# SONOMA COUNTY BAR ASSOCIATION THE BAR JOURNAL

Volume 62 Issue 4 Winter '20



Sunrise over Chardonnay and Wild Mustard, Sonoma County

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By Michelle Zyromski, President, SCBA

#### President's Message: SCBA—The Next Generation

As I write this, the Fall leaves are resplendent in their crimson and golden colors, signaling the changing of the seasons and a call once again for reflection about the events of the past eleven months.

It's an obvious understatement

to observe that our Bar Association and our legal community in Sonoma County have never experienced a year quite like 2020. The overarching dangers of a deadly pandemic, the political drama, the fires that completely upended our sense of normalcy—without much warning, we were all forced to scrap plans, schedules, work, school, and the like and quickly figure out how to navigate the daily uncertainties of our shared upheaval. While we all endured changes on an unprecedented scale, both personally and professionally, I was reminded over and over this year how lucky

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we are to practice law in Sonoma County.

We know that the law is a noble profession—one that requires not only years of education, but also necessitates anyone aspiring to join our ranks to take a strenuous admission examination, pass a moral character test, and then swear an oath; first to support the California and U.S. Constitutions, and then also to faithfully discharge the duties of an attorney to the best of his or her knowledge and ability, and strive to conduct himself or herself at all times with dignity, courtesy, and integrity. This is a tall order but one that our profession demands. To paraphrase the Dickens apparition Jacob Marley, people are our business and "the deals of our trade are but a drop of water in the comprehensive ocean" of our business. Many (if not most) of us were drawn to the profession because we wanted to help people by solving their problems. Our clients come to us when they seemingly are out of options and we take on their struggles as our own relieving their anxiety, staving off financial ruin, preserving their families, securing financial support after catastrophic injuries or other losses, and so much more. Over the years, I have learned that to be an effective lawyer means to combine wisdom, knowledge of the law, an ability to listen, empathy, quick thinking, and an aptitude to express oneself persuasively both orally and in writing-skills we continue to refine in the hope of better serving our clients who need us.

And where did I learn the "recipe"? From other attorneys here in our legal community. Not only were there senior associates and supervising partners at my firms who patiently "showed me the ropes" in a technical sense, but also other colleagues who were willing to answer the phone when I may have had a legal question outside my comfort zone. Still others expressed great kindness when they called me and invited me out to lunch after a tough loss in court. I am grateful to those attorneys and judges who have mentored me over the years. This year has seen the retirement and unfortunate passing of some of the greatest examples of our profession, and our legal community will not be the same without them. They have been our friends and our teachers as well as extraordinary lawyers, and we will miss seeing them at the courthouse and around town.

(Continued on page 11)

By Malcolm Manwell

#### From the Editor: The 4-Way Stop

t is understandable how we take for granted the things about us which work so well. We hardly notice them. For instance, very few of you got up this morning being grateful your children didn't contract polio, or that the lights worked, or that you have clean drinking water. All of these

conditions are in the fabric of our world today. A little more than a century ago, none of them existed.

Each of these gifts, and thousands more like them, came about because of a rule of law which enables a society to be stable, grow and progress.

One of my all-time favorites is the 4-way stop. It's simple. Clear. When you approach an intersection in busy traffic it starts to look and sound like a symphony. It's an August Rush moment.<sup>1</sup> There is a beat. There are stops and rests. There is the crescendo when your two lanes move, and of course, the minor shifts in key when somebody gets to turn across traffic. All wait patiently to play their parts, follow the unseen score, and each take their turns.

All of this happens with a hidden conductor. There is no law visible, yet it permeates the entire process. The law is written in the minds of the orchestra of drivers moving in all directions, in a nearly precise cadence of starts and stops, all to get to their destinations. A similar thing of great beauty that we usually take for granted, but won't in 2020, is the peaceful transition of power built into our Constitution. Once again, we find a Nation divided over our principles. Yet, we do not disintegrate into a *coup d'état*.

There are two opposing groups of true believers, each committed to play the music its side hears, but each, fundamentally, knowing there can be no harmony unless we play together.

After it was announced by one news service Joe Biden had won, he addressed the nation. He called for unity, of course, but he also went one step further—he admonished his own side that the supporters of Donald Trump "...are not our enemies." That was a hopeful start by the new conductor. May his theme continue. Its absence will produce great disharmony.

As this editorial is being penned (the week after the election) there are still many issues left over after the election. The courts and the recounting efforts should resolve these. By the time this editorial appears in December of 2020, many, if not all of these issues should be behind us, and we should be moving forward.

America's peaceful transition of power is one of the greatest gifts our nation has. The 4-way stop pales in comparison. Yet both work because of how you have incorporated the rule of law into your beings. It's a symphony of human achievement. Respect it, and it will take us through.

1 The movie, August Rush, is one of Hollywood's best depictions of what it's like to be inside the head of a musical genius.





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# Proposition 19 Giveth a Little and Taketh Away a Lot: Fundamental Changes Coming to Property Tax Reassessments

n November 3, 2020, California voters passed Proposition 19-a measure that, according to its proponents, expands the transferability of the Prop 13 Tax Base for victims of wildfire and other natural disasters and establishes a fund for fire protective services. For the most part, these changes will benefit those in Sonoma County who have suffered devastating losses to wildfires, earthquakes, or other declared natural disasters. Lesser publicized, however, Proposition 19 has effectively gutted the Parent-Child Exclusion (Proposition 58) and Grandparent-Grandchild Exclusion (Proposition 193) for intra-family transfers. These exclusions from property tax reassessment have become critical elements of an estate plan, and given the upcoming changes, could fundamentally change the transactions and estate planning strategies for real estate and estate planning attorneys and their clients.

#### Transfer of Prop 13 Tax Base Value

#### Principal Changes:

- Extends availability of Prop 13 tax base transfers to fire/disaster victims
- Allows transfer of tax base to any replacement property, regardless of value
- Applies state-wide.

First, the good news. Under current law, those over 55 and severely disabled homeowners who elected to downsize could transfer their Prop 13 tax base value to a home of equal or lesser value. The transfer of the tax base only applied in the same county as the former home, or in a county that agreed to accept inter-county transfers, and homeowners could only use the exemption once.

Effective April 1, 2021, homeowners who are over 55, severely disabled, or the victims of wildfires or other natural disasters will be able to transfer their Prop 13 tax base value to any property in the state, regardless of value. If the new home's appraised value is more than the former home's value, the assessor will create a blended rate that keeps the old tax bases and increases it by the difference in assessed values. (As before, if the new home is equal or less than the old home, the tax base remains the same).

This change is particularly helpful to qualifying homeowners, because now the transfer of the tax base value will not be limited to downsizing and will apply statewide. For example, a couple who bought a small starter home when they were young and had been successful over the years could use the transferred tax base to help keep the property tax bill down on a larger, more comfortable home they built or bought after losing everything in a fire. Then, as seniors, they can downsize to a new county (up to a total of three transfers).

# Intra-Family Transfer Exclusions (Parent-Child/Grandparent-Grandchild)

Principal Changes:

- Eliminates intra-family exclusions for all properties except primary residences
- Transferee now must obtain homeowner's exclusion to qualify for exclusion
- Limits qualifying exclusion to taxable base PLUS \$1 million
- Makes grandparent-grandchild exclusion bi-directional.

Current law allows for an unlimited number and value of transfers of a transferor's primary residence, plus up to \$1 million of non-primary residence real property (lifetime/per transferor) when the transfer is between parents and children (bi-directional), or from grandparents to grandchildren (if the grandchild's parent has died). To receive the exemption from reassessment, transferees must apply to the assessor's office within three years of the transfer or prior to transferring the property to a third party, whichever is earlier. Applications after three years may be filed at any time prior to transfer to a third party, but will not be retroactive.

