

Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
August 2021 • Issue 587

Spotlight on Judge Geck

Abbe Humanitarian Award / California's Housing Laws /
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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.

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Judge Donna D. Geck

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Women's Equality in 2021

BY ERIN PARKS

In 18 countries, husbands can legally prevent their wives from working.

In 39 countries, sons and daughters do not share equal inheritance rights.

1 in 5 women and girls have experienced physical and/or sexual abuse by a partner.

23.7% is the percentage of female representation in national parliaments.

6 countries give women equal work rights as men.

47% signifies the increased likelihood that women will suffer severe injuries in car accidents because safety features are designed for men.¹

80 years is how long American suffragettes fought to attain the right to vote for women.²

The women's suffrage movement in the United States arose out of an 1840 conference in London, where two female delegates to the World Anti-Slavery Congress, Lucretia Mott and Elizabeth Cady Stanton, were expelled for being female. This rebuff inspired Mott and Stanton to band together to guarantee voting rights for women.³

In 1919, Congress passed the 19th Amendment. Even though the constitutional amendment had been ratified, it was not official until it was certified by the U.S. Secretary of State. On August 26, 1920, he signed a proclamation ending women's struggle for the vote. August 26th, or Women's Equality Day, is intended to commemorate the August 26, 1920 certification of the 19th Amendment to the U.S. Constitution that gave women the right to vote.⁴

In 1971, Congresswoman Bella Abzug⁵ championed a bill in the U.S. Congress to designate August 26th as "Women's Equality Day." The bill says that "the President is authorized and requested to issue a proclamation annually in commemoration of that day in 1920, on which the women of America were first given the right to vote."

In 1972, President Richard Nixon issued the following Proclamation designating August 26, 1972, as "Women's

Rights Day;" the first official proclamation of what is now known as Women's Equality Day:⁶

"A Proclamation

Fifty-two years ago, the Secretary of State issued a proclamation declaring the addition of the Nineteenth Amendment to our Constitution. That act marked the culmination of a long struggle by the women of this country to achieve the basic right to participate in our electoral process.

As significant as the ratification of the Nineteenth Amendment was, it was not cause for ending women's efforts to achieve their full rights in our society. Rather, it brought an increased awareness of other rights not yet realized.

In recent years there have been great strides in extending the protection of the law to the rights of women, and in promoting equal opportunities for women. Today more women than ever before serve in policy-making positions in the executive branch of our Government. Throughout the Nation, in State and local government and in the private sphere women are playing a more active role.

Although every woman may not desire a career outside the home, every woman should have the freedom to pursue whatever career she wishes. Although women today have a greater opportunity to do that, we still must do more to ensure women every opportunity to make the fullest contribution to our progress as a Nation.

Now, Therefore, I, Richard Nixon, President of the United States of America, do hereby designate Saturday, August 26, 1972, as Women's Rights Day and call upon all our citizens and particularly those organizations concerned with the protection of human rights to observe this day with appropriate ceremonies and activities.

In Witness Whereof, I have hereunto set my hand this 26th day of August, in the year of our Lord nineteen hundred seventy-two and of the Independence of the



Erin Parks

United States of America the one hundred ninety-seventh.⁷”

On August 16, 1973, the U.S. Congress approved a resolution stating that August 26th would be designated as Women’s Equality Day and that “the President is authorized and requested to issue a proclamation in commemoration of that day in 1920 on which the women in America were first guaranteed the right to vote”.⁸ Every U.S. President since Richard Nixon has issued a proclamation designating August 26th as Women’s Equality Day.⁹

And yet, it took until January 20, 2021, for one of the most historically monumental events for women in the U.S. to come to fruition. A woman, Kamala Harris, was sworn in as the Vice-President of the United States (VPOTUS).¹⁰ Most women welcomed the opportunity to celebrate the determination and bravery of all the women who paved the way for the first female, Black, and Asian “Madam Vice President”. Yet, many wished the occasion was not such a big deal; that watching the swearing-in of the first female VPOTUS was banal.¹¹

This year of 2021 offers hope to many of us, men, and women alike, that the new administration can make up for lost time in making gender equality a reality in the U.S.¹² Women’s rights and gender equality can only rise to the top of the agenda when the Equal Rights Amendment is incorporated into the U.S. Constitution and gives all women, girls, and marginalized genders, constitutional protection from gender-based discrimination. Only then, will the U.S. government demonstrate a commitment to meaningful change for women’s rights.¹³

In the meantime, each of us can be the change! Since Women’s Equality Day is about uplifting and empowering women, and marveling at women’s progression in the face of oppression, on August 26th, express gratitude to influential women in your lives, support local women-run businesses,¹⁴ and celebrate womanhood with the remarkable women in your lives. Join an organization that promotes women’s rights locally and/or nationally, such as the League of Women Voters, Santa Barbara Women Lawyers, California Women Lawyers, the National Organization for Women, or the Center for Reproductive Rights. Raise funds for charities and organizations that support women’s

empowerment. Share success stories on social media under the hashtag #WomensEqualityDay. Make sure the women in your sphere of influence are registered to vote.¹⁵

Finally, walk the talk. Treat every woman you interact with the same as you would treat a man—not just on August 26th—but every day. ■

Erin Parks is the Editor of the Santa Barbara Lawyer, a member of Santa Barbara Women Lawyers and the California Employment Lawyers Association’s Women’s Committee. Since 1992, she has been a solo practitioner emphasizing Employment Law and representing women employees in their fight against discriminatory workplace practices. Equality in the workplace is a fundamental right. Ms. Parks can be seen at www.erinparks.com and contacted at law@erinparks.com or 805-899-7717.

ENDNOTES

1. Preceding statistics: <https://nationaltoday.com/womens-equalityday/>.
2. <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-women/>.
3. Id.
4. <https://constitutioncenter.org/blog/why-august-26-is-known-as-womans-equality-day>.
5. Bella Abzug was a feminist and civil rights advocate who gained notoriety in the 1970s as one of the most controversial members of the U.S. House of Representatives. Abzug inspired an entire generation of women and was a role model for future Congresswomen. “It wasn’t that she was the first woman in Congress. It was that she was the first woman to get in Congress and lead the way toward creating a feminist presence.” <https://history.house.gov/People/Detail/8276>.
6. Id.
7. <https://www.presidency.ucsb.edu/documents/proclamation-4147-womens-rights-day>.
8. <https://uscode.house.gov/statutes/pl/93/107.pdf>.
9. <https://constitutioncenter.org/blog/why-august-26-is-known-as-womans-equality-day>.
10. https://www.equalitynow.org/building_back_equal_madam_vp.
11. Id.
12. Id.
13. Id.
14. Lists of women-owned businesses can be found on the Small Business Administration’s website or by reaching out to your local chamber of commerce.
15. <https://nationaltoday.com/womens-equality-day/>.

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Q&A with Santa Barbara Superior Court Justice, Donna D. Geck

BY DONNA D. GECK

How long you have been on the Bench?

I was appointed to the Bench by Governor Arnold Schwarzenegger on June 30, 2010.

Tell us about your education:

I grew up in the Midwest and was educated in Midwest schools. I received a B.A. in Journalism from Marquette University. I attended the University of North Dakota Law School (for reasons which will not be disclosed here) where I received a Juris Doctor with Distinction and was inducted into the Order of the Coif.

What advice would you offer to a new attorney?

Find a mentor. Choose someone who you admire and respect and see if the lawyer would be willing to take you under his or her wing. There are also mentorship circles held by Santa Barbara Women Lawyers. Young lawyers can learn a lot by participating in local bar activities and the Inns of Court. If your interest is in litigation, make a point to observe trials and second chair if you can. There are also formal trial advocacy schools and programs offered through American Board of Trial Advocates (ABOTA). They provide excellent training. Read everything in a file/case. Strive to be the lawyer who is most prepared and knows the case better than anyone in the courtroom.

