SONOMA COUNTY BAR ASSOCIATION THE BAR JOURNAL

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By David Berry, President, SCBA

President's Message: Could My Late Father Help with DEI Now?

My dad, Bob Berry, died on March 16, 2020. To the outside world, Bob Berry was a successful, heterosexual, white male with an MBA from Harvard and an impressive resumé. He worked until just months before passing at

80 years of age. I never heard him use the phrase, "diversity, equity and inclusion." I have often wondered to what extent my dad consciously pursued diversity, equity, and inclusion, or whether those values were simply hard-wired into his being. Regardless, the lessons he practiced in life, and instilled in his children, apply to Sonoma County's DEI efforts today. Please bear with me. On a level, this is a eulogy to my dad. He deserves it.

To my sisters and me, he was an amazing—and annoying—dad. He was very active and caring. However, he did not hover and he did not fix our problems. He taught lessons and waited. Sometimes we learned quickly. Sometimes he had to watch us fail before we suc-

= In This Issue =

ceeded. He was patient. He talked to us—even as children—like we had insight and the ability to improve. He expected us to figure life out (with thoughtful and gentle guidance). He was our hero. My sisters and I often talk about how much we miss him.

Dad and I had our last meaningful conversation when he was dying. I sat across from him at his house, sadly watching him read the New York Times. My hero was a shell of himself. He looked up at me and, in his weakened condition, handed me the paper. He asked me to read the article he had just finished—about sources of conflict in the Middle East. I complied. Then we talked. There I was, with my dying dad, talking about something that had nothing (but everything?) to do with his death and my life.

Though I never would have asked, I believe his point was simple: keep your aim high and your perspective broad. Maybe you can change the world, if you focus and apply yourself. I think of this conversation often, and hold it close to my heart. As he stood at death's door, Dad offered no tangible words of advice, nor did he reflect or express sorrow. He trusted that I didn't need platitudes. He invited me to think deeply. He believed good people ultimately do right. He often told my sisters and me (particularly when we were depressed or in some "crisis"): "Everything always works out for the best, as long as you try your best."

Dad's application of DEI in his life can teach us a lesson. He was in business; he built and managed teams for a living. He was great at it. He always built diverse teams, because he knew that different personalities, life experiences, and viewpoints made their work better. He talked to my sisters and me about his failures, struggles, and successes. I vividly remember a story in the early 1980s about pushback he got for hiring a black woman for an important job when we lived in Houston, Texas. I was about 12 years old at the time (I am not kidding). I remember his massive pride in her success. I could tell that same story with different folks he hired through time. To him, those hires weren't about filling a quota or feeling pressured into trying to right a wrong. He knew that diversity, equity, and inclusion made the team stronger. That is one facet of my dad. (Continued on page 10)

From the Editors: Sonoma County Superior Court Judicial Appointment Delays Have Become Critical

n light of continuing delays and limitation on access to justice due to ongoing vacancies at the Sonoma County Superior

Court, we reprint, with the approval of Editorial Director Jim Sweeney, the Press Democrat June 16, 2022 editorial entitled "Help Wanted at the Courthouse." Please consider applying for appointment or election to the Bench, and encourage others to do so. [Bar Journal Editor notes are in brackets in the body of the article.]

-William Adams, Bar Journal Editor

"Sonoma County will have two new Superior Court judges once the votes are counted from last week's election. While court Commissioner Laura Passaglia-McCarthy won a judgeship in a landslide, attorneys Oscar Pardo and Joe Passalacqua are separated by about 1,300 votes in a contest that may not be decided until the last ballot is tabulated. [Pardo was elected.]

Yet even as two courthouse vacancies will soon be filled, three judicial seats will remain open, one more local judge is retiring next month, and yet another is on a temporary assignment to the state Court of Appeal, which also is short-handed.

Between retirements and temporary assignments, Presiding Judge Shelly Averill said Sonoma County currently has six openings on a court that at full strength has just 20 judges. As a result, the early felony case resolution department is closed, and the domestic violence court was consolidated with a felony trial department.

Unfilled judgeships mean longer waits for people with business before the court or extra work for already busy judges—or, more likely, both.

In 2018, the most recent year for which statistics are posted, 63,622 cases were filed in Sonoma County—misdemeanors, felonies, civil lawsuits, divorces, conservatorships and evictions, among others.

California assigns retired judges to help short-handed courts, but Averill said they are often unavailable because "many courts are experiencing the same judicial shortage that we are experiencing."

The fix is simple and straightforward: Gov. Gavin Newsom needs to hurry up and appoint some judges in Sonoma County. These positions are authorized and budgeted, awaiting only a gubernatorial appointment.

In California, the vast majority of Superior Court judges are appointed by the governor. They serve six-year terms and are subject to electoral challenges. But it's rare for anyone to run against an incumbent judge. This year's elections in Sonoma County occurred because Judges Virginia Marcoida and Gary Nadler didn't file for reelection. Marcoida retired in February, and Nadler will step down in September.

Judges Nancy Case Shaffer, Barbara Phelan and Jamie Thistlethwaite retired last year, and their seats remain open. Judge Arthur Wick retires in July.

Judicial appointments are political opportunities for any governor. Newsom has used his to increase the percentage of women and minorities on the bench. He also nominated the first Latina and gay justices on the state Supreme Court. Adding judges with diverse backgrounds and experiences to the bench is important, and Newsom deserves credit for making it a priority. But it's also important to ensure that courts are staffed to handle cases in a timely matter.

Governors need to do their homework, but they have able appointments staffs and advisory councils to help them find able judges in a timely manner. Leaving seats open for as long as Newsom has—one Sonoma County judgeship has been vacant for 17 months—impedes the administration of justice. Adding to the backlog, courts postponed hundreds of cases, especially trials, to limit exposure to COVID.

Sonoma County isn't alone. The latest report from the state Judicial Council shows 95 vacancies statewide—about 6% of Superior Court judgeships. Newsom, meanwhile, asked for 23 new judgeships in the state budget for 2022-23. Sonoma County has hundreds of knowledgeable and experienced lawyers. Surely, the governor can find four who are ready and willing to sit on the bench."

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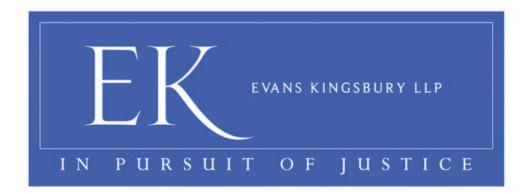
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Hon. Arthur A. Wick Retires from Bench

July 31, 2022, after serving 16 years as a Superior Court Judge in Sonoma County. But don't say goodbye. From the moment he and his family moved to Windsor in Sonoma County in 1985, Andy has been a dynamo of family, professional, and civic life in our community, and that is not likely to change.

Professional Life

During his tenure as a trial court judge, Andy served during the 2011-2013 years as Presiding Judge of the Appellate Division of the Sonoma County Superior Court, and during the 2012-2014 years as Supervising Judge of the Civil Division of the Superior Court. In 2019, by appointment of the Chief Justice of the State Supreme Court, Andy served as a judge in a Justice Pro

Tem assignment on the First District Court of Appeal. During his stint on the First District, Judge Wick authored several published opinions for the First District, one of which is now cited by the Rutter Group "Civil Procedure Before Trial" publication as controlling authority on a point of law.

Andy's "law career" began in 1974 when he served as a sworn deputy in the Los Angeles County Sheriffs' Department. He held that

position until 1980. While working as a deputy sheriff, Andy first obtained a Bachelor of Science degree in Administration of Justice from CSU, Long Beach (1976) and then a law degree from Northrop University School of Law (1980), all while working full-time.

Andy's first job as an attorney was with the law firm of Gilbert, Kelly, Crowley, and Jennett in Los Angeles. In a column limited to no more than 1800 words it is not possible to retell Andy's experience as a young attorney sitting in on depositions and reviewing millions of exhibits related to the fire that destroyed the first version of the MGM Grand Casino in Las Vegas, resulting in 85 deaths. Suffice it to say that a Google search of the cause of that fire demonstrates the different levels of learning experience for a young trial attorney. The case settled for \$1.2 billion.

