



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

Answering Hate With Love

On February 14th, former student Nikolas Cruz walked into Marjory Stoneman Douglas High School in Parkland, Florida and shot 17 people dead with an AR-15 rifle. More than a dozen others were injured. This sort of horrifying violence has become all too familiar in America. This particular incident was the 17th school shooting within the first 45 days of 2018.

Despite all kinds of efforts to prevent future school shootings from tragically cutting students' and educators' lives short, the violence keeps happening. It's easy to feel powerless in this situation, particularly as a person just reading the news in a distant city, with no personal connections to any of the families who have lost loved ones.

But of course, we need to do something. And it is not using this latest tragedy as fuel in a political debate, or relying on distant policymakers in Washington DC or Sacramento to solve the problem for us. It is taking action to strengthen our communities by reaching out on a personal level to the individuals we see around us who need help.

In his remarks after the Florida shooting, President Trump urged us all to take this kind of personal action: "Answer hate with love. Answer cruelty with kindness. We must also work together to create a culture in our country that embraces the dignity of life, that creates deep and meaningful human connections, and that turns classmates and colleagues into friends and neighbors...It is not enough to simply take actions that make us feel like we are making a difference. We must actually make that difference."

As attorneys, we obviously respect and uphold the law. But it is important to remember that without the support of the people, and without the hard work of individuals who

implement and uphold it, the law is just words on paper. And no matter how strong the law, a determined evil-doer can find a way around it.

This is why supporting legislation that promises to deliver a solution like gun control or better mental health services is not enough. Such a response may make us feel like we are "making a difference," but it will not address the soul-sickness at the root of every school shooting. To root out this sickness, we need to practice love, kindness, respect, and forgiveness in our daily lives. You never know who you will touch with such love, how their lives will be changed, and how the world will change as a result.

As attorneys, we tend to come into situations after something negative has already happened. In many instances, it is not only our job to identify the cause or source of a problem, but also to focus on helping our clients through verdicts and settlements that change policy, and with it, improve the safety of our society. Our specific role is to help our clients and their families move forward in the aftermath of a tragedy. And though we cannot change the past or undo the harm, we can make sure families receive the justice and other benefits to which they are entitled, and that new and safe policies are implemented that increase the safety of our society.

In the midst of the debate on how to prevent future school shootings, it is important not to lose sight of the

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Inns of Court

Our Second Look at Sexual Harassment, Assault, and Offensive Behavior – Take #2

by Mark H. McGuire, President

This two part article involves my thoughts on the current sexual harassment scandals so prevalent in the media. I wanted to know if there was something different about this issue in the legal field and how we, as members of this profession, should address it. To assist me along this path I interviewed two mentors of mine, Joan Nelms and Jack Osborn. In part one I presented Ms. Nelms' thoughts on the subject. She pointed out the need for both men and women, in professional situations, to be careful not to put themselves in situations where they could be subject to harassment or to be wrongfully accused. She also pointed out that given the law's requirements involving burden of proof and due process, we should be mindful not to convict people based on mere accusations alone. In Take 2, we will explore Mr. Osborn's rebuttal to Ms. Nelms' ideas. Mr. Osborn's rebuttal reminded me of another lesson I had learned from my father, for which I will propose not a solution but a possible path to a solution.

Mr. Osborn pressed two points. First, he stressed that many women are employed in places where they cannot always choose the situations in which they are going to be – and thus may possibly subject themselves to harassment with no error of conduct on their part. Second, he reiterated several times that the problem is the same in the legal field as in others, but that given the nature of our profession, we likely have a higher degree of duty to each other than in other professions.

His main point was that our profession may be different in one regard: that we all have a duty to each other, in order to raise the standards in our profession as a whole. Meaning, we not only have a duty to correct each other upon the occurrence of inappropriate behavior but we also have a duty speak privately to the parties after the fact, to raise the standards of behavior to come. Mr. Osborn stated that in some professions, the first step – standing up at the time to the bad behavior – may be sufficient, but not in ours. That may be the easy part. The harder part is likely the second conversation with the perpetrator of the bad behavior, attempting to educate and assist them.

The analogy, Mr. Osborn pressed, is that of our duty to our colleagues when it comes to drug and alcohol abuse of a fellow member. We have a duty to each other regarding these matters. It is not sufficient to raise the issue, stop the bad behavior in the moment, and move on. The harder conversation with the parties must be had. Why did they say the things they did? Why did they think that behavior was appropriate? If we do not have the second harder conversations we not only do a disservice to the parties involved but to our profession as a whole. We must be the change we want to see in the world and that not only comes from standing up against wrongs, but for bringing up those who have fallen behind.

Mr. Osborn's points reminded me of one such occurrence I was witness to early on as a new lawyer. I was one of the attorneys involved in a heated four way settlement discussion. Present was an older male attorney, an older female attorney, a younger female attorney, and myself. The older male attorney was attempting to take charge of the conversation by belittling the younger female attorney – essentially patting her on the head saying, "There, there, you will learn how to do this one of these days, honey." I spoke up saying that the comments were inappropriate and not helpful to the task at hand. The discussions continued on but to no resolution. The older female attorney pulled me aside after saying that it was inappropriate for me to step in as I did to defend the younger woman. She explained that I needed to leave her on her own so that she could learn to stand up for herself and her client. Essentially she was charging me with sexism for defending the younger female attorney.

I have thought about this occurrence many times over the years. In the end I came to realize that given my upbringing (raised by two teachers and four World War II generation grandparents from Texas), I was likely speaking up because the comments were inappropriate and not because of the gender of the other attorney. Yet it always makes me think twice. There was likely a better way I could have spoken up in the moment. Perhaps speaking to the older man and younger woman privately could have had longer lasting implications. I could have done a better job of using Ms. Nelms' advice and changing the situation; and Mr. Osborn's of mentoring the colleagues. We all have a duty to ourselves not to create or choose

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**SETTLEMENTS UNDER CODE
OF CIVIL PROCEDURE
SECTION 664.6
by Randal Hannah**



Code of Civil Procedure §664.6 has been in existence since the early 1980's. As initially enacted, Section 664.6 allowed the court to retain jurisdiction to enforce a settlement agreement, but only so long as the matter was pending. If the action was dismissed, the court's jurisdiction to enforce the settlement agreement was terminated.

In 1993, the legislature amended the statute to allow the parties to request the court to retain jurisdiction to enforce the settlement. With this addition, Section 664.6 has become ubiquitous in settlement agreements, allowing the parties to dismiss their action; the court to remove cases from the civil active list; and still allowing the parties to enforce the terms of their settlement. That being said, there are areas of concern that must be considered by counsel.

Any issues arising from a motion to enter a judgment under Section 664.6, after a dismissal, must first pass a jurisdictional hurdle to determine the court's authority to act. In those instances when a dispute arises subsequent to settlement and the dispute is litigated, the interpretation of the jurisdictional requirements of Section 664.6 is a first step to obtain entry of a judgment to enforce the agreement.

As long as a case has never been dismissed, there is no question of the court's jurisdiction to enforce a settlement agreement. Once a dismissal has been entered, the court is apparently divested of both personal and subject matter jurisdiction (*Wackeen vs. Malis*, 97 Cal.App.4th 429; 118 Cal.Rptr. 2d 502), excepting certain statutory rights, including the right to return to the court under Code of Civil Procedure §473. The loss of this jurisdiction would have a devastating effect on the ability of a party to receive the benefit of the settlement.

There are three basic requirements that must be met before a court can retain jurisdiction under Section 664.6. (*Wackeen*, supra) The first requirement is to request the court to retain jurisdiction during the pendency of the case. Once an unrestricted dismissal is filed, the court is completely divested of jurisdiction not previously retained. Failure to comply with this requirement is more likely if the principal obligation of settlement is the

payment of money. Once payment is made, it is far too easy for the parties to reach an agreement and dismiss the case without advising the court of the terms of dismissal, even if there are ongoing obligations contained in the settlement agreement other than a monetary payment.

The courts have been colorful in emphasizing the need to keep the court informed and to request the court to retain jurisdiction prior to the dismissal of the action. One court noted that "[A]lthough section 664.6 provides a valuable tool in aid of enforcing settlements, it does not float in the ether to be drawn upon whenever a party seeks enforcement." (*Hagan Engineering, Inc. vs. Mills*, 115 Cal. App. 4th at p. 1008.)

To avoid this pitfall, the dismissing parties should consider the additional expense of making an appearance before the court to request the court to retain jurisdiction before a dismissal is filed.

The second requirement is that the parties themselves must enter into the stipulation. A stipulation to retain jurisdiction between counsel is insufficient. In a typical mediation, with all parties present, this may be a non-issue. In the context of a case managed by an insurance carrier, the failure to have the real party in interest present and available to sign the settlement agreement would appear to prevent enforcement of the agreement pursuant to Section 664.6.

Finally, the request to retain jurisdiction must be made, either in a writing signed outside the presence of the court, or orally before the court. In the latter case, the oral stipulation must also be by the parties. If the stipulation is made orally before the court, it must be by the parties individually, not by counsel. If by a written agreement, also signed by the parties, Section 664.7 indicates that as long as an agreement has been signed, the court can retain jurisdiction even though the agreement has not been submitted to the court.

The drawback to preventing the court from reviewing the written agreement is that the court is effectively retaining jurisdiction to review the agreement at a later date, and then decide if the agreement properly creates a basis for jurisdiction to enforce the settlement under Section 664.6. There

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compromising situations that lower our standards of civility and professionalism. Yet when those situations happen, we do have a duty to each other not only to speak up at the time, but also to speak to the parties in an effort to raise their standards as well.

Recently I have been reading reports of female politicians who have been at the forefront of the anti-sexual harassment embroiled in their own scandals and investigations. I have also been reading articles about the unintended consequences the movement has created in men in business and positions of power choosing not to have any female mentees, not ever be alone with a woman, and even being fearful of taking an Uber from a female driver alone, for fear of accusations being laid against them and believed outright. The harm in our society of having a system where men cannot be alone with women in professional situations is vast and goes without saying that we cannot go down that path. What is the solution, then? We all want the truth of abuses to be let out (exposed?) but the result should not be that all men are assumed guilty and shunned from their profession based on their gender. We cannot have men and women retreat to separate work spaces or impose such Draconian rules regarding interactions that no mentoring and exchange of ideas is done.

Attempting to find a solution to this conundrum, I thought of what is missing from this movement: statements of what we want out of men. We are only reporting on bad behavior. There is no #mydad, #mybrother, #myhusband or #myboss, laying out stories of good male behavior that should be modeled. We are focused on the negative – partially because scandal sells, and men are not reminded of what they are supposed to do, only what they are not supposed to do. This reminded me of when I was teaching my sons how to ride a bike. I never told them, “don’t hit the tree”, or “look out for the light pole”. Why? When we focus on what not to do, guess what, we end up there. If you tell the kid not to hit the tree, they will focus on the tree and steer right towards it. When you learn to surf, you are taught to turn your head in the direction you want the board to go, and your body and the board will follow. If we want men to behave better, we must model that good behavior. I do not have all the answers for what that behavior should be, but I know it is missing from the conversations at present.

To model good behavior we need good leaders. This reminded me of how my father (John McGuire) was brought in to model good behavior after he had retired

from a small college as a professor. A few years after he left, the school was consumed by a grade fraud scandal and most of the staff fired. An outside Chancellor was brought in to run the school for a year and hire all new staff. He did something very wise right off the bat. Knowing that he did not know the community and could not accomplish the Herculean task of hiring all new staff to keep the doors open on his own, he sat the remaining skeleton crew of staff down and asked them, “Whom do I hire to assist me?” To a person they all said, “You go get John McGuire.” That has always stuck with me. There are good men to model good behavior. Perhaps we should spend more time telling their stories as well.

Of course we are only in the early stages of this movement. We are not going back to the way things were, and that is a good thing. The truth of abuses must come out but there must be a place for men in the dialogue as well. One model for a resolution to this problem I have been looking at is the Truth and Reconciliation Commission (“TRC”) that was set up after the end of Apartheid in South Africa. The system was not perfect but created a space for perpetrators and victims to tell their stories in an effort to seek reconciliation between abused black communities and white political leaders. One of the things the anti-sexual harassment movement has right is that the truth must come out. There can be no change without it. But it cannot be that the end result is to assume that all men are perpetrators on their own; or that a perpetrator, once he honestly admits fault, can never work in the profession again. The concept of repentance means to turn and walk in the other direction. It is not just to admit fault but to change one’s behavior, but to turn and walk in the other direction. Men who have committed these horrible wrongs to women at their workplaces must be called out. But we must give them a road to walk back on once they turn and repent. That road must be the model for good behavior, not just a series of mile markers telling men what not to do.

March 2018 Calendar

March 8 - Judicial Dinner
March 17– St. Patrick’s Day
March 25 - Palm Sunday
March 28 - MCLE
March 30 - Good Friday

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are advantages and disadvantages to both methods. Failing to disclose the agreement to the court clearly provides a judicial economy and avoids reviewing an issue that may never arise. In the alternative, reviewing the agreement in the present allows all parties and the court to consider the agreement in light of present facts, not after the underlying facts have become stale, possibly years after the litigation.

There are a few approaches to avoid the above limitations and still provide the dismissal with prejudice that defense attorneys demand. One option identified by the court of appeals is to file a motion to set aside the dismissal pursuant to Code of Civil Procedure §473. This option is limited to the extent that it is based on excusable neglect and has a six-month time limit. It is also more complicated and expensive based on the costs of filing the motion, especially given the volume of case law surrounding Section 473. Another option is to provide a limited form of dismissal, requesting the clerk to dismiss the case with prejudice in its entirety, but specifically providing the dismissal does not apply to the court's authority to enforce settlement pursuant to Section 664.6. A third, and probably the most effective option, is for the attorneys and/or the parties, either at

the time of mediation or subsequently, to executed a stipulated order requesting the court's signature formally dismissing the case, with prejudice, while retaining jurisdiction to enforce the settlement.

A separate concern arises if a court is concerned by whether a case is dismissed with or without prejudice. However, the nature of the dismissal should not be controlling to the extent that the application of Section 664.6 appears to be entirely jurisdictional. As long as the court retains jurisdiction to enforce the settlement, the term "with prejudice" would appear to mean only that the parties are prevented from re-filing the same action at a later date and are limited to either enforcement pursuant to Section 664.6 or a separate lawsuit to enforce the settlement agreement as a contract.

In the end, litigation does not end with settlement or payment. It is important to understand that once a settlement agreement has been reached and payment is made, the attorneys should evaluate the nature of the case, the potential for further proceedings and then prepare their dismissals to retain jurisdiction over the settlement agreement while also dismissing the underlying causes of action.

Western San Bernardino County Bar Association 2018 - 2019 Slate of Officers and Directors

A vote of the members of the association will be conducted pursuant to the bylaws of the organization, if required, on a date and time to be announced later.

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individuals whose lives have been lost in the “Valentine’s Day Massacre” at Marjory Stoneman Douglas High School:

Alyssa Alhadeff, 14, a talented soccer player; Gina Montalto, 14, a gifted artist; Martin Duque Anguiano, 14, a sweet and funny young man; Nicholas Dworet, 17, recently recruited for the University of Indiana swim team; Jaime Guttenberg, 14, a beloved daughter and sister; Luke Hoyer, 15, a teen with a contagious smile and laugh; Cara Loughran, 14, described by family as a beautiful soul; Joaquin Oliver, 17, a newly-minted US citizen; Alaina Petty, 14, dedicated to community service; Meadow Pollack, 18, a senior with college plans; Helena Ramsay, 17, a kind and thoughtful person and a top student; Alex Schachter, 14, a talented musician;

Carmen Schentrup, 16, a National Merit Scholar semifinalist; Peter Wang, 15, junior ROTC member; Scott Beigel, a geography teacher; Chris Hixon, an athletic director; and Aaron Feis, a fearless football coach who took a bullet for his students.

The families of the victims will need our support and prayers. As President Trump put it, “In times of tragedy, the bonds that sustain us are those of family, faith, community and country. These bonds are stronger than the forces of hatred and evil. And these bonds grow even stronger in the hours of our greatest need. And so always, but especially today, let us hold our loved ones close. Let us pray for healing and for peace and let us come together as one nation to wipe away the tears and strive for a much better tomorrow.”



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Honoring

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**San Bernardino County Superior Court
Rancho Cucamonga**

**Thursday Evening
March 8, 2018**

**5:00 p.m. ~ Social Gathering
6:00 - 8:00 p.m. ~ Dinner & Program**

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WSBCBA MCLE

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