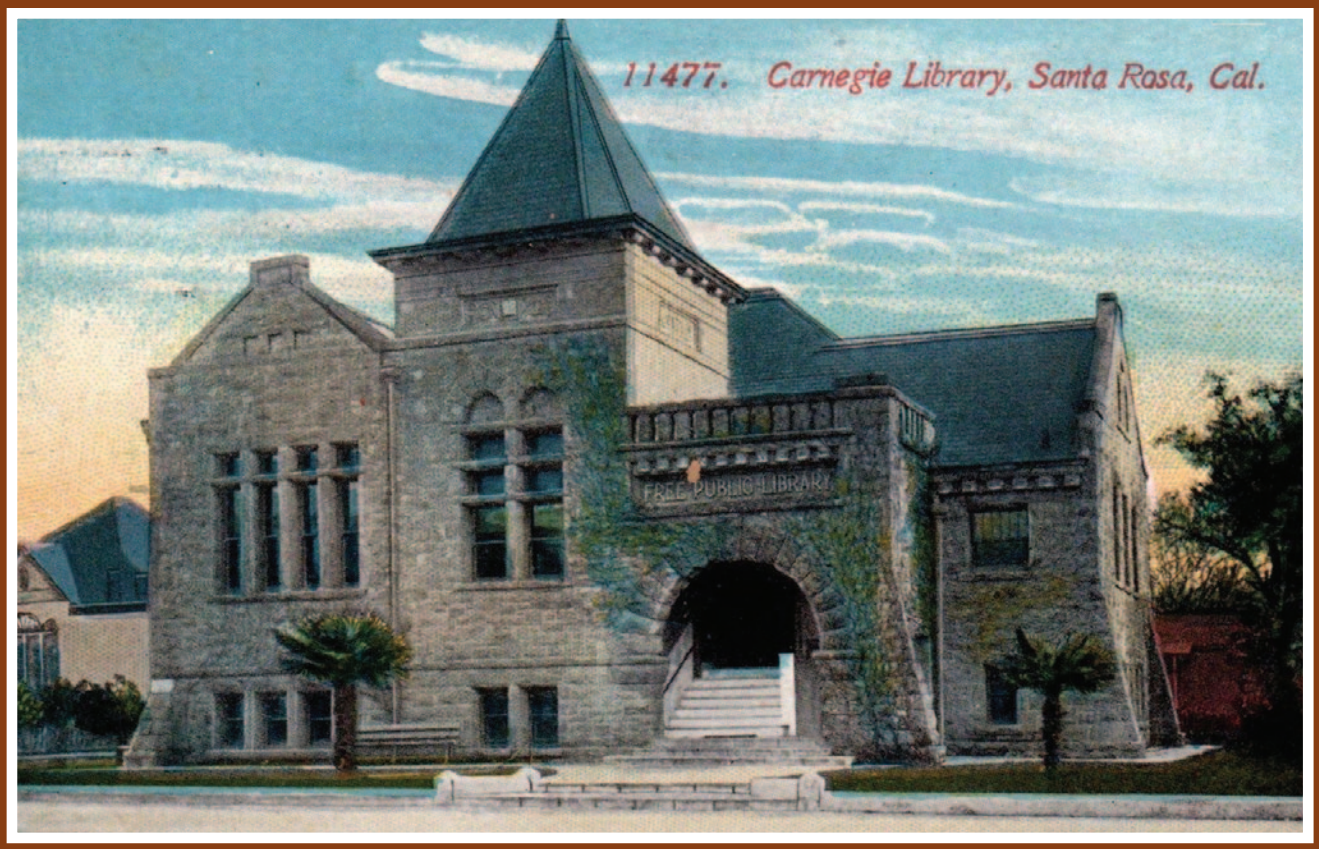
Sonoma County Bar Association

THE BAR JOURNAL

Volume 65 Issue 3 Fall '21



Vintage postcard of Santa Rosa Carnegie Library, circa 1914
(Building demolished in 1965)
Celebrating The Sonoma County Bar Association's 100th Anniversary: 1921-2021

The Leadership Legacy of Joe Murphy • King John, the Virus and the Fairgrounds
Pipeline Programs: Our Opportunity & Obligation to Inspire Future Lawyers
Hon. Nancy Shaffer Retires from Bench • Sonoma County Women in Law: Scholarship Recipients
Back to Basics • Twenty Graduates for Empire Law School Class of 2021
Hearsay & Other Pertinent Objections During the Time of Covid

congratulations

JD & MLS Grads

Law School Class of 2021

Photo by Steven Yeager

Jon Edward Balme, MLS, JD*
Joseph E. Brighenti, III, MLS*, JD*
A. Max Courtney, MLS, JD*
Gina Fortino Dickson, MLS*, JD*
Bianca Vanesa Garcia, MLS
Jessica Elizabeth Gomez Alvarez, MLS, JD
Shawntay Sherrie Jordan, MLS, JD
Ian James Kendall, MLS, JD
Michael Francis Henson Mallonga, MLS
Regan Vincent Masi, MLS▲, JD▲
Kasra Ali Parsad, MLS*, JD*

Haley Stiles Patrick, MLS*, JD*
Karla Berenice Peña, MLS, JD*
Kaela Mollise PerLee-Peckham, MLS*, JD*
Nickolas Michael Rineberg, MLS, JD
Dominic Martin Rosales, MLS▲, JD▲
Ana M. Sanchez-Lopez, MLS, JD
Kristine Tellefsen, MLS*, JD▲
Kaitlyn Danielle-Tovani Wright, MLS*, JD*
Aaron Herschel Ziskin, MLS*, JD▲

* Cum Laude
▲ Magna Cum Laude

Empire College
SCHOOL OF LAW

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

By Stephanie Hess, President, SCBA

President's Message: *"Lawyers in the Library"*

Many people go their entire lives and never require the services of a lawyer. They may never have gotten a speeding ticket, been evicted from their homes, been arrested, gotten a divorce, sued anyone, or been sued by anyone. Some have never even met an attorney and have only a vague understanding of our legal system. Then something unexpected happens. For those folks unfamiliar with the process, any legal issue can quickly become overwhelming and just figuring out the first step to take to address their legal issue is daunting. Yet the consequences of inaction or a procedural misstep may be life-altering

"Lawyers in the Library," a collaboration between the Sonoma County Bar Association, the Sonoma County Law Library and the Sonoma County Regional Library, helps take some of the mystery out of the legal process. On the first Wednesday of each month, approximately 20 people gather at the Sonoma County Law Library with all manner of legal issues. Volunteer lawyers of varying specialties meet virtually with these individuals for up to 20 minutes. They provide free legal information and referrals, providing some much needed direction.

Although long-running, this valuable program is not yet able to meet the needs of the community it serves. Nikolaos Pelekis, Director of the Sonoma County Law Library, whose office administers the program, frequently turns away 15 or more people seeking help for want of available volunteer attorneys. According to Pelekis, a mere 36 attorneys volunteering just one time each year would enable Lawyers in the Library to meet the current needs and start bridging the justice gap in Sonoma County. No training is required and no attorney-client relationship is formed. If you are a licensed lawyer and can spare just 2 hours a year, you can help.

Available to help? Contact Nikolaos Pelekis at ***Nikolaos.Pelekis@sonoma-county.org***. Your help will make all the difference.

In This Issue

The SCBA Office Reopens on September 1st!

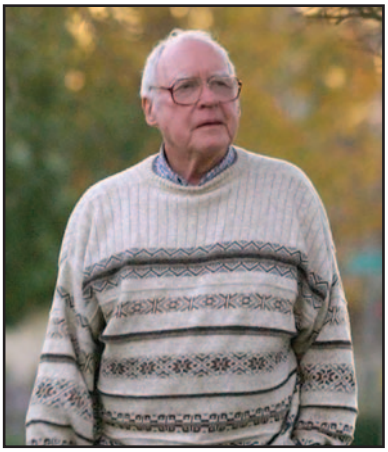
We're very happy to announce the reopening of the SCBA office on September 1, 2021. Staff will be in the office full-time to assist members who wish to conduct business in-person. In accordance with local mandates, masks will be required for in-office visits.

Please note, our Welcome Back Mixer, previously scheduled for September 1st, has been cancelled. Due to rising COVID transmission in the county, including breakthrough transmission of the vaccinated, SCBA will not be offering in-person options for meetings, seminars, and social events in the near future.

For the most up-to-date information on our reopening status please visit our website at **www.SonomaCountyBar.org/office-policies**.

The Leadership Legacy of Judge Joe Murphy

The following Bill Adams' profile of Judge Murphy is part of our 100 Year anniversary retrospective remembering major figures in the history of Sonoma County's legal community.



Photograph courtesy of the Santa Rosa Press Democrat

I first met Joe Murphy at a Marine Corps birthday luncheon at the Santa Rosa Veterans Building in 1993, when he sat down next to me, put out his hand and said, "Hi, I'm Joe Murphy, are you new in town?" No pretense, just that special Irish twinkle in his eyes. A few minutes later, I learned from someone else that Joe was a prominent retired judge, which was daunting to someone awaiting his Bar results. Little did I know that we would become friends as our paths crossed repeatedly over the years.

Judge Joe Murphy was born and raised in Oak Park, Illinois, and graduated in 1943 from Holy Cross College in Boston. The intellectual and ethical standards of his Jesuit education served as a foundation for his lifetime of faith and service, until his passing in 2012. At the time, Press Democrat columnist Chris Smith described Joe as "a scholarly and gentle-natured man widely admired for his fair mind and compassionate heart."

Joe received his Holy Cross diploma in the mail while serving as a Marine Corps Officer in the Pacific during World War Two, including participating in the assault on Iwo Jima. His daughter, Cathy Murphy, said that surviving the assault on Iwo Jima, but losing friends in that and other battles, gave her father "a different respect for life and an appreciation for every day." Joe's leadership legacy arose from the concept of noblesse oblige—the obligations of nobility—that to whom much is given, much is expected. He paid it forward and lived life to the fullest.

Upon his return to the States, he attended University of Michigan Law School, graduated in 1948, and passed the Illinois Bar Exam the same year. As he explained in his 1995 SCBA "Careers of Distinction" profile, Joe immediately left Illinois and headed to California, where he barnstormed the state, sizing up opportunities for a young lawyer. He was attracted to the growing post-war community of Santa Rosa that had a population of 17,000 in 1949. Joe passed the California Bar Exam and was hired by the Sonoma County District Attorney's office. After five years as Chief Deputy District Attorney, Joe formed the law firm of McKenzie, Arata & Murphy in 1954.

In 1964, after a decade in private practice, Joe was appointed by Governor Pat Brown to the Sonoma County Municipal Court Bench. He was serving as 1964 SCBA President at the time of his appointment. In 1966, when a fourth Superior Court judge was needed to staff the expanded Sonoma County Superior Court, Joe was appointed by Governor Brown to the Superior Court bench, where he was reelected three times and served for eighteen years until his retirement in 1984.

Joe's eldest son Steve Murphy shared that his father presided over every type of case, including homicides and other violence. However, Steve said, "the ones that caused him the most trouble were the ones that involved child custody. He would take it upon himself to take walks with the kids around the courthouse" to see how they were doing. At his retirement party in 1984, seasoned attorneys called Joe "the embodiment of what a judge should be" and "the total personification of what lawyers think of as a judge's qualities."

When asked about his career, Joe recalled such highlights as presiding over the Korbel Winery ownership dispute and the then-nationally celebrated People v. Barboza case, which involved a Boston mafia figure accused of committing a murder in Glen Ellen while residing there under the Federal Witness Protection Program. After his retirement from the bench, Joe was active as a mentor to new lawyers, as well as a sought-after arbitrator and mediator in a variety of disputes. He was prescient in the importance of party-controlled solutions, stating "I think it is important that arbitration and mediation be used to both reduce and accelerate the pace of litigation."