In 1985, Andy and Kate and their then young children moved to Sonoma County and settled in Windsor. Shortly thereafter, Andy became a partner in the trial firm of Boyd, Murray, and Wick. Andy remained a part-

ner with that firm until 1995, when he joined School and College Legal Services of California (SCLS), a joint powers authority duly established under provisions of the state Government Code. While with SCLS Andy was the chief litigation attorney for well over 200 public school and community college districts throughout California. In that role he litigated an alphabet of school-related cases from agricultural easements to zoning. In one particularly difficult and high-profile college case in Humboldt County, the SCLS General Counsel told Andy, "If the jury goes the wrong way on this case, don't come back." As insensitive as that comment was, it immediately became the "good luck" salutation before every subsequent trial. (Yes, he won that trial.)

Pam Brown, Andy's longtime litigation secretary at

SCLS, remembers Andy this way: "Andy always treated me with kindness and respect. Numerous times over the years he included me in discussions about his cases and always made me feel like I was an asset to him and the firm. I have admired and respected Andy for 33 years and I am honored to call him a friend."

Mary Jane Burke, long-term Marin County Superintendent of Schools, who at the

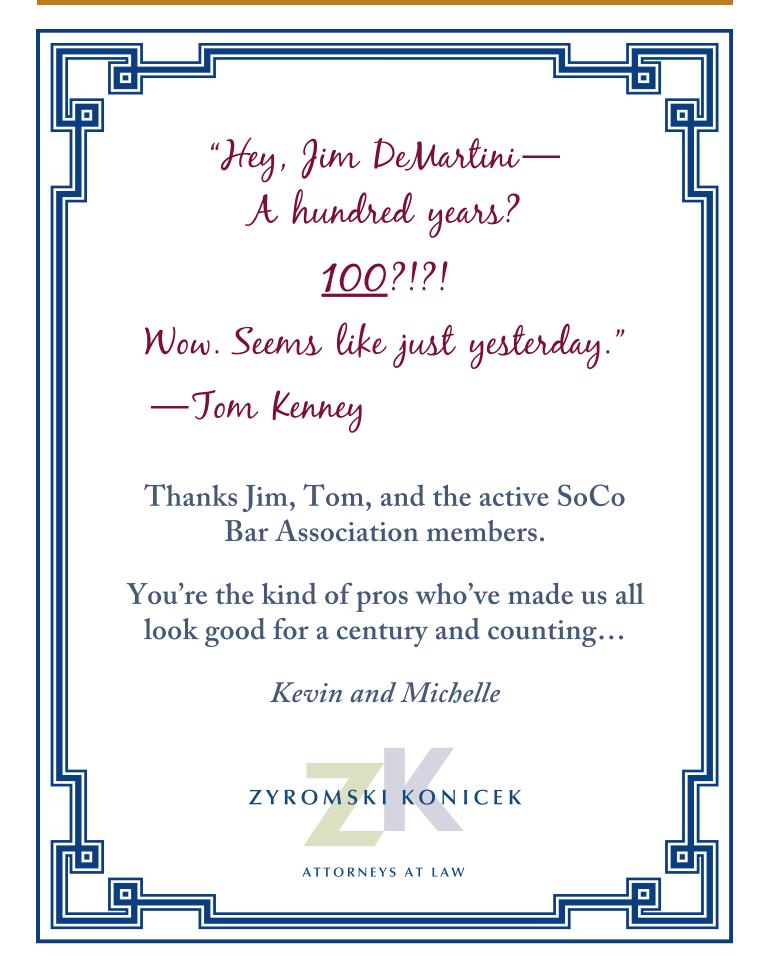
time of Andy's employment with SCLS served as chair of the governing board of SCLS, described Andy's service with SCLS as: "Successful litigator yes, but also trusted advisor, educator, author, citizen, and friend."

In 2002, Andy was elected President of the Sonoma County Bar Association, after having served in several other leadership assignments for the SCBA.

When the governing board of SCLS learned that Andy was under serious consideration for an appointment to the Superior Court by then Governor Schwarzenegger, it made him an offer it felt he couldn't refuse, which included a salary 50% higher than the salary of a superior court judge. It should be noted that no animal was harmed in the making of the offer. To the disappointment of SCLS and over 200 public school clients, Andy declined the SCLS offer and accepted the appointment from the Governor.

After his appointment in 2006 to the Sonoma County (Continued on page 8)





Hon. Arthur A. Wick Retires from Bench (continued from page 6)

Superior Court, Andy served in a number of judicially-related assignments both in Sonoma County and statewide, including three years on the board of directors of the California Judges' Association, president of the California Judges' Foundation, 15 years on the Committee for Judicial Education and Research (appointed by the Chief Justice), and on the Sonoma County Law Library and Jury Service Committees.

Well-known Sonoma County trial attorney Steve Gallenson offers: "I always enjoyed trying cases before Judge Wick. He had an excellent understanding of the legal issues we presented to him and his rulings reflected a very measured approach to the law. I appreciated his dry sense of humor, and his willingness to make difficult and sometimes unconventional decisions."

Jenny Jackson, Andy's long-term court clerk, describes working with Judge Wick as follows: "Judge Arthur Wick led a courtroom environment where we all felt like a team. He was fair, precise, and thoughtful in all of his decisions. When I first started clerking for him, he told me to always come to him with any questions. I would come to find this to be one of the most valuable things about our working relationship—the ability to achieve clarification without judgment or criticism. He facilitated a collaborative working environment under his leadership. His guidance, patience and optimism made me a better clerk. I am fortunate to have worked with him." Andy adds, "That feeling was mutual."

Civic Involvement

Within the Windsor community it is well understood that neither the Town of Windsor nor the Windsor Unified School District would have existed as soon as they did without Andy's leadership and credibility. From 1986-1992 Andy chaired the Citizens for Windsor, an organization that directly led to incorporation of the Town of Windsor. He also chaired the other key incorporation committees and conducted all negotiations concerning incorporation with the County Board of Supervisors. From 1990-1992 he served as co-chair of the Committee to Create the Windsor Unified School District; that effort led to the creation of the Windsor Unified School District. He then chaired the bond committee for the district; that effort successfully raised \$28.5 million, a figure then matched by the State of California.

Upon the creation of the Town of Windsor, Andy served as the chairman of the Town's first Planning Commission, a position he held for 18 months. Several years ago, in recognition of his service to the Town of Windsor, Andy was given the honorary title of Duke of Windsor. He then served as Grand Marshal (Duke) in its Windsor Days Parade.

Family & Home Pursuits

Andy and wife Kate have been married for 44 years. Kate Wick taught 2nd and 3rd grade for the Windsor Unified School District until her retirement in 2017. Kate and Andy have two children. Son Daniel is a registered nurse who did vital work on the Covid ward of a local hospital during the worse years of the pandemic. Daughter Emily has followed in her father's footsteps and is a practicing attorney and real estate broker here in Sonoma County. Andy and Kate have 4 grandchildren to whom they devote as much attention as the parents allow.

The Wicks are avid outdoor enthusiasts and quite frequently can be found enjoying the various local and state parks in the Sonoma County area.

Andy has always been a strong swimmer and in recent years he can be found swimming 60-80 laps at any of several pools here in Sonoma County. If you run into him, go ahead and ask Andy to demonstrate how he became known to certain grandchildren as "Cannonball Andy." At 6 feet 4 inches, with a wingspan to match, Andy can displace a lot of water.

No mention of the personal life of the Wick family is complete without mentioning their second home on the Kona Coast of the Big Island of Hawaii. Travel promoters love to describe certain ocean-front property as a "stone's throw to the surf." Andy and Kate's Kona home would more accurately be described as a "stone's drop" to the surf. When you add 365 days a year of spectacular sunsets you can understand why the Wicks plan on spending much of their "retirement years" at their Kona home.

