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Inside:

Spotlight On Judge Karen O'Neil

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On the Cover

Judge Karen O'Neil, photo by Janene Scully

Spotlight on Judge Karen O'Neil

As She Approaches Her One Year Anniversary on the Bench

By Nicole O. Coulter

Judicial newcomer, Judge Karen A. O'Neil, has served on the Santa Barbara Superior Court-Miller Division bench since last June, following two decades as a civil attorney in Santa Maria, Calif., where she was the president and managing shareholder of Kirk & Simas. In her private practice, she handled employment law, agriculture and farming, and advised cemetery districts.

O'Neil replaced Judge Timothy Staffel, who retired after 24 years on the bench. Approaching the one-year anniversary of her investiture, O'Neil reflected on her decision to pursue a judicial opportunity and how she has adapted to life on the bench.

A Natural Role

"Becoming a judge was something that had been in the back of my mind for years," she explained on a recent Saturday morning from her court chambers in downtown Santa Maria. While she loved her private practice and her clients, little nudges and opportunities to pursue a judgeship kept popping up, tapping a passion within her. "One of my core values is fairness and giving all sides a chance to be heard," O'Neil said. "The role of a judge is to promote fundamental fairness within the bounds of the law."

It was a natural role for O'Neil.

Two years ago, O'Neil saw the opportunity presented by the judicial mentorship program championed in Santa Barbara County by Judge Gustave Lavayen. After encouragement by Assistant Presiding Judge Patricia Kelly on the Santa Barbara Superior Court, O'Neil began the lengthy review process for selection to the bench. She completed painstakingly thorough questionnaires, background checks and preparatory interviews before Governor Gavin Newsom appointed her to the bench on March 30, 2023.

While selected to fill the remaining year-and-a-half of Judge Staffel's six-year term, Judge O'Neil had to quickly complete paperwork and gather dozens of signatures to run for election this year. She won election by default this Spring (2024) because she faced no opposition. (Superior Court judges don't appear on the primary ballot if there is no opposition.) She will serve for the next six years before she needs to run again.

Nicole O. Coulter

O'Neil, a graduate of Righetti High School in Santa Maria, received her B.A. cum laude from San Diego State University in Political Science, before earning her J.D. with distinction, at Pacific University in Sacramento in 2000. As she reflects on her enrobing ceremony in May of last year, O'Neil relished the presence of so many of her friends and colleagues. "It was a wonderful celebration," she recalls. "My private practice spanned the state. So, I had the local legal community there, but I also had clients come in from up and down the state." Her mother, mother-in-law, and younger sister (all in the Santa Maria area) were there to support her, as well as a nephew who came in from out of town.

Judge O'Neil in her chambers

Pursuing Fairness to All

Donning the black robe gives O'Neil a chance to put into practice values and instincts she has cultivated since her youth. Born in Madrid, Spain at Torrejon Air Base to a military family, O'Neil moved frequently during her formative years before her family ultimately arrived in Santa Maria. She brings this worldview into the courtroom.

"We all have experiences that shape our lives and motivations," O'Neil said. "Living in different countries and states taught me versatility and empathy. I know what it feels like to be the new stranger in town [and to not have a voice]. I went into the law because I wanted to be an advocate for those who did not have a voice." She originally planned on a career as a government attorney, but municipal and state hiring freezes in 2000-2001 re-directed her into private practice.

O'Neil says as a young person, she felt like an outsider at times, even in England where she ostensibly spoke the same language as her classmates but with a "foreign sounding" American accent and different family customs. Her appreciation for how even subtle differences matter in life and in the courtroom has led her to advocate for court interpreters who speak the exact dialect of the parties involved to minimize the chance for misunderstanding.

Language barriers can create implicit bias. As an attorney, O'Neil sought out training as a "neutral investigator" to raise her own awareness of explicit and implicit bias—and to improve her objectivity. The state bar requires at least two credit hours of recognizing and eliminating bias in the legal profession. "I learned how to identify such biases and minimize them in witness interviews and credibility determinations," she said. "This has translated well to the bench."

Learning the Judicial 'Robes'

Pursuing fairness within the bounds of the law can be a struggle in the midst of a hectic daily court calendar.

Judge O'Neil's workload jumped from 50+ hours a week in private practice to 60+ hours in her transition to the bench. Her weekdays begin at 5:45 a.m. as she gets an early start to handle a very busy criminal court docket. Saturday finds her doing more prep work for trials in her chambers from mid-morning until mid-afternoon. Each day she pushes herself. "It's a lot of work, and definitely a learning curve," she admits. But overall, the transition has been a joy. I'm so grateful for the collegiality of my colleagues."

As an attorney in her civil practice, O'Neil had fewer trials to prepare for as the cost of civil litigation often prompted a settlement. She has brought that "meet and confer" mindset into her work as a judge. She is known for her friendly

Judge O'Neil reviews the finer points of the Declaration of Independence with Benjamin Franklin

chambers' conferences—complete with snacks (donuts, shortbread biscuits in a tin—or healthier alternatives such as apples and oranges) for the opposing counselors. "I am a big believer that if people come together and share a snack, they may see each other as an adversary, but not as an enemy," she said. "By having candid discussions, the parties are more likely to engage in problem solving instead of remaining entrenched in their respective positions."

Meeting Challenges as They Come

O'Neil cultivated a reputation for problem solving in the private sector, creating a unique legal niche serving cemetery districts. "It started one cemetery at a time," she explained. "I assisted one cemetery with an employment issue and then another with some policies, and then over time I became one of the few attorneys who had cemetery law as part of their practice. I enjoyed the work and the people."

