



**REMARKS FROM THE  
PRESIDENT'S DESK -  
By: *Fernando D. Vargas***

## Happy Holidays from All of Us at the Western County Bar Association

November, December and January are full of festive holidays. We at the Western County Bar Association hope you have a fantastic holiday season celebrating with friends and family.

The holiday season is upon us! It's such a wonderful time of year to get together with family and friends and celebrate all the special holidays. Thanksgiving is right around the corner, as are many other wonderful holidays including Bodhi Day (Buddhist), Hanukkah (Jewish), Kwanzaa (African American), the Mawlid (Muslim), and New Year's. Learn about all the holidays celebrated in the upcoming months with this interesting blog from the Western County Bar Association, and enjoy celebrating this special season.

### Celebrating Thanksgiving

Thanksgiving is a federal holiday that was established by President Abraham Lincoln in 1863. It's a special day that Americans set aside to give thanks for all the blessings they have received during the year. On Thanksgiving Day, people thank God, our neighbors, friends, family, and even themselves for all the effort they have put into making last year great. Many enjoy a turkey feast, a football game, and a turkey trot race, too. Happy Thanksgiving from all of us at the Western County Bar Association.

### Warm Wishes on Milaad

Milaad is a traditional Muslim holiday that commemorates the Prophet Muhammad's birthday. This year, Milaad is celebrated on December 1. Milaad is celebrated in almost all Islamic countries and many others around the world that have Muslim citizens, including the United States.

Milaad is often celebrated with carnivals, large street processions, and the telling of stories about the life of Muhammad. Children recite poetry and mosques and homes are decorated to show love for Muhammad. Warm wishes on Milaad from all of us at the Western County Bar Association.

### Honoring Bodhi Day (Buddhist)

Bodhi Day is celebrated by Buddhists around the world on the 8<sup>th</sup> day of the 12 lunar month of the Chinese calendar. This year, it falls on December 8<sup>th</sup>. Bodhi Day commemorates the day that the historical Buddha, Siddhartha Gautama (Shakyamuni) experienced enlightenment. Before Bodhi Day, the Buddha had endured years of extreme ascetic practices and had resolved to sit under a tree and meditate until he found the root of all suffering and how to become liberated from it. When he saw the morning star at dawn, he attained enlightenment and became the Buddha, also known as the "Awakened One." Bodhi means enlightenment in the Sanskrit and Pali languages.

Many Buddhists celebrate Bodhi Day with special religious services and festivals. Meditation, studying of the Dharma, chanting of Buddhist texts (sutras), performing acts of kindness for other people, and enjoying a traditional meal of tea, cake, and sharing readings are also common ways of celebrating Bodhi Day. Happy Bodhi Day from all of us at the Western County Bar Association.

### Happy Hanukkah

Hanukkah, also known as Chanukah or the "festival of lights," is a special Jewish holiday that spans eight days. This year, Hanukkah begins on December 12 and ends on December 20<sup>th</sup>. The Hebrew word Chanukah means "dedication," and this holiday celebrates the rededication of the Holy Temple in Jerusalem in the second century BCE.

Jewish people celebrate Hanukkah by enjoying a nightly menorah lighting, singing and saying special prayers, and partaking in traditional fried foods. Children play with a dreidel (a four-sided spinning top) to win a pot of coins, nuts, and other items. Happy Hanukkah from all of us at the Western County Bar Association.

*(Continued on page 9)*

## Welcome WSBCBA New Members

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Western San Bernardino County  
Bar Association

HAPPY HOLIDAYS

HAPPY NEW YEAR

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**A Second Look at “To Kill a Mockingbird” and**  
**“Anatomy of a Murder”**  
*by Mark H. McGuire, President*

I have focused these articles on the theme of taking a second look at areas of law or certain legal issues that we come across on a regular basis. The idea is that taking a second look at these issues gives us a second chance to get it more right. Our meetings this year at the Joseph B. Campbell American Inn of Court have focused on taking a second look at famous legal novels. We had high expectations for our program chairs this year, Amar Hatti and Eric Anderson, and their first two programs presented did not disappoint. The October meeting presented a second look at the legal issues involving racial bias of a jury and the use of such bias by attorneys in “To Kill a Mockingbird”. The November meeting was a reboot of the novel, “Anatomy of a Murder”, with the central issues discussed being witness coaching. Both programs presented difficult ethical issues and got me to thinking about importance of mentorship in our profession.

