go blind or colorblind, and it should always be quick enough to discern something as large as a tractor-trailer truck in order to earn the respect and trust of the motoring public.

Be that as it may, the National Highway Traffic Safety Administration conducted a probe of the incident and concluded that no system defect existed in the driver-assist software, and therefore no recall was necessary. (Mitchell, *Probe clears Autopilot in fatal Florida Tesla crash*, Jan. 20, 2017.) NHTSA relied heavily on the fact that Tesla stated clearly in its owner's manual and on-screen instructions that the human driver alone was responsible for driving the car, thereby differentiating this incident from any future ones involving fully autonomous vehicles. (*Id.*)

Interestingly, however, Tesla emphasized in its news releases that the "autopilot" feature on the 2015 Model S was still in "beta testing" and "required the driver to remain alert." (See, e.g., Reisinger, *Another Driver Blames Tesla for Autopilot Crash* (May 26, 2016) Fortune.) Putting aside the question of whether "beta testing" of an "autopilot" system for cars should ever be done on the open-road with ordinary drivers at the wheel, this Tesla response raises a far-reaching issue for all self-driving vehicles.

When Google first began testing its driverless cars, it noticed a disturbing pattern. The "test drivers" were told to keep their eyes on the road and be ready at all times to take the wheel should errors in driving occur. But many did not. After miles of "perfect" autonomous driving, the test drivers became distracted; reporting that it was difficult to focus on the road when it seemed unnecessary. Human nature? Should it then be assumed that as cars become more and more autonomous humans will become less careful? Clearly, the designers of self-driving vehicles should consider this carefully while conducting their Failure Modes and Effects Analyses (FMEA) and testing related to FMEA. (For a more-detailed discussion of FMEA, see Forum, *supra.*)

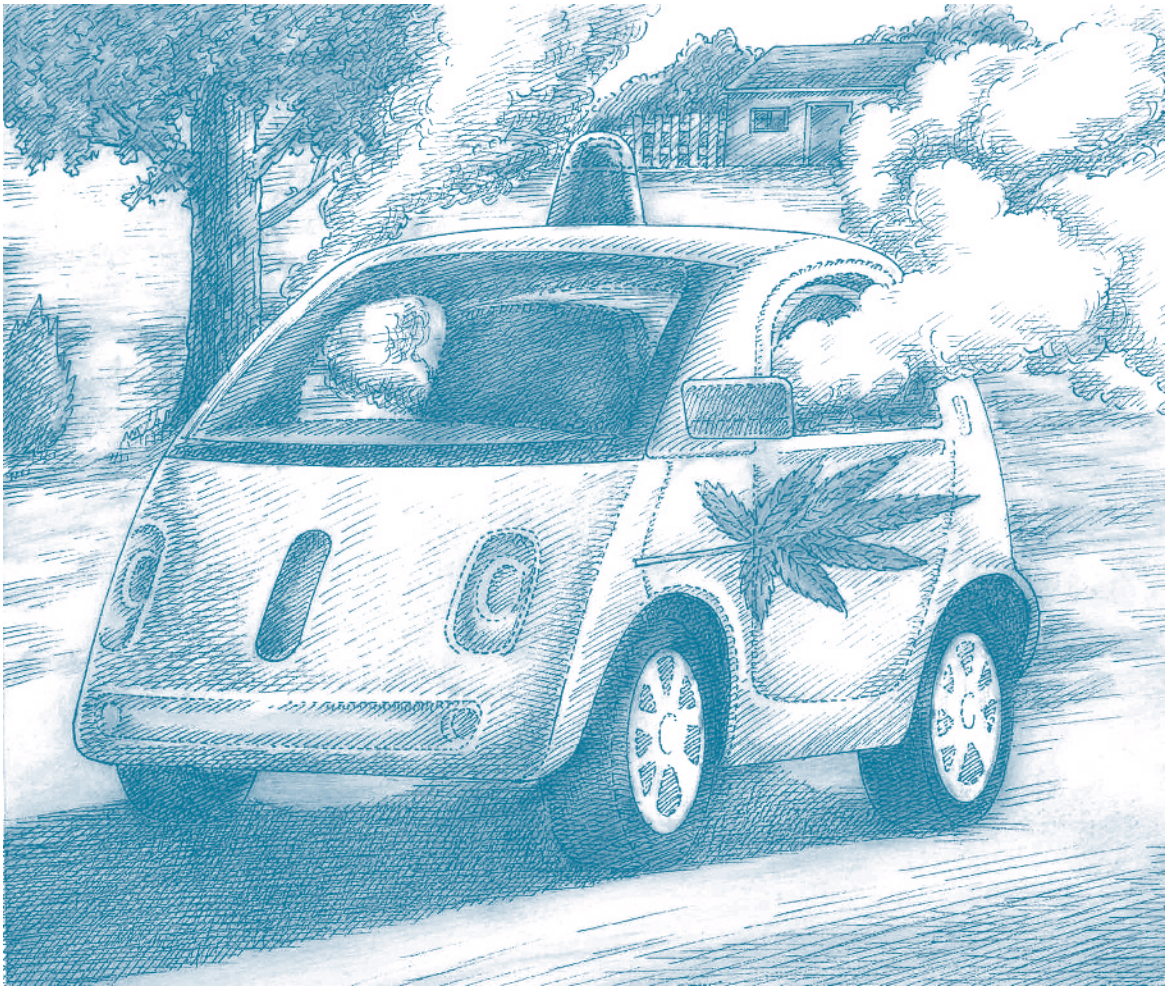
— Federal Law —

With respect to self-driving cars, some commentators have called for the preemption of state tort laws (through NHTSA regulation and federal legislation) to accelerate development of the technology and its use on the open road. This is despite the facts that open-road use is in its infancy, the specific technologies used by the various companies are varied, and the safety limitations of self-driving cars are both well-recognized and still emerging.

In addition, Presidential Memorandum 2009 (Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24-693-94 (May 20, 2009)) condemned the federal pre-

emption of state tort law, and in concert with that pronouncement, in August 2010, the Solicitor General, on behalf of NHTSA, submitted an amicus brief to the Supreme Court in *Williamson v. Mazda Motor of America, Inc.* (2011) 131 S.Ct. 1131, arguing against preemption through NHTSA regulation. Additionally, of course, there is the clearly worded saving clause of the Safety Act itself that states point blank: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." (49 U.S.C. § 30103(e).)

But putting legal history aside, how could it make sense to federally preempt the consumer protections of state tort law in a largely untested field of varied, unproven technologies rife with real-world safety limitations? As commentators have noted: "Self-driving vehicles [could be] just one tragedy away from the scrap heap—like say, a robotic car kills a child or running its occupants off a cliff. Faulty and dangerous technology has doomed certain car models and delayed entire companies, sometimes for decades." (See Vella, *supra*, at p. 56.)



As a result, for both the benefit of public

safety and continued progress in the safe development of self-driving cars, the safeguards of state tort liability should not be abandoned through federal preemption.

— Product Liability —

In the aggregate, no concept has done more to accelerate automotive safety than the product liability laws of the various states. With product-liability cases blazing the path, we have gone from exploding gas tanks, dangerous interior designs that killed and maimed innocents, and deadly roll-over prone vehicles to safe designs, airbags, electronic stability control and much more. For safety's sake, all of the related product-liability case law should apply to self-driving vehicles, and even classical case law can and should apply.

Take, for example, Judge Learned Hand's 1932 opinion in *The T.J. Hooker, 60 F.2d 737* (2d. Cir. 1932). In that case, two tug boats were towing shipping vessels out to sea. A storm arose and the shipping vessels sank. Judge Learned Hand affirmed the trial court's finding of negligence by determining (1) that had the tug crews known about the storm in advance they could have easily towed the ships to safe shelter, and (2) that the tugs should have had radios because radio technology was readily available and used on other tug boats in the area. In essence, Judge Hand established that the standard of seaworthiness changes with advancing technology, and as a result the tugs had a duty to embrace radio technology.

The same should and does apply to 21st Century self-driving vehicles. Those marketed to the public through sale or lease should come with state-of-the-art safety technology, including hardware, software, firmware and connectivity systems that foster safety first. Anything less could cause disaster.

— Legislating Morality? —

A key question looms unanswered. The driverless car must be programmed to make moral decisions. Whether by legislation, programming or both, how is that best done?

For example, how will a driverless vehicle choose the lesser of two evils? Will it careen into a group of pedestrians, or spare them by steering off the road and killing its own passengers? (Kaplan, *Ethical dilemma on four wheels: How to decide when your self-driving car should kill you*, Los Angeles Times (Jun. 23, 2016).) Will it do the morally correct thing, the legally correct thing, or will it simply steer to take the fewest lives? University of Oregon psychologist Azim Shariff teamed up with the Toulouse School of Economics in France and the MIT Media Lab to study this dilemma. After a series of studies involving nearly 2000 people, they found that the fewer pedestrians likely to be saved, the weaker the consensus that the car should sacrifice its passengers. (*Id.*) Yet in general, people favored setting rules that maximized the number of lives saved, but with one huge exception—that almost swallowed the other rules: *People wanted their own cars to protect them at all costs.* In commentary that accompanied the study, the authors concluded, "The prospect of being killed by one's own car may feel like a personal betrayal." (*Id.*) After all, a self-driving vehicle "is a product that might decide to kill you, even if you do everything right." (*Id.*)

__ MAJOR EFFECTS __
ON WORLDWIDE INDUSTRIES

If current studies indicating that more than 90% of all crashes involve driver error are correct, the good news is that driverless cars could drastically reduce crashes, especially rear collisions. The bad news, for the insurance industry, is that such an outcome would also drastically reduce auto insurance sales.

Presently, the United States market for personal auto insurance generates $200 billion in premiums per year. (Peltz, *Self-driving cars could flip the auto insurance industry on its head*, Los Angeles Times (Jun. 20, 2016).) Driverless cars and the predicted decrease in crashes could see those premiums plummet nearly 90%, for a loss of $180 billion dollars a year—just in the United States. In addition, if, as many think, the automakers and suppliers end up responsible for most of the liability associated with driverless cars, they may well decide to add the insurance premium to the sticker price of new cars, supplanting the insurance companies and presenting still another huge threat to the insurance industry.

> *'Can a computer think accurately enough and fast enough to distinguish between a pedestrian who is alert and one who may wander into the road?'*

On the other hand, some predict that driverless vehicles could be "the death of the automobile industry as we know it." (Lutz, *Fully Autonomous Cars Will Kill the Auto Industry as We Know It* (Feb. 29, 2016) Road & Track.) If, for example, we travel the freeways in "a whole snake of vehicles at 150 mph, brands will no longer matter." (*Id.*) People, especially in urban areas, may not even want to own a car when they can just call up and get one to travel from point A to point B with the ease of Uber (without drivers). Once the brand motive for purchase is gone, and perhaps with it any motive for purchasing a vehicle at all, what will become of today's worldwide auto industry? Clearly, it will change or die.