Personally...

No tribute to Andy could be compete without making reference to his personal attributes, of which there are many: hard-working; fair-minded; proper demeanor appropriate to the circumstance; respect for opposing

Hon. Arthur A. Wick Retires from Bench (continued from page 8)

points of view; strength of conviction; a delightful sense of humor; and a loyal friend.

As noted above, don't say goodbye to Andy Wick. His personal and professional accomplishments more than adequately demonstrate that his body of work is not yet done. Well, if we can't say goodbye to Andy what can we say? Let's start with the obvious: How should we refer to Andy now that he has retired? "His former Honor" seems a bit pregnant with pejorative connotations. But, "the formerly Honorable" is even worse. Given that Section 10 of Article 1 of the US Constitution provides that "No State shall ... grant any Title of Nobility," and given the historical focus of the current SCOTUS, can we safely assume that 250 years of practice is sufficient to confer a lifetime of honor on someone who served a mere 16 years of service as a trial court judge? One can assume that "The Honorable Arthur A. Wick, Ret."

should be sufficient. But, in the age of the Google generations, a search will provide that the first reference to "ret" is to the soaking of hemp fibers which, for anyone familiar with Andy, knows how utterly ridiculous that would be. The second Google reference to "ret" is to a medical term meaning "rearranged during transfection," whatever that means. If you expect an answer to the question of how to refer to Andy in his retirement years recall what they told us in law school: "the law is not an answer; it is a tool to get the answer your client needs." With that behind us, and in the right context, "Cannonball Andy" seems a fitting salutation. "

By Robert (Bob) Henry

Robert Henry has been an Attorney at Law since 1971. He earned his law degree from UC Berkeley School of Law, and was the 2006 Sonoma County Bar Association Career of Distinction Award Recipient.

A FAREWELL MESSAGE FROM JUDGE WICK

To the Sonoma County Bar President, the Bar Board and to all attorneys:

After more than 45 years in a courtroom, it is time for me to retire. On reflection, I believe I managed to enjoy and complete a host of personal goals as both an attorney and as a judge, including spear-heading the creation of the Town of Windsor, co-chairing the committee to create the Windsor Unified School District, chairing the successful bond campaign to raise \$28.5 million for the Windsor Unified School District, serving as the president of the Sonoma County Bar Association, serving as the supervising judge of our Civil Division, sitting on the executive board of the California Judges' Association, serving as president of the California Judges' Foundation, sitting on the First District Court of Appeal, and serving alongside each of my colleagues for the past 16 years in our court.

I cannot thank my staff enough for all the years of faithful assistance in the courtroom and behind the scenes. My clerks, judicial assistants, and research attorneys have always worked tirelessly and their work has always been stellar. Their combined work efforts have always been sincerely appreciated.

Also, I wish to thank all the attorneys with whom I have worked and all those who have appeared before me throughout the years. I have bragged about our bar association and its fine members numerous times while traveling throughout California teaching judges about the importance of working relationships between their bench and their bar associations.

My last day with the court [was] July 29, 2022. I wish each of you the very best in all future endeavors. Thank you for your trust and thank you for allowing me the pleasure of working with you and your clients for so many years; I have enjoyed every minute.

Sincerely yours, Judge Andy Wick

President's Message (continued from page 3)

He taught me by example a credo I now try to model in my life and work: Diversity, equity, and inclusion are sound foundational principles for our society. They not only ensure each of us a place at the table but also provide the broad perspectives that make our work better.

Here is the Yoda part of my dad. He did not expect folks to *immediately* understand or accept his views. He often taught by example, and then sat back and watched. He would never tell me that my view was wrong. Instead, he presented me with examples of why his perspective was valid and worthy of my consideration. He loved the saying, "You can lead a horse to water, but you can't make it drink." His point was always the same: You will do the right thing when the time is right. I believe in you. When you believe, you will apply yourself. Until then, you may wallow. If so, I will watch non-judgmentally and not provide much if any advice (unless you ask).

From my perspective, Sonoma County needs a Bob Berry moment. Most of us have been taught about diversity, equity, and inclusion. We have the data, but have yet to deliver meaningful change. If we choose to believe it, we *could* understand that seeking and relying





on different personalities, life experiences, and view-points will improve the delivery of justice. We are the metaphorical horse. It is time to drink the water, by including our entire diverse community in equitably delivering justice. We all belong here. Together.

SCBA Welcomes Our New Fall 2022 Members!

Samantha Carranza, Law Student Gregory Clark, Law Offices of Gregory Clark Gregory Fairbrother, Gregory P. Fairbrother Danielle Garduno, Law Student Jasmin Hernandez Du Bois, Law Student Maurice Javier, Law Offices of Maurice M Javier Kelly Leonhardt, Krankemann Law Offices, P.C. Sean Lerche, Law Student Patrick McDonell, Legal Aid of Sonoma County Terry Motschenbacher, Bay To Valley Brokers Glenn Nunes, Quaeritur Vincere Law, P.C. Sarah Ragan, Law Student J. Mario Rosso, Law Student Jennafer Sarmiento, Law Student Chelsea Stickney, Carroll Law Sandra Sutton, Law Student Jill Updyke, Law Student Lydia Waters, Law Student Alexander Wiegel, Perry, Johnson, Anderson Miller & Moskowitz, LLP Angela Yakou, Law Student

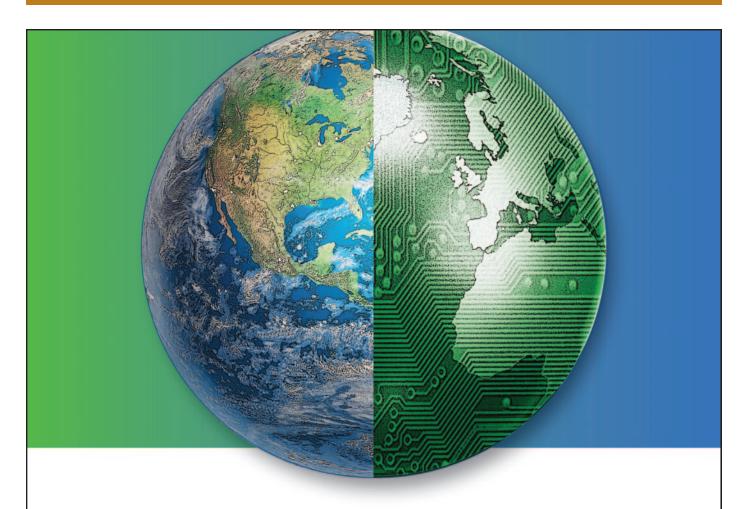


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The Bench-Bar Retreat: From Inception to a Call for Action

Imost 20 years ago to the day, I instituted the A inaugural Bench Bar Retreat as president of the Sonoma County Bar Association. It was apparent that a healthier and more diverse method of communication was needed between our bench and local bar association. This led me to propose the creation of a "bench bar retreat" to address these significant issues. I went to Judge Tansil, our supervising civil judge, seeking his approval of the bench bar retreat concept. He was in complete agreement, provided "we reach across the apparent lines of separation within our local bar association to address the bar as a whole." According to most judges and attorneys who attended the event the first year, our Bench Bar Retreat was a complete success and was well-attended by a representative cross-section of our legal community.

During the ensuing 20 years, the depth and breadth of the communications between our bench and bar continued. The Sonoma County Bar Association and its members have been friends and supporters of the Bench here in Sonoma County for dozens of years. Now, two decades later, we find ourselves in grave need of additional communication across lines that divide us, such that a new focus for the Bench Bar Retreat is now warranted.

