Sonoma County Bar Association

# THE BAR JOURNAL

Volume 56 Issue 2 Summer '19

*Russian River Valley, Sonoma County*

*congratulations*

# *JD & MLS Grads*

## Law School Class of 2019


Martin Christopher Ananias, JD
Amy M. Balch, MLS, JD
Brandon Tyler Bierke, MLS, JD
Jake O'neill Dolan, MLS, JD
Shawn Michael Dolan, MLS, JD
Michael James Dowdell, MLS, JD*
Jessica Ann Gorton-Dicker, MLS, JD
Dana Haug, JD
Nicholas Andre Henry, MLS, JD
Shawntay Sherrie Jordan, MLS
Ian James Kendall, MLS
Chantell La Tina Martinez, JD
Phillip Michael Mendelson, MLS, JD
Cody Sierra Molica, MLS

Reed Joseph Moran, MLS*, JD*
Demetri D. Murphy, MLS, JD
Nathaniel Evan Myers, MLS, JD
Karla Berenice Peña, MLS
Danielle Marie Petersen, MLS*, JD*
Stephanie Marian Ransom, MLS▲, JD▲
Travis James Ransom, MLS*, JD
Debra Ivy Sanders, MLS, JD
Nicholas Richard Swain, MLS, JD
Nicole Umemoto-Snyder, MLS, JD*
Christopher David Van Nuys, MLS▲, JD▲
Angela Yolanda Vazquez, MLS, JD

* Cum Laude
▲ Magna Cum Laude

Empire College
SCHOOL OF LAW

3035 Cleveland Avenue, Santa Rosa
law.empcol.edu 707-546-4000

*By Malcolm Manwell*

# From the Editor: *The Miracle*

You and I live in a miracle. We are part of one of the greatest, if not the greatest, empires in the history of civilization. Perhaps most miraculous is that, every four years, for nearly 2½ centuries, we transition power peacefully.

France has had four Constitutions since the end of World War II and 16 total since 1789. The USA has had one and 27 amendments since 1789.

In spite of this stability, we are now witness to a group of politicians who are attempting to redesign a key component of the U.S. Constitution. In April of 2019, a group of U.S. Senators introduced and supported a resolution for a constitutional amendment to abolish the Electoral College.[1]

Things did not go well for their side in the 2016 Election. So, the solution is to redesign the Miracle? End the Electoral College? Only a majority should rule? Change the Constitution so it will blow in the wind, just as Congress does?

This is not a partisan issue. In 1956, John F. Kennedy spoke eloquently from the floor of the U.S. Senate and beat back an effort to destroy the Electoral College.[2] How did we end up today with a bunch of U.S. Senators who suffer from such collective amnesia?

The danger to our form of Government is democracy (James Madison, *Federalist* 10).

I would think a California Senator would be at the top of the list to recognize this. In 1966 the *majority* of California's voters voted by nearly 2/3 to permit discrimination in housing against black citizens, the Rumford Fair Housing Act. In 2008, the *majority* of Californians said no to gay marriage.

Might does not make right. Often the mob is wrong.

The danger to our form of government comes from unchecked democracy—Tyranny of the Majority (Madison, id). The purpose of the Electoral College, among others, is to ensure that the *majority* do not tyrannize a minority (i.e. the large states trample the small states).

I think the time has come for the Sonoma County Bar Association to compose a letter to Congress and urge more reasoned action. To suggest to our leaders in Congress that they need to sit down and address the problems of the nation, not magnify them by destroying the Constitution.

Nothing involving human beings will be perfect, but a system that depends on balancing the special interests we all have, which employs a monarchial element (the Presidency), an aristocratic element (the Senate) and a more democratic element (the House), and which has a neutral body of legal minds rule on the legal principles involved, has much to be said for it, especially when it is the oldest living Constitution on the planet and the one emulated by practically every other nation on earth.

Integral to that Constitution was and is a system of electing our Chief Executive by taking into account both the areas of the nation and its popular vote, i.e. the Electoral College. It was essential back in 1789 to the formation of "…*a more perfect union*…," and it is essential today to maintaining that union.

Something happened in 1789, and we would be well to keep that in mind before we blast off in some unknown direction, the results of which we have no idea [to paraphrase John F. Kennedy].

---

1. *https://www.cnn.com/2019/04/02/politics/senate-democrats-electoral-college-constitutional-amendment/index.html*

2. See e.g. for the gist of JFK's opposition: _ *https://dailycaller.com/2019/03/23/john-f-kennedy-electoral-college/*

## In This Issue

*By Suzanne Babb*
*President, SCBA*

# President's Message: *SCBA — What Have You Done for Me Lately?*

Recently, we took a look at how the Sonoma County Bar Association stacks up against other bar associations in the area in terms of benefits and costs. Here, I will focus on one of the primary functions of the SCBA: Providing the local legal community with continuing education.

It turns out that the SCBA is the only bar association among neighboring North Bay counties that offers a full menu of continuing legal education programs from which its members may select. This came as a surprise to me.

SCBA's regular monthly roster of programs spans every conceivable practice area. These classes provide all the benefits of live learning, and offer participants the opportunity to engage with practitioners and judges in this community, as well as notable visiting speakers. In many instances, SCBA programs address uniquely relevant issues on a local level, such as classes tailored to those who serve winery clients, or the wide array of post-fire programs.

San Francisco is the next nearest location with a breadth, depth and frequency of educational programs for lawyers. For members, the San Francisco Bar Association's programs, which obviously enjoy more favorable economies of scale, are $20 less per unit than Sonoma County. However, annual membership in the San Francisco Bar Association is $155 more than the SCBA. While acknowledging this analysis involves a certain ceteris paribus approach, SCBA leaves more money in its members' pockets to spend on the programs of their choosing.

More importantly, although I have always understood the tremendous time, focus, and effort the SCBA staff and the Education Committee (led by Deputy County Counsel, Josh Myers) commits to these efforts, I did not have an appreciation for how uncommon it is. Sonoma County has the proud distinction of being the leading force of legal education in the North Bay. The graphic below summarizes the continuing legal education offerings of the four other North Bay counties. It also compares the SCBA with the San Francisco Bar Association.

## North Bay Bar Associations

| Marin County | |
|---|---|
| Dues | $200.00 |
| *Periodic Section Luncheons* | *hosted by firms* |
| Members | $50.00 |
| Non-Members | $60.00 |

| Napa County | |
|---|---|
| Dues | $100.00 |
| *No MCLE offered* | |

| Lake County | |
|---|---|
| Dues | $35.00 |
| *A few MCLE a year* | |
| Members | $10/per hour |
| Non-Members | $35.00 |

| Solano County | |
|---|---|
| Dues | $105.00 |
| *No MCLE offered* | |

**BAR ASSOCIATIONS WITH FULL MCLE CURRICULUM**

| Sonoma County | | | San Francisco County | |
|---|---|---|---|---|
| Dues | $240.00 | | Dues | $395.00 |
| MCLE Member Fees | $60.00 | *versus* | MCLE Member Fees | $40.00 |
| MCLE Non-Member Fees | $75.00 | | MCLE Non-Member Fees | $55.00 |

# 1st Annual Judges' Jubilee—A New Event at a New Venue

On May 3rd, blessed with lovely Spring weather, SCBA members and guests gathered to mingle, imbibe, nosh and celebrate our Sonoma County Bench at the Kendall Jackson Wine Estate and Gardens during the 1st Annual Judges' Jubilee. 180 guests attended.

This inaugural SCBA event replaces the Summer Soirée—allowing for many members who vacation in the summer to attend a Spring event more readily.

The entire Estate and Gardens were available for guests to wander, gather and mingle, with the majority of visitors enjoying the covered patio, where four food stations and two wine bars were located, in addition to the regular tasting bar in the main Estate, pouring a wide variety of Kendall Jackson wines.

For additional fun, a photo booth was set up with a bunch of fun accessories for take-home snaps.

The general consensus was that this was a lovely and enjoyable venue for SCBA events and we look forward to other activities here in the future.

Thanks to Carla Hernandez Castillo and the Special Events Committee for their work planning this inaugural event, to volunteers Diana Duenas-Brown, Caren Parnes, Dorian Stansberry, and Debbie Winters, and special thanks to our many event sponsors listed below.

