# SONOMA COUNTY BAR ASSOCIATION THE BAR JOURNAL

Volume 61 Issue 3 Fall '20



Shiloh Ranch Regional Park Trail Looking West at Sunset, Sonoma County

President's Message: State of Emergency! (Beware, Rule of Law) From the Editor: Second Responders' Vicarious Trauma • One of a Kind: Norbert Cyrille Babin Expert Evidence Supporting or Opposing a Motion for Summary Judgment Pitfalls of the California Revocable Transfer on Death Deed Remembering Kirt Ziegler • Understanding Bail

Introducing the SCBA Diversity & Inclusion Section • Ethical Duties in Times of Crisis



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By Michelle Zyromski, President, SCBA

# President's Message: State of Emergency! (Beware, Rule of Law)<sup>1</sup>

Among the far too many SCBA pandemic-related cancellations this Spring was Law Week. Our volunteer attorneys and judges had been looking forward to joining with local middle and high school students in

wrestling with this year's topic of the "Rule of Law."

In retrospect, it could be argued that failing to engage in that conversation might turn out to have been one of the most profound lost opportunities of our tumultuous year—and perhaps years to come as well.

As former President Barack Obama stated in 2016,

One of the challenges of a democratic government is making sure that even in the midst of emergencies and passions, we make sure that rule of law and the basic precepts of justice and liberty prevail.<sup>2</sup>

# — In This Issue —

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I don't know about you, but it certainly feels to me like the past few months have consisted of one wave after another of "emergencies and passions" in which the rule of law too often seems to be taking a backseat.

As the year began, we'd already been subjected to officially-declared homeless and housing emergencies. We were still fast under the legal and financial constraints attending the 2017 Tubbs and 2019 Kincade fire states of emergency. And of course the new year brought with it the pandemic state of emergency.

Even Juan Peron never had so many opportunities.

Encouraged by the Executive Branch, the California Judicial Council promptly abrogated to itself the legislative function of suspending provisions of the Civil Code, Code of Civil Procedure, Penal Code, Rules of Court, and others.<sup>3</sup> Governor Newsom issued a statewide Shelter-In-Place Executive Order on March 19, 2020. And our county's Public Health Director designated who was and was not "essential."

Somehow this is all starting to seem a bit far afield from wearing a mask indoors and washing your hands. During the Vietnam emergency, it was called "mission creep."

And then there are the oft-unstated exceptions to all the new rules and decrees. We are now all legally-bound to wear a mask, except when participating in a politically-favored demonstration. I personally witnessed at the end of May, two wee-hour melees consisting of 100-plus (Continued on page 11)

- 1 Just before publication, Judge William Stickman of the U.S. District Court for the Western District of Pennsylvania issued his opinion in the case of County of Butler v. Wolf, \_\_\_\_ F. Supp. 3d \_\_\_, Case No. 2:20-CV-677 (W.D. Pa. September 14, 2020), which ruled that certain of that state's Governor's COVID-related emergency orders were unconstitutional; including those pertaining to congregate gathering limits, lockdowns, and business closures. See also Lindsey F. Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: the Case Against Suspending Judicial Review, 133 Harv.L.Rev.F. 179 (2020).
- 2 Remarks of the President with President Peña Nieto of Mexico in Joint Press Conference, obamawhitehouse. archives.gov. July 22, 2016.
- 3 April 6, 2020 Judicial Council Emergency Rules 1-11.



By Malcolm Manwell

# From the Editor: Second Responders' Vicarious Trauma

Sonoma County is a small part of the Nation. Yet, as communities go, this past four years it has shouldered far more than its share of traumas and disasters.

We are now into our 5<sup>th</sup> national disaster. In 2017 we had the

epic Tubbs Fire; we went from that to a yearly succession of major fires and relocations, in 2018 and 2019, and as this Editorial is being written, the County is yet again faced with a series of major fires triggered by a lightning storm (the LNU Complex). And, to pile on, we are enduring the largest Global Pandemic since 1918.

All told, our local Emergency Operations Center has been activated to address disasters on five occasions in four years, and this year it is handling two at once. Though it's a distinction you could live without, you now probably have one of the best, if not the best trained EOCs on the Planet.

In that environment, attorneys and psychologists play a vital role as the Second Responders, helping survivors navigate the complexities of rebuilding and advocating for their needs.

But four consecutive years of this is going to take its toll. And you are optimistic if you think we are through all this. The unprecedented turmoil in the Nation over the unfair treatment of persons of color, an upcoming bitterly contested national election, and the massive financial burden this is all going to cost will affect our future. Who knows what else 2020 holds?

The level of trauma you have repeatedly experienced, some in your own lives, and certainly in your clients', is significant. Your job requires you to identify and step into your clients' trauma, and that is eventually going to bring you down if you don't take care of yourself. As the Flight Attendant tells you before each flight, put on your own mask first so you can help others.

The standard "fixes" are not tenable: Reducing your caseloads, avoiding negative people (like, say, opposing counsel?) and reporting others who are impaired.

The State Bar and local Bar have tried to support you with MCLE requirements concerning stress and substance abuse.

There are three other ideas that might help.

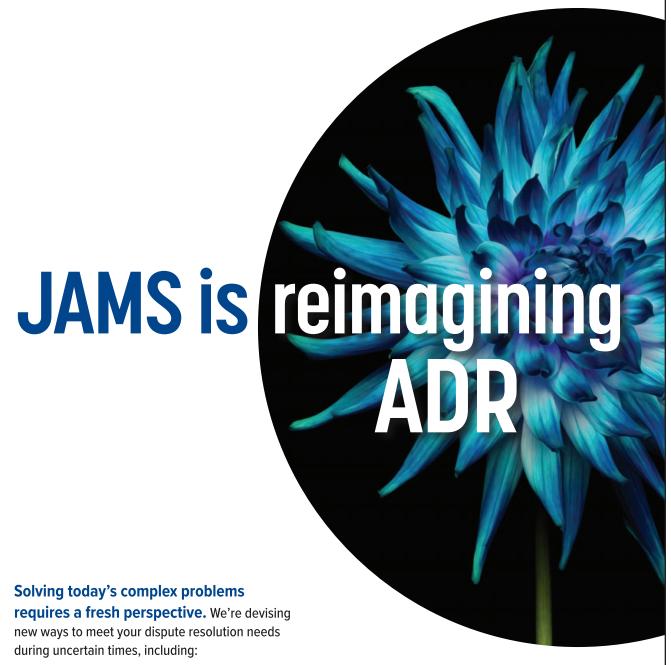
First, a lawyer who represented victims of sexual abuse in the Boston Diocese, and who suffered PTSD as a result (Roderick Eric MacLeash) has written a report on "Vicarious Trauma" and how to deal with it. You can get a copy simply by Googling his name along with "Vicarious Trauma."

Although he writes from the standpoint of an attorney who got PTSD from helping sexual abuse survivors, his insight into taking care of yourself in any trauma is worth the read.

Second, you need to be mindful of what therapists refer to as your "Circle of Connection." You have various "circles" (e.g. transactional [business], community [clubs, church, etc.], conditional [those who seem to call us more than we call them] and finally, your inner circle). Your inner circle are folks who will walk through the night for you. You need to call these people and let them know you care for them and will be there for them. They will be there for you.

Finally, as you sift through the mountain of problems you are facing (the upcoming election, the unfair treatment of persons of color, the Covid restrictions, the traumatic fires, and the concurrent emotions and stresses of your clients), you have to make up your mind and decide: How much time do I spend correcting things going wrong versus helping things go right? What is the proper balance of energy I spend on these two activities?

The answer, I believe, is not 50/50, it's 90/10. 90% of your effort should be toward helping things go right and only 10% should be spent on correcting things going wrong. When you change your mental attitude to create instead of negate, you rise above your stress.



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# One of a Kind: Norbert Cyrille Babin

On May 13, 2020 the Sonoma County Legal Community lost one of its bright lights with the passing of Norbert Cyrille Babin. Norbert passed away peacefully with his family by his side in his beloved Healdsburg. Norbert was 85 years old.

Combined, your authors practiced law as Norbert's partners for more than 50 years. We could not have asked for a better mentor, partner or friend.

Norbert was born and raised in San Francisco and graduated from Lincoln High School. He made his way across the Bay and graduated from UC Berkeley in 1955. Norbert married Judy, his high school sweetheart, in 1956 and he served in the US Army for the next two years. Norbert enjoyed his time in military intelligence and simply described

his job as, "I was a spy."

After discharge from the Army, he and Judy moved to Daly City where they lived for twenty years. Norbert was working as a claims adjuster for Allstate Insurance and he and Judy had three children when Norbert enrolled in the night law school program at Golden Gate University. Their fourth child was born shortly after his law school graduation.