The biggest problem O'Neil did not anticipate before her ascent to the bench was the degree of mental health challenges facing criminal defendants, victims and their families. "I did not understand the staggering need for mental health

Judge O'Neil enjoying Lamley Castle

services," she says. "The Justice partners (district attorney's office) have recognized this need and are working together to address it in our community."

O'Neil takes care of her own mental health by dedicating part of each Sunday to her garden. "I do like to garden," she smiles. "It's nice to get your feet and hands in the soil. It keeps you grounded." She enjoys growing lavender, sunflowers, tomatoes and chives—especially for their purple flowers when they go to seed. Judge O'Neil also enjoys traveling—getting away—whether a trip to the United Kingdom, and the 14th Century Lumley Castle, or right here in great state of California.

True to her wandering childhood, she loves "experiencing new cuisine and new culture" – and gaining perspective on the world. A perspective she retains from her perch atop the judge's bench in Department 3. ■

Nicole Coulter is a veteran business journalist whose work has appeared in trade magazines such as Bank Investment Representative and RIA Central. She is pursuing a J.D. at Santa Barbara Colleges of Law and plans to work in civil litigation or corporate law after the bar. She lives in Goleta with her three children.

Civility in Litigation

By Barbara A. Carroll

Attorneys from all walks of life come together in courthouses and law offices to advocate for their clients and uphold the principles of justice. However, amidst the rigors of litigation, the importance of civility can sometimes be overlooked. It is crucial for legal professionals in Santa Barbara—everywhere really, but we have to start somewhere—to maintain a high standard of civility in interactions with one another, not only to uphold the integrity of the legal system but also to foster a culture of respect and professionalism.

The concept of civility in litigation goes beyond mere politeness; it encompasses the principles of mutual respect, professionalism, and ethical conduct. In a city as picturesque and serene as Santa Barbara, it may be easy to assume that such virtues come naturally to its legal practitioners. However, the reality is that the pressures and adversarial nature of litigation can often test the limits of civility. Therefore, it is essential for attorneys to be mindful of their conduct and strive to maintain a standard of courtesy and decorum in all aspects of their legal practice.

One of the most important aspects of civility in litigation is the way in which attorneys conduct themselves in the courtroom. Santa Barbara's courthouses, with their stately architecture and imposing presence, demand a certain level of reverence and decorum. Attorneys may find it easy when in court to address the Judge and their colleagues with the utmost respect.

The concept of civility needs to extend beyond the courtroom and into the day-to-day legal practice on the phone, emails, depositions, settlement conferences, etc. Attorneys must be mindful of their language and behavior, refraining from engaging in personal attacks or disrespectful conduct, as well as maintaining a professional demeanor at all times. Attorneys are often engaged in activities that require a great deal of cooperation, collaboration or coordination with the opposing side. Maintaining a professional and cordial relationship with colleagues helps ensure the interests of clients are best served.

In the larger world we have seen a number of major cultural shifts that have lowered cultural standards of civility. Over the course of the past decade we have seen public figures, including lawyers, educators and elected officials —the types that used to be held up as examples of high standards and ideals—use foul language, make threats, use actual violence, and lie with impunity.

Barbara A. Carroll

The problem of lawyer incivility is not new. There are many things a lawyer can do that members of the public would perceive as uncivil, including interactions with opposing counsel. For several years, the media has been filled with images of lawyers using shocking language when talking about other lawyers or judges, or reacting to court decisions in an extreme manner. What would have been shocking several years ago has now become commonplace. Nonetheless, states and courts must be very careful about placing restrictions on constitutionally protected speech.

From its inception, the California Bar has relied upon the goodwill of the legal community to deter bad behavior. However, civility in the law has been a hot topic over recent years. Initiatives have been introduced by various County Bar Associations promoting professionalism and ethical conduct among attorneys, and guidelines have been established pertaining to civility in the practice of law. If you are looking for examples, you can find several here: https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/attorney-civility-and-professionalism.

The Civility Task Force was formed in 2019. Forty judges and lawyers from across the state came together and then in 2021 presented their initiatives to the State Bar, which the State Bar approved in July 2023. They were:

- Amend California Rule of Court 9.7 to require all California lawyers to take the current version of the oath containing the pledge to strive for civility, which was previously only required of lawyers licensed in California since June 2014, and reaffirm that commitment each year.

- Amend California's Rules of Professional Conduct 1.2 and 8.4 and adopt proposed new rule 8.4.2, to make incivility (as defined) a disciplinary offense.

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> Proposed rule 8.4.2 defines incivility as "significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct."

- Require 1 hour of a civility MCLE during each 3-year MCLE compliance period to be included within the current total of 25 credits.

The California Supreme Court has approved some of these recommendations and they have been implemented, but the recommendation regarding proposed rule 8.4.2 has not yet been adopted.

In the end, it comes down to each of us remembering that we each play a role in embracing the values of respect, professionalism and ethical conduct—in how we treat each other and in how we require others to treat us—for civility to make the come back we all say we want it to. ■

Barbara A. Carroll is a Senior Deputy County Counsel with the County of Santa Barbara. She has been practicing law since 1998. She serves on the Board of Directors of the Santa Barbara County Bar Association, and is the President of the Santa Barbara County Bar Foundation.

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To Snitch or Not to Snitch: California's New Rule Addressing Mandatory Reporting of Misconduct

By Richard Lloyd

Richard Lloyd

"If at first you don't succeed, wait for a decade and the occurrence of a widely-publicized client fund embezzlement scandal, then try again." After prior attempts in 2010 and 2016 were unsuccessful, the California Supreme Court in June last year approved a revised rule governing the mandatory reporting of misconduct for California lawyers[1].

