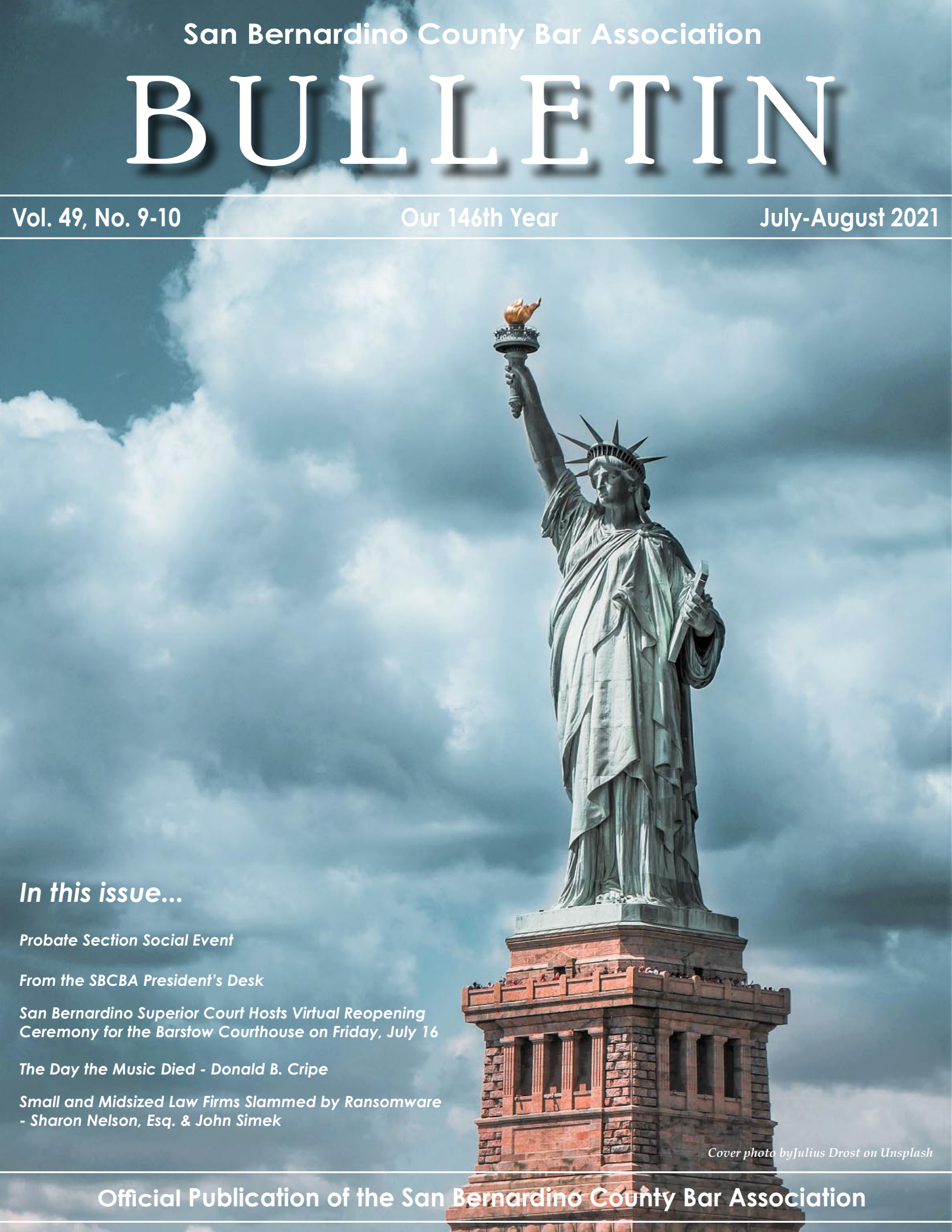
San Bernardino County Bar Association

BULLETIN

Vol. 49, No. 9-10 Our 146th Year July-August 2021



In this issue...