The panel members for the program on “To Kill a Mockingbird” were Michael Schaefer, Aric Davison and Justin King. The panel was moderated by co-program chair, Eric Anderson. Mr. Schaefer did an excellent job of setting the table for discussion regarding the use of bias to sway a jury. The trial in the novel is of a black man accused of rape during the Great Depression in Alabama. The jury is swayed by the prosecutor’s use of racial bias to wrongfully convict the defendant. Mr. Schaefer noted that such use of bias was allowed under the standards of the time, but would not likely be allowed now, even in the indirect insinuating matter in which it was done at trial in the novel. The probative value of such insinuations being for more prejudicial and probate. See California Evidence Code § 352. This also raises the issue of whether the prosecutor with the higher duty to “Due Justice”, is allowed the leeway of the “Zealous Advocate” to use every tool in the box for their client. If such use of bias is allowed, should the attorney use it? Just because a tool is allowed, is it required? Is it malpractice to not, in the furtherance of a client’s interest to push the envelope so to speak, in seeking the ends for your client, by any means allowed?

A lively discussion ensued regarding this battle in the rules between being zealous advocates and officers of the court with truth and justice as our goals. The consensus

was that an attorney could not use racial bias to sway a jury now, but about other biases? What if it is bench trial and you know the judge’s preferences? Is the use of such biases legitimate, mandated, disallowed? The rules may be set, but as society changes around the court house, we must take a second look at how the rules are implemented. These are not simple questions and the ability to discuss them as they arise with other practitioners who may have found solutions to difficult problems is paramount. There may indeed be a conflict between what is allowed, i.e. ethical, and what is aspirational, i.e. moral. Shakespeare poetically noted in Henry V that, “Every subject’s duty is to his king, but every subject’s soul is his own”. Atticus Finch is an ideal we may all strive to be like, but in reality, it is our day to day conversations with those respected members of our bench and bar which can help us all not only be ethical, but perhaps aspirational as well.

For our November meeting the JBC Inn took on a reexamination of the issues relating to the attorney-client relationship and witness coaching in “Anatomy of a Murder”. The story takes place in a small town in Michigan in the 1950’s and involves the murder of a man accused of raping the wife of a war veteran when the couple was vacationing lakeside in town. Ugo Ejike hosted the panel discussion, playing clips of the scenes from the classic 1959 film. The defense attorney, Paul Bieglar, former District Attorney of the county, is played by Jimmy Stewart. The defendant a combat veteran of World War II and Korea, Lt. Frederick Marion, is played by Ben Gazzara. Claude Dancer, the Michigan state assistant attorney general brought in to prosecute the case, is played by George C. Scott. The soundtrack, distinctive and timeless, was composed by none other than Duke Ellington as his first film score. The novel is based on a book of the same named by a retired Michigan judge, Robert Traver.

The discussion centered on the initial client interviews after the arrest of Lt. Marion. Defense attorney Bieglar (Stewart), and Marion do not have a cordial initial consultation. Lt. Marion feels he has the “unwritten law” on his side, for killing the man who rapped his wife. Bieglar informs Lt. Marion that there is no such law and that any man who kills based on that mistaken belief has committed murder and likely earned a commitment to be jailed for life. After the initial client interview, Bieglar’s alcoholic associate, Parnell McCarthy (played by Arthur

*(Continued on page 6)*

## How to Get Your Brother-in-Law Out of Jail by Robert Little

The first thing a criminal defendant's family asks is, "Can you get our loved one out of jail?" At this stage, the defendant is being held in jail on a bail in conformance with a bail schedule.

Although bail reform in California is still on the horizon, there are excellent arguments for a bail dramatically lower than the county bail schedule, or release on own recognizance.

First, the use of a "bail schedule" by a judge is arbitrary and capricious. Second, setting an unaffordable bail violates the Eighth Amendment. Third, the only legal basis for setting a bail is risk of flight.

And remember: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno* (1987) 481 U.S. 739.

### 1. Bail Schedules

Every county's judges create a bail schedule. They are for jail deputies, who must set a bond on the fly without knowledge of the defendant's particular situation. Sometimes this is incorrectly referred to as "statutory bail"; bails pre-set by statute would be illegal.

The bail schedule is authorized in Government Code sec. 72301 (bail accepted by court clerk) and Penal Code sec. 1269b (bail accepted by custodial officer).

However, once the prisoner does appear before a magistrate, it is the magistrate's constitutional duty to fix bail in an appropriate amount based upon factors relevant to that individual prisoner, and not upon any fixed schedule.

As the Supreme Court stated in *Stack v. Boyle* (1951) 342 U.S. 1, 5, the factors relevant to a determination of the appropriate amount of bail "are to be applied in each case to each defendant." Bail set solely by reference to a non-tailored schedule is therefore not set in conformance with the requirements of the United States Constitution.

