Sonoma County Bar Association

THE BAR JOURNAL

Volume 71 Issue 4 Winter '23-'24

Crocker Creek—Winter in Alexander Valley

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By Nicole Jaffee, President, SCBA

President's Message: *Following in the Judges' Footsteps*

This message should have been written by Kinna Crocker as her outgoing President's Message and writing this on her behalf is bittersweet. As many of you already know, Judge Crocker was appointed as a judge for Sonoma County Superior Court and, therefore, had to end her presidency early. Because Jane Gaskell, vice-president of the Sonoma County Bar Association in 2023, was also appointed to the bench (are you seeing a trend here?), in a matter of months rather than years, I became the president of SCBA. I am ecstatic for the appointment of Judges Crocker and Gaskell and know they will be great assets to our court. I will also miss them.

Judges Crocker and Gaskell were key in advancing SCBA's mission of serving the legal profession and enhancing its professionalism, serving the Sonoma County community and supporting and improving the justice system. They were instrumental in advancing the focus that is near and dear to me: increasing diversity in the local legal community. I met Judge Crocker through the Diversity and Inclusion working group and she was integral during its transition into the Diversity Equity & Inclusion Section. Judge Crocker has kept DEI as a main focus of SCBA and I plan to continue that.

When I started practicing in Sonoma County in 2016, after growing up in San Francisco and starting my career in San Francisco and the East Bay, I immediately noticed that the legal community in Sonoma County did not reflect the community at large. I was happy to find that others, including Judges Crocker and Gaskell, shared that concern and a passion to make changes. Since then, under their leadership, SCBA has continued outreach efforts. Such efforts included the kickoff in 2023 of the DEI Section's Pipeline Pods Program, which connects a person from the legal community (mostly lawyers) with a law school student, a college student and a high school student for mentoring and assisting the students in their efforts to join the legal profession. They also helmed the Bench Bar Retreat that resulted in hands-on discussions and planning related to the various mentoring and pipeline programs in our community.

It is my honor to serve this legal community. I am grateful for the leadership of Judges Crocker and Gaskell and their mentoring and friendship. I look forward to furthering the trajectory of SCBA as a welcoming and supporting community of legal professionals from diverse backgrounds, experiences and practices. I hope that our seminars will get back to pre-COVID attendance and members will continue to enjoy our in-person events. I am excited about our upcoming year and building upon the legacy of those who came before.

In This Issue

From the Editors: *New Beginnings — "cherish these few specks of time"*

As you peruse this issue of the Bar Journal, we are turning the corner into the new year of 2024. I hope you enjoy the recap of the Careers of Distinction awards (after a COVID hiatus) and update on program opportunities coming out of the very enthusiastic and productive Bench Bar Retreat.

Congratulations to 2023 SCBA President Kinna Patel Crocker on her appointment to the Sonoma County Superior Court, as part of the continuing legacy of SCBA Presidents transitioning to the bench. Based on my review of SCBA lore, it has been more than 46 years since a sitting SCBA president was appointed to the bench, when then-SCBA President Alan Jaroslovsky was appointed as a federal bankruptcy judge for the Northern District of California in January 1987.

After a several years break due to COVID, the reprise of the SCBA Paralegal & Legal Support Section's ethics jeopardy MCLE event will take place on January 22, 2024. Please come join Grace de la Torre, Kate Muller, and yours truly for high-energy fun with audio adrenaline and pithy film clips. Also, on the horizon and visible from Highway 101 are the lights of the ongoing new courthouse construction at the County Administration Center, hopefully opening in 2025.

I have been thinking about the continuum of time in connection with life and our legal profession. Common law concepts such as statutes of limitation and Latin phrases connect time and the law. For example, we generally can't turn back time, but actions taken *nunc pro tunc* ("now for then") does exactly that by having filings or order apply retroactively to an earlier date. The importance of precedence and historical continuity are the key underpinning of the doctrine of *stare decisis* ("to stand by things decided"), except when precedence is discarded or overruled.[1] Attributed to William Penn is the aphorism "Time is what we want most, but what we use worst."

In the turmoil and tumult of our times, I take solace in the many reminders of the good work so many do for our profession and communities. The ethos of *pro bono publico* ("for the public good") makes public service part of our collective DNA. For my part, then, "I will cherish these few specks of time."[2] *Tempest fugit* ("time flies"). Thank you for the opportunity to be on this journey together. Happy New Year!

Postscript. On a personal note, my 92-year-old father recently passed after a good full life. The gracious support and kindness from Bench, Bar, clients, and many folks my family did not know we knew reinforced John Donne's 1624 poem "No man is an island." When it is time, the bell tolls for each of us. Namaste.

By William Adams

Bill Adams is principal counsel at William L. Adams, P.C., was SCBA President in 2004, and serves as co-editor of The Bar Journal.

1. See, e.g., U.S. Supreme Court opinions *Furman v. Georgia* (1972) 408 U.S. 238 (after nearly 200 years, finding capital punishment unconstitutional as cruel and unusual), reversed four years later by *Gregg v. Georgia* (1976) 428 U.S. 153; and, more recently, *Dobbs v. Jackson Women's Health Organization* (2022) 597 U.S. ___ [142 S. Ct. 2228] (overruling 1973 *Roe v. Wade* federal abortion rights).

2. Academy award winner Michelle Yeoh as Evelyn to her daughter in the multiverse film *Everything Everywhere All At Once* (2022)

Link to 2024 Schedule of Seminars & Events

Please view our seminar and event schedules online.

Visit ***https://www.sonomacountybar.org***

and go to the Seminars/Events tab at the top navigation bar for the list of events. Thank You.

Taking Action! Supporting Diversity Efforts, Access to Justice, and Creating a Space of Belonging in Sonoma County

On Friday, September 29th, 71 members of the judiciary and Sonoma County Bar Association gathered to once again discuss and collaborate on issues impacting justice in Sonoma County. Participants were welcomed and treated to lunch while enjoying the exceptional view from Paradise Ridge Winery's deck or from the breezy meeting room overlooking the vineyard and art installations.

Continuing the conversation from last year's Bench Bar Retreat, the 2023 Bench Bar Retreat and Workshop once again focused on diversity, equality, inclusion, and belonging (DEIB) within the legal community. Whereas last year's program took a broader view of the topic, with speakers from across California, this year's program focused more on the local level and set aside significantly more time to specifically highlight and "workshop" activities in Sonoma County's legal community which advance DEIB initiatives.

Judge Oscar Pardo and Judge Karlene Navarro kicked off the discussion with an enlightening keynote on the state of diversity within California, and more specifically, Sonoma County, while also sharing some of their personal experiences and feelings on equality and belonging as people of color. A poll of the audience on such factors such as types of schools they attended, the age of the textbooks they were offered, and access to tutoring for themselves vs. their children further highlighted inequities participants may have experienced.

After the keynote presentation, participants broke into smaller groups. Each group was given a different topic to discuss. Group One's discussion on court outreach and education was facilitated by the Honorable Karlene Navarro, Carla Rodriguez, and Lynne Stark-Slater. Participants in this group learned about the Court's elementary school and junior high school mock trial program and Peer Court program/Court Camp and discussed how the bar can best support the Court's efforts to bring awareness of and interest in legal careers amongst the youth in Sonoma County.

Group Two's discussion centered on mentorship and was facilitated by the Honorable Oscar Pardo and Bernice Espinoza. Participants of this group received an overview of SCBA's attorney-to-attorney mentorship program, the Diversity, Equity & Inclusion Section's Pipeline Pods cohort-mentorship program, a judicial mentorship program in progress, and Empire College's first generation mentorship program. They also discussed the availability of internships and work mentorships with local firms. As part of their discussion, this group brainstormed ideas on expanding programs that already exist, providing funding for interns through scholarships and stipend programs, and also servicing the needs of non-attorneys working within the legal sphere (paralegals, legal assistants, court reporters, etc.).

Group Three discussed the possibility of creating affinity groups within Sonoma County, either through SCBA or separately. Participants explored the objectives and purpose of affinity groups, what is happening in other areas of California, and brainstormed what an "Affinity Bar" might look like locally. This group's discussion was facilitated by the Honorable Paige Hein and Jeanne Grove.

The Honorable Chris Honigsberg and Andrew Spaulding led a discussion with Group Four on Sonoma County's Law Week program, a longstanding partnership between the Sonoma County Bar Association and Sonoma County Office of Education. Group Four came up with many new ideas for supporting and expanding this program and provided a jump-start to the planning for 2024.

Finally, Group Five was tasked with looking farther into the future. What can the bench and bar do to *further* support DEIB efforts in Sonoma County? The Honorable Lynnette Brown and Carla Hernandez Castillo facilitated this brainstorming session, asking participants to share their thoughts on where the bench and bar currently stand and asked for everyone's wild ideas. Participants largely discussed ways SCBA could be more inviting/appealing to non-members and how the bar can reach out to and welcome those who are new or not actively participating socially. They identified barriers, both emotional and technical, attorneys might come up against in finding belonging in Sonoma County.