California's new Professional Rule of Conduct, Rule 8.3 ("Rule 8.3") went into effect on August 1, 2023. Rule 8.3 imposes a mandatory duty on all California attorneys to inform, without undue delay, the State Bar of California (or a tribunal with jurisdiction to investigate or act upon such misconduct), whenever they are in possession of credible evidence that another lawyer has committed an act that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer[2]. Within this definition, Rule 8.3 provides specific examples including: (1) criminal acts; (2) engaging in conduct involving dishonesty, fraud, deceit, or reckless or intentional representations; and/or (3) misappropriating funds or property[3].

For those of you are more familiar with ABA Model Rule 8.3, this article may come as a surprise that California *did not have* a mandatory reporting requirement. ABA Model Rule 8.3, which came into existence in 1983, has long imposed a mandatory ("shall report") duty on lawyers who know another lawyer has committed a violation of the Rules of Professional Conduct that raises a "substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects"[4]. California, at least until August 1, 2023, has never imposed an equivalent rule imposing a mandatory duty to report[5].

However, as with every new rule, our new Rule 8.3 comes with additional considerations, applications and interpretations to consider.

First, what is meant by "without undue delay"? Comment 3 to Rule 8.3 provides additional context to help lawyers balance the potential impact of reporting against the concern of adverse impact to a client in a pending lawsuit or transaction, and clarifies that a report is required "as soon as the lawyer reasonably believes the reporting will not cause material prejudice or damage to the interests of a client of the lawyer or a client of the lawyer's firm"[6].

Second, what does "credible evidence" mean? The State Bar has helpfully provided various materials to assist attorneys in their understanding of the new Rule, including providing a number of factual scenarios to game out. For example, rumors almost certainly do not constitute credible evidence, nor would a mere belief that an attorney made a reckless or intentional misrepresentation, without further evidence that the attorney knew, or should have known otherwise[17]. On the other hand, learning in a conversation with a partner that client funds have been misappropriated would clearly trigger the mandatory duty to report[8].

Third, to which entity should the matter be reported? Comment 6 provides assistance in this regard. While reporting to the State Bar would appear to fully satisfy any reporting obligation under any circumstance, careful consideration must be given to whether an alternative body has the power to "investigate and act upon" the alleged misconduct. An example given in Comment 6 is reporting to a non-judicial officer in a forum such as a private arbitration, and suggests that may not be sufficient to comply with the reporting requirements[9].

Fourth, what type of conduct constitutes a "substantial question" as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects? The misuse and misappropriation of funds has long been a matter of concern, and is called out specifically in Rule 8.3[10]. Comment 4 also provides some additional guidance, limiting the reporting obligation "to those offenses that a self-regulating profession must vigorously endeavor to prevent[11]." Comments 8 and 10 respectively serve to remind attorneys that threats to report are not to be used as leverage in a civil dispute, and that false and malicious reports may subject attorneys to discipline or other penalties[12]. Finally, no doubt with hot

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WELL-BEING IN BRIEF

Recognition and Value

By Robin Oaks

This month's issue will launch a new column called "Well-Being in Brief." As the SBCBA's "Well-Being" Director and Section Chair, I'm excited to create this monthly column spotlighting topics that promote wellness, well-being, and thriving for ^legal professionals. The idea, in brief, is to raise awareness about the many life dimensions, skillsets and competencies vital for professional success and through a holistic approach make fostering well-being and wellness a center post supporting our legal practitioners, clients—and community.

In the spirit of a legal *brief*, each month will highlight an important well-being issue. Citing stories, science-based strategies, studies, and legal realities, I'll make an argument in favor of fostering well-being and you can be the judge to decide what's relevant for you. In conclusion, I'll include a practice or question to reflect upon to bring the concept alive and spark discussion with others.

At times, others will be invited to share expertise, and the focus might be on a relevant current book, article, study, or local event. All readers are considered de facto members of a community-wide well-being task force, so become involved and contact me to share resources and topics of interest.

Because our Bar Association has recognized the value of fostering well-being by creating a new section and Board position, I'm highlighting for this first column a study exploring how recognition and values matter.[1] The study led by Patrick Krill, surveying nearly 2000 attorneys, researched whether the perceived values of employers, i.e., what the lawyers felt they were valued for, were "differentially associated with lawyer well-being."

Those lawyers (62%) perceiving they were valued for "my overall talent and skill as a lawyer, and inherent worth as human being," (Professionalism/Individual group), scored highest for mental and physical health and lowest for risk of attrition and substance use issues. Those lawyers (27 %) perceived to be valued for their billable hours and responsiveness (Revenue Generation/Availability) scored significantly lower on health and well-being. Those who fared the worst in wellbeing ratings were those lawyers (10%) who perceived that they weren't valued for anything or never received enough feedback to even know.

Robin Oaks

Krill noted, "In short, our findings revealed a striking health hierarchy among lawyers that appears linked to their employers' values." Not being recognized, feeling de-valued, or lacking a clear sense of "I matter and my work matters" are tangible mental and physical stressors—and contribute to burnout and attrition. Understanding the power of recognition, aligning work with values, and consciously sharing with others how their work matters, will fuel engagement, motivation, energy, and sustainability and profit legal professionals.

Practice

1. Pause and take a moment to jot down three reasons why you are doing the work that you do—and for whom. Identify what reason feels most meaningful—or more draining.
2. Say thank you to someone. State specifically why you value their work and what quality or talent they've demonstrated that reflects the firm's values.
3. At your next team meeting, recognize someone for their work contribution, and describe how their work was important overall to a legal matter or case progress.
4. For one week, write down how your work each day benefited others, identifying one value you care about that is connected to your work. ■

Robin Oaks has been an attorney for nearly forty years, and for twenty-five years has provided legal services focused on independent workplace investigations and mediation. She is certified in and has studied a wide range of healing, emotional intelligence, cognitive fitness, and mind-body practices. She is a well-being consultant and offers confidential professional life coaching sessions for legal professionals seeking to optimize potential, restore balance, and thrive during stressful life changes and challenges. Contact: Robin@RobinOaks.com or 805-685-6773.

