Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
October 2020 • Issue 577

Santa Barbara County Bar Association

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Mission Statement

Santa Barbara County Bar Association

The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.

Santa Barbara Lawyer

A Publication of the Santa Barbara County Bar Association

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October 2020 • Issue 577

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Thanks to Our Fee Arbitration Panel!

The SBCBA would like to extend many thanks to the following Mandatory Fee Arbitration attorney-arbitrators for their service in 2019-2020. The program, which operates under the auspices of the State Bar of California, provides services to resolve fee disputes between clients and attorneys.

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A big thank you also to the Chair and committee members of the fee arbitration program, Eric Berg, Naomi Dewey and Vanessa Kirker Wright.

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A Tribute to Judge Royce Lewellen

By the Honorable Timothy Staffel

The Santa Barbara County legal community and specifically, the North County, lost a legal icon when Judge Royce Rutledge Lewellen passed away on September 2, 2020 at the age of 89.

For virtually everyone engaged in the practice of law and administration of justice in our area over the past several decades, words in an article cannot adequately describe what a larger than life and admired person Royce Lewellen was throughout the region and the County.

He was a model of judicial decorum before, during and after his judicial career. He was simply successful in every venture he became engaged in and associated with – as a businessman with broad business interests from his family's Missouri based trucking company to the Lucas & Lewellen Vineyards and Winery he founded; as a Solvang attorney in private practice from 1957 to 1969 (for part of that time, with law partner Zel Canter, who later became a long serving Superior Court judge himself); as Solvang Justice Court Judge (from 1969 to 1975) and Santa Barbara County Superior Court Judge from 1975 to his retirement in 1989.

In 1992 the Santa Barbara County Superior Court named the courthouse complex after him in his honor. For judicial officers, past, present and future, Royce Lewellen's legacy has long set the standard for fairness, high character and for being such a positive presence in the larger community for philanthropy and involvement, judicial outreach and overall good works.

Jim Glines, the Chairman of the Board of the Community Bank of Santa Maria, a local historian of note, and a longtime friend of Royce Lewellen spanning 50 years, summed up Royce's life and legacy accurately and succinctly commenting:

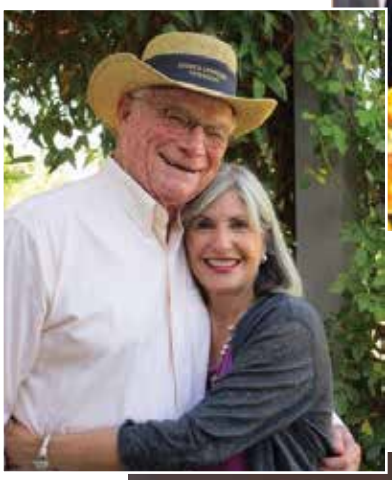
"Royce was a champion in life and a champion in the community. He had a huge impact on virtually everyone that came in contact with him, both personally and professionally."

Members of the Santa Barbara County legal community provide their remembrances of Judge Lewellen:

Judge Rodney S. Melville

Judge Rodney Melville, who was Royce Lewellen's successor on the Santa Barbara County Superior Court, Santa Maria Division, and a close personal friend who shared annual backpacking trips to the Sierras with Lewellen and family members, said: "Words will never be adequate to describe how much I miss Royce."Judge Lewellen was an extraordinary jurist. He was intelligent, courageous, and had a wonderful judicial temperament. He was known for his integrity and commitment to the highest ethical standards. The same qualities that made him an excellent judge made him an extraordinary friend and colleague. He never

Judge Royce Lewellen and Ann Foxworthy Lewellen, photo courtesy of Allan Hancock College/ Pacific Conservatory Theater (PCPA)



Judge Royce Lewellen, photo courtesy of Allan Hancock College/Pacific Conservatory Theater (PCPA)

The Honorable Royce Lewellen and the Honorable Rodney Melville (photo courtesy of Full Court Press)

revealed a confidence, said Melville. "I started appearing in front of Judge Lewellen in 1972 as a young prosecutor, at the Solvang Justice Court. From then until I took the Bench in 1987 (appointed to the Santa Maria Municipal Court from which Judge Melville was elevated to the Superior Court in 1989 as Judge Lewellen's successor with full support and backing by Judge Lewellen) I tried every kind of case you can think of in front of him, including criminal matters both as a prosecutor and a defense attorney, family law cases, Real Estate acquisition and easement matters, Breach of Contract cases and Small Claims Appeals. I have appeared in front of a lot of very good judges and supervised others during my terms as Presiding Judge on our Court, but none finer than the Honorable Royce Lewellen. (Author's note: many of us feel the same way about the Honorable Rodney S. Melville whose implementation of the direct calendaring system for all case types in our court is a lasting legacy improvement of court operations that continues to benefit the public today).

Gary Blair, former Court Executive Officer

"Judge Lewellen was always a person I would describe as the definition of a class act at all times. He was one of the select few judges who was appointed to his respective court positions by governors of different political parties (by Gov. Ronald Reagan to the Solvang Justice Court in 1969 and by Gov. Jerry Brown to the Santa Barbara County Superior Court, Santa Maria Division, in 1975). This almost never happens – but that's the kind of appeal Royce Lewellen had to people of all political views. He was always positive and viewed the world through an 'optimistic lens' and brought out the best in his colleagues, and all those who worked with him. He would compliment everyone who did a good job and encouraged them. He inspired me and I always looked up to him. As the Court's Executive Officer you need to please many different judges with a variety of personalities – Judge Royce Lewellen's gracious, efficient nature sure made my job and life easier and I am forever grateful to him."

Judge Timothy J. Staffel

"Those of us who appeared before and knew Judge Royce Lewellen admired and respected him tremendously. He just knew how to bring out the best in people and make them feel good about themselves, whether you were a young lawyer fumbling around during one of your initial inept appearances before him or later a Bar leader and established attorney. Royce Lewellen was the first person who suggested that I might consider becoming a Superior Court judge, something he did for others as well.

He noticed an earnest, detailed oriented family law attorney with the highest ethical standards named Arthur A. Garcia, who was gaining an excellent reputation among his colleagues and the Bench, and encouraged him to consider a judgeship. Shortly after their respective appointments, both Judges Staffel and Garcia were honored to be treated to a memorable 'Welcome to the Bench" lunch by the Honorable Royce Lewellen.

Judge Jed Beebe

"Some 30 years ago, I was a lawyer in the County Counsel's office and argued and lost (I prefer to say 'failed to prevail') in a case before Judge Royce Lewellen. But the earnestness with which he approached the issues and the integrity he displayed in viewing the evidence made a deep and lasting impression on me. Shortly thereafter, he was part of the Court committee of judges and staff that hired me as the North County Research Attorney. This position gave me the extraordinary opportunity to observe his work ethic and kind spirit up close and behind the scenes. The model he set as a judge is one we all aspire towards – it's truly amazing that as excellent a judge as he was, it ended up being only a small part of his extraordinary career and legacy to the community, especially in the arts and business."

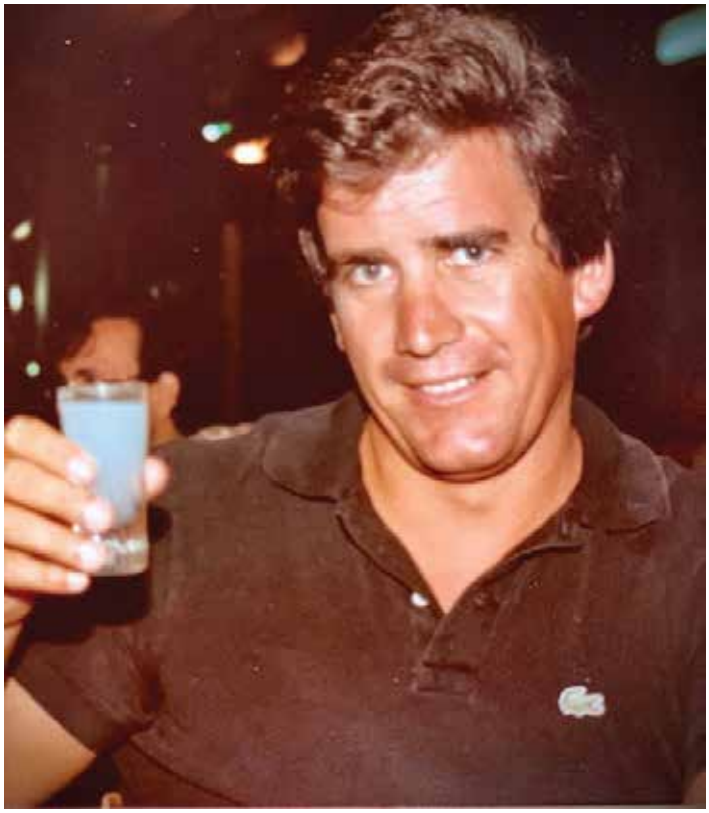
Judge James Herman

"He brought people together. He was a great judge not only because of his fine mind and superior intellect, but because he was humble and genuinely loved people, encouraged them in their pursuits, and it showed in everything he did and was involved in."