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

I cannot pick just one thing. I would improve access to justice, especially for pro per litigants and those for whom English is not their first language. Legal concepts can be challenging, as evidenced by some lawyers who struggle, but imagine going to court on your own, without a lawyer and where the proceedings are in a different language. There are resources available, such as Legal Aid, the Family Law Facilitator, and the Self-Help Clinic, but often pro per litigants do not know about them or do not avail themselves of the services.



Judge Geck officiating wedding of daughter Paige and son-in-law Sam

Wisdom gleaned from the Bench:

As much as you would like to make everyone happy, that is not the role of a judicial officer. One party will win, and another will lose. Judges have a familiar adage – “for every ruling you make, you gain one temporary friend and one permanent enemy”. All a judge can do is read everything, patiently listen to the litigants, and strive for an outcome that is reasoned, fair and based on the law.

Describe your style in the courtroom:

First, I read everything that the litigants submit. It would never occur to me to not read the entire file. I strive to know the case as well as the lawyers standing before me. I try to be patient. I generally do not impose time limits. I want to give the lawyers and litigants ample opportunity to be heard, but please do not abuse it. I believe I handle matters in an efficient manner to not waste everyone’s time. I try to treat everyone with civility and respect, and expect the lawyers and parties to conduct themselves in the same manner.

What do you love about your job?

In a word, everything. I happen to think it is the best job in the world and I am humbled and grateful to have it. I have the most amazing and outstanding staff. I love adoptions because everyone is happy. I like the variety of matters I get to handle, and I learn new things every day. I like watching the attorneys in action and having a chance to observe the various skill sets. I love being in a position where I can, hopefully, improve the lives of the litigants. And, as the kicker, I get to work in the most beautiful building in Santa Barbara!



Judge Geck's children at Christmas



Judge Geck's family at daughter's wedding at Courthouse Sunken Gardens

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

Be prepared. Be on time. Make sure you have served and filed all necessary pre-trial documents. Know how the Court expects exhibits to be handled. Have your witnesses lined up and ready to go so there are no gaps or “dead time.” If you are going to be using technology, have someone with you to handle its use while you try your case. You do not want to be fumbling with technical glitches which will detract from your presentation. Please do not continue arguing after a ruling has been made and please do not react to a ruling, whether it is for you or especially if it is against you.

The pandemic has been hard on the courts and litigants. Zoom has afforded us a means to move through these uncertain times. But do not forget that just because you are appearing remotely, you are still in court and must conduct yourself accordingly. Unfortunately, I have seen lawyers eating and drinking, pets wandering on screen and crying children being held during a hearing. I have seen lawyers dressed inappropriately for Court. Worse, I have seen Judges commit the same faux pas. I recently attended an on-line judicial education seminar, where one of the judges ate his lunch, then brushed his teeth and then did push-ups on his desk! The bottom line is, if you would not dress that way, or act that way in Court, do not do it on your Zoom court appearance. Conduct yourself with dignity. Assume your microphone is always on. On occasion, lawyers and litigants have made inappropriate comments when they thought they were muted, which have been heard by the entire court. I am sure they would be mortified if they knew.

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

It is exciting to see how the Courts have embraced technology. Zoom has enabled the Courts to continue to

function during the pandemic, and it is likely here to stay in some application. Technology can improve communication and the presentation of evidence. Consider how effective impeachment can be when you show excerpts from a videotape deposition where the exact opposite of what a witness testified to comes out of his mouth. It is much more devastating than reading from a deposition transcript. Which do you think is more effective – watching an accident reconstruction on a screen or listening to an expert drone on about how the accident occurred? I also think the recent changes in the criminal justice system are exciting and moving us toward a more just and equitable system.

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

When you wear the mantle of the advocate, it is all about winning. When you wear the black robe as a neutral, it is all about fairness, justice and doing the right thing. ■

Prior to her elevation to the Bench, Judge Donna D. Geck was licensed to practice in four States. Her practice was exclusively civil litigation including jury trials, court trials, arbitrations, and mediations. Judge Geck was board certified as a Civil Trial Specialist by the National Board of Trial Advocacy and she served as a Settlement Master for the Superior Court. Judge Geck is an Associate of ABOTA, past president of the local California Coast Chapter, and past board member of CAL-ABOTA. She is a Master at the William L. Gordon Inns of Court. Judge Geck continues to serve as a Teen Court Judge. She is a member of the Santa Barbara Women Lawyers and previously served on the Board of Directors. Judge Geck is member of the California Judges Association.

The Foreign Account Tax Compliance Act Wreaks Havoc on Americans Abroad

BY COLLEEN GRAFFY

Legislation that is little known in the United States is wreaking havoc for American nationals globally. The Foreign Account Tax Compliance Act (FATCA)¹ was passed in 2010 as a means to counter Americans engaged in money-laundering, tax evasion, or financing terrorism, by identifying assets and bank accounts hidden overseas. A laudable goal, but the law overlooks that most overseas assets and bank accounts owned by Americans are not hidden. They are there quite openly because these Americans live and work overseas, and they need bank accounts to go about their daily lives, and need financial institutions for their mortgages, investments, and pensions.

The Department of the Treasury can identify American-owned overseas assets by requiring foreign institutions to report the names and accounts of any Americans on their books or face a stiff 30% penalty tax on any of their U.S. transactions. For many international banks and financial institutions, the regulatory red tape of identifying and reporting Americans—or mistakenly missing one—is not worth the hassle or risk, so they simply refuse to open or keep American accounts.

Take the example of my friend, a distinguished former U.S. ambassador who was appointed Secretary-General of the International Chamber of Commerce in Paris, France. *Quel honneur!* Yet, when he went to open a bank account in Paris - with JP Morgan nonetheless - he was told that they no longer allowed bank accounts for Americans because the work and hazards involved were too onerous. *Quelles horreurs!*

Americans with foreign financial accounts are also required to self-report through the Foreign Bank Account Report (FBAR).² The unintended consequence is to once again make Americans undesirable. Here, I will use my own example when Chairman of the Society of English and American Lawyers in London, England. The normal practice is for the new chairman to assume signatory power over

the bank account but, thanks to FATCA and its burdensome reporting requirements and severe penalties, the board decided that it was not a good idea to have an American as the signatory for the accounts. A more dramatic story is that of an American hired to be the chief financial officer of a Swiss hospital. Understandably unwilling to have its account information handed over to the U.S.

Treasury, the hospital gave the American executive the choice of either giving up his job or giving up his citizenship.

FATCA is only part of the problem. The real culprit is the “original sin” of America’s unique tax policy. The U.S. is the only country in the world—outside of Eritrea—that taxes based on citizenship, rather than on residency. The consequence of Citizen-Based Taxation, or CBT, is that individuals who had once been proud of their American citizenship, such as U.K. Prime Minister Boris Johnson (who was born in New York when his father was working with the United Nations), are driven to give up their citizenship. “Accidental Americans” (known as such because they have little or no connection to the U.S. aside from being born there) often have no idea that their place of birth is now putting them on the proverbial wanted list in the U.S. They are unaware that they should have been filing taxes or reporting through the FBAR because they have never worked or lived in the U.S. aside from the few months or years after they were born. Some do not even speak English. Due to FATCA, and the long-armed reach of the U.S. Department of Treasury into the data of foreign institutions, these Accidental Americans are getting a shock from Uncle Sam and their lives are put in turmoil.³

This clear injustice receives no attention in Washington, D.C. because the nine million or so Americans who live overseas have no representation. If gathered as one state, Americans abroad would be the eleventh largest state in the union, yet there is no representative advocating on their behalf. Frustrated, Americans abroad have been propelled to take a new approach by questioning whether the U.S. reporting requirements breach the European Union’s strict data protection laws.⁴ In a broadcast last weekend for the BBC, I discussed the case of “Jenny,” the pseudonym for an



Colleen Graffy

American living in Britain who is taking Her Majesty’s Revenue and Customs (HMRC) to the High Court to challenge the U.K.’s compliance with FATCA.⁵ The European Parliament has also taken up the issue in a study that examines the negative impact of FATCA on U.S. citizens abroad and criticizes the extraterritorial nature and lack of reciprocity of the law.⁶ The basis for the intergovernmental agreements for foreign nations to allow data on U.S. citizens to be given to the U.S. was that it was going to be reciprocal.