Norbert practiced law in San Francisco until he decided to follow his dream of living full time in his family's summer home along

the Russian River on Fitch Mountain in Healdsburg. His family built the original home in 1938 and Norbert spent every summer on the river. In San Francisco, Norbert had developed expertise in insurance law and civil litigation practice. His clients followed him as he moved his practice to Santa Rosa in 1978.

The firm of Babin & Seeger, LLP, was founded in 1982 when Norbert Babin and Martin Seeger joined forces. Martin remembers that he and Norbert tried a case against each other in Lake County. Since both were from out of town, they stayed in Lakeport and had dinner together. Martin commented that, "as an opposing counsel, Norbert was gracious, courteous, and

tough!" Shortly after the conclusion of the case, they decided to practice together, beginning a friendship and professional relationship that lasted more than 40 years. "Longer than most marriages," Martin quipped. Other members of the office came and went over the years, but the relationship forged in a Lake County courtroom never changed. The last case Norbert tried concerned the sale of rural property that once was a graveyard. When its prior history was discovered, the buyers sued because they were afraid of ghosts. Norbert in his usual charming fashion had the jury laughing and defensed the case. Despite the usual pressures and stress of a busy litigation practice, Norbert was perennially cheerful and always willing to help. "He was the best partner a lawyer could have—a

loyal friend and a consummate professional" Martin commented.

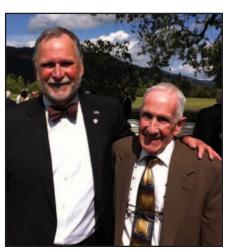
The Honorable Lynn O'Malley Taylor, Retired, told us about her friendship and working relationship with Norbert.

"My husband, Bruce, and I have known Norbert Babin for over 52 years, since Bruce was a claims examiner at Central Mutual Insurance Company and assigned cases to Jim Shovlin, with whom Norbert was working at the time. Later Bruce went to work with Jim and Norbert, and we became social friends with Norb and Judy.

"After I had been in practice for

eight years in Marin County, Norbert asked me to come work with him in Santa Rosa. I worked with him for two years until I was elected to the Marin County Municipal Court in 1982.

"Norbert established his own insurance defense practice in Santa Rosa a few years before I went to work with him. He was brilliant and very methodical in his approach to practicing law. He was relaxed, flexible, supportive, and a great mentor. I learned how the insurance carriers relied on my reporting and how the reporting really helped me analyze the case and make recommendations for settlement or trial. He taught (Continued on next page)



Hon. Allan D. Hardcastle with Norbert Babin

me how important it was in preparing for trial to be able to argue both sides of any case. If you could anticipate the other side's argument, you would be prepared to counter it. He encouraged me to visit the scene of accidents, which is how I learned all about logging and horse racing. It was fun working with Norbert. He had defended so many cases, there weren't many that surprised him, and he always knew where to look and what questions to ask to develop the defense."

In 1986 Allan Hardcastle joined the firm. "I first met Norbert when we were involved as defense counsel in a condominium construction defect case. With Norbert's gravelly voice, his ever present pipe and his fierce loyalty to his client, I thought he was a gruff curmudgeon. As I got to know him, I learned Norbert was a kind, gentle soul. When you were his friend, you were his friend for life. He was a throwback to the time when a lawyer's word was his bond. He practiced as he lived, honestly and civilly. No matter how busy he may have been, he always had time to help with any problem.

Members of the Plaintiffs' Bar often called Norbert with questions about insurance law and insurance coverage questions because they knew he would give them a straight and correct answer."

Family was everything to Norbert. Some of our favorite memories of the Babin Family are from the "Christmas in May" party that Norbert and Judy hosted on the river. Judy was ill at Christmas time in 1980 and she and Norb missed the annual Christmas parties. When Judy felt better in the spring of 1981, they began their annual Christmas in May party. It was something to see the whole house and yard decorated for Christmas and the party was one of our families' favorite events. They hosted the parties for 20 years until Judy again took ill and passed away in 2002. She and Norbert were married for 47 years.

Adam Abel and John Fritsch, lawyers in the City of Santa Rosa City Attorney's Office, began their careers with Norbert Babin. Mr. Abel recalls, "I was fortunate (Continued on page 15)

# **Psychiatrist / Researcher / Expert Witness**

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# **Expert Evidence Supporting or Opposing a Motion for Summary Judgment**



Hon. Gary Nadler

There has been considerable appellate attention given to expert witness declarations in the context of summary judgment motions. Motions are denied, or granted, as a result of a deficient expert declaration. The focus of this article is on expert declarations in the context of motions for summary judgment.

California Code of Civil Procedure section 437c(d) requires that supporting and opposing declarations shall be made on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated. Expert declarations in support of or in opposition to an MSJ must state evidentiary facts in support of the opinion stated; and must not contain inadmissible hearsay or opinions (Hayman v. Block (1986) 176 Cal.App.3<sup>rd</sup> 629, 638-639.) The starting point is this: the expert's declaration must meet the requirements for admissibility in the same manner as if the expert were testifying at trial (Evidence Code section 720; Perry v. Bakewell Hawthorne, LLC (2017) 2 Cal.5th 536, 541.) Our Supreme Court, in Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4<sup>th</sup> 747 at 771-772, provides that the trial court "acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of any type on which an expert may not reasonably rely, [and] (2) based on reasons unsupported by the material on which the expert relies, or is speculative...." Thus, regardless of the judge's familiarity with the case, it is imperative to make certain that the declaration is legally sufficient on its face.

As to the issue of competency, a declaration paragraph simply stating that the declarant has personal knowledge and is competent to testify is conclusory and has no evidentiary value. Declarations that include "to the best of my knowledge" and which are made "on information and belief" are not made on personal knowledge (Bowden v. Robinson (1977) 67 Cal.App.3<sup>rd</sup> 705, 719; Lopez v. University Partners

(1997) 54 Cal.App.4th 1117, 1124). The expert declaration must make an affirmative showing that the expert is competent to testify to the matters stated. In the recent case of Lowery v. Kindred Healthcare Operating, Inc. (2020) 49 Cal.App.5<sup>th</sup> 119, the complaint alleged that when a 92 year old patient suffered a stroke, the nursing home failed to recognize and properly respond to the stroke which delayed transfer to an acute care hospital, resulting in damages. In support of the MSJ, the defense submitted a declaration of a neurologist with 30 years' experience who testified that the delay had no bearing on the outcome of the stroke, as the stroke was caused by atrial fibrillation resulting from a blood clot. The neurologist testified that once the clot occurred there was no way to reverse the effects of the stroke. In opposition, plaintiff submitted the declaration of a physiatrist, who stated that he was an expert in physical medicine, rehabilitation, geriatrics, and pain disorders. The declaration did not provide a description of his education, skill, or knowledge regarding neurology, or any subject within the discipline. The appellate court determined that plaintiff's expert failed to state a foundation for his competency to testify as to the effect of a stroke. Summary judgment was upheld.

As to the evidentiary substance of the expert's opinion, it must not be based on speculation or conjecture (Sargon Enterprises, Inc., supra, 55 Cal.4th 747 at 769; Mitchell v. United National Insurance Company (2005) 127 Cal.App.4<sup>th</sup> 457, 478.) Although experts may rely on hearsay in forming their opinions, that too has been limited. In People v. Sanchez (2016) 63 Cal.4th 665 at 677, 686, the court held that, contrary to previous practice, an expert may not base his or her opinion on facts specific to the case, unless on personal knowledge or otherwise admissible (e.g., hearsay exception). In other words, the expert may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (Id., 63 Cal.4th at 686). Otherwise, those stated "facts" are hearsay and may not be relied on by the expert. However, experts may still rely on non-case

(Continued on next page)

specific facts and general background information, even if hearsay, if it is within their general knowledge in the field of their expertise (Id., 63 Cal.4<sup>th</sup> at 677.)

Although caselaw provides that opposing declarations are not required to be as detailed or extensive as that required in expert testimony presented in support of an MSJ, evidentiary rules still apply. The basis for each opinion must still be explained on the basis of admissible evidence (Fernandez v. Alexander (2019) 31 Cal.App.5<sup>h</sup> 770, 782.) As an example, returning to the recent Lowery case, the defense neurologist identified the cause of the stroke as atrial fibrillation resulting from a blood clot. The neurologist testified that once the clot occurred there was no way to reverse the effects of the stroke. Plaintiff's expert physiatrist stated that the stroke was not caused by atrial fibrillation but did not otherwise identify the cause of the stroke. He stated that the failure of the nursing home to immediately transfer plaintiff to an acute care hospital was grossly negligent and constituted elder abuse. In upholding summary judgment, the trial court explained that, with regard to the basis for his opinion, plaintiff's expert failed to make an adequate showing. Although the physician stated that his opinion was based on documented medical literature, none were identified. Opining that the defendant committed gross negligence and elder abuse was improper, as it is a prohibited legal opinion. Finally, the physician did not factually explain what did cause the stroke. Again, summary judgment was upheld based on the inadequacy of the opposing expert declaration. In Garibay v. Hemmat (2008) 161 Cal.App.4<sup>h</sup> 735 at 742-743, a medical malpractice expert physician submitted a declaration which stated his opinion, which was based on his review of the medical records. The court determined that the opinion was objectionable, in that none of the medical records were attached to the declaration or otherwise before the court:

"We realize that although hospital records are hearsay, they can be used as a basis for an expert medical opinion. However, "a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact." "Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another as independent proof of the fact." (Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4h 1516, 1524–1525, 3 Cal.Rptr.2d 833.) Physicians can testify as to the basis of their opinion, but this is not intended to be a channel by which testifying physicians can place the opinion of out-of-court physicians before the trier of fact (Whitfield v Roth (1974) 10 Cal 3d 874, 895, 112 Cal.Rptr. 540, 519 P.2d 588.)"