Judge Herman and Judge Lewellen, fellow Santa Ynez Valley residents, shared a Missouri upbringing and a love for wine, vineyards and grapes. Their families socialized together right up to Royce's passing. "It was a shock, he was always such a healthy and vital guy full of optimistic energy and an avid hiker and back-packer."

Judge Herman noted that his wife, Denise DeBellefeuille, a retired Santa Barbara County Superior Court Judge, worked with Royce Lewellen on the Solvang PCPA Theaterfest Board in its current renovation effort. Royce Lewellen spearheaded the effort that led to the construction of the Solvang Festival Theater in 1974. Herman and DeBellefeuile each echoed the comments of longtime PCPA artistic director, Mark Booher, "He loved and respected PCPA , was a visionary leader and foundational supporter of everything PCPA in Solvang and in Santa Maria – he personified the real meaning of philanthropist by his investment and love for others." ■

Santa Barbara Loses One of Its Own: Clark O. Alexander



Clark O. Alexander

What does it feel like to be brilliant but to carry your brilliance in a manner that is no more noticeable to others than the sound you make when you breath? For virtues, such as humility, kindness and empathy to be as automatic as the sense of smell, taste, or touch? What would it be like to be able to finish nearly every workday, including all scheduled projects, calls, meetings, correspondence, etc., and to be experiencing the initial chill of the ocean before the rest of us would have barely completed our first run at yesterday's unfinished stack of phone messages? What would it be like to be able to create an articulate, well researched, cogent, and successful moving or responsive pleading, in as few as 2-3 pages, while the rest of us struggle to fit our pedestrian efforts within the 10-page limit imposed by the Local Court Rules? What would it be like to carry no grudges, to harbor no resentments, and to have the innate ability to quickly disarm those burdened by both?

What would it be like, and how would it feel? Well, it would be and feel like sneaking into the soul, spirit, and embodiment of my friend, Clark Alexander. But only for a few minutes. And that would only leave you begging for permission to remain just a little longer, so that you would be able to experience more. If granted permission to stay you would learn what it feels like to be an extraordinarily loving and supportive father of two remarkable children. You would learn and experience the feeling of everlasting, committed, and unwavering friendship. You would gain entry into an endless stockpile of wicked smart humor and masterful wit, combined with perfect timing. And you would experience a breadth of knowledge that would leave you slack-jawed, spinning and convinced you should have paid more attention and spent more time reading.

You would learn how it feels to be loved and cared for by a partner and friend, whose selfless efforts, dedication and commitment would enable you to show her yours in a truly remarkable and tragic turn of events, resulting in a journey through a range and depth of emotions, love and life few have ever been blessed to experience. And while I am honored to share these thoughts with the hope of allowing you a glimpse into the life and spirit of my friend Clark, I am far more honored to have experienced all of the above, first-hand. I will continue to struggle until time works its magic, and sadness is replaced with the comfort, warmth and smiles nurtured by years and years of fond memories of time spent with my friend Clark.

– Paul A. Capritto

I first remember Clark at Hope Ranch Beach, he was about 12 years old, a sandy haired kid, but a really wonderful person . He became an immediate friend even with about a six year age difference in age. We were together primari*ly during summer*. Although I was in early college, Clark became an immediate friend and it was a friendship that never stopped. I leave other kind and heartfelt remarks to others. There will be many. All I have left is "good bye Clark." See you on the white, sandy, sun-soaked beach in heaven when I can—let's say about noon and bring your surfboard. Love always and forever.

– Douglas R. Hayes

Continued on page 12

Spotlight on Judge Jean Dandona

Sandra Day O'Connor, retired Associate Justice of the Supreme Court of the United States, toured the Santa Barbara Courthouse in February 2007. Joining her on the surprise visit was the SB research attorney staff: Judge Jean Dandona, Ann Battles, and Judge Pauline Maxwell.

How long you have been on the Bench?

Twelve years next month.

Tell us about your education.

Childhood education from Manila, Philippines to Anchorage, Alaska. Undergraduate degree and secondary teaching credential from UCSB. Law degree from University of California, Hastings College of the Law.

What advice would you offer to a new attorney?

Do not ever, ever compromise your ethical values. Do not underestimate the value of your good character and reputation. Although good character is its own reward, in the law it is also an advocacy tool.

Discover what you like doing and become an expert in that field. Then use your expertise to improve the delivery of justice.

If you could change one thing about the judicial system what would it be?

At the local level, I would reopen the Santa Barbara juvenile court (both dependency and juvenile justice). The juvenile court was closed on March 20, 2020 and the cases moved to Santa Maria for hearing. To my knowledge, it is the only department that has not reopened. We can and should provide better access to justice for our local families. [Coincidentally, since submitting this article, I have been advised that the court is in the process of developing a plan to reopen juvenile court in phases.]

On a broader level, I would continue the tremendous recent advances in the delivery of justice in the criminal courts, including expanding and funding diversion and drug treatment programs. In recent years in California we have seen, for example, Proposition 36 (2012), which changed Three Strikes law so that a 25-to-life sentence requires that the third felony be a serious or violent felony; Proposition 47 (2014), which reduced nonviolent theft and drug crimes from felonies to misdemeanors; Proposition 64 (2016), which reduced penalties for many marijuana offenses; Proposition 57 (2016), which required that a judge rather than a prosecutor determine whether a juvenile may be tried as an adult; military diversion (Penal Code §1001.80, 2017); and mental health diversion (Penal Code §§1001.35-1005.36, 2018). Many of these changes were met with opposition and predictions of increases in serious crime, which to my knowledge has not occurred.

Yet, while California now rates better than many other states, the United States as a whole still has the highest incarceration rate in the world. I am embarrassed by that statistic and so should every American. We have near-sacred Constitutional protections such as the presumption of innocence and right to trial by jury, yet our country's appalling ranking remains unchanged. We need to study, plan and implement additional changes, while addressing issues of racial justice.

Wisdom gleaned from the Bench:

The criminal court is a culture of tradition, and change is likely to take time.

The jury system really does work.

Describe your style in the courtroom:

I'm not sure of my ability to accurately self-evaluate, but this is what I aim for: prepared, courteous, considerate, patient, compassionate, kind, thoughtful and fair. I try to make the courtroom a safe place for everyone, emphasis on everyone. I have had to deliver some very bad news, but I have never regretted delivering it with kindness and, if possible, some measure of hope. If what happens in the courtroom brings healing, hope or closure, I consider it a good day.

Who were/are your mentors? What were important lessons they taught you?

My favorite and only female mentor is retired Judge

Denise de Bellefeuile. She is such a trailblazer—the first woman judge in South County and the only one for fourteen years, until I was appointed to the Bench. A former prosecutor, she brought courage, grace, and a sense of humaneness to the Bench. She is a genius in judicial ethics, which she taught to judges statewide. She taught me fortitude by example. She taught me not to ever give up and to balance our hard and sometimes disheartening work with the daily pleasures of life. She taught me the importance of supporting each other in this often lonely profession. I am not certain I would have pursued the Bench without her consistent support, and I value her friendship immensely.

What do you love about your job?

I love being in a position to have a positive impact on people's lives. Some of my current assignments (the treatment courts and juvenile) provide daily opportunities. A trial or sentencing hearing provides an opportunity for people to feel that justice has been accomplished. I also love learning something new every day.

What do you do in your spare time? Hobbies?

I spend time with my five adult children (3 children, 2 sons-in-law), new granddaughter, siblings and two rescue dogs. I exercise (now it is long beach walks with the dogs), garden, am active in my church, travel, try to keep up with world events, and spend time with friends. While most of these activities have been impacted by Covid-19, I have enjoyed more quiet, introspective time, reading and Netflix.

Do you have advice for attorneys trying a case before your Bench?

A concise trial brief is often helpful; I will read it and research any legal issues you identify. Cite any dispositive law; I will read what you cite.

Stipulate to as many issues and evidentiary issues as possible and appropriate. I will give you the time you need to present your case, but your case is not stronger if you spend a lot of time on issues about which there is not really a dispute, or force the other side to. Focus on the evidence and the law; that is my focus.

Be prepared, but know that I know that surprises happen, and we will deal with them.

Are there any changes in the legal community you're excited about?

I am extremely excited about Mental Health Diversion (Penal Code §§1001.35, 1001.36). Effective 6/27/18, it allows pretrial diversion to persons charged with a crime who qualify under the statute. It is a monumental advance in the way society treats people who commit a crime because of a mental disorder. Most crimes are eligible (not most sex offenses, murder and involuntary manslaughter).

Judge Dandona and Gerri Cota

It is a discretionary disposition the Court can grant if it determines the defendant is eligible and suitable under the statute. The defendant participates in treatment instead of a trial or other disposition, and if he or she successfully participates in the individualized treatment plan, the case is dismissed.

I preside over the periodic court reviews of those granted the diversion program in South County. There are currently 30 individuals being monitored. So far there have been four successful completions with dismissal of all charges; 1 unsuccessful termination with criminal proceedings reinstated; 1 transfer; and 1 deceased.

What do you believe is the biggest difference between practicing law and presiding as a judge?

While presiding as a judge, you do not represent or advocate for a particular client or cause; you rule on the merits in an unbiased way. Practicing law is just the opposite. I was fortunate to work as a court research attorney before joining the bench. That made the transition an easy one.