*By Caren Parnes*

*Caren Parnes, owner of Enterprising Graphics, works with SCBA to produce the Bar Journal and Annual Directory.*

## A Special "Thank You" to Our 2019 Judges' Jubilee Sponsors

**Supreme Sponsors—$1,100:**
Abbey, Weitzenberg, Warren & Emery, P.C.
Anderson Zeigler, A Professional Corporation
Friedemann Goldberg LLP
Geary, Shea, O'Donnell, Grattan & Mitchell
Law Offices of J. Chrisp
SCBA Labor & Employment Section
Spaulding McCullough & Tansil LLP

**Appellate Sponsors—$850:**
Beyers Costin Simon
Carle, Mackie, Power & Ross
Clement, Fitzpatrick & Kenworthy

**Superior Sponsors—$600:**
Arbitration and Mediation Center
Dunst Law Offices
JAMS
Law & Mediation Office of Thomas D. Wright
Law and Mediation Offices of Marie Maiolo Muchow
Law Office of Walter Rubenstein
Law Offices of BJ Fadem & Associates APC
O'Brien Law, PC
SCBA Alternative Dispute Resolution Section
SCBA Civil Bench Bar Section

**Superior Sponsors—$600 (Cont.):**
SCBA Family Law Section
SCBA Trust & Estate Section

**Advocate Sponsors—$300:**
A Family Law Firm, Inc.
Bluestone Zunino & Hamilton, LLP
Buell Law and Mediation
Conner, Lawrence, Rodney, Olhiser & Barrett, LLP
Emerick Law Offices
Esther Lemus, Windsor Town Councilmember
Exchange Bank
Law Office of Ethan A. Glaubiger
Law Offices of Ann L. Larson
Law Offices of Freeman & Freeman
Law Offices of Richard Freeman
O'Brien Watters & Davis, LLP
One Legal
Professional Fiduciary Association of California, Sonoma County Chapter
SCBA Criminal Law Section
SCBA Paralegal & Legal Support Section
Terre Family Law
Verbatim Reporting Service
Young Law Office

*Photography courtesy of Alexis Kent & Caren Parnes*


*At Left: SCBA guests mingling at the Kendall Jackson Estate*

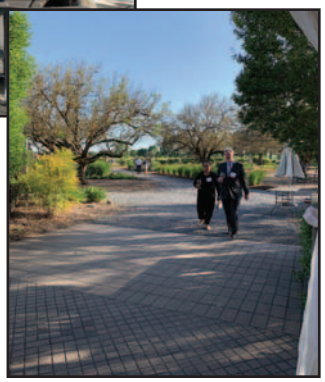
*At Right: Hon. Rene Chouteau, Ret. chatting with volunteer Deb Winters, SCBA Executive Director Amy Jarvis, & SCBA Office Coordinator Emily Rippen*

*At Right, L to R: Presiding Superior Court Judge Gary Nadler, Sponsor Sandra Hirschfield & COD Honoree Hon. Arnold Rosenfield (Ret.)*

*At Left: Guests enjoying the covered patio*

*At Left: Sponsor Angela Emerick with Sponsor & Board Member Carla Hernandez Castillo*

*At Left: Hon. Troye Shaffer & Hon. Kenneth Gnoss*



*At Right: Guests stoll in the gardens*

*Board Member Joshua Myers, Sponsor Elizabeth Fritzinger & SCBA Past President & Sponsor Bonnie Hamilton*

*Hon. Jennifer Dollard & Alexis Kent*

# Log It, Graze It, or Watch It Burn?

Last summer, then-governor Jerry Brown proposed changes to current logging rules to aid in thinning forests and hopefully stave off yet another year of devastating and deadly wildfires.

In what now seems grim foreshadowing, the Chico *Enterprise-Record* published an article on Brown's proposed changes August 24, 2018—a scant 76 days before the deadly Camp Fire broke out in nearby Paradise, California. The article detailed proposed changes intended to thin forestland that had dangerously overgrown from over a century of fire suppression efforts.

That conflagration would go on to be the deadliest fire in the state's history, killing at least 85 people. The blaze raged for more than two weeks and spurred Pacific Gas & Electric (PG&E), the state's largest utility, to file for Chapter 11 bankruptcy protection. The utility is estimated to face approximately $30 billion in damages claims from various wild fires that laid waste to communities across the state during 2017 and 2018.

A phrase began appearing spray painted on homemade plywood signs and on bumper stickers of mostly dirty pickups, making the rounds on social media via memes: "Log it, graze it, or watch it burn." Are those our only options? Are those options even effective? Is there a way to leave our majestic forests largely intact or are they destined to go up in smoke?

It depends.

The Camp Fire ignited on National Forest Service Land. There are approximately 19 million acres of federally-owned forested public lands in California. Management of these lands falls under the purview of the U.S. Forest Service, a division of the United States Department of Agriculture.

According to the U.S. Forest Service website, just under three quarters of the 191 million acres of federally-owned forests in the United States are deemed "forested." Under Forest Service rules, revised amid concerns about environmental impacts and conflicting uses, thirty-five percent of the forested land is subject to regularly scheduled timber harvests. The website states about one half of one percent of those trees are harvested in any given year. The remaining sixty-five percent of the forested land is off-limits for logging for various reasons.

It helps to understand the history underlying our current forest management policies. The U.S. Forest Service was founded in 1905 and five years later a series of forest fires termed the "Big Blowup" burned three million acres across Washington, Idaho, and Montana in only two days. The Big Blowup spawned the U.S. Forest Service policy of extinguishing all blazes as soon as possible and discouraging the intentional burns that had been used to manage forestland since time immemorial. This policy lasted until scientific data showed the beneficial effects of intentional burns in the 1960s and 70s, leading to a "let it burn" policy which allows wildfires to run their course where possible. Currently, fire-fighting eats up a full fifty percent of the U.S. Forest Service budget.

California has little to no power to effect change in federal policies governing National Forest Service Land. However, forest management on private land in the state is administered by the California Department of Forestry and Fire Protection (CAL FIRE). CAL FIRE is responsible for enforcing the 1973 Forest Practice Act which regulates logging in California. The State Board of Forestry and Fire Protection is charged with enacting and enforcing additional rules governing logging practices.

Logging on private land in California requires submission of a Timber Harvest Plan (THP) which, drastically simplified, explains which trees will be cut and what mitigation will take place. Registered Professional Foresters prepare the THPs, which can range from one hundred to five hundred pages or more.

Each THP must comply with stringent rules and, if a logging operation is found to be in violation, it can be shut down with citations and/or fines issued. CEQA, California's notoriously exacting environmental quality act, is among the rules and regulations that must be observed when logging on private land.

Circling back to Governor Brown's August 2018 proposal to ease logging rules, he attempted to piggyback additional rollbacks on AB 425, a bill introduced by Assemblywoman Anna Caballero in February 2017.[1]

The original version of AB 425 focused on relaxing road-building rules applicable to logging operations. Brown's additions proposed allowing harvest of trees measuring up to 36 inches in diameter, a significant increase from the current 26-inch limit.

No permit would be required so long as the trees were cut on a property of 300 or more acres[2] and landowners could build roads up to 600 feet long, so long as the resulting damages were mitigated. Allowing larger trees to be harvested for lumber would incentivize landowners to log and aid in wildfire prevention efforts.

Unfortunately, AB 425 was ordered to the inactive file by Senator Cathleen Galgiana, where it died in November.

Despite this, changes are on the horizon. Governor Gavin Newsom declared a state of emergency on March 22, waiving environmental protections to clear the way for 35 high-priority fuel reduction projects identified in a CAL FIRE report to move forward. The projects are expected to cost $35 million, to be paid for with funds earmarked for forest management in the current budget.

So, there will be increased logging this year, at least in the form of the 35 projects identified in the CAL FIRE report. But what about the second option on the bumper stickers: can increasing grazing on forestland aid in preventing wildfires?

The University of California, Division of Agriculture and Natural Resources, operates the Hopland Research and Extension Center (HREC) near Hopland. The River Fire tore through the HREC in July 2018, burning around 3,000 acres.[3]

Some of the area burned was being grazed, some was not. Researchers are currently conducting post-fire studies on, among other things, grazing practices as fire suppression. Initial observations show oaks survived in pastures where sheep grazed but the trees burned on ungrazed land. HREC's director, John, Bailey, has been quoted in media reports, stating that grazing stock on the land reduced the fire hazard.