Under the new law, effective February 16, 2021, transfers between parents and children and between grand-parents and eligible grandchildren will be excluded from reappraisal only if the transfer involves the transferor's primary residence (the "family home") and ONLY if the transferee makes it his/her family home (Continued on next page)

thereafter. To qualify, the transferee must submit the homeowner's exemption or disabled veteran's exemption at the time of the purchase or transfer. Post-transfer applications may receive the exemption by claiming the homeowner's exemption or the disabled veteran's exemption within one year of the purchase or transfer (with a refund of excess taxes paid). The statute does not provide for prospective-only relief for late submissions (but could come with implementing regulations, which are still under development).

#### **Analysis**

The Parent-Child Exclusion has become a ubiquitous tool for estate planners to help clients transfer value from one generation to the next. With the passage of Proposition 19, most of those opportunities will disappear because it will only apply to the family home (family farms also qualify). Residential rental properties, commercial properties, family vacation homes, and the like all will be fully reassessed on any transfers. Significantly, parents who help children purchase their first home will likely want to avoid putting names on title as co-owners as is often done because when the loan is paid off and the parents' interest transferred to the child, that portion will be reassessed.

With a February 15, 2021 deadline looming, practitioners may feel the urge to have clients rush to make lifetime gift transfers of the non-primary-residence properties.

# SCBA Welcomes Our New Winter 2020 Members!

Suzan Aiken, with Law and Meditation Offices of Suzan Barrie Aiken

**Gina Conklin**, Legal Support with Dickenson, Peatman & Fogarty

Susan Corbisiero, with Abbey, Weitzenberg, Warren & Emery

Mitchell Genser, with BizMediate

Cassidy Jourdan, Law Student

Peter Kiel, with Dickenson, Peatman & Fogarty

Nicole Medeiros, with Reed Smith LLP

James Rush, with Rush Injury Law

Gordon Wilson, Law Student

Don't let the property tax tail to wag the dog. Lifetime transfers may make good use of the property tax exclusion, but such transfers would miss out on the step-up basis that comes with transfers on death, which could impose a greater capital gains tax on the next generation if it decides to sell the property. But, if a client has a gifting strategy to minimize estate tax, it may make sense to use those properties that will no longer be eligible for the parent-child exclusion while it will still apply. Every situation is different, which is why it will be important to bring in the client's tax advisor and to talk carefully about the intent for the property at each generation.

As noted above, the regulations implementing Proposition 19 are still being developed, so practitioners should keep an eye out for those in the coming months. The Board of Equalization does not expect them to be released until shortly before the respective deadlines.

By Chad O. Dorr, Esq.,
Chad is an attorney with Perry, Johnson,
Anderson, Miller, & Moskowitz, LLP

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#### Sonoma County Women in Law 2020 Scholarship Recipients





Sonoma County Women in Law has awarded scholarships to two dynamic and very accomplished women. The 2020 recipients of The Honorable Gayle Guynup Scholarship Endowment Fund are Kiana Herold and Gina Fortino Dickson.

Kiana Herold is a law student at University of California, Berkeley, School of Law. Her resume is impressive; a graduate of Amherst College where she was a Three-time All American in track and field, a Fulbright English Teaching Assistant, Associate Editor of the California Law Review, and Articles Editor of the Berkeley Journal of International Law.

This year, Kiana contributed to an amicus brief to the California Supreme Court on the topic of the impact of criminal fines and fees on indigent defendants. She worked on arms control issues at the United Nations. In 2015, she volunteered during the refugee crisis in Austria. Later, she researched sexual violence in Greek refugee camps.

On a lighter note, Ms. Herold lists her interests as making sushi, surfing, and cross county running. She mentioned that she once ran across Lichtenstein (while arguably a very small country, is mountainous and something I would never attempt to do.) Her ties to Sonoma County are strong; she grew up in Sebastopol and attended high school in Santa Rosa.

In evaluating scholarship applicants, the Scholarship Committee considers a "demonstrated interest in promoting equal opportunity and justice for all women." Upon learning of her award, Ms. Herold noted, "this scholarship will support my work this summer at an organization that is fighting workplace gender discrimination and supporting women's right to equal pay through litigation."

The second recipient is Gina Fortino Dickson, a third year law student from Empire College School of Law. As one of six sisters, she certainly has the credentials to understand interpersonal relationships among women, and the particular challenges that women face throughout their lives.

Professionally, Ms. Fortino Dickson is a certified facilitator and has fifteen years' experience in grant development, management and administration. She currently works at the Sonoma County Office of Education. Much of her career has been in the education arena and housing for the disenfranchised. Through the NorthBay Alliance of Professional Woman, she works to mentor and support women in achieving their career goals.

Ms. Fortino Dickson has consistently worked to improve the conditions of women's health, childcare, housing, and the political status of women. For example, she currently volunteers as a Court Appointed Special Advocate to mentor and assist children in foster care (this is while simultaneously working, being a mother, and going to law school). Ms. Fortino Dickson is active in the legal community as a member of SCBA and Barrister's Club and we look forward to seeing her continue her amazing work post-graduation.

The Sonoma County Women in Law Scholarship was created in 2001, funded in part by the generous contributions of The Founder's Circle. The first scholarship was presented by California Supreme Court Associate Justice Joyce Kennard. Since then, SCWiL has had the privilege of watching its scholarship recipients develop rewarding careers and give back to our community.

Unfortunately, Women in Law will not be having its annual reception this year due to the Covid pandemic. We would like to thank the Sonoma County legal community for its continuing support.

#### By Carla Rodriguez

Carla Rodriguez is a Chief Deputy Attorney in the Sonoma County District Attorney's Office. Among her duties, she supervises the Domestic Violence and Elder Abuse Units. Since 2017 she has served on the Board of Directors for Sonoma County Women in Law.

**WINTER 2020** 

#### SCWiL 2020 Scholarship Recipients (continued from page 8)

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

SCBA staff and the Executive Committee are continu- through live webinars on Zoom, on-demand videos ing 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 March 2021. We will continue to provide "distance learning"

linked through our website, and self-study options through the Bar Journal newsletter.

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

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#### 2020 Unsung Hero Bruce Goldstein: "Cautiously Optimistic" The Perspective of a True Public Servant of Sonoma County

ach year, the Sonoma County Bar Association acknowledges an "Unsung Hero" within the legal profession; someone who has gone above and beyond for our community without expectation of accolades. As 2020 slowly comes to an end, we look back on a tumultuous year of disaster after disaster. The county could not have survived without the help of dedicated and hardworking public lawyers like Bruce Goldstein. Bruce is enjoying a very well-deserved retirement of only a few months now. He humbly accepted this recognition, stating he accepts on behalf of the 40 lawyers and staff at the Sonoma County Counsel's Office.

Bruce spent his early career years working for juvenile justice system reform before attending law school at Stanford University Law School. While at Stanford, Bruce focused his time on juvenile justice and immigration clinic work and was a student director of the East Palo Alto Community Law Project.

Bruce started his career in 1988 at the firm of Farella, Braun & Martel in

downtown San Francisco. However, the city firm lifestyle did not suit him, and he moved his family to Sonoma County. After a few years of commuting, an opportunity opened with the Sonoma County Counsel's Office; of course, it turned out to be a perfect fit. County Counsel gave him the opportunity to work with public policy, his passion, and this ignited a spark in him that led to a long career fighting for the community of Sonoma County. After eight years of representing child protective services on juvenile dependency cases, he was tasked with working with the local tribes. Bruce took the lead in the county negotiations that led to intergovernmental mitigation agreements with the Dry Creek Band of Pomo Indians and the Federated Indians of the Graton Rancheria related to their casino developments.

Bruce was then promoted to Assistant County Counsel, where he was faced with a wide range of issues. Bruce was quick to say the best thing about the job was working with a team of great attorneys on behalf of clients who are all committed to public service. Bruce spoke passionately of the creation of the Secure Families Collaborative to provide legal representation to undocumented members of our community. While not a county project, Bruce said this effort was possible because of county leadership. With approximately 25,000 undocumented individuals in Sonoma County, they are important to our social and economic fabrics but unfortunately have become a target under the Trump administration. The Secure Families Collaborative organization provides free deportation defense and affirmative relief and, over the last three years, has raised

almost \$2 million and served over 500 individuals, in over 250 separate cases.