While I was sitting at the First District Court of Appeal on assignment by the Chief Justice of the Supreme Court, I was impressed with renewed force of the urgent and critical need to reach across racial and economic inequalities in our country and in our county. This epiphany came to me because of two major

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Home: 707-778-0282 • Bait Shop: 707-875-3344 Email: mizsea@aol.com factors: the continuous viewing of national and local news on these topics; and the sheer weight of the realization that I was "sitting in for" one of the more insightful and progressive thinkers of our time in the California judicial system. I was sitting in the chambers of Associate Justice Martin Jenkins.

Consequently, I penned a letter to the former justice, then retired, who was serving as Governor Newsom's Senior Judicial Appointments Advisor, asking him for an opportunity to meet personally with him to discuss and address the critical issues of race, diversity, equity, and inclusion. A few months later my request was granted, and I met privately with Justice Jenkins. We candidly discussed our acknowledged need and joint desire to address the compelling issues of race, diversity, equity, and inclusion as those issues continue to confront us here in Sonoma County and across our great state. He listened patiently and expressed support for the ideals and our efforts to address the crucial issues of race, diversity, equity, and inclusion here in Sonoma County.

Later, at a Bench Bar Retreat, while race, equity, and inclusion issues were being discussed among attendees, I openly remarked, "It's time we stopped looking back over our shoulders and asking, "How is it going back there?" We need to assess precisely how we approach and address our local race and diversity issues and how we confront and correct the quandary we now find ourselves facing here in our legal system.

In December of last year, the SCBA president-elect called me and asked if I would be interested in planning this year's retreat, with a heightened focus on race, diversity, equity, and inclusion. I related the story above and offered to broker a solution to our identified concerns. I did nothing more than ask this year's potential panelists if they had an interest in assisting us with our critical situation. The responses were unanimous, direct, and overwhelming: "Yes! When and where?"

Now, with dozens of hours and multiple planning meetings behind us, our BBR planning committee has devised a unique, promising, and intriguing event, highlighting the following individuals: **FALL 2022** 13

The Bench-Bar Retreat: From Inception (continued from page 12) to a Call for Action

- California Supreme Court Associate Justice Martin J. Jenkins:
- California Court of Appeal, First Appellate District, Division Five, Presiding Justice Teri L. Jackson;
- California Court of Appeal, Fourth Appellate District, Division Two, Associate Justice Marsha G. Slough; and
- Santa Clara Superior Court Judge Erica R. Yew

These individuals were selected based on their stellar personal qualities of character and brilliance, and each individual's ability to articulate the precise issues and possible answers to the critical issues involving race, diversity, equity, and inclusion we face daily in our personal and professional lives. (Please take the time to peruse their individual resumes; you will be astonished.)

This year's Bench Bar Retreat promises to be the most significant event of its type in this state to date. The title of this event is Diversity, Equity, Inclusion and Belonging. The Retreat is scheduled for Friday, October 7th. It will be memorable and, perhaps, even moving as a call to action. I

Hon. Arthur A. Wick, (Ret.)

Judge Wick served as a superior court judge for 16+ years. He presided over hundreds of court and jury trials, both civil and criminal. During his tenure he served on assignment at the First District Court of Appeal. He served as the president of the Sonoma County Bar Association in 2002. After 45+ years in a courtroom, Judge Wick retired from the bench effective July 31, 2022.



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Jade and Nico: Where Family Law, Estate Planning and Probate Law Came Together

ade and Nico, in their early forties, had been living together for several years in Jade's home when they decided to buy a vacation home together in joint tenancy. Both were frugal and had amassed considerable savings and retirement accounts with the thought of retiring by age sixty to their beautiful vacation home at Hidden Lake. Jade's total assets were about twice as valuable as Nico's.

As they celebrated their forty-fifth birthdays together, they decided it was time to get married. Both agreed that they should have a prenuptial agreement and retained family lawyers. The prenuptial agreement provided for most of their assets and income to stay separate, with the option of creating community property by agreement or creating or acquiring jointly titled accounts or assets. The agreement provided that Nico would be able to stay in Jade's home should Jade predecease Nico, with the length of the residency depending on the length of their marriage. Their lawyers said they should waive their statutory rights related to probate since they were doing a prenuptial agreement. Jade and Nico didn't know what the statutory rights really meant but it seemed to make sense. The lawyers told Jade and Nico they should consult their estate planning lawyers after their marriage.

#1. Possible problem—Jade's Trust and Their Prenuptial Agreement Are Not Consistent

Jade's sister needed financial assistance from time to time because of health issues and Jade was committed to helping her as long as needed. The trust Jade created before the marriage provided that in the event of their death, Jade's residence would be transferred to Jade's sister. Jade did not change this trust in the first five years of her marriage to Nico.

If Jade dies before amending the trust, the prenuptial agreement would be enforceable by Nico because it is a contract. Jade's sister would receive the remainder interest in the property pursuant to the terms of the Trust.

California Probate Code sections 140-147 address the contractual arrangements relating to rights at death which can be waived, whether signed before or during the marriage. Such a waiver must be in writing, signed by

the surviving spouse, and is enforceable against the surviving spouse subject to the same defenses as enforcement of contract, except that lack of consideration is not a defense. (Prob. Code, § 142, subd. (c)(1).) In the event of Jade's death, Nico's waiver would likely be effective. So Nico would not be able to request rights under section 141(a), including a probate family allowance, a probate homestead, the right to set aside exempt property, and other rights that might have been meaningful. However, Probate Code section 144 gives the Court broad, equitable discretion to enforce or not enforce the waiver based on the facts and circumstances.

Four and a half years later, Jade and Nico finally got around to estate planning. They decided that they loved each other so much that they wanted to create a joint trust using the same lawyer. They explained to the lawyer that even though their prenuptial agreement kept their property mostly separate, they had decided that on their fifth anniversary, their gift to each other would be to pool all of their assets and income as jointly owned property, except for a few family heirlooms that each would own individually. The trust the lawyer created stated that all their property was community, including a specific list of community assets, except for another list of their respective separate property. The lawyer explained that community property was a taxadvantaged way to hold their assets, so congratulated them on taking that step. The attorney advised them to change the titles on their real properties to the trust. Jade transferred title to the house to the trust but they never got around to transferring the title to the vacation home (it was already jointly owned so not a priority.)

#2. Massive problem—Their Separate Property Was Not Properly Transmuted to Community Property

Family Code section 852 states: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." The provisions in their trust concerning community property do not meet this test.

In Marriage of Holtemann (2008) 166 Cal. App. 4th 1166, the court concluded that characterizing separate

Jade and Nico: Where Family Law, (continued from page 14) Estate Planning and Probate Law Came Together

property transferred to a trust as "community property" is insufficient to effectuate a transmutation of the property in the absence of "language which expressly states that the characterization or ownership of the property is being changed." (*Id.*, at p. 1169, quoting *Estate of MacDonald* (1990) 51 Cal.3d 262, 272.)

This rule applies even if their intent was to transmute the property per Estate of MacDonald (referencing the predecessor statute to Section 852.): "We are aware that § 5110.730(a), construed as we have construed it today, may preclude the finding of a transmutation in some cases, where some extrinsic evidence of an intent to transmute exists. But, as previously discussed, it is just such reliance on extrinsic evidence for the proof of transmutations which the Legislature intended to eliminate in enacting the writing requirement of § 5110.730 (a)." (Estate of MacDonald, supra, at p. 273.) Jade and Nico's trust, or a separate transmutation agreement, should have specifically stated that each of them was changing the character of their separate property to community property.

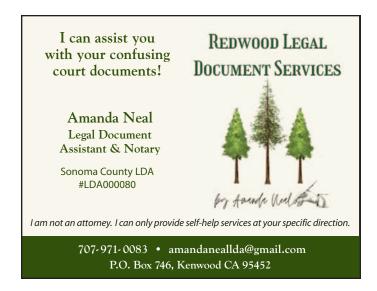
Further, because of their marriage, they have fiduciary duties to each other which results in a presumption of undue influence if a transaction between them results in a favorable gain, benefit, or profit to one of them. The presumption applies here since Jade's assets were worth twice as much as Nico's, and Nico therefore benefited from the transmutation. If the transmutation is challenged, Nico will have to show that the agreement

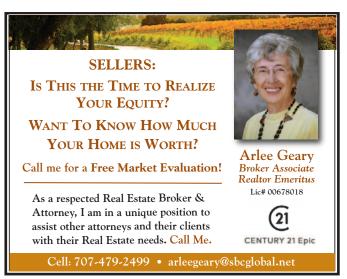
was "freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect." (*In re Marriage of Delaney* (2003) 111 Cal.App.4th 991, 996. 1000.)