Who is your legal hero/ine?

CASA volunteers. Gerri Cota. Joyce Dudley. Tracy Macuga. Judge Tom Anderle. Tara Haaland-Ford. Layla Arshi. Ann Battles. Judge Art Garcia. Attorneys who are parents. We are surrounded by legal hero/ines, doing honorable work honorably, resolving conflict in a civilized way, protecting and defending the Constitution. I see them daily, and I am grateful. ■

Alexander, *continued from page 9*

Clark and I met when we were both brand new lawyers and either fools or brave to start our careers by opening our own offices. I was sure we were the former; Clark was certain of the latter. We learned together and laughed together. Clark's favorite answer to any suggestion was always "Porque no?" He was always there for his friends, good or bad, right or wrong, never passing judgment.

– James F. Cote

For those who did not know Clark, he was born in Santa Barbara, grew up in Hope Ranch, went to San Marcos High School and Pomona College, where he was a starting pitcher who "didn't have any heat but a lot of good junk." He was also a kicker for the Sagehens football team. After graduating from Santa Clara Law School in 1977, he opened his own office and handled criminal defense and personal injury matters until he retired in 2010. ■

It's Time to Rethink the California Bar Examination

By Jackie Gardina

A maxim ascribed to Lenin that "there are decades where nothing happens; and there are weeks where decades happen" certainly applies to the Supreme Court's decision to adjust the California Bar Examination (CBX) passing score from 1440 to 1390, to allow the exam to be taken remotely, and to order the State Bar to create a provisional licensing program for 2020 graduates. COVID-19 has accelerated change in places where it has long been resisted. But the Court shouldn't stop here. It's time to rethink how the State of California licenses attorneys.

The bar exam is currently one leg of a three-legged licensing stool. To become licensed in California, a new attorney must pass the CBX, pass the Multistate Professional Responsibility Examination (MPRE), and receive a positive moral character determination. Each leg is considered essential to protecting the public. The CBX is identified as the leg that determines whether an entry-level attorney has the "minimal competence" to practice law.

To be considered competent, a bar applicant must receive a passing score on a closed-book, timed exam taken over two days covering thirteen subjects imbedded in 200 multiple choice questions, five essays questions, and one Performance Test. The exam format bears little resemblance to the practice of law. And, as the State Bar's recent job analysis study determined, some of the subjects covered on the CBX are rarely invoked in the early years of practice, if ever.

Because every state adopts its own passing score, there is no common understanding of competence across jurisdictions. Until now, California required an overall score of 1440 to pass. In contrast, the national median is 1350, and New York, the state with a legal practice arguably closest in scale and complexity, draws its line at 1330. Bar applicants in California had to score 110 points more than those in New York to be deemed competent to practice.

If the passing score is an important barrier between the public and incompetent attorneys, as many have argued, one would suspect that states with higher passing scores would have fewer malpractice claims and fewer disciplinary actions, especially among new attorneys. Yet there is no evidence to support this contention. Even in Wisconsin, a state with a 139-year history of diploma privilege for graduates from Wisconsin law schools, there is no evidence to support that the bar exam acts as a filter. Keith Sellen, the director of Wisconsin's Office of Law Regulation recently told the *ABA Journal* that:

"My experience in 20 years of disciplinary regulation informs me that the causes of professional misconduct have little to do with whether the lawyer took a bar exam or was admitted by diploma privilege. These causes are, in general, a poor or nonexistent mentor; anxiety, depression and chemical dependency; inadequate organizational skills; character issues; and a lack of business acumen."

The current bar exam does more than restrict access to the profession, it drives law school curriculum and supports a profit-driven commercial bar exam preparation industry. Legal education should be focused on helping aspiring legal professionals become skilled, competent, and ethical attorneys. Yet, law schools spend an inordinate amount of time helping students gain the test-taking skills and knowledge necessary to pass an exam that bears little resemblance to the actual practice of law.

A new attorney's lack of skills and knowledge does not go unnoticed. Experienced attorneys and judges often lament their absence. They often question how a struggling attorney even passed the bar exam, given his or her apparent lack of ability. The question assumes a correlation where there is none—that the bar exam identifies who has the skills necessary to competently represent clients. The profession would be better served if law schools focused their curriculum on the knowledge and skills necessary to practice law, not navigate an exam.

In addition to the CBX's questionable validity as a measure of attorney competence, it's 1440 passing score has had a disparate impact on the bar applicants most underrepresented in the profession. A State Bar study revealed that adjusting the passing score would significantly increase the number of new attorneys from underrepresented groups. If the 1390 passing score has been in effect in 2016, 40 percent more Black bar applicants and 26 percent more Latinx bar applicants would have passed.

Given the State Bar's recent failing grade on its first annual *Report Card on the Diversity of California's Legal Profession*, diversity is an important consideration. Not surprisingly, the report found that "the state's attorney population does not reflect its diversity." According to the report, attorneys who identify as white account for nearly 70 percent of

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Propositions 15 and 19 Could Reshape California Real Property Tax Law

By David E. Graff

David E. Graff

There are currently twelve ballot measures certified to appear on the ballot for the election on November 3, 2020. These ballot measures cover issues including the expansion of suffrage, changes to criminal sentencing, and reclassifying app-based drivers as independent contractors. This article will focus on two ballot measures that—if passed—would dramatically change the cornerstone of real property taxation law in California known as "Proposition 13".

Proposition 13 Generally

Proposition 13, approved by California voters in 1978, amended the Constitution of California with sweeping changes to California's tax laws. Proposition 13 is embodied in Article XIII A of California's Constitution, which is, in turn, embodied in California Revenue and Tax Code Sections 50 through 100.96.

The law's most significant effects are: (1) the requirement of a two-thirds majority in both legislative houses for future tax increases; and (2) capping the rate of real property tax at one percent (1%) of the assessed value of all property, and restricting annual increases of assessed value to two percent (2%) per year.

Proposition 13 sets a "base year" assessed value for real property taxation, generally based upon the purchase price of the property. Unless there is a specific event that causes a full or partial reassessment of the property, the base year assessed value can only increase a maximum of 2% per year (which, historically, has been much less than the rate of growth in real property values). The events that cause reassessment of property are generally either new construction or "changes in ownership." The rules determining whether a change in ownership has occurred (which are not discussed in this article) are extremely complex, especially as they relate to trusts and entities.

Currently, the protections described above apply to *all* types of real property: residential, commercial, industrial, and agricultural. One of the ballot measures you will be voting on this November, Proposition 15, seeks to change that.

Also, there are numerous exceptions that prevent reassessment of base year assessed values. For example, currently, if property is being transferred between parents and children (or grandparents and grandchildren), it may qualify for an exclusion from reassessment, notwithstanding a change in ownership. A second ballot measure on the ballot this November, Proposition 19, seeks to make significant changes to those exclusions.

Proposition 15

2020 ballot measure Proposition 15 would eliminate restrictions of annual increases of assessed value for all commercial and industrial properties (except those zoned as commercial agriculture). For all other properties (including residential properties), the 2% per year restrictions on annual increases would remain. This would create what has been called a "split roll" between different types of properties based upon their use.

Commercial/industrial properties would be subject to reassessment to fair market value as of the effective date of the new law. Commercial/industrial property will be periodically reassessed "no less frequently than every three years as determined by the Legislature." The legislature is further directed to develop a process for hearing appeals resulting from the reassessment of properties (of which, this author suspects, there will be more than a few).

For mixed-use property, only that portion of the property that is used as commercial or industrial will be reassessed. The legislature will have the power (but not requirement) to further exclude the commercial/industrial share of a mixed-use property if that commercial/industrial share is 25% or less of the property by square footage.

Of course, there cannot be a new rule without exceptions. Because Proposition 15 is designed to collect additional tax revenue from larger, wealthier, corporations and businesses, there is a key (but, perhaps poorly thought-out) exception for the "little guy".

Proposition 15 excepts properties whose business owners have $3,000,000 or less in commercial/industrial property holdings in California. The $3,000,000 amount is adjusted

for inflation, but separately for each county (so it is not clear how this will work for owners of properties in multiple counties).

The owner of one or more commercial/industrial properties must aggregate the values of all such properties. If the total is below the $3,000,000 threshold, then all of those owner's commercial/industrial properties will avoid periodic reassessment (and retain the benefits of a maximum 2% annual increase in assessed value). If the total is above the $3,000,000 threshold, then ***all*** of that owner's commercial/industrial properties will be subject to periodic reassessment.

The most problematic issue with this concept is that Proposition 15 provides that the aggregation includes both direct *and indirect beneficial ownership*. For example, consider the individual who owns a 50% interest in each of ten limited liability companies, which, in turn, each own a separate $1,000,000 industrial property. Using plain language, one would say that the individual indirectly owns $5,000,000 worth of California industrial property.

Applying Proposition 15 might result in *every one* of the ten properties being subject to periodic reassessment. However, the other LLC owners may be ten unrelated individuals who only own $500,000 worth of industrial property.

Such a result would not be fair to the other LLC owners. If each of the properties is partially periodically reassessed, will the LLC governing documents apportion the additional property tax costs to the individual owner causing the increased tax?