There is no case in California permitting the use of a bail schedule by a magistrate in fixing the amount

of bail for a defendant appearing before such magistrate. No California case has yet directly addressed the constitutionality of such a system. However, the use of a bail schedule in such a manner has been found improper in other jurisdictions, including federally, and in state situations by the United States Department of Justice, *Amicus Curiae Brief in Walker v. City of Calhoun (Georgia)* (2016) 11th Circuit case no. 16-10521-HH, filed August 18, 2016, as well as by the San Francisco City Attorney and Sheriff.

If a Court relies upon the "bail schedule" in fixing the amount of bail, and not upon the factors that are constitutionally relevant, then the court acts arbitrarily and capriciously.

### 2. Bail Must be Affordable

Once release is deemed appropriate, "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment." *Stack v. Boyle* (1951) 342 U.S. 1, 5 [emphasis added], cited app. in *Salerno*, supra, at 752-755, see also Art. 1, Sec. 12, next to last para., *People v. Ormiston* (2003) 105 Cal.App.4th 676, 688.

The Eighth Amendment is applicable to the states. "The Eighth Amendment provides: 'Excessive bail shall not be required....' The provision is applicable to the States through the Fourteenth Amendment." *Roper v. Simmons* (2005) 543 U.S. 551, 560 [citing many cases]; see also *Schilb v. Kuebel* (1971) 404 U.S. 357, 365, cited app. on that incorporation point in *McDonald v. Chicago* (2010) 561 U.S. 742, fn. 12 [130 S.Ct. 3020, 3034-3035, fn. 12].

Therefore, counsel should be prepared to present facts specific to the defendant's ability to afford bail at bond hearing. Multi-state killer Robert Durst skipped a \$250,000 bail which was obviously insufficient. However, that same bail would be unconstitutional if set for a middle class defendant unable to post the premium.

### 3. Risk of Flight is the ONLY Basis for Setting a Bail

Two California propositions effectuate bail rules. Both Proposition 4 and Proposition 8 were

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O'Connell), "reminds" Bieglar that sometimes an attorney has to instruct the client/witness as to the possible angles available to him in his defense, lead him to the waters of a particular theory that may be helpful in the case, and let them decide if they want to drink or not. After an objection to the idea of coaching the defendant by Bieglar, Parnell responds that perhaps Bieglar is "... too pure for the natural impurities of the law". The scene is set for the second client interview and whether Bieglar will coach Lt. Marion into a justification defense of "irresistible impulse," a version of temporary insanity.

At the second client interview, Bieglar tells Lt. Marion all of the defenses and justifications not available to him and says, "You are smart, now let's see just how smart you are", asking him to think about a valid justification and just how "mad" he was that night. The panel discussion here emphasized an attorney's duty not to present false evidence and the duty of candor to the court, Cal. R. Prof. Conduct 5-200; Cal. Bus. & Prof. Code § 6068(d). The issue is, of course, the line between necessary and valid witness preparation vs. improper witness coaching. The issue of the client who tells you they are going to lie on the stand is difficult to deal with, but straightforward in terms of the ethics. We cannot suborn perjury, Cal. Penal Code § 118. But what do we do when our client asks us "Should I say.....," which could be helpful to your case? The answer is of course, if it is true, yes, if not, no. However, language and human interactions can be tricky. Innuendo can be a hint that you want them to say something that is not true or to stretch the truth, and just not tell you about it. The problem is exacerbated by the fact that we have an obligation to discuss the legal ramifications of issues with our clients, perhaps leading them to filter the information for us, presenting their story in a better light and attempting to ethically shield the lawyer.

The panel concluded that it is best to develop a good honest relationship with your client and get the facts, the real facts, as best you can, and let the chips fall where they may. Our job is to deal with the facts and the law as they are, not to make them up as we go along. Navigating the line between proper and improper witness coaching is complicated and not intuitive. It is most important to have the advice of experienced counsel to direct new lawyers on these sticky points. We can foster more aspirational aspects of our profession by passing wisdom along through mentorships.

We must remember this: our rules of professional conduct are the bar by which we are judged, not the

ceiling. We must at a minimum act ethically, professionally, and diligently, meeting or exceeding the rules. We can never do less, but we can always do more. It would be nice if there was a matrix or rules and factual scenarios for us for every situation, a lexicon of honor in the practice of law, in which we could simply ask, "What would Atticus Finch do?", turn the page and be rewarded with the right path to take. Alas, we are often more like Hamlet on the roof tops of our castles, alone whispering to ghosts of the past for guidance. It is imperative that we have mentors and that each of us mentor others, as much as possible. We often have difficult dilemmas placed before us. Time, experience and thought are our best beacons to lead the way. Those who have gone before must shine the light for those following not to stumble on the same stones.