Dr. Frumovitz had no personal knowledge of the underlying facts of the case, and attempted to testify to facts derived from medical and hospital records which were not properly before the court. ...Therefore his declaration of alleged facts had no evidentiary foundation. An expert's opinion based on assumptions of fact without evidentiary support has no evidentiary value...." (Garibay v. Hemmat (2008) 161 Cal.App.4h 735 at 720-721).

In sum, consider the following framework in preparing an expert's declaration for use in an MSJ: (1) determine whether the competency of the expert with regard to stated opinions is fully set forth; (2) analyze what the expert relied on in reaching his or her opinion; (3) determine whether the matters relied on were of a type reasonably relied on by experts such as declarant; and (4) determine the factual basis for the opinion, including whether the declaration contains case specific facts upon which the expert relies, and the admissibility of those facts. See, for example, *In re Lockheed Litigation Cases* (2004) 115 Cal.App.4<sup>h</sup> 558, 563-564. \*\*

By Hon. Gary Nadler

The Hon. Gary Nadler serves in the Civil Division of the Sonoma County Superior Court. He is an Adjunct Professor at the University of San Francisco School Of Law, and is on the faculty of the B.E. Witkin Judicial College. Judge Nadler has been a frequent contributor to the Sonoma County Bar Association's Bar Journal newsletter.

# Pitfalls of the California Revocable Transfer on Death Deed

Clients planning their estates often want to keep matters as simple and straightforward as possible—both for themselves and for their heirs after they pass away. At first glance, California's Revocable Transfer on Death Deed appears to be a simple solution which attorneys can offer clients in order to pass real property to heirs upon death without the expense of creating a will or trust, and without forcing the estate to go through the probate process in order to have the property distributed to their chosen heirs.

California's Revocable Transfer on Death Deed law, which was made effective as of January 1, 2016 and codified in California Probate Code Sections 5600 through 5696, provides that a validly executed transfer on death deed in substantially the same form as required in Probate Code section 5642 transfers the real property to the named beneficiaries upon the grantor's death. Per Probate Code Section 5610, this method can be used for single-family homes or condominiums, or a residence containing no more than four units.

Unfortunately, there are pitfalls to this approach, especially for clients who wish to retain the property's low Proposition 13 property tax base and avoid property tax reassessment on the property. An attorney wishing to provide a simple solution to a client via a Revocable Transfer on Death Deed may instead inadvertently cause the client's family to pay far more in property taxes. The low property tax base enjoyed by the parent can easily be partially or entirely lost for beneficiaries who inherit property via a Revocable Transfer on Death Deed.

Here is an illustrative hypothetical. A parent wishes to transfer the family home, worth \$3 million, equally to her three children. The parent acquired the home 20 years ago for \$1 million at a Proposition 13 property tax base value of \$10,000. If the parent signs and records (within 60 days of signature) a Revocable Transfer on Death Deed naming her children as beneficiaries of the family home, the home will automatically be transferred to her three children upon her death pursuant to Probate Code Section 5652. The children will inherit the home at the same property tax base as their parent, since there is an exception to property tax reassessment for transfers from parents to chil-

dren pursuant to Revenue and Taxation Code Section 63.1. The children can then co-own the property while paying the same base property tax value of \$10,000 as their parent did, potentially saving them thousands of dollars in property taxes per year, since the property will not be reassessed for property tax purposes.

However, property transfers are rarely so simple. For example, what if the children do not want to co-own the home due to logistical or geographical concerns, do not get along well enough to co-own the home, or would prefer to have other estate assets in lieu of real property? If the home had been transferred to the children via a will or trust, the trustee or executor could arrange a distribution scheme which distributed the home to only the child or children who wanted it and who could then retain the low property tax base, and distribute other assets to the children who did not want the home. Alternatively, one child could buy the others out during the course of the estate or trust administration using their own funds or a private loan (per the Board of Equalization's Property Tax Annotation 625.0235.005). Each of these approaches would accomplish the client's and the family's goals, and preserve the entire Proposition 13 tax base.

These alternatives are not available if a Revocable Transfer on Death Deed is used. Since the home passes to the children automatically upon death, the children cannot redistribute the home amongst themselves or buy the others out without triggering a property tax reassessment, since there is no exclusion from reassessment for transfers amongst siblingsonly for transfers between parent and child (or grandparent and grandchild). Therefore, if two siblings buy one sibling out, one-third of the property would be reassessed, meaning that the property taxes would rise to \$20,000 (the original \$10,000 property tax base on two-thirds of the property, plus the \$10,000 due from the reassessment of one-third of the property). The family would have lost a valuable opportunity to preserve the property's lower Proposition 13 property tax base. The cost of this mistake greatly exceeds the cost of setting up an estate plan which would have preserved the ability to exempt the entire property from reassessment.

(Continued on next page)

If a client's goal is to pass property to children while preserving the maximum amount of family wealth, think twice about using a Revocable Transfer on Death Deed for real property in California—the result could be costly.

By Mara M. Mahana, on behalf of HCS Equity Mara M. Mahana is a Senior Counsel at Greene

Mara M. Mahana is a Senior Counsel at Greene Radovsky Maloney Share & Hennigh, LLP, where she is a member of the firm's Trusts and Estates practice group. About HCS Equity: HCS Equity provides private real estate loans throughout California. For more than 15 years we have used our own capital to provide heirs, probate/estate attorneys, guardians and conservators specialized financing. We work directly with the executor of the estate or estate attorneys to quickly create liquidity, in order to solve financial problems and to fund buyouts of heirs and other beneficiaries.

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# President's Message (continued from page 3)

"demonstrators" heaving rocks, bricks, water bottles, and even explosives at police officers. They confronted the cops in a profanity-laced, tight line, with others behind them in close-knit clusters. Not a one was wearing a mask. All were out hours past the emergency curfew.

Yet for none of these acts was anyone ever apparently arrested for Public Health Order violations—never mind the plethora of non-COVID offenses. On those nights, "passion" (in President Obama's words) simply trumped application of the rule of law.

Whatever it's become, the Black Lives Matter movement at its inception was a fervent appeal to the rule of law; highlighting how, no matter what it says, the law is sometimes applied based on one's skin color. And regardless of our own personal passions, we must nevertheless admit as professionals that the same breach of the rule of law occurred when law enforcement, in the form of a senior FBI attorney, recently admitted to fudging on a FISA application simply because of his political loathing for the target.

None of this is new in American history. "Emergencies and passions" have gotten the better of us before. Lincoln believed that the exigency of defeating slavery justified suspending habeas corpus. The Palmer Raids—ironically conducted in the wake of the Spanish Flu pandemic, and not so ironically following the Russian Revolution—were intended to address the public's concerns about the influx of

Communists among immigrants. Japanese-American citizens were interned in the Second World War out of fear some among them might commit sabotage.

All of these emergency/passion-driven measures ultimately were deemed breaches of the rule of law.

How?

Because lawyers and the courts had the courage to stand up and champion the rule of law.

Think about it. As members of our profession, we are the guardians of this sacred foundation of civilization. If we don't champion it, who will?

My hope is that the next time we see the rule of law being threatened, whether locally or elsewhere, that we do stand up. Say something—especially if contrary to our own passions. Write a letter to the editor. Post something on Facebook. Dare to say something among friends that might not be well-received. Fate denied us an opportunity to teach the lesson of the rule of law during Law Week, but let's never forget that it's still our sacred duty to champion it every day.

As a guy who knew what he was talking about following the worst "emergency" of the last century, Dwight Eisenhower reflected:

The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.

# Remembering Kirt Ziegler

Sonoma County lost one of the giants of its community earlier this year when Kirt Zeigler died of complications from prostate cancer on April 15, 2020. He was 80 years old.

During the span of a more than 50 year legal career, Kirt Zeigler developed a reputation for integrity, honesty, intellectual curiosity, lack of ego and a deeply held work ethic. As one of Sonoma County's most highly regarded lawyers, he specialized in estate planning and probate but enjoyed delving into myriad other areas of law. If asked what type of law he practiced, he was likely

to reply, "I represent people and deal with all the problems that people have." He was still working part-time at his law firm as recently as last fall.