Bruce stated County Counsel is the best job in the legal profession, but sometimes there is just too much of it. Sonoma County entered 2020 while still dealing with the recovery of the 2017 fires, the floods and fires of 2019, and the aftermath of the health crisis from the 200-300 homeless people living on the

local Joe Rodota Trail. Then, the first case of COVID hit our community in mid-February. While dealing with unprecedented times, the Walbridge Fire hit early in August, shortly followed by the Glass Fire. Bruce explained that public lawyers are held to an especially high ethical standard and he is proud of the integrity with which County Counsel lawyers practice law.

When asked about COVID and the unique challenges Sonoma County faces, Bruce's advice is to give ourselves and each other a little more slack, have gratitude over the many things we have to be thankful for living in Sonoma County, and understand that all are doing their very best to help navigate a dangerous and challenging time in largely uncharted waters. Bruce spoke of his work with Department of Health Services' Director Barbie Robinson and the Health Officer and Public Health Division Director Dr.Sundari R. Mase in helping develop the 'shelter-in-place' and other health orders, noting the importance of using science and (Continued on next page)



making intelligible orders that consider the competing needs of our community; this has been the challenge.

While fond of his entire time in government work, the most personally gratifying projects were his negotiations and agreements with the Sonoma County tribes, his work on immigration issues, and the recent \$150 million+ settlement reached with PG&E for the 2017 fires (the largest settlement ever obtained by the County). After 23 years of service, Bruce, now retired, says he can sleep well knowing he left the Office in good hands and that he remains cautiously optimistic for our County's recovery from 2020. He

stated County Counsel is a privileged position, where you can make a difference on such important issues, and it was an honor to serve in such a role. It is clear his passion for our community and drive to make it better for all will continue well into retirement as he is a true "Unsung Hero" of Sonoma County.

By Amy S. Winters

Amy S. Winters is an associate at Barulich, Dugoni & Suttmann Law Group, Inc. where she practices primarily trust and estate and business litigation.

#### President's Message (continued from page 3)

But 2020 is proving to be the year of change, and it is on our watch that the responsibility of cultivating the next generation of attorneys now falls. Due to our geography and smaller size-not to mention, the spiraling of our profession into more mercenary waters it is rare to find the career trajectory that was the norm decades ago where there was a firmly established "partner track." The recent non-fiction book White Shoe by former Wall Street attorney John Oller chronicles how East Coast attorneys at the beginning of the 20th century developed a new system of law firm management. Oller details how Paul Cravath pioneered "the Cravath system" of hiring graduates straight out of top law schools, grooming them as associates by providing general training with multiple partners before arriving at a specialization; and if proven worthy, granting partnership at the firm essentially for life.

Without such structure today, new attorneys oftentimes are left to fend for themselves—a daunting prospect. I believe we can do something about this. That's why I'm so proud of the Bar Association's work this year to implement the brand-new Mentorship Program. This program is designed to fill the gap between the organic Cravath system, and our more atomized reality, pairing more experienced attorneys with members of the SCBA Barristers Section who are just starting out or are still in law school. The goal of the program is to foster relationships in which the younger lawyers will have an experienced guide who

can provide tips about law and life in general. The Executive Committee has worked diligently to implement this program and we are excited to report that it is off the ground. Thank you to those volunteer mentors whose dedication extends to a willingness to support the next generation of our profession.

A heartfelt thank you also to Amy Jarvis, SCBA Executive Director, and staff Susan Demers, Ann Horn, and Win Rogers, who led SCBA through this tumultuous year with a steady hand and a positive attitude. Amy is energetic and seemingly unflappable; we are fortunate to have her at the helm. I also owe many thanks to the Executive Committee-Suzanne Babb, Stephanie Hess, Mark Rubins, and David Berry. Their support this year has been phenomenal and the Bar Association is in good hands. I would be remiss in not thanking the many members of the SCBA itself who took the time to volunteer this year-by presenting a Zoom MCLE seminar, attending section meetings, acting as Discovery or Demurrer Facilitators, and all the other ways our members unselfishly pitched in to help each other this year. We survived 2020 in no small part because you gave back to the profession.

It truly has been an honor to serve as your Board President. Next year will be the 100th anniversary of SCBA and we will celebrate our good fortune of practicing law in "the Chosen Spot in All this Earth." Happy 2021!

#### ADR in a Virtual World

was asked to offer some comments on mediation and arbitration for the new environment in which we find ourselves. The world now plays out on a screen, with most of the participants in far-flung locales. Given the sophistication of this readership, I will spare you observations on the more apparent characteristics: the tragedy of no free lunch; the joy of appearing while you are in sweatpants and flip flops while displaying your best top-side fashions; the challenge of managing your image as a high-powered attorney when (as recently happened) your 8-monthold becomes transfixed by Zoom.

I've conducted virtual mediations in almost 100 cases in the last few months and arbitrated a six-day matter as part of a tripartite panel. I've been exclusively working as a full-time neutral for almost 25 years. From my perspective, there has not been a meaningful difference between virtual versus in person mediations in terms of results. The cases that do not settle do not resolve for the typical reasons: a material difference in assessment of strengths and weaknesses; it was early in the process and some amount of discovery was necessary; a demand was made too late in the process to afford sufficient time to evaluate a realistic response, and so forth.

#### A chain is as strong as its weakest link

Whenever we set a mediation or arbitration, my trusty staff offers to counsel and their clients a 'walk through' on the platform we are employing. Many lawyers scoff at the suggestion. May I respectfully suggest you reconsider? Your clients are heavily investing in the effort, in your time, the mediator's time and their own expectations and desires. We have all mastered the Zoom essentials necessary to attend a CLE program or a Friday night distanced happy hour, but conducting a mediation deserves additional focus. Many clients have no familiarity with online meetings; consider their relative inexperience when you decline an offered 'walk-through.' The stakes at mediation warrant additional focus.

Additionally, much of the quality of the experience (in terms of smooth streaming, uninterrupted visual and audio presentations) is a product of the adequacy of the connection. As most of you know, you are far better off with a wired, versus wireless, connection. Many of your clients are in more remote locales, and the more remote, in general, the less adequate the quality of the service. Do yourself and your clients a big favor: try a walk through with the intended connection, either through the offering of the ADR provider, or using your own virtual account. If the client is not nearby physically, you may find the best option is to have them in a court reporter's office where virtual is commonplace and someone can help shepherd them to the connection.

#### **Aesthetics**

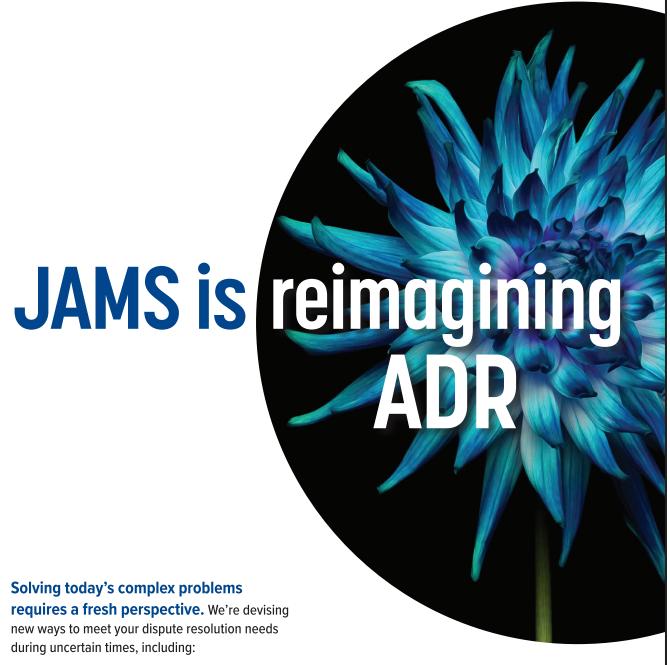
Maybe this is just a personal bête noire, so take the following with a big grain of salt. Art is, after all, in the eye of the beholder.