(Continued on next page)

The Leadership Legacy of Judge Joe Murphy (continued from page 4)

Joe met his future bride Marian in 1953 and married the following year at St Eugene's Cathedral. Marian served as a nurse in Hawaii during World War Two and subsequently worked in Santa Rosa's Memorial Hospital labor and delivery unit. The love of his life, Marian and Joe raised eight children and 19 grandchildren who affectionately knew him as "Papa Joe." Marian died in June 2021.

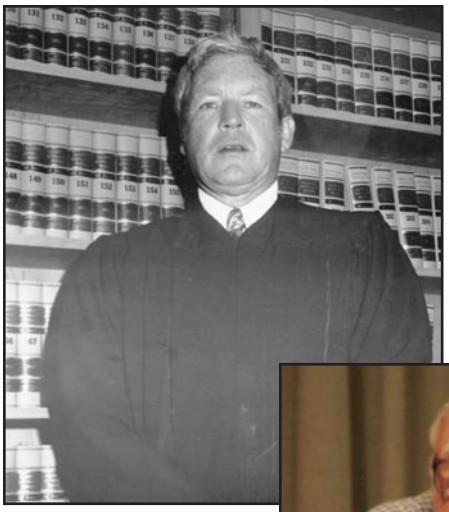
When Joe and Marian experienced the 1989 San Francisco earthquake during a World Series game at Candlestick Park, they became separated after Joe returned to his seat, beer in hand, waiting for the game to begin again. Marian sensibly exited toward the parking lot as the building shook, reportedly declaring "Every woman for herself!"

Their life together included cross county trips with all eight kids in their station wagon, annual pilgrimages to baseball spring training in Arizona, and long train adventures around the United States and Canada. They loved everything Irish and embodied a belief in the inherent goodness of people, the importance of public service, and the value of libraries as a great equalizer of opportunity.

Among Joe's many contributions to our community were his role as Presidents of the Sonoma County Bar Association, Family Service Agency, and the Easter Seal Society. He was a longtime chair of the Sonoma County Library Commission and served for many years on the Board of Directors of SCBA, the Legal Services Foundation and the Gray Foundation. He was also active in Democratic Party politics at the local and state level. As the U.S. moved closer to attacking Iraq early in 1991, Joe took to the streets of downtown Santa Rosa as a sponsor of an anti-war demonstration that drew thousands.

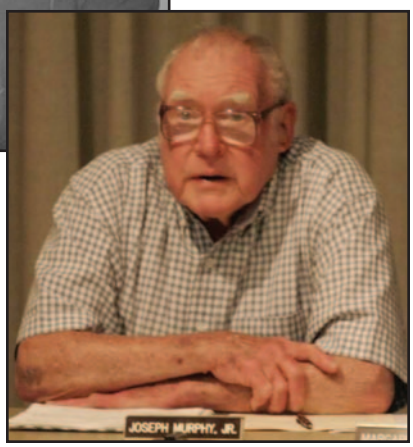
Joe was an avid baseball fan and historian. As member of the Society for American Baseball Research, he has published articles in the Society's journal on the manager of the 1917 White Sox, the last Chicago team to win the World Series until the Cubs won in 2016, four years after Joe's passing. Joe conceded in his 1995 COD profile that being a White Sox and Cubs fan provided him with . . . "patience." This leadership quality served him well as he coached numerous local Little League teams throughout the years, including his beloved "The Mighty

(Continued on page 6)



Judge Murphy in robes in 1973

Photograph Courtesy of SCBA Archive Committee



Joe Murphy in his longtime capacity as Chair of the Sonoma County Library Commission

Photograph courtesy of the Santa Rosa Press Democrat

The Leadership Legacy of Judge Joe Murphy (continued from page 5)

Beavers." On that subject, fellow COD recipient Everett Shapiro recalled "Every child played in each game, no matter what his abilities. Winning was not as important as [the] teaching of baseball and care and concern for each child's feelings. That's the kind of man Joe Murphy is." One of Joe's mentors, retired Justice Joe Rattigan, inaugural SCBA COD honoree, stated about Joe: "In the language of his beloved baseball, he is both M.V.P. and Hall of Fame."

Adept in applying his life experience and leadership to helping resolve disputes and develop public policy for the betterment of our community, Joe was equally at home on the golf course, in baseball stadiums and enjoying his family retreat in Calaveras County.

Two anecdotes help describe Joe—one about baseball and the other about our SCBA collective memory.

As a kid in Illinois, Joe and his brother were avid collectors of baseball cards and autographs, including some 1,300 autographs and photos of baseball's past legends, such as Lou Gehrig, Babe Ruth, Ted Williams, the DiMaggio brothers, Branch Rickey and many more. Joe's son Steve recalled that 55 years ago in Santa Rosa, the kid next door, Kirk Collins, pitched a no-hitter in Little League. Marian Murphy surprised the lad with a white, baseball-like Hostess Sno-Ball with a candle in it. Then, "My dad walks over and gives Kirk his Babe Ruth baseball."

With the exception of that ball signed by Babe Ruth, in November 2020, the Murphy family donated the Joseph Murphy Autograph Collection to the Sullivan Family Research Center, located at the San Diego Public Library. Steve considers the destination "like a Holy Grail" ending for Joe's search for the right place to put the astonishing results of his lifelong dedication to the sport he loved. "He was so involved in baseball history," said Steve, "and libraries—he was 30 years on the Sonoma County Library Commission. It's the perfect place!"

In 1992, Joe was instrumental in developing the SCBA "Careers of Distinction" award to recognize our peers while they are still alive as part of a fun black tie event. The unanimous first honoree was Justice Joe Rattigan—and, over his initial reluctance, Joe Murphy was a natural to be similarly recognized shortly thereafter. Joe also helped initiate the SCBA Archives Committee, in part by clipping attorney obituaries and news stories for decades, providing this history file to keep our collective memory alive.

Justice Joe Murphy eulogizing his friend and mentor Justice Joe Rattigan

Photograph courtesy of the Santa Rosa Press Democrat

In 2007, Joe elegantly eulogized his friend Justice Rattigan as "a monumental figure in terms of his public service, respected for his integrity and just the personification of excellence. I used to observe him in the law library here," Joe recalled. "Law students and young lawyers would come up and talk to him and he was, without exception, generous in his advice and his ability to share their concerns. He was simply always available for counsel."

Joe could have been describing himself by looking in the mirror at his own leadership legacy that inspired generations of Sonoma County attorneys and others. He lived a life of great integrity with a deep commitment to his faith, his family and his passion for public service. It was fitting that he was watching spring training baseball on TV in his Santa Rosa home when he died.

We are better for having known him.

By Bill Adams

Bill Adams is an attorney with Johnston | Thomas Attorneys at Law in Santa Rosa, and served as 2004 SCBA President.

In addition to 20 years of friendship, this article is based largely on the 1995 Bar Briefs "Careers of Distinction" profile of Judge Murphy; an essay by Chris Smith of the Press Democrat shortly after Joe's death in 2012; and Sonoma County historian extraordinaire Gaye LeBaron's March 2021 column about the donation of his baseball card collection.

SUNDAY, JULY 24, 1988

GAYE LeBARON'S NOTEBOOK

What ever happened to Judge Hardy?

When Charles McGoldrick was appointed to the Superior Court bench in 1951 Sonoma County had less than 110,000 people, less than 18,000 of them living in the county seat. And, naturally, there were some who thought it was absolutely amazing that the population (or, at least, the criminal population) had exploded to the point that we needed THREE Superior Court judges.

We had gotten on nicely with just two judges, under one system and another, for 100 years. Some said this quantum leap in the judiciary was an early sign that Sonoma County — which had been pretty much unchanged in the first half of the century — was either coming of age or on the path to wrack and ruin, depending on your point of view.

The two Superior Court judges who had served the county for more than 20 years were certainly capable people. Hilliard Comstock had little competition for the title of "leading citizen" of Santa Rosa and Donald Geary came from a respected legal family that included a congressman who was almost vice president of the United States.

Charlie McGoldrick, the "new kid" of 37 years ago, died this week. So did Helen Comstock, Hilliard's widow. It seems a proper time to remember how judges used to be.

• • •

JUDGES USED to be Very Big Deals. Which is not to say they are not today. But it isn't the same. Remember Lewis Stone as Judge Hardy in the "Andy Hardy" movies? There you have it.

Calm, dignified, plenty of time to sit in his study and read law books or gaze out the window of his chambers.

Hilliard Comstock was a Judge Hardy kind of judge. And more. He was a tall man whose military bearing was acquired in command of Santa Rosa's Company E, an Infantry battalion in World War I. Respected as a lawyer, he was an organizer and first secretary of the Sonoma County Bar Association. He was also a civic leader, having served as president of the Santa Rosa Board of Education for nearly 10 years before resigning to accept his appointment to the bench in 1929. He was a Superior Court judge here for 35 years.

Comstock earned tremendous respect as a judge, as well as a reputation for going beyond the call of duty to see justice served. In the days when there were no social agencies to refer to in domestic relations cases, one veteran lawyer recalls, "Judge Comstock would take it upon himself to call divorcing couples into his chambers to talk to them. A lot of reconciliations were effected in this way. There are people living today who would say that Judge Comstock saved their marriage."

There is no question that he was a presence in the community. He and Helen and their family lived on the corner of Mendocino Avenue and Benton Street and he would stroll down Mendocino Avenue to the Courthouse in the middle of the plaza every morning, in the words of one who was an awe-struck young attorney then, "like the lord of all he surveyed." It was common knowledge, although exaggerated perhaps, that prospective candidates for public office paid a courtesy call on Judge Comstock before they declared their intentions. Until his death in 1967, he remained in great demand as a speaker at civic affairs, his attendance lending dignity and credibility to events public and private.

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DONALD GEARY looked more irascible than Judge Hardy. He had a reputation for being stern. He commented on this aspect of his character himself on the occasion of his return to private practice after 26 years as a judge. He told a reporter he was looking forward to practicing criminal law — for the defense — and anticipated no problem adjusting the advocacy. "I've never been accused of being particularly docile," he said.

It is true that in his latter years as a judge, Geary often peered down from his bench like a suspicious bull dog, usually at members of the press, whom he mistrusted. A man who acted on his convictions, he set some stern legal precedent in 1956 when he barred the press from a murder trial at the defendant's request, saying she would speak more freely if reporters were not present. Press Democrat lawyers kicked up a fuss, of course, but Geary's ruling was upheld by the Court of Appeals.

Judge Geary's behavior in the sanctity of the courtroom notwithstanding, he was regarded by his colleagues as a gentle and kindly man. Healdsburg attorney Francis Passalacqua, who passed the bar in 1939 and began practice alone, credits Geary with a mentor's role. "When I lost my first case in Justice Court, I went into see Judge Geary and cried on his shoulder," said Passalacqua. "He encouraged me. He gave me good advice. When a group from San Rafael wanted me to run for assembly, I asked him and he discouraged me, reminding me what politics can do to a law career. 'Stay out of politics!' he said. And I did."

Passalacqua and others remember Geary for his sense of humor, which extended even to pranksterism. He and his long-time friend and bailiff Norman McIlwain played practical jokes on each other and there were always rumors, until they tore the old Courthouse down, that certain stains on the stairwells were made by the two of them, shooting each other with water pistols during a court recess.

Geary's family credentials were impeccable for a judge in his time. His father, Thomas Geary, had been district attorney and then congressman from this district before the turn of the century. His success on the national political scene made him a candidate to run for vice president with presidential candidate Grover Cleveland in 1892 but he lost at the Democratic Convention to Adlai Stevenson of Illinois — grandfather of the 20th century presidential candidate.

