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## Fact or Fiction

**A**lthough mindful of two recent decisions disqualifying district attorneys from representing the People, where they had, respectively, cooperated in the making of a film about the crime, or in writing a book, the firm is pleased to announce that **Gwen Freeman's** debut mystery novel—*Murder . . . Suicide . . . Whatever . . .*, the first in the Fifi Cutter detective series—will be out and available in bookstores in March 2007. Any resemblance to anyone you know is totally coincidental.



Gwen Freeman

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### You are invited to a Launch Party!

Gwen Freeman's new murder mystery entitled

***Murder...Suicide...Whatever...***

will debut at

**Mystery & Imagination Bookstore**

238 Brand Boulevard  
Glendale, CA 91203  
(818) 545-0206

on

**THURSDAY, MARCH 22, 2007**

from 5:30 p.m. to 8:00 p.m.

Parking is available behind the store on Maryland Avenue.

Wine and cheese will be served.

Ms. Freeman's book is also available at Amazon.com.

In *Hollywood v. Superior Court*, the court found that recusal of the deputy district attorney was required in the high profile capital murder prosecution of Jesse James Hollywood. The DA had actively assisted director Nick Cassavetes in making a film about the pending case, entitled *Alpha Dog*. The court found that by cooperating with the filmmakers, the DA had potentially infected the jury pool with his views on the strength of the People's case. The court reiterated that prosecutors are held to the highest standards of the legal profession, particularly where that prosecutor seeks the ultimate penalty.

Further, the DA had virtually given his entire case file to the filmmakers. The court found that it was aware of no authority which permitted a public

prosecutor to give away public property, especially when that property, in this case, a file, contained highly sensitive confidential material. Further, giving his file to Cassavetes created numerous evidentiary issues, such as a possible waiver of any claim of work product privilege.

In *Haraguchi v Superior Court*, the court recused a prosecutor who had written, and was actively promoting, a self-published crime novel based on the rape of an intoxicated woman, the identical charge against the defendant she was then prosecuting. The protagonist of the novel was, by the deputy DA's own admission, a "pumped up version" of the DA herself and was described as having "the poise and sexiness of a dancer, the brains of a scholar, and protective passion of a mother." The fictional defendant, on the other hand, was described as having a bloated face, protruding belly, filthy hands, and as being "felony ugly."

The protagonist in the fictional story is passionate about the prosecution of the case, saying to herself, for the reader's edification, that "I'll get you, you heartless bastard" and "I can't try this one . . . unless I can win it."

In the recusal motion, the prosecutor was quoted as having refused to even discuss settlement and "has summarily informed the court that the case will go to trial."

*The fictional defendant, on the other hand, was described as having a bloated face, protruding belly, filthy hands, and as being "felony ugly."*

In the acknowledgements section of the book, the real prosecutor indicated she shared the viewpoint of the fictional prosecutor, saying that she didn't believe anyone could write a "trustworthy novel without the help and support of friends and colleagues who are willing to read and criticize their work." Thus the implication was that the novel was trustworthy, it accurately depicted the criminal justice system, and that it accurately depicted the DA herself as an advocate for heroic crime victims. The court found that the acknowledgment was indicative of the DA's true belief that negotiating a settlement could have a "trickle-down" effect, preventing others victimized by such crimes from coming forward.

The rhetoric of the acknowledgement, in fact, caused the court to question the DA's ability to exer-

cise her discretionary functions in an evenhanded manner. As such, the court found that the prosecutor's continued role in the prosecution of the defendant would be unseemly and that there was a conflict of interest.

Obviously, the two elements of most importance in the *Hollywood* and *Haraguchi* cases are not present in *Murder...Suicide...Whatever...* Gwen's book isn't based on a real, presently pending criminal case, and Gwen is not a prosecutor. The book is, instead, a work of pure imagination, a classic locked-door whodunit, with a quirky detective, who looks nothing like Gwen, and who is railroaded into investigating the mysterious death of a prominent, totally made-up, insurance broker. The book is being published by Capital Crime Press and will be available by pre-order on Amazon in January. For more information, check out [www.gwenfreeman.com](http://www.gwenfreeman.com).

## CONSTITUTIONAL LAW

### Writ of Habeas Corpus Granted to Firm's Client

Lavell Frierson has spent more time on California's death row than any other person. But he may soon be, if not free, than at least not in peril of his life.