REAL-WORLD LIMITATIONS ON SELF-DRIVING VEHICLES

Crashworthiness, Speed and the Unexpected

Crashes are inevitable, especially when self-driving cars are mixed with driver-controlled vehicles on the same roads. The severity of crashes can be mitigated by lower speeds and/or building vehicles with improved crashworthiness.

With all due respect, Google's pod-like prototypes seem short on crashworthiness, though they have been limited to road-use at a maximum speed of just 25 mph. There is no reliable data on the consequences of operating them at greater "highway" speeds. If that is ever in the cards, the prototypes should and must first be tested in controlled experiments to ensure crash compatibility with other high-speed vehicles.

During testing, Google's self-driving cars were involved in numerous fender benders, but none were reported to be the car's fault. Then, in March 2016, a Google car caused a minor crash (without injuries) by changing lanes into a bus. (*Raw: Video Shows Google Self-Driving Car Hits Bus*, USA Today

(2016), *http://www.usatoday.com/videos/news/nation/2016/03/09/81532800.*) At low speeds, there was no serious problem, but at higher speeds momentums are greater and the risks of injury increase.

As one commentator stated, "The issue of trusting your life to a machine or more specifically, to the computer code written by Google (or Apple, or Tesla) is a big leap. Who decides how much risk is written into the algorithms that control the car? [W]ho certifies the risk is accurate? If VW can cheat on emissions testing, why won't it cheat on safety tests?" (Goodell, *Inside the Artificial Intelligence Revolution: A Special Report, Part 2* (Mar. 9, 2016) Rolling Stone.) Gill Pratt, head of Toyota's autonomous-car initiative has been quoted as follows: "Now we have to do the hard part. We have to figure out what to do when there is [no] map; what to do when the road differs from the map; what to do when the unexpected occurs—when the child chasing the ball runs in front of the car, or when somebody changes lanes very fast. These are situations where the dynamics are very hard." (*Id.*)

In addition, of course, urban traffic can cause difficult dynamics as well as unexpected events. For example, during rush hour downtown, traffic can be so heavy that it's almost impossible to make a left turn onto a busy street without edging into oncoming traffic. Humans essentially play "chicken" with each other. However, when Google updated its driverless-car algorithms to be more aggressive, it didn't take long before it caused the earlier-mentioned crash with a *city bus.* (Abuelsamid, *The First Google Self-Driving Car Accident Makes The Case For V2V Communications* (Mar. 7, 2016) Forbes.) How much aggression should be dialed into self-driving car algorithms will remain a lingering limitation for the foreseeable future.

And then there are traffic emergencies. There are times when hand gestures by a police officer must be obeyed rather than posted signs or signals. An officer might use hand signals to slow down cars or funnel them around a crash, or might direct cars to go through an intersection despite a red light. How does the self-driving car decide to ignore its programming to stop at signals and instead obey the officer's hand gestures? How does it distinguish the officer's gestures from those of a malicious prankster?

— Weather Driving —

Snow is a huge problem for driverless vehicles. Besides the risks of snow or ice building on external sensors, even an inch of snow cover on the ground can disrupt a driverless car's map reading or location determination. (Fung, *Test for driverless cars*, Los Angeles Times (Feb. 2, 2016).) In addition, in snowy climates, people often don't drive in lanes; they drive in the tire tracks of the guy in front. In other words, humans know it is sometimes safer to break the rules of the road. How do you teach a machine to defy its own programming?

Standing water is another unsolved issue. It is difficult to detect, and even more difficult for self-driving vehicles to determine the depth of standing water. Humans can usually discern whether water in the road is a mere puddle, or flooded road to be avoided. Driverless cars, on the other hand, can take occupants right into dangerous flooded areas that were either not detected or misidentified. New sensors and algorithms will have to be developed to solve this limitation.

— Human Behavior —

Can a computer think accurately enough and fast enough to distinguish between a pedestrian who is alert and one who may wander into the road? Will a machine know the difference between a cyclist who is wob-

bling and one who is steady? A few years ago, a team at IBM developed a supercomputer called Watson. While a typical computer processor has between two and six cores, Watson had 28 cores. Watson could process data faster than perhaps any other computer built.

The team pitted Watson against two *Jeopardy!* champs and although Watson won, the machine was not perfect. For many answers the machine was too slow, for others the machine was just wrong. (*IBM Watson: Final Jeopardy! and the Future of Watson* YouTube (2011), *http://www.youtube.com/watch?v=li-mo7o_brng.*) In a game of *Jeopardy*!, a wrong answer costs a few dollars. On the road, it could cost lives. This same *Jeopardy!* supercomputer is now being used to power a driverless car prototype. (Jaynes, *This driverless car can harness the power of IBM Watson* (Jun. 17, 2016) Mashable.)

But even supercomputers have trouble understanding human behavior. Humans can make judgments in the blink of an eye. We can see a pedestrian and instantly analyze, often subconsciously, whether that pedestrian is likely to wander into the road, whereas computers would never even see the danger.

In spite of supercomputers, companies must still rely on humans to analyze photos, label elements pixel by pixel and separate objects into hundreds of classes. Some companies employ hundreds of people to look through tens of thousands of images in order to train their computers how and what to see. (Borghino, *Meet Synthia, the virtual driving school for autonomous cars* (June 17, 2016), New Atlas.) While billions of dollars for research and millions of hours of work have been quite successful, for example, in mastering routine fair-weather driving by computer-driven cars, computers are still struggling to conquer the more social aspect of recognizing and predicting human behavior. That, in effect, is the next great frontier for self-driving vehicles.

— Hacking Vulnerabilies —

We all know computers can be hacked. Hackers have clearly shown that self-driving vehicles are vulnerable. In 2015, two hackers teamed up with a reporter from Wired to prove the point. They hacked a Jeep Cherokee and remotely took over the steering and braking until the journalist gave up in panic. The Jeep maker, Fiat-Chrysler, responded with a 1.4 million vehicle recall by shipping the owners USB drives to guard against such future hacks. (See Steinmetz, *supra*, at p. 61.) But what about other hackers, and other hacks?

Researchers, for example, hacked their way into the operating system of Tesla's Model S, making the speedometer disappear, controlling the doors, and even shutting the vehicle off. (Steinmetz, *supra,* at p. 60.) Tesla quickly responded by fixing the bug with an over-the-air update, but lessons were learned. No self-driving car will be fully immune from hacking, and security protocols need to be developed, tested, backed by redundancy, verified and validated for safety. The future of self-driving vehicles depends on it.

— CONCLUSION —

These are exciting times. Driverless cars can benefit us all, especially the disabled and the infirm. They will most likely decrease traffic congestion and related pollution. They may even eliminate low-speed crashes. But the rest is a story still to be told. Eventually, technology will probably conquer the problems posed by winter driving, crashworthiness, hacking, and other challenges. But in the interim, public safety remains paramount.

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Joint Laws Transforming California

By Joaquin Vazquez

Joaquin Vazquez

After 20 years of limited authority for certain medical only cannabis activities, two new systems of California law are dramatically altering the regulatory landscape for both medical and nonmedical cannabis. As the state gears up for the issuance of licenses for cannabis industry businesses, the menace of federal illegality persists as the nation inaugurates a presidential administration that has not yet indicated if it will enforce federal cannabis laws.

California's Medical Cannabis Regulatory Foundation

In 1996, California voters approved Proposition 215, known as the Compassionate Use Act. (Health & Saf. Code, § 11362.5 *et seq.*) It protects patients and primary caregivers from criminal prosecution for the possession or cultivation of cannabis for personal

medical purposes with the approval of a physician.

In 2003, the California Legislature enacted Senate Bill 420, the Medical Marijuana Program Act (Health & Saf. Code, §§ 11362.7 *et seq.*). It established a voluntary identification card program for qualified medical cannabis patients and their primary caregivers and provided immunity to qualified patients, primary caregivers, and holders of such identification cards from criminal prosecution for collective and cooperative cultivation.

Upon this nascent, yet ambiguous regulatory backdrop, courts wrestled with questions concerning the scope of the immunity afforded through the Compassionate Use Act and Medical Marijuana Program Act, especially as medical cannabis facilities proliferated throughout the state. Courts determined that local police power authorized local governments to prohibit such facilities within their boundaries, which facilitated the development of a robust regulatory framework for cannabis facilities. (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729; *Maral v. City of Live Oak* (2013) 21 Cal.App.4th 975.)

The Medical Cannabis Regulation and Safety Act

The Medical Marijuana Regulation and Safety Act, comprised of Senate Bill 643, Assembly Bill 243, and Assembly Bill 266 became effective January 1, 2016. On June 27, 2016, it was renamed the Medical Cannabis Regulation and Safety Act ("MCRSA") by Senate Bill 837.

Local Control and Dual Licensing

MCRSA preserves local government control through a dual licensing system for medical cannabis businesses. Upon adoption of state regulations for commercial cannabis activities, "[n]o person shall engage in commercial cannabis activity without possessing both a state license and a local permit, license, or other authorization." (Bus. & Prof. Code, § 19320, subd. (b).) No person or entity may even apply for a state license "[u]nless that person or entity has received" such local authorization. (Health & Saf. Code, § 11362.777, subd. (b)(3).)

A medical cannabis operation in compliance with a local zoning ordinance and state and local requirements, on or before January 1, 2018, would be allowed to continue operations until its application for a state license is approved or denied by the applicable state agency. (Bus. & Prof. Code, § 19321, subd. (b).) For instance, a medical cannabis cultivation facility currently operates pursuant to an ordinance allowing cultivation in the City of Desert Hot Springs. Assuming compliance with local and state requirements, it would be allowed to operate until its application for a state cultivation license is approved or denied by the California Department of Food and Agriculture. Priority for state licenses will be given to operations that can demonstrate, to the state's satisfaction, that it was in operation and in good standing with a local jurisdiction by January 1, 2016. (Bus. & Prof. Code, § 19321, subd. (b).) It is unclear how such "priority" for state licenses will manifest and be applied.

The maintenance of local control is evident in MCRSA's allowance for local jurisdictions to regulate or ban all medical commercial cannabis activities within its jurisdiction or regulate such activities on a piecemeal basis. (Bus. & Prof. Code, §§ 19315, subd. (a), 19316, subd. (a)-(c).) One city may permit and regulate commercial cannabis cultivation and prohibit commercial cannabis dispensing, while a neighboring city could ban both cultivation, dispensing and all other medical commercial cannabis activities. This authorization for local customization creates

the potential for a patchwork of divergent local regulatory preferences.