In an early 2013 article on this topic for the Wall St. Journal, *How to Lose Friends, Influence, and Citizens*,⁷ I wrote of my concern that FATCA would drive overseas Americans against the U.S. by using this sledgehammer to crack a nut. After all, the vast majority of rich Americans who are evading taxes are living in the U.S., not overseas. Unfortunately, until the U.S. government recognizes and fixes this strategic blunder, we will continue to have record numbers of Americans giving up their citizenship. Over 6,700 Americans gave up their citizenship in 2020, a 260% increase from 2019. The State Department raised the fees to relinquish American citizenship from \$450 to \$2,350, an amount that some are unable to pay.

Lawyers advising foreign clients need to be aware that FATCA affects not only Americans but their non-American spouses and families as well. It is the reverse of the “Downtown Abbey Syndrome” (where impoverished aristocracy sought to wed an American heiress). Now non-American families with wealth will not want their sons or daughters marrying an American. Marriage to an American means that

the U.S. government can charge a capital gains tax on the sale of your family home—even though you already paid the local tax (e.g., the Stamp Duty in the U.K. is a property tax paid upfront on purchase). It means that your non-U.S. pension can be taxed and that you will pay tax on any gains in the exchange rate on your mortgage—even though the mortgage was in the local currency and never converted to dollars, and the “gain” was only on paper.

As we look to maintain America’s leadership position in the world, we should consider the role of Americans living abroad who are an important source of American soft power. Many know the culture and speak the language; they represent American values and create opportunities for trade and commerce. They are unpaid goodwill ambassadors who reach all parts of the globe. We should be striving to keep them, not pushing them away through shortsighted legislation. ■

Colleen Graffy is an Associate Professor of Law at Pepperdine Caruso Law School and was based in London as Academic Director of Pepperdine’s London Law Program and Director of Global Programs. Originally from Santa Barbara, Professor Graffy earned her B.A. from Pepperdine University and her M.A. from Boston University. She then served as co-director of Pepperdine’s Year-in-Europe program in Heidelberg, Germany. Professor Graffy completed the Diploma in Law in London. After attending the Inns of Court School of Law, she was called to the Bar of England and Wales as a Barrister of the Middle Temple and received her LL.M. in international law through King’s College, University of London with merit. She joined the U.S. State Department in 2005 as Deputy Assistant Secretary of State for Public Diplomacy for Europe and Eurasia. In that capacity, she travelled to over 40 countries and worked with U.S. embassies and a team in Washington, DC, to communicate U.S. policy, values, and culture.

ENDNOTES

1. FATCA was passed as part of the HIRE Act. <https://www.govinfo.gov/content/pkg/BILLS-111hr2847/enr/pdf/BILLS-111hr2847enr.pdf>.
2. Under the Bank Secrecy Act, bank accounts, brokerage accounts, and mutual funds held abroad must be reported to the Treasury Department. <https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar>.
3. <https://time.com/5922972/accidental-americans-fatca/>.
4. The General Data Protection Regulation, or GDPR, harmonizes data privacy laws across Europe. <https://gdpr-info.eu/>.
5. The story is 27 minutes into the broadcast: <https://www.bbc.co.uk/sounds/play/w172xyt7n63rkx4>.
6. [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604967/IPOL_STU\(2018\)604967_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604967/IPOL_STU(2018)604967_EN.pdf).
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Judging Intoxication: Are Police Truly Qualified?

BY NEEMAH YAMIN-ESFANDIARY, PHARM.D.

Police have been tasked with making judgment calls on whether a person is intoxicated. This has resulted in both false positive and negative results. The common denominator in this situation is that errors are being made and judging intoxication may be beyond the scope of practice of the police.

Upon entering the police academy, cadets are given a 12-hour course in controlled substances. This course reviews symptoms and how these drugs can affect normal behavior.

Definitions

Correlation: a single number that describes the degree of relationship between two variables (range -1 to 1).

Likelihood Ratio (LR): Used to determine the accuracy of a test (range 0 to infinity).

A Review of Behavioral Indications of Intoxication

1. Red eyes

Studies: A 1997 study reported that red eyes first appeared at an average Blood Alcohol Content (BAC) of 0.065% among nearly a thousand social drinkers in natural environments, although there was wide range among individuals.¹ Later in 2002 the same author reported that having red eyes correlated 0.42% with BAC in the laboratory portion of the study, but that this correlation was obtained entirely below 0.04% BAC.

Conclusion: There is considerable evidence that alcohol produces red eyes, and most studies suggest that its incidence increases as BAC rises. However, the available data are conflicting about the BACs at which it is likely to first appear and to correlate with BAC.

2. Odor of Alcohol

Studies: Fourteen subjects were tested in four repeated trials. Twenty Los Angeles Police Department officers, all trained National Highway Traffic Safety Administration (NHTSA) Drug Recognition Experts, served as judges.

Strong odor of alcohol positively identified 23% of subjects over 0.08% BAC while the false positive rate was 6%, producing a quite respectable LR of 3.95. Of one hundred sixty-four observations at 0.00% BAC, twenty-six (15.9%) were false positives and an additional eighteen (11%) of observations produced an “uncertain” judgment. Overall accuracy rates fell to 55% in the third observation session, after many subjects consumed lunch.²

Conclusion: Several studies have reported a substantial correlation with BAC and the relative absence of detectable odor of alcohol at low BAC levels, despite the lack of a satisfactory scientific explanation. This clue deserves further analysis but is limited by interference from food consumption.

3. Distortions of speech

Studies: In 1989, a study examined the ability of college students and police officers to detect speech abnormalities (primarily slurring) associated with alcohol consumption. Drinking speakers were at 0.1-0.19% BAC when tested. Thirty college students and fourteen police officers served as raters. The police officers were significantly more accurate than students, but accuracy rates were low for both groups (64.7% and 61.5%, respectively). Even when raters expressed the highest levels of confidence (“5” on a 1-5 scale where “5” was labeled “most confident”), they were not more than 75% accurate.³

Conclusion: There are clear group differences in speech variables in intoxicated and sober speakers. However, judgments about individuals, particularly at low BAC levels and without knowledge of their sober parameters, are likely to be of modest accuracy and subject to considerable overconfidence.

Sobriety Tests

In 2007 and 2008, authors exhaustively reviewed the literature on the NHTSA Standardized Field Sobriety Test, which have been the subject of considerable research, although much of it is unpublished. Despite that fact, most of these studies provide superficially supportive evidence.⁴



Neemah Yamin-Esfandiary

1. Horizontal Gaze Nystagmus

Horizontal gaze nystagmus correlated best with BAC, averaging 0.65 across nine studies (range 0.51-0.77). For 0.08% BAC, an average LR of 0.36 (range 2.3-6.6) was observed based on six studies. The average false positive rate was approximately 0.28 (range 0.13-0.37). However, a recent study by one of the test's creators, not included in the previous analysis, found a false positive rate of 0.67, which remained fairly constant across variations in test administration.⁵

2. Walk and Turn

Performance of this test correlated substantially with BAC (mean $r = 0.55$, range 0.37-0.61, four studies), but it appears that its cut-off score (two or more "clues") is set too low, particularly for older, heavier, and physically inactive or compromised subjects. Only two, unpublished, studies reported diagnostic statistics at 0.08% BAC, yielding a modest mean LR of 1.9 and false positive rate of 0.37.

3. One Leg Stand

This test had a lower average correlation with BAC ($r = 0.45$, range 0.16-0.6, six studies) than Walk and Turn, but surprisingly strong diagnostic discriminative power at 0.08% (LR = 3.7) and 0.1% (LR = 4.3). Like Walk and Turn, there are extremely limited data available at 0.08%. Based on two studies, average sensitivity was 0.69 and the false positive rate 0.25.