Frierson, an African American who grew up in South Central Los Angeles, suffers from organic brain damage and was severely abused as a child, enduring relentless beatings that would amount to torture. He began using drugs at a very early age, 11 or 12, and continued to do so throughout his young adulthood. Framed for a homicide to which another man later confessed, Frierson spent time in the notorious California Youth Authority before he was returned to the streets.

On January 3, 1978, two male airline attendants drove to the hotel where Frierson was living, looking for a young woman. Admittedly high on PCP, Frierson followed the pair to their car, where he pointed a gun at them, forced them to drive to another location, and robbed them. During an altercation where, evidence suggests, the victims attempted to disarm Frierson, one victim was shot and killed, the other wounded.

Frierson was first tried in February of 1978 and found guilty. In a second phase, the special circum-

stances making him eligible for the death sentence (i.e. that the murder was willful, deliberate, and premeditated and committed during the course of a robbery) were found to be true. In a third phase, Frierson was sentenced to death.

On appeal, the California Supreme Court found that defense counsel was ineffective for not presenting a diminished capacity defense as no evidence of Frierson's PCP use had been presented.

At a second trial in 1980, Frierson's court-appointed counsel refused to present the diminished capacity defense at the guilt phase and special circumstances phase, despite Frierson's insistence. A diminished capacity defense was presented after guilt and special circumstances had already been found, during the penalty phase. No evidence of Frierson's brain damage or his childhood trauma was presented.

Again, he was found guilty, the special circumstances were found to be true, and he was sentenced

to death. Again, the California Supreme Court found that failure to present a PCP defense was ineffective, overturning the special circumstances finding.

At his third trial, the court appointed an attorney who was, at that time, being accused of ineffective representation of another murder defendant—for failing to present a PCP defense. That case later resulted in a finding of ineffectiveness against the attorney.

The attorney presented, on behalf of Frierson, the same defense that had been presented by the attorneys found to be ineffective in the first and second trials. He did so despite Frierson's repeated pleas that his childhood and drug use should be investigated and despite written evidence of possible organic brain damage.

At the penalty phase, the trial court refused to permit evidence that another person had confessed to the prior murder for which Frierson had been incarcerated as a juvenile and permitted the self-confessed

A petition for habeas corpus is a civil proceeding, seeking a court order addressed to a prison official ordering that a prisoner be brought before the court for determination of whether that prisoner is serving a lawful sentence. It has been known in British and American history as "The Great Writ" and has been recognized as the ultimate check on the power of the government and the most efficient safeguard of liberty. It has been written that writs of habeas corpus "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."

The first recorded use of habeas corpus was in 1305 during the reign of King Edward I, and the first procedure for issuing writs of habeas corpus was codified by the Habeas Corpus Act of 1679. The writ of habeas corpus was most famously used in the *Somerset's Case* (1771), where a black slave was ordered freed, and it was declared: "The air of England has long been too pure for a slave, and every man is free who breathes it."

In the United States, the Founding Fathers had such high regard for the writ that it was specifically included in the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." (Article One, section nine.) Presently, the procedure for applying for a writ of habeas corpus challenging a state court conviction is set forth in 28 U.S.C. § 2254.

The writ was suspended in a limited manner on April 27, 1861, by President Lincoln in Maryland and portions of certain Midwestern states in response to riots and the threat of secession, an act of "Rebellion" as set forth in the Constitution. Lincoln's action was challenged in court and overturned by the U.S. Circuit Court of Maryland in *Ex Parte Merryman* (C.C.D. Md. 1861) 17 F. Cas. 144. Lincoln ignored the lower court's order.

In 1864, Lambdin P. Milligan and four others were accused of planning to steal Union weapons and invade Union prisoner-of-war camps. They were sentenced to hanging by a military court. In *Ex Parte Milligan* (1866) 71 U.S. 2, the Supreme Court decided that suspension of the writ did not empower the President to try and convict citizens before military tribunals.

Fast forwarding 150 years, on November 13, 2001, President Bush asserted the power to detain noncitizens suspected of connection to terrorists or terrorism as enemy combatants. Subsequently, the case of *Hamdi v. Rumsfeld* reconfirmed the right of U.S. citizens to habeas corpus even if declared an enemy combatant. The high court affirmed the basic principle that habeas corpus of a citizen cannot be revoked.

In *Hamdan v. Rumsfeld*, which was argued in March of last year, the petitioner invoked the writ to challenge the lawfulness of Rumsfeld's plan to try him, as a noncitizen, for alleged war crimes before a military tribunal. On June 29, 2006, the Supreme Court rejected Congress's attempt to strip the Court of jurisdiction over such habeas corpus appeals. The *Hamden* case was remanded to district court.

