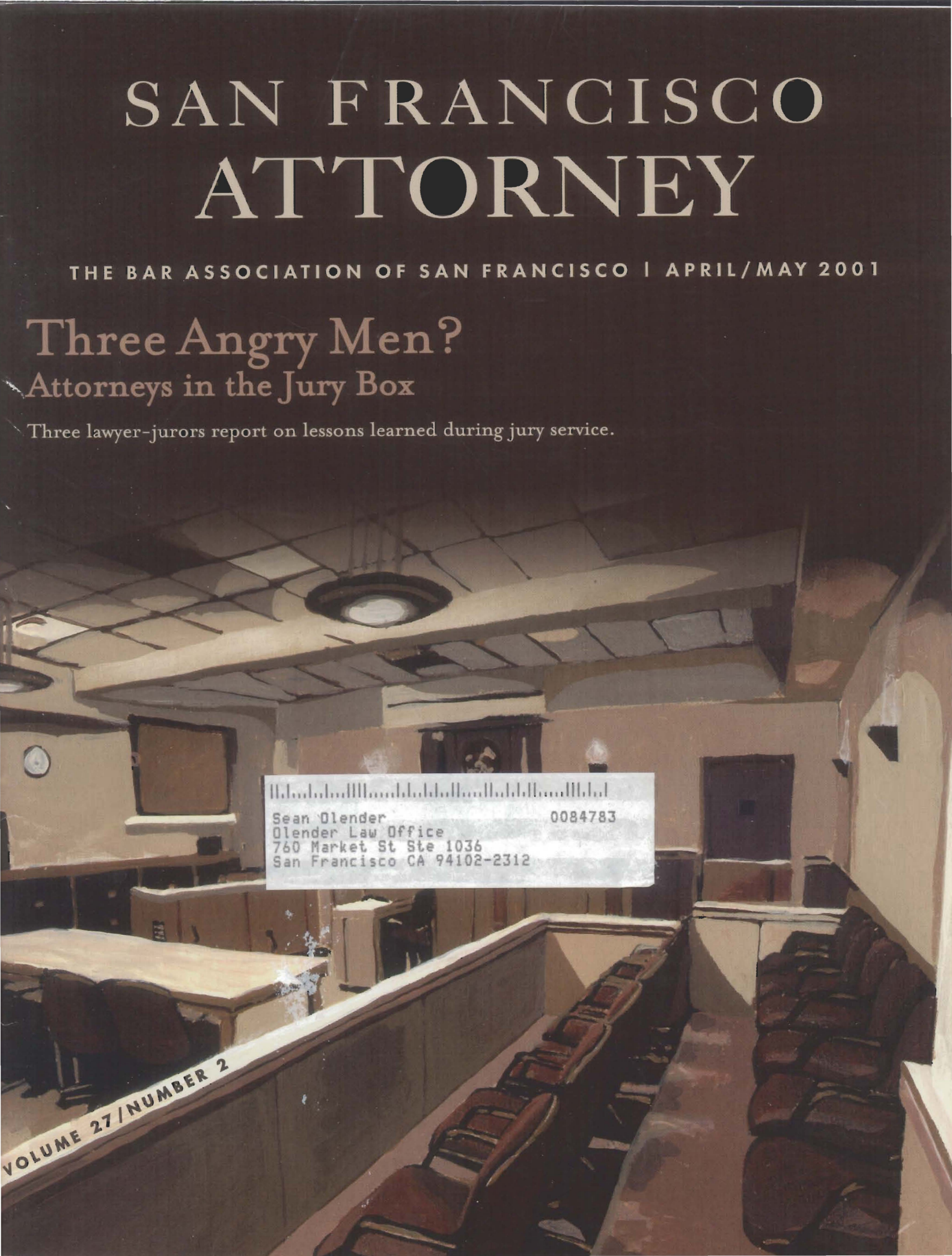
SAN FRANCISCO ATTORNEY

THE BAR ASSOCIATION OF SAN FRANCISCO | APRIL/MAY 2001

Three Angry Men?
Attorneys in the Jury Box

Three lawyer-jurors report on lessons learned during jury service.