In feting Mr. Zeigler upon his receiving the SCBA Careers of Distinction Award in 2014, Anderson Zeigler colleague Wendy Whitson introduced him as follows: "The career and life-path of this 'quiet' man provides inspiration and guidance for those just entering the profession and those who have practiced law for decades, about how to move through the world with integrity and honesty."

Kirt F. Zeigler was born in San Francisco, California on Sept. 6, 1939. His parents shortly thereafter moved their family to Modesto. Growing up in rural Modesto as the eldest of four boys, Kirt learned his work ethic early, when at age 4 his father went off to fight in World War II. He helped his mother tend to the chickens, rabbits, grapes and vegetable garden on their property, and look after his little brothers. He developed a life-long connection to farming and nature from these early experiences.

Evidence of Kirt's superior intellect emerged early. Having learned to read before he started school, Kirt was quickly skipped ahead a grade, and still found he wasn't challenged. He became a life-long avid reader, devouring books on philosophy, politics, and science, always curious to learn more about the world. At 16 he applied to some of the country's most prestigious col-

leges. He was accepted by MIT, Harvard, Yale, UC Berkeley, the University of Chicago and Stanford.

He chose Stanford, making political science his major because it allowed him to indulge his preference for sampling a broad range of subjects. Before the end of his sophomore year, he married his high school sweetheart, Carol Barger, and they started a family.

Upon completing his undergraduate studies, Kirt achieved a perfect score on the Law School Admission Test and continued at Stanford Law School. Despite the fact that he was working full time, carrying a full

load of law school courses, and by now supporting a wife and baby, Kirt was awarded Order of the Coif and wrote for the law review. He graduated from Stanford's law school in the top five of his class. He received offers from a variety of prominent law firms, including several high profile New York firms. He settled on a position with Cleary Gottlieb on Wall Street. During his practice in New York, which included work in estate planning, tax and litigation, he learned the importance of litigation experience in building transactional skills. Whether you are fighting a battle in court, or negotiating a deal, Kirt believed that you needed to be

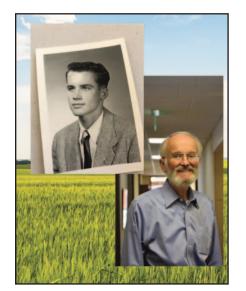


Image of Kirt Ziegler courtesy of andersonzeigler.com

aggressive about advocating your position and assume that people are going to question everything.

After six years at Cleary Gottlieb, Kirt decided the New York City lifestyle was not for him. He was persuaded by a cousin that Santa Rosa was the kind of community he was looking for, and made introductions to the most prominent firms in town to relocate back to California.

In 1969 he joined Santa Rosa's oldest law firm, the prominent and powerful Spridgen firm. There he met the brilliant tax and estate-planning attorney, Ed Anderson, who would become his closest friend and business partner over the next five decades. While Ed's focus was on estate planning and tax work, Kirt dug into any project which crossed his desk, without regard to (Continued on next page)

the topic. Kirt loved the variety that practice in Sonoma County presented and he continued to spend enormous amounts of time reading. Kirt believed that half the art of lawyering is defining the question. Without knowing the question you are asking, you can't find the authority which will give you the answer.

The 1980s was a watershed decade for Kirt. In 1982, Kirt, Ed Anderson and Rob Disharoon separated from Spridgen and founded Anderson, Zeigler, Disharoon, Gallagher & Gray. The new practice thrived and joined the ranks of the North Bay's most respected law firms. From the beginning, the partners all had the same goal: To create a culture of comfort and trust within the firm among both partners and staff—a culture that continues to the present day at Anderson Zeigler.

Bill Hutchinson, founder of Hutchinson Capital Management, and a longtime friend of Kirt's, shared his insight into Kirt's unique approach to representation: "Kirt [took] ownership of each client by digging deep into their past and their ways of thinking, until he clearly [understood] how they process things in their heads. He [was] then able to be a calm guide for what lay ahead of them and what they would be facing." He also noted that Kirt was able to communicate clearly what the other person needed to know as he helped them craft a solution to their situation. Kirt could distill information in a way which enabled anyone to take it in.

The 1980s also saw the beginning of a new chapter in Kirt's personal life. After 23 years of marriage and raising three children, Kirt and Carol Zeigler divorced. In 1982, the same year he started his firm, he married Bev Floyd, who would be his lifelong partner—both personal and philanthropic.

In addition, the 80s began Kirt's legacy of involvement in the community. In the early 1980s Kirt joined the board of directors of the Santa Rosa Chamber of Commerce, later becoming Chairman of the Board, and handling a rocky transition when the Executive Director left on short notice. Along with the creation of the Leadership Santa Rosa program, managing to keep the staff and volunteers happy and motivated during a difficult transition were accomplishments of which Kirt was always quite proud. That began a long-term commitment to the quality of life in the community, most notably in the area of education. Over the past two

decades, Kirt and Bev helped transform education in Sonoma County. This started with their involvement in Sonoma Country Day School, a private pre-K through 8th grade independent day school in Santa Rosa that their children attended. They were an integral part of the effort to raise funds for its new campus, which opened in 2000. As the day school campus was nearing completion, they turned their attention towards a new project: Establishing Sonoma County's first independent college preparatory high school, Sonoma Academy. Bev recalled, "A group of us started this project from scratch. Today it is one of the best schools in the US. I can't believe I was a part of that."

Upon Kirt's passing, Sonoma Academy's head of school since its inception, Janet Durgin, remembered Kirt's part in starting this institution. "Kirt had tremendous faith in the potential and capacities of teens. He was also inspired by the culture of Sonoma County as a region that coalesces the most compelling elements of rural and agricultural life with entrepreneurial and innovative ideas. These came together in the compelling vision that guided he and his wife Bev to lead a group of ten other entrepreneurial souls in the founding of Sonoma Academy. I think we can say that a good deal of the seasoning of our school was sprinkled in liberally by Kirt Zeigler. He was unflagging in his support and vision of this school as one that reflects the practical and experiential wisdom of his agricultural roots and the higher-minded intellectual pursuits he himself maintained to the end of his life. He saw the school in the broadest possible context, impacting our immediate community and the larger Bay Area community for the better and for generations to come. To me, he was (Continued on on next page)



# Remembering Kirt Ziegler (continued from page 13)

a mentor, a guide, a collaborator, a boss, a friend, and an integral and deeply important member of our Sonoma Academy family. His legacy will live on."

Kirt was as eclectic in his leisure pursuits as he was in his intellectual interests. When he was not farming, he was long-distance hiking or indulging his passion for sailing. A self-taught sailor, in 1980, Kirt, with his first wife and two of their children, sailed from Sausalito to Hawaii using only celestial navigation. And in 2012, to celebrate his 70th birthday, Kirt and his son, Scott, hiked 70 miles on the Appalachian Trail.

He has left a rich and varied legacy: Five children, twelve grandchildren, two great-grandchildren, vibrant, thriving schools which came into being through his efforts, thousands of clients whose lives and businesses have been enriched by his work, and a firm which will carry his legal legacy forward for decades to come.

It's the kind of legacy that invites self-reflection and encourages us to ask ourselves: "How can I make that kind of difference?"

Excerpted by Caren Parnes (from articles referenced below)

Caren Parnes is the SCBA Bar Journal Production Manager designer & article contributor

This article was compiled from the several sources attributed below:

Kirt Zeigler Careers of Distinction article, Wendy Whitson, Fall 2014 issue of SCBA newsletter, *The Bar Journal*.

Kirt Zeigler Obituary

https://www.danielschapeloftheroses.com/obituaries/Kirt-Floyd-Zeigler?obId=12712456

"The View from Here" www.sonomaacademy.org, Janet Durgin, posted 4-17-20

https://www.sonomaacademy.org/news-detail?pk=1097400 &fbclid=lwAR31Uy3R-xGkTtehwkVtleu9Ud10yQ1vaMvU5iz 0zNXBnD0xYgcQAaVamTc







# One of a Kind: Norbert Cyrille Babin (continued from page 6)

to begin my law career on January 2, 1991, working for the firm formally known as Babin, Seeger & Hardcastle. Norbert, the senior partner, was a wealth of information to a brand new lawyer like myself because he was 'old school,' having practiced in the pre-discovery days where a young associate was handed a file and told that trial begins tomorrow. Of course, anyone who knew Norbert even a little bit, recognized that he was a character. That he was, like no other, but he was also a kind, sweet and loyal man, and a heck of a litigator. He had quite the presence in the courtroom. He was a wonderful man and an exceptional boss."

Mr. Fritsch remembers, "I was so fortunate to work for and with Norbert Babin. What a fine man he was...he was a fierce litigator and champion of his clients; he was passionate about his work and the fantastic human dramas that unfolded in the cases. He was devoted to his wife Judy and their family; and he was a kind and generous colleague who always had time to weigh in on the knotty problem of the moment...Norbert was just fine being who he was, and he was a joy to be around. I will miss him."