4. Romberg

A major limitation of the Romberg is the subjective degree imposed on police officers to determine body sway. There is no one Romberg test, as some of the variations completely alter the nature of the test. The standard Romberg, as used as a measure of balance, is affected by alcohol, however, the findings are inconsistent about its sensitivity to low BAC levels. Time estimation is not part of the traditional Romberg test and there is very little evidence to support its use in assessing sobriety.

5. Finger to Nose

Finger to nose (FN) is used in some studies of drug effects. Researchers conducted a pilot study with 30 subjects and found an increase from less than one error per subject at 0.00% BAC to an average of 4.05 errors at 0.1%. FN correlated 0.42 with BAC in the main study.⁶ A 1990 study found that adding FN and finger to finger to previous observations and tests decreased accuracy, dropping the correlation with BAC from $r = 0.446$ to 0.414.⁷

FN has a variable correlation when studied in different settings and may be trivial in determining intoxication.

Summary

Judging low to moderate levels of intoxication in strangers is a difficult task. Professions that might be expected to show substantial skill assessing intoxication do not exist. No behavioral or physical sign has emerged that is consistently related to a specific level of BAC without large variation among individuals, with the possible exception of nystagmus. Alcoholics can appear unimpaired at BACs that could be fatal to many drinkers,^{8,9,10} yet appear more impaired than social drinkers at low BACs.^{11,12} More attention should be paid to assessing intoxication in this group.

Take Home Message

Police officers are trained to apprehend criminals and prevent and detect crime. They do not receive training in pharmacology, psychology, or any behavioral science. The effects of drugs on human behavior and physiology are determined by a complex interaction between the individual and their environment. Without the appropriate training it is extremely difficult to draw conclusions on how a particular drug may have influenced someone's behavior. Police make numerous drug arrests, but it is a mistake to assume that they become knowledgeable about the effects of a drug as a result. Being pursued, questioned, or arrested by the police is an abhorrent situation. This, even without any drugs, can cause a heightened sense of fear, anxiety and response in the flight or fight response. Consider that some arrested for drugs have pre-existing psychiatric disorders, while others may be intoxicated from using multiple drugs, including alcohol. When all these complexities are added to an already abnormal setting, it is often difficult to tease apart the effects of a particular drug from those of non-drug influences. The point is that law enforcement officials are not qualified to serve as drug education experts simply because they make arrests that may involve drugs. Both scientists who study toxicity in animals and the police who arrest users and sellers often have a limited view of the complex interaction between drugs and individuals. No one whose professional experience focuses only on one aspect of illicit drug use can be considered a real expert in the sense of being able to imagine all the intended and unintended consequences of continuing our current policy of treating illicit drug use primarily as a criminal issue.¹³ ■

Neemah Yamin-Esfandiary, Pharm.D., graduated from University of the Pacific, School of Pharmacy, in 2008. In mid-2009, Dr.

Yamin-Esfandiary moved to the Central Coast and began working as a Forensic Pharmaceutical Consultant. Dr. Yamin-Esfandiary has written reports and testified in state and federal courts on numerous cases regarding the apparent influence of medications on cognitive and motor function. He actively seeks to bring a fair and balanced perspective to medications as they relate to the forensic judicial system. During his personal time, Dr. Yamin-Esfandiary enjoys the great outdoors and spending time with his family. He can be reached at 310-666-4279 or neemahy@gmail.com.

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- scientific and legal issues. *Law and Human Behavior* (2007/2008) 32(4), 293–313. DOI: 10.1007/s10979-007-9111-y.
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2021 Bench & Bar Meetings

As Assistant Presiding Judge, the Honorable Pauline Maxwell has set the schedule for the Bench and Bar Meetings that will take place as follows:

August 19, 2021
November 18, 2021

These Bench and Bar Meetings will be held via Zoom. They 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

Robin Unander To Receive Abbe Humanitarian Award

It gives the Santa Barbara County Bar Association (SBCBA) great pleasure to announce that attorney, Robin Unander, has been chosen to receive the Richard Abbe Humanitarian Award. This special award is given to an outstanding attorney or judge whose life, leadership and conduct exemplifies humanitarian principles. The award is named after an Associate Justice of the California Court of Appeal, Richard Abbe, who was widely recognized for his contributions to the State, family, environmental law, and for his commitment to humanitarian causes. The SBCBA Board of Directors' unanimous vote to bestow the award on Ms. Unander came after receipt of the following excerpt of her nomination by Director, Michelle Roberson:

"Dear Colleagues of the Santa Barbara County Bar Association Board:

I respectfully submit my nomination of local attorney, Robin Unander, for the Richard Abbe Humanitarian Award.

I had to look up the word humanitarian because I know that when I think of Robin, I believed her to be a humanitarian, but now that I read the definition, I know that there may be no other person that more finely fits that description in our local pool of attorneys than Ms. Unander.[]

Humanitarian: One who is devoted to the promotion of human welfare and the advancement of social reforms; showing concern for the welfare of humanity, especially in acting to improve the living conditions of impoverished people.

I have known Ms. Unander for several years as a staunch defender of tenant rights. The irony is that I am sometimes the "landlord" she is battling against for her client.... This alone shows how much respect I have for Ms. Unander given we are on opposite sides of a legal battle....

[Robin works at the Legal Resource Center, which is funded by UCSB tuition, and she gives students legal education and support.] ...[S]he is also involved with the Isla Vista Tenants Union. In 2019, she organized a group of tenants against a landlord and sued the landlord en masse for mishandling their security deposits. But let me take you back a few years.

Isla Vista has historically had a large Latino population and over the last two decades, with student housing being in high demand, out of town developers will buy complexes and displace entire buildings to renovate and convert into higher-priced university living. Here is where Ms. Unander steps in and, again, her advocacy work for the non-student population of Isla Vista is not part of her daily job. One may even argue that the future tenants would be her future clients, but she is instead choosing to protect the community....[]

...In handling the mass eviction matters, [Robin] realized

that it was not merely a family being displaced from their longtime home, but an entire community being disrupted....

[] Her knowledge and skill in that advocacy work has let her advocate for many other Latino families that were subsequently displaced by owners not aware of a county ordinance she helped enforce for their benefit.[fn omitted]

...[M]any of us probably never heard of Ms. Unander because she does not actively get involved with many of us lawyers in Santa Barbara, and she spends much of her free time collecting and redistributing used items. You read that right. [] Approximately twelve years ago, Ms. Unander was blessed with her first pregnancy and found that many of her friends were offering her their gently

used items for her baby.... Astutely aware of her own good fortune of having a circle of educated friends, a strong local network, and being in a position to afford her own items, she recognized that the free items she was being offered could go to somebody that needed it more....[] She started accepting baby items and leveraged her connections by accepting anything people would otherwise donate or toss and would give them to expecting parents that needed them....[] Before too long, she....[used her lawyer skills] to organize her little idea into a non-profit called Mother's Helpers....[]



Robin Unander

Continued on page 31

The New California Criminal Justice Act

BY SARAH S. SANGER AND ROBERT M. SANGER

On January 1, 2021, the California Racial Justice Act (CRJA) went into effect. The CRJA aims to address not only intentional racial bias in criminal proceedings, but also implicit bias, which is just as harmful, if not more so. The CRJA has not yet been addressed by the appellate courts although there have been cases filed in the superior courts, some writ petitions taken to the courts of appeal, and at least one summary denial of review in the California Supreme Court.¹ This month's Criminal Justice column will discuss the addition of Penal Code section 745 by the CRJA.²

The "Impossible" Standards of *McCleskey v. Kemp*

Proving racial discrimination in criminal prosecutions has been extremely difficult. By enacting the CRJA, the California Legislature stated that it intended to address the "nearly impossible" standards set forth by the courts to prove racial discrimination.³ In particular, the Legislature referenced the unjustifiably high evidentiary standard imposed by the United States Supreme Court in *McCleskey v. Kemp*.⁴