Endnote

1. Krill, et al., *People, Professionals, and Profit Centers: The Connection between Lawyer Well-Being and Employer Values*, Behav. Sci, 2022, 12, 177.

Constitutional Law if You Can Keep It

By Robert M. Sanger

Robert M. Sanger

This *Criminal Justice* column will address a modest question: What is constitutional law today in the United States? Okay—it is not so modest and is probably a bit controversial. There are purported schools of constitutional law. Recently, there has been the ascension of Originalism or Textualism, claiming that the Constitution is not a living document subject to interpretation but is a static text that is binding as written unless amended.

As will be discussed, this is not a matter of liberalism versus conservatism. Justice John Paul Stevens claimed that he was a true conservative because he valued *stare decisis* as an integral part of the rule of law. He said, to sum up his career, "I was trying to apply the law in a sensible way."[1] That attitude is in direct conflict with the stated approach of the current majority of the United States Supreme Court. This obviously has had and will have a profound effect on Constitutional interpretation across the board, including in criminal cases, particularly those based on the Fourteenth Amendment Due Process and Equal Protection clauses.

What is Constitutional Law

There are many rabbit holes to go down and some of them would take us into realms, not unlike the psychedelic wonderland that Alice experienced. Certainly, legal philosophy over the millennia has explored the larger question of "what is law?" That is all informative but is the subject of some serious postgraduate study. However, the aim here is to keep it a bit more grounded in the current evaluation of the technique used by the United States Supreme Court in telling us what the Constitution of the United States means.

First, a constitution is the foundation of the rule of law and is opposed to rule by power. As a concept, it restrains the ruler or ruling class from violating rights of the governed. In the England of 1215, the Magna Carta restrained the power of the King to exercise power over the Barons. It was a flawed document protecting the landed gentry but was a start. Nevertheless, if formed a basis for subsequent issuances of the Charter and documents like the Petition of Right in 1628 and the Habeas Corpus Act of 1679 which extended rights somewhat more broadly to the people.

The United States Constitution of 1787 was also flawed for a number of reasons, not the least of which was the express subjugation of "Indians" and enslaved people who were counted as three-fifths.[2] And, of course, it protected the white, male, landed aristocracy of the new nation. The first ten Amendments to the Constitution, ratified in 1793, extended some protections to citizens primarily against the exercise of power over white males by the federal government. In the post-Civil War Amendments, the Thirteenth, Fourteenth and Fifteenth, rights against exercise of power were extended to theoretically protect Black males and the Nineteenth Amendment, ratified in 1920, finally extended the right to vote to women.[3]

By definition and by practice, a constitution is accepted (acceded to by the reigning power, or ratified by the people) in order to place constraints on those exercising power. In a democracy, power theoretically is exercised by a majority but, in our country right now, it is exercised by the financial elite. A constitution, even in an autocratic democracy, restrains the people in power from unfairly subjugating the rest of the population. A constitution is not in place to protect the people in power from the people in the community.

Second, of course, the Federalist Society and the hard right[4] voting bloc on the Supreme Court have been making a concerted effort to turn the concept of a constitution on its head and hold that the United States Constitution should be construed to protect the people in power from the rights of the people in the community. The hard right march of the Supreme Court is accomplishing that goal.

Decisions on the rights of women to bodily integrity do not uphold the rights of the people against those in power – they ensure that those in power can retrain those individual rights even if those in power do not represent majority.[5] Decisions giving corporations power to influence elections by spending unlimited money,[6] giving states power to limit voting rights,[7] prohibiting institutions from using affirmative action to give equal opportunity to historically racially oppressed minorities,[8] and so many more, all favor the power of the state over the individual. The Due Process

clause of the Fourteenth Amendment is systematically being eviscerated as a protection for the people to require fairness in the exercise of government power.

Of course, the one part of the Constitution that seems to have been construed in favor of individual rights is the Second Amendment. The Second Amendment has historically not been invoked to provide for individual rights until the 1970's when the NRA started a program to insist that the Amendment was enforceable by individual gun owners.[9] Now there is an entrenched, anti-historical, invocation of that amendment to promote a hard right agenda where militant gun rights advocates are in the minority and the majority wants some sort of regulation. Although it seems to be an outlier, it is actually skewed in favor of the politically, socially and economically powerful gun lobby and opposed to the people who desire some modicum of gun safety.

How Have We Lost Our Way?

We should make no mistake. The Supreme Court has almost always been an institution that has retrenched itself in older and often archaic values. The vaunted Marshall Court, despite the cleverly reasoned *Marbury v. Madison*,[10] was a Court that favored the landed, white plantation owners of the Southern States and their hegemony over the new territories.[11] The shame of the Court in *Dred Scott*,[12] *Slaughterhouse Cases*,[13] *Plessy v. Ferguson*,[14] *Korematsu*,[15] *Schechter*,[16] and other cases has dominated the Court history.

The Warren court was the exception, recognizing the Constitution for what it is—a constraint on the politically, socially and economically powerful, rather than an enabler for the elite in an oppressive exercise of power.[17] All of the Warren Court decisions based on Due Process, Equal Protection or the right of Privacy are currently under attack in concurrences and dissents from the entrenched hard right.[18] The Court is retreating and retrenching in what history will find to be an unconscionable mode. How does this happen?