The effective date of Proposition 15 also does not escape complexity. The change from the existing base year assessed value to the periodic market reassessments will be phased-in beginning in fiscal year July 1, 2022 through June 30, 2023. However, properties, such as retail centers, whose occupants are 50 percent or more "small businesses" will be switched to periodic assessment beginning in fiscal year July 1, 2025 through June 30, 2026, or at even a further later date that the legislature determines.[1]

Unfortunately, there may be limited planning opportunities to deal with the effects of Proposition 15. If Proposition 15 passes and applies to a given property, property taxes will increase. Those facing substantial increases in property tax expenses (whether landlord or tenant under a triple-net lease) may find they can no longer afford that California commercial or industrial property.

However, if a specific individual knows that their commercial/industrial property will be subject to periodic reassessment, it will likely impact their other non-tax decisions (including decisions as to what properties they may wish to sell, gift, or otherwise transfer).

Proposition 19

Before getting into the specifics of Proposition 19, it is helpful to summarize the existing law related to certain exceptions that prevent reassessment of base year assessed values, notwithstanding a change in ownership.

In 1986 Californians passed Proposition 58, which allows homeowners to transfer real property to (or from) their children without triggering the reassessment consequences of a "change in ownership".[2] A child[3] can receive their parents' California real property and retain the parents' base year assessed value, which is almost always lower than the property's then-current fair market value. The transfer can be by sale, gift, or bequest.

This is one of the greatest tax benefits that a parent can provide for their child. For example, it is not uncommon for a child to inherit their parents' residence, perhaps now worth over $1,000,000, and continue to pay a real property tax bill that might be less than $1,000 per year. In that example, the child will save approximately $9,000 per year, *each year that the child owns the house*.

The Proposition 58 "parent-child exclusion" does have its limitations. The exclusion from reassessment covers:

- The entirety of the transferor's principal residence, regardless of the fair market or assessed value; and
- Up to $1,000,000 (not indexed to inflation) in assessed value[4] of other real property.

A "principal residence" is defined as a dwelling that is eligible for a homeowners' exemption or a disabled veterans' exemption as a result of the ***transferor's*** (e.g., parent's) ownership and occupation of the dwelling.

There is a similar "grandparent-to-grandchild exclusion"[5] from reassessment that applies to transfers of property between grandparents and grandchild (which apply, essentially, so long as the intervening child is deceased).

In 1986 Californians also passed Proposition 60, which allows homeowners over the age of 55 to transfer the assessed value of their present home to a replacement home.[6]

However, the benefits of this law are limited, because: (1) The replacement home must be equal or lesser value than the original property; (2) must be purchased or newly constructed within two years of the sale of the present property; and, perhaps most limiting, (3) *must be located in the same county as the original property*.

With regards to the last limitation, there is an attempt in the existing law to provide some relief to older Californians who wished to "downsize" to a different county. A county board of supervisors can *elect* to provide reciprocity with another county, to accept the transfer of base-year assessed value. However, according to the Board of Equalization, as of 2018 there are only ten counties that have an ordinance

enabling the intercounty base year value transfer.[7] Santa Barbara County is not one of those counties.

2020 ballot measure Proposition 19 would amend Article XIII A of California's Constitution in two ways, one designed to lessen property tax burdens and a second to increase tax.

First, the proposition will remove the intercounty restriction of Proposition 60/California Revenue and Tax Code § 69.5. Following the implementation of the law, which would have an effective date of April 1, 2021, anyone who is over 55 years of age will be able to transfer his or her base year assessed value to any other property in California, regardless as to the location of the replacement property. The replacement primary residence must still be of equal or lesser value than the original primary residence to obtain a full transfer of base year value.

In addition to removing the intercounty restrictions, the proposed law also adds a new category of individual who can take advantage of the base year transfer: any victim of a wildfire or natural disaster. Given the current spate of wildfires engulfing large portions of the state, and as the state is likely to see more and more disasters in future years, this aspect of Proposition 19 might end up being the most impactful. However, this author can foresee a number of challenges of implementation, including, for example, disagreements taxpayers may have with county assessors as to the value of the original, possibly damaged or destroyed, residence (impacting the allowed value of replacement property).

Second, Proposition 19 will severely reduce the benefits of the parent-child exclusion from reassessment. Essentially, there will ***only*** be a parent-child (or grandparent-to-grandchild) benefit to the transfer of property *that will be used by the child (or grandchild) as their "family home"*. It will no longer be relevant whether the ***transferor*** (e.g., parent) used the property as their principal residence; rather, the analysis will be whether the ***transferee*** (e.g., child) will use the property as their family home.

Proposition 19 defines "family home" in the same manner as "principal residence." However, Proposition 19 further includes "family farm" within in the definition of family home. So, in some cases, family home will be defined in a

much broader sense than principal residence.

Further, even in those cases where the transferee will use the property as their family home, the transferee may still see a property tax increase. The proposed law allows for the transferee to avoid a reassessment increase on only the first $1,000,000 (indexed to inflation) of difference between the then-current real property tax assessed value (i.e., the base-year plus annual adjustments) and the market value of the property at the time of the transfer.

The language Proposition 19 uses to effectuate this concept is quite convoluted, but may be interpreted as shown in the following example: Parents transfer property to a transferee child (who intends to occupy it as her residence) that has a real property tax assessed value of $300,000, but a market value of $1,700,000. There is a $1,400,000 difference between $1,700,000 and $300,000, but the child is only able to avoid reassessment on the first $1,000,000 of that amount. Therefore, the child will end up with a new base year assessed value of $700,000 (the parents' $300,000 base year plus $400,000).

The changes to the parent-child exclusion will be effective February 16, 2021 (a slightly earlier date than the removal of the intercounty restrictions).

The ballot measure would also create a California Fire Response Fund (CFRF) and require that 75% of the funds raised by the new assessments be added to that fund to be used for fire-protection purposes.

Due to the February 16, 2021 effective date, there will be limited time to consider and implement planning to deal with the effect of a loss of the traditional parent-child exclusion. And, depending upon when election results are certified, there may not be much time to act before the end of the year.

Certainly, for those clients who wish to preserve low property tax bases, and who can also afford to transfer wealth currently, it would be beneficial to transfer properties to children before the law takes effect.

Remember that those transfers can be by gift *or by sale*. If the parent/property owner does not necessarily want to give up an income stream associated with income-producing property, the parent might consider selling their property in exchange for a promissory note (i.e., seller-financing). And, if the parent wishes to avoid potential capital gains on such a sale, the parent might further consider selling that property to an intentionally defective grantor trust (IDGT). This technique has an added benefit of using minimal amounts of a client's lifetime gift and estate tax exemption, which is helpful in cases where the client might have limited remaining exemption.

Under current law (and before Proposition 19 comes into effect, if at all), careful consideration must go into how best to apply the existing $1,000,000 of assessed value of non-principal residence property in the context of a parent-to-child transfer. Clients should consider the difference between the market and assessed values of properties, as well as the duration the child is likely to hold on to ownership of the property.

If both Propositions 15 and 19 pass, planning before they take effect should consider the greater benefit of applying existing parent-to-child transfers to residential and agricultural property, as opposed to commercial and industrial which would end up with periodic reassessment in future years. ■

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Endnotes

1 The memo states that, "employees across the Executive Branch have been required to attend trainings where they are told that "virtually all White people contribute to racism" or where they are required to say that they "benefit from racism." The "they" referred to are "white people." Id.

2 See, Richard Delgado and Jean Stefancic, Critical Race Theory: An Introduction. Critical America, New York University Press (2nd ed., 2012) (explaining how political and legal actin has to be deconstructed in the context of race in America).

3 See, e.g., Nicole Gaudiano, "*Trump wants to teach 'American exceptionalism,' an idea he once disavowed,*" Politico, (August 24, 2020).

4 Connor Perrett, "*Trump threatens to investigate and pull federal funding from schools that teach NYT's 1619 project on the consequences of slavery,*"

5 At: https://implicit.harvard.edu/implicit/takeatest.html.

6 There are numerous presentation on line and sometimes available with group membership. E.g., see, the California Employers Association training at: https://www.employers.org/pages/harassment-prevention/.

7 See, e.g., the books cited *supra* at notes 4, 17, 18, 19, 20 and 21 – but there are many more.

Gardina, *continued from page 13*

licensed attorneys in California while comprising only 40 percent of the state's population. In contrast, only 7 percent of California attorneys identify as Latinx even though the group makes up 36 percent of the state's population.

The lack of diversity in the legal profession has real consequences for the public's trust and confidence in the legal system. According to the American Bar Association, "racial and ethnic diversity in the legal profession is necessary to demonstrate that our laws are being made and administered for the benefit of all persons. Because the public's perception of the legal profession often informs impressions of the legal system, a diverse bar and bench create greater trust in the rule of law." This issue is even more important now as the country struggles, once again, to address systemic racism.

California now has an opportunity to reimagine how it licenses new attorneys. The State Bar Board of Trustees and the Supreme Court are creating a Blue Ribbon Commission on the Future of the California Bar Exam. The Commission is tasked with, among other things, "recommending whether to adopt methods, other than those used in the current bar exam, to ensure minimum competence in certain subject areas or skills." Imagine creating a licensing process that actually reflected practice, that harnessed technology to simulate practice environments, or that required bar applicants to demonstrate basic writing acumen outside a timed-exam. Wouldn't the profession and the public be better served? ■

Jackie Gardina is the dean of the Santa Barbara and Ventura Colleges of Law and served on the California Attorney Practice Analysis Working Group responsible for the recent jobs analysis study.