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Official Publication of the San Bernardino County Bar Association

ESTATE PLANNING & PROBATE LAW SECTION
SBCBA

A Probate Bar Social Event

Tuesday, July 13, 2021
5:00 pm to 7:00 pm
Live and In-Person

Hosted by R. Sam Price • 300 E. State Street, Suite 620 • Redlands, CA 92373

A Social Event to Discuss the Future of Our Probate Legal Community
Complimentary Appetizers and Drinks

Come and take part in a discussion of the future of our Probate Legal Community and learn about the Probate Open House Project and how you can improve access to justice with ***Vision 2020 and Beyond***. We will have similar events in the High Desert and Rancho Cucamonga within the next few months.

Please respond to me by email with an RSVP by Monday July 11 so that we can get a head count:

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Mark Your Calendar!

SBCBA Bench Bar Symposium:
Estate Planning, Trust & Probate Practice

Thursday, November 18th

Watch for details on the EP, Trust & Probate Section page here:

http://www.sbcba.org/probate-law-section

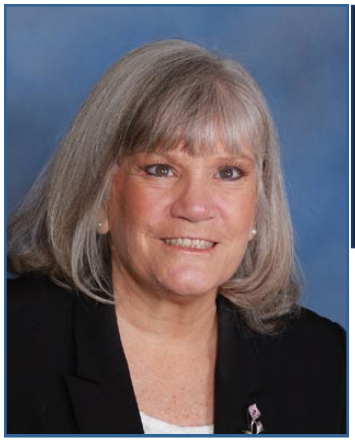
The San Bernardino County Bar Association's Lawyer Referral Service...

needs additional panel members!

We have a need for qualified panel members practicing in the following fields of law:

Landlord-Tenant Law (commercial), and Juvenile Dependency Law. We also need attorneys located in the High Desert areas who practice Criminal Defense and Family Law.

Please call the SBCBA office at (909)885-1986 or send an email to claire@sbcba.org or lisa@sbcba.org.



From the President's Desk

by Barbara A. Keough

The simple meaning of life.

In the 1980's sitcom series Family Ties, the oldest sister, Mallory Keaton, was asked the meaning of life. She said, "The meaning of life? That's simple. Try to be happy, try not to hurt other people, and hope to fall in love."

That phrase, which I heard over 40 years ago, still resounds as a truism today. Suffice it to say, a lot has happened these past 40 years, but the adage to be happy, not hurt others (I like to add, "use your gift to help others") and aspire for true love applies even to this day.

Try to Be Happy. 2020 has been a year for the record books. It's hard to "try to be happy," when the odds are stacked so high against you. I have personally lost several friends to the virus and was denied an opportunity of a final good-bye. Yet, all around I saw encouragement and inspiration, television programs, billboards and commercials encouraging us that, "We're all in this together," and "we'll get through this." Hope is an amazing virtue – it allows us to strive for a goal, for some positive outcome. Hope is an act of optimism, and it helped many of us get through this pandemic.

When I was first sworn in as your president in October, the pandemic had already claimed so many lives, and there was really no end in sight. No vaccines had been discovered, and our only protection was to exercise distancing, wash hands, wear masks, obey the safer-at-home orders, etc. Our courthouses suspended trials, which effectively inundated the system with an unbearable backlog of cases.

Try Not to Hurt Anyone (Use Your Gift to Help Others). Your Bar Association wanted to help our County courthouses. We had that hope – that optimism – that the members of this Bar Association – our bar association - would be inspired to use our gift to help our struggling courthouse.

To best serve our Bar Association, the citizens of this community, bench and bar, the Board of Directors formed a non-profit corporation for the sole purpose of raising funds to promote access to justice. Last month, the San Bernardino County Bar Foundation ("SBCBF") was formed, a 501c3 a non-profit, public charitable corporation. The SBCBF is designed to work hand-in-hand with various programs and fundraising campaigns whose sole purpose is to provide access to justice. Our current campaign is called, "Vision 2020, and Beyond," and is designed to raise money to purchase the hardware and software for the San Bernardino County Courthouses to permit low or no-cost, web-based video appearances. Our members (and anyone else, for that matter) may now make tax-deductible contributions towards the Vision 2020, and Beyond campaign through the San Bernardino County Bar Foundation.