The retreat's work was wrapped up in a final plenary session where each group shared what they learned and discussed. Participants were encouraged to take things a step further, continue the conversation, and consider donating their time and energy to some of the programs

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Taking Action!

(continued from page 6)

discussed that day. The discussion remains ongoing, but the time to take action is now. Will you join us?

For more information on the programs discussed at the Bench Bar Retreat and to volunteer your support, please visit: *https://sonomacountybar.org/program-summaries-2023-bench-bar-retreat.*

By Amy Jarvis
Amy Jarvis is the SCBA Executive Director.

A Very Special Thank You to our Bench Bar Sponsors!

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- Planet Depos
- SCBA Business & Intellectual Property Law Section
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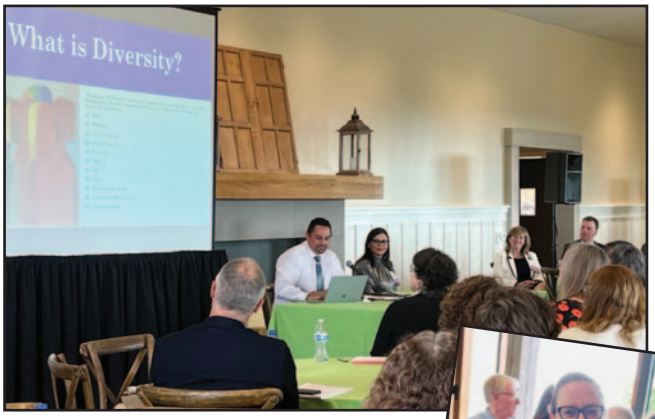
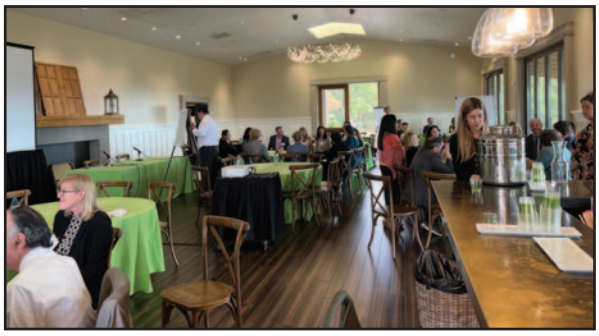
- Smith Dollar PC

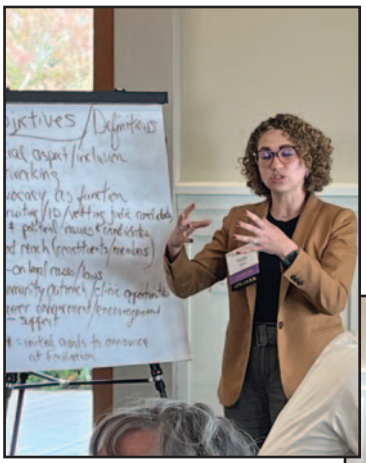


Judges Oscar Pardo & Karlene Navarro giving keynote presentation

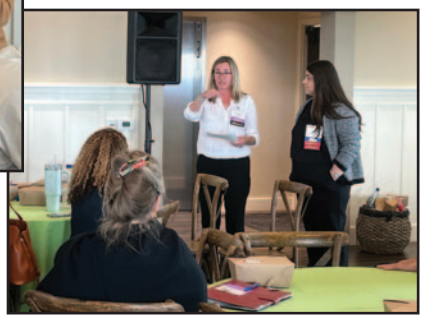
SCBA Executive Director Amy Jarvis & Anne Caldwell



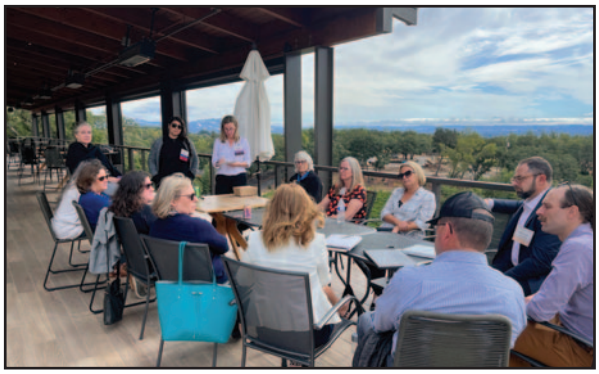
Bench Bar Retreat afternoon breakout sessions



Judge Paige Hein facilitating the Group Three discussion



Hon. Lynnette Brown & Carla Hernandez Castillo



Hon. Lynnette Brown & Carla Hernandez Castillo facilitate a break-out session

Photography courtesy of Amy Jarvis

MCLE: The "Snitch Rule"—New Rule of Professional Conduct 8.3

DISCLAIMER: The opinions expressed in this article are those of the author and are not the opinions of the State of California Department of Industrial Relations, the Division of Workers' Compensation, or the Workers' Compensation Appeals Board.

Introduction

It took the egregious conduct of disgraced former attorney Thomas Girardi, ex-husband of Erica Jayne of "Real Housewives of Beverly Hills" fame, to compel the State Bar of California to implement a mandatory reporting requirement for California's lawyers. Girardi was disbarred after allegedly misappropriating $18 million in settlement proceeds from his clients. According to Senator Umberg, Chairman of the California Senate Judiciary Committee:

> "Many attorneys noticed Girardi's egregious ethical violations, including those in his own law firm. However, these attorneys had no duty to report his misconduct. The lack of a mandatory reporting statute resulted in a substantial delay in justice to his victims. Thankfully, in 2022, a court ordered Girardi to pay $2,300,000 in restitution and he was finally disbarred."[1]

American Bar Association (ABA) Model Rule 8.3, in existence since 1983, requires a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer, to inform the appropriate professional authority.[2]

After failed attempts in 2010 and 2016 to enact a similar mandatory reporting rule, California has finally adopted a new Rule of Professional Conduct in response to the fallout of the Thomas Girardi case. On June 2, 2023, the California Supreme Court approved California Rules of Professional Conduct (CRPC) Rule 8.3, to mirror ABA Model Rule 8.3. The Supreme Court's order stated that the rule is in effect as of August 1, 2023.[3]

Understanding CRPC Rule 8.3

New CRPC Rule 8.3 provides that:

> "[a] lawyer shall, without undue delay, inform the State Bar, or a tribunal with jurisdiction to investigate or act upon such misconduct, when the lawyer knows of credible evidence that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

The duty to report lawyer misconduct is time-sensitive and must be done "without undue delay." What constitutes "undue delay"? Comment [3] to CRPC 8.3 specifies that reporting must be made "as soon as the lawyer reasonably believes the reporting will not cause material prejudice or damage to the interests of a client of the lawyer or a client of the lawyer's firm."[4]

Secondly, an attorney must "know of credible evidence" of the lawyer's misconduct. California's heightened standard differs from the ABA Model Rules counterpart, which simply requires that a lawyer have "knowledge" of the misconduct. The additional element imposed by California suggests that an attorney must exercise their professional judgment as to the credibility (or lack thereof) of the evidence received. The use of the term "credible evidence" implies that merely hearing a rumor or harboring a suspicion of a fellow lawyer's misconduct is insufficient to trigger a duty to report. Whether or not the misconduct raises a "substantial question" as to the fitness of the lawyer refers to the seriousness of the possible offense and not the quantum of evidence.[5]

Also, be aware that if a lawyer knows of credible evidence of another lawyer's misconduct that occurred prior to August 1, 2023, the lawyer is obligated to report

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1. California Senate Judiciary Committee, SB 42 (Umberg)—Subject: Attorneys: Reporting Professional Misconduct (Dec. 5, 2022). *https://tinyurl.com/mvv98mcr*.

2. American Bar Association, Rule 8.3: Reporting Professional Misconduct—Maintaining The Integrity of the Profession. *https://tinyurl.com/bdd9mbhd*.

3. Balassone, California Supreme Court Approves New Rule Compelling Attorneys to Report Misconduct by Other Attorneys, California Courts Newsroom (Jun. 22, 2023). *https://tinyurl.com/4at838tz*.

4. California Rules Prof. Conduct, rule 8.3, comment [3]

5. California Rules Prof. Conduct, rule 8.3, comment [4]

MCLE: The "Snitch Rule" (continued from page 8)

the past conduct because the lawyer's knowledge exists on or after August 1, 2023, the effective date of Rule 8.3.

The practical implementation of Rule 8.3 should be considered in tandem with other provisions governing California lawyers in the Rules of Professional Conduct and Business and Professions Code. For example, Rule 8.3 only applies to the reporting of the misconduct of another lawyer. A lawyer has their own self-reporting obligations pursuant to Rule 8.4.1(d)(e) and Bus. & Prof. Code, § 6068(o).

Misconduct under Rule 8.3

Not every violation of the California Rules of Professional Conduct will trigger mandated reporting. Unlike ABA Model Rule 8.3, California's version is very specific as to what conduct is subject to reporting: 1) a criminal act; or 2) conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property.