I find virtual backgrounds largely annoying. Honestly, I know you are not parked in front of the Magic Castle, or somehow airborne over the Golden Gate Bridge. It is commonplace for some or all of the image of the participant to be lost during the session; edges of your head or shoulders seem to episodically vanish. To me, it is a distraction that adds little to the efforts at resolving the case, and anything that impairs direct contact cannot be helpful. We don't yet live in that holographic world where you will appear in 3D glory (well, there go the flip flops...), but virtual backgrounds make the connection seem more tentative and remote than using a regular background might make it. Consider whether it really adds anything to the quality of your virtual presence.

#### **During the Session**

Remember that you will be 'with' your client for as much of the day as you or they may wish. If you are physically in the same room with them, consider a few difficulties which may arise. If you share a room with your clients, only one microphone can be on at a time or there will be feedback. If you share the room, it becomes more difficult or awkward to have a private discussion with the mediator and/or opposing counsel. (Continued on page 14)

<sup>1</sup> The vast preponderance of my cases have been on Zoom, but I also have used Teams (the Microsoft variant); I am not familiar with Bluejeans or WebEx for virtual mediations.



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#### ADR in a Virtual World, (continued from page 12)

You either take your laptop down the hall to another room, or ask the clients to go elsewhere; neither is optimal from my perspective. Perhaps you consider, if they wish to be at your office, placing them in a separate conference room to avoid these issues.

The mediator will be the host. There will be a virtual room for each side of the case; and perhaps more than one if there are coverage issues or personal counsel involved. I usually have an additional two or more virtual rooms set aside for private discussion with counsel. With the press of a button, you are placed in the open breakout room, where I join you for our discussion. It is not uncommon that the parties and counsel will mute and close the camera when I am not with them, and 'return' to the session when I am back in their virtual room. But that down time is a great opportunity for you to learn much from your client that may well have value during the efforts to settle the case; use the opportunity well.

There is no doorbell to ring or door to knock upon; depending upon your generational milieu, I either transport into your room (a la Star Trek) or disapparate (thank you Harry Potter). I attempt to speak up as I am entering, both to make my arrival audible to the participants in that room, and to impede my ability to inadvertently hear anything that was not intended for my ears. I sometimes get a cell number so that I may text before I enter, but the desire to move things along means I often forget to text.

Finally, and for the ears of everyone, including the mediator, I do a terrible job of not walking around for a few minutes between rooms. If we were physically present, it happens as a known by-product; leave Room A, walk down the hall to Room B, repeat. Even a brief physical activity has value in helping refocus upon return and dissipating some of the tension and energy that is present in every negotiation. I encourage you (and myself) to keep this in mind during the day; 5 minutes for your client to step outside and get a breath of fresh air may genuinely help them get through a stressful day.

#### The Loss of Personal Contact

The opportunity to cultivate a personal relationship between counsel and the mediator, let alone between opposing counsel, is made more challenging in the virtual world. As a matter of practice, I attempt to have discussions with counsel in a separate breakout room, outside the presence of the parties or claims representatives. It's an occasion for both (or all) of us to have that informal exchange we would once have achieved in the hallway, over lunch or at the allegorical water cooler. Those moments have a much greater value than first glance would suggest. It is in those typically brief moments that a greater rapport and ease can develop.

There are those clients and carrier representatives who do not wish the mediator to have a private exchange with their counsel. For plaintiffs, it is often fear of a deal being struck behind their back, or that the attorney will not sufficiently advocate the merits of their claim. For claims representatives, it appears to me to be much more an anxiety that counsel for their insured might be too candid about challenges in the case or reveal that there may be divergent views on the case between the rep and her counsel. To try and dissipate these concerns at the outset, I typically tell the parties that I often talk to counsel privately (an accurate statement) and to please allow me some discretion on how best to approach the case.

While I typically reach out to counsel before the session, I don't always succeed. I attempt to prioritize reaching out to those attorneys in the case with whom I am not familiar. If counsel have a mediation set with someone they have not worked with before, perhaps you can offset some of the lost casual interaction of an in-person session by reaching out to the mediator before the case is heard. There is no such thing as an improper ex parte communication with a mediator; she or he cannot dictate or order anything.

#### How will I get to an enforceable closure?

When we settle a case in person, typically counsel and clients or representatives sign the JAMS Stipulation for Settlement form, providing the participants the security of a signed, enforceable document. They leave knowing they have resolved the matter with finality. How do we get there when everyone is virtual?

It is not a great deal different, but for the unfamiliar it can be daunting. If we are fortunate enough to settle (Continued on next page)

#### ADR in a Virtual World, (continued from previous page)

the case, I bring all the attorneys into a virtual breakout room. I then use the 'Share Screen' function, bring up the form and review it with counsel to confirm accuracy and any additions/modifications necessary.

Upon conclusion of the session, I forward the form with all agreed terms to my case manager, who converts the document into a DocuSign. When she or he has received all the completed responses, the signed version is then distributed to all counsel. The usual turnaround time for a fully-executed agreement is about a day.

#### A few considerations on virtual arbitrations

Many of the technological considerations in mediation apply, with greater emphasis and urgency, in arbitration. You cannot over-prepare for the smooth and seamless presentation you aspire towards. Are your documents ready at your fingertips, whether cloud-based or via Screen Share? How will you combine viewing a document and viewing the witness at the same time?

Where will the witness be testifying from; and are you comfortable with the prospect that they will not be 'coached' by someone else present in the room that is off camera? Is the witness perhaps better presented from a court reporter's office or a local law firm? Is a subpoena necessary to compel their attendance?

And finally, given the paucity of civil courtrooms, and the accumulated backlog of criminal and civil matters when they finally return to pre-pandemic availability, might arbitration be a preferred avenue, versus another year or two of delay? Have you explored floor and ceiling options for arbitration with opposing counsel, particularly where you have a case that may exceed policy limit values? And my oft suggested, never embraced, suggestion of baseball arbitration: the arbitrator may only award the proposed number offered by plaintiff and defense counsel respectively; he or she has no discretion to choose some other number.

#### Virtual or physical, some things never change...

Each and every year (oh, let's be honest: each and every week) a plaintiff submits a brief a day or three before the session with the first demand, often a seven or eight figure opener. Or a defendant submits

their brief, often confidentially, with an entirely new issue of coverage, or course and scope, or the necessity for further discovery before meaningful discussion may take place.

Counsel create their own destiny by waiting until the last minute to advance their view of the case. Why would you do that? One of my favorite aphorisms: if you've got assets, flaunt 'em! And that applies whichever side you represent. If you believe your case has big dollar value, give the opponent enough time to digest, consider, report and committee how they wish to respond. If a defendant believes there is a huge reservation on coverage, or a significant risk of success on liability, give the plaintiff reason and opportunity to consider the argument.

I appreciate every mediation requires some judgment by counsel about how forthright they wish to be at that moment; the tactical decisions of when to acknowledge either a strength or weakness, particularly if you have concerns about how 'serious' the opposing party intentions are in mediation. Neither side can evaluate a legal or factual issue that has not been disclosed. Give yourself the opportunity to achieve success; afford your opponent sufficient time to consider your arguments.

#### **CONCLUSION**

Whether a fan or foe, it is a fact that in person mediations and arbitrations will be rare or non-existent for the near- and mid-term futures. If you've not participated in a virtual mediation, you shall soon. Take the time necessary to best ensure the experience is a successful one; speak with colleagues and learn of their experiences and concerns, and mistakes they would avoid. Seek out the mediator to address issues you have before the day of the event. You may find this new world not really so different, or so terrible.