In addition to the 35 high-priority fuel reduction projects to be completed pursuant to Governor Newsom's emergency declaration, beleaguered utility provider PG&E is taking steps to expand its Community Wildfire Safety Program by expanding the scope of its Public Safety Power Shutoff policy. The company announced earlier this year the shutoff policy will now apply to all electric lines, distribution and transmission, passing through areas with a high threat of fire.

Information disseminated by PG&E makes clear that all of the company's 5 million power customers may have their power cut if appropriate factors are present. Those factors include a red flag warning, humidity levels below 20%, high winds, moisture content of fuel, and on-the-ground observations.

*1. Specifically, AB 425 sought to amend section 4584 of the Public Resources Code, which relates to forestry.*

*2. Exemptions for shorter roads for smaller parcels of property were also included in the revised version of AB 425.*

*3. No livestock, stock dogs, or people died at the HREC during the River Fire.*

It is worth noting a red flag warning was in effect when the Camp Fire ignited and PG&E had alerted customers in numerous counties, including Butte County, that power could be cut. But the power stayed on. In a surreal twist, PG&E tweeted that it would not conduct a Public Safety Power Shutoff as weather conditions no longer warranted such a measure—nine hours *after* the Camp Fire tore through Paradise and surrounding communities.

But will any of it work? It is too soon to tell. However, given the death and devastation wreaked on the Golden State as a result of wildfires, it is clear changes must be made—and quickly. Otherwise, we will likely watch our forests burn.

*By Sarah Lewers*

*Sarah is a litigator with Krankemann Petersen, LLP, in Santa Rosa. She is the newest regular contributor to The Bar Journal, and is providing profiles of local attorneys as well as other articles of interest.*

# The Trial Court Is (Almost) Always Right: Burdens, Inferences and Presumptions on Appeal

Many attorneys and parties make the common mistake of believing that the appellate court is another opportunity to argue their case. It is often thought that a second set of judicial eyes would see what to them are obvious errors. But, to use a baseball analogy, when you step up to the plate in the appellate court, you have 2 strikes, 3 balls, 2 outs and an umpire whose job it is to call the next pitch a strike unless you hit it out of the park.

Burdens, inferences and presumptions in the appellate court can create a trap for the unwary trial lawyer considering whether to appeal an adverse decision or prepare a petition for writ review.

The scope of appellate review is relatively narrow, and limited by specialized jurisdictional principles unique to appellate litigation (*Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 69.) The appellate court's jurisdiction is generally governed by Code of Civil Procedure section 902 and appealable decisions and orders are limited by Code of Civil Procedure section 904.1. The appellate court is confined to deciding issues of law, not reviewing issues of fact. The appellate court will not review factual questions, nor substitute its judgment for the judgment of the trier of fact in the trial court (*Brown v. Oxtoby* (1941) 45 Cal.App.2d 702, 705.)

The usual burdens of proof on issues that apply in the trial court do not apply in the appellate court. For instance, in the trial court, the party asserting a proposition or bringing a claim has the burden of proof. In the appellate court, that burden of proof does not apply. Instead, the appellant has the burden to prove nearly everything in the appellate court, regardless of who had the burden of proof in the trial court.

The good news is, the appellate court will review errors of law. The bad news is, your client must jump over several hurdles to affirmatively prove those errors of law.

The trial court's decision is presumed correct. The appellate court will indulge in all intendments and presumptions to uphold the trial court's decision (*Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 633.) Countless appellate opinions begin by intoning the mantra: "A judgment appealed from is presumed correct and all intendments and presumptions are indulged in favor of its correctness." It's never good news for the appellant when the Court's opinion begins this way.

Even if you can show an error of law by the trial court, you're not yet home free, because the appellate court will uphold the trial court on *any* lawful basis, whether or not the trial court stated it as a ground for its decision (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880, fn. 10.) The appellate court reviews the ruling, not the trial court's reasons for its ruling. The reason for this rule is that there can be no prejudice from an error in logic (*Fierro v. Landry's Restaurant* (2019) 32 Cal.App.5th 276 286.) And the appellate court is only interested in prejudicial errors, not harmless errors (*Tint v. Sanborn* (1989) 211 Cal.App.3d 1225, 1235.)

When the evidence on an issue is conflicting, the appellate court will accept the evidence which is most favorable to the judgment (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 344.) When either one of two inferences may fairly be deduced from evidence, the appellate court must accept the inference which will be favorable to judgment. (*Id.* at 348.)

The appellate court will review an error only when a record has been made in the trial court. If a record is silent or incomplete on an issue, the appellate court will construe it against the appellant (*Fernandes v.Singh* (2017) 16 Cal.App. 5th 932, 935, fn.3.) I cannot count the number of cases I have reviewed for trial counsel who are convinced the trial court erred, but the issue was never raised in briefs or at oral argument. In the trial court, at least make an offer of proof. No record, no appeal.

When representing an appellant on appeal, not only must you show that the trial court erred and that your client was prejudiced as a result of that error, you must, as a practical matter, convince the appellate judges that the trial court cannot be upheld on *any* lawful ground, even if the trial court didn't consider it. These burdens, inferences and presumptions render most any appeal a Sisyphean task. Keep them in mind when considering the likelihood of success on appeal.

*By Noreen Evans*

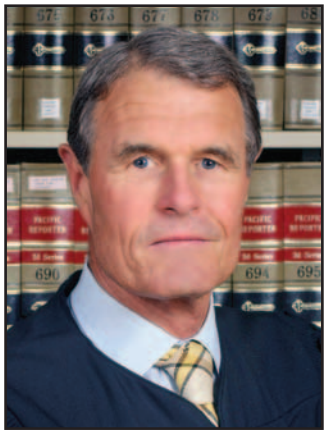
*Noreen Evans is of Counsel with O'Brien Watters & Davis LLC, a member of the SCBA Civil Bench Bar Section and Education Committee, and a former State Senator.*

# Judge Chouteau: Advocate and Public Servant

Before becoming a judge, Rene Chouteau was an accomplished litigator. For nearly 30 years, he argued cases before the United States Court of Appeals, Ninth Circuit, and Court of Appeals of California, First Appellate District. This article discusses Chouteau's life, litigation work, and education, which began in San Francisco.

Chouteau was born three years after the attack on Pearl Harbor and the United States' entrance into World War Two. An active army base, the San Francisco Presidio was still phasing out coastal artillery fortifications. Chouteau's childhood home was in San Francisco's Richmond District. Blocks away, there were mounted guns and mines in the harbors and on the beaches.

As a boy, Chouteau operated a switchboard phone at his grandfather's law firm, Young, Rabinowitz, and Chouteau. It was while working there that Chouteau observed the work of celebrated San Francisco trial lawyers Vincent Hallinan and James Martin MacInnis. Says Chouteau, "They were tough, very tough." Chouteau watched criminal and civil trials. He recalled seeing Vincent Hallinan conclude a withering cross-examination by saying: "That's all. You can crawl down off the witness stand now."



Chouteau's grandfather successfully defended James Martin MacInnis against State Bar disbarment proceedings. In 1949, Hallinan and MacInnis had represented Australian-born Harry Bridges, the leader of the International Longshoremen's and Warehousemen's Union, in a deportation attempt because he had failed to disclose his Communist Party membership when he became a United States citizen in 1945. A jury convicted Bridges of perjury, and a federal judge ordered Hallinan and MacInnis disbarred and imprisoned due to, "a studied, persistent, and inflammatory course of conduct, flouting the authority and orders of the court." Bridge's conviction was reversed by the United States Supreme Court. Hallinan and MacInnis retained their law licenses. As a young man, Chouteau worked for MacInnis, and thought of him as "a gentleman, the greatest orator of his age, and an instrumental influence on his concept of how to practice law."

In 1960, Chouteau graduated Stanford University with a "pre-law" designation. Outside of the law, Chouteau studied literature, and especially Herman Melville's Moby Dick. He learned that good writing conveys a sense of time, place and voice. After college, Chouteau enrolled as a law student at Stanford University. His first-year Contracts professor was John Hurlbut. The John Bingham Hurlbut award for excellence in teaching is now bestowed on a law professor selected by third-year Stanford law students. Professor Hurlbut earned a reputation for his mastery of the Socratic method, bringing forth answers that related intelligently to the problem at hand. Chouteau recalled his classmates had nicknamed Hurlbut the "Silver Fox," for his ability to inspire students' attention and affection.