Paragraph (b)

CRPC Rule 8.3(b) provides that a lawyer "may, but is not required to, report to the State Bar a violation of" the Rules of Professional Conduct that does not fall into the category defined in CRPC 8.3(a).

Paragraph (c)

CRPC 8.3(c) exempts "conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California" from the reporting requirement.

Paragraph (d): Exceptions.

- Generally, California is careful to protect privileged relationships and confidential information. As such, Rule 8.3 specifically does *not* extend to the following:
  - Information received by the lawyer while participating in a substance use or mental health program[6];
  - Information protected by the Duty of Confidentiality as set forth in Business and Professions Code section 6068(e)[7], CRPC Rule 1.6[8], and CRPC Rule 1.8.2[9];
  - Information received by a lawyer while participating as a member of a state or local bar association ethics hotline or similar service[10];
  - Information received by a lawyer who is consulted or retained to represent a lawyer whose conduct is in question, or who is consulted in a professional capacity by another lawyer on whether they have a duty to report a third-party lawyer under the rule[11];
  - Mediation confidentiality[12];
  - Lawyer-client privilege[13];
  - Other applicable privileges or by other rules or law.

Lawyers have two ways to fulfill their obligation to "inform the appropriate professional authority."[14] Rule 8.3 specifies that the lawyer make the report either to the State Bar or to a "tribunal with jurisdiction to investigate or act upon such misconduct." If litigation is pending before a non-judicial tribunal with no jurisdiction to investigate the misconduct, reporting to that tribunal may not be sufficient and the lawyer should report to the State Bar.[15]

Lawyers can report misconduct using the attorney misconduct online complaint form on the California State Bar website.[16] Lawyers should specify that the report is being made under Rule 8.3. Complaints are confidential unless charges are filed.

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6. California Rules Prof. Conduct, rule 8.3(d), comment [5]

7. Bus. & Prof. Code, § 6068: It is the duty of an attorney to (e) to maintain the confidence, and at every peril to himself or herself to preserve the secrets of his or her client.

8. California Rules Prof. Conduct, rule 1.6(a): A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.

9. California Rules Prof. Conduct, rule 1.8.2: A lawyer shall not use a client's information protected by Business and Professions Code section 6068, subdivision (e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted by these rules or the State Bar Act.

10. California Rules Prof. Conduct, rule 8.3, comment [2]

11. *Ibid*.

12. Evid. Code, § 1115 et seq.

13. Evid. Code, § 950 et seq.

14. California Rules Prof. Conduct, rule 8.3(a)

15. California Rules Prof. Conduct, rule 8.3, comment [6]

16. The State Bar of California, Attorney Misconduct Complaint. *https://www.calbar.ca.gov/Portals/0/documents/forms/Attorney_Misconduct_Complaint.pdf*

MCLE: The "Snitch Rule" (continued from page 9)

Final Considerations

While this rule is no doubt a step forward in fostering accountability and transparency in our state's legal system, the implementation will not be without challenges.

As a practical matter, some lawyers may be reluctant to report colleagues, friends, or co-workers (especially in a family-owned law firm), even if they "know of credible evidence." The lawyer's reputation could be affected if they report too much or not enough. Yet, a non-reporting lawyer may be subject to discipline by the State Bar if the conduct was required to be reported.

Similarly, filing a false report can result in disciplinary action. This would, hopefully, dissuade an attorney from filing a baseless report against opposing counsel to create a potential conflict of interest with their client.

Finally, in rendering credibility determinations of their own evidence, the lawyer essentially acts as the judge and jury. After all, the rule's comments recognize that a "measure of judgment is, therefore, required in complying with the provisions of this rule." This 'measure of judgment' seems to be present in nearly every step of the reporting process, including what, when, and where to report misconduct.

Notwithstanding, perhaps my use of the word "snitching" is an unfair framing of this new rule. It is not snitching. It is reinforcing our commitment to upholding the highest ethical standards and, most importantly, protecting the public and our clients.

By Judge Katie Ferchland Boriolo

Judge Boriolo is the Presiding Workers' Compensation Judge in Santa Rosa. Prior to being the Presiding Judge, she was a Workers' Compensation Judge for five years. Judge Boriolo is a Certified Specialist in Workers' Compensation. She teaches Professional Responsibility at Empire College School of Law.

SCBA's President Kinna Patel Crocker Appointed Newest Sonoma County Superior Court Judge

On October 5, 2023 Governor Gavin Newsom announced that Kinna Crocker had been appointed Superior Court Judge in Sonoma County to replace retiring judge Arthur Wick. She will be a judge in criminal misdemeanor court.

Crocker had been serving as president of the Sonoma County Bar Association in 2023. She stepped down at the end of October, with Nicole Jaffee assuming the role for the remainder of 2023 and through 2024.

"It's absolutely exciting," Crocker said about the appointment in an interview with the Press Democrat.[1] "I feel like everybody is really open to questions and really wants me to succeed in this job and to make the bench a good place." She added she had received a lot of support from other judges in the area and across the state.

Crocker was a Santa Rosa Family Law attorney who had almost 20 years of courtroom experience. She had been a Sole Practitioner from 2013 until her appointment. She was an Associate at Terre Family Law from 2011 to 2013, at Lozano Smith from 2010 to 2011 and at Northern California Family Law Group from 2004 to 2008. Crocker has her undergraduate degree from Vanderbilt University and earned a Juris Doctor degree from the University of San Francisco School of Law.

Crocker is of East Indian descent, and immigrated with her family to the U.S. from the United Kingdom when she was 2 years old and became a citizen at 16.

"When I interviewed with the governor's office...they asked me if there was anything I wanted the governor to know. I said that I appreciate the governor's focus on diversifying our bench...not only because of my identifiers in race, gender, and sexual orientation, [but] I am also grateful he values diversity of practice. Not a lot of family law attorneys are named to the bench. Our expertise is something very valuable we can bring to the bench."[2]

By Caren Parnes

Caren Parnes is a graphic designer and editor. She has worked with the SCBA to publish the Bar Journal since 2006.

1. *https://www.pressdemocrat.com/article/news/a-win-for-the-community-local-family-attorney-appointed-to-serve-as-sono/*

2. Quote from Bay Area Reporter article published 10/6/23: *https://www.ebar.com/story.php?ch=news&sc=news&id=328922*

Self-Study MCLE Credit

HOW TO RECEIVE ONE HOUR OF SELF-STUDY MCLE (LEGAL ETHICS) CREDIT

The Sonoma County Bar Association has been approved as a Multiple Activity Provider (Provider #130) for Minimum Continuing Legal Education credits by the State Bar of California. Below is the true/false quiz showing the questions for credit for this article. If you wish to recieve MCLE credit, go to the link below to access the SCBA web page with instructions for purchasing a self-study packet for $25. You will have a choice of this article as well as our archive of previously published articles. Please access the archive at *https://sonomacountybar.org/self-study-articles*.

1. If a lawyer knows of credible evidence of another lawyer's conduct that occurred prior to August 1, 2023, the lawyer is obligated to report the past conduct because the lawyer's knowledge exists on or after the effective date of Rule 8.3.

2. If your client is a lawyer, the duty of confidentiality takes precedence over your obligation to report misconduct pursuant to Rule 8.3.

3. A lawyer can be disciplined for failing to report their own misconduct under Rule 8.3.

4. If a lawyer knows that another lawyer's conduct was already reported to the State Bar, they do not need to report it themselves.

5. Any violation of the California Rules of Professional Conduct triggers mandating reporting under Rule 8.3.

6. Failure to report conduct as required by Rule 8.3 may subject a lawyer to disciplinary action by the State Bar.

7. Filing a false misconduct report about a lawyer can result in criminal penalties or disciplinary actions.

8. A rumor about another attorney in the firm satisfies the knowledge requirement of Rule 8.3.

9. An attorney is encouraged to indicate that they are filing the State Bar complaint based on their duty to report professional misconduct under Rule of Professional Conduct 8.3.

10. If a lawyer commits an act that is considered a crime in Arizona but is not a crime according to California law, that lawyer's conduct is not subject to the reporting requirement under Rule 8.3.

11. The duty to report does not extend to information received by a lawyer while participating as a member of a state or local bar association ethics hotline.

12. Triggering the obligation to report, the term "substantial question" in Rule 8.3 refers to the gravity of the evidence and not the seriousness of the possible offense.

13. It is required that the particular tribunal to which a misconduct report is made have the ability to "investigate and act upon" the alleged misconduct.

14. If your client is another lawyer, the duty to report pursuant to Rule 8.3 does not apply to the information that you glean from the representation of your client.

15. The identity of the reporting attorney is kept confidential to the extent permitted by law.

16. An attorney may threaten to file a Rule 8.3 complaint regarding opposing counsel to obtain an advantage in a civil dispute.