First, is the undeniable influence of the hard right wing of the Republican party and, in particular, the Federalist Society. The Society has vetted all of the most recent Supreme Court nominations as well as all of the nominations to the lower federal courts. They are doctrinally hard right and closely aligned with the most right leaning members of the Republican Party. Under Republican control, the Society has taken over the traditional role of the Ameri-

can Bar Association in determining whether applicants for court appointments are qualified or not. The ABA is not a particularly liberal organization and, for a long time, was considered quite conservative. However, their evaluation of judicial candidates was and is based on measures of merit rather than simply on fealty to a hard right line of doctrines.

Second, the Court and the Federalist Society have used the doctrinal cover of originalism, textualism, or a variant thereof to justify the outcomes which suit hard right politics. This means that *stare decisis* has been sacrificed wherever it suits the purpose. Famously, precedents, like *Roe v. Wade*,[19] have been cast aside without concern for the traditional values of the rule of law. Perhaps more importantly, the court has given lip service to ideologies, e.g., originalism and textualism, but manipulate them or abandon them to come to the desired political decision. This has been documented time and again but, most recently in a detailed account by the Dean of the University of California Berkely School of Law, Erwin Chemerinsky.[20]

Conclusion

Constitutions, including the Constitution of the United States and its Amendments, are first, intended to set forth general principles of governance and, second, intended to protect the unempowered against those in power. As a result, the only way a constitution can be properly interpreted is to study and understand the general principles that give rise to the language in the document and to continue to interpret the document in light of recent history and current realities of life and society.

None of the political machinations giving rise to preferred hard right doctrines are based on a constitutional philosophy. It is simply impossible to discern a jurisprudence of the current Court or the further urgings of the Federalist Society. Just as in Justice Taney represented racist dogma and just as the Four Horsemen of the Apocalypse represented big business interests as they undermined the recovery efforts of the New Deal, the result oriented hard right decisions of the current Court will affect this country for decades. Yet, the decisions are not based on sustainable principles of constitutional interpretation or anything that resembles a constitutional jurisprudence. Hopefully, not more much harm will be done to human beings depending on a constitution to ensure their liberty against power. However, when the light of history shines upon this Court, the current Court will be judged harshly. ■

Robert Sanger is a Certified Criminal Law Specialist (Ca. State Bar Bd. of Legal Specialization) and has been practicing as a litigation partner, now principal shareholder at Sanger Law Firm, P.C., in Santa Barbara for over 50 years. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is an Adjunct 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.

The opinions expressed here are those of the author and do not necessarily reflect those of the organizations with which he is associated.

Endnotes

1 Erin Blakemore, "*How John Paul Stevens' Views Evolved Over 34 Years on the Supreme Court,*" History (June 18, 2019).
2 U.S. Constitution, Article 1, Section 2, Clause 3: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."
3 Although the Equal Rights Amendment, establishing gender equality, was passed by the United States Senate in 1972, it still has not been ratified.
4 "Hard right" is not intended to simply be pejorative but is used to distinguish it from traditional conservative values.
5 *Dobbs v. Jackson Women's Health Organization*, 597 U.S. __ (2022).
6 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
7 *Shelby County v. Holder*, 570 U.S. 529 (2013).
8 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, __ U.S. __ (2023).
9 See, Thom Hartmann, The Hidden History of Guns and the Second Amendment, (Barrett-Koehler, 2019).
10 *Marbury v. Madison*, 5 U.S. 137 (1803).
11 Gustavus Myers, History of the Supreme Court of the United States (Reprint, Burt Franklin, originally published 1912).
12 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
13 *Slaughterhouse Cases*, 83 U.S. 36 (1873).
14 *Plessy v. Ferguson*, 163 U.S. 537 (1896).
15 *Korematsu v. United States*, 323 U.S. 214 (1944).
16 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
17 E.g., *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Loving v. Virginia*, 388 U.S. 1 (1967).
18 See, e.g., Justice Thomas in concurrence in *Dobbs v. Jackson Women's Health Organization*, 597 U. S. ____ (2022). He would also overturn *Lawrence v. Texas*, 539 U. S. 558 (2003) and *Obergefell v. Hodges*, 576 U. S. 644 (2015) but, interestingly, does not suggest overturing *Loving v. Virginia*, 388 U.S. 1 (1967).
19 *Roe v. Wade*, 410 U.S. 113 (1973).
20 Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism, (Yale University Press, 2022). But see, also, Elie Mystal, Allow Me to Retort: A Black Guy's Guide to the Constitution, (The New Press, 2023) and Joan Biskupic, Nine Black Robes, (William Morrow, 2023).

Lloyd, *continued from page 13*

topic issues such as abortion and cannabis law in mind, the State Bar has explicitly excluded from the definition of "criminal acts" any conduct that would not be a criminal act in California[13].

Fifth, does it matter where the "credible evidence" came from? Yes, absolutely. Rule 8.3(d) establishes that no duty to report arises from information obtained by participation in a substance use or mental health program, or information obtained in the course of a confidential, privileged relationship, including but not limited to the attorney-client privilege, mediation privilege, or any other applicable privileges, rules or laws. [14]. Comment 5 reinforces the policy basis for the substance abuse/mental health exclusion, and explicitly references the State Bar's policy of encouraging participation in programs such as the Attorney Diversion and Assistance Program[15].