In the seventies, Chouteau was an assistant city attorney for the city of San Francisco. As an assistant city attorney, he brought impeachment proceedings against Joseph Mazzola. Mazzola, the leader of a 20,000-member plumber and pipe-fitters union, had been appointed to the San Francisco Airports Commission. In 1976, Mazzola led a 38-day citywide strike that deprived the airport of essential plumbing services. The City's board of supervisors charged Mazzola with "official misconduct." At trial, Chouteau presented "massive evidence" against Mazzola by showing payroll records that proved the plumbers were not on the job during the strike, along with subpoenaed newsreels depicting the strike. The Board of Supervisors removed Mazzola from the office of airports commissioner, though Mazzola successfully appealed his impeachment to California's Court of Appeal, First Appellate District, which reversed on grounds that there was no legal basis for a finding of official misconduct.

After his two children were born, Chouteau moved north to the Santa Rosa area, where, during the eighties and nineties, he was Santa Rosa's city attorney. As city attorney, Chouteau handled a complex 42 U.S.C. Section 1983 action in which a motorcycle gang member sued city police officers due to an unannounced, forced entry into a home used as a motorcycle gang clubhouse. During the raid, which began at 6:00 a.m., police officers broke through the door of the house with a battering ram, and violence ensued. After a jury trial which awarded damages to the plaintiffs, Chouteau appealed the district court judge's denial of a motion for summary judgment regarding the police officers' entitlement to qualified immunity. The Ninth Circuit Court of Appeal held that the exigency exception justified the immediate, forced entry into the home, and reversed the district court's denial of summary judgment, ending 11-years of litigation.

Chouteau defended Santa Rosa in myriad lawsuits involving Santa Rosa's sewage system. One such lawsuit was brought by the Russian River Watershed Protection Committee. The "Watershed" contended that Santa Rosa's system of treating

*Continued on page 13*

# Law Week 2019: 16 Years of Collaboration Between the Sonoma County Office of Education and the SCBA

County-wide teacher recruitment, expertly prepared thematic curriculum* and the extraordinary management of the presenter schedule by SCBA's Susan Demers gets the Law Week program in front of hundreds of students each year.

This year's curriculum, "Freedom of the Press," provided a concise review of press freedom, and an incisive review of limitations on that freedom. The curriculum included five creatively written case studies, providing clarification and context for teachers and their students.

I visit a few Law Week presentations each year. For Law Week 2019, I'd like to provide a snapshot of a couple of presentations, both of which occurred at the Sonoma County Juvenile Justice Center. What follows are reflections on the experience, from the hosting teachers and several presenters:

Jim Reed teaches in Unit 4, which houses female juveniles at the JJC. "In our preparation for our Law Week presentation on First Amendment freedoms, we studied the 1734 Zenger case. Zenger criticized the colonial British government in his New York newspaper, was arrested, and freed by a jury. This precedent showed how colonial Americans believed that people had the right to criticize their government. Students learned that freedom of speech and press is important, because in a representative democracy, citizens need to be able to speak and publish their ideas about legislation, without fear of reprisal.

During our Law Week presentation, students were encouraged to check a variety of news sources to guard against misleading, biased, or fake news. Also discussed were press protections, and limits on libel and obscenity; a student added that you must prove malice to win a libel charge. Additionally discussed was that U.S. troops movements, fighting words and obscenity are not protected speech; another student asked if freedom of speech applied in jail. Students became engaged in the discussion, enjoyed learning 'helpful things,' and asked that we have it more often."

Dean of Empire Law School, Brian Purtill's reflections on addressing students in Unit 4: "We circled the desks and sat with the students to have a discussion, rather than lecture. We tried to make the material relevant to their perspectives. They had keen observations on both the limitations of freedom of speech and the press. The students developed their own hypothetical fact patterns involving Mark Zuckerberg and Justin Bieber as Dan Lanahan presented material on libel and slander and the protections afforded the press when the subject is a celebrity; this allowed for some humorous moments in the discussion.

Overall, students were engaged, insightful, and invested in the topic. It was not lost on all of us that we were discussing freedoms with young women who had temporarily lost theirs, and I think the students came away with a strong sense of the need to be alert, to not take these freedoms for granted, and to be judicious in judging the accuracy of the news of the day. I'd call the day a complete success and worth every hour of preparation."

Co-presenter Dan Lanahan of Flack Law, PC: "I was particularly impressed with the students' participation in the Socratic method and how, without the need for leading questions, they were able to differentiate the analysis of a 'known falsity' and a 'reckless disregard for the truth' within the actual malice burden applied in public figure libel actions. They were very quick to point out in our fictitious fact pattern, that the newspaper did nothing to verify the story and that while the publication did not lie, its actions constituted more than just a simple mistake."

Teacher Michelle Scarboro instructs in Unit 6, JJC's maximum security unit for young men. "Law Week is an excellent and meaningful program. The students in Juvenile Hall benefit from the knowledge the speakers bring to the units. Having hosted Law Week several times, I appreciate that the lawyers and judges speak to students without using jargon.

Our Law Week 2019 presenters provided well-researched information and then opened the conversation for questions. They were patient and understanding while answering each young man's queries. Some of the questions were more difficult to answer than others, generally because of the very specific details the students used in their examples. Many questions sounded like they pertain only to the First Amendment, but once examined, the questions covered more ground than just that—gang enhancements, vandalism, destruction of property, right to assemble for non-political speech, the juvenile versus adult justice systems, First Amendment behavior while on probation, voting rights for felons, citizenship. Their curiosity was honored, satisfied, and piqued by our presenters.

I hope the SCBA continues to support Law Week as it is one of the more meaningful and significant classroom experiences our students get. Thank you to all involved."

**Thank you Carmen Sinigiani, Adam Eberts, Eric G. Young, William L. Adams, Danielle Restieaux for the fine Law Week 2019 curriculum.*

*Photography courtesy of Rebecca Gallagher*

New to the Law Week effort, attorney Daniel Wilson of Anderson Zeigler, presented in Unit 6: "When I first heard I was teaching a class at the Juvenile Justice Center, I had a mixture of curiosity and nerves. However, the students I addressed were ordinary high school kids, who happened to be locked up. Some were engaged, some weren't. Some were mild mannered, some weren't. Some seemed happy to see a fresh face, others were probably wondering who let me in the door. They were like kids you would see in almost any public high school classroom in America. In fact, they were much better than many I had encountered when I occasionally taught during law school.

The thing that had the greatest impact on me was that for all the anticipation, security measures, guards, the experience was a pleasure."

Echoing Dan, it has been my "pleasure" for these many years, to recruit teachers county-wide to offer this collaboration called Law Week, to their students.

I am grateful to all our Law Week volunteers. A high school audience, no matter the school, can be tough! But your preparation and efforts to creatively engage, do in fact, resonate in those young minds.

*At Right: Presenters Anthony Bettencourt & Christopher Costin in Jamil Dawsari's Petaluma High School classroom*

*At Left: Presenters Holly Rickett & Hon. Dana Simonds presented in Dorothy Patch-Kennedy classroom at Montgomery High School*

*By Rebecca Gallagher*

*Rebecca Gallagher is the Education Specialist in the Career Development Department, Sonoma County Office of Education*

## Judge Chouteau (continued from page 11)

and discharging wastewater into the Russian River violated the Clean Water Act. After a bench trial, the district court entered judgment in Santa Rosa's favor, based substantially on the expert testimony of city wastewater officials. The Watershed appealed the district court's judgment, but the Ninth Circuit upheld it, finding Santa Rosa's wastewater treatment system complied with the Clean Water Act. Chouteau litigated cases involving Santa Rosa's sewage system for more than 12 years.

Yet Chouteau's proudest accomplishment as city attorney does not involve litigation. In 1991, Santa Rosa launched the Neighborhood Revitalization Program, a coordinated interdepartment task force consisting of planning, zoning, housing, police, and city legal services. Together with Housing Director Steven Burke, Chouteau applied the program's resources to the Apple Valley neighborhood. Says Chouteau, the program was a "very concentrated effort" that turned the neighborhood around and improved the quality of life for Apple Valley residents.