State Licences and Multiple License Restrictions

MCRSA instituted state license classifications for each type of medical cannabis business. (Bus. & Prof. Code, § 19300.57.) Regulations for such licenses are to be promulgated by different state agencies with regard to the cultivation, dispensing, distribution, manufacturing, testing, and transportation of medical cannabis. These activities are defined as "commercial cannabis activities." (Bus. & Prof. Code, § 19300.5, subd. (j).)

There are limitations on the number of different licenses that a state licensee can obtain. With narrow exception, a state licensee may only hold a state license in up to two separate state license categories. A Type 11 distributor licensee, for example, is also required to hold a Type 12 transportation license but cannot obtain a state license in a cultivation, manufacturing, dispensing, or testing license category. Further, a state licensee is prohibited from holding an ownership interest in real property, personal property, or other assets associated with or used in any other state license category, subject to limited exception. (Bus. & Prof. Code, § 19328.)

No New Taxation Under MCRSA

MCRSA did not create any new taxes pertaining to medical cannabis businesses but enabled local jurisdictions to continue to assess "fees and taxes" on licensed activities, subject to voter approval. Also, every person engaged in the business of selling tangible personal property must obtain a seller's permit from the California Board of Equalization, which has been applied to medical cannabis business such as medical cannabis cultivation and dispensing. (Cal. Code Regs., tit. 18, § 1699.)

The Control, Regulate and Tax Adult Use Of Marijuana Act

The Proposition 64 ballot initiative known as the Control, Regulate and Tax Adult Use of Marijuana Act ("AUMA") was approved by California voters on November 8, 2016. Note that AUMA utilizes the term "marijuana" to refer to the same plants referred to as "cannabis" in MCRSA.

Provisions for Adults Age 21 and Older

AUMA allows adults age 21 and older to smoke or ingest marijuana or marijuana products, which include marijuana concentrates, edibles, and topical products. It also enables them to possess, process, transport, purchase, obtain, or give away to adults age 21 or older, without compensation, up to 28.5 grams of marijuana, or eight grams of concentrated marijuana. (Health & Saf. Code, § 11362.1, subd. (a).) It provides that marijuana and marijuana products linked to such activities conducted in a lawful manner are not contraband nor subject to seizure and cannot constitute a foundation for detention, search, or arrest. (Health & Saf. Code, § 11362.1, subd. (c).) However, marijuana and marijuana products may not be smoked or ingested in certain specified locations, such as anywhere tobacco is prohibited, or while engaging in specific activities, such as driving a vehicle. (Health & Saf. Code, § 11362.3, subd. (a).)

Adults age 21 or older are authorized to possess, plant, cultivate, harvest, dry, or process up to six living marijuana plants for personal use within, or upon the grounds of a single private residence. The marijuana plants and any marijuana grown in excess of 28.5 grams must be kept within, or upon the grounds of the relevant residence and in a locked space and cannot be visible "by normal unaided vision from a public place." (Health & Saf. Code, §§ 11362.1, subd. (a)(3), 11362.2.)

Cities and counties can completely ban such personal medical marijuana cultivation activities in outdoor areas but are precluded from completely prohibiting them inside a private residence or inside a fully enclosed and secure accessory structure on the grounds of a private residence. They may, however, enact reasonable regulations on indoor personal marijuana cultivation. (Health & Saf. Code, § 11362.2, subd. (b).) For example, an ordinance in the City of El Monte prohibits outdoor personal adult nonmedical marijuana cultivation and establishes regulations and a permitting process for indoor personal adult nonmedical marijuana cultivation.

Licensing and Distinctions from MCRSA

While MCRSA established a comprehensive framework for the production, transportation, and sale of medical cannabis, AUMA created a complex, analogous framework concerning nonmedical marijuana. AUMA governs "commercial marijuana activities," which include nonmedical marijuana cultivation, distribution, manufacture, delivery, testing, transportation, and sale. These two systems have both significant overlap and critical distinctions.

AUMA establishes the Bureau of Marijuana Control, under the Department of Consumer Affairs, whose director is obligated to administer and enforce both MCRSA and AUMA. (Bus. & Prof. Code, § 26010, subd. (a).) State agencies already required to develop regulations and issue licenses for medical cannabis activities under MCRSA are also obligated to promulgate regulations and issue licenses for business activities involving nonmedical marijuana. (Bus. & Prof. Code, § 26012.)

State license issuance shall commence by January 1, 2018. (Bus. & Prof. Code, § 26012, subd. (c).) As a result of this extended time frame for the issuance of state nonmedical commercial marijuana licenses is that adults age 21 or older otherwise eligible to use marijuana and marijuana products cannot purchase such items since no establishment currently possesses a state license for nonmedical marijuana retail sale.

'AUMA instituted a tax structure affecting both nonmedical marijuana and medical cannabis. It imposes a state excise tax of 15% on both nonmedical marijuana and medical cannabis sales, which added to any sales or use tax imposed by the state and local governments.'

AUMA's commercial license categories are similar to those under MCRSA and include

nonmedical marijuana cultivation, manufacturing, testing, retail, distribution, and microbusiness operation. AUMA utilizes the license category "retailer" instead of the analogous MCRSA term "dispensary" category, and eliminates the transporter license, thereby relying upon distributors to transport product from one licensee to another. AUMA also establishes a unique microbusiness license. (Bus. & Prof. Code, § 26050.) A "microbusiness" is a small, vertically nonmedical marijuana business, which is authorized to cultivate an area less than 10,000 square feet, and distribute, manufacture, and sell nonmedical marijuana. (Bus. & Prof. Code, § 26070, subd. (a)(3).)

__ Limited License Restrictions __ and Vertical Integration

The restrictions on holding multiple licenses under MCRSA are not emulated in AUMA, as exemplified by microbusiness vertical integration. AUMA prohibits, however, certain large scale integration. Specifically, holders of large medical marijuana cultivation licenses may not hold distribution, testing, or microbusiness licenses. Moreover, such large medical marijuana cultivation licenses may be issued by the state as early as January 1, 2023, in order to allow smaller cultivators to establish a market foothold. (Bus. & Prof. Code, § 26061, subd. (d).) Commercial licenses under both MCRSA and AUMA are valid for a period of 12 months. (Bus. & Prof. Code, §§ 19321, subd. (a), 26050, subd. (c).)

__ State Licensing __ and Local Control

Notwithstanding MCRSA's dual state and local licensing scheme, AUMA requires nonmedical marijuana businesses to have a single state license. Local control is facilitated by AUMA's prohibition of a state licensing authority from issuing a state license for a commercial marijuana activity if it would violate the provisions of a local ordinance. (Bus. & Prof. Code, § 26038.) For instance, if a city adopted a zoning ordinance prohibiting nonmedical commercial marijuana cultivation throughout its boundaries, the state could not issue a state license to an applicant seeking to conduct such cultivation. Unlike MCRSA, state license applicants are not required to provide evidence of local permission to conduct a commercial marijuana activity. (Bus. & Prof. Code, § 26056, subd. (a).)

— New Taxes under AUMA —

AUMA instituted a tax structure affecting both nonmedical marijuana and medical cannabis. It imposes a state excise tax of 15% on both nonmedical marijuana and medical cannabis sales, which added to any sales or use tax imposed by the state and local governments. (Rev. & Tax Code, § 34011, subd. (a).) It establishes a commercial cultivation tax at a rate of $9.25 per dry-weight ounce on flowers and $2.75 per dry-weight ounce on leaves. (Rev. & Tax Code, § 34012.) The state excise tax and cultivation taxes are to take effect as of January 1, 2018, and do not limit the imposition of local government taxes on nonmedical marijuana and medical cannabis. (Rev. & Tax Code, § 34021.) As of the effective date of AUMA, November 9, 2016, medical cannabis is exempt from state and local sales taxes. (Rev. & Tax Code, § 34012, subd. (j).)

Practical Tips for Practitioners — Advising Prospective Cannabis — Businesses

Budding entrepreneurs should first be advised to identify which jurisdictions in a given area permit medical cannabis or nonmedical marijuana businesses. This task is currently daunting as many local jurisdic-

tions have adopted temporary zoning moratoria to allow their governing bodies time to study and evaluate permanent regulations or bans of such businesses. Such local review of regulatory and prohibition options offers potential operators an opportunity to engage with local legislators and advocate for favorable laws that will facilitate a welcoming regulatory environment for these commercial activities.

‘Among the lesser known provisions of AUMA are those concerning revised criminal penalties and related resentencing options, which augment the personal allowances described above regarding personal use and residential cultivation for adults age 21 or older.’

It is then necessary to ensure that the specific cannabis-related activity sought to be carried out by a client is, in fact, permitted. Although a city may permit commercial medical cannabis cultivation, it can concurrently prohibit cannabis deliveries or dispensaries. Additional examination will be required once nonmedical marijuana state licenses are issued to determine whether a jurisdiction permits medical cannabis or nonmedical marijuana businesses, as some clients may prefer to exclusively serve the needs of qualified medical patients or nonmedical users.

For potential businesses focused exclusively on medical cannabis activities and chomping at the bit to enter into the market prior to state license issuance, MCRSA currently allows such businesses to operate exclusively with local approval in permissive jurisdictions. As noted above, such businesses will not be forced to shut down upon the issuance of state licenses for commercial cannabis activities under MCRSA and can continue to operate until their applications are approved or denied by the state. There are risks, however, for businesses operating in such environments as state regulations, which are eventually promulgated may be more strict than those locally imposed, at best causing the operator to incur costs to make the facility state compliant, or, at worst, subjecting the facility to state license denial.

Tax and fee implications should also be taken into consideration in assisting clients in finding a suitable jurisdiction for a business. All other things being equal, one city may be preferable to another solely because it imposes a lighter gross receipt tax burden or does not burden businesses with cost-recovery regulatory fees.

Operators seeking real property in a welcoming jurisdiction should be advised of rel-

evant buffer zones requiring separation from sensitive uses. For example, commercial facilities under both MCRSA and AUMA cannot be within 600 feet from certain public or private schools. (Bus. & Prof. Code, § 26054, subd. (b); Health & Saf. Code, § 11362.768, subd. (c).) Local jurisdictions, under MCRSA, may also impose additional distance requirements from other areas, such as single family dwellings. (Bus. & Prof. Code, § 19315.)