#### Good Luck!

#### By Ken Gack

Ken Gack has been a full time neutral with JAMS since 1996. He was recognized by SFTLA as Mediator of the Year in 2004, and in 2019 honored by SCBA with their designation of Career of Distinction.

#### **Ethical Duties Pertaining to Accepting Credit Card Payments**

#### Introduction

Maintaining and properly servicing a client trust account is fraught with stress even during the most relaxed of times. During the current worldwide pandemic, remote working conditions and restrictions on face to face contact raise additional compliance issues. This article explores procedures and ethical concerns pertaining to accepting payment from clients by credit card.

Are attorneys allowed to receive funds from client via credit card and, if so, are there restrictions on accepting such payments? As is so often the case in the law, it depends.

The California State Bar website provides extensive resources for attorneys in a webpage entitled "Client Trust Accounting Resources." The page collects applicable rules, statutes, publications, articles, forms, ethics opinions, and online videos.

Fortunately for attorneys seeking to utilize remote forms of payment while in person contact is restricted, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion Number 2007-172 addressing acceptance of funds from a client via credit card.<sup>2</sup>

The Opinion addresses a hypothetical situation where an attorney wants to accept both payment and deposits via credit card for "(1) earned fees, (2) fees not yet earned, and (3) advances for costs and expenses." The Opinion assumes the attorney will eat any service charges, which necessarily reduces the ultimate amount collected by the attorney.

#### Credit card payments for earned fees

As to earned fees, the Opinion begins by describing

how a credit card payment is processed. Banks which issue credit cards hold membership in "not-for-profit associations of member banks that operate a worldwide communication system for financial transfers using credit cards." 4

Thus, in order to accept payment by credit card, an attorney must open an account with what is called a merchant bank: a bank which is a member of the same not-for-profit associations, but which only have accounts with businesses rather than consumers. <sup>5</sup>

The merchant bank with whom the attorney establishes an account provides a point of sale terminal to process credit cards. <sup>6</sup> If the transaction is approved at the point of sale terminal, the information regarding the charge is sent to the not-for-profit association, who forwards the transaction to the bank which issued the credit card, which "carries the debt until the cardholder pays the bill."<sup>7</sup>

Extrapolating from this process, the Opinion holds that because "the merchant bank may invade the funds via chargebacks...in the event the cardholder disputes the charge" a merchant account may not be considered a client trust account. 8

What does that mean for an attorney seeking to collect earned fees via credit card? A prior California State Bar Formal Opinion contained dicta regarding acceptance of payment via credit card, but did not answer the question. <sup>9</sup> The instant Opinion clarifies an attorney may ethically accept payment of earned fees by credit card, so long as ethical obligations are satisfied. <sup>10</sup>

(Continued on next page)

- 1 Link to the California State Bar Client Trust Accounting Resources webpage: https://www.calbar.ca.gov/Attorneys/ Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Accounting-Resources
- 2 This Opinion interprets former Rules 1-320, 3-100, 3-700, 4-100 and 4-200 of the Rules of Professional Conduct. Those Rules were revised and renumbered effective November 2018. The 2018 revisions do not substantially alter the former Rules interpreted by the Opinion. For the convenience of the reader, the revised Rules are noted throughout this article.
- 3 Cal. State Bar Formal Opn. No. 2007-172, p. 1.

- 4 Id.
- 5 Id. at pp. 1-2.
- 6 Id. at p. 2.
- 7 Id. (citing U.S. v. Ismoila, 100 F.3d, 385-386 (5th Cir. 1996).
- 8 Id. at p. 2, (citing F.T.C. v. Overseas Unlimited Agency, Inc., 873 F.3d 1233, 1233-1234. (9<sup>th</sup> Cir. 1989).
- 9 Id. (citing Cal. State Bar Formal Opn. No. 1980-53).
- 10 Id. at p. 2.

The duty of confidentiality is paramount. Given the requirement of credit card issuers that each transaction contain a description of the charge, when providing a description "attorneys may not disclose confidential information without the client's informed consent." <sup>11</sup> The duty of confidentiality may be satisfied by using a general description, such as "for professional services rendered." <sup>12</sup>

What about potential fees and interest charged to the cardholder by the issuing bank? Do these implicate Rule 4-200's<sup>13</sup> prohibition against charging an unconscionable fee? The Opinion says no, instead allocating that risk to the client's personal choice to use a credit card to pay an attorney for earned fees.<sup>14</sup> "The attorney may choose to advise the client that the client's credit card issuer sets interest rates and late charges...but is not ethically obligated to do so." <sup>15</sup>

Similarly, Rule 1-320<sup>16</sup> prohibiting sharing of fees with a non-attorney is not implicated in acceptance of a payment for earned fees via credit card.<sup>17</sup> The Opinion sets forth that "[a] service-charge debit, which amounts to the attorney's payment for a convenient method of receiving funds owed to the attorney, does not frustrate the purpose of Rule 1-320, and for that reason does not come within the rule's proscription."<sup>18</sup>

So, accepting payment for earned fees by credit card is allowed, provided ethical duties are satisfied. What

about a classic retainer as opposed to a deposit for future fees?

A classic retainer, where a client pays a fee to ensure an attorney's availability over a set period of time, is included in the definition of "earned fees," and thus subject to the discussion above. 19 But what about accepting a deposit for fees not yet earned?

#### Credit card payments for fees not yet earned

Rule 1.15 (formerly Rule 4-100) mandates an attorney has an ethical obligation to place all funds held or received for a clients' benefit into a trust account.<sup>20</sup> "This ethical obligation is not qualified, conditional, or avoidable, and therefore does not allow the attorney, with or without the client's consent, to take such actions as depositing client funds initially into an account other than a client trust account and subsequently transferring them into a client trust account if or when reasonable or practicable." <sup>21</sup>

A parallel ethical obligation to "take reasonable care to protect client funds" which is "both personal and nondelegable" also applies. 22

However, as interpreted by the courts, Rule 4-100 (now Rule 1.15) allows an attorney to ethically deposit fees not yet earned into a client trust account, but it is not required.<sup>23</sup>

"If an attorney were required to deposit fees not (Continued on page 18)

- 11 *Id.* at p. 3 (citing Cal. Bus. & Prof. Code §6068(e), Rules of Prof. Conduct 3-100). Rule 3-100 is now Rule 1.6.
- 12 *Id.*, (noting holding in *Hooser v. Sup. Ct.,* 84 Cal.App.4<sup>th</sup> 997, 1105 (2000) (stating that even the fact that an attorney is representing a client may fall within the protection of the attorney-client privilege)).
- 13 Rule 4-200 is now Rule 1.5. All further references to "rules" refer to the Rules of Professional Responsibility.
- 14 Id.
- 15 Id.
- 16 Rule 1-320 has been incorporated into Rule 5.4.
- 17 Id.

- 18 Id. Rule 1-320 has been incorporated into Rule 5.4.
- 19 *Id.* at p. 1 (*citing Baranowski v. State Bar*, 24 Cal.3d 153, 164, fn. 4 (1979).
- 20 *Id.* at p. 4 (*citing* Rule 4-100(A) (now renumbered as Rule 1.15.)).
- 21 Id.
- 22 Id. (quoting Cal. State Bar Formal Opn. No. 2005-169).
- 23 Id. at p. 4 (citing Securities & Exch. Comm'n v. Interlink Data Network of L.A., 77 F.3d 1201, 1205-1207 (9<sup>th</sup> Cir. 1996); Vapnek et al., Cal. Prac. Guide: Prof'l Resp. §§ 9:107-9.108 (The Rutter Group 2006)).