In 1902, when his son Donald was 14, Tom Geary was a candidate for the Democratic nomination for governor of California but withdrew in support of candidate Franklin Lane — who lost to Republican George Pardee. Through his forays into politics, Geary retained law offices in Santa Rosa and eventually both his sons (Donald's brother Finlaw was an outstanding criminal lawyer) joined him.

Like Comstock, Geary was an officer, serving with "Black Jack" Pershing chasing Pancho Villa on the Mexican border in 1916 and in Europe during WWI. He was the first commander of Santa Rosa's American Legion post.

Geary resigned from the court in 1957 after a heart attack, but recovered his health to practice until his death 10 years later, in partnership with his son Bill in a firm that became Geary, Geary & Shea (now Geary, Shea & O'Donnell).

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COMSTOCK and Geary. Such was the state of justice in Sonoma County's higher court through the 1930s and '40s. Before them it had been Thompson and Campbell — Rolfe Thompson went on to the State Appeals Court, Ross Campbell died in 1931, succeeded by Geary — Sewell and Daughtery, Crawford, Pressley, Rutledge and Albert Burnett.

Superior Courts were established in California in 1880, replacing the previous system which called for one district judge and one county judge in each county. The lower courts were Justice Courts, generally by township, still in effect through the Comstock and Geary days. Francis Passalacqua was president of the Sonoma County Bar Association after World War II when that organization took a look at the increasing population and the crowded (by those early standards) court calendars and petitioned the legislature for a third court.

Charlie McGoldrick, the district attorney, won that appointment. He was different from his deeply-rooted colleagues in several ways. He was younger, a veteran of a newer World War. His private practice was in Petaluma. And most of his court experience was as a prosecutor.

Judge McGoldrick, already known as a vigorous district attorney, soon earned himself a reputation as a tough judge. He was tested early, in the first year, with a bribery case against the Del Norte County sheriff, which had been transferred to his court.

On guard against ribald humor in the highly-publicized up-country case which involved a permit to operate a brothel, McGoldrick slammed down the gavel at the first ripple of laughter and offered to clear the court, warning that he would not permit his courtroom "to be turned into a carnival." Nobody even smiled in his presence for the duration of that vice case. Later, a courtroom threat to his life was shrugged off with a "They always threaten the judge after they're sentenced."

A reporter here, discussing the judiciary as it used to be, observed that "those were the days when judges hunted ducks." Certainly, in the case of McGoldrick that was true. His friends remember him as an outdoorsman, a hunter of both ducks and deer and the owner of some of the best-trained Labrador retrievers in the state.

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THE THREE-COURT system continued in Sonoma County until 1966. Judge Lincoln Mahan (who was the first municipal court judge in the county) succeeded Geary in the Superior Court. (Historical footnote: It was in 1959 that the trio of Comstock, McGoldrick and Mahan posed for a photograph in their robes — the first day that black robes were required by California law. Linc Mahan remembers, with a laugh, that the first recommendation of the legislature was for "WIGS and robes! But that died in committee.")

Judge Joe Murphy was appointed to the fourth seat, when it was established in 1966. F. Leslie Manker was then in Comstock's seat, having moved up from the muni court in 1964. It was ten more years before the fifth, which was and still is occupied by Judge Rex Sater, was created.

Judge Mahan, now retired, acknowledges that things were very different then. His tenure was a bridge between past and present. When he retired in 1976, the Superior Court here had doubled, with the sixth judge about to be appointed. Now it has tripled. There are nine Superior Court Judges and Mahan acknowledges, sadly, that handy anyone can name them all. Or even most of them, that judges don't command the attention they once did in the community.

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MAHAN DOESN'T like the suggestion that judges were "more powerful" 30 years ago. "It wasn't power," he said, so much as respect." And, of course, the dilution caused by weight of numbers. There are just more of them. And they are busier.

Senior Judge Sater has pondered some, also, on the disappearance of the mythical Judge Hardy. Sater is the only one still on the bench who practiced before the Old Guard, appearing before both Comstock and McGoldrick. "I had that same impression of a judge's life," says Sater. "It seemed like a calm, sedate sort of existence. In those days the old Courthouse was sometimes dark by Wednesday afternoon because the few cases on the calendar were settled, and a judge could walk slowly through the town, nodding at the people, who all knew him."

The population explosion of the '60s and '70s — AND the advent of a litigious society — exploded Sater's dream of being one of those judges who "spent hours looking out the window, puffing on his pipe."

"Instead," said Sater, "I felt like I was working a pit stop for the Indianapolis 500." Although he was a practicing attorney and thought he understood, said Sater, "I had no concept of the traffic in the courts. We just couldn't keep up for a while. Joe Murphy worked every Sunday of his life. We were hanging on for dear life. There should have been a fifth judge ten years earlier. We didn't begin to cut our way out of it until we got our sixth judge and, since then, we've added one about every two years."

"There's rarely been space to stand and look out the window and be wise."

• • •

THERE'S another thing that's different, some judges will tell you. Call it power, call it politics. But the bureaucrats may be winning the omnipresent struggle for control. There was never a Board of Supervisors in Sonoma County that won a budget argument (or even HAD a budget argument) with Hilliard Comstock or Donald Geary. When it came to administration of the courts, judges were kings.

Today's judiciary doesn't command that kind of position. Maybe the supervisors have changed. Maybe the judges have let the control slip away. Certainly the times have created the need for more clerks, another level of administration. But there isn't a black robe in the Hall of Justice who hasn't said to a colleague on occasion: "What we need is a Charlie or a Linc out here to tell us how to act. Because they didn't tell judges what to do in those days."

At left: Santa Rosa Press Democrat Article, Sunday, July 24, 1988, by Gaye LeBaron.

Article on history of Sonoma County Judges

Courtesy of Newspapers.com

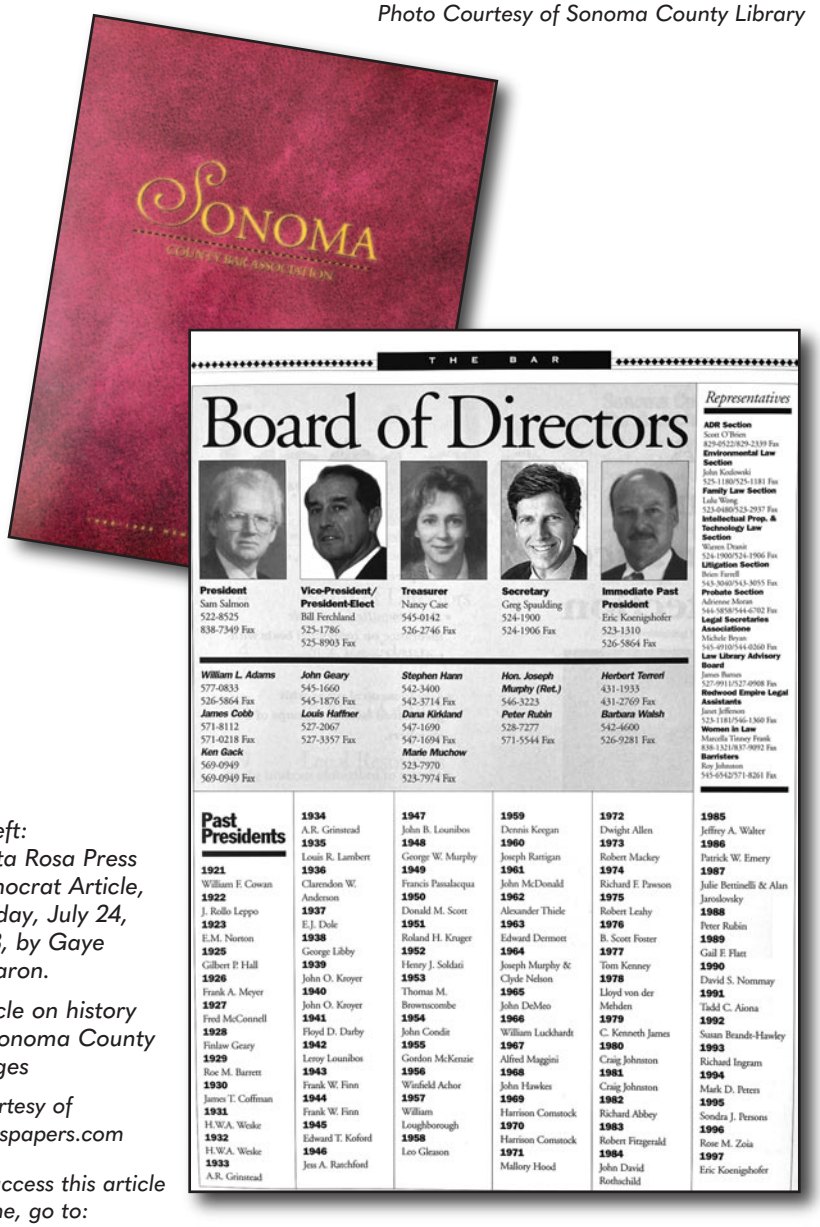
To access this article online, go to:

https://northbaydigital.sonoma.edu/digital/collection/Lebaron/id/981/rec/1

Judge William B. Boone (ret.), Judge Joseph P. Murphy, Jr., (ret.), Comm. Greg Jilka (Marin County), Judge Rex H. Sater (ret.), Justice Joseph A. Rattigan (ret.),

January 2000

Photo Courtesy of Sonoma County Library



1998-1999 SCBA Directory with Board of Directors, Representatives and Past Presidents listed

Courtesy of SCBA Archive Committee

King John, the Virus and the Fairgrounds

Magna Carta, clause 39:

> "Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium pariium suorum vel per legem terre."
>
> *"No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by the lawful judgement of his peers and the law of the land."*

My normal commute took an early turn to the east as I headed to the Fairgrounds. Along the way were large illuminated signs announcing a COVID 19 testing site, and relevant to my being there, the sign announced: "Jurors Enter through the East Gate." The sign seemed significant—not only for its unusual message but also for its announcement that jury trials were again being conducted in Sonoma County. I immediately thought about the importance and necessity of our community reengaging in the historical right to a trial by jury.

When I was a teenager, my father, who often worked in D.C., took me on a business trip with him. When we arrived, he gave me a fully loaded Metro card, and told me to occupy myself while he was at work. After working my way through the museums and galleries on the National Mall, I found myself at the National Archives. Being a weekday, the lines to enter were non-existent, and I walked through the enormous bronze doors. I passed by the fading copies of the Declaration of Independence and the Constitution. At that time you could lean on the case and look closely at the signatures and the clauses. I remember being worried that the fading ink would someday be illegible. Indeed even on that day, it was very difficult to make out much of the Constitution. I probably stood over the cases for a good thirty minutes, fascinated with John Hancock's signature and trying to read the preamble of the Declaration that so many of us had memorized. As I was looking at the document I worried in the back of my mind that the fading ink was a bad omen.

Slowly I made my way to the exit. Standing there, near the exit, in another case was yet another document. This document was in much better condition than either the Declaration of Independence or the Constitution. The vellum was a rich cream color, with obvious yellowing, but the ink was still bright and legible. Below the document dangled a large seal. A docent and security guard were stationed on either side of the case. Most of the other visitors did not even glance at it on their way back into the muggy heat of the afternoon. But I stopped to look. The docent immediately said: "It didn't solve anything." I could not tell if he was talking to me, so I kept trying to figure out why this document was sitting in *our* temple to democracy—ignoring what felt like a *non sequitur*. The signage made it clear that it was Magna Carta from 1297 on loan from The Perot Foundation. I had heard of Magna Carta, even remembered a silly rhyme about 1215 and the banks of the Runnymede; but, admittedly, I did not know why it was featured in such close proximity to our founding documents. The docent again said, now directly to me: "It didn't solve anything."