Sean Olender 0084783
Olender Law Office
760 Market St Ste 1036
San Francisco CA 94102-2312

VOLUME 27/NUMBER 2

CONTENTS

SAN FRANCISCO ATTORNEY/THE BAR ASSOCIATION OF SAN FRANCISCO MAGAZINE

APRIL/MAY 2001 • VOLUME 27 • NUMBER 2

Columns

Departments

Features

COVER DESIGN KARA THAUER

A Footnote to the Chavez Confirmation Scandal

Immigration attorneys examine immigration law used as a litmus test for Senate confirmation.

by **Sean Olender & Grace Hoppin**

Harboring an illegal alien is a serious crime, but one that has apparently never been prosecuted without at least some aggravating factors.

Certain immigration laws are very rarely enforced, and laws against employing and harboring illegal domestic workers are used more often to intimidate presidential cabinet appointees than to imprison an average violator. It's actually difficult to find a single case where someone has been prosecuted exclusively for employing or harboring a single illegal alien. It is inefficient and confusing for Congress to identify a crime such as harboring serious enough to warrant five years in prison, while the Department of Justice never prosecutes anyone for violating it. Whether you like this law or not, either the U.S. Attorney's Office should enforce it, or Congress should repeal or amend it.

In January 2000, Linda Chavez, President George W. Bush's secretary of labor nominee, withdrew when it was revealed that she had provided an illegal alien a room and private bath in her Bethesda, Maryland home and "a few hundred dollars every few weeks."[1] Both Chavez and Marta Mercado, the illegal alien who stayed at her home from 1991 to 1993, said there was no employment agreement and no relationship between Mercado's occasional "chores" and the cash payments Chavez made to her.

In 1993, Bill Clinton lost two successive nominees for attorney general—Zoe Baird and Kimba Wood—because each had admitted to employing illegal aliens. Baird admitted to employing an illegal Peruvian couple as domestic help, and Wood admitted to having a part-time illegal babysitter. The Senate and the media focused on the tax aspect of Baird and Wood's activities, with little or no mention of harboring. Clinton secretary of defense nominee Bobby Ray Inman withdrew because—among an awful lot of other things—he employed a housekeeper for seven years and failed to report that fact or to pay approximately $6,000 in Social Security taxes he owed as a result (he has since paid).

When Chavez's relationship with Mercado was revealed, the media drew parallels between her situation and the earlier "Nannygates" of Baird and Wood. Because Chavez asserted she did not employ Mercado, opponents raised the issue of harboring.

There is an important difference between employing someone not authorized to *work* in the United States and harboring someone not allowed to *be* in the United States. Employers harboring dozens of illegal workers in underground sweatshops cause public outrage, but cases limited to domestic workers are less often investigated and prosecuted—and less well understood.

Surprisingly, employing a few illegal aliens carries relatively mild consequences, but harboring just one is a serious crime—one that has apparently never been prosecuted without at least some aggravating factors.

Employing "Legal" Domestic Workers

Although employers don't have to withhold federal income tax from a domestic worker's wages, they do have to withhold and pay Social Security and Medicare tax if they pay the worker $1,300 or more this year.[2] After the 1993 Nannygates, Congress changed a 1950 law that had required employers to pay Social Security and Medicare taxes for domestic workers paid more than $50 in a quarter or $200 per year. Baird and Wood arguably violated this requirement. In discussing the bill, then House Ways and Means Committee Chairman Dan Rostenkowski (D-Ill) said, "No one ever intended that Americans be required to pay taxes on occasional babysitters or yard workers ... but that's what has happened over time."[3]

Employers must also complete a form I-9 for household employees who perform work

on a regular basis; however, "casual employment by individuals who provide domestic service, in a private home, that is sporadic, irregular, or intermittent" is exempted.[4]

But if Chavez wasn't employing Mercado, as she asserted, she didn't break any laws by failing to withhold Social Security and Medicare taxes or by failing to complete an I-9.