17. An attorney must report the misconduct of a fellow attorney as soon as they obtain knowledge of credible evidence of their misconduct.

18. Ben and Jerry are at a party talking about their old law school friend, Sarah. Ben tells Jerry that he heard from another friend that Sarah has been embezzling money from her son's PTA for years but has never been charged. Based on what Ben tells Jerry, Jerry is obligated to report Sarah's embezzlement to the State Bar.

19. Amanda is in the Lawyer Assistance Program where she reveals to the other lawyers in the group that she committed fraud and misappropriated settlement proceeds in two of her cases. There is no obligation for the other lawyers in the group to report Amanda's misconduct pursuant to Rule 8.3.

20. California Rule 8.3 requires a higher level of knowledge of another lawyer's misconduct than ABA Model Rule 8.3.

SCBA Winter '23-'24 "Movers & Shakers"

If you have news 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.

Richard Burger and **Jeffrey Pierce** created their firm, Burger & Pierce, LLP, in Petaluma . . . **Susannah Edwards** recently got married and her new name is **Susannah Noble** . . . **Paige E. Gordon** is now going by her married name, Paige E. Clark . . . **Kathy Jalilie** is now with Beyers Costin Simon in Santa Rosa . . . **Judge Kinna Crocker** was sworn in by Gov. Gavin Newsom Monday, October 16, 2023, filling a vacancy left by retired Judge Arthur Wick . . . **Shawn Loring** has moved to Livingston, TX . . . **Regan Masi** is with Perry Johnson Anderson Miller Moskowitz in Santa Rosa . . . **Roz Bateman Smith** is now with Dynasty Law in Windsor . . . **James Sansone** is now with McLaughlin Sanchez LLP in San Francisco.

Legal Tech-nicalities: 2023 Winter Wrap-Up
The Cybersecurity Threat is Real

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.*

2023 represented a watershed year in terms of new technology. Most notably, legal professionals watched with a mixture of trepidation and amazement at the rapid rise of artificial intelligence (AI) within our field. The flagship AI vehicle that captured everyone's attention—ChatGPT—is set to reach 77.8 million users in the U.S. alone within two years of its November 2022 release. This adoption rate is more than double the rate for tablets and smartphones in a similar period.

Many of the most reluctant law firms eagerly embraced AI, recognizing this technology will likely become (whether for good or ill) a crucial component for effectively managing law practices and delivering legal services more efficiently. AI presents many ethical dilemmas for legal professionals, as was noted in literally hundreds of articles published by ethics "experts" in 2023. These same "experts" also warned of impending ethical doom when lawyers began using email in the mid-1990s. Look at us now.

At the same time, the past year revealed significant challenges facing law firms that fail to "…keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…"[2] Information overload continues to affect almost half of all lawyers. However, one threat stood out from all the others: Cyber-attacks.

2023: Law Firms Became Prime Cyber-Crime Targets

Law firm data security (or lack thereof) weighed on a lot of lawyers' minds in 2023. News that prominent firms had been breached became an almost weekly occurrence this past year, including notable firms such as Loeb & Loeb, Orrick Herrington & Sutcliffe, and K&L Gates.[3] These firms, accustomed to advising their clients on cybersecurity and technology issues, found themselves targets of their clients' class action lawsuits, accusing these prominent players of not acting diligently or spending enough money on prevention.

Cyber criminals did not limit their attacks to big firms. Across the board, cyber-attacks against firms of all sizes rose by a healthy 7% in the first quarter of 2023 over the first quarter of 2022.[4] In fact, one out of every forty attacks in the first quarter of 2023 (1,248 attacks total) was against a law firm.[5] An often-cited explanation for why law firms are targeted is because lawyers are "soft targets." In other words, we make for easy prey for sophisticated cyber criminals due to a lack of understanding technology, ignorance about cyber threats, or failure to invest in cybersecurity measures.

Lack of Cyber Protections Expose Clients to Harm and Lawyers to Malpractice & Discipline

There is some truth in this explanation. Despite the fact that every law firm represents a potential treasure trove of data about our clients, the most common excuses lawyers assert for why their firms have not (or will not) invest more time and money in cybersecurity simply do not add up:

- "It's too expensive.
- It will interfere too much with our operations.
- We're not really a target for cybercriminals.
- Our employees already have security fatigue—this will make it worse.
- Legal ethics rules don't require this."[6]

Such excuses are, at best, short-sighted. Clearly, law firms of all sizes are targets, and being held hostage to ransomware will interfere far more with operations than

(Continued on page 13)

1. Mr. Young is the principal at Young Law Group, a personal injury litigation firm in Santa Rosa, CA. If readers have any questions, comments, feedback or would like to see a particular topic covered in a future article, please email Mr. Young at *admin@younglawca.com*, or you can call (707) 343-0556.

2. ABA Model Rules of Professional Conduct, Rule 1.1, Comment 8. *https://bit.ly/47Fl1Xc*.

3. Skolnik and Witley, et al., *Law Firm Cyberattacks Grow, Putting Operations in Legal Peril*, Bloomberg Law (Jul. 7, 2023). *https://bit.ly/49H47ZJ*.

4. Nelson and Simek, et al., *Law Firm Data Breaches Surge in 2023*, Maryland State Bar Association (Aug. 14, 2023). *https://bit.ly/3MQ22AW*.

5. *Ibid.*

6. *Ibid.*

Legal Tech-nicalities (continued from page 12)

adopting reasonable cybersecurity measures. Reasonable measures are required by ethical rules in most jurisdictions and arise from the duty of competence and confidentiality.

The "it's-too-expensive" refrain is also incorrect. While comprehensive cybersecurity solutions can be quite expensive, many tools exist that would harden law firm data against cyber-attacks. Two simple tools which can be adopted in a day by any law firm regardless of size or budget are: (i) maintaining effective anti-virus protections, and (ii) using a virtual private network (VPN) to encrypt and mask online activities. You can expect to pay $50-$150 per year for reliable anti-virus software.[7] The average cost for a leading VPN service is approximately $5-$10 per month.[8] Neither of these solutions are cost-prohibitive for even the smallest firms.

An Ounce of Prevention is Worth a Pound of Cure

In 1736, Benjamin Franklin advised fire-threatened colonists in Philadelphia that "an ounce of prevention is worth a pound of cure." The cybersecurity risk posed to law firms is not dissimilar to the fires that threatened the colonists. Like the colonists, we need more accurate, up-to-date information about the risks. Another step lawyers should take is to learn as much as possible about the nature of the cybersecurity risks we face, including the most common attacks waged law firms.[9]

Law firms wrongly assume that lawyers are the targets of cyber criminals. Most law firm breaches in 2023, however, resulted from attacks targeting administrative staff, particularly legal secretaries and assistants. This approach makes perfect sense. Other than yourself, who has access to all the electronic data managed by your law firm, but who also may not have the same security protections on their system that you or your IT department implemented for you? This common scenario is tailor-made for cyber crime.

Avoiding the Three Most Common Cybersecurity Threats to Law Firms

Phishing[10]

Phishing continues to plague law firms due, in part, to the volume of email exchanged with clients. Website contact forms, which are ineffectively policed by most hosting companies, represent another pathway cyber criminals use, posing as potential new clients needing help with lucrative cases.

While this type of attack may seem "old school," it works. One of the most well-known phishing scams involves an unsolicited email sent by or on behalf of a Nigerian prince who desperately needs legal help to obtain his rightful inheritance, a share of which is promised in exchange for a small advance payment to cover the prince's "expenses." As of 2019, this scam continued to rake in over $700,000 per year.[11] As long as a fraud keeps bearing fruit, scammers will use it.

Avoid falling victim to phishing scams by recognizing the communication for what it is. It is unsolicited, originating from an unknown sender. How many of you routinely decline an unanticipated call to your mobile phone from an unknown number? Emails deserve the same scrutiny. Educate and train your workers, too. Use a good email server that recognizes phishing attempts and sends them to junk or spam where you and your staff are less likely to read them.

Ransomware[12]

Here is how a ransomware attack works: A user clicks on a malicious link that downloads a .exe file from an external website and then runs the file, which installs the ransomware.

(Continued on page 14)

7. Wolpin, *How to Buy Antivirus Software*, U.S. News & World Report, (Oct. 20, 2023). *https://bit.ly/3QGtouB*.

8. Walker and McNally, *How Much Does a VPN Cost? (And How to Save Money)*, All About Cookies (Sep. 5, 2023). *https://bit.ly/3GoGtnL*.

9. At a minimum, include the topic of cybersecurity as part of your CLE studies.

10. "Phishing" occurs when someone attempts to acquire sensitive data, such as bank account numbers or other private information, through a fraudulent solicitation in an email or on a website in which the perpetrator masquerades as a legitimate business or reputable person. National Institute for Standards & Technology (NIST), CRSC Glossary, *https://csrc.nist.gov/glossary/term/phishing*.