Practitioners should advise clients of any necessary land-use-related approvals required for operation. Most local jurisdictions do not allow cannabis-related businesses by right (without discretionary review and approval) and require special use permits. The cultivation facility in the City of Desert Hot Springs, as mentioned above, for example, was obligated to obtain a conditional use permit in order to commence operation. Such approvals can also entail development agreements, which enable local jurisdictions to negotiate potentially lucrative financial public benefits.

Revised Criminal Penalties and Resentencing Opportunities

Among the lesser known provisions of AUMA are those concerning revised criminal penalties and related resentencing options, which augment the personal allowances described above regarding personal use and residential cultivation for adults age 21 or older. AUMA reduces the penalties for many marijuana offenses by reclassifying certain offenses, which were previously felonies, as misdemeanors, infractions, or wobblers. (Health & Saf. Code, § 11357 et seq.) For example, the cultivation of no more than six plants by adults between the ages of 18 and 20 was previously classified as a felony and is now only an infraction. (Health & Saf. Code, § 11358, subd. (a).) As for minors, AUMA classifies most marijuana-related offenses as infractions, subject only to drug education or counseling and community service. (Health & Saf. Code, § 11362.4.)

Pursuant to Health and Safety Code section 11361.8, AUMA allows, with limited exception, persons previously convicted of certain marijuana offenses to obtain a reduced sentence if the activity in question would have been legal or subject to a lesser penalty had AUMA been enacted at the time of sentencing. New sentences would be based upon the relevant punishment that AUMA imposes for such activity. Individuals currently in prison or jail would be eligible for community supervision upon release, subject to judicial discretion. Persons who have already finished serving sentences for offenses that have been reduced under AUMA may apply to have such offenses designated as misdemeanors, infractions, or dismissed. These resentencing provisions are applicable to juvenile adjudications. (Health & Saf. Code, §§ 11357, subd. (a)(1), 11362.4.)

AUMA requires the Judicial Council to promulgate forms for courts and the public. (Health & Saf. Code, § 11361.8, subd. (l).) These forms are available on the Judicial Council website at www.courts.ca.gov/prop64.htm and may be immediately utilized for clients.

Conclusion

It is essential for practitioners in the myriad fields that AUMA and MCRSA affect to stay abreast of these laws as they evolve. This is especially important as the potential for federal prohibition enforcement looms over the state's entire regulatory structure as a new presidential administration takes hold.

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The Opening Statement For the Defense

By John C. Conti

John C. Conti

Lawsuits typically proceed in three sequential phases: gathering, distilling and presenting. Gathering refers to the acquisition of the facts and data underlying the claim or defense and incorporates investigation, research, and discovery.

In the distillation phase, the lawyer crafts the overall theme around which evidence will be organized and presented. This phase necessarily involves a good deal of judgment and

demands a confident approach, since the honing of a central theme requires abandoning all extraneous information. In the presentation phase, the lawyer incorporates elements of theater and stagecraft, becoming the director of the play, making nuanced and detailed determinations about how each piece of evidence should be displayed and offered to the jury.

Invoking a movie-making analogy, gathering equates to storyline research; distillation is analogous to drafting the screenplay; and the presentation phase mirrors the direction of the movie itself. The opening statement in this analogy is therefore the enticing and attention-grabbing movie preview.

__ Defendant Seeks to Exploit Flaws __ in Plaintiff's Case

The opposing parties bring to bear two very different perspectives and roles that necessitate fundamentally dichotomous approaches. From the plaintiff's perspective, the objective is to take a given set of facts and shape and polish them into the most favorable configuration. In contrast, the defense's goal is to exploit the flaws and fissures in the case to bring about a fracturing, if not outright crumbling, of the edifice plaintiff is attempting to erect.

So, for example, while the plaintiff must meet the burden of proof comprising multiple elements, the defense can elect to hone in on a singular, fatal flaw—perhaps causation or perhaps a credibility question that undermines a key facet of the case and casts plaintiff in an unflattering light. An expert-report that conspicuously omits mention of an essential fact could serve as the focal point of the overall defense theme.

__ Plaintiff Sets the Agenda, __ Tone and Tenor of the Trial

The defense must be mindful that its presentation, including most prominently the opening statement, will be received by the jury against the backdrop of plaintiff's opening. This is not to say that the defense should in any sense mimic plaintiff's style or even reference it. But the defendant should nonetheless attempt to contour his or her opening to take into consideration the tone and temperament of plaintiff's counsel.

If the plaintiff is markedly aggressive and overtly inflammatory, the defense should strive to negate or defuse the antagonistic tone, but do so in a manner that draws a positive contrast in terms of either style or theme.

__ Play off Plaintiff's Opening __ Statement if Possible

Ideally, it is most effective if the defense can begin its opening statement with a particular point that refutes the last comment made during that of the plaintiffs. Try to create the impression of a seamless transition from the end of your opponent's opening to the beginning of yours, as though you are continuing the presentation but then turning it on its head. One might say, "You know, counsel's last comment about the need to be fair minded in examining the evidence, is something we can all agree on, in part because it illustrates the inherent unfairness in viewing evidence with the benefit of hindsight, which is precisely what they are doing."

__ Know Your Audience: __ Jury, Judge, Adversary

The well-configured, well-thought-out opening always has in mind the particular proclivities of the trial judge, the demographics and other characteristics of the jury, and the opposition's style and approach. Formulaic approaches can spoil, if not entirely undermine, an otherwise well-crafted opening, because they appear canned, akin to a politician's stump speech.

Judges bring to their courtrooms varying reputations for strictness and temperament.

'Video animation may capture the jurors' attention, as may carefully prepared charts and graphs, but so may a common poster board with a key piece of evidence or a simple model or anatomic exhibit. Low tech—writing on poster board—provides a dramatic contrast and offers a compelling teaching opportunity.'

Be mindful and respectful of the court's approach to all facets of the trial, especially any rules or admonishments relating to openings. This is your opportunity for a first impression, and an objection by counsel, or much worse, an interruption by the court would be a grave unforced error.

Anticipate the Jury's Thoughts, Perceptions and Questions

Far too often an opening is delivered in a wooden, formalistic style—a speech rather than an implied dialogue with the jurors. It is entirely appropriate to incorporate within the defense opening remarks comments honed to juror interests, such as "you may be asking how jurors are expected to make decisions involving complex engineering issues," or "jurors often wonder why they cannot ask questions during trial." This will convey an important sense that you are engaged with the individual jurors and not instructing or lecturing them.

In short, jurors appreciate that you are at least attempting to be mindful of their thoughts as they sit in what is a very foreign environment. If done deferentially but without condescension, it can prove to be an effective means of guiding a jury through the issues to be considered, framed in a helpful manner.

A Defense Opening Should Stop the Momentum

In our era of instant communications, "conversation" takes place in bites and snippets, which diminishes attention spans and demands quick answers and judgments. While it makes sense for the defense to hold back some important information by way of a strategic plan, the opening must never allow jurors to misapprehend or have to guess at what the defense will be. Jurors should come away with a clear understanding that there are two credible, principled sides to the story, that plaintiff's case has certain fundamental flaws, and that it is altogether proba-

ble the case is without merit.

Despite more ancient advice to the contrary, jurors should be told at the outset precisely why you believe plaintiff's case fails; they must be shown the contradictory documents, the incriminating photos, the timelines, the "game-changing" testimony (in whatever form permitted by the court) that refutes plaintiff and undergirds your defense. The risk of a jury making up its mind early, tuning out the defense, or worse—becoming angry over what is perceived as excuse-making or a cover-up—is simply too great.

__ Social Media Culture Demands __ Concise, Compelling Responses

The substantive response to plaintiff's argument must be configured in a way that comports with characteristics of social media, being at the same time concise, factual, emphatic, and, to the extent possible, visual.

Recognizing that plaintiff will present evidence first, the defense must put before the jury two or three key pieces of evidence, compelling and graphic, that they can call to mind at any point in the trial. A text by a patient (plaintiff) to his wife while at the defendant doctor's office will never be explained away if it refutes the thrust of the malpractice suit. The challenge is to distill the defense to a small number of exhibits that the jury will be reminded of throughout the case.

— Establish Credibility —

It is essential that you present to the jury only those evidentiary points that you are certain are true and that you can prove to the satisfaction of any reasonable person.

Especially as a defendant, you often will have to stake out your case in just a few issues, as rarely can one credibly offer a broad array of defenses. A compelling defense argument can be eclipsed by a single overreach. Aim for the high ground, where the strongest most credible defense can be erected. And along that path, make all necessary concessions. Nothing is better received by a court or jury as evidence of candor and truthfulness.

__ Use Demonstrative Evidence __ Wisely, Combining Low Tech with High

Video animation may capture the jurors' attention, as may carefully prepared charts and graphs, but so may a common poster board with a key piece of evidence or a simple model or anatomic exhibit. Low tech—writing on poster board—provides a dramatic contrast and offers a compelling teaching opportunity.

Capturing the attention of a jury whose demographics span several decades—from the era of black and white television to large screen, high definition theater—is no mean feat. This is especially so when trial courts have such divergent views on the use of demonstrative evidence in openings. Woe unto the defendant whose presentation is at odds with the court's rules or clashes unflatteringly with plaintiff's presentation.

California's Evidence Code does not provide a specific rule or limitation on the use of demonstrative evidence in opening statements. Rather, demonstrative evidence is only restricted by the foundational limitation placed on all evidence—that evidence may be excluded at the trial court's discretion "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Even still, the threshold limitation of admissibility may not apply to certain demonstrative evidence used exclusively in the opening statement. *(See People v. Green (1956)* 47 Cal.2d 209, 215 ["Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves

a proper purpose, be used as an aid to the opening statement."].)

While using demonstrative evidence in opening statements is a matter of discretion for the trial court, courts have generally applied a liberal approach to such evidence. As stated by the Supreme Court, "[t]he purpose of the opening statement 'is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect,' and the use of matters which are admissible in evidence, and which are subsequently in fact received in evidence, may aid this purpose." *(Green, supra,* 47 Cal.2d at 215, quoting *People v. Arnold* (1926) 199 Cal. 471, 486.) Demonstrative evidence used during opening statements merely provides an additional mechanism to prepare the jury for what to expect.

Be Yourself — Do Not Read

If there is any phase of the trial that should be performed largely from memory or with limited notes, it is the opening statement. Whatever might be lost by not following a script is more than made up for by the compelling nature of what is perceived as largely an extemporaneous performance. It will command the attention of the jurors while at the same time make clear that you have mastered both the underlying facts and the strategic framework of the defense.

This is achieved only through practice, and more practice, but the result will be worth it. A well-crafted single page outline can provide a more than sufficient memory-guide or "crutch."