The better practice is for each party to have their own counsel to advise them and include provisions in their postnuptial agreement that describe the impact on the value of each of their separate and community estates of the transmutation as well as any other facts that show the *Delaney* test was met.

#3. Further Problem—A Right to Reimbursement Was Not Waived

Even if the transmutation had been done properly, there is another potential landmine in the event of a divorce. Per Family Code section 2640, a spouse who contributes separate property to the acquisition of community property is entitled to reimbursement of the amount contributed at the time of a divorce unless there is a written waiver of that right. Jade and Nico's trust did not include a waiver, so if they divorced, each would be entitled to reimbursement of the value of the separate property transmuted to community property at the time the trust was established, even if their intent was to gift it to each other. (In re Marriage of Carpenter (2002) 100 Cal.App.4th 424.) So if Nico and Jade divorce, each will be reimbursed for the value of their separate property at the time the postnuptial (Continued on page 16)





Jade and Nico: Where Family Law, (continued from page 15) Estate Planning and Probate Law Came Together

agreement was signed. Unfortunately for Nico (and the malpractice carrier for Nico's attorney), Jade's residence had appreciated considerably between the time they married and the time the transmutation agreement was signed, so Jade's right of reimbursement was now triple the amount of Nico's right.

Unfortunately, their love for each other was eclipsed by Nico's love for someone else, and Nico filed for divorce just before their tenth anniversary. Not surprisingly, Jade was not too happy about this turn of events. Jade was worried about her sister and wanted to make sure she would be provided for in the event of Jade's death. Jade's family law attorney told Jade that the Automatic Temporary Restraining Orders ("ATROs") restricted what was possible during a divorce, but that the trust could be revoked and the vacation property could be converted from a joint tenancy to a tenancy in common. The attorney offered to do these steps and refer Jade to an estate planning attorney to create a new trust. The attorney drafted a statement revoking the trust, helped Jade prepare a holographic will, and kept the originals in the file to have on hand in the event of Jade's death. The attorney also prepared and recorded a deed transferring the vacation property from joint tenancy to tenancy in common.

#4. Deathly Problem—Filing a notice and serving it on the other party are required!

If Jade dies during the divorce, Jade's wishes will likely not be carried out because Jade's actions violated the ATROs applicable while a divorce is pending (Family Code section 2040, subdivision (b)(2) effective on Petitioner when filed and on Respondent when served.) Family Code section 2040(b)(2) allows a party to revoke a trust, but only with written consent of the other party or after "notice of the change is filed and served on the other party." Jade's attorney did neither of these. Thus, the trust is still in effect.

Family Code section 2040, subdivision (b)(3) allows a party to eliminate a right of survivorship, but in the absence of written consent, again only after "notice of the change is filed and served on the other party." Jade's attorney did neither of these. Thus, the title of the Hidden Lake property is still in joint tenancy.

#5. Additional Deathly Problem—Trust Not Properly Revoked

Even if the proper notice was given to Nico, the trust was not properly revoked. The trust described a process for revocation, which required personally serving a notarized copy of the revocation to Nico, which was not done.

Probate Code section 15401, subdivision (a) sets out two alternative methods for the revocation of a trust. Under the first method, a trust may be revoked by "compliance with any method of revocation provided in the trust instrument." Under the second method, a trust may be revoked in "a writing, other than a will, signed by the settlor...and delivered to the trustee during the lifetime of the settlor." But, if "the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation," that method must be used. (Cundall v. Mitchell-Clyde (2020) 51 Cal.App.5th 571, 581, 584.)

However, there is a split in authority in the California courts regarding whether a method specified in a trust is the exclusive means of revocation if not explicitly designated as such. At this time, the First, Third, and Fifth Districts have all adopted a restrictive approach, while the Fourth District has adopted a more lenient view. The Supreme Court has granted review in *Haggerty v. Thornton* (2021) 68 Cal.App.5th 1003 and *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511. Until the Supreme Court renders its decisions, it is most prudent to closely follow the procedure specified in the trust instrument.

Fortunately, Jade had decided to consult with an estate planning attorney to create an individual trust. That attorney saw that the trust with Nico had not been properly revoked and corrected that error. The attorney created a trust for Jade but told Jade to wait to transfer assets into it until Jade knew what they would be getting in the divorce (since creation of an unfunded trust during a divorce is permissible under Family Code section 2040, subdivision (b)(4).) However, the attorney also recommended that Jade change the beneficiary on their 401(k) as soon as possible, which is a violation of Family Code section 2040, subdivision (b)(2).

In anger from the betrayal, Jade mentioned to the

Jade and Nico—Self-Study MCLE Credit

attorney that Nico should be killed before the divorce went through so Jade could keep all the property. Fortunately, the attorney advised Jade about the "slayer" statutes (Probate Code §§ sections 250-253) that would mean not only would Jade be in prison but Jade would not be entitled to any of Nico's property.

With the assistance of their lawyers and a mediator, Jade and Nico reached an agreement on all issues and have updated estate plans.

By Catherine Conner & Audrey Gerard

Catherine Conner is a founding partner of Conner, Lawrence, Rodney, Olhiser & Barrett, LLP, practicing family law consensual dispute resolution.

Audrey Gerard is a partner at Conner, Lawrence, Rodney, Olhiser & Barrett LLP whose practice is focused on Estate, Trust and Financial Elder Abuse litigation and Estate Planning.

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- 1. Spouses are allowed to waive their rights at the death of their spouse, but only in a writing signed after the marriage.
- 2. Even if a surviving spouse signed a waiver of rights of death, the court can equitably decide not to enforce it.
- 3. If parties to a prenuptial agreement are keeping their assets and income separate, it is always advisable to waive their rights at the death of their spouse.
- 4. An asset owned prior to marriage is transmuted from separate to community if a trust states all property is community and lists the asset on a community property exhibit.
- 5. For an effective transmutation, there must be language which expressly states that the characterization or ownership of the property is being changed.
- 6. If there is proof that a spouse intended to make a gift to their spouse when placing separate property in a trust, then an express statement that the character or ownership is being changed is not required.
- 7. If separate property is properly transmuted to community property by agreement when creating a family trust, during a divorce the spouse who owned the separate property is entitled to reimbursement of the value of the property at the time of the transmutation unless there was an express written waiver of such right.
- 8. If there is proof that a transmutation of separate property to community was intended as a gift from one spouse to the other, there is no right to reimbursement in a divorce.
- 9. If a transmutation from separate to community, or vice versa, benefits one party, there is a presumption of undue influence.
- 10. When there is a presumption of undue influence, the party seeking enforcement of the transaction must show that it was made freely and voluntarily, with full knowledge of all the facts, and with a complete understanding of the effect.

- 11. Although not required, the best practice is for both parties to be represented for any significant spousal transmutation agreement.
- 12. As soon as a Petition for Dissolution is filed, Automatic Temporary Restraining Orders are in effect prohibiting either spouse from engaging in any transaction that affects the other spouse's financial interests.
- 13. While a divorce is pending, a trust can only be revoked after filing a notice of the change and serving it on the other party.
- 14. While a divorce is pending, a joint tenancy may only be severed after filing a notice of the change and serving it on the other party.
- 15. The restrictions on changing a beneficiary during a divorce don't apply to 401(k) plans because they are governed by ERISA, a federal law.
- 16. A trust can be created during a divorce but cannot be funded while the divorce is pending except with the consent of the other party.
- 17. A trust can always be effectively revoked by a writing, other than a will, signed by the settlor and delivered to the trustee during the lifetime of the settlor.
- 18. If a trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the alternative method described in the Probate Code is not sufficient.
- 19. The issue of whether a method specified in a trust is the exclusive means of revocation if not explicitly designated as such is pending in the California Supreme Court.
- 20. One who feloniously and intentionally kills another cannot receive any of their victim's property, including as a designated beneficiary, by intestacy, or by right of survivorship.