Hope you Find Love. Well, I'm sorry, but I cannot help in that department! However, I'm pleased to report that our Bar Association will be hosting LIVE events soon, which could (who knows?) help you find love! There will be numerous fundraising events for the V*ision 2020 and Beyond* campaign and, in fact, certain sections will be competing against each other to raise a specific amount of pledges/donations before the end of this year. Stay tuned for more information.

If you're interested in being part of the *Vision 2020 and Beyond* campaign, please access the pledge page at the link at the bottom of this page.

May you enjoy a fun, safe and blessed summer.

Click on logo to see details on Vision2020 →

VISION 2020 and beyond

Join The Superior Court on Facebook for a Virtual Reopening Ceremony

BARSTOW, CA — San Bernardino Superior Court (SBSC) is pleased to announce that the Barstow Courthouse will reopen on Monday, July 12 providing 3.5 family law courtrooms, a Self-Help Resource Center, Family Court Services, and a children's waiting room to the residents of the High Desert. These services are in addition to those already provided at the Barstow Courthouse including small claims/ landlord tenant, civil, child support, and traffic matters. All parties with family law cases heard in the Victorville Courthouse have been noticed and should report to the Barstow Courthouse beginning Monday, July 12, 2021.

In celebration, SBSC invites you to join the Barstow Courthouse Reopening Ceremony virtually on Friday, July 16 from 2:15 p.m. to 3:00 p.m. via the court's official Facebook page **(@sanberncourt)**. Join and listen to the live ceremony hosted by judicial and court executive leadership. Following the ceremony, SBSC invites you to take a virtual tour of the improvements made to the Barstow Courthouse. The link along with a recorded version of the reopening ceremony will be available on the High Desert Reorganization webpage.

Since 2018, SBSC has been seeking solutions to the overcrowding, ever-growing caseload, and service challenges presented in the Victorville Courthouse. SBSC was able to thoughtfully plan and set aside funds with the Judicial Council to move forward with this project before the recession impacting the local budget. After securing space from the County of San Bernardino in February 2020, child support and civil matters (civil harassment, elder abuse, and name changes) moved from the Victorville Courthouse to the Barstow Courthouse in November 2020.

For media inquiries, contact Communication and Public Affairs Officer Julie Van Hook at courts-pio@sb-court.org.

The Day the Music Died

By Donald B. Cripe, Sr. ADR Professional, MC3 Certified Mediator

I have a friend who is a long-time trial attorney from Orange County. My friend, a plaintiff's lawyer, was in the middle of what he considered to be a significant damage case in his local courthouse in the late summer of 2011. He and I often enjoyed sharing the events of the day while we were in trial, so when he telephoned me during the 2nd week of August of that year, I wasn't surprised. I was, however, surprised by the anger he was firmly expressing to me. It was on that day word of Howell v. Hamilton Meats & Provisions, Inc., (2011) 52 Cal.4th 541; 257 P.3d 1130; 129 Cal.Rptr.3d 325, 76 Cal. Rptr. 3d 325, ("Howell") hit the streets of California. Every stage of my friend's case was pursued on the basis of the standing law regarding the calculation of personal injury damages as it stood when his trial began. Well into his second week of a hotly contested trial, the Howell decision burst his damage bubble. Instead of being able to claim the value of the medical treatment that had been billed by the providers, Howell limited a plaintiff's claim to the amount paid for treatment. As much as my friend and his colleagues from the plaintiffs' bar felt devastation, the defense bar, or at least insurance carriers, rejoiced. Little did they realize at the time the difficult mess of damage calculations that was coming.

Though the lien provider practice was common pre-Howell, many from the plaintiffs' Bar were content dealing with and submitting the billed medical expenses as their clients' special damages instead of relying upon medical lien arrangements. It was easy and straight forward: order the billing, get it admitted at trial and "blackboard" the numbers for the jury. The defense always had their argument regarding "reasonableness" of the charges, but it was a difficult one given the fairly standard community billing practices of health care providers. The defense bar saw an enormous difference between billing and what was paid for services. For example, an MRI might be billed at $1,500, but because of contracts between health care providers and health insurers which demanded significant discounts from the providers, payment for that MRI might be as low as $300 thereby reducing a plaintiff's damage claim for that item by $1,200.