The defendant in *McCleskey* challenged the Georgia capital sentencing scheme on the basis that it violated the equal protection and cruel and unusual punishment clause because it was "administered in a racially discriminatory manner."⁵ To support this claim, the defendant proffered a statistical study, known as the "Baldus study," that showed a disparity in the imposition of death sentences in Georgia depending on the victim's race and the defendant's race.⁶ The Baldus study considered 230 "nonracial variables" to explain the racial disparity.⁷ One model that considered 39 of those variables, showed that defendants accused of killing white victims were 4.3 times more likely to be sentenced to death than defendants accused of killing Black victims.⁸ Under this model, Black defendants accused of killing white victims "have the greatest likelihood of receiving the death penalty."⁹

Despite this statistical evidence, the Court rejected the defendant's claim. The Court stated that, to prove an



Sarah S. Sanger



Robert M. Sanger

equal protection claim, the defendant had to "prove that the decisionmakers in *his* case acted with discriminatory purpose."¹⁰ The Court held that "the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey's* case acted with discriminatory purpose."¹¹ The Court required "exceptionally clear proof" of discrimination, and the Baldus study did not meet that high requirement.¹²

In the face of these impossibly high standards for race discrimination claims, last year California's Legislature passed the CRJA. In the uncodified portions of the CRJA, the Legislature directly addressed what was wrong with cases like *McCleskey*: "Even though racial bias is widely acknowledged as intolerable in our criminal justice system, it nevertheless persists because courts generally only address racial bias in its most extreme and blatant forms."¹³

The Legislature called out the "racially incendiary or racially coded language, images, and racial stereotypes" that can pervade criminal trials.¹⁴ The Legislature called out the acceptance that racial disparities are "inevitable."¹⁵ The Legislature recognized the importance of not only addressing intentional bias but also addressing implicit bias which "may inject racism and unfairness into proceedings similar to intentional bias."¹⁶

The CRJA applies only to cases in which judgment had not been entered prior to January 1, 2021.¹⁷ Therefore, the pending litigation involves a limited class of cases. A motion would either be filed regarding a case pending trial as of the first of the year or one where a judgment of conviction occurred after that date. It is too early to know what the courts of appeal or California's Supreme Court will do to enforce the CRJA provisions but, on the face of it, the legislative mandate is both principled and broad. The question is: how far will the courts go to call racism what it is in the criminal justice system?

New Criteria for Establishing Discrimination

The CRJA added section 745 to the Penal Code which prohibits the State from seeking or obtaining a criminal conviction or seeking, obtaining, or imposing a sentence based on race, ethnicity, or national origin.¹⁸ In addition to this sweeping language, there are four specific types of violations set forth in Penal Code section 745.

First, under subdivision (a)(1), a violation occurs when the “judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin.” Second, under subdivision (a)(2), a violation occurs if “[d]uring the defendant’s trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant’s race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant’s race, ethnicity, or national origin, whether or not purposeful.” Third, under subdivision (a)(3), a violation occurs if the defendant was charged or convicted of a more serious offense than defendants of other similarly situated races, ethnicities or national origins, and the evidence establishes that the prosecution sought or obtained convictions for more serious offense for those who share the defendant’s race, ethnicity, or national origin in the same county. Fourth, under subdivisions (a)(4)(A) and (B), the Legislature addresses disparate sentencing based on the defendant’s race or the victim’s race.¹⁹

In contrast to the almost impossible standard under *McCleskey*, the CRJA provides for an evidentiary hearing where the defendant makes a *prima facie* showing of a “substantial likelihood” that the violation occurred.²⁰ A “‘substantial likelihood’ requires more than a mere possibility, but less than a standard of more likely than not.”²¹

At a hearing on an alleged violation of Penal Code section 745, either party may present evidence including “statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses.”²² The court may also appoint its own independent expert.²³ To prevail after a hearing, the defendant must show that a violation occurred by a “preponderance of the evidence.”²⁴

Discovery

Of course, in the context of the contemporary denial of racism, making a *prima facie* case to obtain a hearing is not a given. Acknowledging that race had a role in seeking or obtaining a criminal conviction or seeking, obtaining, or imposing a sentence, is a small step intellectually but a big

step politically. As a result, and to further avoid roadblocks like those set up by *McCleskey*, the CRJA specifically provides for comprehensive discovery procedures.

The defendant is entitled to discovery relating to a “potential” violation of section 745.²⁵ The Legislature made its intent clear in the uncodified portions of the CRJA: “It is the further intent of the Legislature to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.”²⁶ The discovery motion can be filed prior to or concurrently with the filing of the CRJA motion as long as there is a “potential” violation of the Act.²⁷

Upon a showing of good cause, under Penal Code section 745, subdivision (d), the court shall order “disclosure to the defense of all evidence relevant to a potential violation of subdivision (a) in the possession or control of the state.” There are provisions for the court to allow redactions. Of course, given the fact that all of this information is relevant to a defense motion, it is probably required to be provided without a motion by *Brady v. Maryland*.²⁸ The Court of Appeal, in *Magallan v. Superior Court*,²⁹ held that the prosecution is required to provide discovery that is relevant to a defendant’s statutory motion – there, it was a motion to suppress under Penal Code section 1538.5 and here it would be motion for remedies under Penal Code section 745(a). But, required or not, section 745(d) also provides for discovery.

Remedies

The CRJA then provides for an actual hearing at which the defendant must show by a preponderance of the evidence at the hearing that a violation of Penal Code section 745 occurred. That showing leads to several statutory remedies under subdivision (e). Before the judgment has been entered, the statutory remedies include a mistrial, empaneling a new jury, dismissing enhancements, special circumstances or special allegations, and reducing one or more charges.³⁰ After a judgment has been entered, the court must vacate the conviction and sentence, order new proceedings, and consider remedies specific to the type of violation of section 745 that occurred.³¹ In all cases, the defendant is ineligible for the death penalty.³²

Finally, Penal Code section 745 allows for other remedies “available under the United States Constitution, the California Constitution, or any other law.”³³ However, this does not just seem to be a catch-all. Subdivision (a) says, “The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin.” Subdivision (c) provides that, “At the

hearing, evidence may be presented by either party, including, but not limited to, statistical evidence, aggregate data, expert testimony, and the sworn testimony of witnesses.” Read together, evidence of statistical disparity and pervasive racism should lead to an outright prohibition from obtaining a conviction or sentence.

Conclusion

Time will tell whether, and to what extent, the courts will go to make an accurate assessment of both the express racism and implicit bias involved in prosecution, conviction and sentencing in California. The reality is that racial and ethnic bias have a demonstrated effect in the criminal justice system even when the people in that system are of seeming good will. The Legislature and the Governor’s office have created a mechanism to deal with racism in criminal cases. It is now up to the third branch of government to implement it. ■

Sarah S. Sanger is the principal author of this article and of the pleadings in a CRJA proceeding in Los Angeles Superior Court. Ms. Sanger is an associate attorney in the law firm of Sanger Swysen and Dunkle. She graduated from the University of California, Santa Barbara, Phi Beta Kapa and with Honors, and received her Juris Doctor from the University of California at Berkeley School of Law. She clerked for the Office of the State Public Defender working exclusively on capital cases before coming to SS&D in 2018. Ms. Sanger is currently the Chair of the Board of Death Penalty Focus (DPF) and a member of various professional organizations.

Robert Sanger is a Certified Criminal Law Specialist with the California State Bar Board of Legal Specialization and has been practicing as a litigation partner at Sanger Swysen & Dunkle in Santa Barbara for 47 years. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is a Professor of Law and Forensic Science at the Santa Barbara College of Law. Mr. Sanger is an Associate Member of the Council of Forensic Science Educators (COFSE). He is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers’ organization, and Past Chair of DPF.

The opinions expressed in the article are those of the authors and do not necessarily reflect those of the organizations with which they are associated. ©Sarah S. Sanger and Robert M. Sanger.