THE OTHER BAR NOTICE

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Discrimination Laws Applicable in California

By Robert Sanger

Robert Sanger

In this *Criminal Justice* column, we will look at criminal and civil liability for discriminatory behavior under federal and California law, which has been characterized as "hate crimes" and "hate incidents."[8] The point of this column is to identify the potential liability and then to consider what can be done to avoid it rather than to talk about the elements and defenses. Some of the behavior proscribed by federal and state law is unapologetically racist or bigoted. It is well reported that such hate behavior has increased in recent years. Some is more subtle – at least from the viewpoint of the perpetrator – although profoundly harmful to the recipient and to society as a whole. We will look at some of the proscribed conduct including the newest addition to antidiscrimination legislation, AB 1550, relating to discriminatory "911" calls.

Offensive conduct is sometimes claimed by the perpetrator to have been spontaneous or somehow not intentional. The focus of this article is to seek an understanding of how the actions occur and how lawyers might provide a remedy.[9] Sometimes the person acting protests after the fact that it was not "who they really are." Famously, some of the incidents of racist behavior around the country have been followed by profuse apologies and claims by the perpetrator that she or he really is not a racist. Some portions, or all, of those explanations may be disingenuous, but some portions may be attributed to implicit bias.

Once we have reviewed the types of things that lawyers need to be concerned about on the part of their clients, we will focus on the bias that gives rise to the actions. To the extent that implicit bias is involved, training should help in avoiding liability for individuals, employees, and employers. But training is often resisted. It is now being subject to systemic attack. To make progress, the best legal strategy is to redouble the efforts to pursue training, education, and self-awareness notwithstanding pressures to the contrary.

Discriminatory Conduct

The federal and state legislatures, since the Reconstruction era, through the sixties civil rights movement and more recently, have basically said that discrimination on the basis of a protected characteristic is illegal. We cannot expect that everyone in the country or in this state will memorize the various statutes and their convoluted interpretations. People need to know that it is illegal to discriminate. But, that is the hard part: knowing what conduct is discriminatory. And, it is even harder, since a lot of what can lead to liability is based on implicit bias or some sort of cultural, mindless bigotry.[10]

Federal law, of course, is enforceable against people, including officials, in California. For instance, state and local officials, that is, anyone acting "under color of law," may be subject to both civil and criminal sanctions under the federal Civil Rights Act of 1964 if they deprive any person "of any rights, privileges, or immunities secured by the Constitution and laws."[11] Federal Agents may also be liable for Fourth Amendment violations under *Bivens v. Six Unknown Named Agents*[12] and for conspiracy to violate civil rights under a vestige of the Reconstruction-era statute where "two or more persons" "conspire" to violate a claimant's civil rights.[13]

Liability against employers, including for compensatory and punitive damages, and attorney's fees, is also available, under Title VII of the Civil Rights Act of 1991, to victims of discrimination in employment on the basis of "race, color, religion, sex, or national origin."[14] Added to this are laws relating to age discrimination[15] and discrimination against people with disabilities.[16] All of this can be based on implicit as well as express bias.

The federal law also makes it a crime to cause bodily injury to a person "involving actual or perceived race, color, religion, or national origin" under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.[17] California has its own hate crime statutes which are broad and do not require that the perpetrator be acting under the color of law. In other words, they apply to everyone. Penal Code section 422.55(a) states:

"Hate crime" means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

(1) Disability.

(2) Gender.
(3) Nationality.
(4) Race or ethnicity.
(5) Religion.
(6) Sexual orientation.
(7) Association with a person or group with one or more of these actual or perceived characteristics.

Penal code section 422.6 makes it a crime to "by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States" or to "knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any [such] right or privilege." Penal Code section 11410 et. seq. makes it unlawful to interfere with the right of assembly of protected persons, terrorize owners or occupants of property, threaten the exercise of religion or harass a person's child.

California also has the Unruh Act which provides, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[18] There are other laws that protect individuals from discrimination,[19] in addition to provisions of the federal[20] and California Constitutions.[21]

The newest law addressing discrimination in California is Assembly Bill 1550. As of this writing, it is awaiting the Governor's signature but is expected to be signed into law. If so, it would add section 52.35 to the Civil Code and would amend Penal Code sections 148.3 and 422.7. Essentially, it creates clearer path to civil remedies against a person, "who, motivated by the persons' race, religion, sex, or any other protected status, through the use of a "911" call knowingly causes a peace officer to arrive at a location to contact the person with the intent to do any of the following:

(1) Infringe upon the person's rights under either the California Constitution or the United States Constitution.
(2) Unlawfully discriminate against the person.
(3) Cause the person to feel harassed, humiliated, or embarrassed.
(4) Cause the person to be expelled from a place in which the other person is lawfully located.
(5) Damage the person's reputation or standing within the community.
(6) Damage the person's financial, economic, consumer, or business prospects or interests."[22]

The prevailing plaintiff can recover general damages, including emotional distress, special damages and punitive damages or, in lieu of actual damages, statutory damages of between $250 and $10,000, plus attorney's fees and costs.

Outright vicious physically violent hate crimes certainly are illegal. However, so are acts that are spur of the moment and, to the perpetrator, may not seem that significant.[23] These acts will require more than a lawyer's guidance to avoid. However, a lot of discriminatory conduct, including conduct violating the new "911" statute, can be avoided with training, education, and self-awareness. Whether the after the fact protestations of "not being that kind of person" are sincere, they do reflect the sense that if the perpetrator had been more aware, she or he might not have made that call or said those things. True, their public humiliation and loss of their jobs might have motivated the apologies, but it also suggests that had the perpetrators been aware, they might not have done it. So, what can we do as lawyers to help avoid this conduct and the resultant liability?

Avoiding Criminal and Civil Liability

One way to help avoid criminal and civil liability is for lawyers to draft careful memos instructing clients, employees and employers exactly what they can say and do and what they cannot. However, that only goes so far unless their clients, employees and employers are educated and aware of implicit biases. Intensive instruction on specific rules in the workplace is helpful and necessary. Yet, a lot of liability, like calling 911, occurs outside of the workplace. Individuals in their private lives are not generally receiving legal memos on how to behave.

Ultimately, education and self-awareness – which for some people will require overcoming significant cultural denial – is the best way to prevent "unfortunate" but destructive acts.

Fact: We live in a culture of white privilege, which influences the actions of everyone in the culture. That privilege redounds to the benefit of whites, and generally, white males.[24] People do not like to hear this – particularly people who are white males. But we live in a caste society where race is the most obvious marker.[25] It has been said over and over but it is something Americans have not been able to deal with honestly.[26] People like Albert Einstein and Eric Fromm could see pervasive effects of caste having escaped German antisemitism. They spoke to Americans but it was, and is, a nation in denial.[27] Nevertheless, education and

self-awareness are the beginnings of the cure.[28]

A lot of what gives rise to the legal claims is based on implicit bias that manifests itself in discriminatory acts. That makes it all the more perplexing why the federal government, in a memo by the Director of the Office of Management and Budget (OMB), would seek to end training in the federal government on implicit bias[29]-- perplexing as an act of governance, but comprehensible as an act of propaganda politics. Under the guise of banning "critical race theory"[30] the memo is a signal that abuse of white privilege is acceptable or, at the least, as the memo says, that white people should not be told that they "benefit from racism."[31]

This OMB memo comes at a time when the actions of state, local and federal officials are under intense scrutiny for acts of discrimination. It also comes at a time when there is a real possibility that the "qualified immunity" doctrine might be repealed and create even more exposure. In other words, the OMB's reaction to remove the training that is designed to address implicit bias and avoid costly errors is unintelligible to all but the most cynical. And, of course, the OMB did not do this in a vacuum since the president has condemned such training as "a sickness"[32] concurrently advocating "American exceptionalism," which is not so lightly dusted with white supremacy,[33] and has attempted to end the teaching of the consequences of slavery.[34]

This is aggressive denial, and it is hard to tell if any of it is sincere or if all of it is just manipulative. However, contrary to the message from the current administration, to do our jobs as lawyers, we have to do something to confront and remedy the consequences of the deep-seated caste and class structure in this country. As litigators, we have to pursue or defend criminal or civil cases regarding discrimination. As transactional lawyers, we have to advise our clients to follow complex rules. As human beings, we all want to live in a better world.

The first thing lawyers can advise individuals, employees, employers and themselves is to take the free Harvard Implicit Bias Test through Project Implicit.[35] The second thing is to take training classes on implicit bias and associated issues.[36] The third thing is to read about, reflect upon and discuss how we can all do a better job at not just avoiding liability, but at being good human beings in our relationships, direct and indirect, with those around us.[37]

Remedies

If the reader has gotten this far, it is pretty clear that the remedy is not just lawyerly memos, although they are necessary. The remedy is training, education and self-awareness. Many of us are required to take implicit bias training annually through our firms or other institutions —such as educational institutions at which we teach. But even people who go through the trainings year after year still make tragic errors of judgment—sometimes because they are not willing to hear the message and, other times, because the message has not sunk in.