Hon. Arthur Wick was involved in many cases with Norbert. He told us, "Norbert was always upbeat and cheerful, even when he was mad! He used to brighten my day. Once when we were taking two-plus weeks of depositions in a construction defect case, my wife remarked about the bummer having to return to Day 10 with eight other attorneys in the case. I clarified the situation by stating: 'Today will be fabulous! Norbert begins his cross-examination this morning! This will be a hoot for all persons present, but the deponent!' He

was no let-down; we left for lunch in stitches. We will never replace this type of gentleman. Long live his memory."

"It was my good fortune to work for Norbert for a few years in the early 1990's," Cindy Gaddie told us, who is now Judicial Assistant to Judge Patrick Broderick. She continued, "I was a little intimidated at first, but I soon found out that his gruff and gravelly voice was nothing for me to worry about...I can still remember his laugh, the twinkle in his eye, the music blaring from his office, and the order, 'Cindy! I need this done post-haste!' Norbert was a gentleman—kind, funny, warm, and gracious—and always one of my favorite people."

Norbert thoroughly enjoyed watching and attending sports, especially his grandchildren's events, and rooting for the Golden State Warriors and his beloved Cal Bears. His time on the Healdsburg Museum and Historical Society Board was important and precious to him as was his time as a member of the board of directors of the Association of Defense Counsel. Norbert loved people and always had a sparkle in his eye. He will be missed. ¶

By Martin L. Seeger & Hon. Allan D. Hardcastle, (Ret.)

Martin Seeger is an A.V. rated attorney and founding member of Babin & Seeger, a firm that handles complex civil litigation and insurance defense matters.

Allan Hardcastle is a retired Sonoma County Superior Court Judge. He served on the bench from 1997 to 2020.

# Status of SCBA Programs During Shelter-in-Place Order

SCBA staff and the Executive Committee are continuing to monitor the situation surrounding the Shelter in Place Order and social distancing requirements. As of this writing, we've determined we will not be offering any in-person programs through at least January 2021. Instead, we will continue to provide "distance learning"

through live webinars on Zoom, on-demand videos linked through our website, and self-study options through the Bar Journal and our website.

The current information on the status of any program will be at www.sonomacountybar.org

# **Understanding Bail**

Bail" is one of those words that has different meanings depending on the context. And sometimes, different meanings within the same context. In the realm of pretrial release, bail means the "security required by a court for the release of a prisoner who must appear in court at a future time." 1 It can also mean the person pledging the security.2

To fully understand bail, one must understand surety. Suretyship exists when "pursuant to contract...an obligee has recourse against a person...or that person's property with respect to the obligation...of another person...to that obligee." In other words, surety is when A promises B that A will meet C's obligation owing to B in the event C does not. The parties to a bail arrangement are usually the surety, the court, and the defendant. The defendant's obligation is to appear in court when ordered. In the event the defendant fails to appear, the surety's obligation is to pay the bail amount.

The use of surety in a pretrial setting dates back nearly 2,500 years. The Twelve Tables, a Roman codification of civil and criminal law included a directive that in proceedings preliminary to trial, "For a free-holder a freeholder shall be surety; for a proletary anyone who wishes shall be surety." Likewise, a California defendant has a right under the California Constitution to post bail by "sufficient sureties." This means that the defendant is not required to deliver cash to the court or jail to secure his or her release once a bail amount has been set. Instead, the defendant may post a surety bond.

Not every offense is bailable. The California Constitution provides a list of non-bailable offenses: Capital crimes when the facts are evident or the presumption great; 6 felony acts of violence or sexual assault offenses when the facts are evident or the presumption great and the court finds clear and convincing evidence that there is a substantial likelihood the release would result in great bodily harm to others; 7 and felony offenses when the facts are evident or the presumption great and the court finds clear and convincing evidence that the person has threatened another with great bodily harm and there is a substantial likelihood that the person would carry out the threat if released. 8

The amount of bail is determined by a schedule set and revised annually by the judges in that county. 9 In determining the bail schedule, judges are required to "consider the seriousness of the offense charged" and assign additional amounts of bail for "each aggravating or enhancing factor chargeable in the complaint." 10 At the same time, "[e]xcessive bail may not be required." 11 When setting bail on an individual basis, the court must consider the defendant's "previous criminal record" and the "probability of his or her appearing at the trial." 12

Article I, Section 28, which specifies crime victim's rights, was added to the California Constitution in 1982. Subsection (f) was added by amendment in 2008, which directed that "[p]ublic safety and the safety of the victim shall be the *primary* considerations [in setting bail]."13

(Continued on next page)

- 1 Black's Law Dictionare, 9th Ed.
- 2 See Pen. C. § 1305 (a)(2)(A) "...and the bail shall be released of all obligations under the bond..." Accord People v. Wilcox (1960) 53 Cal.2d 651, 657 "...the defendant and his bail appear..."
- 3 Restatement Third Suretyship and Guaranty § 1
- 4 https://avalon.law.yale.edu/ancient/twelve\_tables.asp accessed on 7-31-20
- 5 Constitution of the State of California, Art. 1, § 12
- 6 Constitution of the State of California, Art. 1, § 12 (a)

- 7 Constitution of the State of California, Art. 1, § 12 (b) (Emphasis added)
- 8 Constitution of the State of California, Art. 1, § 12 (c) (Emphasis added)
- 9 Pen. C. § 1269b subs. (c)
- 10 Pen. C. § 1269b subs. (e)
- 11 Constitution of the State of California, Art. 1, § 12; Accord United States Constitution, 8th Amend.
- 12 Constitution of the State of California, Art. 1, § 12
- 13 Constitution of the State of California, Art. 1, § 28, subs. (f) (3)

Penal Code section 1269c creates a mechanism whereby an arresting officer may seek higher bail when the defendant was arrested "without a warrant" for a felony, or for a misdemeanor violation of a domestic violence restraining order. The officer must have reasonable cause to believe that the bail amount is insufficient to "ensure the defendant's appearance or...the protection of a victim, or family member of a victim, of domestic violence." 14

The same statute allows the defendant or the defendant's "attorney, friend, or family member" to apply for "release on bail lower than that provided in the schedule...or on his or her own recognizance." When such an application is made, bail may be set in an amount the judge "deems sufficient to ensure the defendant's appearance or to ensure the protection of the victim" and has discretion to set terms and conditions that the judge deems appropriate. 16

Last year, the California Supreme Court took up the question of whether a judge had inherent authority to impose bail conditions in the absence of the defendant's application for release on bail lower than schedule.<sup>17</sup> The trial court required, as a condition of release, that the defendant waive her Fourth Amendment right to be free of warrantless or unreasonable searches. 18 Court noted that the authority to order such a condition existed when the defendant was granted release on her own recognizance. 19 However, the defendant posted bail at the scheduled amount-she did not seek a lower bail amount. Reserving the issue as to whether the conditions setwaiver of Fourth Amendment rights-was proper (because, as to Ms. Webb, the question was moot), the Court held that a judge has the inherent power to impose additional conditions on release on bail.<sup>20</sup>

Before Penal Code section 1269b, subsection (c) was enacted, judges set the amount of bail individually.

Early in my career, a couple old-timers described to me how they would have to go to a judge's house at night or on the weekend to secure a "writ" setting the bail amount and then deliver it, along with a bond, to the jail. Countywide bail schedules were a great improvement. Now, however, the trend is turning back to individualized bail setting.

The California Supreme Court is poised to address the very issue of individualized bail setting—In re Humphrey. I am co-counsel for an amicus brief Golden State Bail Agents Association filed in that case. Arguments have not yet been scheduled. The Court limited the issues to three questions: (1) Do principles of due process and equal protection require the consideration of a defendant's ability to pay in setting bail? (2) In setting bail, may a court consider public safety and victim safety? Must it do so? (3) What constitutional provision governs the denial of bail in noncapital cases? Art. 1, Section 12 or Art. 1, Section 28, subdivision (f)(3)? Can those provisions be reconciled?

An argument against the use of bail as a pretrial release mechanism focuses on the disparate treatment between persons possessing assets with which to post bail, and persons that do not.<sup>21</sup> This is a valid concern. Senate Bill 10, passed by the legislature and signed by Governor Brown in August 2018 was slated to take effect October 1, 2019. A referendum (Prop 25) qualified for the November 2020 ballot. A yes vote on Prop 25 approves SB 10, while a no vote disapproves SB 10.

Major features of SB 10 are that it eliminates bail schedules and the setting of bail in California.<sup>22</sup> It would authorize "preventative detention" of defendants accused of enumerated crimes.<sup>23</sup> A preventative detention hearing must be scheduled no later than 3 court days after a motion for preventative detention is filed.<sup>24</sup> (Continued on on next page)

<sup>14</sup> Pen C. ß 1269c

<sup>15</sup> Pen C. ß 1269c

<sup>16</sup> Pen C. ß 1269c

<sup>17</sup> In re Webb (2019) 7 Cal.5th 270

<sup>18</sup> Id. at 272

<sup>19</sup> Id. at 274

<sup>20</sup> Id. at 272

<sup>21</sup> Senate Analysis of SB10

<sup>22</sup> Text of SB 10

<sup>23</sup> Id.