In December 2018, Chouteau retired after 17 years as a superior court judge, and 26 years as a litigator. In retirement, Chouteau teaches math to junior high school students at St. John's in Healdsburg, and he presides as a visiting judge over proceedings in Sonoma County Superior Court. Chouteau's life and work demonstrate the principles of public service and skillful courtroom and appellate advocacy.

*By Edward Lester*

*Edward Lester is an associate attorney with Geary, Shea, O'Donnell, Grattan & Mitchell, P.C., an A.V.-rated law firm that regularly handles complex civil litigation, public entity defense, all aspects of winery and vineyard law, family law, and estate planning.*

# Paralegals: Independent Contractors No More?

Last April, the California Supreme Court handed down a ruling in *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 ("*Dynamex*") which dramatically altered the status of many independent contractors in California. The ruling created a bright line, three-prong test to determine whether someone is an independent contractor. California is now catching up to the majority of states that have statutes or case law of a similar nature.

With *Dynamex*, there are now two California Supreme Court rulings that apply to determining whether someone is an employee or independent contractor: *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*") and *Dynamex*.

*Borello*, decided in 1989, has a long list of conditions which are applied to employment to determine a person's employment status. The primary factor is whether the employer controls "the manner and means of accomplishing the result desired" (*Borello*, at p. 350.) Additional factors include the right to discharge at will without cause; whether the worker is in a distinct occupation and engages in an independently established business; who supplies the tools and place to work; length of time of the work and the permanence of the relationship; method of payment (hourly or by the job); the amount of supervision provided to the worker; and whether the parties believe there is an employee/employer relationship. This rather cumbersome test has been used since 1989.

The *Dynamex* decision applies only to Wage Order No. 9 which governs, among other things, overtime, minimum wages, meal and rest periods, and reporting time pay, and supplants *Borello* in these categories. For taxes, the IRS has a "20-factor" test. For unemployment, the EDD uses a combination of statutes and common law factors. *Borello*, on the other hand, continues to control for Workers' Compensation, waiting time penalties, wrongful termination, and unfair competition.

While *Borello* is still the controlling case law for many aspects to determine employment, *Dynamex* is likely to be the determining factor overall as, if the conditions of *Dynamex* are not met, then the *Borello* conditions will be moot. In addition, the presumption in the ruling is that workers are employees unless they meet the conditions of the "ABC test" which the court set forth in *Dynamex*, and it is up to the employer to prove that the employee meets all three prongs of the test in order for the employee to be an independent contractor.

The *Dynamex* decision is, in fact, almost identical to Massachusetts General Laws, Part 1, Title XXI, chapter 149, section 148B, which creates the same three-pronged "ABC" test that the Court adopted in *Dynamex*.

In issuing this opinion, the Court recognized that wage orders and statutes protect workers who have "less bargaining power than a hiring business and that workers' fundamental need to earn income for … survival may lead them to accept work for substandard wages or working conditions. The basic objective … is to ensure that such workers are provided at least minimal wages and working conditions … necessary … [for] a subsistence standard of living and protect worker's health and welfare." (*Dynamex*, p. 952.)

The ABC test that the California Supreme Court created is as follows:

*(A) The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;*

*(B) The worker performs work that is outside the usual course of the hiring entity's business; AND*

*(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.*

*All* of these conditions must be met. It is the burden of the employer to prove that all of these conditions are met. An employee cannot sign an agreement stating that they agree that they are an independent contractor to circumvent the requirements. Prongs (A) and (C) primarily amplify and clarify conditions already set forth in *Borello*. Prong (B), however, is distinct and new.

Prong (B) applies to a broad spectrum of professions and situations where, until this decision, workers have been independent contractors. In the legal profession in particular, this applies to paralegals (and support staff). Many paralegals, myself included, work as independent contractors for law firms. Because paralegal work is not "outside the usual course" of business, paralegals and support staff can no longer be hired as independent contractors.

In addition, for paralegals there is difficulty with prong (A) as a paralegal's work is not free from the "control and direction" of the hirer, and in fact, a paralegal's work *must* be supervised by an attorney ("It is unlawful for a paralegal to perform any services for a consumer except as performed under the direction and supervision of the attorney…" (Bus. & Prof. Code, § 6451).) Further, paralegals as independent contractors violate the standards of *Borello* also for this same reason. Going forward, attorneys will have to hire paralegals, perhaps as temporary hires, but hired nonetheless.

An option around this dilemma may be to use employment services such as Robert Half. These services hire temps as staff

to their company and provide all the benefits associated with being an employee.

This test would seem to overturn some of the language in Business and Professions Code section 6450, et seq. which allow for "independent paralegal" and "contract paralegal" in the definitions (Bus. & Prof. Code, §6454.)

In May, Joseph Gruchawka of Law Office of Joseph Gruchawka and Samantha Pungprakearti of Carle, Mackie, Power & Ross, gave an excellent MCLE at the Bar Association on this topic (I am indebted to their research and presentation.) There was a discussion about solutions to prong (B) in particular. One idea was that since the Court is concerned with workers making subsistence wages, there could be a financial limit, above which the restrictions would not apply. It would seem that most independent paralegals would probably fall in this category as most are not dealing with subsistence wages. Another suggestion was that perhaps an employer would need to have a minimum number of employees before the test takes effect as the FMLA requires 50 employees or EEOC minimum of 15 employees for their regulations.

There are several subsequent court decisions on this matter and as I write this I see another from the Ninth Circuit. Perhaps more on that later.

*By Shafiq Spanos*

*Shafiq Spanos obtained his paralegal certificate from SSU in 2009 and has been working as an independent contractor for the last five years. He has recently joined the law firm of Fiumara and Milligan, PC.*

# Sonoma County Superior Court Judge Robert S. Boyd Retires After 21 Years of Service

*The following is a reprint of the Press Release from the Superior Court of California, County of Sonoma.*

After serving for over 21 years, Judge Robert S. Boyd will retire from the Sonoma County Superior Court bench as of June, 2019. Judge Boyd was appointed to the Sonoma County Superior Court in 1998 by Governor Pete Wilson. Since his appointment Judge Boyd has heard cases in the Criminal, Civil, and Family Law Departments. From 2005 to 2008 Judge Boyd served as the Presiding Judge of the court.

"Judge Boyd is a highly respected jurist; his presence will be missed by all of his colleagues on the bench," said Gary Nadler, the Presiding Judge of the court.

In addition to serving on the bench, Judge Boyd was selected as a member of the Judicial Council's Civil Law and the Alternative Dispute Resolution Advisory Committees, serving as Chair of the Alternative Dispute Committee. He was also elected to serve on the Trial Court Presiding Judges Advisory Committee; and was selected to serve on the Judicial Council Budget Committee. Judge Boyd received the Alternative Dispute Resolution Judge of the year Award from the Sonoma County Bar Association in 1999.

Judge Boyd's community service also included endeavors outside of the courthouse. For fourteen years, Judge Boyd taught contracts to first year-law students at Empire law School. He was a member of the Board of Garbage Reincarnation, a company active in collecting and recycling reusable garbage and other used household items. From 1997 to 2012, Judge Boyd served as a board member of the Blood Bank of the Redwoods and served as its president from 2007 to 2011. For the last twenty five years he has been an active member of the Sebastopol Rotary Club.

After graduating from the University of California, Berkeley, Judge Boyd served in the United States Navy, attaining the rank of Lieutenant Junior Grade. After his service in the Navy, Judge Boyd attended the University of California, Hastings School of Law, graduating and becoming a member of the California State Bar in 1972. Judge Boyd began his practice of law in San Francisco. In 1977 Judge Boyd moved Sonoma County, starting a law practice in Santa Rosa. As part of the firm's practice, Judge Boyd and Robert Murray founded the Arbitration and Mediation Center 25 years ago.

Upon his retirement, Judge Boyd looks forward to again serving as a private arbitrator and mediator.

# 2019 SCBA Family Law Section Events

## Family Law Judicial Officers Luncheon

On March 1, 2019, the Family Law Section held its annual Family Law Judicial Officers' Luncheon at Vintners Inn. The section had the pleasure of hearing comments by Commissioner Becky Rasmason, Judge Jim Bertoli and the newest judge to the Family Law bench, Judge Lawrence Ornell. The theme of this year's presentation was "We Like It When…" and the Judicial Officers provided some valuable insight about best practices in their respective courtrooms. Thank you to all who attended for making this event a success.