On September 29, 2006, the U.S. House and Senate approved the Military Commission Act which would suspend habeas corpus for any alien determined to be an enemy combatant. President Bush signed the act into law on October 17, 2006.

In late 2006, the district court hearing the *Hamden* matter found that the new statute meant that foreigners held in overseas prisons do not have the right to challenge their detention.

On January 19, 2007, at a Senate Judiciary Committee, U.S. Attorney General Alberto Gonzales asserted that the Constitution does not confer the right of habeas corpus to Americans: "The Constitution doesn't say every individual in the United States or citizen is hereby granted or assured the right of habeas corpus. It doesn't say that. It simply says the right shall not be suspended, except in cases of rebellion or invasion."

murderer to assert the Fifth Amendment and refuse to testify. Defense counsel did not point out that the person had been previously acquitted of the murder and, therefore, had no right to assert the Fifth Amendment.

But the composition of the California Supreme Court having changed, Frierson was, this time around, denied relief.

A petition for a writ of habeas corpus was filed in federal district court, alleging that the ineffective representation Frierson received was a denial of the right to be represented by an attorney, guaranteed to all by the United States Constitution. **Gwen Freeman**, working with other counsel, litigated the case for over ten years.

At trial, the district court agreed that counsel was ineffective but found that the ineffectiveness was not prejudicial to Frierson.

However, the Ninth Circuit recently reversed the district court's finding. Two judges out of the three-judge panel determined that defense counsel's conduct at the penalty phase in failing to investigate and present mitigating evidence of extensive drug history, early childhood head trauma, mental impairments, organic brain damage, and childhood abuse was prejudicial. The third judge found that counsel's failure to point out that the self-confessed killer did not have the right to assert the Fifth Amendment was prejudicial. All three judges voted to grant relief from the penalty phase verdict of death. (*Frierson v Woodford* (2006) 463 F.3d 982.)

Frierson's right to relief from his sentence of life imprisonment without parole is still pending.

**Gwen Freeman**

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## LEGAL AUDIT

### Scrutinizing Legal Bills

**B**illing practices utilized by law firms are an ongoing issue in the client/attorney relationship. *The Wall Street Journal* recently ran an article entitled "Lawyer's Charge Opens Window on Bill Padding," by Nathan Koppel. This article told of accu-

sations by junior partner Matthew Farmer against his former employer Holland & Knight. The Chicago offices of Holland & Knight won a month long trial for Pinnacle Corp in a copyright infringement matter. Mr. Farmer, who was the trial attorney, was reviewing the firm's bills after the trial and found multiple instances of bill padding. He complained, first to management and later, after leaving the firm when they declined to act, to the Illinois Attorney Registration & Disciplinary Commission, of the managing billing partner creating "fictitious" narratives, using such phrases as "review key documents" and "analyze defense strategy" to describe work that was never performed.

Also cited in the *Journal* article was data from a billing survey conducted by William Ross, a professor at Samford University's Cumberland School of Law in Birmingham, Alabama. The survey was conducted in 1996, and Mr. Ross found that "two-thirds of the attorneys (and three-fourths of the clients) reported knowledge of bill padding."

A retainer agreement that documents the understanding between attorney and client of scope of work, invoice billing format, and proposed billing rates is mandatory. When work commences, prudent clients regularly scrutinize billing statements to ensure fees and costs billed are reasonable and consistent with services undertaken.

KPC Legal Audit Services has provided review and evaluation of legal bills services since 1991. In that time we have observed multiple instances of retainers and billing formats that are so vague they do not adequately set forth the work performed or the basis of charges. While certainly not the general practice, we have witnessed our share of overbilling and even billing fraud.

All legal service invoices should reflect reasonable, detailed, and accurate fees and costs. This is sometimes a time consuming and tedious chore for the billing reviewer. If outsourcing is considered, KPC Legal Audit Services provides that option for individuals, corporations, law firms, and insurance companies. With the general consensus that billing fraud has increased, vigilance and attention to detail concerning billing for professional services is imperative for both the law firm and the client.

**Karen L. Scott**

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## LITIGATION

### NEGLIGENT ENTRUSTMENT: When Does Giving Someone the Keys to Your Car Land You in Legal Trouble?

Imagine the following scenario: It is New Year's Eve and you are having a small gathering of friends at your home. You decide that more wine is needed to go with the bread and cheese. Bob, a friend of yours who lives down the street, volunteers to pick some up from the local grocery store and asks to borrow your car for the venture.