Training is necessary, but education goes beyond the training programs. Books and articles abound to provide education on a deeper level. Ultimately, self-awareness is what will lead to real change. All of that can lead to avoidance of criminal and civil liability but, more importantly, it can lead to an increase in the quality of life for everyone. ■

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ENDNOTES

1 However, keep in mind that the "lien date" for any fiscal year is January 1st of that year. Meaning that the lien date for July 1, 2022 through June 30, 2023 is actually January 1, 2022.
2 California Revenue and Tax Code § 63.1.
3 There are numerous complications when property passes *in trust* for the benefit of a child (and/or other individuals), which must be analyzed carefully to ensure qualification for the parent-child exemption. Also, it is important to point out that the parent-child exclusion is not available to real property vested in an entity (even if that entity is disregarded for income tax purposes, and even if that entity is passing entirely from a parent to a child).
4 Article XIII A of California's Constitution uses the term "full cash value", which is subsequently defined as the assessed value of the property.
5 Proposition 193, which passed in 1996.
6 California Revenue and Tax Code § 69.5.
7 Those counties are: Alameda, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Mateo, Santa Clara, Tuolumne, and Ventura.
8 https://oag.ca.gov/hatecrimes.
9 There are legal defenses to both criminal and civil liability. Both the act and the mental state need to be proven. Most discrimination statutes require evidence of willfulness, knowledge and/or and intention to violate civil rights. For instance, under California's Unruh Act, Civil Code section 51.7, there must be evidence that the defendant was "motivated" by a prohibited factor. Under Penal Code section 422.6 and 422.7, there must be evidence that the defendant acted "with the specific intent to intimidate or interfere with the alleged victim's free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or law of California or the United States."
10 bell hooks, THE WILL TO CHANGE: MEN, MASCULINITY, AND LOVE 17

(2003). ("The phrase 'imperialist white-supremacist capitalist patriarchy' [describes] the interlocking political systems that are the foundation of our nation's politics.") If the reader is offended, he is probably white. If she is Black, the truth is lived every day.

11 42 U.S.C. section 1983, et seq.
12 403 U.S. 388 (1971).
13 42 U.S.C. § 1985(3)
14 42 U.S.C. § 2000e-2(a)(1).
15 29 U.S.C. § 623(a).
16 42 U.S.C. § 12112.
17 18 U.S.C.A. § 249
18 Civil Code, section 51 (b).
19 E.g., Civil Code sections 51.2 and 51.10 (age discrimination in housing); Civil Code section 51.5 (Business establishments); Civil Code section 51.6 (Gender Tax Repeal Act); 51.7 (Ralph Civil Rights Act); Civil Code section 51.8 (franchises); Civil Code section 51.9 (sexual harassment); Civil Code section 52.1 et seq. (Tom Bane Civil Rights Act); Civil Code section 53 (real estate transactions); Civil Code section (political groups); Civil Code section 54 et seq. (disabilities); Education Code section 200 et seq. (educational equity); Government Code section 12940 et seq. (employment discrimination); Government Code section 12955 (housing discrimination); Government Code section 11135 (State agency discrimination); Labor Code section 1735 (employment); Military and Veterans Code section 130
20 The Privileges or Immunities Clause is Amendment XIV, Section 1, Clause 2 of the United States Constitution states in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...." The 15th Amendment to the U.S. Constitution Article XV. Section 1 states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation." Neither provision, however, permitted women to vote at all and Black men were effectively prohibited under Jim Crow laws. And, of course, today voter suppression is having a disproportionate effect on people of color.
21 Constitution Art. 1, section 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.")
22 Proposed Civil Code section 52.35.
23 Of course, the consequences are substantial to the recipient of the behavior both in the moment and cumulatively. The consequences to the entire community, including to the dominant as well as the subordinate class or caste, are even more substantial, even if not fully appreciated. See, Wilkerson, Caste, *supra*.
24 Adam Cohen, Supreme Inequality, Penguin, New York (2020) (demonstrating how the United States Supreme Court accomplished the bidding of the most wealthy); see also, Thom Hartman, The Supreme Court and the Betrayal of America, Berrett Koelher, Oakland (2019); Thom Hartmann, Monopolies, Berrett Koelher, Oakland (2020) (how the unprecedented concentration of wealth has controlled government decision making and held back the middle class); Richard Rothstein, The Color of Law (2017)

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Diversion

By Santa Barbara County District Attorney Joyce E. Dudley

If you have listened to, or participated in, any recent criminal justice reform discussions, you've heard that the DA's office should offer diversion programs.

Diversion programs are programs that divert individuals from the criminal justice system either by deleting a conviction from a person's record or by avoiding a conviction altogether. Some programs also divert participants away from the traditional sentencing structure by substituting treatment and program compliance for possible incarceration. Participation is voluntary, and the benefits of the particular program are granted after successful participation in the program. Diversion programs have been created by various laws, such as; Penal Code section 1000 pre-plea drug diversion, PC 1001.36 pre-plea mental health diversion, and PC 1001.80 pre-plea military diversion, which can all result in avoiding a conviction. Penal Code section 1210.10, post-plea non-violent drug possession diversion, generally prohibits incarceration for non-violent offenders and results in deleting the conviction for the successful participant.

In addition to the various statutory diversion programs, your DA's office has also created other diversion programs either on our own or in collaboration with other criminal justice partners.

In addition to the programs we presently offer we also have other Diversion programs in the infant or planning/implementation stage.

Our most successful Diversion program is our Truancy Program. Its success is based upon research conducted by Fight Crime Invest in Kids. This is a national organization; I serve on the Executive Board in California. According to their research 60% of the inmates in California's state prison have not graduated High School. Based upon that fact we have created a successful Truancy program called CLASS, which keeps children both in, and engaged in, school.

We are also approaching our 10th year of offering pre-filing diversion for many misdemeanor crimes. The goal of this program is to offer those who have been cited or arrested for a crime an opportunity to attend a class focused on addressing the type of criminal behavior alleged, as well as paying any restitution in full in exchange for no charges being filed. We hope to extend this Diversion Program to some felony crimes as soon as an effective and cost efficient Felony Diversion programming can be established.

Additionally, we offer other misdemeanor diversion programs including: Theft Awareness, post-plea Veteran's and post-plea Mental Health Diversion.

Joyce Dudley

Beyond those we also support diversion programs focused on crimes committed by our unsheltered/homeless population including Restorative Court and a post-filing program called Solutions Track.

We have also had a long history of participating in many treatment courts: Substance Abuse Court, Mental Health Court, Dual Diagnosis Court, and Veteran's Court. Graduation from these courts results in criminal charges being dropped.

Whenever possible, we plea-bargain cases and support defendants attending treatment programs rather than going to jail, or in combination with a shortened jail sentence.

Most recently, we have added Credo 47, a grant-funded diversion program administered by the Public Defender and Behavioral Wellness. This program is focused on avoiding incarceration for misdemeanor and low-level felony offenders who are suffering some form of serious mental illness/substance use disorder.

Our office, in conjunction with Santa Barbara County Supervisor Greg Hart, IV Community Service Board President Ethan Bertrand, and our Community Corrections Partnership have begun formulating a Neighborhood Court Program within the City of Goleta in which we intend to incorporate the principals of Restorative Court to misdemeanors and, when possible, some low-level felony offenses.

Our office continues to seek new Diversion Programs in our effort to divert individuals away from our criminal justice system and reduce our jail population, but without negatively impacting public safety.

Finding the balance between giving those cited or arrested for a crime another chance, and risking the safety of our community, is an arduous task that we are committed to pursuing just as we are committed to seeking justice for all. ■

Joyce E. Dudley has a BA in psychology, and two Master's Degrees in Education. In 1990 Joyce received her JD degree. The day she passed the Bar she was hired by the Santa Barbara County District Attorney's office. For 20 years Joyce was a Deputy District Attorney specializing in prosecuting violent crimes against vulnerable victims. In 2010 she was elected District Attorney.

Finger On The Pulse – U.S. Visa Processing Solutions During The COVID Pandemic

By James Alexander

James Alexander

I hesitated to write this article for months due to the daily changes affecting employment based visa processing since the rapid spread of COVID-19 in the United States, beginning in January 2020. This article cites no case law because, as you will read below, U.S. immigration law often changes through government-issued memoranda, and by executive order and proclamation. This is especially true in recent months, as many of the changes that restrict the entry of individuals who are deemed to be detrimental to the country's interests have been implemented by proclamation under the President's authority granted in the Immigration and Nationality Act.

Since the outbreak of COVID-19, companies that employ highly skilled foreign workers have faced unprecedented challenges with regard to their ability to transfer critical workers to the U.S. These challenges include the closure of consulates worldwide, the suspension of travel from most of Europe, the United Kingdom, Ireland, Brazil, China and Iran, and a prohibition against issuing certain types of work visas. Businesses struggled further due to a lack of guidance from the executive agencies that are responsible for controlling entry to the U.S. by foreign nationals.