### *FL Judicial Officers Luncheon Photos*

*At Left: Hon. Becky Rasmason speaking to guests as Hon. Lawrence Ornell (at left) & Hon. Jim Bertoli (at right) look on*

*At Right: Guests listening to Hon. Lawrence Ornell's remarks*

*At Left (L to R): SCBA Executive Director Amy Jarvis with presenters Hon. Jim Bertoli, Hon. Lawrence Ornell & Hon. Becky Rasmason*

*Family Law Events coverage by Jenna H. Coffey*

*Jenna H. Coffey is a partner at Geary, Shea, O'Donnell, Grattan & Mitchell, P.C. She is the current chair of the SCBA Family Law Steering Committee.*

## Rex Sater Award Dinner

The Rex Sater Award for Excellence in Family Law is given each year to an individual or group who has contributed to improving the practice of family law in Sonoma County. The plaque commemorating this award states: "Judge Sater's legacy to Sonoma County is his belief that people hold the answers to their family conflict locked in their own hearts. The System's primary duty should be to help those people find their own answers…."

Dr. Daniel Pickar was presented with this honor at an event which embodied characteristics of Dr. Pickar himself—warm, funny, collegial and kind. Attorneys, judges, and mental health professionals gathered at the Santa Rosa Golf and Country Club on April 5, 2019 to raise a glass to the man who carries on Judge Sater's legacy each and every day. Presentations included kind words by Dr. Jeff Kahn, an "evaluation" by attorney John Johnson (complete with props) and surprise remarks by Dr. Robert Kaufman. In attendance were Dr. Pickar's wife Miriam, his mother Adele and his children Jacob and Leah, whom he noted were his "greatest accomplishment."

Dr. Pickar's work in the custody evaluation field provides an invaluable service to the most vulnerable, the most helpless, and the most affected by the family law system, the children. It was the Section's honor to recognize his accomplishments and contributions to the practice of family law.

### *Rex Sater Awards Dinner Photos*

*At Right: Rex Sater Award recipient Dr. Daniel Pickar accepts his award from presenter & SCBA Chair of the Family Law Steering Committee Jenna Coffey*

*At Left: Speaker John Johnson delivers a "Cycology" Rorschach test to the audience*

*Photography courtesy of Owen Scott Shirwo*

# Civil Trial Workshop: Everything You Ever Wanted to Know About Civil Litigation, in Seven Hours

On March 22, 2019, almost two dozen members of the Sonoma County legal community provided 64 attendees with the cumulative wisdom of several centuries of civil litigation experience in an all-day workshop, graciously and efficiently moderated by Greg Spaulding.

While discussing pre-trial matters, Tad Shapiro, Michael Shklovsky and Pamela Stevens provided an extensive analysis of Sonoma County Local Rule of Court, Rule 4, a comprehensive guide for all pre- and post- trial matters. Among other things, Rule 4 addresses alternative dispute resolution, mandatory case management settlement conferences, the duty to meet and confer prior to trial, an extensive list of pretrial documents required by the Court and the Discovery Facilitator and Demurrer Facilitator Programs.

Elizabeth Fritzinger, John Geary, and Bonnie Hamilton discussed the use of motions in limine to exclude prejudicial and irrelevant evidence, with particular attention to character evidence; how to get it in, and how to keep it out. Filing these motions alerts the court to possible evidentiary issues during trial, while the subsequent ruling on the record preserves the objection on appeal.

Judge Jennifer Dollard, Michael King, and Jack Weaver offered insights on juror questionnaires, California Civil Jury Instructions and the creation of the special verdict form, the art of voir dire with a mock voir dire of attendee volunteers, and the uses of a jury consultant besides for voir dire, including case analysis and strategic planning, drafting the juror questionnaire, and witness preparation.

Desiree Cox, Debra Newby, and Judge Bradford DeMeo outlined effective elements for an opening statement, including establishing your own credibility (the old "be yourself," who knew?), using a narrative to state facts and imply an argument, and a simple conclusion. This introduces the theme and theory of case, and the panel strongly advised the Plaintiff's opening statement be immediately rebutted.

After lunch, Richard Freeman, Dawn Ross, and Victor Thuesen reviewed some basic principles for direct examination: Be sure to use each witness to tell your client's story in a logical orderly fashion and to prove the elements of your case. Witness should be prepared, not over prepared and don't forget to listen to the witness' response so that you can correct mistaken testimony and follow up on that which needs to be highlighted!

Judge Nancy Shaffer was joined by Michael Miller and Michelle Zyromski for a discourse on effective cross-examination: Ask brief, leading questions in plain English, and never allow the witness to rehabilitate testimony with an explanation. The panel recommended several lines of attack for cross-examination of an expert witness; the expert opinion is like a house of cards, undermining one assumption will collapse the entire structure.

Judge Gary Nadler, Suzanne Babb and Traci Carrillo reviewed the three elements of the closing statement: Argue the facts in a way that favors your side, review the evidence and the law as promised in the opening statement, and leave the jury with a call to "do the right thing."

The expertise of the panelists, and the extensive and generous handouts offered, resulted in a virtual "what to expect when you're expecting" your case to go to trial in Sonoma County Superior Court.

*By Rebecca Slay*

*Rebecca is a certified paralegal with the Law Office of Richard J. Meechan in Santa Rosa. Prior to receiving her A.A. from Santa Rosa Junior College in 2018, Rebecca worked in education and public policy for over 20 years.*

*Panelists (left to right): Desiree Cox, Hon. Bradford DeMeo & Debra Newby*

*Workshop attendees with moderator Greg Spaulding (bottom front row)*

*Panelists (left to right): Michael King, Hon. Jennifer Dollard & Jack Weaver*

*Photography courtesy of Owen Scott Shirwo*

# Technology & Law Part 1: *Motion for E-mail Determination of Privilege*

*Technology & Law is a semi-regular column written by Linda Tavis. The column's aim is to provide you with useful tips for using technology more effectively in your life and practice.*

Celebrating its 48th birthday in June, e-mail communication, which predated the internet's 1991 arrival has, despite the appearance and disappearance of numerous technological developments, become ever more robust. It is not unusual for professionals, in addition to using a business email account, to have one or two personal accounts with each of their e-mail accounts accessible on business computers, public computers, and a myriad of different mobile devices. According to research reports, the average number of e-mails received a day can range from 80 to 120 with approximately 68% of new e-mails being opened on a mobile device.

Studies have found that the manner in which professionals manage their professional e-mail communication results in higher levels of stress, has a negative impact on daily business productivity and fosters heightened client expectations. For some, checking e-mail messages may be one of the last business tasks of the day. [*Part 2 of this article will focus on e-mail management strategies.*]

Attorney client e-mail communication and the attorney-client privilege (ACP) have been the focus of numerous lawsuits, with judicial decisions varying. The client's understanding, lack of understanding or misunderstanding of attorney-client privilege and how the privilege can be and has been waived using e-mail communication is the thread in each of the lawsuits.

The ABA, the California Bar and other jurisdictions have issued formal opinions regarding attorney-client privilege (ACP) as the privilege relates to e-mail communication; ABA Model Rule of Professional Conduct, 1.1 and 1.6., ABA Formal Op. 477R, California Rule of Professional Conduct, 1.6., Cal. Bar Formal Opinion 2010-179.

*City of Ontario v. Quon* (2010)130 S.Ct. 2619

The U.S. Supreme Court, in *Quon* evaluated public employees' rights to privacy on mobile devices under the Fourth Amendment. The mobile device in question was a pager provided by the city for the purpose of improving the performance of both SWAT units and the pagers in SWAT situations. The Court, however, declined to create a hard and fast rule for all mobile devices in applying the Fourth Amendment to new technologies, electing instead to dispose of the case on narrower grounds. The Court instead framed its decision of whether the SWAT officer had reasonable expectation of privacy when the officer had been told of the possibility of an audit if he exceeded a preset character allocation. Since the officer had knowledge of the potential audits, the search was found to be reasonable.