Do Not Fight the Battle that Plaintiff Has Invited

It is never appropriate to spend inordinate time attempting to refute the central allegations of plaintiff's case or to focus undue attention on the issues as your adversary defines them. To the contrary, the opening is an opportunity to provide perspective, context, and to otherwise demonstrate that the case, viewed more completely and objectively, represents a far different picture than portrayed by the other side.

'One might also illustrate the burden of proof in a tort case by using a drawing of a bridge, with one pier representing negligence, the opposing pier damages, and the superstructure representing causation.'

Stated another way, the defense should

change the viewpoint or context from which the jury views the evidence. Typically, providing a broader landscape casts plaintiff's argument in an entirely different light or dramatically alters the perception—*e.g.*, viewing an action through a "real time" lens rather than in hindsight.

__ Provide a Framework __ of Key Legal Principles

Regardless of the extent to which plaintiff's counsel has addressed this issue, you must set out the legal framework on which the jury will base its deliberations. It is folly to assume that the jury otherwise understands its role or the legal tools that it may use in its decisionmaking. In fact, the jury may just assume its role is simply to decide whether to award money based on nothing more than its own sense of justice. Thus, it is essential to define all key concepts, the overall structure of the trial, and the necessary elements of plaintiff's claim. And as you define the concepts, incorporate your defense strategy so that the jury understands, for example, that causation is the central theme.

— Graphically Depict Key Concepts—

Classically the scales of justice can be used to illustrate the role of the jury in weighing evidence or determining credibility. One might also illustrate the burden of proof in a tort case by using a drawing of a bridge, with one pier representing negligence, the opposing pier damages, and the superstructure representing causation. This is especially helpful since causation is often defined as a rather easy burden (increased risk of harm) while the implication that plaintiff must construct a bridge represents a much more formidable task.

— Show Respect —

The jury needs to understand that, notwithstanding your role as advocate, your actions must never be viewed as evidencing disrespect towards the parties, counsel, the court or the legal process in general.

Never be baited into an acrimonious interchange with counsel and never argue with the court. Jurors almost invariably will have a correct sense of any unfairness being visited upon you or your clients—and any lack of decorum is certain to be counterproductive. At the same time, a straightforward expression of respect for the plaintiffs and whatever injury they suffered will be well-received.

__ Tell Jurors __ What You Want Them to Do

Jurors must have a clear picture of the issues they will be called upon to decide as well as the answers you believe are compelled by the evidence.

Without exception, this requires that you, to the extent feasible, discuss in sequence each of the questions on the verdict form—capsulizing your position and respectfully requesting what answer you believe is supported by the evidence. This provides not only a guide to the issues they will have to decide, it serves as an opportunity to convey, directly or by implication, what issues are not properly part of the case.

In sum, a properly crafted opening statement puts the jury in the proper frame of mind, with the necessary understanding of procedure and the issues, to receive and evaluate evidence, and most importantly, resist any urge to reach a judgment before the appointed time.

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Identifying And Avoiding the Unauthorized Practice of Law in a Global Economy

By Alison Buchanan

Alison Buchanan

With the globalization of the economy, avoiding the inadvertent unauthorized practice of law (UPL) has become a greater concern for many practitioners. Clients' businesses span borders, as do their disputes and their employees. The conscientious lawyer may worry whether he or she is exposed to a UPL

claim each time the lawyer touches an issue involving some jurisdiction other than that in which the lawyer is licensed.

— California Laws Prohibiting UPL —

For California lawyers, several bodies of law prohibit the unauthorized practice of law. They include the California Rules of Professional Conduct (Rule 1-300 prohibits UPL and aiding and abetting UPL), the Business and Professions Code (section 6125 provides that, "[n]o person shall practice law in California unless the person is an active member of the State Bar," and makes UPL a misdemeanor), and the Rules of Court (Rule 9.40, *et seq*., contains California's temporary practice rules). Additionally, a wide body of case law provides guidance.

— Identifying UPL —

Despite the various statutory schemes prohibiting UPL, there is no statutory definition of UPL in California. Nor is there a statutory definition of what constitutes the practice of law.

Oft-cited case law defines the practice of law as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (*People ex rel. Lawyers' Institute of San Diego v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535.) The practice of law "includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court." (*Ibid.*) Other states generally define the practice of law similarly.

Most jurisdictions considering whether a lawyer who is licensed in another jurisdiction has committed UPL look at whether the lawyer has established an office or other systematic and continuous presence for purposes of practicing law. In New York, holding oneself out as a lawyer is, by itself, conduct sufficient to constitute the practice of law.

California Lawyers Temporarily — Practicing Law — in Other Jurisdictions

California lawyers temporarily stepping into other jurisdictions for professional purposes must be familiar with ABA Model Rule 5.5, the ABA's rule prohibiting UPL. Most U.S. jurisdictions have adopted some form of Rule 5.5. But only about 70% of states have adopted the portion of Rule 5.5 that allows for temporary practice, commonly referred to as multijurisdictional practice (MJP).

Specifically, Rule 5.5 (c), added in 2002, allows lawyers in good standing in their admitted jurisdiction to temporarily practice in another jurisdiction in the following four narrow circumstances: (1) where the services "are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter"; (2) where the services "are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized"; (3) where the services "are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission"; or (4) where the services "are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

Given the variations of Rule 5.5(c) amongst those states that have adopted some form of the MJP rule, and given the rapid pace in which states are responding to the increasingly global nature of the economy, lawyers seeking to lawfully engage in temporary practice in another jurisdiction are best protected by carefully eining that specific jurisdiction's version of Rule 5.5 before taking any steps. For example, New York has historically been on the more protective side, allowing almost no temporary practice, except by law students and officers for societies for the prevention of cruelty to animals. However, article 523 of the Rules of the Court of Appeals, effective December 30, 2015, expanded New York's rules to allow temporary practice by lawyers .from other U.S jurisdictions and foreign (non-U.S.) jurisdictions.

'The best approach for avoiding UPL is to know the rules of your own jurisdiction and to carefully evaluate the rules of any jurisdiction in which you plan to, even arguably, engage in the practice of law (either physically or virtually).'

California lawyers should also be aware of state-specific MJP nuances before stepping into another jurisdiction. For example, Montana only allows two pro hac vice admissions. Nevada and New Jersey both allow temporary practice, but require that the visiting lawyer register and pay a fee.

Non-California Lawyers — Temporarily Practicing Law — in California

California's Rules of Court allow temporary practice by non-California licensed lawyers in specific, limited circumstances. These rules set forth specific, separate rules for foreign legal consultants, qualified legal services providers, in-house counsel, litigation attorneys, and non-litigating attorneys.

California's rules specifically permit pro hac vice admissions, and there is no limit on the duration or the number of matters. However, if a lawyer fails to promptly seek authorization, under rule 9.47 (the rule on temporary practice for litigation attorneys), that failure ends the lawyer's eligibility for temporary practice. In other words, rule 9.47 contemplates that temporary litigation attorneys will promptly seek pro hac vice admission and seemingly punishes those who do not.

— Consequences of UPL —

The consequences for engaging in UPL, or aiding and abetting another's UPL, are substantial. Of course, the State Bar may pursue discipline based on a violation of the Rules of Professional Conduct. The Business and Professions Code provides that one who engages in UPL may be subject to criminal prosecution and fines. And, of course, a lawyer who commits UPL in another state can be disciplined not only by the jurisdiction in which he or she committed UPL, but also by his or her home state. (*In the Matter of Wells* (2005) 4 Cal. State Bar Ct. Rptr. 896.)

Additionally, while UPL is a disciplinable offense, and in many states also a misdemeanor, in at least two states (New York and Florida) UPL is a felony.

Finally, consequences for UPL can also include civil liability and, as one famous California case demonstrated, fee disgorgement. (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119.)

__ Virtual UPL __ and Recent Illustration

Of course, technology and its prevalence in modern law practice has made avoiding UPL even more challenging. A California lawyer can sit at her desk in California and, by phone, email, or other technology, provide legal advice to a California-based client regarding an employee issue in Texas. As illustrated by the recent matter, *In the Matter of Lenard* (2013) 5 Cal. State Bar Ct. Rptr. 250, physical presence is not the litmus test for identifying or establishing that a lawyer has committed UPL.

In the Matter of Lenard involved a California lawyer disciplined in California for committing UPL in nine other jurisdictions. Lenard had been performing contract work for consumer debt settlement companies. In the course of that work, Lenard sent "welcome letters" to consumer clients in various states, but none of those letters specified that Lenard was only licensed in California. Lenard evaluated the clients' eligibility for bankruptcy relief and then sent cease and desist letters to those clients' creditors, again failing to specify that Lenard was only licensed in California.

The Review Department of the State Bar Court of California evaluated Lenard's UPL culpability by examining the rules of each of the nine states involved. After doing so, the Review Department affirmed the hearing judge's finding that Lenard committed twelve acts of UPL in nine states. The Review Department accepted and affirmed the hearing judge's recommendation for disbarment.

In the Matter of Lenard serves as a UPL cautionary tale for several reasons. First, Lenard never set foot in the jurisdictions in which he was found to have committed UPL, illustrating that a lawyer's physical presence is not required to be engaged in UPL. Second, the Review Department focused on Lenard's written communications and specifically his failure to mention either in his "welcome letters" to clients or in the cease and desist letters to creditors that he was only licensed in California. The Review Department considered this to be "holding himself out" as licensed to practice in each of the various jurisdictions. Third, Lenard's discipline in California was independent of any investigation or discipline in the various jurisdictions in which he was found to have committed UPL; indeed, there is no mention in the opinion as to whether the nine subject states pursued UPL charges against Lenard.

— Best Practices for Avoiding UPL —

The best approach for avoiding UPL is to know the rules of your own jurisdiction and to carefully evaluate the rules of any jurisdiction in which you plan to, even arguably, engage in the practice of law (either physically or virtually). Ascertain whether that foreign jurisdiction allows for temporary practice and, if so, familiarize yourself with those rules and comply with them fully before engaging in the practice of law.

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A Review of Catherine L. Fisk's

Writing for Hire: Unions, Hollywood and Madison Avenue

By Marc D. Alexander

Marc D. Alexander

Don Draper, meet Dalton Trumbo. Draper, the mythical madman of Madison Avenue, highly-paid, hard-charging, creative, alcohol-addled, and alienated. Trumbo, the iconic screenwriter, victim of the blacklist, writer of Roman Holiday, Johnny Got His Gun, Exodus, also an alcoholic. Who was the most satisfied with work and work relationships? Answer: clearly,

Matthew Weiner, Don Draper's creator, producer of one of the most successful television shows ever, beneficiary of a high income, creative control, an outstanding reputation, residuals, and unionization.