Other issues of note include *when* the alleged misconduct occurred. While not set forth directly in either Rule 8.3 or the accompanying comments, the State Bar's Frequently Asked Questions handout suggests that if a lawyer knows of credible evidence of misconduct that occurred prior to August 1, 2023, the fact that knowledge exists after the effective date of Rule 8.3 is sufficient to trigger the reporting requirement[16]. The same materials advise that it is not sufficient that you know the conduct has been reported by another attorney—there is no exception for when a lawyer knows a complaint has already been filed[17]. Finally, are you required to report yourself under Rule 8.3? No—but every lawyer has an independent duty to report their own conduct in certain instances[18].

While the new Rule 8.3 brings California in accord with the majority of jurisdictions, it remains to be seen how the rule will play out in practice. In an April 14, 2022 report, the California State Auditor idenitifed a series of systematic failings on the part of the State Bar, noting that it "failed to effectively prevent attorneys from repeatedly violating professional standards[19]". Concerns remain that the new Rule 8.3 will be weaponized, as well as fears that attorneys acting in good faith may inadvertently be subject to discipline. For those who were present at the Bench & Bar Conference in January this year, Judge Geck provided valuable insight from the bench on those very topics.

Finally, for further reading, the State Bar has established a website with additional reading materials; a self-study

MCLE course, as well as a FAQ and factual scenarios to review[20]. A "toolkit" may also be requested that includes additional resources, including a PowerPoint and lesson plan, should you wish to dive in further, or host a program for your firm or organization. ■

Richard Lloyd is an associate attorney with Cappello & Noël LLP. He attended the Santa Barbara Colleges of Law while working as a paralegal and became an associate upon passing the California State Bar exam in 2020. Since admission, he has represented clients in commercial business and landowner property disputes; high-value personal injury and wrongful death claims, in addition to multiple class actions pending in both federal and state courts.

ENDNOTES

1 https://www.calbar.ca.gov/Portals/0/documents/rules/Rule-8.3.pdf
2 Rule 8.3(a)
3 *Ibid.*
4 https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct/
5 See e.g. San Diego County Bar Association, Advisory Ethics Opinion 1992-2 [concluding in California, attorneys have no duty, express or implied, to report ethical misconduct of other attorneys], accessible at https://www.sdcba.org/?Pg=ethicsopinion92-2
6 Comment 3 to Rule 8.3.
7 State Bar of California, Rule 8.3 Reporting Scenarios, Scenarios 6, 7 (https://www.calbar.ca.gov/Portals/0/documents/ethics/Rule-8-3-Scenarios.pdf)
8 *Id.* at Scenario 1.
9 Comment 6 to Rule 8.3; see also Rule 8.3 Reporting Scenarios, *supra*, at Scenario 5 [reporting misconduct to court where litigation was pending satisfies reporting obligation, as would reporting to the State Bar]
10 See e.g. *Doyle v. State Bar of California* (1982) 32 Cal.3d 12, 23 ["Misappropriation of trust funds is a most serious violation of professional conduct, is likely to undermine public confidence in the legal profession and, when committed, merits severe discipline."]; see also Rule 8.3(a).
11 Comment 4 to Rule 8.3.
12 Comment 8, 10 to Rule 8.3; see also Rule 8.3 Reporting Scenarios, *supra*, at Scenario 4 [filing complaint without an evidentiary basis may subject complaining attorney to discipline and/or criminal penalties]
13 Rule 8.3(c).
14 Rule 8.3(d)
15 Comment 5 to Rule 8.3; see also Rule 8.3 Reporting Scenarios, *supra*, at Scenario 3 [information learned through course of lawyer-client relationship does not trigger reporting duty]
16 FAQ: Rule of Professional Conduct 8.3 at ¶ 3 (https://www.calbar.ca.gov/Portals/0/documents/ethics/Rule-8-3-FAQ.pdf)
17 *Id.* at ¶ 8.
18 See e.g. Rule 8.4.1(d) and (e); Business and Professions Code, § 6068, subd. (o)(1) through (10) [listing matters requiring reporting to State Bar, in writing, within 30 days of knowledge of matters]
19 https://www.auditor.ca.gov/reports/2022-030/index.html#section1
20 https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Rule-83-Required-Reporting

Motions

Cory Baker joins **Stradling Yocca Carlson & Rauth, LLP** as an associate in the firm's Employment Law practice group. Cory has accrued extensive experience in civil litigation and case management, having represented clients in a wide range of industries and resolving a variety of matters involving employment, real estate, and other commercial business litigation.

Prior to Stradling, Cory was an associate at Reicker, Pfau, Pyle & McRoy LLP in Santa Barbara. Before that, Cory was an associate at Paladin Law Group LLP in Santa Barbara.

He earned his J.D. from Pepperdine University School of Law and a B.A. from the University of California, Santa Barbara.

* * *

If you have news to report such as a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc., 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.*

* * *

Scholarship Foundation Joins Local Law Firm to Boost Local Hiring

By Tim Dougherty

The Scholarship Foundation of Santa Barbara has forged a partnership with Mullen & Henzell L.L.P. to provide area law school students and graduates with career development opportunities in the law firm's Santa Barbara office.

Under the partnership, the foundation will inform current and former scholarship recipients of available law clerk and attorney employment opportunities at Mullen & Henzell. Scholarship Foundation officials believe the program could serve as a template for collaboration with other area employers.

"Last summer, we helped highlight multiple summer law clerk opportunities at Mullen & Henzell among our law scholarship recipients and recent graduates, and that process led to discussions about initiatives to bolster our local workforce through collaborative efforts with employers," said Melinda Cabrera, foundation president/CEO.

"We encourage other employers to work closely with us, and would welcome more such partnerships," she said.

Last year the foundation awarded scholarships totaling $183,370 to 19 local students attending law school. All told, the foundation awarded nearly $7.2 million to 1,864 students throughout Santa Barbara County for the 2023-24 academic year.