Bob had been pulled over several years ago for driving under the influence, but those days are a thing of the past, or so you thought. You lend him your keys, however, he already had a few beers at home before walking over. On his way to the grocery store he runs down a pedestrian and disables her for life. Several months pass and you are served with a complaint alleging, in addition to your liability as owner of the vehicle, you are liable for the negligent entrustment of your vehicle to Bob.

In this nightmare New Year's Eve scenario, you may be held *vicariously* liable for Bob's negligent driving that fateful night. California Vehicle Code section 17150 provides that the owner of a motor vehicle is vicariously liable for death or injury to person or property resulting from the wrongful (negligent or intentional) operation of the vehicle by any person using it with the owner's express or implied permission.

Additionally, you may be charged *directly* with your *own* negligence in entrusting your vehicle to Bob, a person known to be likely to create an unreasonable risk of harm. Under the common law "negligent entrustment" theory, one who "entrusts" a motor vehicle to another who is *known*, or from the circumstances *should be known*, to be incompetent or unfit to drive may be liable for injuries inflicted by the driver that were proximately caused by the driver's incompetence.

In a negligent entrustment cause of action the threshold issue is whether the defendant who

entrusted the vehicle had knowledge that the driver was incompetent or unfit to operate it. The "knowledge" requirement is satisfied if the defendant either *actually* knew that the driver was incompetent or had knowledge of *circumstances reasonably indicating* that the driver would create an unreasonable risk of harm to others. Here, if you knew about Bob's prior incident of driving under the influence, or had any indication that he had a few drinks earlier, then you may be found liable for the negligent entrustment of your car to him.

Liability for negligent entrustment amounts to a determination whether a duty exists to anticipate and guard against the negligence of others. In *Lindstrom v. Hertz Corp.*, the Second Appellate District held that a rental car company is not required to investigate its customer's driving records or inquire as to their knowledge of traffic laws before leasing them a car. The court found in *Lindstrom* that a rental agency had no duty to determine whether a driver from a foreign country was familiar with California's "rules of the road," nor was the agency required to furnish the driver with a copy of those rules. Similarly, a rental car agency has no duty to ask whether an apparently fit customer, who shows a valid license, has a drunk driving record or intends to drive while intoxicated.

*...the threshold issue is whether the defendant who entrusted the vehicle had knowledge that the driver was incompetent or unfit to operate it.*

Other examples of the legal duty limitation include a commercial lender typically having no duty to investigate a driver's incompetence before financing a vehicle's purchase. However, no reported case has yet decided whether negligent entrustment liability may lie against a lender who knew the purchaser was a dangerous driver likely to cause harm to others.

Further, bailees, such as valet parking attendants, are not exposed to negligent entrustment liability, even if the bailee has knowledge that the bailor is intoxicated and in an unfit condition to drive. This is so because bailees at best have "transitory control" over a bailor's automobile, which is not sufficient to give them a legal duty to act to prevent the bailor from causing harm to others.

Unlike these prior examples, a private owner of a vehicle is not exempt from his or her legal duty to anticipate and guard against the negligence of oth-

ers. In fact, negligent entrustment liability even may lie against one co-owner for the negligent driving of the other. The court in *Mettelka v. Superior Court* held that a negligent entrustment action could be stated against a father who co-owned a vehicle with his son. The court found that a negligent entrustment claim is stated if the co-owner had power over use of the vehicle by the other, and the negligent co-owner drove with the express or implied consent of the controlling co-owner who knew of the driver's incompetence.

Although negligent entrustment claims typically arise from the use of automobiles, this common law tort can potentially spring from the use of various other forms of chattel (movable articles of personal property). The Restatement (Second) of Torts, section 390 states that:

One who supplies directly or through a third person a chattel for the use of another whom the supplier *knows or has reason to know* to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Negligent entrustment claims often arise, as easily imagined, from the use of dangerous instrumentalities such as firearms, explosives, boats, and aircraft. Therefore, the next time you lend a friend your car, motorboat, or other potentially dangerous instrumentality, think twice. You may be directly charged with the knowledge you have about that person's incompetence or unfitness to operate your personal property. Ignorance may be bliss, after all, as far as avoiding negligent entrustment claims. Therefore, the more you know—the greater *your* responsibility.