*Holmes v. Petrovich Development Co., LLC* (2011)191 Cal.App.4th 1047

Ms. Holmes was an executive assistant at Petrovich who acknowledged reading and signing the company's employee handbook that spelled out the company's policy concerning technology resources. The handbook directed employees that the company's technology resources should be used only for company business and that employees were prohibited from sending or receiving personal e-mails. Moreover, the handbook warned that "[e]mployees who use the Company's Technology Resources to create or maintain personal information or messages have no right of privacy with respect to that information or message." The "Internet and Intranet Usage" policy in the handbook specifically stated, "E-mail is not private communication, because others may be able to read or access the message. E-mail may best be regarded as a postcard rather than as a sealed letter. . . ." The handbook further spelled out that the company may, "inspect all files or messages . . . at any time for any reason at its discretion" and that it would periodically monitor its technology resources for compliance with the company's policy. Ms. Holmes subsequently filed a lawsuit against Petrovich. Her e-mails to her counsel were sent using her company e-mail account. The Court found she had no reasonable expectation of privacy and her e-mail communications were not privileged. "However, the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in the employer's conference room, in a loud voice with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him. By using the company's computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of e-mail usage, Homes did not communicate "in confidence by a means which, so far as the client is aware, disclosed the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmis-

sion of the information or the accomplishment of the purpose for which the lawyer is consulted (Evid. Code, § 952)."

*Stengart v. Loving Care Agency Inc.* (N.J. 2010) 990 A.2d 650

Ms. Stengart was a Loving Care Agency employee who used a company provided laptop to communicate with her attorney. When she communicated with her counsel, she used her personal, password-protected web-based e-mail account. Ms. Stengart, in the course of her employment, filed a discrimination lawsuit against the company. With the assistance of a forensic expert, the company discovered her attorney client e-mails. Loving Care attorneys took the position that the ACP was waived because of the company's written policy that information exchanged via company equipment was not to be considered private. The New Jersey Supreme Court disagreed. The Court ruled that Ms. Stengart had not waived the attorney-client privilege because the scope of the company's computer policy did not expressly reference personal, password-protected, web-based e-mail accounts accessed via a company computer. According to the NJ Supreme Court "Stengart had a subjective expectation of privacy because she used a personal e-mail account, and had an objective expectation of privacy because the company policy did not specifically address the use of personal accounts."

Various Courts have held that an employer's policy reserving the right to access and monitor employee accounts alone is sufficient to support a finding that an employee has no reasonable expectation of confidentiality in e-mails transmitted over an employer's e-mail system. Other jurisdictions have found that an employer's policy preserving the company's right to access and monitor an employee account is insufficient to find that the employee's expectation of privacy has been waived unless the e-mail accounts had been routinely monitored.

It is reasonable for counsel to assume, until you know to the contrary, that your client's employer's internal policy allows for access to the e-mails sent to or from your client's workplace device or system, potentially bringing your ACP related to those e-mails and the e-mail attachments into question. And while our professional Rules of Conduct and the ABA Model Rules do not imply that the lawyer engages in professional misconduct any time a client's confidences are subject to authorized access or disclosed inadvertently, we do have a duty to take reasonable precautions against waiver of the privilege. "…[L]awyers have the duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

Educating your client at the onset of your representation about ACP and e-mail communication, adding your client's written acknowledgment and understanding of your ACP/e-mail discussion, and including your client's authorized e-mail address for attorney-client communication to your retainer agreement are three (3) steps that may assist you and your client to avoid an inadvertent waiver of ACP when communicating via e-mail.

*By Linda Tavis*

*Linda C. Tavis has been a trial attorney in the area of Family Law for the past 22 years. She has litigated complex dissolution and custody matters incorporating the use of technology.*

Technology Integration for Professionals Seminars

# Superhero Collateral Damage—Are You Covered?

It is a really good time to be a nerd. *Star Trek* shows are back, and talking about Trek in public no longer elicits solely groans and eye rolls. *The X-Files* revival, though mostly disappointing, brought Scully and Mulder back into popular culture, and I could not be more thrilled. Joe Manganiello, Deathstroke in the *Justice League* post-credit scene, recently spent his entire nine-minute spot on the *Colbert Report* discussing "Dungeons & Dragons," which Stephen also plays, and during which Stephen proclaimed "it's hip to be a nerd, now." Comic books are accessible online, there are more women and minority comic creators and contributors than ever. There is a comic book out there for everyone—even you! Most prominently, the superhero movie genre is at its peak. A new comic book-related or superhero movie seems to come out every six weeks.

If you're like me, one of the first things you think when you see a city block leveled in one of these movies is, "who is going to pay for that?" (Unless, of course, the movie is set in the DC Cinematic Universe, in which case the answer is probably Wayne Enterprises, Inc.) There have been attempts to address this question in comic books and onscreen. The TV series *Powerless* aired briefly on NBC and focused, in the original pilot, on the non-powered folks working at Retcon[1] Insurance, an insurance company that specialized in providing coverage for damages caused by superheroes and villains. Marvel Comics published "Damage Control," which focused on a construction company specializing in repairing the damage from such conflicts.[2] What if comic book superheroes and villains really existed, and huge swaths of major metropolitan cities and their outlying suburbs were decimated on a regular basis? Great Hera! Are you covered?

Many attorneys in Sonoma County have become quite familiar with insurance coverage in the wake of recent wildfires, but here's an extremely basic primer of property insurance. Insurance policies are written for insurable risks—those losses which are measurable, random and unintentional, and for which insurers are willing to bear the risk in exchange for payment of an affordable premium. Every policy contains insuring language (identifying the basic scope of coverage), exclusions (describing matters not covered, some of which are subject to exceptions which can restore coverage), conditions (both precedent and subsequent, setting forth the duties of insured and insurer), and definitions (defining key terms and phrases). For a loss to be covered, it must fall within the basis scope of coverage and not be excluded.

Exclusions are designed to avoid coverage for risks insurers don't want to insure, such as war, terrorism, and flood, where the magnitude of those catastrophic losses are such that it is difficult to insure against them at an affordable price. Floods cause a high amount of damage to individual properties but also entire regions, making it challenging to spread the cost to other property owners by way of their premiums. The reasons for excluding losses resulting from war and terrorism are similar. Damage and destruction from massive "supers" battles[3] would very likely fall into the uninsurable loss category as a result of the war or terrorism exclusions, existing exclusions would be broadened accordingly[4], or new exclusions would be written. Accordingly, in a world where powered folks exist, be it Earth Prime or Earth-616, there would necessarily be residual market mechanisms which would provide property owners a way to obtain coverage when it is otherwise unavailable through a private sector insurance company (if for no other reason than to subsidize the efforts of Wayne Enterprises, LexCorp, Stark Industries, etc.).

Fair Access to Insurance Requirements ("FAIR") Plans are such a mechanism. FAIR plans were formed beginning in the late 1960s in response to problems with availability of insurance following catastrophic property losses from riots and civil disorders and have evolved to provide a variety of coverages for high-risk properties. Insurers doing business in a state with high occurrences of a certain type of catastrophe generally must participate in such programs by assuming a share of the residual market's results.

---

*1. "Retcon" is a term with which comic fans are all too familiar. It's short for "retroactive continuity" and is a device used to insert backstory that didn't previously exist, or adjust or contradict established facts—often much to the chagrin of comic fans. See, e.g., Batgirl in the New 52. Barbara Gordon/Batgirl, the daughter of Commissioner Gordon, was confined to a wheelchair after being shot by the Joker and paralyzed from the waist down. Thereafter, she became Oracle, a technical advisor, computer expert, information broker, and disabled icon. In the DC Comics relaunch the New 52, Barbara underwent experimental surgery and regained her mobility, retconning twenty years of Oracle.*

*2. Damage Control has also appeared in other comic books, in episodes of Agents of S.H.I.E.L.D, and in the Marvel Cinematic Universe.*

*3. See, e.g., the battle between Zod, Faora-Ul, that big scary guy, and Superman in Man of Steel—one of my favorite comic book movies ever and no, I don't care if you don't like Zack Snyder.*

*4. For example, while an exclusion for "Acts of God" typically refers to events beyond the control of humans, it may be broadened to apply to acts of those considered to be gods on their home planets.*

As each state regulates its own insurance market, the design of FAIR plans differ from state to state. For example, some states' FAIR plans may provide hurricane-related coverage, while others provide coverage for earthquakes. Coastal/beach "pools" are a similar type of mechanism where traditional insurers exclude damage caused by wind or hail; these pools write wind only or wind/hail policies in certain coastal areas. The "pool[5]" is funded by charging a tax on each insurance policy in the state, and property owners are reimbursed from the pool for their covered losses. With FAIR plans, premiums are charged and are dispersed to participating insurers based on their size in the market in that state. Those private insurers then share in the profits, losses, and expenses of the FAIR plan in proportion to the company's market share of the business written in the state. In years with significant disasters in that state (every year, these days), companies may have to dig into their own reserves to pay claims. The National Flood Insurance Program ("NFIP") is another such mechanism. Under the NFIP, private insurers offer and administer standard form flood insurance policies—which must conform to FEMA regulations—with the federal government acting as the underwriter. Claims and administrative expenses are paid by the U.S. Treasury.