#### Ethical Duties (continued from page 17)

yet earned into a client trust account, the attorney would not be permitted to accept such a deposit from a client by credit card to the extent that the card issuer deposits funds into a merchant account that is subject to invasion." <sup>24</sup>

"That is because, to that extent: (1) the credit card issuer deposits the funds into a merchant account; (2) the attorney, however, must deposit the funds into a client trust account; (3) the attorney must take reasonable care to protect the funds deposited in a client trust account; and (4) before the attorney can assert control over the funds, the merchant bank may invade the funds in the merchant account, thereby putting the funds at risk beyond the attorney's protection." <sup>25</sup>

The saving grace here is the interpretation of Rule 4-100 (now Rule 1.15) to allow, but not require, that unearned deposits from a client be placed in a trust account. Thus, because immediate deposit to a trust account is not required, "the attorney may accept such a deposit by credit card, resulting in a deposit into a merchant account." <sup>26</sup>

Finally, is there a difference between accepting a credit card payment for fees (earned or unearned) and accepting a credit card payment as a deposit for costs and expenses? Yes, and while it's a subtle distinction, it's an important one.

#### Credit card payments for costs and expenses

"Under rule 4-100, among the 'funds received or held for the benefit of the clients' that an attorney is ethically obligated to deposit into a client trust account are 'advances for costs and expenses.'" <sup>27</sup>

24 Id. at p. 4 (emphasis in original).

25 Id.

26 Id.

27 *Id.* at p. 5, (*citing* Rule 4-100(A) (now renumbered and incorporated into Rule 1.15)).

28 Id. at p. 5 (emphasis in original).

29 Id.

As a result of the requirement that an attorney must directly deposit such funds into a trust account, the attorney "may not ethically accept such a deposit by credit card...to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion." <sup>28</sup>

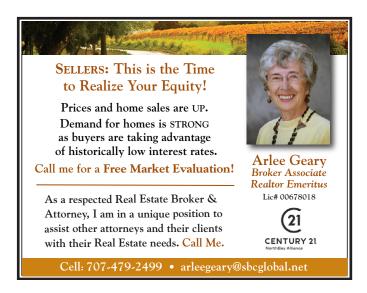
Thus, an attorney is precluded from accepting any deposit by credit card for costs and expenses not yet incurred. <sup>29</sup> However, an attorney is ethically permitted to accept reimbursement for costs and expenses via credit card payment because this "does not constitute an 'advance' of such costs and expenses, and consequently it need not—and indeed may not—be deposited into a client trust account.

#### Conclusion

To sum up, an attorney may accept payment for fees, whether earned or unearned, via credit card so long as ethical obligations are maintained. However, an attorney may not accept an advance deposit for expenses and costs via credit card. Reimbursement by credit card for fees and costs already paid out by an attorney is, however, permissible. ¶

By Sarah Lewers

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#### Ethical Duties—Self-Study MCLE Credit

#### 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. An attorney may receive earned fees from a client by charging a client's credit card.
- 2. There are no ethical duties applicable to accepting payment from a client for earned fees via credit card.
- 3. An attorney cannot accept a classic retainer fee paid to ensure an attorney's availability over a set period of time via credit card.
- 4. A merchant bank account held by an attorney is secure and is considered a client trust account.
- 5. An attorney accepting payment for earned fees from a client by charging the client's credit card should only use a general description such as "for professional services rendered."
- 6. In describing the nature of a charge on a client's credit card, it's permissible for an attorney to simply state the charge is for "legal representation."
- 7. In describing the nature of a charge on a client's credit card, an attorney should provide a detailed description of the work performed for the client.
- 8. An attorney has a duty to advise a client paying earned fees by credit card of the potential fees and late charges that may be imposed by the bank which issued the client's credit card.
- 9. If an attorney accepting payment for earned fees from a client does not advise of the potential fees and late charges that may be imposed by the bank which issued the client's credit card, the attorney may be found in violation of the Rule 1.5 (formerly Rule 4-200) prohibition against unconscionable fees.
- 10. An attorney cannot pay service charges related to accepting payment of earned fees by credit card because it violates the prohibition of Rule 5.4 (formerly Rule 1-320) regarding sharing of fees with a non-attorney.
- 11. It is permissible under Rule 1.15 (formerly Rule 4-100) to deposit funds held for the benefit of a client into a non-trust account, so long as the funds are transferred to a client trust account within a reasonable time following the initial deposit.
- 12. It is permissible under Rule 1.15 (formerly Rule 4-100) to deposit funds held for the benefit of a client

into a non-trust account, so long as the funds are transferred to a client trust account as soon as it is practicable to do so.

- 13. An attorney is permitted to delegate the duty of reasonable care to protect client funds to an individual in a position of trust.
- 14. It is permissible under Rule 1.15 (formerly Rule 4-100) for an attorney to deposit fees not yet earned into a client trust account.
- 15. An attorney must deposit fees paid by a client but not yet earned by the attorney into a client trust account.
- 16. A deposit for unearned fees paid by credit card first passes through a merchant bank account subject to invasion, which precludes an attorney from accepting such a deposit.
- 17. An attorney can accept an advance deposit for costs and expenses from a client using a credit card.
- 18. An attorney can accept a reimbursement via credit card for costs and expenses already incurred.
- 19. If an attorney accepts a reimbursement for costs and fees via credit card, the payment must be placed in a trust account.
- 20. If an attorney accepts a reimbursement for costs and fees via credit card, it is the attorney's choice whether to place the payment in a trust account.

# 2020-2021 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 go to the Seminars/Events tab at the top navigation bar for the list of events. Thank You.

#### **Bostock**—Protecting LGBTQ+ Employees Under Title VII

ollowing the landmark decision by the U.S. Supreme Court in Lawrence v. Texas<sup>1</sup> in 2003, many in the LGBTQ+ movement began to focus on securing the right of same-sex couples to marry. While there was some success at the state level over the next 10 years, there was no comprehensive change until June 26, 2013, when the Court issued its historic ruling in United States v. Windsor. 2 Here, the Court ruled that section three of the so-called "Defense of Marriage Act" (DOMA) was unconstitutional and that the federal government could not discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections. This was followed on June 26, 2015, when the Court issued its ruling in Obergefell v. Hodges<sup>3</sup>, striking down the state-level bans on same-sex marriage that remained in 13 states.

Although these were truly significant decisions on the path towards full equality under the law, even in situations where these cases were applicable, they did nothing to address the pervasive issues of discrimination on the basis of sexual orientation or gender identity in the employment context. Given that only some individuals choose to marry, but almost every member of the LGBTQ+ community needs a job, it is easy to understand how protections against discrimination in the employment context are much more important to the community as a whole.

Since 1975, LGBTQ+ rights activists have attempted to address this issue legislatively at the Federal level through proposed amendments to Title VII of the Civil Rights Act of 1964 ("Title VII"), which outlaws hiring or employment discrimination on the basis of the employee's "race, color, religion, sex, or national origin," and

by introducing free-standing federal legislation to prohibit discrimination on the basis of sexual orientation and, more recently, gender identity. <sup>4</sup> To date, however, all such legislative attempts have been unsuccessful.

While there has been some success in gaining state-level protections against discrimination on the basis of sexual orientation and gender identity, prior to June 15, 2020, when the Supreme Court published its long-anticipated opinion in *Bostock v. Clayton County* 5, there were state-level protections in only 21 states and the District of Columbia, and the scope of such protections were not uniform across jurisdictions.<sup>6</sup>

There have also been a number of cases decided in various jurisdictions and guidance issued by the EEOC. At least since 1989, some of these have held that LGBT people may be entitled to Title VII protections in some certain circumstances. This has not been the result in every jurisdiction, however, and without explicit language in the statute, the protections have not been assured in any particular case.

As a result, if a person who is lesbian, gay, bisexual, or transgender lived or worked in a state in which there was no express prohibition against discrimination in employment on the basis of sexual orientation or gender identity in the state law, it has remained almost entirely legal for an employer to choose not to hire or promote an individual, to fail to protect an employee from harassment in the workplace, or to fire an employee based solely on the sexual orientation or gender identity of that individual.