I looked up from the description on the plaque, and responded, "What didn't solve what?" "Glad you asked" was the reply. In the next fifteen minutes, the docent lectured about the Kings of England, the Norman Conquest, the rights of the people, and tyranny. The docent explained that Magna Carta was likely agreed to by King John under duress and that he likely never intended to honor any of the provisions. I remember the docent emphasizing that after the signing of the original Magna Carta on June 15, 1215, the Barons and King John soon renewed their hostilities; the rights and obligations in Magna Carta were soon ignored by all. He explained that that version displayed was a reissuance of Magna Carta by King Edward I, who was also facing a baronial revolt. It seemed that every time a King got in trouble, he would reaffirm the rights and obligations in Magna Carta, only to have them conveniently annulled by the Pope. The docent pointed to Clause 39, recited it in perfect Latin, and discussed the importance of a jury in medieval England.

That hot and muggy day in D.C. ignited my passion for Magna Carta and its importance and place in history. Since that day, I have been fascinated with the idea that the rights described over a thousand years ago are so influential in our daily lives. Through my reading

(Continued on next page)

King John, the Virus and the Fairgrounds (continued from page 8)

I found that the rights being "forced" on King John were not novel or unprecedented. The Anglo-Saxons (who preceded the Normans) were much less tied to a notion of the divine right of kings. Indeed, for the most part, the Anglo Saxons did not have a concept of hereditary rule. At a gathering of nobles, called a Witenaġemot or Witan, the Anglo Saxons would elect their kings. The true power of the Witenaġemot remains debatable; but what is not debatable is the fact that the Anglo Saxons had far greater notions of personal liberty and sovereignty than did the Normans. Anglo Saxons certainly enjoyed the right of a trial by jury. By the time of Magna Carta, the Anglo Saxons had been thoroughly replaced by the Normans. With the coming of the Normans, England soon adopted continental concepts of hereditary rule and the divine right of kingship. The pendulum of personal and baronial rights had shifted distinctly away from the barons and toward King John. The revolt that was not solved by Magna Carta was a reaction to the perceived overstepping of King John—including the right to a jury by one's peers. Magna Carta was not a revolutionary document, but a restatement of rights that the barons wanted recognized; rights that were anciently rooted.

Magna Carta was on my mind as I turned right onto Brookwood Avenue and parked my car near Garrett Hall. I thought of the crisis that drove the Barons to revolt against King John. I wondered how they must have felt having to remind their sovereign that he was King, but still restrained by rights that had been ingrained into the very fabric of society. Like that morning at Garrett Hall, I imagined Runnymede was cold and damp—as English summers tend to be. I thought of the weight of the document with its seal; how it must have felt in the heavily gloved hand of a baron. Did that baron realize then, in June of 1215, that Magna Carta would take on a life and lore of its own; and would be regarded as one of the great expositions of personal rights? That in the distant future those rights would apply to all, and not just the nobility? I thought about the sense of relief that must have been tempered with the obligation to spread the

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King John, the Virus and the Fairgrounds (continued from page 9)

word about King John's acquiescence. Indeed, Magna Carta would be posted throughout the kingdom, to be read by all. Also, when the barons demanded the right to a jury of their peers, they must have understood that right would be illusory unless they, themselves, were ready to sit as jurors.

I remember walking into Garrett Hall and seeing rows and rows of prospective jurors, masked, seated, separated and silent. It struck me as like a scene from a dystopian movie. Then, it hit me: This was pretty awesome. Right there, in Garrett Hall, we were having our own Runnymede. The citizens of Sonoma County were there to confront a crisis. There, in that unheated hall, citizens were not demanding that the right to a jury trial be recognized by a tyrannical autocrat, but rather those prospective jurors were performing their civic duty. The juror's silence in Garrett Hall has stuck with me to this day. In our country's turbulent history, rights are often asserted and won through protest and action, or by a skilled advocate's pen—but that day the right to a trial by jury was secured in silence. In their collective action they were ensuring that the right to jury, an ancient right, reaffirmed in Magna Carta, would survive.

I was moved by the courage of the jury panel. Despite the often inconvenient nature of jury duty, they were there, ready to serve. This inconvenience compounded by a world turned upside down by COVID-19. I felt then, and still today, that such acts of participation are necessary when a crisis endangers the fabric of our society. We in Sonoma have been confronting what seems like a never-ending high tide of calamity. Yet there, in that Hall, the citizens of Sonoma confronted their fears, trepidation, unknowns, and sat silently waiting to do their duty in defiance of a worldwide pandemic. They did this so that someone unknown to them could assert their right to a jury trial. Unlike the Magna Carta, their act was and is a lasting solution. Perhaps we should petition to rename Garrett Hall to Runnymede.

By Kenneth G. English
Hon. Kenneth G. English is a commissioner for the Sonoma County Superior Court of California.

Pipeline Programs: Our Opportunity & Obligation to Inspire Future Lawyers

With the introduction of the Diversity + Inclusion section this year, SCBA has invited the section to submit articles which address the relevant topics, issues and goals of their mission, as stated below:

The Diversity + Inclusion Workgroup of the Sonoma County Bar Association works to create and support diverse leaders in our legal community, inclusive & equitable workplaces, and to develop a local pipeline of diverse legal professionals by providing relevant resources, training, and best practices for our members.

The importance of pipeline programs cannot be overemphasized. Think of the attorneys you know. How many have at least one family member who is an attorney? Many lawyers have parents and/or grandparents who are or were lawyers. Those are the attorneys who are already part of the bar. Unfortunately, as of 2019, the California bar is not made up of people from diverse backgrounds in the same percentage as California's population. According to the State Bar of California, "California's attorney population does not reflect the state's diversity, with Latinos being particularly underrepresented." While white adults comprise 40 percent of California's population, they account for 68 percent of California attorneys. Latinos comprise 36 percent of California's population, but only 7 percent of California's licensed active attorneys. Further, "women of color are underrepresented among leadership positions in all employment settings with Asian women being particularly underrepresented." [1]

If we are to have a legal population that more accurately reflects the general population, we need to plant seeds in the minds of our youth to consider becoming lawyers. For some, the only connection to a future in law is a pipeline program. A pipeline "refers to programs at all levels of education intended to target, enroll, and support to graduation certain students, usually underrepresented students including minority, low income, and women, with the goal of increasing their representation in certain fields." [2]

Pipeline programs can be more than simply a way to expose students to the law. Even if a student is exposed to law, many students, especially diverse students, "not only need the tools to navigate the application process, but also need to believe that they deserve to go to law school." [3] Pipeline programs help student gather the information necessary for getting to law school and beyond, start their network of legal connections, and grow their self-confidence.

Pipeline programs also provide students with a valuable connection with a mentor they might not otherwise have found. For Sania Grandchamp, 1L at Empire School of Law, she considered law as a teen, but life took her along another path: entrepreneurship, journalism and the arts. It was mentors—a financier and a district attorney—who brought her back to the law. After completing her first semester, Ms. Grandchamp is happy with her choices and believes that law should be a required course for all children. "Law is a changemaker," she said. If she were to advise her 16-year-old self, she would still encourage her to continue down the path she took because of the life experiences that will serve as a strong foundation to her legal career. She would only caution her to return to the law sooner so she would have more time to enjoy being a lawyer. But for her mentors, Ms. Grandchamp is not sure she would have gone to law school. In this way, mentorship is an important part of a successful pipeline program.

While it may be one person who will solidify a student's decision to become an attorney, there are several points at which potential future lawyers can be supported. Rocio Mondragon Reyes grew up in Roseland as the oldest of three children. She witnessed her father cycle through the criminal justice system for misdemeanor offenses and learned first-hand how people's

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1 Almarante, C. et al, *The State Bar of California Report Card on the Diversity of California's Legal Profession* (2019) https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf

2 Katz, J. et al, *Measuring the Success of a Pipeline Program to Increase Nursing Workforce Diversity* (2015) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4724384/

3 Tenecora, M., *The Importance of Pipeline Programs: I Would Not Be Here Without Them* (2019) https://abaforlawstudents.com/2019/09/09/the-importance-of-pipeline-programs-i-would-not-be-here-without-them/

Pipeline Programs (continued from page 11)

lives can be forever impacted by it. When she was only eleven years old, her father was detained for three weeks while facing federal deportation proceedings after being stopped by local police. Over the phone, her father told her to "be strong" and take care of the family. She became the family's translator and advocate, meeting regularly with their English-speaking attorney. Although Rocio didn't realize it at the time, she was learning important advocacy skills that would help her later in life.

Rocio was a ninth grader at Roseland University Prep when she started thinking about becoming an attorney. Rocio responded to an ad in the newspaper for work at a local immigration law office. The attorney, Christopher Kerosky, was understandably concerned about hiring a 14-year-old. Rocio's teacher at Roseland Prep, Mr. Augustin Fonzeca, went out on a limb and wrote a letter on her behalf and agreed to be the contact person if any issues arose. Rocio began to work at Mr. Kerosky's law office for 3 to 4 hours every Wednesday afternoon. She prepared U-Visa applications, prepared documents, wrote memos, and got firsthand experience about what it means to work in a law office. With the help of a teacher and a lawyer who both believed in her, Rocio was able to get invaluable hands-on experience in a law firm.

Rocio Mondragon Reyes

While still in high school, Rocio started the school's first newspaper. During her junior year, she wrote an article about the shooting of her peer entitled, "Close to Home: Go beyond Blame in Andy Lopez Case" published in The Press Democrat. A local attorney, Marylou Hillberg, read the article and reached out to Rocio to offer her a job. Rocio worked for Ms. Hillberg once a week, editing briefs that were headed to the Supreme Court of California, and maintaining client files. In essence, Ms. Hillberg opened a door to Rocio by giving her the opportunity to gain practical legal skills and add to her resumé.

Although Rocio graduated as Valedictorian of her high school class in 2015, she worried about getting into a good college. There were limited AP classes at Roseland Prep, she didn't have a college counselor, and her test scores were predictably not amazing. Rocio had to figure out the complex process of learning about private schools on her own. Rocio applied at several schools around the country and eventually chose Georgetown University in Washington D.C. Unlike most parents of college freshmen, her parents couldn't fly with her out to D.C. for fear of getting deported. Unlike most college students her own age, one of Rocio's biggest fears was that she'd have to fly home and take care of her three younger siblings at a moment's notice.

Rocio chose Georgetown University for its Scholar Program, a program designed to help low-income students have a more equitable college education through financial support, mental health support, and career services. The Georgetown Scholar Program gave her money to buy a winter coat, bought her bedding for her room, and provided emotional support. And if Rocio's parents got deported, the program would pay for her to fly home at any given moment.

After graduating from Georgetown, Rocia had a fellowship in New York with the Immigrant Justice Corps, a program providing entry into the field of immigration law. She assisted clients with obtaining green cards, citizenship status, and related issues. Her skills as an eleven-year-old advocating for her father kicked in. She accompanied clients to interviews to protect their legal rights, and stood her ground with the immigration officers, a skill she learned at age eleven.

Ms. Mondragon Reyes was appointed to a vacant board seat for Roseland School District in March 2021. In addition, she works as an administrative associate for the Making Wave's Foundation, an organization dedicated to proving equitable education for persons of all socio-economic backgrounds. Rocio hopes to

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Pipeline Programs (continued from page 12)

attend Stanford so that she can pursue dual degrees in law and International Comparative Education.

Rocio is determined to make the path easier for other students who share her background, by showing them the ropes and teaching them all they need to know to get in to college. She envisions a program where students learn how to write a resumé, send a professional email, and learn important skills such as rapport-building, interviewing, and feeling comfortable about asking questions with potential employers. Rocio says she wants low-income students to know their worth: "The way it's framed is that colleges are doing us a favor. But the private schools need us. They need to know the experiences of an actual low-income person."