In her excellent study, *Writing for Hire: Unions, Hollywood, and Madison Avenue* (Harvard University Press 2016), Catherine L. Fisk, Chancellor's Professor of Law at UCI, plunges into the history of Hollywood and Madison Avenue writers' employment relationships. The subtitle of Professor

Fisk's book, "Unions, Hollywood, and Madison Avenue," signals that she will favor the advantages of the Hollywood labor relations model, because Hollywood had unions to which actors and writers belong, whereas Madison Avenue did not unionize.

If you were ever curious about the arcana of Hollywood accounting, separated rights, royalties, residuals, script fees, bonuses, profit sharing, sequel rights, and character rights, *Writing for Hire* is guaranteed to satisfy that curiosity. Even more interesting, however, is Professor Fisk's exploration of how legal employment relationships shape the writer's own feelings about professionalism, control, autonomy, loyalty, dignity, craftsmanship, recognition, public responsibility, security, social standing, and self-worth.

Beginning with the legal premise that an author and a writer are not the same, *Writing for Hire* spins out that premise in all its intricacies. The copyright system has developed the elaborate fiction that a writer who works for hire is not ultimately the author of the work: the employer, typically a corporation, becomes the author of a work for hire, owning the copyright. Divorced from ownership of their work, and the control that comes with ownership, Hollywood writers could easily fall prey to exploitation by the bygone studio factory model.

Accepting their status as employees may have been disparaging to the self-image of writers as creative and independent professionals. But affixing the legal label of "employee" upon Hollywood writers meant they could legally unionize, for unless they were employees, they could be treated as conspirators in violation of anti-trust laws when they bargained collectively. Unionization became "a necessary trade-off for the loss of intellectual property rights."

Enter the union model, and a lengthy, sometimes bitter struggle by writers to claw back some of the bundle of rights that are part of copyright ownership. In the 1930's, during the surge of Popular Front politics and labor solidarity, Hollywood writers organized to obtain screen credit for their

'In sharp contrast with Hollywood, the advertising industry did not unionize. Instead, it developed its own professional norms and labor practices.'

anonymous work, some modicum of control over the use of their work, decent compensation, and security. The unionization of Hollywood writers eventually resulted in the Minimum Basic Agreement, providing basic rights and protections for Hollywood writers.

> *'A number of writers whose voices are heard in* Writing for Hire *express their view that they were more concerned about autonomy and self-respect than about salaries.'*

Writers' struggles to obtain attribution through the assignment of screen credits, and eventually to obtain residuals, are key parts of the story. Professor Fisk's insight is that a deep understanding of employment relations in the industry cannot look only at the formal development of statutory and common law. Instead, one must look at labor relations, evolving collective bargaining agreements, and thus to an ongoing process that is both legal and social.

The dramatic climax of the story is the blacklist: a time when many writers who had been the staunchest supporters of unions found themselves branded as communists or fellow-travelers, and ended up with their careers in shambles. The Screen Writers Guild performed a juggling act, purging its Executive Committee of communist sympathizers, maintaining that it was not a political organization, insisting that writers' politics were irrelevant to their work, and protecting members from rumors that they were communists. Studios enforced the blacklist through the "morals clause" in studio contracts, and "the blacklist nearly destroyed the Guild's contractual right to determine screen credit for those screenwriters who continued to write and sell scripts." Nevertheless, the Guild muddled through, attempting to adhere to legal processes. Credit corrections were made even decades after the blacklist had ended.

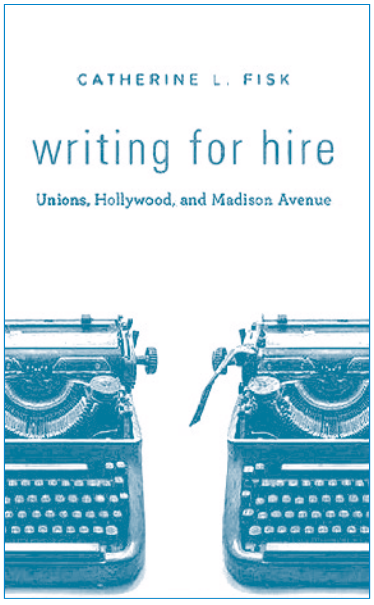
In sharp contrast with Hollywood, the advertising industry did not unionize. Instead, it developed its own professional norms and labor practices. Sponsors owned the work (and originally their advertising agencies even wrote the shows). The copywriter, part of a professional team and hopefully well-paid, remained anonymous, and television commercials did not credit the

writers who dreamt up slogans to sell drugs, cars, laxatives, and soft drinks. Recognition came in the form of industry awards, bonuses, and in-house memos. Those who wrote for Madison Avenue became symbols of alienated labor: pencils for hire, men in gray flannel suits.

The labor model in our own profession is closer to the Madison Avenue model: fealty to the client who owns the file, no fretting by the individual lawyer about copyright ownership in court filings, and no unions. But the legal profession also differs from Madison Avenue, because lawyers do sign their names on briefs, and make public appearances, probably making the attribution of credit where credit is due something less of an issue for us—though sometimes it is the person at the bottom of the signature block who wrote the brief, rather than the person at the top, who is the client contact.

A number of writers whose voices are heard in *Writing for Hire* express their view that they were more concerned about autonomy and self-respect than about salaries. Yet the bargain made by Madison Avenue copywriters suggests that writers, like most workers, must care about their income: the copywriters received good salaries in exchange for the loss of public recognition, creative control, and self-respect. Except for occasional comments that some writers were well-paid, *Writing for Hire* does not provide a basis for comparing the effects of unionization upon the incomes of Madison Avenue and Hollywood writers.

Highly skilled writers working in film and radio have had to face the prospect of short-term jobs, punctuated by periods of unemployment. As Professor Fisk explains, those are also characteristics of employment in today's expanding "gig economy." However, any bet that workers in today's gig economy can recreate the labor solidarity that motivated Hollywood writers to bargain collectively is a longshot. In fact, union workers comprise a small and plummeting percentage of the workforce, from nearly one third of the workforce 50 years ago, to less than one in ten *workers today. (See Swanson, The Incredible decline of American unions, in one animated map*, Washington Post, Feb. 24, 2014 (https://www.washingtonpost.com/news/ wonk/wp/2015/02/24/the-incredible-decline-of-american-unions-in-one-animated-map/?utm_term=.a32dcd303c00)) Certainly without that solidarity, workers in the gig economy cannot look forward to the recognition, respect, compensation, and benefits achieved for employees by the Guild.



Marc D. Alexander is a litigator and mediator at AlvaradoSmith APC. He publishes the blawg California Mediation and Arbitration and contributes to the blawg California Attorney's Fees.

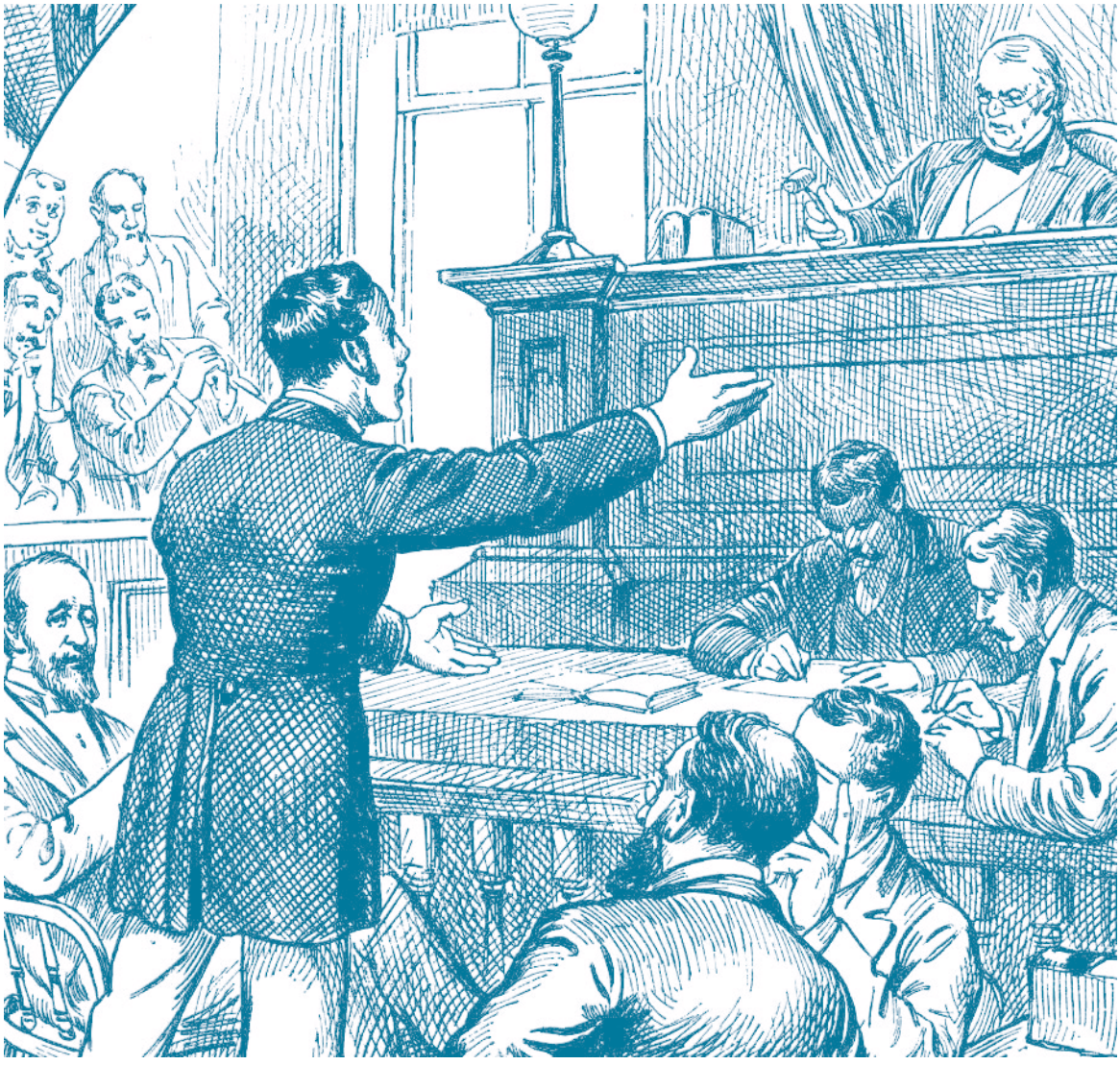
My First Appellate Argument

By Yen-Shyang Tseng

Yen-Shyang Tseng

As an associate aspiring to become an appellate specialist, I was excited (and nervous) for my first opportunity to argue before the California Court of Appeal. I had about three weeks to prepare, and there was much to be done before I would be ready. I took the advice of countless articles and prepared by mastering

the record and the law and by practicing the form and delivery of my argument.