Was the Court's ruling logical and reasonable? Objectively, yes. After all, our civil litigation system is based upon compensating injured persons for their actual losses; Civil Jury Instructions go so far as prohibiting speculation as to what those losses are. Only because health insurers often assert liens on Personal Injury recoveries does the law allow recovery of the funds paid by the carriers to be claimed by plaintiffs.

If Howell is a principled decision serving to compensation for actual losses, what is the problem?

Aside from the obvious impact it has upon damage awards, an unintended consequence has become the normal circumstance in personal injury cases.

Once the reality of Howell and its impact came into full focus, plaintiffs' damage claims have become much harder to deal with either in settlement discussions or sometimes even in jury deliberations. Instead of relying on the hard-number billing of the professional providing the services (often the plaintiff's own personal physician), plaintiffs who, for whatever reason, chose not to go to their regular health care providers, turned to lien providers.

The key to this process is that those providers are not paid until the case is resolved through settlement or trial. For the same reasons contingency lawyers' fee agreements may yield more (and possibly less) in fees for the attorney than he would receive on an hourly basis for the same case, health care providers working on a lien bases are working on a similar arrangement. Consequently, it is common for providers working on a lien basis to charge far more for a given service/procedure than they would on a cash-basis for the same patient. What mediators see on a daily basis may be perceived by some as a form of billing abuse while the health care providers who often negotiate their charges to fit the circumstances of resolution of cases to be a leveling mechanism, i.e. what they lose on this case will be recovered on the next.

This article does not attack or offer criticism of the practice of lien billing or those who take advantage of it for their cases. Because of the downward pressure Howell places upon damage claims, a situation that was originally intended to help uninsured individuals who could not afford cash-pay treatment has morphed into a situation in which the value of medical expenses is often an item to be litigated with the assistance of expert opinions. Since

lien providers, who are willing to negotiate final payment, often peg their negotiations on what the patient recovers from the case, it is very difficult for litigants, counsel, mediators or any settlement officer, or the defense to accurately calculate a settlement number that will leave plaintiffs financially "whole" but does not over-compensate. Defense counsel and insurance carriers strongly resist hypothetical numbers. During settlement negotiations we see the amount of medical expenses carriers are willing to "recognize" to be widely divergent from what has been presented. The defense often relies upon health insurance payment schedules as a basis for their evaluations creating a great deal of difficulty finding an acceptable number.

Lawyers and lien providers may not be all that concerned over this new stress point, but plaintiffs who are facing hefty medical bills are in constant fear that they will be left with unpaid bills if the case settles for too little. I hear attorneys offer reassurances to plaintiffs in every personal injury mediation, but I have never heard an attorney promise any plaintiff what a lien provider will take in the end. I have heard defense counsel and carriers argue stridently that their analysis of medical bills is accurate but have likewise never heard counsel or a claims representative state with certainty a trier of fact would agree with them. The problem, of course, is that there can be no certainty.

I suggest, as reasonable as Howell sounds, it has become the bane of personal injury litigation for both sides of the conflict. Unfortunately, our litigation system cannot seem to grow with practice and technology. In my view, the system relies on the same type of medical billing Mrs. Palsgraf's attorneys relied upon in her case nearly 100 years ago and those that came centuries before (one wonders if we would still honor bills for bloodletting?).

Donald B. Cripe is an Arbitrator, an MC3 Certified Mediator, and panelist with California Arbitration & Mediation Services (CAMS) among others such as the American Arbitration Association, AHLA, California Association of Realtors, and others. Mr. Cripe is also a cofounder of California Arbitration & Mediation Services.