Legal Tech-nicalities: The Ethics of Legal Technology and Remote Work

Legal Tech-nicalities is an ongoing column written by Eric G. Young, Esq.¹ The column's aim is to provide you with useful tips for using technology more effectively in your life and practice.

The State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC) recently issued Formal Opinion Interim No. 20-0004.² The opinion is based on a common scenario these days. A law firm would like its attorneys and legal staff to continue working remotely while the firm downsizes to smaller facilities. The question posed is broad: "What are a California lawyer's ethical duties when working remotely in response to the COVID-19 pandemic or another

disaster situation?" The answers provided are expansive and create significant (and sometimes unrealistic) standards for legal professionals. This article discusses the ethical issues involved in remote work, what the new ethics opinion recommends, and how its recommendations will affect our work.³

Setting the Stage

In 2020, the COVID-19 pandemic ushered in an new workplace paradigm for the legal profession—"remote work." Prior to the pandemic, only 17% of all full-time employees in the U.S. worked remotely. However, when public officials across the nation issued "shelter-in-place" orders, law firms that traditionally scorned "alternative" working arrangements were forced to pivot to remote work.

- 1. Mr. Young is the principal legal tech geek at Young Law Group, a personal injury law firm in Santa Rosa. Questions or comments about the column, or suggestions for an upcoming article, may be directed to Mr. Young at admin@younglawca.com.
- 2. State Bar of California Standing Committee on Professional Responsibility and Conduct. Formal Opinion Interim No. 20-0004. August 12, 2021. https://bit.ly/3FzAiMl.
- 3. As of July 18, 2022, Formal Interim Opinion No. 20-0004 remained out for public comment.

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Legal Tech-nicalities: The Ethics of Legal (continued from page 18) Technology and Remote Work

By April 2020, the number of full-time, remote workers in the U.S. soared to 83%. Although this number has subsequently decreased with the lifting of pandemic-related restrictions, the number of remote workers still sits at a respectable 45% overall.⁴

Among legal professionals, the numbers are even more striking. According to a study conducted by MyCase, a leading case management software provider, 53% of legal professionals reported that their firms would permit lawyers and law firm staff to work remotely full-time once their offices fully reopened. Nearly three-quarters (70%) of respondents shared that their firms would allow attorneys and staff to work remotely part-time after reopening.⁵

To the legal profession's credit, law firms adapted quickly. Of course, this rapid shift could not have occurred without the advances in legal technology that have occurred over the past ten years. Think how devastating the pandemic would have been for law firms if we had been unable to work in the cloud or conduct Zoom videoconferences.

What About Legal Ethics?

This dramatic, workplace transformation has not escaped the eye of bar association ethics committees. An early shot across the bow came on April 10, 2020 from the Pennsylvania Bar Association in Formal Opinion 2020-300.6 This detailed opinion provides (Continued on page 20)

- 4. Saad, Lydia and Wigert, Ben, Ph.D. "Remote Work Persisting and Trending Permanent." Gallup. October 13, 2021. https://bit.ly/3yxLeIH; Jones, Jeffery M. "U.S. Remote Workdays Have Doubled During Pandemic." Gallup. August 31, 2020. https://bit.ly/3Ph5uEC.
- 5. "2021 Legal Industry Report." MyCase.com. https://www.mycase.com/guides/industry-report/.
- Pennsylvania Formal Opinion 2020-300: Ethical Obligations for Lawyers Working Remotely. https://bit.ly/3RD9rV8.

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Brian J. Purtill has been with AMC since 1996.

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Background: Mr. Purtill has been a civil litigator in Sonoma County with O'Brien Watters & Davis and Tarkington O'Connor & O'Neill. He was a partner in Purtill & Bryan for 7 years, followed by 2 years in his own office. He spent 10 years as "Of Counsel" to Spaulding McCullough & Tansil LLP. In 2018, Mr. Purtill became Dean of Empire College School of Law, where he previously taught Civil Procedure and Professional Responsibility.

Contrary to the popular belief that a good settlement leaves the parties equally disgruntled, the best settlements are those with which all are reasonably pleased." - Brian J. Purtill



Philip H. Kelly has been with AMC since 1997.

Areas of mediation expertise include:

Employment disputes, personal injury, bad faith claims and construction defect, real estate and partnership disputes. Member of Association of Conflict Resolution and Northern California Mediation Association.

Background: Mr. Kelly was associated with Senneff Kelly PC from 1979 until 2000, then formed his current litigation and mediation practice. He is a member of the American Board of Trial Advocates, past President of the Redwood Empire Trial Lawyers Association, and Sonoma County Legal Aid Foundation. He served as Judge Pro Tem in Sonoma County and as a neutral for the U.S. District Court. Mr. Kelly has tried over 40 jury and more than 50 court trials.

Mediation is a win-win proposition. When you combine motivated parties with a skilled and trained mediator, success is virtually assured." - Philip H. Kelly

Legal Tech-nicalities: The Ethics of Legal (continued from page 19) Technology and Remote Work

guidance on "best practices" related to remote legal work, including the requirement that lawyers use encrypted emails when communicating with clients. The opinion also remarks that lawyers' ethical responsibilities continue regardless of any public health crisis or remote work arrangements.

Other state ethics committees soon followed suit, including Wisconsin,⁷ Delaware,⁸ and New Jersey,⁹ to name just a few. The American Bar Association has also joined in, issuing a many recent articles and opinions related to remote work.¹⁰ While each writing addresses slightly different scenarios or circumstances, a single, consistent thread emerges: The rules of professional conduct apply in times of crisis and to legal staff who work remotely.

California Weighs In

California did not join the discussion until August 12, 2021, when COPRAC issued Formal Opinion Interim No. 20-0004. The opinion is detailed on the topic of remote work, particularly as it relates to the ethical use of technology. The opinion concludes:

"Lawyers may ethically practice remotely under the California Rules of Professional Conduct and the State Bar Act, provided they continue to comply with these rules, including the duties of confidentiality, competence, communication, and supervision. Lawyers should implement reasonable measures to ensure compliance that are tailored to the relevant circumstances and remote working environment."¹¹ Unfortunately, the broad scope of this conclusion, and its underlying requirements and recommendations, are not always buttressed by concrete suggestions for compliance. For example, the opinion allows law firms to use third-party cloud or other technology vendors to store or backup confidential client files, provided the firm does the following:

- Investigates and monitors third-party vendors;
- · Limits access to confidential information; and
- Obtains written assurances from the provider concerning data security and breaches of confidentiality.

Moreover, if a lawyer is unable to evaluate the security of the technology, the lawyer must:

- · Seek additional information, or
- Consult with someone who possesses the requisite knowledge.¹²

These requirements are fine as far as they go. But, how can a lawyer "monitor" a third-party vendor like Clio or Dropbox? Is familiarizing oneself with the vendor's Terms of Use and Privacy Policy on its website a sufficient "written assurance," or is something more required? The opinion does not specify.