<sup>24</sup> Id.

# Understanding Bail (continued from page 17)

In place of bail, SB 10 requires the use of a specified risk assessment tool.<sup>25</sup> Sonoma County's SPRAT tool is not an authorized tool.<sup>26</sup> Defendants charged with offenses involving violence and other specified offenses would not be eligible for receiving the risk assessment until after a judge or magistrate so orders.<sup>27</sup>

Systems that rely solely on risk assessment tools also have their critics. Inherent bias is the largest issue. To the extent past contact with the criminal justice system is the result of bias, a risk tool relying on past criminal justice system interactions to assess a defendant's level of risk perpetuates that bias.<sup>28</sup>

Bail amounts tend to migrate upward. Historically, Sonoma County's bail schedule has been lower than the statewide average. It still might be higher than necessary to effectuate its purpose—ensuring defen-

dants appearances. Particularly when "there should be no element of revenue to the state nor punishment." <sup>29</sup> ¶

By Dale C. Miller, Esq.

Mr. Miller practices business, real estate, and estate planning law. Prior to becoming a lawyer, he was a bail agent for thirty years.

- 25 Id.
- 26 See Id.
- 27 Id.
- 28 See A. J. Wang, Yale Law School: Procedural Justice and Risk-Assessment Algorithms, June 21, 2018; accessed at https://ssrn.com/abstract=3120136.
- 29 People v. Wilcox (1960) 53 Cal.2d.651, 657

# HOW TO RECEIVE ONE HOUR OF SELF-STUDY MCLE CREDIT

Below is a true/false quiz. Submit your answers to questions 1-20, indicating the correct letter (T or F) next to each question, along with a \$25 payment to the Sonoma County Bar Association at the address below. Please include your full name, State Bar ID number, and email or mailing address with your request for credit.

Reception@SonomaCountyBar.org • Sonoma County Bar Association, 111 Santa Rosa Ave., Ste. 222, Santa Rosa, CA 95404

- (1) The California Supreme Court has determined that due process and equal protection require a court to consider a defendant's ability to pay when setting bail.
- (2) An arresting officer can petition the court for bail to be set above schedule when the defendant has been arrested on a warrant.
- (3) California allows a defendant to post bail by isufficient sureties.î
- (4) Felony bail amounts are set by the Judicial Council.
- (5) The use of surety pretrial dates to Roman times.
- (6) Bail has been eliminated in California.
- (7) Risk assessment tools eliminate all forms of bias present in the criminal justice system.
- (8) Bail is not permitted when the defendant is charged with a capital crime.
- (9) Judges must assign additional bail amounts to the bail schedule for each aggravating or enhancing factor.
- (10) The California Supreme Court decided that a trial court has inherent authority to impose additional conditions on release on bail.
- (11) The California Supreme Court decided that requir-

- ing a defendant to waive Fourth Amendment rights as an additional bail condition is proper.
- (12) A family member of an incarcerated defendant can apply for release on bail lower than schedule.
- (13) The California Constitution states that the primary considerations in the setting of bail is ipublic safety and the safety of the victim.î
- (14) The word, ibaili also refers to the person pledging the security.
- (15) As written, SB 10 permits all criminal defendants to assigned risk assessment tool upon arrest.
- (16) Every criminal offense is bailable.
- (17) In setting bail, a judge is not permitted to consider the defendant's previous criminal record.
- (18) A defendant may apply for lower bail but may not apply for release on own recognizance.
- (19) An officer requesting higher bail is not subject to a ireasonable cause standard when making the request.
- (20) If SB10 is approved by the voters, Sonoma County will be able to continue using its risk assessment tool (SPRAT).

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# **Introducing the SCBA Diversity & Inclusion Section**

# **Background of D&I Committee**

The SCBA is pleased to announce its commitment to diversity and inclusion: The creation of the Diversity + Inclusion Section. For more than 18 months, the Sonoma County Bar Association's Diversity + Inclusion Workgroup, led by Josh Myers and Nicole Jaffee, has developed continuing legal education programs and convened important discussions to support a shared understanding of the importance of increasing diversity and inclusivity in our profession.

The Diversity + Inclusion Section's mission is to create and support diverse leaders in our legal community, inclusive and equitable workplaces, and to develop a local pipeline for diverse legal professionals by providing relevant resources, training and best practices. The Section is dedicated to encouraging and guiding our legal community in best practices for collaboration and partnership to ensure that legal representation, education, and employment are provided in an unbiased manner to underrepresented and underserved community members.

The Section welcomes additional members interested in working in its four main areas: program, pipeline, affinity, and policy. For questions, please contact the Section Coordinator Nicole Jaffee at Jaffee@perrylaw.net.

# Our Shared Challenge

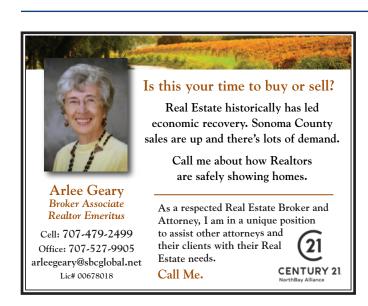
The current legal community does not reflect our diverse Sonoma County community. In that way, we are sadly not unique: the legal community in California does

not reflect the diversity of the state. The State Bar reports that when comparing the attorney population to data on Californians over the age of 18, 77 percent of attorneys are white, while only 41 percent of the state's adult population is white. Similarly, while a slight majority of Californians over 18 are women, only 42 percent of the profession is made up of women.

As the Bar Association worked to increase membership, provide relevant programming, and create a home for our local legal community, members faced a challenge. Not only do we struggle with the lack of diversity in our profession, but we heard the many stories of lawyers and legal professionals of color, women, and LGBTQ about their experiences with exclusion, racism, sexism, and homophobia from their peers, in court, with clients, in their offices, and at bar events. The connection between a lack of diversity in our bar and our colleagues' negative experiences made clear our charge: we recognized how important it was to acknowledge these issues and to take responsibility to create a different environment in our local bar.

During early meetings of the D&I task force, our members shared stories about their experiences as diverse legal professionals in this community. Here are a handful of representative stories.

• I was once "carded" at court security because the guard did not believe I was an attorney despite my suit and briefcase. So I had to show my bar card. (Continued on next page)



# 2020 Upcoming Schedule of Seminars & Events

Due to the fluid nature of the SCBA event plans and schedule during Covid-19, we are directing our newsletter readers to view our seminar and event schedules online.

Please visit https://www.sonomacountybar.org
and look at the left home page sidebar
for the list of events. Thank You.

- My immediate boss (an attorney) used a racial slur during a professional meeting with other attorneys and staff. No one spoke up. I was definitely in shock (to say the least) at both the word being said and silence in the room. I did speak out against this and now, I'm the bad person.
- A colleague in open court continually referred to a litigant as "he" instead of "she." When the woman's attorney objected and asked the judge to intervene, the judge did absolutely nothing to curtail the misbehaving attorney.
- I have been mistaken for a criminal defendant or a Spanish interpreter many times in court. Even though embarrassing and infuriating at first, I learned to assert myself by proactively identifying myself as a lawyer.
- As a woman with short hair and a younger-looking face, people sometimes assume that I am less experienced than I really am (junior associate); or a court reporter or legal secretary. I've also had male opposing counsel say uncomfortable things during a deposition, such as "that blouse looks great on you," or "you're doing great, sweetie."

These individual experiences are shared with women and diverse lawyers across the country. As is demonstrated by a 2018 American Bar Association report, You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession, based on a survey of 3,000 lawyers at law

firms and in-house legal departments, behaviors and perceptions have a negative impact on our colleagues, including the following highlights:

- Women of color reported "Prove It Again" bias at a higher level than any other group, 35 percentage points higher than white men.
- White women and men of color also reported high levels of PIA bias, 25 percentage points higher than white men.
- Women of color reported that they are held to higher standards than their colleagues at a level of 32 percentage points higher than white men.
- Women of color reported that they had been mistaken for administrative staff, court personnel, or janitorial staff at a level 50 percentage points higher than white men. This was the largest reported difference in the report.

White women reported this bias at a level 44 percentage points higher than white men, and men of color reported this bias at a level 23 percentage points higher than white men.