Founded in 1953 as Cavalletto, Webster, Mullen & McCaughey, Mullen & Henzell represents clients in a range of personal, business, and professional endeavors across four primary practice areas: business and real estate, tax and estate planning, civil litigation, and labor and employment.

The firm prioritizes mentoring new lawyers and positioning them for professional success. Its law clerk program enables current law school students to obtain real-world legal experience in a collaborative environment. Candidates selected for the law clerk program in recent years have included Scholarship Foundation recipients.

Tim Dougherty

"Mullen & Henzell is pleased to partner with the Scholarship Foundation of Santa Barbara in support of its mission," said Brian Daly, a partner in the firm's labor and employment group. "Like the foundation, Mullen & Henzell is an institution with deep local roots.

"The firm looks forward to continuing to provide law school students and new attorneys with opportunities to work on sophisticated legal matters with highly experienced attorneys on the Central Coast."

For more about the Scholarship Foundation, visit www.sbscholarship.org. ■

Superior Court, County of Santa Barbara

NOTICE

March 12, 2024

REDUCTION OF COURT REPORTER SERVICES

Effective Monday, March 25, 2024, the Santa Barbara Superior Court will ***no*** longer provide court reporters for the following types of proceedings:

Civil – Evidentiary Hearings, Court Trials, and Jury Trials

Family Law – Evidentiary Hearings and Court Trials

Probate – Evidentiary Hearings and Court Trials

At their own expense, any party may arrange for a reporter to be present at a hearing listed above. A party that has been granted a fee waiver may make a written request for a court reporter, in advance, for a hearing listed above. (See Cal. Rules of Court, rule 2.956(c) for more information).

Santa Barbara County Bar Association Probate Section Presents:

THE HON. COLLEEN STERNE—(ROUND TWO!)
PRESENTATION BY PAUL GRAZIANO AND DAVID GRAFF, ALLEN & KIMBELL
MODIFICATION AND TERMINATION OF IRREVOCABLE TRUSTS
TWO HOURS OF MCLE CREDIT AVAILABLE

Date:
Friday, April 5, 2024

Time:
2:30 p.m. until 4:30 p.m.—Note earlier start time, so more material can be covered, and more questions answered!

Place:
Santa Barbara County Superior Court, Department Five

Speakers and Topic:
The Hon. Colleen Sterne will briefly discuss the court's role and process in evaluating petitions for modification and termination of irrevocable trusts (calendaring; review by probate examiner; referral to research attorney, etc.)

Back by popular demand! Paul Graziano and David Graff, of Allen & Kimbell, will continue their initial presentation on Friday, January 19, in order to cover more of this large topic, and answer questions which exceeded the time limits at the initial presentation. This (round two!) presentation will be for two hours, instead of just one. Both Mr. Graziano and Mr. Graff are Certified Specialists, and have considerable experience in evaluating the options for addressing the modification and termination of irrevocable trusts via court order on noticed petition. In addition to the general of issues of how and when irrevocable trusts may require modification or termination for estate and non-estate tax reasons, the other procedural issues that will be discussed will include: 1) who is required to receive notice, and when a guardian ad litem is required to be appointed or when the doctrine of virtual representation applies; 2) when settlor or beneficiary consent is required; 3) what constitutes "changed circumstances" or "uneconomically low principal"; 4) when restrictions on alienation or "spendthrifts clauses" must be considered; 5) when is the rule against perpetuities significant?

Lori A. Lewis, Chair of Probate Section, and Lawrence T. Sorensen, Mediator, will act as moderators.

Questions are welcome for submission and review prior to meeting; please submit to Lori A. Lewis at llewis@mullenlaw.com.

If MCLE credit is requested, an RSVP is required to afrasher@mullenlaw.com. Upon receipt of RSVP, MCLE payment instructions will be provided.

Attention All Judges and Past Presidents

SAVE THE DATE

Santa Barbara County Bar Association

Past Presidents Luncheon
May 16, 2024

Santa Barbara County Bar Association Diversity, Equity, and Inclusion Task Force Presents:

Fair Housing and Restrictive Covenant Modifications in Santa Barbara County

When:

April 11, 2024 from 12:10 P.M. – 1:20 P.M.
(Lunch served at 12:10, program will start at 12:20)

Where:

Santa Barbara College of Law, 20 E Victoria St, Santa Barbara, CA 93101

MCLE:

1 Hour General MCLE Credit

Speaker(s):

Melinda Greene, Chief Deputy Clerk Recorder, County of Santa Barbara and **Alex Entrekin**, Managing Attorney – Housing, Legal Aid Foundation of Santa Barbara County

Program Description:

April is Fair Housing Month! This presentation will review the history of fair housing laws, restrictive covenant modifications in Santa Barbara County in response to Assembly Bill 1466, and the current state of fair housing in California.

Price:

Members: $30 Non-Members: $40, includes lunch

Contact Information/RSVP:

Please RSVP to: Teresa Martinez at teresamaemartinez@gmail.com or Marietta Jablonka sblawdirector@gmail.com

Payment may be made via check made out to SBCBA and mailed to 15 W. Carrillo Street, Suite 106, Santa Barbara CA 93101; Venmo @SBCBA; or by credit card by calling (805) 569-5511

Classifieds

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Established law firm seeks an attorney committed to the highest standards of practice to join its Santa Barbara office. Civil or criminal litigation experience preferred; lateral transfers encouraged. Salary depending on experience; good benefits. Sanger Law Firm, P.C. — contact jswanson@sangerlawfirm.com or call 805-962-4887."