__ Preparation Part I: __ Mastering the Record and the Law

I began by reviewing both parties' briefs and the record. I would normally also focus on the trial court's order, but in my appeal, the trial court had offered almost no factual findings or legal analysis. My goal was to have complete command of the facts, arguments, and law. It had been months since I wrote our briefs, and I tried to review them from a neutral perspective, as if I were still clerking for a judge. Reviewing both par-

ties' briefs in this manner helped me see the big picture and identify strengths and weaknesses.

'Finally, I repeatedly practiced giving my opening, presenting my arguments, answering questions, and giving my closing. By the day of the argument, I felt ready.'

As I reviewed the briefs and the record, I took notes and wrote two memos to myself. In the first memo, I identified every issue I wanted to address and every argument I wanted to make, outlining the supporting facts in the record. At this stage, my purpose was to gather my thoughts and structure my argument. In the second memo, I wrote every question I could anticipate the court asking, and my answer to each question. I constantly revised this memo until I was satisfied with my answers and could think of no more potential questions. In the process, I identified two weaknesses that I was sure the court would ask about.

To further develop my argument, I reviewed the relevant authorities until I was confident I could discuss with the court the facts, holdings, and reasoning behind each important authority, and why it supported my position. I also checked if anything new on the subject had been published since the reply brief, and found nothing.

__ Preparation Part II: __ Practicing Form and Delivery

Having re-familiarized myself with the case, I began to focus on the form and delivery of my argument. Even if I knew all of the facts and law, I needed to use my time wisely and present a coherent argument. I reduced my narrative memo down to a two-page outline. I planned to discuss the issues with the court, not give a speech, and I intended to use the outline only to ensure that I had presented all of my major arguments or to get me back on track if I got lost. I also developed concise opening and closing statements to briefly tell the Court why it should reverse the trial court's order. I suspected I would have precious few minutes (or even seconds) for an introduction and conclusion, and wanted to maximize the impact of that time.

Further, I wanted to get a sense of what oral arguments were actually like. Through the California Supreme Court's webcasts, I observed some of the best oral advocacy I had ever seen live. I also attended a CLE on

oral arguments co-presented by a Court of Appeal justice, and learned how the justices approach arguments (and the importance of directly answering "yes or no" questions). And by stroke of luck, I was given the opportunity to argue a few motions the week before my appellate argument, which gave me first-hand experience of the challenges of oral advocacy.

Finally, I repeatedly practiced giving my opening, presenting my arguments, answering questions, and giving my closing. By the day of the argument, I felt ready.

The Argument: Listen to the Court's Questions

On the morning of the argument, I practiced my introduction, arguments, and conclusion while driving to the courthouse. I arrived early and brought only the necessities for a last minute review: my outline, the briefs, and key cases and portions of the record. My case fourth on the calendar, so I observed the preceding arguments and the type of questions the court asked.

Eventually, my turn came. Despite my preparation, I was still nervous. After a brief pause at the beginning, I gave my introduction. Questioning started almost immediately. I quickly recognized the court's tentative was definitely not in my favor—and it became apparent what issues I needed to address. The primary concern was a weakness I had identified during preparation. I had anticipated these questions, and was generally able to give and explain my answers before transitioning to my affirmative arguments. At one point, the court asked for pincites to cases I had been discussing, and appeared to appreciate my offer to provide the citations on rebuttal as I did not have them on hand. I did not have to refer to my outline, and believe I presented my arguments even better without it.

After what seemed like mere seconds, it was opposing counsel's turn. I realized the importance of listening to the discussions between the court and opposing counsel. Just as their questions informed me of the issues I needed to address, the justices' questions again hinted at the arguments they either agreed or disagreed with. I took just enough notes to guide me to the issues I needed to address during rebuttal.

I began my rebuttal by providing the citations I had promised. The court then immediately asked me about the issues raised by opposing counsel. Again, I had prepared for many of these questions; one concerned another weakness I had identified during preparation. By this point, I felt comfortable answering the questions and trying to persuade the court that I was right on the facts and the law. I eventually ran out of time, but the Presiding Justice allowed me a few final remarks. I presented my conclusion and left the lectern, thankful that the court had engaged in the discussion, and feeling as if I had done everything I could for my client.

After the Argument: Reflect and Prepare for Next Time

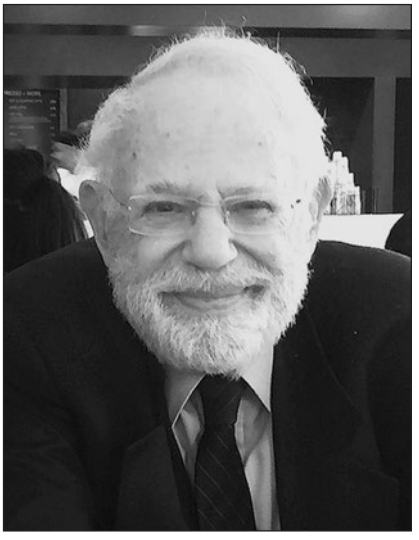
Not everything went perfectly. I did not reach every argument I wanted to make and had to quickly decide where to focus. Despite my best efforts, I did not always directly answer the questions, and the court reminded me a few times to answer first before explaining my answer. I also was asked to repeat several points because I had failed to keep my voice up. But my preparation clearly paid off. I presented my best arguments and made fewer errors than I had expected. At the end, the Presiding Justice even commented that the appeal had been well-argued by both sides! I have not forgotten that compliment, and I am already looking forward to my next appellate argument

Yen-Shyang Tseng is an associate at Keller/Anderle LLP in Orange County. ytseng@kelleranderle.com

Trial Lawyer Hall of Famer Ephraim Margolin:

An edited version of an interview

By Jeffrey Thomas



Ephraim Margolin

In 2012, the California Attorneys for Criminal Justice presented Ephraim Margolin with its "Significant Contributions to Criminal Justice" Award. Mr. Margolin was a founding member of ACJ and its first President.

__ Where Were You Born? __ What is Your Mother Tongue?

My parents met in Berlin in 1923, pursuing their respective doctorates. They married in January 1926. Not wanting to arrive early, I delayed my own birthday until October 1926. My birth created so much excitement and joy that I decided to remain an only child. My hair was orange. When I was six months old, we moved from Berlin to Poland. Mother spoke Russian. Father preferred Polish. When they needed privacy from me, they spoke French or German. I understand French and German and I speak Hebrew, studied Arabic, practice law in English. I never had one mother tongue. I have the same accent in all languages. I still count in Polish. In court, I take my notes in Hebrew. Nobody but me can read them! I dream multilingually.

Tell Us About Immigrating — to Palestine When You Were — Nine Years Old.

I was playing in the garden of our apartment house in Lodz, when our Polish landlord suddenly asked me whether my parents were ready to celebrate Passover, and had they murdered a Christian child already? I did not understand this question. "I will ask my mother," I said. Two months later, my dad borrowed funds to afford the trip, and my mother and I left for Palestine. It was 1936. Palestine saved my life. I have served as a pro bono attorney for the State of Israel for the last forty years.

Dad remained in Poland to pay off that loan. He was supposed to join us in Tel Aviv on September 3,1939. The Germans invaded Poland on September 1. Dad escaped to the Soviet part of Poland, but a Soviet court secretly sentenced him to five years of hard labor, "for the possession of a visa to Palestine" and "for speaking Hebrew." They marched him on foot to a Siberian "labor camp." We had no idea what happened to him. He disappeared. A year later, my mother started advertising in Polish newspapers in Tel Aviv for someone who may have seen him. In 1945 she learned he was hospitalized in Siberia. She began sending him food packages, which saved his life. When the Soviets recognized the Communist government in Poland, my father succeeded in obtaining a permit to relocate from Siberia. He rejoined us in 1946 and published his acclaimed book on the Soviet Gulags, "La Conditions Inhumain," published in 1952 in French, German and in Ford Foundation's shortened Russian editions. It was "re-discovered" recently to heavy acclaim and forty years after his demise, it was published in full in Paris.

Mother worked herself menially to the bone, to sustain us, to send me to school, to save my father and to maintain a home for European refugees who had no home of their own. We did not have much, but our home was constantly crowded with new immigrants, who had less. One of our stellar short time guests was Menachem Begin. He was the head of the IZL (aka the Irgun) underground, and destined to become prime minister of Israel.

In 1941, You Joined the IZL — Underground and Became Begin's — Private Secretary.

My joining was inevitable. Most of my friends were already inducted in the underground. The Irgun was in the air. I wanted to

volunteer. Still, the induction was melodramatic. An anonymous inductor hid in the shadow of a building and addressed me in a whisper. He lisped. I was supposed not to recognize his voice. I recognized him instantly. Both of us adhered to the "rules of the game." We pretended not to know each other. In the movies, such "swearing in" features dramatic props: a gun, a bible, and a flag. Not in my case. I was asked whether I was prepared to join and, if necessary, to die for the cause. I felt a surge of excitement. I volunteered to die! I stuttered a breathless affirmative. I was told that I would be contacted. I was. In time I became a three-inch mortar man, a secret radio announcer and an instructor in officer training. I volunteered for a parachute mission to go back to Poland, behind German lines.

'So, I did not attend law school in Israel. I returned to The Hebrew University in Jerusalem for my third year of philosophy, history and literature. Law or political science faculties did not yet exist.'

In 1948 I commanded Shuni, an old Turkish stronghold on the slopes of Mount Carmel, and an IZL school for 150 war refugees from 6 to 17 years old. On the day of their arrival in Palestine, I issued an order for the first Hebrew class. No one showed up. My order was written in Hebrew. No one read Hebrew!

In 1948, Begin offered me my first paying job, as his private secretary—secretary to a famous man, gradually emerging from running a secret underground! I had no idea what secretaries did. I felt simultaneously under- and over-qualified. Yet, I was "the genuine article," a third-year Hebrew University Student, veteran of IZL, multilingual, and awkwardly shy. Begin tried to do everything himself: he hand-wrote his letters, answered his phones, made his own coffee, delegating little. Initially, I had no instructions. Then, I guided foreign visitors around, spoke to them in their own languages, and bonded with some of them. This is how I met Professor Vincent Harper of Yale Law School, the "William Prosser of the Poor." I did not know Harper. I did not know Prosser. I did not know what Yale Law School was. But I liked Harper. We spent a lot of time together and he invited me to visit him at Yale.