Given the immediate and practical impact of one's (Continued on next page)

- 1 Lawrence v. Texas, 539 U.S. 558 (2003).
- 2 United States v. Windsor, 570 U.S. 744 (2013).
- 3 Obergefell v. Hodges, 576 U.S. 644 (2015).
- 4 See e.g. H.R. 166, 94th Cong. (1975); H.R. 4636, 103rd Cong. (1993-1994); H.R. 5, 116th Cong. (2019-2020).
- 5 Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020).
- 6 J. Hunt, A State-by-State Examination of Nondiscrimination Laws and Policies, Center for American Progress, available at https://www.american-progress.org/wp-content/uploads/issues/2012/06/pdf/state\_nondiscrimination.pdf.
- 7 See e.g. Nicholas v. Azteca Restaurant Enterprises, Inc., 26 F.3d 864 (9th Cir. 2001); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Macy v. Holder, 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 10, 2012).

ability to get and keep a job, and to be kept safe while on the job, the *Bostock* decision, which holds that Title VII prohibits discrimination based on sexual orientation and gender identity, is being heralded as one of the most significant decisions in a generation.

Bostock resolved three cases from the Second, Sixth, and Eleventh circuits in which employees alleged that they were fired for being gay or transgender in violation of Title VII. In one case, a gay employee in Georgia was fired after expressing interest in a gay recreational softball league. In another case, a Michigan funeral home employee was fired when she announced her gender reassignment surgery. In another case, a skydiving instructor in New York was fired after mentioning he was gay.

The issue before the Court was whether discrimination on the basis of sexual orientation or gender identity is discrimination "because of sex" as prohibited by Title VII.

In a 6-3 decision, in which Justice Gorsuch wrote the majority opinion, the Court held that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." 8

The majority looked to canons of statutory interpretation in reaching its result, holding that when Congress establishes a broad rule without any exceptions, "courts apply the broad rule." <sup>9</sup> The majority noted that "many, maybe most, applications of Title VII's sex provision were 'unanticipated'" in 1964. For example, since its passage in 1964, Title VII has extended to discrimination on the basis of motherhood and sexual harassment of male employees. Justice Gorsuch found that "the limits of the drafters' imagination supply no reason to ignore the law's demands." <sup>10</sup>

The Bostock ruling echoes what has already been long-standing law in California. The California Fair Employment and Housing Act has outlawed sexual orientation discrimination since 2000. In 2004, FEHA was again amended to prohibit discrimination on the basis of "gender," including gender identity and expression. The Legislature has also expanded sexual harassment training requirements to require regular workplace training on the prevention of harassment based on sexual orientation, gender identity and gender expression.

Even with California's protective laws, the *Bostock* ruling provides LGBTQ+ employment litigants avenues to pursue their discrimination claims in federal courts, which in some jurisdictions may be more friendly to employees and lead to larger damage awards. Also, California employers with workers working remotely in other states, such as Texas, will now need to ensure that their local employee handbooks and policies comply with *Bostock*. In addition, the Court's holding has significant implications for other federal statutes, including Title VI, Title IX, and the Affordable Care Act.

Following the Bostock ruling and in the waning days of the Trump Administration, on November 12, 2020 the Equal Employment Opportunity Commission announced that it is "updating" its compliance manual as it pertains to religious discrimination and religious accommodation issues, as well as legal defenses by religious employers. With the confirmation of Justice Barrett to the Supreme Court, many LGBTQ+ rights groups remain concerned that in the coming years, the Court will more broadly interpret Title VII's religious exemptions. In short, watch this space.

By Naomi E. Metz & Angela Clements

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<sup>8</sup> Bostock, at 1741.

<sup>9</sup> Bostock, at 1747.

<sup>10</sup> Id., at 1737.

#### Antitrust in Northern California: Coercion and the Cartwright Act

like so-called "pay for delay" arrangements, when a pharmaceutical patent holder pays for delaying the availability of generics into the market, or the breakup of a monopoly. But there is a strong tradition in northern California of the Cartwright Act, Business & Professions Code section 16700 et seq, the state's principal antitrust law, being used to address anticompetitive conduct in local as well as statewide markets. Yes, Sonoma County included. The California First District Court of Appeal recently affirmed all aspects of Judge Chouteau's decision on a Cartwright Act violation in health insurance. Oral argument on the appeal also occurred during the pandemic, leading to requiring adjustments for the new practice of law.

#### The Cartwright Act

The Cartwright Act prohibits combinations and conspiracies in restraint of trade. The "principal goal is the preservation of consumer welfare" and "[a]t its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces." <sup>2</sup>

To these ends, the "combinations and conspiracies" of impermissible trusts are expansively defined. The Cartwright Act's primary substantive provision is Business and Professions Code section 16720. This section defines a "trust" as "a combination of capital, skill, or acts by two or more persons" for such specific purposes including price-fixing, exclusive dealing, or group boycotts, as well as a broad ban of other unlawful purposes "[t]o create or carry out restrictions in trade or commerce" or "[t]o prevent competition." Business and Professions Code section 16726 declares that "every [such] trust is unlawful, against public policy and void."

This was a critical question at trial for Judge Chouteau. Was there the requisite combination or conspiracy between two or more people? Although people often speak in terms of a "conspiracy" in

restraint of trade, the significance of "combination" was central to the case.

### The "Combination" in Dispute, and Healthcare Complexities

The plaintiff was Ben-E-Lect, the state's largest third party administrator for small group employers who "wrapped" their employee medical policies. "Wrapping" is the use of a Health Reimbursement Account (HRA) with a high-deductible health plan. Employers could buy a group policy of medical insurance with a high deductible and self-fund to pay for the healthcare expenses employees incurred within the annual deductible or any copay requirement. The employer could also add services: air ambulance is a popular addition in many parts of the state. Ben-E-Lect clients were able to reduce their costs and improve the benefits available to their employees.

Ben-E-Lect's wrapping services were sold through independent insurance agents who sold health plans to the small group employer market in California.<sup>3</sup> There are about 20,000 health agents in the state, about 10,000 of whom are actively engaged in selling health insurance.

The defendants were Anthem Blue Cross Life and Health Insurance Company and Blue Cross of California (collectively "Anthem"). Anthem sold its health plans primarily through the same independent agent; an agent has to be an Anthem-appointed agent to sell an Anthem plan.

Beginning in 2006, Anthem prohibited "wrapping" with most of its plans, its so-called antiwrapping policy. Then in 2014, Anthem prohibited wrapping all Anthem plans.

Anthem imposed its anti-wrapping policy by threatening the agents with loss of commissions and their Anthem appointment if they advised clients to wrap. With each group application, the agent had to certify in a Statement of Understanding (SOU) that they would not advise the employer to wrap. There was (Continued on next page)

<sup>1</sup> Ben-E-Lect v. Anthem Blue Cross Life and Health Insurance Company and Blue Cross of California (2020) 52 Cal.App.5th 484, Modified by, Rehearing denied July 22, 2020; Review denied Sept. 23, 2020).

<sup>2</sup> In re Cipro (2015) 61 Cal. 4th 116, 136,

<sup>3</sup> The size of the small group market changed, as defined by statute, from 2-50, up to 100 during the litigation.

substantial evidence that but for the anti-wrapping policy, hundreds of agents in California would have recommended the Bene-E-Lect HRA option to their clients.

In 2015, Ben-E-Lect sued Anthem over its policy to prohibit wrapping of its health insurance products, including for a violation of the Cartwright Act. Ben-E-Lect asserted that Anthem was coercing the agents into adhering to the anti-wrapping policy, and that Anthem used the policy to stop employers from buying its less expensive plans. Anthem took the position that "wrapping" led to higher utilization of its plans, affecting the actuarial basis for its pricing.

#### Was There an Illegal "Combination"?

Anthem asserted that it could not conspire with its agents as a matter of law. Anthem cited to Kolling v. Dow Jones <sup>4</sup>, which was a Cartwright Act case involving claims by a newspaper distributor in the San Francisco

4 Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d 709, 718.