These changes make it critical, now more than ever, that employers work closely with immigration counsel to develop and implement strategies for those foreign employees who are critical to the company's U.S. business operations. It is still possible for companies to bring necessary and critical personnel to this country when businesses plan ahead and develop strong evidence that their employees should be allowed to enter this country. This article reviews the Trump administration's early initiatives and the recent relaxation of policies, and it identifies solutions for employers to hire and retain the best and brightest talent regardless of a candidate's nationality as they seek to recover from the economic fallout stemming from the COVID pandemic.

Phase One – Travel Restrictions From Countries Heavily Impacted By COVID & Consular Closures

On January 31, 2020, President Trump announced a travel ban for individuals traveling directly from China to the United States. The Administration next expanded this travel ban to include direct travel from Iran on February 29, 2020. Then, on March 11, 2020, President Trump announced the most significant expansion of the travel ban, when he declared that travel from the Schengen region of Europe was prohibited. Three days later, the United Kingdom and Ireland were added to the list. Most recently, on May 24, 2020, the Administration prohibited travel from Brazil. These travel bans did not and do not apply to U.S. citizens and lawful permanent residents and their immediate family members, those individuals who are traveling to the U.S at the invitation of the U.S. Government to help contain COVID-19, diplomats, crewpersons, members of the U.S. Armed Forces and their families, and those individuals whose entry would be in our country's national interest.

Solution: During this initial phase of restrictions, it was imperative for immigration counsel to identify those U.S. Customs & Border Protection (CBP) offices and U.S. consulates that had established guidelines and procedures for those individuals applying for national interest exceptions, because they were more prepared to consider requests to travel to the U.S. during the pandemic. During this time, the government agencies tasked with processing visa applications and admitting foreign nationals struggled to implement the procedures necessary to enforce these travel restrictions. By identifying and working with those offices, our firm successfully negotiated the entry of senior level employees and specialists to the U.S. from Europe. By identifying those offices that had established procedures and guidelines, we were successful in demonstrating that our clients should be admitted to the U.S. because they were seeking admission to conduct critical work that was in our country's national interest.

U.S. Consulates Close Worldwide

In the middle of March 2020, U.S. consulates around

the world were forced to shut down indefinitely in order to curb the spread of the disease. U.S. consulates play a critical role in the legal immigration process. Specifically, U.S. consulates are responsible for determining whether foreign nationals are legally eligible to travel to the U.S. If the consulate deems a foreign national to be eligible to travel to the U.S., a visa is placed in the traveler's passport, allowing the individual to travel to the U.S. and to seek admission to this country. With the closure of consulates, U.S. companies were faced with the possibility of stopping work on important projects, because critical team members were unable to obtain visa interviews and, without visas, were essentially grounded.

Solution: Immigration counsel should work with clients to identify multiple strategies to assist companies to overcome these new challenges. Our firm took a two-prong approach to assist clients bringing essential workers to the U.S., notwithstanding the closure of U.S. consulates. For urgent projects in the U.S. that required foreign specialists, we alerted CBP about these critical infrastructure projects and the need for foreign specialists to oversee the installation and repair of foreign manufactured products on these projects. We facilitated these specialists' entry to the U.S. under a provision of U.S. immigration regulations that allows for individuals to travel to this country without visas. For individuals who did not meet the requirements for traveling to the U.S. without a visa, we negotiated with U.S. consulates to obtain emergency visa appointments and for visas to be issued, by proving that their work directly related to critical infrastructure, or COVID research or patient care.

Phase Two - Prohibition Against The Issuance of H, L, & Certain Types Of J Visas

On June 22, 2020, citing the economic impact of COVID on the United States, President Trump issued Presidential Proclamation 10014, which prohibited consular officers from issuing H-1B, H-2B, L-1A, L-1B and some J-1 visas. https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/

These visa categories are the most commonly issued work visa classifications for U.S. businesses bringing in foreign workers and trainees to the U.S. The presidential proclamation does not apply to those individuals who were in the United State on June 24, 2020 and who were in possession of a valid L, H or J visa. Additionally, the proclamation established national interest exceptions for those individuals whose work is deemed to be in the national interest, by either the State Department or the Department of Homeland Security.

Initially, there was little guidance from the State Department regarding the requirements to obtain national interest exceptions for L, H, and J visa applicants. Given the multiple travel and visa restrictions imposed by the Trump administration over this very brief period of time, there was widespread confusion as to how to demonstrate that clients' applications should be approved and their visas issued, and on how to apply for waivers to be able to travel to the United States once the visa was obtained.

In this state of confusion, even though the US Consulates started re-opening, U.S. consulates cancelled visa interviews for *all* L, H and J visa applicants on the basis of the presidential proclamation, regardless of whether the individual could qualify for a national interest waiver. The State Department's initial interpretation of the requirements for a national interest waiver for L, H and J visa applicants was extremely narrow and made eligible those individuals who were involved in COVID-related research or patient care.

Solution: Law firms must conduct due diligence regarding their clients' business and the purpose of an employee's travel to the U.S. in order to advise whether there are alternate nonimmigrant visa classifications for their employees. For some clients who rely on the L-1 and H-1 visa classifications normally, there could be other visa classifications available. In fact, we were able to obtain E visas for employees of foreign owned companies during phase two. Likewise, for individuals who have achieved widespread recognition in their fields, there are other nonimmigrant visa classifications that could be obtained.

Phase Three – U.S. Consulates Reopening

As alluded to above, in early July 2020, a glimmer of hope for a return to "normal" appeared as the State Department confirmed that it intended to reopen our country's consulates. As consulates started to reopen, visa applicants were able to book appointments for interviews. For many large, multinational businesses, the L-1 visa category is extremely efficient and is preferred for their intra-company transferees, especially if they have already been pre-qualified by the USCIS under its blanket L petition program. However, Presidential Proclamation 10014 meant that many companies would still not be able to proceed with critical transfers to the U.S., unless their employees could apply for and obtain a waiver based on the national interest in their work in the United States.

On August 12, 2020, the State Department provided additional guidance, which instructed officers to consider a number of factors when determining whether an appli-

Continued on page 31

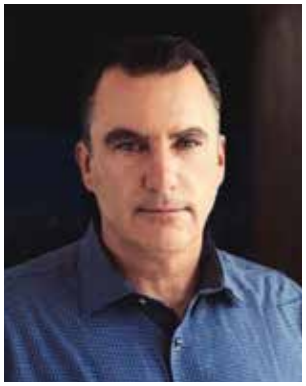
Motions

Santa Barbara natives **David Tappeiner** and **Mark DePaco** have jointly founded and opened their own law practice, **DT Law Partners**, in downtown Santa Barbara.

Mark DePaco

DT Law Partners combines the two attorneys' talents to offer a wide range of services. Tappeiner is an expert in estate and trusts, including preparation of all types of estate planning documents, trust and estate administration, conservatorships, and trust and probate litigation.

DePaco's legal practice focuses on corporate transactions, including securities offerings, debt and equity raises, mergers and acquisitions, and all matters related to corporate and business growth. He operates as outside general counsel to companies of all types and phases of development, and counts angel investors, investment companies, funds and family offices among his clients.



David Tappeiner

Born and raised in Santa Barbara, Tappeiner earned his bachelor's degree in 1997 from the University of California, Santa Barbara. He attended the University of Denver College of Law, receiving his law degree in 2000 and practiced law in Denver from 2000 to 2006. He returned to Santa Barbara in 2006 and joined the law firm of Fell, Marking, Abkin, Montgomery, Granet & Raney, LLP, becoming a partner there within two years.

Tappeiner is licensed to practice law in California and Colorado, is a member of the State Bar of California Trusts and Estates division, and a California State Bar Certified Legal Specialist in Estate Planning, Trust, and Probate Law. He has a preeminent rating with Martindale-Hubbell and is a member of the Santa Barbara Estate Planning Council.

DePaco earned his B.A. degree from the University of California, Los Angeles in 1994, and received a law degree from the University of Southern California Law School in 1998. Prior to founding DT Law Partners, he was a partner at Fell Marking in Santa Barbara, for ten years.

DePaco began his legal career locally as an associate with Hatch & Parent and transitioned shortly thereafter to Stradling Yocca Carlson & Rauth P.C., helping to establish their Santa Barbara office. Mark then moved to the San Francisco Bay Area, and spent eleven years there, before deciding to make the move back to his hometown of Santa Barbara.

* * *

Kingston, Martinez & Hogan LLP is proud to announce that **Andrea M. Anaya** has become a Junior Partner of the firm as of September 1, 2020. She will continue her practice in immigration law, specializing in family-based immigration, deportation/removal defense, immigration, post-conviction relief, deferred action, and federal immigration litigation.

Andrea Anaya

Andrea joined Kingston, Martinez & Hogan in July 2016. Since that time, she has an impressive track record of courtroom successes at The Executive Office for Immigration Review (EOIR) granting clients the opportunity to remain in the United States and keeping families together.

Andrea earned her Bachelor's degree in Political Science from the University of California, Santa Barbara. She earned her Juris Doctorate from Santa Barbara College of Law in January 2016. She is admitted to the State Bar of California. She is a member of the American Immigration Lawyers Association, Santa Barbara County Bar Association, Los Angeles County Bar Association and Mexican American Bar Association.