11. Leonhardt, *'Nigerian prince' email scams still rake in over $700,000 a year—here's how to protect yourself*, CNBC Make It (Apr. 18, 2019). *https://cnb.cx/3slbmA7*.

12. Ransomware occurs when a cybercriminal uses software that encrypts a user's data so the user can no longer access it and then ransoms it back the original user. Barker, et al., *Ransomware Risk Management: A Cybersecurity Framework Profile*, NIST (Feb. 2022). *https://nvlpubs.nist.gov/nistpubs/ir/2022/NIST.IR.8374.pdf*.

Legal Tech-nicalities (continued from page 13)

The ransomware exploits vulnerabilities in the user's computer and other computers to propagate throughout the organization.

The ransomware encrypts files on all the computers, then displays on-screen messages demanding payment to decrypt the files.[13]

Cyber criminals used this method to hack a variety of businesses in 2023, including law firms. Avoiding a ransomware attack requires more tech tools than one needs to avoid phishing. The National Cybersecurity Center of Excellence (NCCOE) publishes a useful infographic listing the tech needed to avoid ransomware attacks, which is available for download.[14]

Lack of Policies, Procedures, or Protocols

The final top cybersecurity threat facing law firms stems from the lack of adequate (or any) written policies or procedures for the use of technology coupled with a lack of effective protocols for dealing with a data breach. Written handbooks containing guidance and actions based on common sense are as important as adopting the right tech tools. Two leading legal tech experts have prepared a helpful (albeit somewhat dated) article discussing which policies, procedures, and protocols law firms should implement, along with links to model policies that minimize the need to create these policies from scratch. The article is available as a free PDF download.[15]

Concluding Remarks

Lawyers are the caretakers of an enormous quantity of private client information. Bound by confidentiality and privilege, a data breach can mean significant harm to clients, jeopardize our reputation and impair our ability to practice law. At the same time, law firms are notoriously lax about cybersecurity. This careless attitude creates a "perfect storm" for cyber criminals. Fortunately, by keeping abreast of the risks and benefits of technology, and being proactive rather than reactive to the threat, law firms can navigate through the tempest that cyber criminals create.

13. *Ransomware Protection and Response*, NIST. *https://bit.ly/3sIdwQf*.

14. Infographic. *Tips and Tactics: Ransomware*, NIST & NCCOE. *https://bit.ly/3QHQ2Tf*.

15. Nelson and Simek, *Essential Law Firm Technology Policies and Plans*, Sensei Enterprises, Inc. (2011). *https://bit.ly/3ulHPwy*.

Meet the SCWiL 2023 Scholarship Recipients

Sonoma County Women in Law is proud to introduce our annual scholarship recipients. In October, Francesca Borin was awarded the $2,500 Honorable Gayle Guynup Scholarship which is largely funded through contributions from the SCBA. You can donate directly from our website, *http://www.sonomacountywomeninlaw.com/donate.html*. Earlier this year, Daniel Snell was awarded the $3,500 Community Advocacy Scholarship through the generous grants sponsored by several of our Sonoma County Supervisors.

Ms. Borin holds a B.A. in theology from Georgetown University and a M.S. in bilingual education from City University of New York, City College. Ms. Borin was born in San Francisco and raised in Sonoma County. She worked as a tutor in Spain after graduating from college, and upon returning to the U.S., she was accepted into the New York City Teaching Fellows. She moved to New York City and taught full-time while pursuing a master's degree in bilingual education. Ms. Borin enjoyed a 16-year teaching career in New York, NY; Ashburnham, MA; and Philadelphia, PA before moving back home to Sonoma County in 2019. During her years in the classroom, her passions were Spanish language immersion, elementary math, and social-emotional learning. Ms. Borin stayed home with her children during COVID and never went back into the classroom, deciding instead to pursue a lifelong dream and enroll at Empire Law School.

She took a clerkship at VIDAS Legal Services, which provides competent and compassionate legal immigration advocacy at no or low cost to clients. Immigration law allows Ms. Borin to pursue her passion for helping people with her love of the Spanish language and the cultures of the diverse countries of the world and advocacy for members of persecuted groups. The work inspires her in a way she has never experienced before, and she feels that she has found her calling. Ms. Borin is honored to accept the Board of Sonoma County Women in Law Hon. Gayle Guynup Scholarship, and dedicates her scholarship to Steve, Josie, Charles, Aldo, and Lois, without whom none of this would be possible.

Mr. Snell, a Sonoma County native, is a single father attending law school and working as a certified law clerk at the Sonoma County Public Defender's Office.

Mr. Snell has overcome many adversities but is determined to establish a career as an attorney. Early in life, Mr. Snell struggled with substance abuse which eventually led to his incarceration. During his time in prison, Daniel vowed to make a change. In 2012, he sought help with his substance use and was granted a second chance by the Sonoma County Court. Since then, Daniel has dedicated himself to helping others who struggle in similar ways.

Mr. Snell enrolled at Santa Rosa Junior College where he was involved in the Second Chance Program which is designed to help formerly incarcerated students obtain higher education. He graduated from SRJC with an associate's degree in political science and social behavioral science with highest honors.

During his two-plus years of employment at the Sonoma County Public Defender's Office, Mr. Snell has worked to help formerly incarcerated people obtain post-conviction relief by helping to reduce their felonies to misdemeanors, obtaining dismissals, and sealing arrest records. He has assisted Sonoma County residents in obtaining dismissals in hundreds of cases, which has given them better opportunities for employment and housing. Mr. Snell believes that helping people obtain this type of relief reduces recidivism rates and ultimately benefits the community as a whole.

Mr. Snell is currently in his last year of law school and intends to take the California bar exam in July 2024. His short-term goal is to become an attorney at the Sonoma County Public Defender's Office so that he can continue to give back to the underserved in his community; his long-term goal is to become an appellate judge. His dream is to argue cases on behalf of indigent clients before the United States Supreme Court.

Mr. Snell's life and work demonstrates that people who have been involved in the criminal justice system or have struggled with substance abuse can recover their lives and become productive members of our community.

By Lynne Stark-Slater

Lynne Stark-Slater is 2023 SCWiL Scholarship Chair and Chief Deputy Public Defender, County of Sonoma

Affirmative Reaction

Editor's Note: The Supreme Court decision discussed in this article was decided at the end of June, and this article was written shortly thereafter. This article has been held for publication until this issue.

The Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[1], eliminating an applicant's race from consideration during the collegiate admission process, generated considerable comment, much of it critical. The decision focused on programs at the University of North Carolina and Harvard that allowed for the use of race as one of several factors in the process of approving admission applications to the respective institutions. Advocates of what is known as affirmative action consider it essential to narrowing the power and prosperity gaps existing between the majority race and minority groups traceable to centuries of legally permitted and enforced discrimination. The old legal regime may have been eliminated decades ago, but its effects are still with us. Those who oppose affirmative action prefer that race not be considered at all on account of the plain text of the Equal Protection Clause of the Fourteenth Amendment and its apparent mandate of a color-blind legal order. The former accuse the later of obscuring their racism behind the Constitution; the latter condemn the former for preferring a racial spoils system and sowing racial discord through constant recitation of evils that ceased to exist seventy to a hundred years ago. The topic is one charged by these competing animosities and is difficult for that reason even to broach. Better to examine the rationale of the Court in reaching its decision than delve into the supposed motives of those on either side of the troubling subject. Perhaps in doing so, a clearer approach to discussing the matter may emerge, and a constitutionally sound solution to the underrepresentation of members of racial minority groups in higher education can be discerned.

When affirmative action appeared in the early 1970s, it often entailed quotas. The supporting rationale typically was to remedy the effects of historic and continuing racial discrimination. Persons belonging to a racial group denied access to jobs, education, and other benefits would gain access on account of their race. It was a quota system that was at issue in the earliest decision over the constitutionality of the practice. In *Regents of the University of California v. Bakke*, a white student complained that he had twice been denied an opportunity to compete for a seat in the freshmen class of the UC Davis Medical School due to the fact that the school reserved sixteen of one hundred places for persons who were not white. He argued that as the school was a public institution and received federal funds, it was subject to the Equal Protection Clause and the Civil Rights Act of 1964, which prohibit discrimination on the basis of race. Five justices agreed that a pure quota system was either unconstitutional or a violation of Title VI of the Civil Rights Act. Four of these justices based their opinion exclusively on the view that Title VI barred the use of race as grounds for "excluding anyone from participation in a federally funded program."[2] The fifth member of the majority, Lewis Powell, relied solely on the Equal Protection Clause.[3] He decisively broke with his four brethren on one crucial point: that under the right circumstances, race could be one of multiple factors a college could consider in its decision whether to admit a particular student.[4] In the use of race in this way, a college could only do so for the purpose of achieving a singular goal, which was the creation of a diverse student body that would in turn be conducive to a more vibrant learning environment.[5] Four dissenting justices led by Thurgood Marshall argued that a pure quota system did not violate the Equal Protection Clause due to the historic discrimination by American society against people of color.