ENDNOTES

- 1 See, *People v. Jade D. Harris*, No. S269619, stay and petition for review denied by the California Supreme Court July 1, 2021, from a petition for writ of mandate denied by the Second District Court of Appeal in *Harris v. Superior Court*, No. B313302 (Petition for Writ of Mandate filed June 28, 2021, in 2nd District Court of Appeal, Div. 4).
- 2 As a matter of disclosure, the authors filed a motion in the Los Angeles Superior Court in a multi-count murder case entitled *People v. Cleamon Johnson*, No. BA242006. The motion requested sanctions under the CRJA and was accompanied by a motion for CRJA discovery. Both the discovery motion and the CJRA motion itself are being set for hearing. This article does not address the specifics of that litigation but is intended to give the reader an overview of the legislation. CJRA litigation is in its infancy and the response of the courts will be instructive.
- 3 Sen. Comm. on Pub. Safety, Report on Assem. Bill 2542 (2019-2020 Reg. Sess.), p. 8.
- 4 *McCleskey v. Kemp*, (1987) 481 U.S. 279 (*McCleskey*).
- 5 Id. at 286.
- 6 Ibid.
- 7 Id. at 287.
- 8 Ibid.
- 9 Ibid., footnote omitted.
- 10 Id. at 292, emphasis in the original.
- 11 Id. at p. 297.
- 12 Ibid.
- 13 Stats. 2019, ch. 317, § 2(c).
- 14 Id. at § 2(e).
- 15 Id. at § 2(f).
- 16 Id. at § 2(i).
- 17 Pending Assembly Bill 256 would make Penal Code section 745 retroactive. That bill was re-referred to the Assembly Committee on Appropriations by the Committee on Public Safety on June 29, 2021. At the time of this writing, the bill was still in committee.
- 18 Pen. Code, § 745(a).
- 19 Pen. Code, § 745.
- 20 Pen. Code, § 745(h)(2); see also § 745(c).
- 21 Pen. Code, § 745(h)(2). As of the writing of this article, no court has granted a hearing on the issue other than the *Johnson* case, referred to in fn.2, supra.
- 22 Pen. Code, § 745(c)(1).
- 23 Pen. Code, § 745(c)(1).
- 24 Pen. Code, § 745(c)(2).
- 25 Pen. Code, § 745 (d).
- 26 Stats.2019, ch. 317, § 2(j).
- 27 Pen. Code, § 745 (d).
- 28 *Brady v. Maryland* (1963) 373 U.S. 83.
- 29 *Magallon v. Superior Court* (2011) 192 Cal.App.4th 1444.
- 30 Pen. Code, § 745(e)(1)(A)-(C).
- 31 Pen. Code, § 745(e)(2)(A)-(B).
- 32 Pen. Code, § 745(e)(3).
- 33 Pen. Code, § 745(e)(4).

Litigation Funding: Access to Justice or Ethical Quagmire?

BY RICHARD LLOYD

My first encounter with third-party litigation funding, or litigation financing, was while working in the City of London in the mid to late-2000s. During this period, hedge funds were making headlines by funding high-stakes commercial litigation in exchange for a cut of the recovery.¹ Despite strenuous opposition from heavy-hitters such as the U.S. Chamber of Commerce,² the litigation funding market has since transformed into a multi-billion dollar global enterprise, projected to double in size over the next decade.³

What is Litigation Funding?

At the most basic level, litigation funding occurs when a third party *unrelated* to a lawsuit provides funding to a plaintiff, in exchange for a portion of any recovery from the lawsuit.⁴ The lack of connection to the lawsuit distinguishes litigation funding from the traditional contingency fee arrangement, where the lawyer or law firm funds the litigation by working for “free” or at a reduced rate, in exchange for which the client agrees to pay the lawyer a portion of the damages recovered.⁵

Traditionally, objections to third-party funding of lawsuits were grounded in the legal doctrines of *champerty* (funding another person’s lawsuit in exchange for a share of the proceeds) and *maintenance* (funding another’s lawsuit).⁶ Originating in feudal France, and imported to the United States via English common law, the bar on third-party funding was justified as a means to “prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of law.”⁷ To this day, several jurisdictions continue to prohibit these doctrines, and echoes of the underlying policy concerns remain even where the doctrines have been abolished.⁸

Litigation Funding in California

Unlike many east coast states, the doctrines of *champerty* and *maintenance* were never adopted into California’s

laws.⁹ In fact, over twenty years ago, the California Supreme Court resoundingly endorsed the concept of third-party funding, holding that California has “no public policy against the funding of litigation by outsiders” and that efforts to block it would create a “pernicious barrier to free access to the courts.”¹⁰ Despite this broadly favorable proclamation and California’s alleged plaintiff-friendly reputation,¹¹ the market for litigation funding in California remained, at best, a niche interest.



Richard Lloyd

A decade later, the Los Angeles County Bar Association (“LACBA”) issued Formal Ethics Opinion No. 500, titled “Financing Legal Expenses of Another’s Lawsuit.”¹² The impetus for the opinion was a request from a State Bar member, who proposed establishing a business that would finance the expenses of business and real estate litigation, in exchange for an assignment of an interest in the proceeds of the claim and a recovery of the expenses.¹³ LACBA ultimately concluded that such an arrangement would not violate any statutory or common-law prohibitions, nor would it violate any ethical duties or professional obligations, so long as: 1) the funder does not interfere with the attorney’s exercise of independent professional judgment or the attorney-client relationship, and 2) the duty of confidentiality was maintained.¹⁴

As LACBA notes, a potential ethical conflict may arise when the funder and the attorney disagree on the use of certain tactics or pursuit of an action, presenting the attorney with a choice between acting in the best interests of the client, or potentially losing funding for the case going forward.¹⁵ Absent a clear agreement addressing such issues, this conflict threatens to “drive a wedge in the attorney-client relationship, and interfere with the exercise of the best judgment of the attorney.”¹⁶

LACBA similarly identified that a funder will wish to monitor the case it is funding and will communicate with the attorney running the case. Invariably, these communications will result in sharing of confidential attorney-client information. To ensure the benefits of Evidence Code section 952 attach to such communications, LACBA recommended any funding agreement clarify that such disclosures are essential to the ongoing representation of the client and

include a confidentiality agreement requiring the funder to maintain the confidentiality of all information disclosed.¹⁷

Recent Developments

As the saying goes, you wait ages for a London bus, then two come along at once.¹⁸ Remarkably, it would be twenty years before the American Bar Association and the State Bar of California finally weighed in with substantive guidance on the ethical and professional implications of third-party litigation funding.

In August 2020, the ABA overwhelmingly voted to adopt its proposed “Best Practices for Third-Party Litigation Funding.”¹⁹ While the details of the recommendations are beyond the scope of this article, the core recommendations echo those highlighted by LACBA: spell out the arrangement in writing; make clear and disclose the nature of the investment including how the funder will be compensated, who is responsible for payment and what happens if the agreement is terminated; make clear it is the *client* (or their lawyer) who controls the litigation, not the funder, and exercise caution in making case-related disclosures.²⁰

Two months later, the State Bar of California published Formal Opinion No. 2020-204 on Third-Party Litigation Funding.²¹ The State Bar opinion reinforces the legality of third-party funding, and highlights the implications of litigation funding agreements for California attorneys.²² Duties implicated include the duty of competence, the duty to communicate, the duty to protect confidential client information, the duty to address potential conflicts, and crucially, the duty to exercise *independent* professional judgment, including that a lawyer *must not* allow obligations to a funder “to compromise the quality and soundness of advice offered to a client.”²³ Ultimately, the State Bar concluded that while potentially significant ethical issues and conflicts exist, those dangers can be mitigated by careful adherence to professional rules of conduct.²⁴

Given the recent favorable opinions of the ABA and California State Bar and projected growth of the litigation funding market, third-party funders are clearly a force to be reckoned with. While the prospect of increased access to justice remains a tantalizing upside, both the ABA and State Bar opinions make clear that attorneys must exercise exceptional care when considering third-party funding arrangements, and that ultimately the client’s interest in competent and independent legal representation must always take priority over the pursuit of profits. ■

Richard Lloyd became an Associate with Cappello & Noël LLP upon graduating from the Santa Barbara & Ventura Colleges of Law and passing the California State Bar exam in 2020. He is

intimately involved in all the firm’s cases, from intake to preparing for and providing trial support for multi-week trials and arbitrations. Prior to moving to California, Richard spent several years working in London, U.K., as a legal fee consultant, during which he regularly worked with law firms, businesses, and high net-worth individuals on complex, high-value and/or multi-jurisdictional legal fee issues.