In our fictional universe, there would probably be some combination FAIR plan, pool, and government-backed program—likely branded with a long acronym which itself spells out something catchy, as occurs frequently in comics—which would cover catastrophic property damage caused by these battles. Whether this solution would be funded in part by taxpayer dollars depends on what universe we're in and whether Lex Luthor is President. Hey, crazier things have happened.

*By Alexis Kent*

*Alexis Kent is an associate at Beyers, Costin, Simon and is definitely an X-Files fan, Trekkie, comic book lover.*

*5. No, not Deadpool.*

## SCBA Movers & Shakers

*If you have new information about yourself or any other SCBA member, please send to **SCBA Movers & Shakers** at **info@sonomacountybar.org.** Include position changes, awards, recognitions, promotions, appointments, office moves, or anything else newsworthy. If your firm sends out notices to the media, please add **info@sonomacountybar.org** to the distribution list.*

**Julia Donoho** has moved her office to 2544 Cleveland Ave., #110A in Santa Rosa . . . **Sarah Montgomery** is now with Rodman & Associates . . . . **Bryan Coryell** has joined the firm, Friedemann Goldberg LLP . . . **David Berry** is at Welty, Weaver & Currie . . . Abbey, Weitzenberg, Warren & Emery announced their newest partners: **Elizabeth Fritzinger**, **Trevor Codington** and **Scott Montgomery** . . . **Dena Young** has moved her law office to 2751 4th Street PMB # 136 in Santa Rosa . . . **Rose Zoia** is now Of Counsel with Anderson Zeigler, A Professional Corporation . . . **Daren Shaver** is now with Hanson Bridgett LLP in San Francisco . . . **Carmen Sinigiani** has made partner at Spaulding McCullough & Tansil LLP . . . **Daniel McCoy** is now In-House Counsel for Optio Solutions, LLC in Petaluma . . . **Erin Carlstrom** has joined two Sonoma County attorneys to create a new firm: **Kelly, Carlstrom & Noble** in Santa Rosa . . . **Ellyn Moscowitz** is now with O'Brien Law, P.C. in Petaluma . . . **Richard Idell** is now Of Counsel for Dickenson Peatman & Fogarty, PC in the Napa & Santa Rosa offices . . . **Alexandra Perrett** is now with Behrens, Nelson & Knudson . . . Empire College recently named **Laura Krieg, CP** as the Legal Department Head of the School of Business. . . **Nina Cooney, ACP** and **Eric Young, Esq.** have joined the Empire College faculty. . . **Patrick Grattan** has joined the faculty of Empire College School Law as a Professor of Community Property. . . Friedemann Goldberg LLP changed its name to **Friedemann Goldberg Wargo Hess LLP** . . . **Heather-Ann Young** has joined Gordon Rees Scully Mansukhani, LLP in Sacramento.

## 2019 Upcoming Schedule of Seminars & Events

| Date | Program & Presenter(s) | Where |
|---|---|---|
| 06/04/19 | *Spring/Summer CEQA Update*<br>Speakers: Leslie Les Perry, Tina Wallis, Rose Zoia | SCBA Office |
| 06/11/19 | *Confidential HIPAA Protections in Discovery and Trial*<br>Speakers: Samantha Pungprakearti, Ken Tasseff | SCBA Office |
| 06/27/19 | *What Legal Professionals Should Know About Digital Device Extraction*<br>Speakers: Bob Mehr, Mayra Mira | SCBA Office |
| 07/15/19 | *Your Health First: How to Cultivate Your Best Health and Wellness in a Stressful Profession*<br>Speakers: Natalie Norman, Marie Muchow | SCBA Office |
| 07/19/19 | *Mortgage Financing Strategies in Divorce*<br>Speaker: Ross Garcia, Jason Crowley, CDFA | SCBA Office |
| 07/25/19 | *Bail Reform and Bias*<br>Speakers: Shilpi Agarwal, Dale Miller, Matt Perry, Jill Ravitch, Judge Jamie Thistlethwaite, Orchid Vaghti | SCBA Office |
| 08/02/19 | *Day at the Fair* | Sonoma County Fairgrounds |
| 08/20/19 | *The Art & Science of Jury Selections–Civil and Criminal*<br>Speakers: Judge Shelly Averill, Judge Arthur Wick, Traci Carrillo, Patrick Grattan | SCBA Office |
| 09/14-15/19 | *Special Issues in Custody and Representing Minors – Two-Day Seminar*<br>To Be Announced | SCBA Office |
| 11/15-16/19 | *Family Law Comprehensive, Part 4 – Two-Day Seminar*<br>To Be Announced | Steele Lane Community Center |
| 12/12/19 | *Holiday Mixer* | SCBA Office |

## Sonoma County Bar Association Welcomes Our New Summer 2019 Members!

**Michael Arikat,** Law Student

**Dolores Bastian Dalton**, with Goldfarb & Lipman

**Karie Burke**, with O'Brien, Watters & Davis, LLP

**Joseph Castagnola**, with ReFi-Real Estate, Financial, and Insurance Law

**Nichole Christensen**, with O'Brien, Watters & Davis, LLP

**Alexandra Geller**, Law Student

**Kara Holtz**, with Law Offices of Kara S. Holtz

**Jim Hudson**, Retired

**Benjamin Larsen**, Legal Support

**Silvana Lucas**, with The Brandi Law Firm

**Kevin Mendez**, with Law Office of James Krupka

**Kati Moncada**, with Kornblum, Cochran, Erickson & Harbison, LLP

**Ashley Perry**, with Legal Constructs/Policy Holder Pros

**Andrew Sampson**, with Friedemann Goldberg Wargo Hess LLP

**Anish Shah, MD, MBBS, QME**, with Siyan Clinical Corporation

**Pamela Stevens**, with Spaulding McCullough & Tansil LLP

**Julie Ann Talbo**, with Brockway Law

**Morgan Vukelic**, with Law and Mediation Offices of Thomas D. Wright

## SCBA Bar Journal

The *Bar Journal* is published quarterly by the Sonoma County Bar Association.
*Editors:* Malcolm Manwell, John Borba;
*Project Management, Advertising Sales, Graphic Design & Printing:* Caren Parnes;
*Editing:* Joni Boucher; *Copyediting/Proofreading:* Susan Demers;
*Photography:* Owen Scott Shirwo;
*Content Development:* Malcolm Manwell, John Borba, Joni Boucher, Suzanne Babb, Amy Jarvis, Susan Demers;
*Cover Image, Summer 2019 Issue:* Raeburnwinery.com trade/media image


### Submissions for the Bar Journal

The *Bar Journal* editorial staff welcomes articles submitted by its members. All submitted articles should be educational in nature, and can be tailored for the new practitioner or experienced lawyers. Feature articles should be between 750 to 1,000 words in length. Citations should be within the article's text (no footnotes). A byline must be included and articles must be submitted electronically. The editorial staff reserves the right to edit material submitted. For further information contact Amy Jarvis at 707-542-1190 x17. Submit all editorial materials by email to: amy@sonomacountybar.org. To place an ad contact Caren Parnes at 707-758-5090 or caren@enterprisingraphics.com. All advertisements are included as a service to members of the Sonoma County Bar Association. The advertisements have not been endorsed or verified by the SCBA.






## Sonoma County Bar Association

111 Santa Rosa Avenue, Suite 222, Santa Rosa, CA 95404-4945
(707) 542-1190 x18 • Fax (707) 542-1195
www.sonomacountybar.org • info@sonomacountybar.org