There are numerous examples of successful pipeline programs. The Bar Association of San Francisco[4] has multiple educational programs for which attorneys can volunteer to increase diversity in the legal profession. The 1L Open Doors Job Shadowing Program matches first year law students and legal organizations so that the students can spend three days in the organization which "gives students an inside view into the daily lives of lawyers and how legal organizations function." The day in court program matches volunteer attorneys and judges to serve as tour guides for students in fifth through eighth grade, showing them the courthouse and observing jury trials. The San Francisco Law Academy program for juniors and senior high school students includes classroom presentations and six-week summer internships.

Here in Sonoma County, there are several pipeline programs already in place or being created. The Sonoma County Bar Association's Law Week[5] is an important program that gets lawyers, judges, paralegals and other legal professionals out into Sonoma County high schools to lead a class regarding the law. It is also a wonderful opportunity for legal professionals to perhaps inspire students to consider a career in the law who otherwise would not have given it any thought. The Sonoma County Bar Association relaunched its mentoring program[6] in 2020 to pair seasoned attorneys with other attorneys or law students to provide mentorship. The Diversity + Inclusion Section of the Sonoma County Bar Association[7] is in the process of starting a pipeline program that will focus on high school students. The goal is to have a program that will provide information, guidance and mentoring for local high school students, including a summer internship program with local law firms, the courts, non-profits and the public sector. In this way, there are many opportunities for each member of the legal community to be involved in inspiring students to pursue a legal career.

https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf

4 https://www.sfbar.org/jdc/diversity-programs-volunteer-opportunities/

5 https://sonomacountybar.org/law-week

6 https://sonomacountybar.org/mentorship

7 https://sonomacountybar.org/diversity-inclusion-section

By Nicole Jaffee & Carla Rodriguez

Nicole Jaffee is a general civil litigator with Perry Johnson Anderson Miller & Moskowitz, LLP, Treasurer for Sonoma County Women in Law Board of Directors and Chair for the Diversity + Inclusion Section of the Sonoma County Bar Association.

Carla Rodriguez is Chief Deputy District Attorney, President of Sonoma County Women in Law and a member of the Sonoma County Bar Association Archives Committee. She is also the Board President of Verity, an organization that serves survivors of sexual abuse and seeks to prevent future violence through education and outreach.

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.

Hon. Nancy Shaffer Retires from Bench

Although her mother went to law school in the 1940s, it was Perry Mason that brought Judge Nancy Shaffer to the law. From an early age Judge Shaffer was drawn to the courtroom. Now after forty-four years in the legal profession she has retired.

Without hesitation, Judge Shaffer declares that she will not reactivate her bar card and will consider, at a later time, whether to join the assigned judges program. Instead, she will enjoy her new recreational vehicle and electric bike while she enjoys more family time and her pursuit of photography, genealogy and her artwork. Along with her husband of forty years, Steve, they plan on discovering more local entertainment and trying out the area's new restaurants.

Whether as a lawyer or jurist, Judge Shaffer is known for her high ethical standards, legal scholarship, her intensity, attention to detail and hard work. She has practiced law, worked as a mediator, served as a commissioner and as a judge for ten years. Her tenure as a judge provided Judge Shaffer with the most meaningful work. She was honored to serve and valued each phase of the work. While initially favoring trial work, she readily embraced each judicial assignment and task, ranging from high-volume criminal calendars to civil law and motion; family law to warrant duty. Judge Shaffer found judging of broader service, allowing one to make a much greater positive impact than practicing law.

Presiding Judge Brad DeMeo praised Judge Shaffer's commitment to the law stating that "she endeavored to make decisions that had sustained integrity." Serving on the appellate panel together, Judge DeMeo noted that she always had the courage to speak out openly and with full transparency.

As a civil litigator Judge Shaffer had a reputation as an aggressive, fierce competitor. As a neutral mediator, commissioner and judge she made a graceful transition to neutral arbiter.

Years ago she mediated a civil case where one of the parties was represented by Judge DeMeo. He observed that Judge Shaffer had a great ability to resolve conflicts. She actively encouraged and facilitated collaboration.

She leaves the bench with a treasure trove of resources. She has prepared resource binders for criminal trials, law and motion, and related responsibilities. Judge Jennifer Dollard praises Judge Shaffer for her support. "Judge Shaffer was welcoming, supportive and helpful from the start...she shared any resources she thought might be helpful as well as her wealth of experience...she always looked to improve the court and it's processes."

Judge DeMeo followed Judge Shaffer to the Family Law Assignment. She left him copies of decisions and materials that would help prepare a newer judge for that particular assignment. She is generous with the time she devotes to assisting her colleagues. Judge DeMeo found her work products to be exceptional in their thoroughness and quality.

Judge Shaffer has been very active in judicial education statewide. She has taught: Evidence, attorney's fees and sanctions, verdicts, understanding Anti-Slapp, probate, bench demeanor and implicit bias and decision making. Of particular interest is the topic of implicit bias in decision making. As a private citizen, she wants to create a support network for people that face struggles with isolation, disrespect and prejudices.

Sonoma County has been Judge Shaffer's home most of her life, with short interruptions for her father's work, her education and early practice. She attended Santa Rosa Junior College before transferring to University of California, Berkeley. In 1977 she graduated from law school at the University of San Francisco. Before returning to Sonoma County, Shaffer worked as a litigation associate for the Oakland Offices of Peter Stanwyck, followed by two years at Cooper, White & Cooper in San Francisco. Upon returning home she started her long-term relationship with Misuraca, Beyers and Costin. She

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Hon. Nancy Shaffer Retires from Bench (continued from page 14)

rapidly moved up the ladder from litigation associate to partner to managing partner.

In 2000 Shaffer was the President of the Sonoma County Bar Association. It was a year of unwelcome surprises. The executive director of the bar abruptly resigned and reported that the bar did not have enough money to make it through the year. Bar sections were reluctant to turn over funds to the bar because of possible mismanagement. The conflict was mediated and steps were made to build the strong organization of today.

Adding to the stress was a contested judicial race. Elliot Daum was running against the incumbent Patricia Gray. Gray did not fare well in the evaluation survey of the two candidates. She discovered that the executive director prior to resigning had hosted a meet and greet for Daum. Gray argued that the event had tainted the survey. Judge Shaffer had to interview all the attendees and determine if the event had influenced their responses to the survey. She determined there was no influence that impacted the survey.

To complicate matters Judge Gray asked that the survey results not be released so that she could go forward with an investigation. The SCBA decided to publish the results of the survey. Gray then publicly claimed that she had never tried to stop the publication of the survey. Shaffer publicly set the record straight, enlarging the dispute. Gray lost the election.

When asked about the greatest challenges as a lawyer, Judge Shaffer indicated it was raising three children while working long hours and the disrespect and hostility of some male adversaries. Peter Simon who practiced law with Judge Shaffer noted that women in Shaffer's generation were blazing trails and had to be better than their male counterparts. In practice, Simon said she was a fantastic trial lawyer, a very tough litigator, a pit bull, exceptionally focused, driven by a sense of fairness. He balanced that comment, recalling that Shaffer was able to strike a balance in her personal life and was a very engaging and varied person with great humor. Others described her humor as slap-stick, more like Lucille Ball rather than nuanced sophisticated humor.

After leaving the daily practice of law she advanced rapidly to the position of ADR Program Coordinator for the Sonoma County Superior Court. In 2008 she was selected to be a Superior Court Commissioner and in January of 2011 she became a Superior Court Judge following a contested election.

Judge Shaffer's expectations of judging did not match reality. She found it to be a much bigger job, the scope of calendars, the variety of assignments, the judicial education. The work off the bench such as on-call duties including reviewing warrants and temporary restraining order requests. She was challenged by the wide exposure to different laws and disappointed in the lack of prep time. With her attention to the law and her hard work she met those challenges.

With her retirement an accomplished legal scholar will be missed. Her legacy will be her well thought out decisions and the in-depth legal materials that she has left for judicial officers that follow.

By Gayle C. Guynup

Hon. Gayle C. Guynup is a retired judge with the Sonoma County Superior Court, a Careers of Distinction honoree and active member of the SCBA.

Sonoma County Women in Law: Scholarship Recipients

Sonoma County Women in Law, with the assistance of community investment grant funds from Sonoma County Supervisors Lynda Hopkins and Susan Gorin, and former Supervisor Shirlee Zane, has awarded two scholarships totaling $6,500. SCWiL chose two deserving law students, Vanessa Alvarez and Bianca Garcia, as recipients of the Community Advocacy Scholarship.

Vanessa Alvarez just finished her first year of law school at University of San Francisco Law School. Vanessa, a bilingual speaker and Sonoma County native, knew she wanted to be a lawyer and give back to her community at a young age. While attending undergrad at U.C. Davis, she would travel back to Sonoma County every weekend to give back to the community. Vanessa did her first summer internship at Galt Advocacy, a Santa Rosa-based advocacy firm for families of children with disabilities. Vanessa was able to use her language skills to help families obtain In-Home Support Services and Protective Supervision. In turn, she has been able to assist a population in our county that is vulnerable on a number of levels. More recently, Ms. Alvarez worked to help small business owners affected by the COVID pandemic by informing them of available loans and grants and assisting those who did not have a social security number to apply for these loans.

Although Ms. Alvarez's first summer internship sparked her desire to become a lawyer, it was her job working at a local restaurant that is helping her choose her future legal specialty. While working at a local restaurant in Rohnert Park, Vanessa realized that there were few legal resources available to local small businesses, especially those owned by members of the Latino community. Vanessa's goal when she gets her law degree is to continue helping small businesses.

Ms. Alvarez stated, "I am so grateful to be receiving a scholarship from my home county to further fund my legal education at USF. I hope to one day give legal aid to small local businesses in Sonoma County, since they are an essential part of the community."

Bianca Garcia is in her second year at Empire College School of Law and is also a Sonoma County native. Ms. Garcia has worked as a bilingual Community Health Worker for the nonprofit ISOCARE, whose primary purpose is to provide resources and emotional support to families affected by COVID. Bianca's job duties included communicating with multiple families, getting referrals for COVID positive individuals, and educating all involved parties about available resources such as financial assistance, food, and emotional support.

Ms. Garcia has also worked with the nonprofit UnDocuFund, helping provide logistics for financial assistance checks to those affected by COVID, as well as North Bay Organizing Project (NBOP), a rental

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SCBA Fall '21 "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.*

Ellie Ehlert is now with Perry, Johnson, Anderson, Miller & Moskowitz in Santa Rosa. . . **Michael R. Wanser** is now with GVM Law LLP, in Napa . . . **MaryClare Lawrence** has retired!! MaryClare was with Conner, Lawrence, Rodney, Olhiser & Barrett, LLP in Santa Rosa . . . **Ashlee Hellman** has joined Spaulding McCullough & Tansil LLP . . . **Tom Haeuser**, with Haeuser, Valluzzo & Piasta LLP, was recently selected President of the FISH (Friends Helping Friends) Board of Directors. Tom also accepted an appointment to serve a 3-year term as Vice Chair of the Sonoma County Library Commission, supporting our county-wide library system . . . **Tina Wallis** has moved her Office to 1400 N. Dutton Ave., #22 in Santa Rosa and has a slight name change: Law Offices of Tina Wallis, Inc. (Inc. has been added) . . . **Bernice Espinoza** is now with Corazón Healdsburg as an Immigration Staff Attorney . . . **Alexis Kent** is now with O'Neill Vintners & Distillers in Larkspur . . . **Nathaniel G. Raff** is now with Mendocino County Counsel in Ukiah . . . **Mary Jane Schneider** has retired from practicing law.