How can legal professionals limit a vendor's access to confidential information? It may surprise some to learn that certain cloud vendors, Dropbox among them, expressly require access to user data to enable technical support, marketing, and other less-well-specified reasons."¹³ In most instances, users have no

- 7. Wisconsin Formal Ethics Opinion EF-21-02: Working remotely. January 29, 2021. https://bit.ly/3kZ8eIE.
- 8. Delaware State Bar Association Committee on Professional Ethics Formal Opinion 2021-1. July 9, 2021. https://bit.ly/38mjzjk.
- 9. Committee on the Unauthorized Practice of Law/Advisory Committee On Professional Ethics Opinion 742. October 6, 2021. https://bit.ly/3M4MbMw.
- 10. Tepper, Roberta. "Ethics in the Time of COVID." American Bar Association. January 1, 2021. https://bit.ly/38foS49. [survey-

ing Model Rules implicated by pandemic]. See also, Clair, Alanna. "Ethical Issues Working from Home: How to Protect Confidentiality in an At-Home Practice." American Bar Association. February 18, 2022. https://bit.ly/3w2moz8; Austin, John S. "Lawyers' Ethical Obligation to Plan for Disasters (and Some Resources to Help You Do It)." American Bar Association. April 5, 2022. https://bit.ly/3w4rQkR.

- 11. Formal Opinion Interim No. 20-0004, p. 8.
- 12. Formal Opinion Interim No. 20-0004, p. 2
- 13. Privacy Policy. Dropbox.com. https://www.dropbox.com/privacy.

Legal Tech-nicalities: The Ethics of Legal (continued from page 20) Technology and Remote Work

idea such company policies exist, and even if they do, users have no control over the vendor's access other than not using the vendor at all.

Similarly, the opinion reiterates that lawyers have a duty of "technology competence," which is subject to a "reasonable efforts standard" and a "fact-specific approach." However, the opinion fails to define these phrases. In fact, the committee goes out of its way not to define these phrases, which may leave many legal professionals baffled.

Interestingly, the opinion links the duty of competence to lawyers' obligation to ensure they possess the "mental, emotional, and physical ability reasonably necessary for the performance" of legal services.¹⁵

According to the committee, these qualities may be compromised during "pandemics and other disasters." ¹⁶ However, "the duty to render competent legal services is generally not excused under these circumstances." ¹⁷

Regarding the duty of communication, the opinion makes reasonable suggestions, such as:

- Consulting with appropriate technology or IT professionals when implementing software or other technology solutions to facilitate remote work;
- Ensuring that client communications are best suited for the clients' particular needs; and

(Continued on page 22)

- 14. Formal Opinion Interim No. 20-0004, p. 3
- 15. Rules of Prof. Conduct, Rule 1.1(b)(ii).

- 16. Formal Opinion Interim No. 20-0004, p. 4.
- 17. Ibid.

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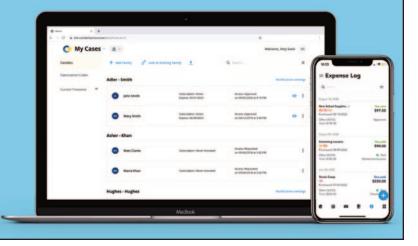
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Legal Tech-nicalities: The Ethics of Legal (continued from page 21) Technology and Remote Work

 Conferring with clients during emergencies to ensure clients have sufficient time to review important documents

The discussion about the duty of supervision is where the opinion sweeps most broadly. In addition to requiring basic steps, such as ensuring access to adequate technology to conduct remote work, the opinion states that law firms that allow (or require) staff to use their personal devices for work should implement "Bring Your Own Device" ("BYOD") policies that preserve client and firm confidentiality on employees' personal devices.¹⁸

The opinion falls short of stating that the policy must be in writing, but it seems clear that is what the committee contemplated. According to the opinion, such BYOD policies should include security measures such as password protection, use of anti-virus software, encryption, prohibition against copying confidential files, and creating a separate server for sensitive data.

Most significant, however, is the suggestion that BYOD policies "should include employees' consent to remote locking or wiping in the event of security breach, theft, loss of device, or employee departure." ¹⁹ The opinion is silent on whether this policy also extends to contract workers. However, other parts of the opinion include contract workers.

While there are a number of software solutions available to achieve this goal, requiring employees to consent to a complete wipe of their personal devices implicates privacy and personal property concerns. If the duty of supervision stretches this far, why not suggest law firms implement the use of "tattleware?"

18. Formal Opinion Interim No. 20-0004, p. 6.

19. Ibid.



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Legal Tech-nicalities: The Ethics of Legal (continued from page 22) Technology and Remote Work

Tattleware is the colloquial term for software designed to give bosses and managers a literal view into what staff members are doing when working from home, including everything from keystroke loggers to random screenshots of a staff members' computer screens.

In fairness to the committee, Formal Opinion Interim No. 20-0004 contains solid requirements and many helpful suggestions. The opinion would be more useful, however, if it addressed ways to comply, and if it had discussed the interplay between technology and issues such as employee privacy and autonomy.

Conclusion

Ethics opinions uniformly acknowledge the central role technology plays in allowing law firms to offer remote work arrangements. The approaches taken to this "new normal" way of working differ from one jurisdiction to the next. Nevertheless, absent some extensive modifications to Formal Opinion Interim No. 20-0004, California lawyers can relax knowing we may practice law both remotely and ethically. Moreover, we can—and should—take advantage of the many benefits legal technology offers in delivering legal services. However, we must take steps to ensure competence (including technological competence), protect confidentiality, communicate regularly and in a manner suited to the particular client, and supervise remote staff—even during pandemics or some other disaster or crisis.



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Can a Paralegal Do That?

Any attorneys accomplish their work with the help of a paralegal. However, there's not much instruction in law school or in practice regarding what a paralegal is permitted to do and how to best leverage the work of a paralegal into improved firm efficiency and profitability. This article addresses what tasks can and cannot be delegated to a paralegal and best practices for effective delegation.

First, what is a paralegal? Business and Professions Code section 6450 ("Section 6450") defines a paralegal as "...a person who holds himself or herself out to be a paralegal, who is qualified by education, training, or work experience, who either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity, and who performs substantial legal work under the direction and supervision of an active member of the State Bar of California, as defined in Section 6060, or an attorney practicing law in the federal courts of this state, that has been specifically delegated by the attorney to him or her." (Id. at subd. (a)) Section 6450 mandates a paralegal must have at least one of three specified degrees or certifications and satisfy continuing legal education requirements every two years. (Id. at subds. (c) & (d).)

The American Bar Association definition is nearly identical to California's statute: "A paralegal is a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible." The National Association of Legal Assistants likewise recognizes that paralegals "have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney."

Some paralegals also hold advanced certifications beyond the statutory requirements and have expertise in specific areas of law, such as e-discovery, family law, and contract management. Paralegal certification was discussed in Kim Davis's article in the Spring 2022 issue of the *Bar Journal*.

Now, what can a paralegal do—or, more importantly, what can't a paralegal do? Section 6450 mandates a paralegal may not do any of the following:

- (1) Provide legal advice.
- (2) Represent a client in court.
- (3) Select, explain, draft, or recommend the use of any legal document to or for any person other than the attorney who directs and supervises the paralegal.
- (4) Act as a runner or capper, as defined in Sections 6151 and 6152.
- (5) Engage in conduct that constitutes the unlawful practice of law.
- (6) Contract with, or be employed by, a natural person other than an attorney to perform paralegal services.
- (7) In connection with providing paralegal services, induce a person to make an investment, purchase a financial product or service, or enter a transaction from which income or profit, or both, purportedly may be derived.
- (8) Establish the fees to charge a client for the services the paralegal performs, which shall be established by the attorney who supervises the paralegal's work. This paragraph does not apply to fees charged by a paralegal in a contract to provide paralegal services to an attorney, law firm, corporation, governmental agency, or other entity as provided in subdivision (a). (Id. at subd. (b).)