* * *

If you have news to report, the Santa Barbara Lawyer *editorial board invites you to "Make a Motion!" Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com. Any accompanying photograph must have a minimum resolution of 300 dpi.*

The single most often asked question today is…what should I do with my investments in this election year.

By Kevin Bourke

Kevin Bourke

What should I do with my investments to prepare for the upcoming election? If you watch cable news, the reporters and anchors would have you believe that the country could very well go into a tailspin regardless of who wins the Presidential election. All this contradictory talk is leaving many investors worried about what they should do with their investments before November 3rd.

So, what should YOU do with YOUR MONEY to prepare for the upcoming election?

Taking all partisan politics out of it, let's just look at the numbers. Statistically one party has dominated.

Can you guess under which party's President the stock market has performed best over the last sixty-eight years? Here are the S&P 500 annualized return numbers from 1952 through June of 2020.

10.8% under Democratic Presidents

4.8% under Republican Presidents.*

Therefore should you sell or buy depending on who wins? Or who you think might win?

NO. These numbers don't necessarily reflect cause and effect. There are a variety of reasons the markets have performed as they have under different Presidents and past performance does not necessarily indicate future results.

The first step is to recognize that the President doesn't have nearly as much influence over the economy and stock market as say, Congress or the Federal Reserve. By setting tax rates and passing policies and laws that affect the economy, Congress can make or break it. So too the Federal Reserve can raise or lower interest rates and boost—or kill—an economy.

Our original question remains, what should you be doing in light of the upcoming election? At this moment, neither candidate has provided much substance as to their proposals, but here are some of the ideas on the table:

Donald Trump has indicated that he would like to extend the 2017 Tax Cuts and Job Act provisions. Essentially this means that lower individual income tax rates would continue past 2025 when they are currently scheduled to expire. Joe Biden has indicated that the tax rate for the highest earners might rise. Each candidate has floated other ideas but again, we haven't gotten much substance from either.

My experience over the decades is that the final results of all these proposed ideas looks much different than originally offered. Those who preemptively make changes are often caught flatfooted. It's proven more effective to wait for clarity before making drastic changes in your investment approach.

For example, if the Democratic party were to win the Presidency, it would take considerable time before tax law changes went into effect, allowing time to adjust your holdings.

Are there any concrete steps you should be taking? Absolutely.

Review your mix of asset allocation. Does it match your tolerance for fluctuation and support you in reaching your goals? Too much money in cash? Inflation and taxes will eat up your principal. Too much invested aggressively? You may find yourself selling into a bad market at reduced prices to raise necessary cash.

Recognize that the single most important question in investing just may be, "what is your time horizon?" If your time horizon is less than two months (the election is less than two months away as of this writing) then you shouldn't be investing. If your time horizon is multiple years then you should probably be invested regardless of who wins the Presidency.

Take a holistic view of your finances. Is your estate in order? Too often investors agonize over their portfolio yet, when they pass, their heirs receive a fraction of the money they should have due to poor planning. Do you have someone assisting you with tax mitigation? Take this time to address important financial issues in addition to your portfolio.

Review your spending. Even the wealthy can spend too

much and end up in financial straits.

This might be the most important advice - Turn off the news. The headlines are meant to shock people and stir up emotions, which should always be set aside while investing, so turn off your TV (or iPad or other gadget) and go for a walk with your family. You'll be happier in the end and your portfolio will be better off too. Remember, the news outlets make money by grabbing eyeballs. That is their chief aim. Don't allow them to sensationalize events and get you off-track.

Finally, regardless of who is President, history has proven that it's much more important just to be invested.

So then, what is the President's role when it comes to the economy?

Mostly? To not mess things up.

As the founder of Bourke Wealth Management and author of the book Make Your Money Last a Lifetime®, Kevin Bourke has worked extensively in the field of financial management since 1987. His designations include CERTIFIED FINANCIAL PLANNER™ (CFP®) and Chartered Financial Consultant. As a way to give back to the community, he taught the Certified Financial Planner™ Board of Standards curriculum at the University of California Santa Barbara (UCSB). He's also been a member of the Santa Barbara Estate Planning Council for several years.

Bourke has been featured on various media outlets including Yahoo! Finance, Fox, ABC News/KEYT and the Santa Barbara Independent. As a public speaker he's given hundreds of lectures on a variety of topics, ranging from how to thrive financially after divorce, to estate planning, to how to make philanthropy a profitable act of giving. ■

* "We Looked At How The Stock Market Performed Under Every U.S. President Since Truman — And The Results Will Surprise You." - *Forbes*

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Alexander, *continued from page 26*

cant is eligible for a national interest waiver of Presidential Proclamation 10014. The factors that must be considered by consular officers vary depending on the nonimmigrant visa classification that an applicant is requesting. The factors for each nonimmigrant visa classification is available here: https://travel.state.gov/content/travel/en/News/visas-news/exceptions-to-p-p-10014-10052-suspending-entry-of-immigrants-non-immigrants-presenting-risk-to-us-labor-market-during-economic-recovery.html

Solution: Immigration counsel should work closely with clients to identify whether their employees could be eligible for exceptions, under the State Department's new guidance. For those individuals who appear to be eligible, on the day of their interview, they should be prepared to explain to the consular officer how and why they qualify for the exception. In most cases, it is important for the U.S. employer to provide information that confirms the visa applicants' explanation. As most visa interviews normally last for less than five minutes, it is essential that the applicant be ready to advocate effectively for himself or herself.

The Next Phase?

It is inevitable to ask what will change after the November presidential elections? Until the number of new COVID cases subsides around the world, the U.S. Government will not eliminate all travel restrictions, especially from regions where the disease is rapidly spreading. Moreover, unless the President terminates the June 22, 2020 proclamation regarding L, H and J visas, those restrictions will remain in place until at least the end of 2020 and are likely to be extended as President Trump's political base, except for the business community, overwhelmingly oppose il?legal immigration. As for the COVID-related travel bans for individuals traveling directly from one of the COVID restricted countries, the Trump administration has not indicated when they will end. If the Democrats take control of the White House in January, it is anticipated that the new administration will ease some travel restrictions, especially those restrictions that seem to target Individuals from certain countries for seemingly political reasons, while allowing citizens from other countries, with even higher rates of infection. However, companies and their employees should still anticipate and plan for additional levels of scrutiny when applying for visas, and even the possible closure of consulates if the spread of COVID-19 increases around the world.

In Santa Barbara, a number of industries rely upon foreign talent for hard-to-fill positions, ranging from agriculture workers, to five-star hotels and resorts, to cutting edge technology companies. These restrictions and the lack of guidance from the executive branch pose restraints on business, but there are solutions for many employers and their essential workforce who make important contributions to the company and to the U.S. national infrastructure. ■

James "Jim" Alexander is a Managing Shareholder of Maggio, Kattar, Nahajzer + Alexander, P.C., an internationally recognized law firm that assists multinational companies, start-ups and other institutions comply with U.S. immigration laws. The firm has offices in Los Angeles, San Diego, Austin, Texas, and Washington, DC.

Chowder Fest 2020 is canceled.

The Legal Aid Foundation of Santa Barbara Foundation staff and board of directors would like to thank all of our previous vendors, participants, and sponsors for their support. Did you know that local businesses donate chowder and beverages for our events? We encourage the legal community to support these businesses during the pandemic.

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2020 Bench and Bar Meetings

As Presiding Judge, the Honorable Michael Carrozzo has set the schedule for the final Bench and Bar Meeting of 2020 which will take place:

November 19, 2020 (12:15–1:15PM)

These Bench and Bar Meetings provide a forum for local members of the Bar to engage in an informal dialogue with the presiding judge as a means of raising issues and concerns that may not otherwise be addressed. All attorneys and paralegals are welcome to attend.

For any practitioners wishing to submit agenda items for consideration before any of the scheduled meetings, please email those items to Ian Elsenheimer: Ielsenheimer@aklaw.net

Criminal Justice

Sanger, *continued from page 23*

(how government regulation, taxation, housing development and support of relining perpetuated segregation).

25 Isabel Wilkerson, CASTE: THE ORIGIN OF OUR DISCONTENTS, RANDOM HOUSE, New York (2020) (comparing the caste system in India, the Aryan supremacy of Nazi Germany and the American treatment of people of African dissent).

26 See, Allison Davis, Burleigh Gardner, Mary Gardner, DEEP SOUTH, University of Chicago Press (1941) (the careful documentation of the effects of caste based on the embedding of four researchers in the caste system in the 1930's.

27 Albert Einstein and Eric Fromm, quoted in Wilkerson, *supra*, 378-379 and 270-271, respectively.

28 See, e.g., Zerlina Maxwell, THE END OF WHITE POLITICS, Hatchette Books, New York (2020) (liberal politics has failed to appreciate the nature and extent of white supremacy in America and has to do so to move forward.); Jennifer Eberhardt, BIASED, Viking, New York (2019) (a Stanford Professor and police consultant illustrating and explaining implied bias).

29 Russell Vought, "*Memorandum for the Heads of Executive Departments and Agencies*," (September 4, 2020), at:.

30 Following and, thereafter, promoted by Fox News, see, e.g., "*Trump ends 'critical race theory' training for federal employees, calls it a 'sickness'*" (September 5, 2020).

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