Sonoma County Women in Law (continued from page 16)

assistance program. Currently, Bianca is enrolled in the Legal Aid Clinic while attending school. When informed that she was one of this year's Community Advocacy scholarship recipients, Bianca said, "This scholarship will help me financially be able to afford my last two years of law school and will alleviate the burden of debt post-grad. I plan to continue to be involved in community work as long as I am able to. Right now I am working with the county on rental assistance, and legal aid on housing help, but will continue to look into other opportunities that allow me to give back and make a difference in our community."

Vanessa Alvarez

Bianca Garcia

Sonoma County Women in Law is honored to award the Community Advocacy scholarships to such worthy and dedicated recipients. Thank you both for all you do for the residents of Sonoma County, and good luck with your studies. Keep up the great work!

As a former Sonoma County Women in Law scholarship recipient myself, I know just how much these scholarships mean. SCWiL was unable to hold its annual scholarship reception this last year—its main fundraiser—due to COVID. If you are able, please consider making a donation to help us provide future scholarship opportunities. Donations can be made to: *The Honorable Gayle Guynup Fund for Scholarships—Expendable, 120 Stony Point Rd., Suite 220, Santa Rosa, 95401.*

By Kristin Horrell

Deputy County Counsel, Scholarship Chair of Sonoma County Women in Law.

Back to Basics

I was asked to write an article for the SCBA Bar Journal in early summer when I was still employed as a Research Attorney at Sonoma County Superior Court. "Sure," I said, thinking I would write an article about sophisticated legal writing and complex motion practice. After serving ten years as a research attorney, supporting a complex civil department in San Mateo and civil and probate departments here—plus ten years practicing in federal and state courts statewide alongside talented co-counsel and opponents—I figured that I had some practical knowledge and tips that might be helpful to even seasoned attorneys. And if it happened to make my own job as an RA a little easier, well, that would be an added perk.

But in late July I made the difficult decision to leave the court to accept a full-time job as an Assistant Professor of Legal Writing at University of San Francisco School of Law. I was inspired by a number of recent experiences, including awarding scholarships to deserving bay area law school students through Sonoma County Women in Law's robust scholarship program, mentoring an Empire Law School student realizing her childhood dream of becoming a lawyer while juggling adult responsibilities, and contemplating the efforts of the Diversity + Inclusion section of the SCBA to develop a pipeline of diverse legal professionals. So, by the time you read this article, I will be well underway teaching Legal Research, Writing, and Analysis to 1Ls. But as I write it, I am still preparing my syllabus for the fall semester. Designing my course has drawn my attention away from the thorny and nuanced topics I had intended to write about and inspired me instead to explore the value of getting back to basics.

IRAC is taught in law school and has stuck with us because it reflects the fundamental model for organizing and presenting legal analysis. As practicing lawyers, we rarely consciously think in terms of IRAC (Issue, Rule, Application, Conclusion), or CRAC (Conclusion, Rule, Application, Conclusion), the version more relevant to persuasive legal writing. As the newer law school graduates among us may know, there are now a number of variations of the same theme being taught, with the tweaks designed to add flexibility or encourage creative thinking: C[or I]REAC (Conclusion [or Issue], Rule, Explanation, Application, Conclusion); C[or I]RAAC (Conclusion [or Issue], Rule, Analogous cases, Application, Conclusion); and C[or I]RARC (Conclusion [or Issue] Rule, Application, Rebuttal and Refutation, Conclusion). But they are all adaptions of the basic, tried-and-true method of legal analysis.

Experienced attorneys rarely struggle with articulating the key issue, identifying the relevant legal rule, applying it to their facts, or reaching a conclusion. It's second nature to most. However, my observation is that practicing attorneys rarely present their arguments in this way. Perhaps it seems too formulaic, simplistic, or dull. But consistent adherence to an organizational system does not need to stifle creativity or inhibit good writing. There are no style points awarded, and a roadmap always helps the reader by guiding him or her through each step of even the most complicated or multi-faceted argument. Your judicial officer may be experienced, dedicated, learned, and bright, but he or she will never know your case the way you do. So, while presenting facts up-front and setting out the relevant law may help set the stage, failing to weave these components into a step-by-step legal analysis in a coherent and expected way may mean that key facts are inadvertently missed, or not given the appropriate weight or consideration, at the relevant part of the analysis. IRAC is not just an effective teaching tool, but an effective organizational tool for solid legal writing. As such, I would encourage all attorneys, new and experienced alike, to go back to basics.

Even so, I can't resist providing a few advanced tips I've picked up along the way:

- Begin and end the drafting process with the notice of motion because you cannot get different relief, or relief on different grounds, than what is stated in the notice of motion, including any alternative relief requested.
- Don't hold something back for the reply; due process requires that your opponent have an opportunity to respond to new facts and new legal arguments.
- Avoid interjecting yourself or your credibility into a brief, i.e, "we've never seen…"
- Take ownership of unfavorable facts and binding authority so you can put them into the best context

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Back to Basics (continued from page 18)

for your client first and avoid appearing evasive or defensive.

- Avoid a kitchen sink approach so you can focus on your best arguments, and only spend significant time or space on procedural objections if you plan to stand on them.
- Don't use all pages allowed under the applicable court rule if you don't need them.
- When using declarations, always anticipate hearsay and foundation objections and draft them accordingly.
- If you are moving for summary adjudication, make sure the "issue" is one that can be summarily adjudicated and copy the issue from the notice of motion verbatim into the separate statement.
- Separate statements are not "evidence," so evidentiary objections must be to the evidence cited within them and not to the numbered facts.
- You should file a reply separate statement in support of a motion for summary judgment which explains why all facts your opponent says are disputed are not disputed by the (admissible) evidence he or she cited or that the dispute is immaterial, and if a party opposing summary judgment has submitted additional facts in an attempt to defeat your motion, you should explain why they are immaterial or insufficient to create a triable issue (and not say that they are disputed, even if they are).
- If you've made a large number of evidentiary objections, call out in your brief which ones may be dispositive so they get the judge's focus.
- Edit ruthlessly; rewrite any sentence (or paragraph) that isn't easily understood and omit any sentence (or paragraph) that doesn't serve a clear purpose.
- Where the judge has discretion on an issue, don't just argue that he or she can do what you want; explain why he or she should do it.

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Back to Basics (continued from page 19)

When I told my former colleagues at Friedemann Goldberg Wargo Hess that I was going to teach, I received a lot of unsolicited advice, which included: "Never polish a turd" and "Periods. More periods." I don't disagree with the former. If an argument doesn't flow and isn't working, it doesn't matter how well it's written. Don't stay wedded to what you've already done; figure out what the hitch is, set aside what you wrote, and start again. And while short, declarative sentences are almost always preferable to long sentences involving multiple clauses, I suspect that the latter piece of advice was specific to me. ("Do as I say, not as I do" is one of my first rules of parenting as well.)

I've written to the court and for the court, so I expect that I will have credibility with my students about the subject matter. The challenge for me resides in teaching it. "Teaching requires that you work at being a person and work at understanding people and the world, and work at feelings and connecting and respect in ways and to a magnitude that is not often asked of adults who aren't bartenders." Tom Rademacher, An Exceedingly Honest (and Slightly Unprofessional) Love Letter to Teaching (Univ of Minnesota Press, 2017). But in the same way that I hope to inspire confidence in my students by reminding them that essentially what lawyers do is communicate—something they've been doing their whole lives—I will also remind myself that I have been an empathetic person for all of mine. (At least most of the time.) After all, getting back to basics includes valuing fundamentals from before we were ever trained in the legal profession. That includes recognizing and appreciating our innate skills and abilities, even as we apply them outside of our comfort zones.

Getting back to basics also means consciously concentrating one's attention and effort on what's most important. Ultimately, I am privileged that my non-linear career path has afforded me the opportunity to do two of the most important and personally rewarding things I can imagine doing with a law degree: Assist with the administration of justice; and train and encourage bright and enthusiastic law students to be ethical, efficient, and successful attorneys. I would encourage everyone to explore the types of organizations and activities that inspire them. If your passion includes mentorship, you can reach out to Amy Jarvis about the SCBA's newly re-launched mentorship program (https://sonomacountybar.org/mentorship) or to Dean Brian Purtill about Empire's Essay Writing Mentor Program (bpurtill@empirecollege.com), and you can donate to Sonoma County Women in Law's Hon. Gayle Guynup scholarship fund at http://www.sonomacountywomeninlaw.com/donate.html.

By Marci Reichbach

Marci Reichbach (Stanford '98, Yale Law '01) recently left her position as a Research Attorney at Sonoma County Superior Court to serve as a full-time Assistant Professor of Legal Writing at University of San Francisco School of Law.

SCBA Welcomes Our New Fall 2021 Members!

Zack Agil, Vivian & Agil Law PC
Natalie Albanna, Sonoma County District Attorney's Office
Lesley Amberger, Legal Support
Thomas Del Monte, Law Office of Thomas Del Monte
Natasha Galvez, Berman North LLP
Danielle Hansen, Law Student
Charli Hoffman, Hanson Crawford Crum Family Law Group LLP
Nichola Kane, Law Student
Erika Kennington, Law Student
Hillary Liljedahl, Law Student
Caitlin Phair, O'Brien Law PC
Amanda Sardis, Sonoma County District Attorney's Office
Alisha Sikes, Wine Country Family Law Bankruptcy Office, P.C.
Michelle Stewart, Geary, Shea, O'Donnell, Grattan & Mitchell, P.C.
Arif Virji, Carle, Mackie, Power & Ross
Christopher Vivian, Vivian & Agil Law PC
David Whitehead, Whitehead Porter LLP

Twenty Graduates for Empire Law School Class of 2021

Hon. Bradford DeMeo, Presiding Judge of the California Superior Court for Sonoma County and Professor of Wills and Trusts, delivered the commencement address at Empire College School of Law's 45th graduation ceremony on Saturday, June 5, 2021. Juris Doctor degrees were conferred upon 18 graduates of the four-year evening law program, and 20 graduates received Master of Legal Studies degrees. Three of the graduates—Kasra Parsad, Kaela PerLee-Peckham and Kaitlyn Wright—are second generation Empire College School of Law graduates.

Constitutional Law Professor Rex Grady addressed the graduating class on behalf of the School of Law's faculty. Dominic Rosales, who graduated Magna Cum Laude, delivered the valedictory address.

Four Magna Cum Laude honors graduates were recipients of Scholastic Achievement Awards provided by six local law firms: Abbey, Weitzenberg, Warren & Emery; Beki Berrey Family Law; Birnie Law Office, Inc.; Kerosky & Gallelli; Michael Allen, Attorney at Law/California Assemblymember (Ret.); and Spaulding, McCullough & Tansil LLP. Gina Fortino Dickson was recipient of the Labe Lebowitz Award which recognizes perseverance and inspiration in overcoming adversity in the completion of law school.

Founded in 1973, Empire College School of Law has small sections and class sizes that encourage a strong sense of community, accomplished faculty who are practicing attorneys or judges, and an array of clinical education opportunities for students to acquire practical experience applying the law and working with clients. Its alumni comprise approximately 25 percent of the Sonoma County Bar. Fifteen alumni are now members of the California judiciary in Sonoma, Napa, Mendocino, Lake, Lassen, Merced, and Calaveras Counties; a sixteenth alumna is a member of the Arizona judiciary. For additional information on Empire College School of Law, call (707) 546-4000 or visit law.empcol.edu.