Following *Bakke*, innumerable colleges implemented affirmative action policies with an eye to what a court might find permissible. The divided nature of *Bakke* made this difficult and inevitably led to a patchwork of lower court decisions upholding or rejecting affirmative action admission based on which side of the fragmented *Bakke* Court the deciding judge favored.[6] The matter

(Continued on page 17)

1. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.* (2023) ___U.S.___ [143 S.Ct. 2141, 216 L.Ed.2d 857].

2. *Regents of Univ. of Cal. v. Bakke* (1978) 438 U.S. 265 [98 S.Ct. 2733, 57 L.Ed.2d 750].

3. *Id.*, at p. 307.

4. *Id.*, at pp. 316-319.

5. *Id.*, at pp. 311-312.

6. Ryan Fortson, "Affirmative Action, The Bell Curve, and Law School Admissions," 24 Seattle U. L. Rev. 1087 (Spring 2001), at 1104-1110

Affirmative Reaction (continued from page 16)

came to a head thirty years after *Bakke* in *Grutter v. Bollinger*[7], involving an affirmative action program at the University of Michigan Law School. The program withstood challenge due to the fact that it fit the description of what Justice Powell had postulated would survive judicial scrutiny of the strictest kind. The program considered the race of applicants, but only as one of numerous nebulous factors, all of which might be construed together to determine whether an applicant was to be admitted to the law school. The Court accepted the justification for the use of race—to increase general diversity of students as a means of enhancing the exchange of ideas—as compelling, and then determined that because race was one of many factors employed without any fixed weight, the use was sufficiently tailored to satisfy the Court's deep apprehension over racial classifications.

Grutter appeared to many observers to be a landmark decision in that five members of the Court had agreed on the rationale for the use of race in determining college admissions. The fractured and uncertain *Bakke* outcome could now yield to a decision reached on firmer ground. *Grutter*, however, was limited in its reach in several significant ways. The Court affirmed the use of race, but not for remedying past societal discrimination, or even to aid historically oppressed racial groups in catching up with their former oppressors. More importantly, the Court was very clear that while race could be used as a factor in the admission process, the window of opportunity to do so would one day close. Noting that the "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," the *Grutter* Court declared unequivocally that "race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands… We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point."[8] The Court ended its discussion by expressing its expectation that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[9]

Grutter opened the door for colleges to construct affirmative action programs similar to the one the Court upheld, using race as one of several non-weighted factors to guide admissions. Proponents of such programs likely hoped that a change in judicial personnel might shift the Court's position to one endorsed by the more liberal members of the Court and make possible a broader program of addressing racial inequities. Owing to court appointments by Presidents Bush and Trump, the Court's jurisprudence did indeed shift, but in a different direction. By 2023, there were six members of the Court who could not be relied on to embrace the *Grutter* precedent and its mild commitment to the use of race in determining college admissions. This became clear in the opening remarks of Chief Justice Roberts while announcing the Court's decision in *Students v. Harvard*. "To its proponents, the Equal Protection Clause represented a 'foundation[al] principle'—the absolute equality of all citizens of the United States politically and civilly before their own laws."[10] The principle of a color-blind law, Roberts noted, had been upheld early on in the court's Equal Protection opinions—in *Strauder v. West Virginia* and *Yick Wo v. Hopkins*. African Americans couldn't be denied a jury of their peers on the basis of race, nor could Asian Americans be divested of any privilege to pursue a profession. In recounting the chain of cases stretching from *Brown v. Board of Education* through the 1960s striking down discriminatory laws that had denied liberty and equality to African Americans, Roberts pointed out that "these decisions reflect the 'core purpose' of the Equal Protection Clause: 'do[ing] away with all governmentally imposed discrimination based on race.'"[11] Only the actual advancement of a compelling purpose, narrowly drawn so as to avoid any unnecessary racial discrimination, could justify the use of race as a factor in awarding benefits or assigning burdens.

Aside from Justice Powell's lone opinion in *Bakke* and the narrow *Grutter* decision, the post-*Brown* Court had

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7. *Grutter v. Bollinger* (2003) 539 U.S. 306 [123 S.Ct. 2325, 156 L.Ed.2d 304].

8. *Id.*, at p. 342.

9. *Id.*, at p. 343.

10. *Students for Fair Admissions, Inc.*, *supra*, at p. 10.

11. *Id.*, at p. 14.

Affirmative Reaction (continued from page 17)

only approved of two purposes sufficiently compelling to justify racially discriminatory laws: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and "avoiding imminent and serious risks to human safety in prisons, such as a race riot."[12] Even in *Bakke*, Justice Powell recognized the dangers inherent in relying on race to accomplish even the most laudable goals. These dangers were more heavily addressed by the Court in *Grutter*, which "stressed the fundamental principle that 'there are serious problems of justice connected with the idea of [racial] preference itself.' It observed that all 'racial classifications, however compelling their goals,' were 'dangerous.' And it cautioned that all 'race-based governmental action' should 'remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'"[13]

Roberts then examined the "compelling" purposes alleged by Harvard and UNC and found them wanting. The purposes included not only "the better education through diversity" rationale, but also training future leaders in the public and private sectors, preparing graduates to adapt to an increasingly pluralistic society, fostering innovation and problem solving, enhancing cross-racial understanding, and breaking down stereotypes.[14] Roberts and the majority found these purposes commendable but too amorphous "to be subjected to meaningful judicial review."[15] Racial segregation in prisons for the purpose of temporarily controlling violence is proven by its result: the actual reduction of interracial violence. Mandating race-based remedies against an offending party who intentionally imposed burdens on the basis of race is justified by the injury the offending party inflicted on specific individuals and specific racial groups. None of the interests justifying college affirmative action programs can similarly be shown to have the intended results, particularly as such a showing would require monitoring of the student body long after its members had departed campus for life and work in the world at large. The more troubling problem with the interests affirmative action programs aim to advance is that in using race as a criteria for admission, the colleges were actually practicing discrimination against applicants not belonging to the favored races. "Our cases," noted the Chief Justice, "have stressed that an individual's race may never be used against him in the admissions process," but at both colleges the lower courts found significant decreases in the numbers and percentages of Asian Americans granted admission.[16]

The dissenting justices Sotomayor and Jackson took strong issue with the majority's decision. One of their more robust criticisms was the majority's disregard of the *Grutter* precedent, that permitted the use of race as a fungible factor for the purpose of enhancing the overall diversity of the student body and generating a more lively and engaged learning process. The dissenters, however, didn't appear to much respect *stare decisis* either; for their rationale for the modest use of race in determining college admissions extended far beyond the *Grutter* majority's narrow approval. Inequality among the races was a product of past governmental policies, they argued, crafted with the intent to suppress Black ambition and success.[17] The older rule of slavery for African Americans yielded to restrictive laws that both subtly and patently effected a result not dissimilar to the outlawed system of human bondage. The fruit of this history is the present inequality in everything from education and employment to life expectancy and the likelihood of incarceration.[18] Affirmative action in higher education is one mechanism for rectifying white society's historic oppression of Black men and women. In short, because American government in former times authorized and permitted racial discrimination that contributed to significantly different outcomes for whites and blacks that are still evident today, colleges should be permitted to use race to close the gap.

Justice Sotomayor quite commendably looked back to history and the meaning and purpose of the Fourteenth Amendment to justify the use of race in college admission procedures. She cited the debates over the Amendment published in the *Congressional Globe*

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12. *Id.*, at p. 15.
13. *Id.*, at pp. 20-21.
14. *Id.*, at p. 23.
15. *Ibid.*
16. *Id.*, at p. 27.
17. *Id.*, Sotomayor, J., dissenting, at pp. 2-3.
18. *Id.*, Jackson, J., dissenting, at pp. 11-14.

Affirmative Reaction (continued from page 18)

and the reports of the Joint Committee on Reconstruction. Congress, she said, was entirely comfortable with race-conscious laws aiming to aid former slaves in acquiring what they needed to succeed as free people. The Freedman's Bureau Act and the various civil rights laws enacted in the 1860s and 1870s all awarded benefits on the basis of the race of the laws' intended beneficiaries. The historical context of the Amendment "makes it 'inconceivable' that race-conscious college admissions are unconstitutional."[19]

Both dissents are lively and well-written, but their scope and tone suggest that defending so modest a use of race as entailed by college admissions programs is not their principle objective. The dissenters focus instead on a vision of a Fourteenth Amendment that allows for liberal use of racial classifications to achieve a broad equality of status and outcome for offenses that occurred decades or even a century ago and which are quite clearly prohibited today by the massive weight of judicial precedent and successive waves of positive law. The dissenting view is one that disregards any connection between a specific state policy and injuries suffered by identifiable injured parties. The scope of the dissenters' proposed remedy appears to know no bounds. Rather than targeting state actors engaged in purposeful racial discrimination and providing relief to those who are proven victims (former slaves, for instance, burdened by hostile state laws), the Fourteenth Amendment apparently vests government with nearly unlimited power to reorganize American society so as to ensure what some believe would be the most equitable of outcomes. Even if this were the correct take on the Amendment, it fails to address one salient reality: while Congress might have the power to impose racial classifications for remedial ends, the Amendment grants no such power to state government entities or private institutions currently subject to federal civil rights laws. The Amendment expressly imposes a limit on discriminatory action by the states and vests remedial power with Congress alone.