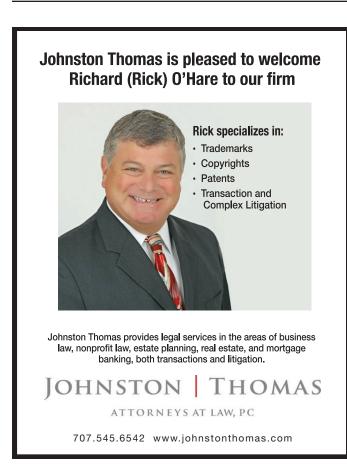
Bay Area that the newspaper publisher pressured its distributors not to sell in excess of a suggested retail price. Like Anthem, Dow Jones claimed it could not conspire with its agents. The late Justice Newsom agreed. But he continued:

"[I]t is also now established that the 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntarily adhere." 5

This is a vertical group boycott analysis: an agreement, even if coerced, between business entities occupying different levels of the marketing chain. (Whereas a horizontal group boycott is an agreement between entities at the same level.)

(Continued on page 24)

5 Kolling, supra, 137 Cal. App. 3d at 720.





#### Antitrust in Northern California (continued from page 23)

Justice Newsom framed the issue:

"The crucial question...is whether the evidence supports a finding that Dow Jones coerced its distributors ... in a manner constituting a restraint on trade." 6

He also used this coercion analysis a year later in another case, in which the "coercion" was from a retailer to wholesalers: a small San Francisco record store alleged that the larger Tower Records used its market power to coerce wholesalers to give it preferential rates.<sup>7</sup>

Coercion trumps agency. <sup>8</sup> Coercion is compelling another to bend to your will. If there is coercion, there necessarily are two actors involved, rupturing the legal "unity" of principal and agent. Coercion is also antithetical to the basic policy underlying the Cartwright Act, the "unrestrained interaction of competitive forces." <sup>9</sup> As Justice Newsom encapsulated it:

"The proscription against restraint of trade seeks only to assure that the choice of a product has been made freely under competitive conditions rather than in response to anticompetitive factors such as coercion." 10

Anthem's anti-wrapping policy prevented this freedom of choice.

The Court of Appeal also upheld Judge Chouteau's determination that the independent health insurance agents have separate and independent economic interests from Anthem, aiding the requisite two parties to a combination requirement. The agents usually have multiple appointments to sell plans offered by different insurers. The Court of Appeal agreed that "Brokers also work on behalf of their clients to try and sell them

the least expensive health benefits solution suitable for their employees. They are not exclusive agents of Anthem, and their economic interests are separate." In this regard, it concluded:

"The relationship between Anthem and its broker agents most closely resembles the producer-distributor relationship that supported an agreement to violate the Cartwright Act in Kolling..." 11

#### Oral Argument in a Pandemic

Due to Covid-19, oral argument on the appeal was by phone, with all three justices in different locations. This was dauting: there would be no eye contact and no indication how they were thinking. I reached out to Steven David Martin, Artistic Director at the Raven Theatre in Healdsburg. Steven has a lot of experience appearing in and directing radio plays. I was relieved to find out that actors do not have a trick that lawyers don't. We went over the basics: speak slowly, clearly and with pauses to allow time for information to sink in and for questions. He did stress visualization, to recreate as much as possible the dynamics and interchange of a courtroom. At his suggestion, I did the argument to a cutout photograph of the mural in the San Francisco Supreme Court courtroom, used by the First Appellate District, and underneath, a photograph of each member of the panel. Thank you, Steven.

#### By Michael Brook

Michael Brook got his first job in a Sonoma County law firm assisting with health care law. Luckily the interview was two days after he learned of this aspect of the job, and he lived near the USF law library at the time.

- 6 Kolling, supra, 137 Cal.App.3d at 720.).
- 7 G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256
- 8 The pun is unavoidable: trial proceeded through the 2016 election, and the appeal has just been resolved prior to the 2020 election. Anthem's law firm also represents the President on his tax issues; the counsel at trial were thoroughly professional and courteous throughout.
- 9 In re Cipro, supra, 61 Cal.4th at 136
- 10 G.H.I.I., supra, 147 Cal.App.3d at 269
- 11 Ben-E-Lect, supra, 874-875



#### SCBA Winter '20 "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.

Kristen Ingersoll and Teresa Norton of Ingersoll & Norton have moved their office Location to 3554 Round Barn Blvd., Ste. 310, in Santa Rosa... Mary Sly-Singleton is now at 250 D St. in Santa Rosa... The Arbitration & Mediation Center moved to 50 Santa Rosa Ave., Ste. 420 in Santa Rosa . . . Emily Vance has partnered with Vanessa K. Wills and changed the firm name, Vance Family Law, to Vance & Wills P.C. in Napa . . . Brian Purtill's new address is Law and Mediation Offices of Brian J. Purtill, C/O Arb. & Med. Ctr., 50 Santa Rosa Ave., Ste. 420, in Santa Rosa . . . Suzanne Laitner opened her own office, Law Office of Suzanne K. Laitner, 131-A Stony Circle, Ste. 500, in Santa Rosa . . . **Jacqueline M. Moreira** in now a Freelance Attorney out of Sebastopol. . . Bob Haroche opened his own office, Haroche Law, in Sebastopol . . . Dickenson Peatman & Fogarty, PC in Santa Rosa is having a new office built, temporarily they are using their Napa Location . . . Gregory Paul is now on his own: Paul Law Offices, in Santa Rosa... Kinna Crocker has moved her office just up the street to 865 Third St., Ste. 100 in Santa Rosa . . . Danielle Restieaux moved her office to 439/441 Piper St. in Healdsburg . . . Janessa McCune is now with Terre Family Law in Santa Rosa . . . Patrick Wilson has retired from School and College Legal Services of California . . . Thomas Kenney moved his office to 301 Equine Place in Santa Rosa . . . Presiding Judge of the Juvenile Court, Hon. Kenneth J. Gnoss, has been named the Judicial Officer of the Year by the Chief Probation Officers of California.

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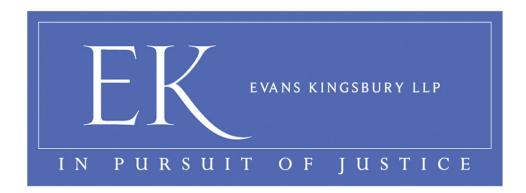
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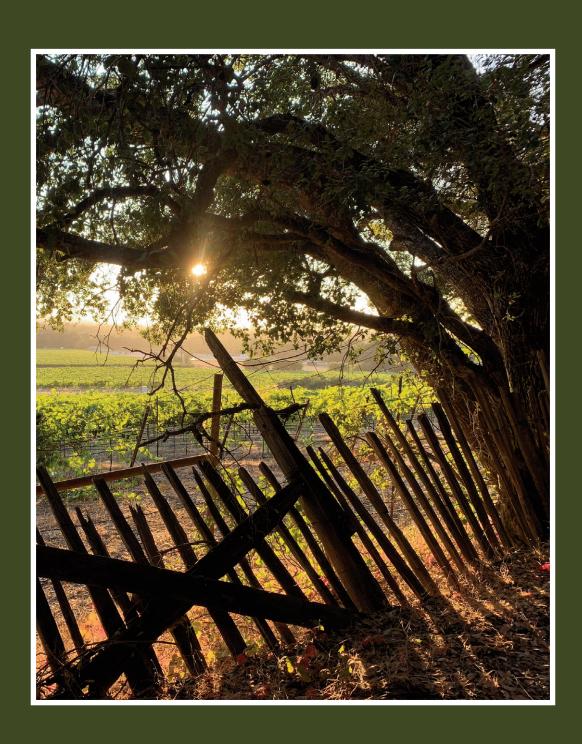
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