Did You Attend Law School in Israel?

Not really. In 1948 the only law classes in Israel were stodgy, colonial British Law classes. All lecturers were self-important, pompous, dull males, trying terminally to look "British." In contradistinction to the ordinary, informal Israelis, they wore coats, ties and top hats. They carried unfurled umbrellas to class, like they did in London. Lectures were in English, and read in a monotone from notes of the same lectures delivered in the past. The notes were never published. The act of reading seemed more consequential than having things heard and understood. The faculty supplied their own legal catechism, which at the end of the year would frame the final examinations. It was cultural halitosis. We saw ourselves transformed into smaller people with smaller hats, on guard of the rapidly shrinking British empire. The faculty pretended that this was not so. Perhaps they did not know any better. Perhaps they did not want to know.

I tried to catch morsels of "wisdom" flung at me, like a hungry sea gull swallowing without chewing whatever was tossed at me from the podium. Questions were not allowed. There were no explanations. There were no books and no library. Our English did not measure up. Curriculum relied only on memory; thinking was not encouraged. "British Law Classes" was a virtual bridge between those unable to communicate and those who would not understand. The school quietly closed after the fourth lecture. There was no notice given. The British left Palestine. You knew that an elephant was there, because of what the elephant left behind.

So, I did not attend law school in Israel. I returned to The Hebrew University in Jerusalem for my third year of philosophy, history and literature. Law or political science faculties did not yet exist. My exciting, life-altering love affair with constitutional law came to me from Yale.

'I was a law professor years before I became a practicing lawyer. I taught Constitutional Law, Criminal Law, and Contracts.'

What Can You Tell Us About Your Hebrew University Experience?

In my first class, the professor asked us "why are you proud of being Jewish?" We were not used to fielding questions. Platitudes followed. Some said "because we were born Jewish." Others spoke of their religious convictions. Still others said "Look

at Einstein, Freud, and Marx." The professor dismissed all our answers. Then, with a twinkle in his eyes, he boomed: "Because you have no choice!" Suddenly, I felt expanding. We were expected to think. We were invited to argue. This is what Yale Law School would be like—a trip from passive childhood to the independence of adulthood. Twenty years later, in San Francisco, it would also be a lawyer's trip from "I" to "We," from private practice to the California Attorneys for Criminal Justice.

After my first year, another professor awarded me "the Bialik Prize in Literature." The real Bialik Prize is the highest national honor Israel awards annually for the best book of the year. Naturally, this is not what I got. I got a five-pound award, backed by a university letter recognizing my thesis about poetry, which the professor liked. It is like awarding the Nobel Prize to the smartest kid in the kindergarten.

My philosophy final consisted of a professor asking me softly "is there is God?" I was a humanist. At home, God was seldom a subject. None of my philosophy classes discussed God. The question probed my maturity. It measured not what I answered but how I answered the question. I spoke for an hour. I told the professor why I disagreed with him on almost all he stood for. I was horribly nonresponsive. And I graduated.

__ Tell Us About Your __ Law School Experience.

Graduating Yale Law School was like going through an earthquake. I was growing in all but caloric directions. Then I got a Bicentennial Fellowship at the University of Pennsylvania and spent three years in psychoanalysis. I married (a marriage that lasted 58 years until she passed away from cancer) and we left for Israel, to clerk in the Supreme and District Court. I had my basic army training and became a clientless member of the bar. We returned and settled in San Francisco, where, as an adjunct, I taught at Boalt and Hastings law schools for almost forty years. I loved it. It helped me to be a lawyer.

— How Did You Become a Lawyer? —

I was a law professor years before I became a practicing lawyer. I taught Constitutional Law, Criminal Law, and Contracts. It took five years before I could be a citizen and become a member of the bar. With practical experience, I became a good teacher. It is easy to say "In God We Trust; All Others We Cross Examine." But unless you try it in court, it is only a phrase. In my first court appearance before a bigoted judge in San Francisco, I won. I should have lost. And I threw up.

Before my admission to the bar, I worked several years as counsel for the American Jewish Congress. I recruited over a hundred local lawyers and we reasoned together about litigation issues at the cutting edge of the law. My first argument in the California Supreme Court had to do with housing discrimination. We won. We argued church and state arguments. Equal jobs accessibility and equal pay for women cases; we won. But in 1962 I had only two job offers: A $675 a month white collar megafirm, and a $200 a month third-associate position with Richard Bancroft. Richard was considered the best African-American lawyer in the city. I took the job with Richard. He threw me into dozens of cases. He was busy and I learned the loneliness of a solo practitioner. Richard became a judge. I opened my office and my only client died a week later.

I had time to burn. I chaired the Northern California ACLU legal committee and I

volunteered to try ten of their jury trials. My first jury trial was about obscene sculptures in an art gallery. I won it. For ten days running it was front page news. I represented the gallery for the next 30 years. I also won the remaining nine trials. I "resided" in the dailies. It did not occur to me that such pro bono activity would help my reputation as a lawyer. It did. I was invited to speak at judicial conferences. All my clients were saintly, principled and innocent. My practice became one-third pro bono. Doing pro bono work slows burning out. It also justifies high fees in the remaining cases.

— What Famous Trials Did You Try? —

Most of my cases should not be discussed in public, and I hate talking about cases I lost. In my office hangs a photograph (of my back) of me arguing the hypnosis-admissibility cases in the Supreme Court. All seven justices signed this picture. It was the first televised argument in California. I was proud of it because as Chair of the Amicus Committee of CACJ, we filed several briefs in the Supreme Court about hypnosis, but we did not file in the case the Court selected to hear the argument. The Court invited me formally to argue the case "due to my expertise" and I insisted on the trial lawyer arguing it with me. The Court sent me a photograph of my handsome back as I was arguing the case. All the justices signed the photo, with Justice Mosk signing above Justice Bird.

I wrote a story about "my first murder case and my wife." The trial lasted three months and ended in a hung jury. My wife accused me of abandoning her by taking a three month "vacation." I lost the appeal of John Gotti. My office split in that case over whether a client's desire not to argue certain issues controls appellate counsel. I pled well the trial of Assemblyman Nolan. In the Wygand case, I got CBS to pay all attorney fees when my informant-client was sued for a billion dollars for disclosing tobacco chemistry secrets on 60 Minutes. That was the $360 billion dollar case against tobacco manufacturers. I argued successfully one of the first California housing discrimination cases in our Supreme Court; tried the "male only" designation of San Francisco public jobs; tried a personal firing of a lesbian state doctor by the governor; and a paid-Good Friday holiday when Yom Kippur was not recognized. I also defended a marijuana grower on a local Sheriff's property. I even represented a German Shepherd mistaken for a pit bull, by an ignorant cop. We won attorneys' fees and the dog sent me flowers.

I represented an Attorney General of the United States, a law school dean, one hundred judges before the Commission on Judicial Performance, a Supreme Court justice, a Las Vegas casino president, and one hundred lawyers before the State Bar. Also, as noted, the State of Israel, a Consul of Mexico, the Street Artists Association, California Assembly members, a San Francisco mayor, a chief of police, a Santa Clara Sheriff, and a forger who paid me with a forged check.

How Did You Become a Founder — of California Attorneys — for Criminal Justice?

Criminal lawyers are loners. When we represent a client, we fight against the rest of the world. We trust no one. At a meeting at the San Francisco airport, we built a siblinghood of criminal defense lawyers. I became our first president. Seventeen years later, when I retired as our Amicus Chair, we had filed over 1700 briefs.

From the Section Chair

(Continued from Inside Front Cover)

Litigation Summit, October 13, 2017, San Francisco

This year our Section will host its first annual Litigation Summit on October 13. Save the date and plan to join us. The Summit will include multi-track educational programming, along with networking opportunities and a luncheon featuring our honored guest, Chief Justice Cantil-Sakauye. You will not want to miss this event.

Trial Lawyer Hall of Fame: Seeking Nominations

Each year, the Litigation Section inducts an accomplished trial lawyer into its Trial Lawyer Hall of Fame. In 2016, the recipient of this special award was San Francisco trial lawyer, Thomas J. Brandi. Mr. Brandi's outstanding trial work in personal injury cases and consumer class actions, along with his dedication to serving his community, made him a truly deserving recipient. The 2017 nomination process is now open. Please visit the Trial Lawyer Hall of Fame page on our Section website for guidelines. **The deadline for submitting nominations is May 8, 2017.**

Legal London, May 7-12, 2017

Every other year since 1988 the Litigation Section has led participants on a grand tour of our jurisprudential roots. "A Week in Legal London" offers an inside look at Britain's Supreme Court, its Royal Courts of Justice, and even the Old Bailey, while providing three years of MCLE credit. We thank our esteemed advisor-emeritus, Donald Barber, who, with his dedicated team, has coordinated this program for more than two decades. If you have the opportunity to join this year, go for it! Last minute registrations will be accepted as space permits. To register, visit the Legal London page on our Section website.

Webinars Welcome

As you have seen already this year, our ever-increasing webinar offerings provide interesting and cutting edge content. Our new webinars guru, Michael Kelleher, is doing an excellent job! If you'd like to put on a webinar or suggest a topic, contact Michael at michael.kelleher@cogentlegal.com.

Coaching for the New Practitioner: What They Didn't Teach You in Law School

Coaching provides a great opportunity for new attorneys to learn from local judges and experienced practitioners. Advisor Lisa Cappelluti coordinates this exceptional program, which has become a Litigation Section staple. Watch your email for this year's Coaching dates in San Francisco and Los Angeles.

Remembering Our Veterans

This year the Litigation Section will sponsor several programs designed to educate attorneys about veterans' issues. Watch for announcements about our upcoming webinar and a special live event this spring in San Diego. We salute Section advisor, Justice Eileen Moore, a veteran of the Vietnam War, and our Core Skills chair, Tom Greene, for their dedication to this issue.

Self-Study Articles Welcome

Self-study articles, available in the Bar's online CLE catalogue, provide one hour of self-study CLE credit for $15.00. See, for example, E-Discovery Skills to Satisfy the Ethical Duty of Competence and Avoid Sanctions, by Michael Kelleher. Contact me at brewerlawoffice@icloud.com if you are interested in submitting an article for self-study credit.

Executive Committee

I must take a moment to thank and applaud the 28 terrific lawyers and 5 distinguished jurists—members and advisors—who comprise the Litigation Section Executive Committee. This congenial, innovative group always impresses; even our newest members have "hit the ground running." Many thanks to all.

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