Photo courtesy of Steven Yeager

Front Row L-R: *Dean Brian Purtill, Professor Heather Bussing, Kristine Tellefsen, Ana Sanchez-Lopez, Karla Peña, Hon. Bradford DeMeo, Professor Rex Grady.* ***2nd Row:*** *Max Courtney, Kaela PerLee-Peckham, Kaitlyn Wright, Gina Fortino Dickson, Shawntay Jordan, Bianca Vanesa Garcia.* ***3rd Row:*** *Regan Masi, Haley Patrick, Jessica Gomez, Nickolas Rineberg, Ed Balme, Aaron Ziskin.* ***Back Row:*** *Michael Mallonga, Dominic Rosales, Joseph Brighenti, Ian Kendall.* ***Not Pictured:*** *Kasra Parsad*

Hearsay & Other Pertinent Objections During the Time of Covid

On December 9, 2020, the Sonoma County Bar Association presented a webinar entitled "Hearsay And Other Pertinent Objections During The Time Of Covid." It was primarily an overview of specific objections and other key evidentiary points to keep in mind with respect to the use of evidence from social media prior to, during, and after trial, not all of which were specific to COVID, of course, but relate to the increased use of remote or distance trial practice. It also included some practical observations with respect to trial objections and appellate practice in general. Panelists included Sonoma County Superior Court Judge Andy Wick, Retired Justice of the California Court of Appeals Daniel "Mike" Hanlon, and attorneys Dawn Ross, Carle Mackie Power & Ross, and Andrew Martinez. The following is a compilation and overview of their overview, compiled and edited by Brian J. Purtill, who moderated the panel discussion in December.)

I. Pre-Trial Evidence Preservation

Today, Social Media is a virtual (pardon the pun) treasure trove of potentially admissible evidence. – Facebook, Twitter, What'sApp, YouTube, Instagram, to name a few, often contain priceless statements and/or photographs helpful to your client or harmful to your opponent.

Every new case intake should involve social media mining. And every new client should be asked about text messages or similar posts they know of which may be helpful or harmful to their case. Finding them is one thing; using them is another.

A. Assume You Will Have Authentication Issues

Try being direct; it often works: if you have texts and/or photographs with which you know the opponent to be familiar, you can demand authentication of them by use of Requests for Admission and/or Depositions.

Use your experts: If authenticity of evidence obtained on line must be established through circumstantial evidence because direct testimony is not available or authenticity is being challenged, you will need a third party (tech expert, Private Investigator, or paralegal, etc.) to identify how/where the evidence was located, how it was downloaded, etc. Utilize best practices to ensure its admissibility in court. See, Authentication, below.

B. Methods for Converting Electronic Communications Into Hard Copy

Even though you may be able to present evidence electronically at depositions and/or trial, you'll still want to convert it to paper form to preserve the evidence during litigation and for trial purposes in case your technology doesn't work. There are several ways to do this, remembering to use someone other than yourself to avoid having to testify to the conversion. Consider using a paralegal or tech expert who would make a good trial witness.

1. Save the information to the Cloud;

2. Print the relevant portions, making sure to include dates/times;

3. Send pictures of the evidence to an email, then print;

4. Take a screenshot of the information (i.e., from a smart phone; Facebook page,Instagram photos or text messages) and email it to your account then print.

II. Admitting Social Media Evidence at Trial

The two primary evidentiary hurdles in seeking to admit social media evidence at trial are authentication and hearsay.

A. Authentication

1. Posts/writings:[1] Authentication requires proof that a particular individual wrote the content, not just that it came from that person's social media account. Common ways to authenticate social media postings include:

a. Testimony from a witness, including the sender, the receiver, or an expert to testify about what s/he observed. In this context, an expert can include a police officer with training and experience regarding the specific social media outlet used. (*In re K.B.*

1. See Evidence Code sections 1413-1421

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Hearsay (continued from page 22)

(2015) 238 Cal.App.4th 989.) Whatever is on the website or app at the time the witness views it and is the subject of the testimony should be preserved in a form that can be presented in court.

b. Evidence of social media postings obtained from a phone, tablet or computer taken directly from the sender/receiver or found in the sender/receiver's possession.

c. Proof of chain of custody following the route of the message or post, coupled with testimony that the alleged sender had primary access to the computer where the message originated.

d. The content of the post refers to matters only the writer would know about.

e. Evidence that after the post was placed on social media, the writer took action consistent with the content of the post.The content of the post displays an image of the writer. (*People v. f. Valdez* (2011) 201 Cal.App.4th 1429.)

g. Other circumstantial evidence including that the observed posted images were later recovered from the suspect's cell phone and the suspect was wearing the same clothes and was in the same location that was depicted in the images. (*In re K.B.* (2015) 238 Cal.App.4th 989.)

h. Evidence that the security measures for the social media site such as passwords-protections for posting and deleting content suggest the owner of the page controls the posted material. (*People v. Valdez* (2011) 201 Cal.App.4th 1429.) In the majority of cases a variety of circumstantial evidence provides the key to establishing the authorship and authenticity of a computer.

2. Chat Room or Other Posts: Common ways to authenticate chat room or Internet relay chat (IRC) communications include:

a. Evidence that the sender used the screen name when participating in a chat room discussion. For example, evidence obtained from the Internet Service Provider that the screen name, and/or associated internet protocol (IP address) is assigned to the party or evidence circumstantially tying the party to a screen name or IP address.

b. Security measures such as password-protections for showing control of the account of the sender and excluding others from being able to use the account. (See generally, *People v. Valdez* (2011) 201 Cal.App.4th 1429.)

c. The sender takes action consistent with the content of the communication.

d. The content of the communication identifies the sender or refers to matters that only the writer would know about.

e. The alleged sender possesses information given to the user of the screen name (contact information or other communications given to the user of the screen name).

f. Evidence discovered on the alleged sender's computer reflects that the user of the computer used the screen name. (See, *U.S. v. Tank* (9th Cir. 2000) 200 F.3d 627.)

g. Party testified that he owned account on which search warrant had been executed, that he had conversed with several victims online, and that he owned cellphone containing photographs of victims, personal information that defendant confirmed on stand was consistent with personal details interspersed throughout online conversations, and third-party service provider (Facebook) provided certificate attesting to chat logs' maintenance by its automated system. (*U.S. v. Browne* (3d Cir. Aug.25, 2016) 2016 WL 4473226, at 6.)

3. Photos: While photos can be amazing evidence, you need to be able to prove not just when the photo was *posted*, but when it was *taken*. Consider other circumstantial evidence as well, including that the observed posted images were later recovered from the suspect's cell phone and the suspect was wearing the same clothes and was in the same location that was depicted in the images. (*In re K.B.* (2015) 238 Cal.App.4th 989.)

Consider: What if you want to oppose the introduction into evidence of a photo of a car running a red light from a traffic camera? See, *People v. Goldsmith,* (2014) 59 Cal.4th 258, 259 (holding that

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Hearsay (continued from page 23)

in the absence of contrary evidence, automatically generated red light camera images are presumed to be authentic).

4. Authenticating the Data Inside the Data: Metadata. If the digital evidence contains "metadata" (data about the data such as when the document was created or last accessed, or when and where a photo was taken) proponents will need to address the metadata separately and prepare an additional foundation for it. Here's where your expert earns their keep.

B. Hearsay and Its Exceptions: Examples Found on Social Media

Hearsay is defined in Evidence Code section 1200 as follows:

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

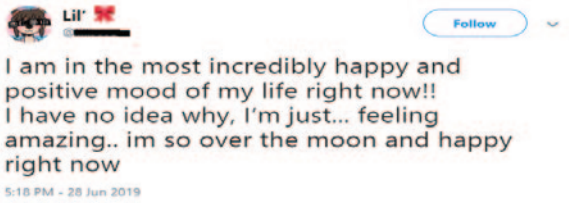
It's been said that the hearsay exceptions often swallow the rule, but the following are some examples of exceptions which may apply to evidence from social media sites.

1. "Excited Utterance/Spontaneous Declaration (Evid. Code 1240, FRE 803(2). A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." And . . .

2. "Contemporaneous Declaration/Present Sense Impression (Evid. Code 1241, FRE 803(1)**.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."

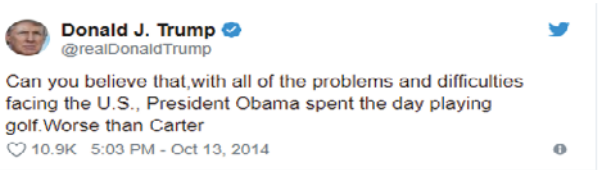
The post with the four "OMGs" shown below is a good example of both.

3. "Then-Existing Mental, Emotional, or Physical Condition, or State of Mind (Evid Code 1250,1252, FRE 803(3). A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)." The state of mind of a party or witness is a common issue in many legal matters. [See, *Gordon v. T.G.R. Logistics, Inc.* (D. Wy. May 10, 2017) (Court orders production of entire Facebook Account history as relevant to mental and emotional state of Plaintiff)]. Example:



Arguably the most compelling social media evidence stems from the propensity of folks to self-incriminate on Twitter or elsewhere, otherwise known as a . . .

4. Statement Against Interest (Evid Code 1230, FRE 804(b)(3) or a *Prior Inconsistent Statement* (Evid. Code 1235, FRE 801(d)(1)(A). This takes multiple forms, including flat out admissions of liability, or previous statements that contradict or otherwise impugn the integrity of a declarant. For instance:



C. Use of Expert Witnesses

What happens when expert witnesses rely on hearsay? The Supreme Court addressed this issue a few years ago in *People v. Sanchez* (2016) 63 Cal. 4th 665.

1. Experts cannot rely on hearsay to provide "case specific" facts.

2. The hearsay statements must first be independently proven by competent evidence or covered by a hearsay exception.

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Hearsay (continued from page 24)

3. The key distinction is "between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception."

4. Query: Can a doctor rely on the content of medical records authored by someone else? Can a real estate valuation expert rely on "comparable" sale information from MLS or similar sources?

D. Some Case Law

In summary, social media provides a great source of evidence that now seems to play a part in every case. It also tends to fall under evidentiary hearsay exceptions, unlike many other forms of out of court statements.

Social Media Cases:

• *People* v. *Beckley* (2010) 185 Cal.App.4th 509, 510 (holding that a Myspace image should have been barred for lack of authenticating evidence).

• *People* v. *Valdez* (2011) 201 Cal.App.4th 1429, 1438 (Defendant's social media page as circumstantial evidence of gang involvement; holding that a Myspace picture was sufficiently authenticated because of messages addressed to the defendant on the page and the page being password protected).

• *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, 855 (ruling that the court can compel a juror to disclose Facebook posts made during jury service).

• *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1027–1028 (a text message is a writing within the meaning of Evidence Code section 250, which may not be admitted in evidence without being authenticated).

III. Making Hearsay Objections: Practical Considerations

Pre-trial examination of the potential issues that may arise in presenting hearsay evidence at trial, or preventing the admission of hearsay at trial, is necessary and extremely effective, but issues not anticipated can always arise at trial.

A. Recognizing what is hearsay, and is it relevant or admissible?

Hearsay defined (a review):

1. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. EC§ 1200(a)

2. Except as provided by law, hearsay evidence is inadmissible. EC§ 1200(b)

B. How to challenge hearsay evidence?

For the rule on cross-examination of a hearsay declarant, see EC§ 1203:

1. The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

2. This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776 , or (3) a witness who has testified in the action concerning the subject matter of the statement.

3. This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

4. A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

C. To object or not to object, that is the question!

And you must have an answer, usually on very short notice. Consider whether it's more important to be correct on the law, or to appear unmoved by the evidence, especially if you think your objection will be overruled. (See section (F) below.)

Once you decide to object, don't delay. The timeliness of the objection is crucial to the Court's ruling on the objection and preservation of issues for a

(Continued on next page)

Hearsay (continued from page 25)

possible appeal. Failure to object is a waiver of the issue for motions for new trial and appeal (except for possible issues of Inadequate Assistance of Counsel).

D. Planning ahead

What is the proper objection, and what should your response be to the Court to provide a basis for your objection? And you should have more than one answer ready to go if the judge doesn't like your first one (that's advice from Judge Andy Wick)!