**Michael G. Rix**

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## REAL ESTATE LAW

### A Commercial Tenant's Obligation to Repair and Maintain the Leased Premises May Not Include the Obligation to Perform More Extensive Replacements

**I**t is a common practice in commercial real estate lease agreements for the tenant to agree to maintain and repair the leased premises during the tenancy. As can be imagined, the extent of a tenant's obligation to maintain and repair the premises has been the subject of much debate. For example, is a tenant obligated to replace a roof when, at the time of lease inception, the roof was already old and dilapidated? As explained below, the answer appears to be that it depends on the express language of the lease agreement.

*California courts will take a conservative approach and uphold a tenant's obligation to make replacements only when the lease agreement clearly and unambiguously spells out the tenant's replacement obligation.*

In *ASP Properties Group v. Fard, Inc.*, the landlord argued that the tenant was obligated to replace an old and dilapidated roof pursuant to tenant's maintenance and repair obligations. The tenant responded that the roof was old and unrepairable at lease inception and, thus, the tenant was not obligated to replace the roof. The trial court agreed with the tenant and concluded that the tenant's obligation to maintain and repair did not extend to an obligation to repair the roof. The landlord appealed.

On appeal, the Court of Appeal (Fourth District) reviewed the express language of the lease agreement and noted that the lease agreement required the tenant to maintain and repair the roof. In analyzing the extent of the tenant's obligation to maintain and repair,



**Gregory L. Torres**

the Court of Appeal acknowledged that, “Modern cases show reluctance to place too literal an interpretation on the tenant’s covenant to repair.”

Then, the Court of Appeal reviewed various California cases which contained the following statements: (1) “to maintain means to repair and keep in good condition things that exist, and not the creation of something new”; (2) “a covenant to keep the leased premises in repair does not obligate the tenant to keep the building up as a new building”; and (3) “the word repair in its ordinary sense relates to preservation of property in its original condition and does not carry the connotation that a new thing should be made.”

After reviewing relevant case law, the Court of Appeal concluded that the tenant was not obligated to replace the roof, and tenant’s duty of maintenance meant that the tenant was to maintain the roof in the same condition it was received at lease inception (i.e., in its then-dilapidated condition). The Court of Appeal reasoned that “[h]ad the parties intended Tenant to assume the obligation to replace the roof, one would reasonably expect the Lease and/or Amendment to expressly so state rather than merely stating Tenant was required to maintain the roof. Case law supports a conclusion that, absent an express provision (or undisputed extrinsic evidence) showing a tenant has an obligation to replace a roof, a tenant’s obligation to maintain and repair the premises (including a roof) does not include an obligation to replace an old, dilapidated roof with a new roof at tenant’s expense.”

Although the Court of Appeal concluded that the obligation to maintain and repair did not include the obligation to make replacements or renewals, the court did acknowledge that a tenant would be obligated to make replacements if there was express language in the lease agreement placing such an obligation on the tenant. At this time it is difficult to predict how future California courts will treat lease agreements placing a replacement obligation on commercial tenants. However, it is anticipated that California courts will take a conservative approach and uphold a tenant’s obligation to make replacements only when the lease agreement clearly and unambiguously spells out the tenant’s replacement obligation.

**Gregory L. Torres**

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## SKI LAW - PART THREE

**F**or our readers who keep up with ski law – and which of you does not? — there’ve been two new reported appellate decisions since our last newsletter. In *Souza v. Squaw Valley Ski Corp.*, the court of appeal held that a minor who skied into a plainly visible snow making machine could not state a negligence cause of action against the resort due to the doctrine of primary assumption of the risk inherent in vigorous participation in sports. Attempting to stretch the liability envelope, plaintiff also pled a Hail Mary product liability cause of action. The court of appeal noted that no such claim could be maintained as the plaintiff had merely skied into the machine, not used it.

In the even more recent case of *Towns v. Davidson*, the court of appeal held primary assumption of the risk applied to preclude liability against a ski resort whose employee, in the course and scope of his duties, had a collision on skis with plaintiff. Notable here was the court’s reaffirmation that expert witness testimony is irrelevant to the issues of law of whether an activity is an active sport, the inherent risks of that sport, and whether the defendant increased the risks beyond those inherent in the sport.

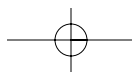
Parenthetically, one of the witnesses in *Towns* was a Highway Patrol officer who saw the accident while riding a chair lift. The court noted that he got in over *100 days of skiing* a year. Way to go, officer!



**K. Stephen Tang**

**K. Stephen Tang**

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