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The State of California's Housing Laws

BY BETTY L. JEPPESEN

The funding for the local rental assistance program through the United Way reached its capacity in May 2021 for those who had not yet applied. However, it was announced that new federal funding will become available to the tune of \$5.2 billion. California's Governor Newsom (Governor) then proceeded to roll out a robust budget for the coming year. Here are the highlights:

Housing

California's statewide housing shortage has been decades in the making—long before the COVID-19 pandemic. In recent years, the State has made significant investments to bolster much-needed affordable housing production through tax credits, housing-related infrastructure grants, and financing loans. The pandemic further exacerbated the statewide housing shortage and impacted housing affordability.

The May Revision to the Governor's budget promotes and maintains stable housing through additional and expanded rental assistance, foreclosure prevention, and down payment assistance investments. Moreover, to continue the momentum on housing production, California's administration (Administration) also proposes innovative ways to further plan, produce, preserve, and enhance the state's supply of long-term affordable housing.

The following May Revision concepts build upon the \$750 million in investments proposed in the Governor's Budget, for a total 2021-22 housing package of \$9.3 billion.

Homeowner and Renter Relief

The pandemic brought unprecedented challenges for renters and homeowners. To provide much-needed economic relief and recovery, the State has sought to maximize federal funds, and enact laws benefitting renters, small landlords, and homeowners.

In August 2020, the Governor signed Chapter 37, Statutes of 2020 (AB 3088), providing eviction protections for renters through March 1, 2021. To protect homeowners struggling to pay mortgages, the Administration also worked with

financial institutions to provide a 90-day grace period of mortgage payments with no negative credit impacts, relief from fees and charges, and a 60-day moratorium on foreclosure sales. The Governor later extended these protections by supplementing up to 18 months of mortgage forbearance provided by the federal government for homeowners experiencing financial hardships in paying federally-backed mortgages.



Betty L. Jeppesen

Building on those measures, the May Revision proposes the following additional augmentations to provide further relief.

California's COVID-19 Rent Relief Program

In January 2021, the COVID-19 Tenant Relief Act, Chapter 2, Statutes of 2021 (SB 91) was signed, creating the California COVID-19 Rent Relief Program. This program provides up to \$2.6 billion in federal rental assistance to those facing financial hardships because of the pandemic and extends the eviction protections through June 30, 2021. After the state's program deployment in March 2021, the federal American Rescue Plan Act of 2021 (ARPA) provided for an additional \$2.6 billion to California for both state and local entitlement jurisdictions for a total of \$5.2 billion in federal rental relief aid.

The May Revision includes statutory amendments to maximize the use of available federal funds for rental, utilities, and housing-related expenses to help as many Californians as possible stay housed, while bolstering the economic resiliency of those hardest hit by the pandemic.

Additionally, California continues to utilize \$331 million in National Mortgage Settlement funds for mortgage assistance. The State is also preparing to utilize \$1 billion from ARPA Homeowner Assistance Funds to the California Housing Finance Agency (CalHFA) to provide additional mortgage assistance, principal reductions, and qualified housing-related charges to provide housing stability.

Many organizations, including local Santa Barbara Rental Property Association (SBRPA) and state-wide California Rental Housing Association (CalRHA), have written to the Legislators and the Governor's staff, as well as lobbied for the end of the eviction moratorium. Since so much funding

is available to renters and the state is opening again, is the eviction moratorium still needed?

On June 28, 2021, the Governor signed into law Assembly Bill 832 (AB 832) extending the eviction moratorium to September 30, 2021. AB 832 also increases rental assistance from 80% to 100% of the past-due rent. All COVID-19 unlawful detainer (eviction) protections established originally by AB 3088 and extended by SB 91 are now extended by AB 832. This is expected to be the last extension since the Legislature will not be in session on September 30th. All landlords who have tenants with past-due rent from March 2020, must send to their tenants a Notice of their rights under this new law by July 31, 2021.

Expanded Homeowner and Renter Legal Assistance

To further protect homeowners and renters experiencing unprecedented economic hardships, the 2019 and 2020 Budget Acts appropriated \$51 million in grants to community-based organizations that offer eviction and foreclosure counseling, consultation, mediation, training, education, and representation.

As homeowners and renters continue to face economic challenges caused by the pandemic, the May Revision

includes \$20 million in federal ARPA Coronavirus State Fiscal Recovery Funds for the next three years (\$60 million total) to the Judicial Council to continue providing legal assistance grants to over 100 legal service and self-help organizations. ■

Betty L. Jeppesen has 39 years' experience in real estate, landlord tenant, contract aircraft leasing law and civil litigation. She was President of the Santa Barbara County Bar Association (SBCBA) in 2003, President of the SBCBA Foundation from 2006-2008, President of the Santa Barbara Women Lawyers (SBWL) Foundation in 2014, President of SBWL in 2015 and is currently the President of the Santa Barbara Rental Property Association (SBRPA) with over 1,000 members representing over 22,000 rental units in Santa Barbara. Her awards include the 2006 SBWL Attorney of the Year, the 2012 award by SBCBA for her 30 Year participation representing Santa Barbara in the California Conference of Bar Associations, the 2017 recipient of the SBCBA Foundation Legal Community Appreciation Award and the SBRPA 2019 George Stevens Memorial Award for Dedicated and Outstanding Service to the Rental Housing Industry. Betty is in solo practice as an attorney and is also a licensed real estate broker affiliated with Sun Coast Real Estate.

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California Laws Effective July 1, 2021

BY ERIN PARKS

Senate Bill 872 (SB 872) could not be more timely considering fire season on the Central Coast. SB 872 is designed to help homeowners who lose property in wildfires during states of emergency and includes provisions for coverage of living expenses. The bill requires: (1) additional living expense coverage to be provided for at least 2 weeks, with additional 2-week extensions, in the event of a state of emergency and an order of civil authority restricting access to the home; (2) the measure of damages available to a policyholder to use to rebuild or replace the insured home at another location is the amount that would have been recoverable had the insured dwelling been rebuilt at its original location, without deduction for the value of land at the new location; (3) for losses related to a declared state of emergency and for which an insured makes a claim on or after January 1, 2021, the insurer must provide an advance payment for living expenses and accept an inventory of contents in any reasonable form; (4) an insurer to offer a 60-day grace period for payments of premiums for policies on property located within an area defined in a declared state of emergency for a period of 60 days after the emergency.¹

California's ban on buying more than one handgun in a 30-day period is expanded to semiautomatic centerfire rifles via Senate Bill 61. Existing law, with exception, prohibits: (1) a person from making more than one application to purchase a handgun within any 30-day period; and (2) a firearms dealer from delivering a handgun to a person whenever the dealer is notified by the Department of Justice that within the preceding 30-day period the purchaser has made another application to purchase a handgun that does not fall within an exception to the 30-day prohibition. Violations of such prohibitions are a crime. Existing law also provides an exemption to the prohibition for the sale of a firearm, other than a handgun, to a person 18 years of age or older who has a valid hunting license, is a law enforcement officer, as specified, or is an honorably discharged member of the Armed Forces. Senate Bill 61

makes the 30-day prohibition and the dealer delivery prohibition also applicable to semiautomatic centerfire rifles to any person under the age of 21, except a law enforcement officer or active-duty member of the Armed Forces.²

Assembly Bill 376 provides for the creation of an ombudsman to advocate for, and field complaints from, student loan borrowers faced with predatory practices.³

Laura's Law, a 2002 measure that allows judges to require intensive mental health outpatient treatment, becomes permanent through Assembly Bill 1976. To qualify a person must have a serious mental illness and recent history of psychiatric hospitalizations, incarceration, or violent behavior.⁴ ■

Erin Parks is Santa Barbara Lawyer's Editor. Her practice emphasizes Employment Law, Immigration and Estates and Trusts. Ms. Parks can be reached at law@erinparks.com, (805)899-7717, or seen at www.erinparks.com.