E. Sources for Hearsay Rules and Guidance

CEB is your friend: Every trial attorney should have in their library, and read, the California Evidence Code and the CEB publication California Trial Objections. These two sources should be consulted whenever questions regarding evidentiary questions arise. The CEB book is great for specific objections, citing case law and giving guidance and practice tips. Sections 1940-1945 give great insight into misconceptions about the hearsay rule, a checklist for hearsay problems, alternatives to objecting and hints on "stating the objection."

Hearsay evidence is covered in California Evidence Code in Sections 1200-1390. Especially helpful are sections 1220-1390, defining the exceptions to the hearsay rule.

F. Consider the effect of your objections on the trier of fact and the effectiveness of your objections.

Ask yourself: Will jurors perceive that you are trying to prevent information they might want to hear? How will they view your attempt if your objection is overruled and the jury hears the evidence anyway?

Consider how to perfect your objection, once you decide to make one. Stay with it; there may be times when a number of objections must be made, after the Court overrules your objection and the question is re-phrased. If you object to a certain question, the objection is overruled and the question is restated differently, it is a new question and must be objected to preserve the issue for appeal.

IV. General Evidentiary and Other Considerations for Appeal

Keep in mind here that the three basic functions of an Appellate Court are: a. Error Correction; b. Law Development; and c. Doing Justice. Your appeal should address at least one of these.

A. When to consider the issues which may present the need for an appeal.

1. From the very outset of your case, you should be identifying potential evidentiary issues and be sure to know the proper ways to preserve them for appeal, should the court rule against you at trial.

2. Be keenly aware of the impact of discovery orders you receive along the way and when and how they may be part of your appeal or should be addressed through a writ (see discussion below on writs).

3. Consider a potential appeal from an order resulting from a terminating motion; be sure to obtain a ruling on the objections you made to evidence. REMEMBER:The ***order*** granting summary judgement is not appealable and is not final until a final judgment is entered. Appeal from the judgment.

4. Ruling on a motion in limine; beware of trial court denying the motion in a non-final way. Rulings must be final to be appealable.

5. Consider the following in creating an appellate strategy:

Fundamentally, be sure you'll be able to raise the issue at trial: There are both substantive and procedural reasons for recognizing the possibility of appeal as part of the litigation strategy from the inception of the lawsuit. One of the most important steps for an attorney to take is to ensure that those issues which he or she thinks may be significant on appeal are raised in the trial court. Appellate courts will generally not consider issues not raised in the trial court.

What is your goal in filing the appeal? Your objective should be looked at from both the broader standpoint of the ultimate object of the litigation and the narrower one of the precise judgement from which the appeal is to be taken.

The Golden Rule of Appellate Practice: Thou shall not sandbag the trial court or opposing counsel. This means to preserve error, an attorney must

(Continued on next page)

Hearsay (continued from page 26)

make an adequate record: This may take the form of an objection or other comment to the trial court, on the record, of the specific problem no matter how insignificant the problem may appear at the time. This rule prevents a party from trying a case on one theory and then disavowing that theory on appeal.

B. Know the difference between a Writ and an Appeal.

General Overview and Prefiling Considerations (The quoted portions below are from a publication from the California Courts of Appeal, found at *https://www.courts.ca.gov/documents/4DCA-Div1-Handout-on-Writs.pdf*):

> "A writ is a directive from [the appellate] court to a trial court, an administrative agency, or a person to do something or to stop doing something. Unlike appeals, which are heard as a matter of right, writ petitions are generally heard as a matter of discretion, and they are governed by equitable principles.
>
> "Appellate courts generally grant writ relief only when the petitioner (1) has no other plain, speedy and adequate remedy in the ordinary course of law; and (2) will suffer irreparable injury if such relief is not granted. If the order, judgment or decision you intend to challenge is directly appealable, you are considered to have an adequate remedy in the ordinary course of law unless you can show extraordinary circumstances (e.g., a need for immediate relief). Check Code of Civil Procedure section 904.1 to see what orders and judgments are directly appealable; for rulings not covered by that section, you may also wish to look at the cases dealing with the ruling in question to see if the issue was resolved by an appellate opinion or a writ opinion.
>
> "The irreparable injury requirement is more difficult to define. It is not established by the mere facts that the challenged ruling is wrong and because of it you will have to spend time and money on unnecessary further litigation. Loss of money damages generally also is not considered irreparable injury. The threatened destruction of one's home or business may constitute irreparable injury, although the threatened foreclosure of unimproved commercial property may not. An order directing release of privileged information, disclosure of attorney work product, or invasion of a protected privacy interest ordinarily will qualify as irreparable injury. You need to judge the circumstances and the severity of the consequences to determine whether you are likely to qualify for extraordinary writ relief."
>
> (*Author's Note: See the publication listed above for more detail on the types of writs available, the time limits for them, the required content of the writ, and other procedural and substantive information*.)

The availability of the extraordinary writ in an appellate court for review of a lower court action must be examined in the context of the final judgement rule. The principal of appealability is that the judgement or order must be final to be appealable. Underlying this rule is judicial economy. The issues in the writ will be:

- *Are there no other adequate means, such as direct appeal, to attain the relief desired?*
- *Will the petitioner be damaged or prejudiced in a way not correctable on appeal?*
- *Was the trial court's order erroneous as a matter of law?*
- *Does the trial court's order raise new and important problems, or issues of law of first impression?*

NOTE: Discovery orders may be addressed via writ: Ordinarily, a trial judge's orders on discovery are not reviewable until after final judgment because of their interlocutory nature. However, if the pretrial order involves potential irreparable injury (e.g. damage from a compelled disclosure of privileged information), the writ should be issued.

By Brian J. Purtill

Brian J. Purtill practiced civil litigation from 1984 to 2018. He has been a mediator with Arbitration and Mediation Center in Santa Rosa since 1996, and since August of 2018 has served as the Dean at Empire College School of Law

Hearsay & Other Pertinent Objections During the Time of Covid —Self-Study MCLE Credit Questions

HOW TO RECEIVE ONE HOUR OF SELF-STUDY MCLE CREDIT IN GENERAL LAW

Below is a part multiple choice, part true/false quiz. ***Submit your answers to questions 1-20, indicating the correct letter next to questions 1–11, and T or F next to questions 12 – 20, identify the name of the article and issue (Hearsay, Fall 2021 Bar Journal) 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

MULTIPLE CHOICE

1. A proper method to use for the authentication of social media documents which were found on the opposing party's webpage/account is:

A: That party's Responses to a Request for Admissions
B: That party's answers in oral Deposition
C: A letter from the opposing attorney agreeing that the documents were found on the opposing party's website.
D: A only
E: A and B

2. The two primary evidentiary hurdles in seeking to admit social media evidence at trial are:

A: Authentication and hearsay.
B: Authentication and best evidence rule.
C: Relevancy and foundational requirements
D: Best evidence rule and hearsay.

3. Common ways to authenticate social media postings include:

A: Testimony from a witness to testify about what s/he observed.
B: Evidence of social media postings obtained from a device taken directly from the sender/receiver or found in the sender/receiver's possession.
C: The content of the post refers to matters only the writer would know about.
D: All of the above.
E: None of the above.

4. Adam was sitting at an outside café on a busy street corner while on vacation in Italy, sipping his cappuccino, eating his pastry, and reading a book, when he saw a car run a red light and cut another car off such that the other car ran off the road and crashed. As he was sipping, he turned to his iPhone and texted to his buddy: "Crazy! I just saw this jerk run a red light and run a guy off the road." He then turned back to his breakfast and his novel. Evidence of his text at the trial of the red-light runner was admissible as:

A: An excited utterance
B: A contemporaneous declaration
C: A dining declaration
D: Both A and B above.
E: None of the above; it was inadmissible hearsay

5. Courts have held that text messages are not within the definition of a writing contained in Evidence Code section 250 because:

A: They don't fit any of the terms in the statute
B: They are rarely grammatically correct
C: They are temporary and can be deleted with ease
D: They did not exist when Evidence Code Section 250 was written or last amended
E: None of the above; texts are indeed within the definition of a writing in section 250.

6. Electronic evidence which was created prior to trial is considered hearsay if:

A: It is evidence of a statement made by someone other than a witness during the trial
B: It is something containing what others have heard and/or said outside the trial
C: It is a statement offered for the truth of the matter asserted
D: All of the above
E: C only
F: A and C

7. When it appears the opposing counsel is attempting to introduce hearsay evidence, the best approach taken in response should be:

A: Object if there are legal grounds for doing so
B: Object if you want to interrupt opposing counsel's flow, even if you're wrong on the law
C: Consider whether the court will overrule your objection before deciding whether it's worth making, even if you think it's technically correct
D: Assess the value of the evidence for appeal purposes before objecting
E: A and C
F: A, C and D
G: C and D

Hearsay & Other Pertinent Objections During the Time of Covid —Self-Study MCLE Credit Questions

8. When a statement has been admitted as hearsay evidence, the person who made the statement (the declarant) may be called and examined by any adverse party as if under cross-examination concerning the statement unless which of the following is true:

A: The declarant is a party
B: The declarant is a person identified with a party within the meaning of subdivision (d) of Evidence Code Section 776
C: The declarant is already at a party instead of at the trial
D: The declarant has already testified in the action concerning the subject matter of the statement
E: A and B
F: A and D
G: A, B, and D

9. Once you've identified inadmissible hearsay evidence you believe will be introduced by your opponent to which you intend to object, you should:

A: Raise the objection in a written motion in limine prior to trial
B: Object at trial when the question is asked or the evidence is offered
C: Hold off objecting at the time of the testimony for fear of alienating the jury and raise the issue with the judge at the end of that day of trial outside the jury's presence
D: None of the above
E: All of the above
F: A and B only

10. You should first start assessing your case for possible evidentiary appealable issues at which of the following times:

A: After you've taken the opponent's deposition
B: After your first client intake interview
C: After you have received the other side's documents in response to your first discovery requests
D: After the trial court's ruling on your first discovery dispute

11. Before an expert may rely on hearsay testimony, which of the following must occur:

A: The hearsay statements must first be independently proven by competent evidence or covered by a hearsay exception.
B: The hearsay statements must relate only to 'case specific facts'
C: The expert must have been the author of the hearsay document from which he or she is testifying
D: The expert must not have ever failed to qualify as an expert witness in any other case.
E: A and B
F: B and C

TRUE OR FALSE

12. To properly authenticate information found on social media, you need only prove that the information came from a particular individual's account.

13. It is never appropriate for a witness to testify about what s/he saw, heard or observed on a social media platform, regardless of the circumstances, as such testimony is inadmissible hearsay.

14. One way to authenticate social media evidence is to prove that it refers to matters that are only within the knowledge of the writer/owner of the app upon which it appears.

15. Evidence of the conduct of the social media account owner which occurred after the post in question was entered onto the site is inadmissible to authenticate that post as subsequent post-liability conduct.

16. It is accepted practice for the trial attorney to have saved the electronic evidence on his or her own laptop and print it out later for use in evidence.

17. A police office can never testify as a witness regarding the specific social media outlet used by another.

18. Hearsay evidence is any testimony or evidence that refers to what someone else said, and is any testimony which starts out by the witness saying: "I heard him say . . ."

19. All rulings by the trial court on motions in limine are properly the subject of an appeal.

20. Writ petitions are akin to injunctive relief in that they require a showing of irreparable harm and proof that there is no other adequate remedy, such as an appeal, to correct the trial court's error.

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SONOMA COUNTY BAR ASSOCIATION
111 Santa Rosa Avenue, Suite 222, Santa Rosa, CA 95404-4945
(707) 542-1190 x100 • Fax (707) 542-1195
www.sonomacountybar.org • info@sonomacountybar.org

Dedication of cornerstone for Santa Rosa Carnegie Library
April 13, 1903

Photo courtesy Sonoma County Library

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