Knowing what a paralegal is not permitted to do is arguably more important than knowing what tasks a paralegal is permitted to tackle—at least, malpractice carriers would contend as much. Paralegals can't appear in court, not even to request a continuance of

^{1.} American Bar Association, Current ABA Definition of Paralegal, https://www.americanbar.org/groups/paralegals/profession-information/current_aba_definition_of_legal_assistant_paralegal/

^{2.} National Association of Legal Assistants, NALA Code of Ethics and Professional Responsibility, https://nala.org/certification/nala-code-ethics-and-professional-responsibility/

Can a Paralegal Do That? (continued from page 24)

a hearing because their attorney is unavailable.³ Nor may they sign their name to pleadings filed with the court, or establish a new attorney-client relationship for someone with an emergency legal need when the supervising attorney is out of the office.⁴ It's crucial to ensure that attempts to increase efficiency and profitability through the use of a paralegal do not cross into forbidden territory.

Having established what a paralegal cannot do, we next address what tasks a paralegal should not be assigned for the sake of effective use of resources. A common stumbling block in the quest for increased efficiency is assigning work to a paralegal that can properly be accomplished by administrative and/or

3. National Association of Legal Assistants, NALA Code Ethics and Professional Responsibility, Canon 3, https://nala.org/certification/nala-code-ethics-and-professional-responsibility/

4. Ibid.

secretarial support staff. Such tasks include but are not limited to: serving and filing papers with the court, formatting and proofreading documents, calendaring deadlines, scheduling meetings, hearings, and depositions, relaying communications to clients, and similar tasks.

In a busy law practice, it's easy to simply dump all delegable tasks on the desk of a trusted paralegal and walk away. However, pausing for a moment to reflect on the best use of time for each member of the team and assigning tasks through that lens is likely to result in a more efficient use of resources overall. That moment of pause can be invaluable with regard to cost-effectiveness and efficiency. The aforementioned tasks are critical to a law practice's operations. In offices which employ both paralegals and administrative/secretarial staff, these tasks should be entrusted to staff well-versed in performing such functions.

Having addressed what paralegals cannot do and (Continued on page 26)



Can a Paralegal Do That? (continued from page 25)

should not do, what tasks is a paralegal permitted to perform?

Section 6450 again provides an answer: "Tasks performed by a paralegal include, but are not limited to, case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is permitted by statute, court rule, or administrative rule or regulation." (Id. at sub. (a)). Additional tasks that can be performed by paralegals include drafting discovery motions, preparing deposition outlines, preparing witnesses for deposition, and drafting contracts.5 Virtually any legal function that isn't expressly prohibited by subdivision (b) could be done by a paralegal.

Many lawyers may be surprised by the tasks set forth above - and it's likely because they are not utilizing their paralegals to the full extent of their capabilities. Lawyers may tend to delegate to paralegals the same narrow range of tasks for each case-even while their own deadlines loom. While routine billable work such as summarizing records and drafting discovery responses is an essential part of a paralegal's function, they can also step in for higher-level assignments that would otherwise be performed by an attorney. It will benefit lawyers to delegate challenging assignments to their paralegals. The task will be completed by the paralegal in a timely manner, while the lawyer is able to focus their time on other matters and review the paralegal's work once completed. Both bill for their time spent working on the respective tasks.

Areas where paralegals tend to be underutilized include preparing drafts of moving papers or oppositions to motions for attorney review, preparing outlines for depositions, assisting in voir dire at trial by

taking notes and analyzing information obtained from potential jurors, and even appearing on behalf of clients in administrative proceedings where allowed, such as before the Social Security Administration.⁶

These sort of "reach" assignments offer perhaps the best opportunity for a practice to re-tool for greater efficiency and profitability. By delegating such tasks to a paralegal rather than an attorney, it frees up counsel to attend to other duties. It also results in a cost savings for clients, who pay a lower hourly rate for work performed by a paralegal than by an attorney. Clients will also be pleased that timely progress is made on their legal matters and their cases moved forward. In turn, the practice gets more bang for the buck from its staff by way of delegating such work—and paralegals get a chance to showcase and expand their full skill set.

Newer lawyers may want to ask other lawyers in their practice, as well as staff, which team members typically perform specific legal functions. Likewise, seasoned practitioners may benefit—both in terms of their own workloads and financially—from determining whether adjustments can be made to their delegation style to ensure everyone on the team is performing at maximum efficiency.

By Sarah M. Lewers & Ellie Ehlert Sarah M. Lewers is an attorney at Abbey, Weitzenberg, Warren, and Emery PC. Ellie Ehlert is a paralegal at Perry, Johnson, Anderson, Miller, & Moskowitz, LLP.

Judge Gary Nadler to be recognized in Winter 2022 Bar Journal article

Hon. Gary Nadler stepped down from his distinguished tenure on the Superior Court of Sonoma County this year, then agreed to a 6 month assignment to the Court of Appeals, which will terminate at the end of this year.

Look for our the SCBA profile of his career in the Winter 2022 Bar Journal.

^{5.} What Paralegals Do (and What Lawyers Shouldn't Do?), https://cel.sfsu.edu/sites/default/files/documents/paralegal/pdf/What_Paralegals_Do1.pdf

^{6.} https://www.ssa.gov/OP_Home/hallex/I-01/I-1-1-2.html

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Submissions for the Bar Journal

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Dean's List: Report from Empire College School of Law

Going forward, the SCBA will feature this spot as a regular article. Brian Purtill, the Dean of Empire College School of Law, will report on the state of the school, students, staff, and faculty, as well as update readers on various developments in the law he finds entertaining. Happy reading!

Greetings, all! Here is the latest news from Empire College School of Law.

The Campus: The library is finished and ready for use! It will also double as a classroom for teaching Legal Research and other electives as needed. We try to accommodate SCBA members and their respective groups or sections by providing a day-time meeting room when possible, so contact me if you're in need.

The Students: Our last group of Introductory students are just finishing up and started their First-Year courses on August 29, 2022. Enrollment is now nearly 80 students, up more than 50% over the past four years, and we expect continued growth as the Monterey College branch gets underway in 2023. I'll keep you posted as the transition continues, but our students will see no interruption or changes to their education.

The Faculty: This Fall we added a new Business Organizations law professor, Santa Rosa attorney Irene Flack, to the faculty. We welcome Professor Flack, and at the same time, we thank Santa Rosa attorney Rob

Rutherford, who retired and created this opening, for his many years of dedication to our students.

Recent Cal. Supreme Court opinion for your consideration: Public School District Not Subject to the Unruh Act. In Brennon B. v. Superior Court of Contra Costa (Aug. 4, 2022, S266254) [2022 WL 3096272], the Court held, among other things, that the California Unruh Act, which prohibits discrimination in business establishments of all types, does not apply to public school districts. The unanimous opinion is a hefty 46 pages, providing detailed statutory interpretation and a discussion on Legislative intent. The Court discussed and distinguished many cases, including federal cases holding to the contrary, and noted that through "uncodified findings and declarations accompanying [another bill]," the California Legislature stated that the Unruh Act did apply to public schools. (Id. at p. *7, fn. 6.) Just the same, the Court held otherwise. It found the abovequoted reference added "little - or nothing - to [its] analysis" (see ibid.), which I suppose we should take as guidance: Legislative declarations of intent are only worth considering if they accompany the actual law they relate to, and even then, perhaps only if they are embodied in the statute itself. In any event, the Court's rationale can best be summarized by its benchmark for determining the application of the Act: the school district does not "act as a business or commercial enterprise when it discriminates." (See id., at p. *8.)

That's it for this issue! I hope to see you at the school; drop by any time. ¶

SCBA Fall '22 "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.

Robert Maddock is now with Teamsters Union Local No. 856 in Cloverdale . . . Liat Sadler is now with Kaye Moser Hierbaum Ford, LLP in San Francisco . . . Shafiq Spanos is now with Law Offices of James N. Eimers in Santa Rosa . . . Amanda Neal

is now with Carroll Law in Santa Rosa . . . FRIEDEMANN | GOLDBERG | WARGO | HESS LLP new address is 400 Aviation Blvd., Ste. 200 | Santa Rosa, CA 95403 . . . Kevin O'Connor moved his office to 703 2nd St., Ste. 11 in Santa Rosa.

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Shiloh Ranch Regional Park at Sunset, Windsor

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