In the wake of the Court's decision, college administrators fear that African American student percentages will plummet in the absence of some kind of racial set-aside favoring African-Americans. A color-blind policy of college admissions simply won't be enough to overcome the enduring disparity between the races. The fear is justified, though the means to assuage it without violating the Constitution are not completely lacking. The Roberts opinion concedes that nothing in it "should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, being it through discrimination, inspiration, or otherwise."[20] Colleges are free to consider race in this way, as well as rely on economic privation as a stand-in for race.[21] In California and Michigan, where voters ended affirmative action years ago, college administrators have long considered factors such as whether applicants are the first in their families to attend college, where they attended high school, and family income, as well as engaged in outreach to encourage a more diverse applicant pool.[22] Some commentators have proposed granting admission to a particular top percentage of high school students, knowing that this will result in admission of top black students from urban schools that remain segregated for entirely de facto reasons.[23] Improving primary and secondary education may be a more fruitful field to till, though the challenges there are in many ways overwhelming, particularly in urban environments where large numbers of poor African Americans reside.[24] Finally, perhaps there is something to be said for simply attending the best school where one can gain admission. Some might consider a "modest" place like Santa Rosa Junior College, with a transfer to a state college or university, and for a legal education at Empire College, where racial diversity is

(Continued on page 20)

19. *Id.*, Sotomayor, J., dissenting, at p. 9.

20. *Id.*, Roberts, C.J., at p. 39.

21. See Richard H. Fallon, Jr., "Affirmative Action Based on Economic Disadvantage," 43 UCLA L. Rev. 1913 (August, 1996); and William C. Kidder, "How Workable Are Class-Based and Race Neutral Alternatives at Leading American Universities," 64 UCLA L. Rev. Disc. 100 (2016).

22. Karen Sloan, "If Affirmative Action is Struck Down, These Law Schools May Point to the Future," (June 15, 2023), *https://www.reuters.com*.

23. See Jack Greenberg, "Affirmative Action in Higher Education: Confronting the Condition and Theory," 43 B.C. L. Rev. 521 (May 2002), at pp. 546-547.

24. *Id.*, at pp. 554-555.

Careers of Distinction Returns after Pandemic Hiatus

Friends, family, and colleagues took a break from the "Spooky Season" on Friday, October 13th to honor Michael Miller, Dawn Ross, and Ronit Rubinoff on their Careers of Distinction. A grand event, 238 guests were wined, dined, and entertained with compelling tales from our honorees' past and heartfelt stories of care and dedication. Introductions were made by 2019 COD Award recipient Kenneth Gack and 2017 SCBA President Gregory Spaulding for Ms. Rubinoff, 2017 COD Award recipient Leslie "Les" Perry for Mr. Miller, and 2014 SCBA President Bonnie Hamilton for Ms. Ross.

A special thanks go out to past COD recipients Patrick Emery (2013), Patrick Grattan (2017), J. Michael Mullins (2016), Sondra Persons (2016), and past President Rose Zoia (1996) for their incredible work producing the evening's tribute videos to the honorees; and to past Presidents Suzanne Babb (2018) and David Berry (2022) for their last-minute sub-in as Masters of Ceremonies—and their gong that kept all the speakers in line!

By Amy Jarvis
Amy Jarvis is the SCBA Executive Director.

L to R: Les Perry, COD honoree Michael Miller, Suzanne Babb & David Berry

L to R: David Berry, COD honoree Dawn Ross, Bonnie Hamilton & Suzanne Babb

L to R: Kenneth Gack, Suzanne Babb, COD honoree Ronit Rubinoff, Greg Spaulding & David Berry

Guests socializing during the pre-event meal

Guests enjoy pre-event cocktails at the Hyatt Vineyard Creek patio

Affirmative Reaction (continued from page 19)

presently not in short supply. In time, perhaps privileged places like Harvard, renowned for their ability to propel their graduates into positions of power in American society, might reflect on the success of "lesser" institutions and show their true commitment to equality by ending their long-standing policies of legacy admission for the underachieving sons and daughters of white, wealthy and powerful alumni. Doing so would free up a large number of available classroom seats and transform those institutions into far more egalitarian places of higher learning than they ever were during the years they so vigorously endorsed using race as a criterion for admitting a relatively small number of non-white scholars.

By Rex Grady

Rex Grady has been Professor of Constitutional Law and Legal History at Empire College since 2007, is employed at the law firm of Robins Cloud, LLP, and is the author of seven books, the most recent of which is The Best Versed Man in Law: Duncan Wellington Perley and Law's Fate on the Far Western Frontier.

Careers of Distinction Returns

(continued from page 20)

COD Honorees Dawn Ross(4th from R) & Ronit Rubinoff (3rd from R), celebrate with their colleagues

A Very Special Thank You to our Careers of Distinction Sponsors!

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- Hon. Gayle Guynup (Ret.)

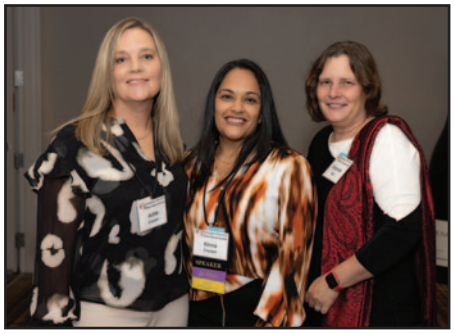
Photography courtesy of Chris Constantine

L to R: Hon. Dana Simonds, Hon. David Kim & Hon. Paige Hein

Trevor Codington talks with Past COD Honoree & Past SCBA President Pat Emery

L to R: Arthur Chaney, Hon. Anthony Wheeldin, Chavette Chaney, Geneva Ward & Beverly Minniefield

At Left: COD honoree Ronit Rubinoff & Suzanne Babb enjoy a celebratory moment



L to R: Ashle Crocker, SCBA Past President Hon. Kinna Crocker & Deborah Bull

COD awards await their owners

Above: COD honoree Michael Miller accepts his award from Suzanne Babb

At Right: COD honoree Dawn Ross addresses the audience upon receiving her award

Update from the Paralegal & Legal Support Section

The Paralegal & Legal Support section has made its comeback after the pandemic, and we have exciting updates to share!

Recent Activity

On June 27, 2023, the P&LS section hosted a MCLE seminar on civil subpoenas. P&LS Section chair Kate Muller and attorney Jack Sanford presented, and together discussed the requirements for issuing all types of civil subpoenas. The seminar was one of the best attended seminars of the year! If you missed the event, the MCLE is available on-demand on the SCBA website.[1]

The P&LS Section assisted the SCBA with the annual court appreciation breakfast on August 21, 2023. Volunteers showed appreciation for Sonoma County Superior Court's court clerks and personnel by serving them a delicious breakfast.

Upcoming Events

Ethics Jeopardy: The P&LS Section will be hosting an ethics jeopardy MCLE on January 22, 2024 at the SCBA offices. This will be a two-hour game show style legal ethics seminar hosted by Bill Adams, Grace De La Torre, and Kate Muller. Pizza and soda will be provided.

Paralegal Student Scholarship: The Redwood Empire Association of Paralegals, before it dissolved, offered an annual scholarship for local paralegal students. The P&LS Section is continuing this tradition, and finalized scholarship development this year. The SCBA Paralegal & Legal Support Section Scholarship is a $1,000 annual award. Eligibility is limited to new or continuing paralegal students enrolled at SRJC with a minimum 2.5 GPA. No separate essay is required; just the short answers completed as part of the general scholarship application. Financial need is considered, but not required. Students can apply for the scholarship through SRJC's online portal this spring.[2] We encourage all eligible students to apply!

Membership in the P&LS Section: All paralegals and legal support professionals are encouraged to join our section. Attorneys, please encourage your staff to join the P&LS section! Firms could also consider covering the cost of staff's membership in the section as a benefit for this coming year. Joining the bar association—and the P&LS section specifically—offers legal staff MCLE at reduced rates, and countless networking, leadership, and professional development opportunities. Please note that membership in the bar association is *separate* from section membership. When joining or renewing online, staff should select the "Legal Support" bar association membership type (or "Law Students" for those in school), and *also* select "Paralegal & Legal Support" under the sections list. Just joining or renewing a "Legal Support" bar association membership does *not* automatically confer Paralegal & Legal Support Section membership.

Looking Forward

The P&LS Section is excited for things to come in 2024. The ethics jeopardy MCLE will be a jovial affair, and the Section is currently working on adding a social mixer event in February 2024, and even more MCLE and networking events throughout the year. If you are interested in contributing to the development of the P&LS Section please contact Kate Muller, *kmuller@abbey-law.com*.