# The Business Case for Diversity

There is also an economic value of diversity in a firm. Sheryl Axelrod in her article Disregard Diversity at Your Peril: Diversity as a Financial Competitive Advantage reported that "[a] firm ranked in the top quarter of (Continued on page 22)

# Sonoma County Bar Association Welcomes Our New Fall 2020 Members!

Adriana Abrica, Law Offices of Andrian & Gallenson Sandra Acevedo, Law Offices of Sandra M. Acevedo Shannah Ahmed, Geary, Shea, O'Donnell, Grattan & Mitchell

Michael Hannan, Law Office of Michael Hannan Kent Kirmaci, Law Office of Kent O. Kirmaci Kelly Lopez, North Bay Stenographers Marilyn McCullum BSN, RN, McCullum Legal Nurse Consulting Reed Moran, Shapiro, Galvin, Shapiro & Moran Jerrica Perez, Fiumara & Milligan Law, PC Katherine Pond, Law Student Genoveva Puga, Fiumara & Milligan Law Tammy Quackenbush, Rush Injury Law Sunny Shiner, Law Student Susana Tolchard, Law Offices of Susana B. Tolchard & Associates

# SCBA Diversity & Inclusion Section (continued from page 21)

the diversity rankings will generate more than \$100,000 of additional profit per partner than a peer firm of the same size in the same city, with the same hours and leverage but a diversity ranking in the bottom quarter of firms." The reason? Axelrod found the following: "Diverse thinkers (defined as those with different educational backgrounds, experience levels, and/or racial, gender, and ethnic identities) are markedly better at solving problems than teams selected for their intellectual ability. The diverse team's collective intelligence...is generally significantly greater than a team whose individual members are uniformly 'smart'."

In sum, diversity makes us better legal professionals. Our clients want and deserve to receive the best services we can provide, and this happens best when we are reflective of the community we serve and represent.

# **Programs**

The D&I Committee is proud to have brought cuttingedge and relevant programs to the Bar Association. On June 9th, the D&I Committee presented a CLE program on Law and Mental Health Considerations for Transgender/Gender Expansive People. Presenters were Commissioner Louise Bayles-Fightmaster, Melle Browning, LMFT, and Annie Babin, PsyD. The program was co-sponsored with Sonoma County Women in Law and the LGBTQI Law Section.

In November, the Section will present a program on Tribal/Native American Law with speakers Tara Kaushik, a partner at Holland & Knight, and Thomas Eagle Weathers and is working on CLEs on immigration and adoption.

We planned to host a reception this summer for new graduates from Empire College School of Law, followed by a presentation and discussion on diversity in hiring and onboarding. With our current restrictions on gatherings, we have tentatively reschedule for January 2021.

### **Our Shared Future**

We recognize the importance of reflection and action during this critical time in our nation's history, and we invite you to join us! We promise vibrant, creative conversations, laughter and learning, and community building—whether over Zoom or a charcuterie plate and some wine in a conference room—to discuss how to

build a stronger pipeline between our local educational institutions and our beloved Bar Association; opportunities for new voices in this newsletter and in our Association; and to learn best practices to recruit, hire, and retain diverse lawyers and legal professionals to ensure our sustainable future.

By Alegria De La Cruz & Martha Sullivan

Alegría De La Cruz is the newly-appointed Interim Equity Officer for Sonoma County, and is an attorney experienced in public interest and public service litigation and transactional matters.

Martha Sullivan, Principal of Thornton Marketing, is a business development coach for lawyers. She was a panelist on diversity at the 2019 SCBA Bench and Bar Retreat and has presented an Elimination of Bias CLE and a Business Development Workshop for the Bar.



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# **Ethical Duties in Times of Crisis**

power is off, courts are closed, mandatory evacuation or shelter in place orders are in effect. Or a worldwide pandemic has businesses shuttered and courtrooms dark.

As counsel, what duties do you owe your clients when factors beyond your control interfere with your law practice?

Sonoma County attorneys have lived these unfortunate realities during the past few years, whether as a result of firestorms, PSPS,<sup>1</sup> or COVID-19 related closures.

The State Bar offers resources related to ethical considerations in such times on its website under the heading "Law practices affected by natural disaster or catastrophic event." <sup>2</sup> Information provided includes a list of rules and statutes <sup>3</sup> involved in such ethical determinations, along with ethics opinions and secondary sources, some from other jurisdictions.

While the State Bar resources deal with both cessation and continuation of a law practice, this article provides an overview of the impact of natural disaster or catastrophic event on the active law practice.

Of particular interest are American Bar Association Formal Opinion 482: Ethical Obligations Related to Disasters and Pennsylvania Bar Association Formal Opinion 2020-300: Ethical Obligations for Lawyers Working Remotely. The ABA also has a Committee on Disaster Response and Preparedness including a Coronavirus Task Force and a collection of CLE products designed to address a variety of issues arising as a result of the COVID-19 outbreak.<sup>4</sup>

While these opinions are mere collateral sources,<sup>5</sup> it is appropriate to consider collateral sources on ethical issues, particularly where there is no California authority on point and the opinions do not conflict with the public policy of the State.<sup>6</sup>

First, attorneys are encouraged to create a plan for disaster before one strikes, including a succession plan. The State Bar website provides several links to resources to aid in creating a disaster plan, some from news sources and others accessible only through a legal research database.

In Formal Opinion 18-482, the ABA notes the duty of communication is one of the first considerations following a disaster. "To be able to reach clients following a disaster, lawyers should maintain, or be able to create on short notice, electronic or paper lists of current clients and their contact information...which should be stored in a manner that is easily accessible."

Initial communications with clients following a disaster should address whether the attorney is able to continue representation. However, the attorney must be mindful of the duty to use relevant technology and also undertake reasonable efforts to safeguard client information from unintended disclosure. 10

Lawyers are encouraged to proactively provide information to clients regarding communication with counsel where there is advance notice of a potential catastrophic event. Emergency contact information may be provided in a fee agreement or engagement letter, eliminating the need to scramble to contact clients following a disaster. 12

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- 1 Public Safety Power Shutoff, the name given by PG&E to the precautionary power shut offs which began in 2019.
- 2 The resources may be accessed at http://www.calbar.ca.gov/Attorneys/ConductDiscipline/Ethics/Publications/Ethics-News
- 3 Listed are Rules of Professional Conduct 1.1, 1.3, 1.4,1.15, 1.16, 5.1, 5.2, 5.3; Business and Professions Code §§ 6068, 6180 et seq., 6190 et seq., and Code of Civil Procedure section 286.
- 4 Resources offered by the ABA Committee on Disaster Response and Preparedness may be accessed at https://www.americanbar.org/groups/committees/disaster/

- 5 See Rules of Professional Conduct, Rule 1.0 (formerly Rule 1-100(A)).
- 6 See State Compensation Ins. Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, 655-656 (citing former Rule of Professional Conduct 1-100).
- 7 ABA Com. On Prof. Ethics, opn. No. 18-482 (2018), p. 1-2.
- 8 Id. at p. 2-3.
- 9 Id. at p. 3.
- 10 Ibid.
- 11 Ibid.
- 12 Ibid.

# Ethical Duties in Times of Crisis (continued from page 23)

An attorney's ethical duties are not modified when counsel continues to practice in an area affected by a cataclysm.<sup>13</sup> Lawyer should consider electronic storage of files so they can be easily accessed online even if the lawyer is displaced.<sup>14</sup> However, "[i]f Internet access to files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.<sup>15</sup>

Attorneys are also charged with ascertaining any changes to court dates or deadlines as a result of a catastrophic event, and must take reasonable steps to ensure clients can access funds held in trust.<sup>16</sup>

If funds are unavailable because financial institutions are non-operational, "a lawyer must notify clients or third persons for whom the lawyer is holding funds when required disbursements are imminent and the lawyer is unable to access the funds, even if the lawyer cannot access the funds because the financial institution itself is inaccessible or access is beyond the lawyer's capability." 17

"Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice." <sup>18</sup>

What if a client file or property is destroyed as a result of a cataclysm? It depends on the type of document or property at issue.

An attorney must notify current and former clients of the loss of "documents with intrinsic value, such as original executed wills and trusts, deeds, and negotiable instruments." <sup>19</sup> Lawyers must also attempt to recreate intrinsically-valuable documents, or acquire copies from another source. <sup>20</sup>

While there is no need to notify current or former clients of the loss of documents that lack intrinsic value, an attorney must respond honestly if asked about the disposition of the documents.<sup>21</sup>

If the documents destroyed are "necessary for current representation or would serve some useful purpose to the client" an attorney can first attempt to reconstruct the file with documents obtained from outside sources. However, if this is not possible current clients must be notified. There is no duty to reconstruct files of former clients where the documents have no intrinsic value, unless the lawyer agreed to do so even where the attorney-client relationship has terminated. 24

Where trust account records are impacted by a disaster, an attorney must "attempt to reconstruct the records." <sup>25</sup>

The ABA again recommends electronic storage of important documents, subject to compliance with ethical obligations as to confidentiality and access to the information are satisfied.<sup>26</sup>

But what are the ethical obligations applicable to electronic storage of client information and, for that matter, a lawyer working remotely?