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**Santa Barbara County Bar Association Criminal Law Section
Presents:
“Crimmigration Updates”**

The seminar will provide a brief overview of crimmigration along with updates in law and recent changes in policy and enforcement.

When: August 18th, 2021, from 12:00 P.M. – 1:15 P.M.

Where: Via Zoom **MCLE:** 1 Hour General MCLE Credit

Speaker(s): Abbe Alan Kingston

Abbe Kingston is the senior attorney in charge of overseeing all immigration matters for Kingston, Martinez & Hogan. He is a founding partner of the firm and has practiced immigration law in Santa Barbara for over 35 years. He has been certified by the California State Bar as an Immigration and Nationality Law Specialist since 1988. He was appointed as a Commissioner on the California State Bar Commission on Legal Specialization for a period of three years. Abbe earned his Bachelor of Science degree from the University of California, Santa Barbara, and his law degree from Loyola Law School. Abbe has published several law review articles, as well as appeared on local and national news as an immigration expert.

Tanya A. Ahlman

Tanya Ahlman is a Partner at Kingston, Martinez & Hogan LLP. She has been certified by the California State Bar as an Immigration and Nationality Law Specialist. Tanya specializes in employment-based immigrant and non-immigrant visas, including the transfer of personnel from multi-national companies. She received her law degree from Georgetown University Law Center and previously practiced law for the Office of the District Attorney of Santa Barbara County. She is admitted to practice law in California, New Jersey, New York, and the U.S. Virgin Islands.

Andrea M. Anaya

Andrea Anaya is a Junior Partner with Kingston, Martinez & Hogan LLP. She practices immigration law, specializing in family-based immigration, Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), deportation/removal defense, crimmigration and federal immigration litigation. Andrea received her B.A in Political Science from the University of California, Santa Barbara. She earned her J.D. from the Santa Barbara College of Law.

Price: Members \$10/Non-Members \$15

Please mail checks by **Friday August 13th, 2021**, payable to Santa Barbara Bar Association, 15 W. Carrillo Street Suite 106, Santa Barbara, CA 93101.

You may also click the link [here](#) to pay via Venmo.

Contact Information/RSVP: Please RSVP by **Friday August 13th, 2021**, to: Jeff Chambliss, Esq. jeff@chamblisslegal.com and Lida Sideris sblawdirector@gmail.com





The SBCBA Civil Litigation Section Presents: “Off the Clock: Professional Ethics on Personal Time”

When: Friday, September 3rd, 2021 12:00 PM

Where: Zoom

MCLE: 1.0 Hours Ethics (Pending)

Speaker(s): Wendy L. Patrick is a past Chair and advisor to the California State Bar’s Ethics Committee. She is a Deputy District Attorney with over 165 trials, ranging from first-degree murder to domestic violence to stalking. She has been selected as one of the Top Ten criminal attorneys in San Diego and named the Ronald M. George Public Lawyer of the year. Wendy is an author and media personality who has appeared multiple times on CNN, Fox News Channel, Fox Business Network, and a variety of other national news programs.

About the Event: Most legal ethics programs focus on how applicable rules, laws, and related opinions govern a lawyer’s behavior when he or she is practicing law. But what rules apply to a lawyer’s behavior off the clock?

The answer is: ethically, a lawyer is never off the clock. This program will focus on the rules, statutes, case law, principles, and guidelines that govern a lawyer’s actions, conduct, and speech, during personal time. It will break down and analyze Professional Rule of Conduct 8.4, Misconduct, breaking down each subsection into informative, practical examples, and present practical illustrations and informative case examples from around the country of how off-the-clock behavior can have on the job consequences.

Price: Members \$10/Non-Members \$15

Please mail checks by **Friday, August 27, 2021**, payable to Santa Barbara Bar Association, 15 W. Carrillo Street Suite 106, Santa Barbara, CA 93101.

You may also click the link [here](#) to pay via Venmo.

Contact Information/R.S.V.P.: Please RSVP by Friday, August 27, 2021 to: Mark Coffin at mtc@markcoffinlaw.com and Lida Sideris at sblawdirector@gmail.com

The SBCBA Labor & Employment Section Presents: “Cal/OSHA Emergency Temporary Standards (ETS) – What’s New & What to Do”

When: Monday, August 9th Time: Noon – 1:15 p.m.

Where: Zoom – Link to be provided upon registration

MCLE: 1.0 Hours MCLE (General)

Speaker(s): Jared W. Speier, Associate, Stradling Yocca Carlson & Rauth

About the Event: In a much anticipated move, the Cal/OSHA Standards Board approved significant revisions to its Emergency Temporary Standards (ETS). Most importantly, the approved revisions relax standards for vaccinated workers, and end physical distancing requirements. By Executive Order of the Governor, the revised ETS went into effect immediately on January 17th. Since it became effective in November 2020, the ETS has been setting the standard for COVID-19 restrictions in the workplace. The new revisions bring some clarity to the regulations but also raise some new questions. This presentation will explore the revisions as well as provide practical guidance for how employers can expect to enforce the ETS and overcome the challenges it presents.

Price: \$10 SBCBA members/\$15 non-members. Please mail checks by **Wednesday August 4th, 2021**, payable to Santa Barbara Bar Association, 15 W. Carrillo Street Suite 106, Santa Barbara, CA 93101.

You may also click the link [here](#) to pay via Venmo.

Contact Information/R.S.V.P.: Please RSVP by August 5th to: Alex Craigie, Esq., The Law Offices of Alex Craigie, 791 Via Manana, Santa Barbara, CA 93108, alex@craigielawfirm.com. (805) 845-1752



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Unander, *continued from page 17*

A few years ago, one of the young mothers she helped started posting on Facebook that she needed somebody to help babysit her baby so she could cover her shift at the 99 Cent Store. [Robin offered and]...[¶] [t]he young lady, Daniella Hearn, accepted.[¶] After a few weeks, Robin noticed that maybe [Daniella] needed some time to get back on her feet... and then agreed to give [Robin] legal guardianship [of her son so she could] sort out her life.... [¶] [One evening,] Ms. Hearn came over ... to see her son at Robin's house, said goodbye, then tragically died in a car accident [that same night.][fn omitted][¶] Robin (and her husband) now found [themselves] with a third child.... Nobody [else in the baby's family] was in a position to take [him] and [Robin] had a decision to make. She could not see this child get put in the system so with the family's blessing, she decided to keep her promise to Ms. Hearn and take care of her little boy indefinitely. Now, Robin [has] a family of five and does not think twice about her decision over four years later.[fn omitted]

Robin is a true humanitarian most deserving of the Richard Abbe Humanitarian Award. Her contributions above to the community that have impacted thousands of people through advocacy and protection of rights and direct volunteer work--in addition to unexpectedly adopting a child she assisted through her organization--would deem her most worthy."

Congratulations, Robin! ■

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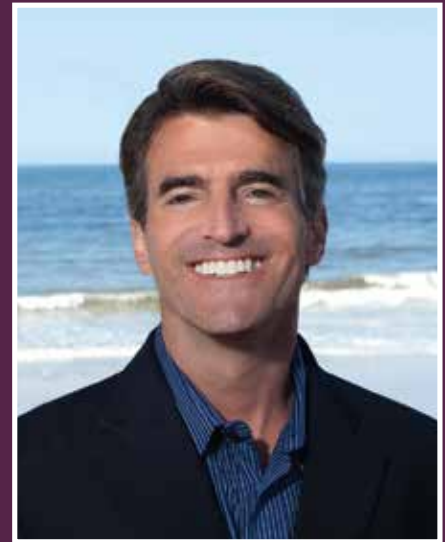
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