By Ellie Ehlert

Ellie Ehlert, ACP, is a paralegal with Perry, Johnson, Anderson, Miller & Moskowitz LLP in Santa Rosa. She is a member of the Paralegal & Legal Support Section and also serves on the Bar Journal committee as primary copyeditor.

1. Civil Subpoena MCLE On-Demand: *https://cle.sonomacountybar.org/?pg=semwebCatalog&panel=showSWOD&seminarid=19586*

2. SCBA P&LS Section Student Scholarship: *https://santarosa.awardspring.com/*

Dean's List: Report from Empire College of Law

In this space, Brian Purtill, the Dean of Empire College 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.

School News—Just a reminder: I often hear from my colleagues that they hadn't heard about what's going on with the school these days, so I thought I'd repeat a bit of what we're up to. We are continuing with our transition to becoming a branch of Monterey College of Law, which is a non-profit California accredited law school. Monterey and Empire have very similar goals, programs, and demographics, and both have been operating for more than 50 years. Our existing entity, Empire College School of Law, is teaching its 2L, 3L, and 4L students to the completion of their JD degrees. The new 1L students are already here and will have completed their first semester by the time this article goes to print. The "new" school is still called "Empire," formally "Empire College of Law, a branch of Monterey College of Law." This 'replacement,' so to speak, is an ideal way for the school to become a non-profit law school and to benefit from the economy of scale resulting from being part of a larger organization. Monterey already had three branches before the Empire branch was approved by the State Bar's Committee of Bar Examiners, so we will benefit from the centralization of most of the administrative tasks while retaining our local staff and faculty. The two schools are working well together, and we are excited about this change, as it will bring additional programs and opportunities to our students and allow for our local flavor to be preserved.

Student News: Empire will again compete in the statewide Spring 2024 Traynor Moot Court Competition, in which the school has regularly placed in the top three to four positions over the years, including a first place finish a few years ago. Our coach, Connie Burtnett, has selected Kathleen Cuschieri, Lillian Dutcher and Alisha Silver for the team, and we are looking for great things from all of them. Stay tuned. This spring we will graduate another cohort of students and start them on their bar exam preparation. Be on the lookout for email blasts soliciting monetary contributions for the Honors Students Awards we give out yearly. And if you have any graduating students working in your firm, please do all you can to allow them time to study for the bar exam. Speaking of which, please welcome Empire's newest members of the California Bar Association, having just passed the July 2023 Bar Exam: Maximillian Bernard; Lauren Camarda Costlow; Sarah Drlik; Colin Gibson; Shawntay Jordan; and Michael Villafana. Congratulations to them all!!

Faculty News: Teaching in your future? For the remaining 3L and 4L courses we will be teaching in the 2024-2025 school year there are no current faculty openings at Empire College School of Law. As each new cohort of students arrives on campus, faculty for their subjects will be under the Monterey umbrella but will typically be the same teachers we have in place now, depending on availability. But if teaching law is something you've always wanted to do, please contact me. There are and will be opportunities in the near future to teach core and elective classes either in person or remotely at one or both of the schools as we continue with this transition.

Recent Case: In case your clients don't think there's any money in being civil... See the October 25, 2023 California Court of Appeal, Second Appellate District case of *Steve Snoeck v. Exaktime Innovations, Inc.*, B321566 Los Angeles County Super. Ct. No. BC708964. Plaintiff Snoeck prevailed at trial on one of six causes of action in an employment suit in the amount of $130,000.00. His attorney, Perry Smith, submitted records to support an attorneys' fee award, which the trial court ultimately valued at $1,144,659.36. The trial court, however, thereafter applied a *negative* 0.4 multiplier, reducing the award to $686,795.62, "to account for [p]laintiff's counsel's…lack of civility throughout the entire course of this litigation." Snoeck appealed, and argued, among other things, that any such incivility was not related to any increased costs of the litigation and therefore not grounds for reducing the fees, making the reduction simply punitive, which is not allowed as part of the fee award. The appellate court affirmed, citing ample authority in upholding the trial court's reduction of the fees. An award of attorneys' fees may be reduced or increased to reflect the level of skill portrayed by the attorney. Professional civility is indeed considered such a skill and the lack of it displayed here supported the reduction in fees. Indeed, it was hard for the appellate

(Continued on page 24)

Dean's List: Report from Empire College of Law

(continued from page 25)

court to see how the continuing, repeated, and intentional disparagement of opposing counsel, and the bringing of those same accusations before the trial court, could be perceived as an appropriate strategy for persuading either one's opponent or the court in favor of one's client.

The decision is worth reading not just for the comprehensive discussion of these issues, but for the inordinately long quotations from the trial record, demonstrating Mr. Smith's uncivil conduct and attitude toward both defense counsel and the trial court. It's quite a primer for what *not* to do in litigation. In summarizing the interrelationship between civility and attorneys' fees, the court quoted from another decision: *'[C]ivility in litigation tends to be efficient by allowing disputants to focus on core disagreements and to minimize tangential distractions. It is a salutary incentive for counsel in fee-shifting cases to know their own low blows may return to hit them in the pocketbook.'*

Thanks for reading, and Happy Holidays to you all!!

David Kim New Traffic and Pretrial Release Commissioner

On Thursday, September 7, 2023, Presiding Judge Shelly Averill administered the judicial oath of office to David Kim at an investiture ceremony in the presence of his family, friends and community members.

Commissioner Kim fills the position that was created by the retirement of Commissioner Anthony Wheeldin on August 2, 2023.

Commissioner David Kim will be assigned to the Criminal Division presiding over Traffic calendars and the Pre-Arraignment Pretrial Release program as well as the Civil Elder Abuse Protection Calendar. He was selected following an open recruitment of many qualified candidates.

Commissioner Kim graduated from the University of Minnesota Law School and after passing the bar examination began his career in the State of Illinois. He initially worked as an attorney in a civil law practice and then transitioned to the Winnebago County State's Attorney's Office as an Assistant State's Attorney. After several years as an Assistant State's Attorney, Commissioner Kim transitioned to private practice in the areas of criminal defense and civil litigation. In 2016, Commissioner Kim and his family moved to Sonoma County where he worked as a Deputy District Attorney at the Sonoma County District Attorney's office. His most recent assignment before joining the court was as a Deputy District Attorney in the Environmental and Consumer Law Division.

Presiding Judge Shelly Averill speaking on behalf of the court said, "Commissioner Kim possesses all of the attributes that are important to being a judicial officer and we are incredibly fortunate to have him join the bench. His experience as a prosecutor, defense attorney and civil law attorney will all serve him well in addressing the cases that come before him."

By Caren Parnes
Excerpted from Superior Court of California, County of Sonoma Press Release.

SCBA Welcomes Our New Winter 2023 -2024 Members!

Megan Cohen, Family Formation Law Office
Rebecca Cornia, Law Office of Rebecca Cornia
Claire Davey, S.C. Public Defender's Office
Victor Escobar-Troya, S.C. Public Defender's Office
Matthew Friedman, S.C. Public Defender's Office
Denise Frienkel, Law Student
Susan Isreal, S.C. Public Defender's Office
Lon Lazar, The Law Office of Lon D. Lazar
Jindan-Karena Mann, S.C. Public Defender's Office
Marcus McMahon, Berry Fritzinger, P.C.
Justin Parvin, Law Student
Vineeth Pillai, Smith Dollar P.C.
Angelina Potter, S.C. Public Defender's Office
Alan Pravel, Center for Advanced Legal Studies
Jaidee Serrano, S.C. Public Defender's Office
Shoshanna Zesati-Maxwell, Law Student

SCBA Bar Journal

The Bar Journal is published quarterly by the Sonoma County Bar Association.

Editors: John Borba & William Adams

Copyediting: Ellie Ehlert

Proofreading: Ellie Ehlert & Susan Demers

Project Management, Advertising Sales, Graphic Design & Editing: Caren Parnes

Bar Journal Committee:
William Adams, John Borba, Susan Demers, Ellie Ehlert, Steven Finell, Nicole Jaffee, Amy Jarvis, Caren Parnes, Brian Purtill, Eric Young

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Submissions for the Bar Journal

The *Bar Journal* editorial staff welcomes articles submitted by its members. All submitted articles should be educational in nature, and can be tailored for the new practitioner or experienced lawyers. Feature articles should be between 750 to 1,500 words in length. Citations should be footnoted. A byline must be included and articles must be submitted electronically, as a .txt readable file. Photographs are welcome at editors' discretion. The editorial staff reserves the right to edit material submitted. For further information contact Susan Demers at 707-542-1190 x180. Submit all editorial materials by email to: susan@sonomacountybar.org. To place an ad contact Caren Parnes at 707-758-5090 or caren@enterprisingraphics.com. All advertisements are included as a service to members of the Sonoma County Bar Association. The advertisements have not been endorsed or verified by the SCBA.

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Winter Morning in the Russian River Valley

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