The State Bar chose to include Pennsylvania Bar Association Formal Opinion 2020-300: Ethical Obligations for Lawyers Working Remotely in the list of disaster-related resources mentioned above.

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13 Id. at p. 4.
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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> *Id.* at p. 5.

<sup>17</sup> Id. at p. 6.

<sup>18</sup> Id. at p. 5.

<sup>19</sup> Id. at p. 8.

<sup>20</sup> Id. at p. 8-9.

<sup>21</sup> Id. at p. 9.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Id. at p. 9-10.

"Attorneys and staff working remotely must consider the security and confidentiality of their client data, and the need to protect computer systems and physical files, and to ensure that telephone and other conversations and communications remain privileged." <sup>27</sup>

Of particular concern when working remotely are issues pertaining to competence, confidentiality, best practices, privacy of communications, and online security.

As to competence, a lawyer has a "duty to provide competent representation" including understanding "the risks and benefits of technology." <sup>28</sup> "[A]ttorneys must evaluate, obtain, and utilize the technology necessary to assure that their communications remain confidential." <sup>29</sup>

The duty of confidentiality is not altered by working remotely.<sup>30</sup> An attorney must not only ensure that proper safeguards are in place regarding electronically-stored information, but must also "make reasonable efforts to ensure that household residents or visitors who are not associated with the attorney's practice" do not have access to paper files or other documents brought into the home." <sup>31</sup>

"This can be accomplished by maintaining the documents in a location where unauthorized persons are denied access, whether through the direction of a lawyer or otherwise." 32

Locking up papers files at home is fine, but what other best practices should an attorney employ when performing legal work remotely?

Confidentiality of communications is key, whether the communication occurs by telephone, video chat, text, email, or any other method.<sup>33</sup> A private space to

hold audio communications and encryption of electronically-sent communications is recommended.<sup>34</sup>

One aspect of confidentiality may easily be overlooked: the Alexa or Google Assistant in your home. It is well-known these devices listen to conversations and record them.<sup>35</sup> These recordings are stored on servers and company employees are hired to review them.<sup>36</sup> Attorneys should be aware of this risk and choose their work-from-home location accordingly.<sup>37</sup>

Additionally, lawyers must ensure proper online security measures are employed. Recommendations include 1) not using public internet connections or free Wi-Fi, 2) use of a virtual private network (VPN) to shield activity from unauthorized persons, 3) use of two-factor or multi-factor authentication when accessing information electronically, 4) using strong passwords which are long and complex, 5) assuring video conferences are secure from hijacking.<sup>38</sup>

The last recommendation is particularly notable in light of the recent "Zoombombing" of an online hearing before Hillsborough County, Florida, Judge Christopher C. Nash.

During the hearing, unauthorized users accessed the video stream and broadcast rap and a pornographic video to all in attendance.<sup>39</sup> Despite attempts to foil the hackers, the judge was forced to abandon the proceedings.<sup>40</sup>

How could this have been prevented? There are several steps that can be taken: 1) do not hold public meetings, 2) use passwords to control admission of persons to the conference, 3) do not post a link to the conference on social media, 4) only provide the meeting link to specified people, 5) use screensharing

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27 Penn. Bar. Assn. Com. On Legal Ethics, opn. No. 2020-300 (2020), p. 1.
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<sup>28</sup> Id. at p. 3.

<sup>29</sup> Id. at p. 4.

<sup>30</sup> Ibid.

<sup>31</sup> Id. at p. 6.

<sup>32</sup> Ibid.

<sup>33</sup> Id. at p. 8.

<sup>34</sup> Id. at p. 8-9.

<sup>35</sup> Id. at p. 8.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Id. at p. 11-12.

<sup>39</sup> Porn and rap interrupt Zoom hearing of Twitter hacking suspect, Los Angeles Times (Aug. 5, 2020).

<sup>40</sup> Ibid.

# Ethical Duties in Times of Crisis (continued from page 23)

options to change screensharing to "Host Only," and 6) make sure users are using the most up-to-date version of the application.<sup>41</sup>

Finally, lawyers are encouraged to act with civility during times of disaster or catastrophic event. Quoting a statement from the Los Angeles County Bar Association Professional Responsibility and Ethics Committee, the Pennsylvania Bar Association opinion advises "all lawyers to liberally exercise every professional courtesy and/or discretional authority vested in them" and "grant reasonable requests for extension and other accommodations." 42

41 Penn. Bar. Assn. Com. On Legal Ethics, opn. No. 2020-

300 (2020), p. 12. 42 *Id.* at p. 13. What's the bottom line? A lawyer's ethical duties are not relieved as a result of disaster or catastrophic event. Rather, they are enhanced by requirements that remote work comply with all ethical obligations, despite the lack of a formal office environment. As counsel, we should proactively address issues of client communication, confidentiality, and access to records before disaster strikes.

Finally, despite our position as counsel, we remain humans facing down a once-in-a-lifetime pandemic. During these trying times, we should be as considerate of and gentle with one another as possible – and move Alexa to another room.

By Sarah Lewers

Sarah Lewers is a litigator with Krankemann Law Offices, P.C., in Santa Rosa, and a regular contributor to the SCBA Bar Journal.

# SCBA Fall "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.

Ashlee Hellman has moved to Novato, CA. . . Bernice Espinoza (formerly with the Public Defender's Office) is now with VIDAS Legal Services in Santa Rosa . . . Lauren Mendelsohn has become a Board Member at International Cannabis Bar Association . . . Mark Rubins has retired from Moss Adams, LLP. . . J. Michael Mullins is no longer with Legal Aid . . . Sarah Baxter Kaplan has gone back to Baxter Law Offices, APC in Santa Rosa . . . Congratulate James V. Sansone, Esq. for starting a new position as Adjunct Professor Of Law at Empire College School of Law as well as joining Carl Mackie Power & Ross in December . . . After 33 years in Fountain Grove, O'Brien Watters & Davis is heading out to 1550 Airport Blvd., Suite 201, in Santa Rosa . . . Robin Estes has moved her office from Suite 200, to Suite 115, at 3510 Unocal Place, in Santa Rosa . . . James Eimers has moved his office to 3333 Mendocino Ave., Ste. 202, in Santa Rosa . . . Joseph G. Baxter has left O'Brien Watters & Davis and is now be located at 18309 Willow Creek Rd., in Occidental

. . . Levy Carroll Law has moved to 411 Russell Ave., in Santa Rosa, Julie S. Levy is back with the Levy Carroll Law firm . . . Anne Keck moved her office, Keck Law Offices, to 228 Windsor River Rd., Ste. 507, in Windsor . . . Cooper Findlay is now with the San Francisco Public Defender's Office . . . Stephen-Bela Cooper has moved to Marin County . . . Bailey Penzotti with Wine Country Family Law & Bankruptcy Office has moved to a new location: 725 College Ave., Ste. 7, in Santa Rosa . . . Bruce Goldstein has retired as County Counsel on September 8, 2020. Newly appointed County Counsel is Robert Pittman . . . Noreen Evans and Deirdre Kingsbury with Evans Kingsbury LLP announced their grand opening was on September 15th at 50 Old Courthouse Square, Suite 601, in Santa Rosa . . . Several of SCBA's members became Empire College Law School's new professors for the Fall 2020 semester: Deborah S. Bull, Evidence; James Sansone, Remedies; and Philip Jeff Terry, Real Property.

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### **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.

Content Development: Malcolm Manwell, John Borba, Joni Boucher, Michelle Zyromski, Susan Demers, Amy Jarvis.

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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 Susan Demers at 707-542-1190 x180. Submit all editorial materials by email to: susan@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.

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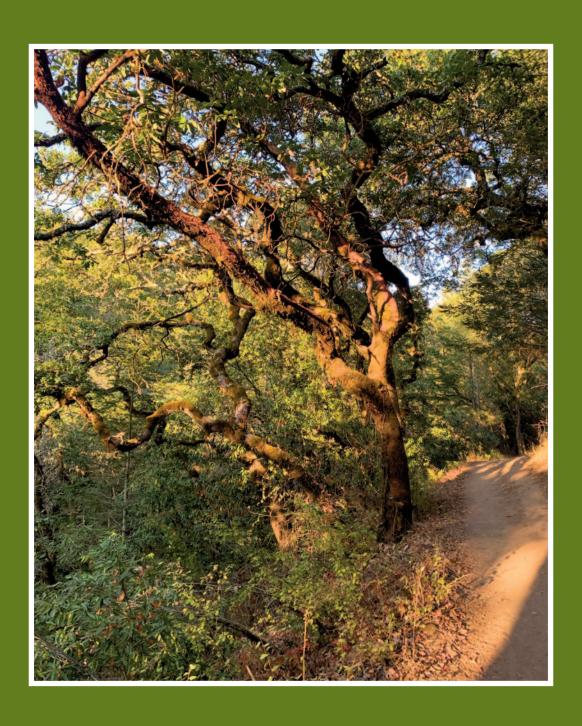
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