LITIGATION ASSOCIATE SOUGHT

Price, Postel & Parma, a long-standing law firm in Santa Barbara, is seeking a litigation associate with superior credentials, at least 2 years of significant litigation experience and a current license to practice in the State of California. Compensation is commensurate with skills, education and experience. A current license to practice in California is required. Salary range for qualified candidates is $115,000 to $200,000. Please submit a cover letter and resume detailing your experience to Craig Parton at cparton@ppplaw.com.

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a state-wide network of recovering lawyers and judges dedicated to assisting others within the profession who have problems with alcohol or substance abuse. We protect anonymity. To contact a local member go to http://www.otherbar.org and choose Santa Barbara in "Meetings" menu.

For more information on classified advertising rates, or to submit a classified ad, contact Marietta Jablonka, SBCBA Executive Director, at (805) 569-5511 or sblawdirector@gmail.com.

"Save the Date for These Fun SBCBA Events!"

May 16th - Past Presidents's Luncheon (Judges, Past Presidents of the SBCBA and New Admitees to the Bar)

June 21st - Summer BBQ

September 27th - Golf, Tennis and Pickleball Tournament

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Please contact Jeanette Hudgens
Cell 805.729.2603

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Diversity & Inclusion
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April

2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1 April Fool's Day	2	3	4	5 SBCBA **MCLE**: "Modification & Termination of Irrevocable Trusts" w/Hon. Colleen Sterne	6
7	8	9	10	11 SBCBA **MCLE**: "Fair Housing & Restrictive Covenant Modifications"	12	13
14	15 Tax Day	16	17	18	19 Goleta Knights of Columbus 5th Annual William McLafferty Memorial Golf Tournament	20
21	22 Earth Day	23	24	25	26 Arbor Day	27
28	29	30				

The Santa Barbara Bar Association is a State Bar of California MCLE approved provider. Please visit www.sblaw.org to view SBCBA event details. Pricing discounted for current SBCBA members.

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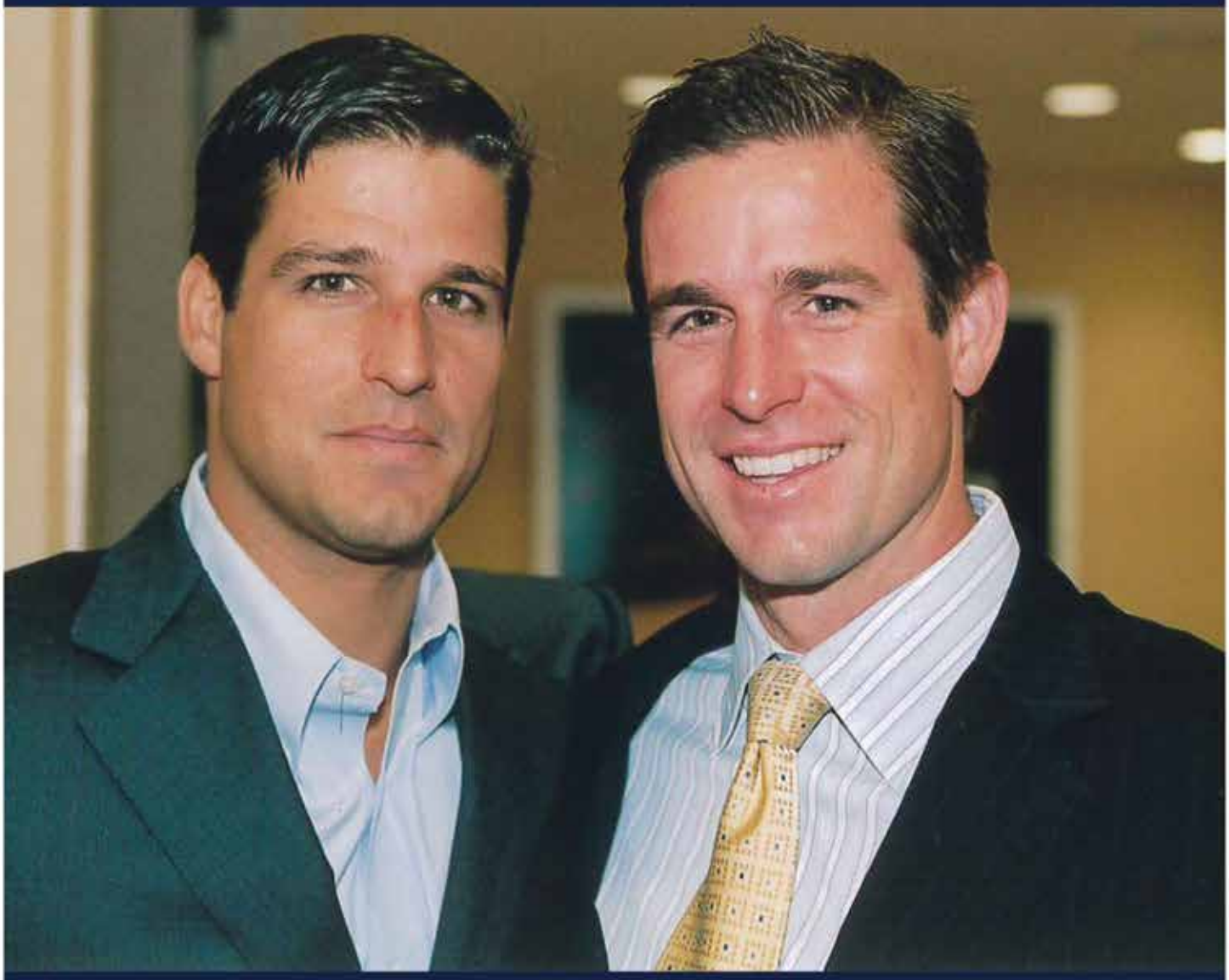

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