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## **December Calendar 2017**

**December 1 - Milaad**  
**December 8 - Holiday Celebration,**  
**Toys for Tots**  
**December 8 - Bodhi Day**  
**December 12-20 - Hanukkah**  
**December 25 - Christmas Day**  
**December 26-January 1 - Kwanzaa**  
**December 31 - New Year's Eve**

*(Continued from page 4)*

on the June 1982 ballot. Because Proposition 4 got more votes, it became the operative law in California as Art. I, sec. 28 of the California Constitution. Proposition 4 made risk of flight the only criterion of the setting of bail, consistent with prior state law; Proposition 8, which never took effect, included other factors, such as “public safety.”

“Because Proposition 4 received a greater number of votes, the bail provisions of Proposition 8 never went into effect.” *People v. Barrow* (1991) 233 Cal.App.3d 721, 723, cited app. *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1211; *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4, *People v. Standish* (2006) 38 Cal.4th 858, 874-875. (See also editor’s notes following, respectively, Article I, section 12, and Article I, section 28, of the California Constitution in the West’s Annotated Codes rendition.) That is, the Article I, section 28, provisions regarding bail was and is a nullity.

Therefore, only the criteria contained in Article I, section 12, of the California Constitution (and only the ones not inconsistent with the Eighth Amendment), is flight risk. (Pen. Code §§ 1270, 1275 to the contrary notwithstanding, as violative of the Constitution.) There is no “public safety” criterion recognized in section 12. That is, the sole criterion remains that of likelihood of appearance. *Van Etta v. Scott* (1980) 27 Cal.3d 424, 438, citing *Underwood*; *In re Samano* (1995) 31 Cal.App.4th 984, 992.

See, e.g., *Ormiston*, supra at 688 [emphasis added], citing many cases: “The sole issue at a bail or OR hearing is whether the detainee will appear for subsequent court proceedings if released, and the sole purpose is to ensure the defendant’s attendance in court when it is required.”

## **Conclusion**

Bond hearings are contested hearings before a neutral magistrate. Counsel should be prepared to argue that use of a bail schedule would be arbitrary and capricious, that the bail must be affordable to the particular defendant before the court, and that flight risk is the only criterion for calculation of bail.

*Robert Little keeps his office in Rancho Cucamonga.  
 Email: remand@gmail.com.*

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(Continued from page 1)

### Joyous Kwanzaa

Kwanzaa comes from the Swahili word that means “first”—it’s a reference to the first fruits of the harvest. Kwanzaa is celebrated from December 26 - January 1. Dr. Maulana Karenga introduced this holiday in the US in 1966 as a way for African Americans to celebrate their heritage. She indicated that there are seven principles of Kwanzaa—unity, self-determination, collective work and responsibility, cooperative economics, purpose, creativity and faith.

Kwanzaa is celebrated by exchanging gifts, lighting candles, feasting, decorating the home with symbols of Kwanzaa, by saying special greetings, by attending and participating in Kwanzaa ceremonies, and by finding creative ways to express the seven principles. Joyous Kwanzaa from all of us at the Western County Bar Association.

### Merry Christmas

Christmas is a Christian holiday that commemorates the birth of Jesus Christ. Many people celebrate Christmas by singing

carols, eating special cookies, decorating trees, and exchanging gifts. Each year, Christians around the world celebrate Christmas on December 25. Merry Christmas from all of us at the Western County Bar Association.

### Happy New Year

The New Year is celebrated on January 1 by people in any country that follows the Gregorian calendar. Most countries in the world follow the Gregorian calendar. Traditions vary country to country, but here in the US, many people mark this special occasion by going to parties, wearing festive Happy New Year hats and glasses, and by kissing at midnight. Happy New Year from all of us at the Western County Bar Association.

**As you can see, November, December and January are full of fun, festive holidays here in the US and around the world. Whichever holidays you and your loved ones celebrate during this special time of year, we hope you have a wonderful holiday season. Blessings from the Western County Bar Association!**

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If you know of someone who merits this award, please use the form below to make your nomination and return it to the Bar Association no later than **Friday, January 5, 2018**.

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A professional headshot of Greg Rizio, a middle-aged man with short, wavy grey hair, smiling warmly. He is wearing a dark suit jacket, a light blue dress shirt, and a blue patterned tie. The background is a blurred indoor setting with a wooden door and some greenery.

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# NEWS BULLETIN

## Save the Dates

**WSBCBA and SBCBA Holiday  
Celebration - Toys for Tots  
December 8, 2017 @ 6:00 p.m.  
Redlands, CA**

**Judicial Officer of the Year  
Awards Ceremony  
March 8, 2018  
DoubleTree by Hilton  
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