Employing Unauthorized Workers

Employing an alien unauthorized to work in the United States carries a modest penalty of $250 to $2,000 per violation.[5] But engaging in a "pattern or practice" of doing this carries a fine of up to $3,000 and six months in jail,[6] and hiring more than ten within a twelve-month period with *actual knowledge* that they are illegal can get a defendant five years in prison.[7] Employers are supposed to know if a person is authorized to work in the United States because all employers are bound to complete an I-9 form for new employees within three business days of hire.[8]

Aliens can be "legal" but still not authorized to work.[9] An example is an H-1B worker authorized to work for one employer. If that alien works part-time for another employer that did not file a petition with the INS, the work is "unauthorized." H-4 aliens are another example. H-1B workers may bring their spouse and minor children to the United States in H-4 status. If these H-4 dependents work without obtaining authorization, they will be working illegally, but not necessarily be illegal aliens. Illegal aliens for the purposes of these penalties are those who enter the United States without inspection (sneak in) or aliens who remain beyond their authorized period of stay.[10]

Did Chavez Harbor?

Congress first proscribed harboring in 1917.[11] Before that, only smuggling was illegal. Harboring is a crime in itself and is mentioned separately from and in addition to concealing. Harboring is providing shelter, and shelter certainly includes a bedroom and a private bathroom for two years.

The 1993 Nannygates did not raise the harboring issue, and Congress did not change that law when it changed the tax rules relating to domestic employees. Harboring an alien with *knowledge or reckless disregard* that the alien is illegally in the United States is a serious crime, punishable by a fine and imprisonment of up to five years.[12] The statute includes harboring, concealing, or sheltering, or attempting to harbor, conceal, or shelter. But federal courts have held that simple shelter alone is harboring and that harboring does not require secrecy or concealment.[13]

Tucker Eskew, a Bush transition spokesman, said that Chavez "didn't know for a fact" that Mercado was illegally in the United States.[14] But Mercado acknowledged, "Gradually, she knew I had no papers." And in a January 10, 2001 interview with Fox News, Chavez said:

By the way, I have sought very good legal counsel, including talking indirectly and directly with three former general counsels, some that served in the Clinton years. I did not harbor an illegal alien. When she was with me and beaten up once, I called the police and brought them to my house. I wasn't trying to conceal she lived there. I don't believe I've broken any laws.

While talking with reporters, Paul Virtue, former INS general counsel, noted, "I guess technically it's possible to have a harboring charge there... but, as a practical matter, I never saw a prosecution where there wasn't something more than someone just residing in a home."[15] And yet allowing an illegal alien to reside in a home is exactly what harboring is.

INS would have little trouble investigating violations. It has, after all, gained considerable notoriety for its worksite raids. A few simple questions to detained illegal aliens would likely reveal the location of thousands of potential harboring defendants—each of whom could then be tried and imprisoned for a few years. Just because INS doesn't investigate and the U.S. attorney doesn't prosecute, doesn't mean that this is a safe and useful law. It's hard to think of a safe and useful law that carries a five-year prison term but is never enforced.

Prosecuting violators may deter illegal immigration, but then again, it may not. And whether or not the maximum penalty for this crime bears any relationship to the bad conduct Congress sought to deter, the point is that this law now seems to serve exclusively to intimidate presidential cabinet appointees.

Sean Olender represents employers hiring tech, biotech, medical, and business professionals from abroad. He serves as chair of BASF's Immigration Committee and regularly writes and speaks on business immigration topics. He can be reached at sean@usvisa-law.com, or visit his Web site at www.usvisa-law.com. Grace Hoppin is an Associate at Fragomen, Del Rey, Bernsen & Loewy and practices exclusively in immigration law. She serves as vice-chair of BASF's Immigration Committee and is an active member of the American Immigration Lawyers Association.

NOTES

1 *Los Angeles Times*, January 9, 2001.

2 The employer must withhold 7.65% of the worker's wages and pay the employer's share of 7.65% of the workers wages plus an additional 0.8% for federal unemployment tax on wages under $7,000 per year. See the IRS' Household Employer's Tax Guide Publication 926 for more information.

3 *The Sacramento Bee*, May 13, 1994.

4 8 CFR 274a.1(f).(h).

5 8 USC 1324a (e)(4)

6 8 USC 1324a(f)(1).

7 8 USC 1324(a)(3)(A).

8 8 CFR 274a.2(b).

9 INA 274A(h)(3).

10 INA 274A(h)(3).

11 *U.S. v. Acosta de Evans*, 531 F.2d 428 at 430.

12 8 USC. 1324(a)(1)(A)(iii).

13 Id.

14 *Los Angeles Times*, January 7, 2001.

15 *Los Angeles Times*, January 9, 2001.