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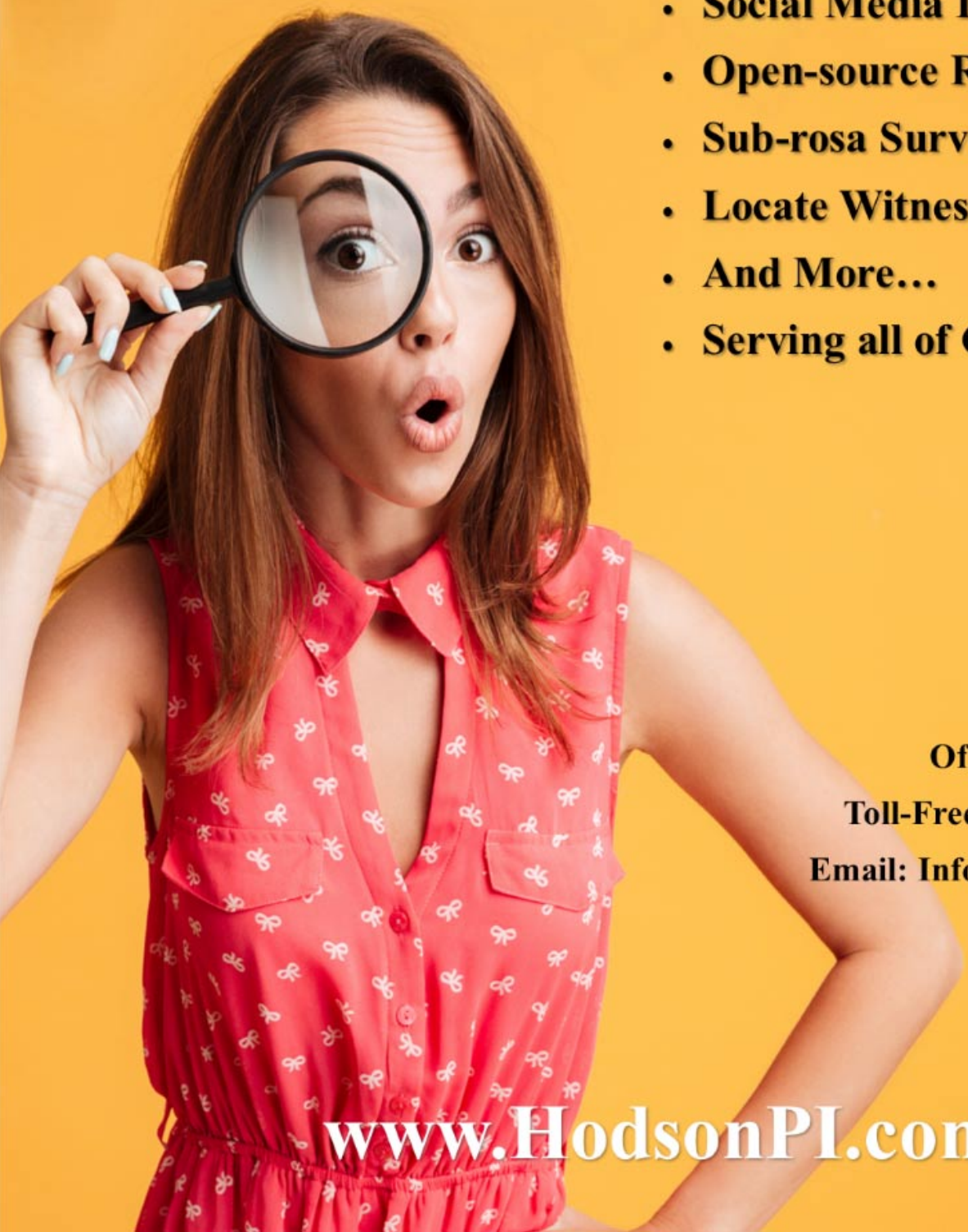

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Small and Midsized Law Firms Slammed by Ransomware

by Sharon D. Nelson, Esq. and John W. Simek

A Warning for Law Firms

The first of the quarterly 2021 surveys appeared during April – and the news isn't good for small and midsized law firms. Note these ominous words from Coveware, a highly regarded aggregator of global ransomware and cyber extortion data, which published the Coveware Quarterly Ransomware Report (Q1 2021):

> "The most notable change in industries impacted by ransomware attacks in Q1 was the Professional Services industry, specifically law firms. Small and medium sized law firms continue to succumb to encryption ransomware and data exfiltration extortion attacks. Unfortunately, the economics of many small professional service firms do not encourage or enable adequate cyber security."

Sobering Statistics from the First Quarter of 2021

The average ransom payment was $220,298 (+43% from Q4 2020)

The median ransom payment was $78,398 (+59% from Q4 2020)

The average number of downtime days was 23 (+10 from Q4 2020)

77% of ransomware attacks include a threat to leak the stolen data (up from 70% in Q4 2020).

