Tips from a Long-Time Judge Pro Tem
By Miranda Franks, Esq.

I have served as a Judge Pro Tem in the San Diego Superior Court, Probate and Small Claims Divisions, since 1998. This opportunity has been rewarding and educational. I recently had the privilege of speaking to the Probate Lawyers of San Diego about my experiences and observations, which are shared below. While the discussion was tailored to the probate attorney audience, the suggestions are applicable to all practice areas.

Top Ten Things I’ve Learned about being a Successful Judge Pro Tem:
1. Always be polite and patient. Encourage the parties and counsel to show respect for each other and the court process. For many individuals this is their first and only time in a courthouse.
2. Allow each party to address the court, ask if anyone has anything else to offer before making a decision. Encourage appropriate comments from unrepresented litigants. An unrepresented litigant may actually be the “good sister” and the “evil sister” may have learned counsel who prevails due to intimidation. Create an environment where parties feel that they have an equal opportunity to be heard.
3. Encourage the parties to discuss settlement and limit the number of items to be determined by the court.
4. Don’t rely upon the notes set forth by the probate examiner. Review the pleadings and applicable rules and statutes to determine whether or not the petitioner has properly plead his case.
5. If it is determined that the probate examiner’s listed defects are valid, encourage counsel to cure defects if a cure can be accomplished with easy explanations. There is typically no official record. Approvals subject to written declaration will show evidence of the cure, or direct the minute order to reflect the explanation and findings.
6. Pay attention to examiner comments and determine if further inquiry is required. Look to applicable statutes and rules. Take steps to limit continuation dates for unnecessary reasons.
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7. Make very clear findings for the clerk to enter into the minute order. Again there is no court reporter so properly crafted minute orders are crucial. Third parties who are not present in court must be able to understand and abide by the minute orders.

8. Make sure that all of the findings required by the statutes are set forth in the minute orders.

9. Starting the calendar with pre-approvals and requests for non-contested continuances makes the calendar run quicker and smoother. Don’t let attorneys make argument while asking for a continuance—many may try to advance their case.

10. Review the stipulations and settlements entered into by the parties before accepting them. Make sure that all interested parties which are affected by the settlement have been given notice and the opportunity to participate in the settlement.

Top Ten Things I Learned about Practicing Law while serving as Judge Pro Tem:

1. Always be polite and patient. Encourage clients to show respect for opposing party and counsel and respect for the court process. Explain what will happen at each of the various types of hearings so that the client understands what is happening in his case.

2. Don’t show signs of displeasure or irritation from the blabbering, non-stop rhetoric that flows from the unrepresented party. The judge is allowing the litigant to express himself and perceive that he is given fair treatment by the court.

3. Discuss settlement with all counsel and limit the number of items to be determined by the court. The amount of cases in the probate court has steadily risen and for judicial economy seek judicial decisions in only those matters which truly cannot be settled or compromised.

4. Don’t rely upon the notes set forth by the probate examiner. Review the pleadings and applicable rules and statutes to determine whether or not the matter has been properly plead. Be ready with a supplement or declaration to further explain the filings.

5. Pay attention to examiner comments and be prepared for the judge’s further inquiry. Look to applicable statutes and rules. Continuation dates are set so far out—take every step to avoid a continuation date.

6. Make sure to submit an order prior to the hearing date, or have a few copies ready at the hearing along with white-out, a black pen, stapler, check book, self-addressed return envelope if a written order is required. If a written order is not required, ask the judge to have the minute order reflect all required findings.

7. Don’t assume that the court remembers the prior actions which have occurred in the case. Many cases have multiple actions as trust, probate, and conservatorship administrations continue through multiple years. Provide a brief history of the case in the opening pleadings for the matter before the court.

8. Make pleadings as clear and concise as possible because no one wants to read through long convoluted pleadings to get to the central core of the petition.

9. Make sure that all interested parties are involved in the settlement discussions and decisions, and that they actually sign the written document memorializing the settlement and resolution of the case.

10. Finally, judges are human and while they strive to create a fair, balanced and unbiased atmosphere in the courtroom, sometimes they may display negative reactions toward counsel, parties, or witnesses—give them a break, remain civil and keep your composure.

If you are interested in volunteering as Judge Pro Tem, you can obtain additional information on the program, eligibility and training requirements at: www.sdcourt.ca.gov.

About the author … Miranda Franks, Esq. is a long time Foothills Bar Association member and past president. Ms. Franks has comprehensive experience in estate planning and business planning, litigation involving senior placement and caring, and estate and trust disputes. She also serves as an Adjunct Professor at Cuyamaca College, Paralegal Studies Program, in Wills & Trusts.
Police Destruction Is Not Inverse Condemnation

By Keith A. Jones, Esq.

One of my law professors observed that many lawsuits are the product of strange circumstances. For instance, a recent appellate decision from South Carolina demonstrates how a bizarre situation for a commercial property owner led to litigation.

The police chased a suspect who fled into a convenience store where the suspect took the store owner hostage. The police tried a variety of methods to rescue the hostage and to induce the suspect to surrender. Verbal negotiations and cutting off power failed. The suspect continued to hold his hostage even after the police pumped tear gas and pepper spray into the building's ventilation system. After twelve hours, the police breached the building's wall with a bulldozer, apprehended the suspect, and rescued the owner. However, the owner's building had been so severely damaged that the owner couldn't enter the premises or reopen for business.

The building owner's course of unfortunate luck did not end after the police rescued him. Rather, the city determined that the damaged building didn't comply with its vacant commercial building ordinance and ordered the owner to repair it. The owner maintained that he wasn't responsible for the unusable condition, and refused to comply with the city's order to correct the alleged violation. Consequently, the city demolished the building. The owner sued, claiming negligence and inverse condemnation based on the legal theory that the police's action constituted a taking of his property and his business.

The trial court granted summary judgment for the city on the inverse condemnation claim. The jury heaped further misery onto the owner, finding in favor of the city on the owner's negligence cause of action. In a split decision, the South Carolina appellate court affirmed the judgment for the city.

The appellate court noted that South Carolina's Constitution on taking is similar to the U.S. Constitution's Fifth Amendment. South Carolina's Constitution states: "private property shall not be taken . . . for public use without just compensation being first made for the property." The appellate court acknowledged that inverse condemnation occurs when a city physically appropriates private property or imposes limits on its use.

In this case, the majority adopted the position of most states that a compensable taking does not occur when private property is damaged by law enforcement officers who are performing their duties. The rationale is that law enforcement should not fear that their police actions will result in an unconstitutional taking.

Interestingly, two justices supported the majority opinion, one agreed with the result only, and the remaining two separately dissented. One dissenting justice distinguished the facts by reasoning that no taking should result when a suspect's property is destroyed during the police's apprehension efforts, such as breaking down doors and windows to capture a suspect. The justice reasoned that: "...we are presented with the rare situation of a wholly innocent property owner whose property was destroyed by the actions of law enforcement."

The second dissenting justice likewise focused on the fairness aspect, concluding that the property had been damaged so significantly to constitute a taking. Moreover, the taking clearly served the public use since it resulted in the apprehension of a dangerous suspect.

No doubt the unsuccessful property owner thought that his strange circumstances which led to his lawsuit ended with an even stranger result.
The Importance of Taking a Vacation
By Cheryl L. Stengel, Esq.

Many of us in the Foothills Bar Association are in solo practice or a principal of a small firm and as such, there are many benefits. One is that you can (theoretically) take a vacation whenever you want, without having to ask “the boss”. But, there are also many drawbacks. That includes feeling like you can never truly take a vacation.

This is a common concern for most small business owners. According to the 2013 Sage Reinvention of Business Study, 43 percent of small business owners take less vacation time than they did five years ago. And many of those “vacations” are no more than an extended three day weekend.

Our reluctance to take time away from work is not surprising. We may miss out on a new client or feel so buried with work we simply cannot take time off. There are compelling economic reasons, as well. Time away from work means fewer billable hours and a drop in revenue. But, small business owners who do not take a meaningful break risk burnout, especially in a high-stress profession like the practice of law. In fact, taking time away from work can improve your overall productivity and mental health.

Of course, it’s difficult to schedule a vacation far in advance as new cases, new deadlines and other obstacles always seem to interfere. But, most attorneys know their schedule a month or two in advance. Be flexible and book your trip later, when your calendar for the near term is known.

Avoid causing alarm to clients, whose idea of an emergency is often much different than ours. Advise current clients in advance of your vacation and unavailability during the scheduled time frame. The same may apply for opposing counsel in certain matters. With technology, keeping in contact with your office can be done easily and with little intrusion. Rather than calling in daily for voice mail messages, you may wish to arrange for someone to check your messages and return phone calls, for no other reason than to advise callers that you are away. If not, an outgoing message on your voice mail to advise callers that you are out of town and will return their call when you are back in the office will suffice. Check your e-mail and respond as necessary once per day or every other day. Keeping in basic client contact is much less intrusive when done by e-mail rather than by phone.
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Find another solo attorney in your practice area to act as back up in the event an emergency does arise while you are gone. Many courts have technologically evolved to provide electronic notice when pleadings are filed in your cases. Checking your e-mail every day or two will alert you if an emergency motion is filed that requires a quick response or appearance or perhaps a simple notification to the Judge’s clerk that you are away and need additional time to respond. You may wish to leave this attorney’s contact information on your outgoing voice mail message as a referral for new clients with emergencies. The other attorney may be able to convince the new client that their “emergency” is not dire and they can wait for you to return.

The importance of taking time away from work has even been recognized by the United States Court of Appeals for the Ninth Circuit. In Ahanchian v. Xenon Pictures, Inc., the Ninth Circuit reversed the district court’s grant of summary judgment against an attorney’s client, where the attorney was late filing a responsive pleading that was due the day after the Labor Day holiday weekend. The lawyer had a previously planned out-of-state family vacation and opposing counsel intentionally timed the filing of the motion to minimize the number of working days available to respond. The Ninth Circuit stated: “Attorneys, like everyone else, have critical personal and familial obligations that are particularly acute during holidays. It is important to the health of the legal profession that attorneys strike a balance between these competing demands on their time.” Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253 (9th Cir. 2010).

You are helping yourself and your family, your colleagues and your clients by taking occasional time away from your law practice for fun and relaxation. With some planning and organization, your time away will be as rewarding and low-stress and possible.

SAVE THE DATE

The Foothills Bar Association’s annual “Hard to Get” MCLE program will be January 18, 2017 at the La Mesa Community Center. This program will feature excellent speakers on legal ethics, competence issues and elimination of bias. Food and beverages will be provided. Details to follow soon.
Looking for Speakers for Future FBA Civil Litigation Section Meetings:

If you have a litigation topic you would like to present at an upcoming Civil Litigation Section MCLE meeting, please contact Section Co-Chairs Mark Raftery at mark@markrafterylaw.com or Elizabeth Smith-Chavez at liz@smithchavezlaw.com.

Foothills Bar Association Notice of Board Meeting:

The Foothills Bar Association Board of Directors meets on the third Tuesday of each month. The next meeting will be on October 18, 2016 at the Kriger Law Firm, 8220 University Avenue, 2nd Floor conference room, La Mesa, CA. The meeting will begin at 4:45 p.m. If you want your voice to be heard in policy discussion and upcoming events planning or would simply like to learn more about the organization, your attendance is welcome.

The Family Court needs settlement conference judges. Please volunteer and share your expertise.
Contact Kelly Fabros at 619-456-4065 or Kelly.Fabros@SDCourt.CA.Gov.
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