Most ransomware-as-a-service (RaaS) affiliates now purchase network access (often for a nominal sum) from someone else, then use the data they can now steal to leverage payment from the victim.

And a new and disturbing trend in 2021? Attackers are taking to disrupting business after an initial attack while the firm is trying to recover – and stealing more data or relaunching ransomware.

What Law Firms Should Assume

Ransomware is no game, but if it were, boy have the rules changed.

The first thing a law firm should assume is that any of its data stolen by attackers will not be destroyed by the cyber criminals even if a ransom is paid. It may well be traded to others, sold – or even held for a second extortion attempt. Those re-extortion attempts are becoming a growing phenomenon.

Also assume that multiple parties held your data and that the data was not necessarily secured and may have been compromised. Also, any of those parties may have made copies for prospective extortion in the future.

It is increasingly likely that data will be published, often called "naming and shaming," before you can even respond to the ransom demand. This ups the ante and puts pressure on the law firm to pay.

Where Does the Danger Come From?

The most common ransomware attack vector is compromised remote desktop protocols, which so many lawyers working from home use to connect to the law firm network.

This is followed by phishing emails, which continue to get better and better at fooling your employees. Employee security awareness training should take place at least annually (more often is better) and running phishing simulations periodically is a good idea. Employees simply forget over time so repetitive training is critical.

Why are Small and Midsize Law Firms So Vulnerable?

As the Coveware report notes, 24.9% of ransomware attacks target professional services firms, especially small and midsize law firms.

So, what are the firms doing wrong? In part, they are hobbled by the modesty of their budgets for cybersecurity. On the other side of the coin, they generally want to maximize profits and distribute income to the partners at the end of the year. Cybersecurity doesn't make the cut when distributions are discussed.

Their clients tend to be smaller and may not demand security assessments as larger clients are prone to do. Sometimes they get to bask in obscurity because attacks on smaller firms often do not make the headlines.

Smaller firms get in a world of trouble because most of them do not have Incident Response Plans (IRPs) and therefore they have a "headless chicken" response to attacks, which they generally don't properly handle. To make matters worse, they don't properly attend to remediation of the vulnerabilities that caused the attack. And you know what happens then? They get re-attacked.

An example of sheer stupidity from our case files. A firm had an Incident Response Plan (IRP). Good for them, right? Except they didn't print it out or put it on a device never connected to the network. So, their IRP was encrypted in the ransomware attack. Doh.

Don't Think Paying the Ransom Will Guarantee You Get All Your Data Back!

Sophos, a highly regarded cybersecurity vendor, issued its "The State of Ransomware in 2021" report. Scary stuff. Their survey found that only 8% of entities get back ALL of their data after paying the ransom. 29% of those who paid the ransom got back no more than half their data. Not only is there no honor among thieves, but there are no refunds for partial performance! In addition, there is no customer service department where you can file a complaint.

There was some good news in the report – sort of. There was a decline of entities hit by ransomware from 51% in 2020 to 37% in 2021. On the face of it, that's a good thing.

But the report notes a very worrisome trend. Attackers are now moving from automated attacks to highly targeted "hands-on-keyboard" hacking. Why is this causing such alarm? Because the potential damage is much greater from these more complex attacks, with more than double the remediation costs, from approximately $761,00 in 2020 to $1.85 million in 2021.

Oh, and to add to the merriment, remediation costs are now ten times greater than the average ransom payment.

Final Thoughts

Not much joy in this article, to be sure. One of the things it proves definitively is that the threats from attackers are morphing constantly. As the threats evolve, so must the defenses. Busy attorneys understandably have trouble keeping up with cybersecurity. But when they can, they should try to stay current through reading reputable blogs and articles online and taking cybersecurity CLEs at least once a year – and more is better. Batten down the hatches – we're in for a bumpy ride for years to come.

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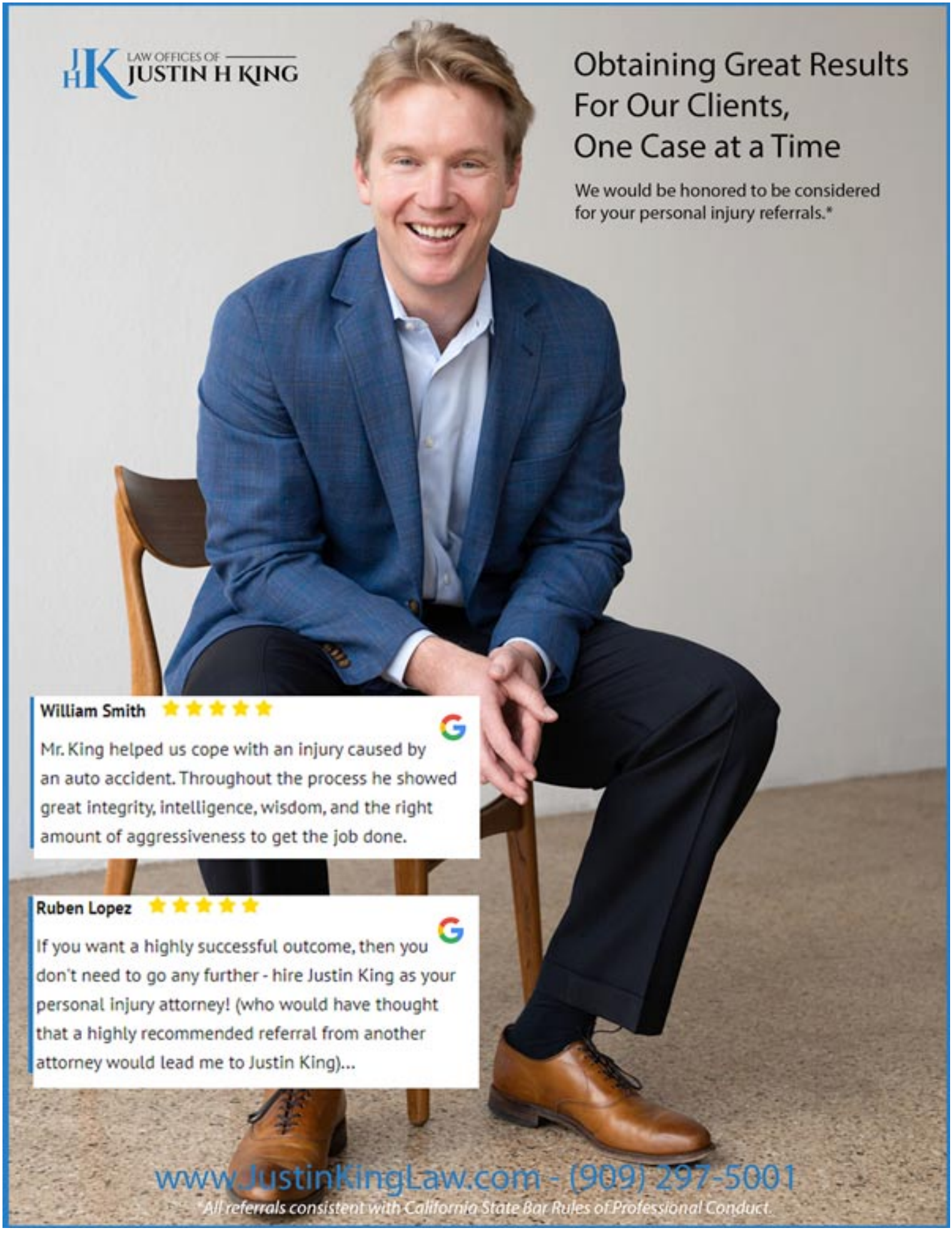
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BULLETIN

of the
San Bernardino County
Bar Association

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The Bulletin of the San Bernardino County Bar Association is published 11 times a year. Our circulation is approximately 1,000, including: our bar membership of 800, 100 state and federal judges, state & local bar leaders, legislators, media, and businesses interested in the advancement of our mission.

Articles, advertisements and notices should be received by the bar office no later than the fifteenth of the month prior to the month of publication. For current advertising rates, please call the number listed above. Please direct all correspondence to the above address.

July-August 2021

TO: