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Elizabeth Diaz, Family Law Facilitator

Inside: **Mediating During An Appeal: What You Need To Know About The Second District Program / The Alcoholic Beverage Control Appeals Board / Strategies for 'Lawyering Well' During Well-Being in Law Week / Majority Concurrences**

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Elizabeth Diaz, Santa Barbara Superior Court Family Law Facilitator. Photo by Marietta Jablonka

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Meet the New (Not Really So New Anymore) Family Law Facilitator:

Elizabeth Diaz

By Jennifer Duffy

Elizabeth Diaz has dedicated her legal career to helping others. After decades with the Legal Aid Foundation of Santa Barbara County, Elizabeth is now the Court's Family Law Facilitator, taking over that role after Deborah Mullin's lengthy tenure and rrecent retirement in March of this year.

The Family Law Facilitator position is held by a licensed attorney employed by the Court to provide information to self-represented litigants in their family law cases, in particular (but not always) cases involving child and spousal support in which the Department of Child Support Services is involved. The Family Law Facilitator's services are free to the community.

Elizabeth Diaz

Growing up as a daughter of immigrant parents, Elizabeth has always had to be a problem solver. Being her parents' first-born child and their only daughter, Elizabeth took on the role of the family's translator and personal assistant as soon as she was old enough to talk and form sentences. Elizabeth helped her parents with any issues that would arise, ranging from translating parent/teacher conferences to negotiating contracts. However, while growing up, she had no idea these skills would be laying the foundation for her career as a lawyer and would allow her to help others in so many ways.

In high school, Elizabeth knew that she wanted to help victims of domestic violence. But she didn't know where or how to do this work. While Elizabeth was a student at UCSB in the early 1990s, she saw an ad in the newspaper placed by the Legal Aid Foundation of Santa Barbara County, which was looking for a receptionist.

Elizabeth applied for the job. However, at that time, Legal Aid needed a full-time receptionist, and as a college student, Elizabeth could not work the hours needed for the position. Instead, Legal Aid offered her an internship with its Temporary Restraining Order ("TRO") Clinic, a "Pro Per" clinic through which she helped self-represented victims of domestic violence complete the restraining order paperwork for court. Elizabeth volunteered with the TRO Clinic once a week. The work was challenging, fulfilling, and often tragic. It also gave Elizabeth more exposure to helping others with legal needs, learning a program that provided both her "where" and "how" to help.

Jennifer Duffy

Eventually, Elizabeth was hired as a part-time receptionist with Legal Aid and became full-time a short time later. She also continued to volunteer for the TRO Clinic.

In 1994, Elizabeth left Legal Aid to work at the Superior Court as a criminal clerk. At that time, the courts were separated as the Superior Court and the Municipal Court. The Municipal Court is now known as the Figueroa Division.

While working at the Court, guided by her passion to help others, Elizabeth obtained her law degree from the (then-named) Santa Barbara College of Law. Then, in March of 1999, Elizabeth received a call from Ron Perry, the then-Executive Director of Legal Aid, who offered Elizabeth the TRO Clinic Coordinator position, overseeing the same clinic for which she had volunteered just a few years earlier. As the Coordinator of this Clinic, Elizabeth took pride in teaching and mentoring the young attorney and student volunteers. Many of the students whom she mentored are now attorneys practicing law throughout the country, with one of her former student volunteers now being the General Counsel for the Los Angeles Chargers.

As Legal Aid began to grow over the next few years, Elizabeth made it her mission to expand services to further help victims of abuse. To that end, the TRO Clinic, which

began as a self-represented legal clinic helping victims of domestic violence and elder abuse with their restraining order paperwork, expanded to offer legal representation to those victims with restraining orders, as well as with limited family law cases.

In 2012, Elizabeth was promoted to be the Managing Attorney of Legal Aid's Family Violence Program. The following year, with a grant from The Women's Fund of Santa Barbara, Legal Aid was able to add a second domestic violence attorney in Santa Barbara to this Program, and Legal Aid's services were expanded again to include immigration remedies for victims of crimes, such as obtaining U-visas and T-visas.

As Legal Aid's services continued to expand, the nonprofit organization adopted a holistic approach to how it offered legal assistance to victims. Not only did the domestic violence attorneys help with restraining orders, they also helped clients with divorce and parentage (unmarried parent) cases to help them cut ties with their batterers and focus on self-sufficiency. Legal representation was also expanded to include victims of both sexual assault and human trafficking.

When Elizabeth saw an unmet need for Legal Aid clients she served, she lobbied the organization to offer these services, and Legal Aid would then seek funding to offer those services to victims of abuse. Having a domestic violence attorney in North County was also important to Elizabeth so that North County victims of abuse could also have legal representation. Eventually, Legal Aid was able to add a North County domestic violence attorney to assist local residents.

Elizabeth loved her job and role at Legal Aid. It truly was a dream job for her. She enjoyed helping and educating people about the law and the legal process. She empowered countless victims of abuse and saw their transformation firsthand, from their first appointment when they were scared and vulnerable, to their last appointment when they were no longer victims but survivors, strong and inspiring.

While there were many weekends while preparing for trial when she questioned her decision to become a lawyer with the stress and all the work that came along with it, Elizabeth would always end up realizing she was lucky to have the knowledge and ability to help vulnerable people who were not able to afford an attorney.

Elizabeth received the Santa Barbara Women Lawyers' Attorney of the Year award in 2017 for her work at Legal Aid and mentorship. She was also the Santa Barbara County Bar Association's ("SBCBA's") first Hispanic Bar President, and eleventh female president in 2020 and 2021. It was through the SBCBA that I really got to know Elizabeth and see firsthand how committed she is to helping others.

While SBCBA's President, Elizabeth created the Diversity, Equity and Inclusion Task Force. The Task Force published a DEI Survey, has hosted and participated in many legal career panels for college students, and hosted social and educational events. The Task Force has also recently established a DEI scholarship to help college and law students offset expenses to take the LSAT and the bar exam. Elizabeth has stated, "I have truly been blessed to be part of this legal community and I am proud of all the relationships I have developed with attorneys, judicial bench officers, and legal professionals. I appreciate their support of me and my career. It keeps me motivated to continue to do my best and continue to help people."

It was in 1999 that Elizabeth first met Deborah Mullin, who was then the Family Law Facilitator. At that time, Elizabeth was the TRO Clinic Coordinator at Legal Aid. Deborah was someone Elizabeth could turn to for help as both a great resource and a friend. Deborah's almost 27-year career as the Family Law Facilitator began in October of 1997, and in that role, she focused on family law matters: divorce, custody/visitation, child support, spousal support, division of property, and parentage. She also mediated child support, spousal support and simple divorce property issues. She then announced her retirement, to be effective March of 2024.

When Elizabeth learned that the Family Law Facilitator position was opening, she was not looking for a new job and had no plan to leave Legal Aid. But she was also interested in the role. So, when the position became formally available, (a position that is clearly not open often,) she applied for it. On April 2, 2024, Elizabeth started as the new Family Law Facilitator for South Santa Barbara County.

Leaving Legal Aid was bittersweet for Elizabeth. Yet, as much as she loved that organization, its work and impact, and her co-workers, she was excited to start a new chapter in her career.

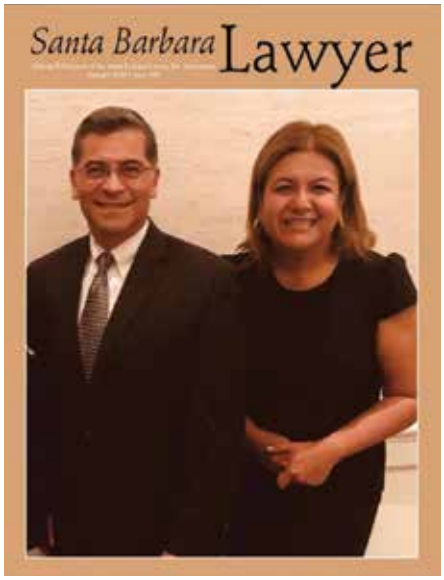
Family Code Sections 10000 – 10015 set forth the role

of the Family Law Facilitator. The facilitator's duties include: providing information to self-represented parties concerning dissolution of marriages (divorce); the process of establishing parentage; and establishing, modifying, and/or enforcing child support and spousal support. The Family Law Facilitator can also mediate issues of child support, spousal support, and property division between family law parties, and also presents workshops and conducts community outreach. The Family Law Facilitator does not represent any party, and no attorney-client relationship is created between a party and the Facilitator. The Facilitator's services are free.

When asked how the new (not really so new anymore) job is going, Elizabeth stated, "I love it. I was not sure in the beginning. I was kind of just going through the motions the first few days, but I quickly realized that this position gives me the same feeling as Legal Aid did. I feel good when I know that I have helped someone. When I have given the litigant information that helps them to proceed with their case, and I hear a sigh of relief as they understand the process, it feels good. I love walking into the historic Courthouse. As I walk the hallways, I am motivated for the day, and realize how lucky I am."

The Family Law Facilitator's Office in Santa Barbara is located within the main courthouse, at 1100 Anacapa Street, 2nd Floor (in the Self-Help Center); (805) 882-4660; SBFLF@sbcourts.org. At the time of publication, walk-in hours with support staff are Monday through Friday, 9:00 am to noon, and 1:30 - 3:00 p.m. Further information about the Facilitator can be found at www.santabarbara.courts.ca.gov/divisions/family-law/family-law-facilitator.

Jennifer Duffy is an attorney with Rimôn Law, having practiced family law, employment law, and related civil litigation for 25 years. She is a Certified Family Law Specialist, certified by the State Bar of California Board of Legal Specialization, and, like Elizabeth Diaz, is a past president of the Santa Barbara County Bar Association. Jenn is happy to highlight Elizabeth in this article, showing what a benefit Elizabeth has been and continues to be to our community. Thank you, Elizabeth. You make a tremendous difference, one person at a time.



Photos: Top: Elizabeth Diaz and Deborah Mullin at a recent AB 1058 Conference. Middle: Legal Aid co-workers: Jennifer Smith, Executive Director; Elizabeth Diaz; Luer Yin, Former North County DV Atty; and Trish Geyer, Financial Director. Below right: Camille Agnello and Elizabeth Diaz at Legal Aid; both worked in the FVP&I program. Below left: Cover of Santa Barbara Lawyer *with Xavier Becerra when Elizabeth became County Bar President in 2020.*

Mediating During An Appeal: What You Need To Know About The Second District Program

By John Derrick

John Derrick

Most Santa Barbara lawyers are quite familiar with the ADR programs administered by our Superior Court. Less is often known, however, about the Court of Appeal's mediation program in our part of the state.

As most readers will know, Santa Barbara County falls under the jurisdiction of the Second District California Court of Appeal. This also includes Los Angeles, Ventura, and San Luis Obispo Counties. The Second District houses seven of its eight Divisions in Downtown Los Angeles. However, cases originating from Santa Barbara, Ventura and San Luis Obispo Counties are generally handled by Division Six in Ventura. Division Six sometimes also handles "overflow" cases from LA County.

Most Second District Appeals Qualify for Low- or No-cost Mediation

Whichever Division a case is assigned to—or even before an assignment is made—parties can request to take part in the Court's appellate mediation program, which provides a no- or low-cost means of exploring settlement. Unlike some Districts in other parts of the state, the Second District does not screen cases to determine which might benefit from appellate mediation. Rather, it is up to the parties to ask for it.

The program is only available for civil matters in which all parties are represented by counsel. Other than that, no case is turned away if all parties agree to take part.

The program does not cover cases that are likely headed to the Court of Appeal, but not quite there. You need to have an active appeal to qualify. If you find yourself in need of a mediation in that twilight zone when trial court proceedings are wrapping up—perhaps with post-trial motions or a statement of decision—before a case becomes ripe for appeal, you will need to arrange it privately.

History and numbers

The Second Appellate District first launched its voluntary settlement/mediation program in 1995, led by Justices Fred Woods and Richard D. Aldrich. Justice Earl Johnson subsequently introduced the use of volunteer attorneys with appellate experience or mediation training, replacing the Justices who had previously served as hearing officers. In 2002, the program expanded to include trained non-attorney mediators as well and became known as the Mediation Program.

In 2023, the Second District received 6,761 appeals, of which 2,343 were civil. In that year, it conducted 28 mediations through the program. The largest number of mediations in recent years was in 2018, when there were 36. So the numbers are relatively low.

But the numbers appear to have been higher in the past. The Court website states that "[s]ince the inception of the mediation program, over 4,000 cases have been mediated." This suggests there were years with well over 100 mediations. It is not clear why the numbers have gone down. One possibility is that more appellate litigants are choosing to mediate outside the program. Another is that fewer appellate mediations are taking place overall.

Reasons to Mediate on Appeal

Trends aside, one reason why the number of appellate mediations statewide has always been relatively low is that many lawyers feel that by the time a judgment is entered and a case goes up on appeal, the time for mediation is past and any settlement efforts would be futile.

In some cases, that assessment may be realistic. The balance of power fundamentally changes after judgment is entered. Some losing parties do not fully grasp this. Conversely, though, some prevailing parties might not appreciate that obtaining a favorable judgment is one thing, but enjoying its benefits—or being certain it will stick—is another.

In some appeals, there is real uncertainty about whether the appellate court will reverse. The California Court of Appeal does so in almost one in five civil cases. Reversal rates can be higher in cases lost on the pleadings or summary judgment where a party was prevented from taking

the case to trial. So settlement can be part of risk management.

But even if a prevailing party feels confident of an affirmance in full, settlement can still have advantages. It can save attorney fees. And an appeal usually lasts more than a year, sometimes two years or more. In many cases, the judgment is unenforceable while the appeal continues. So a mediated resolution can achieve a speedier remedy or payment.

In some cases, especially where there is a monetary judgment, the losing party in the trial court may simply not be able to meet the terms of a judgment. Rather than force a party into bankruptcy, or spend money on litigating enforcement, a negotiated implementation of a judgment can be worth exploring.

In other cases, the parties are going to have a continuing relationship due to common interests or would like to have one. And so ending the litigation with an agreement can create a better basis for moving on.

Additionally, a sometimes-overlooked consequence of litigating an appeal all the way to the end is that a party may end up with a published decision setting a precedent that could have an unfavorable impact in another case or to the conduct of business outside of litigation. A negotiated end to an appeal avoids the risk of creating potentially harmful law.

The Purists' Point of View

Some purists question whether appellate courts should be in the business of trying to settle cases. They argue the mission of appellate courts is to weave the tapestry of the common law and "getting rid" of cases through settlement programs detracts from that role.

But the purists are in a minority. Most appellate lawyers and Justices agree there is great value to settlement at all stages of the litigation timeline. Successful appellate mediations can reduce pressure on crowded dockets and, thereby, help to deliver speedier appellate justice in those cases that do not settle. There will still be plenty of raw material to feed the common law.

Maximizing the Opportunities

In some ways, the fact there is a judgment in place makes appellate mediation tougher than the ordinary variety. But with a skilled appellate mediator, that can be turned around as

a force in favor of settlement. For a start, there is generally less uncertainty with a judgment than there was before without one.

And in pre-judgment mediations, parties are often tight with information and reluctant to share ideas. This is because—if the case does not settle—they will be back litigating the case in the trenches of the trial court, and perhaps conducting discovery, immediately after. In many ordinary mediations, the parties barely interact.

But appeals are different. There is no new evidence in an appeal. At this stage in the case, the parties' core arguments have been fully laid out. Yes, they may be refined or filtered for an appeal. But, given the scope and limits of appellate review, there is less opportunity for surprise. And so there is less reason to be guarded in communication with the opposing side.

Rationally, this should allow for a more open conversation to identify issues and solutions. And to explore whether there may be some resolution that is better for both sides than allowing the appeal to run its course. But it can take some subtle diplomacy to allow that rational conversation to occur. In short, appellate mediation can be an opportunity to move beyond "I'll see you in court!" types of posturing and to have a conversation about options.

What You Get Under the Second District Program

The Second District maintains a panel of volunteer mediators. I have been on the panel since 2008. These days, I am in full-time ADR practice. But for most of my time on the panel, I was practicing as an appellate specialist. So I have experienced the program both as a lawyer-advocate as well as as a mediator. And—having known it from both sides—I highly recommend it.

When a mediator is assigned to a case, he or she agrees to commit 4.5 hours pro bono. Of these, three hours are generally for mediation time on the day, with the remainder being for preparation. My policy as a panel mediator is to extend the pro bono time if the preparation goes over an hour and a half, which it usually does, so I guarantee three hours of "free" time on the day.

Once the mediation is past the pro bono hours, the mediator can start charging his or her normal rate, providing the parties agree in writing. For example, I recently conducted a successful mediation under the program where I prepared for about two and a half hours, including pre-mediation calls with the lawyers, mediated for a bit over six hours on the day, and billed the parties for a total of three hours (split between the two sides).

If a panel mediator's policy is—unlike mine—to have preparation time over 1.5 hours eat into the three hours on the day, the program rules require them to discuss this with counsel during the pre-mediation conferences and confirm the resolution reached in writing.

Venue

These days, many mediations under the program take place via Zoom. This can be very effective. Zoom mediation grew during the pandemic out of necessity, but is now here to stay.

Whereas some mediators have now gone to all-Zoom, others offer both. Even when I lean toward Zoom, I generally ask the parties whether they would prefer in-person. The Second District has a set of conference rooms at its Downtown Los Angeles location at 300 South Spring Street, which are available for in-person mediations under the program at no charge. It is an excellent facility, which compares well with what you would usually find at a private mediation. It became available again late in 2023 after an extended closure during the pandemic. A benefit of the location is that parties who somehow want their "day in court" may find a mediation at the Court of Appeal satisfies that need more than one over Zoom or at another physical location.

However, a Los Angeles venue may not be ideal for cases being litigated in Santa Barbara. And there is no equivalent facility at the Division Six courthouse in Ventura. So mediators and parties wanting a local venue for an in-person mediation under the program need to make their own space arrangements.

How to Arrange a Second District Mediation

When a party files a notice of appeal in a Superior Court in the Second District, they should receive a Request for Mediation form shortly after. If—and only if—all parties consent to mediation, one party should email it to the Second District's Mediation Program Coordinator. If you don't have the form, you can find it on the Court's website. (Go to the "Court Programs" menu and then select "Mediation Program." You'll also see the email address of the Coordinator.)

Unlike with some court ADR programs, a list of panel mediators is not published on the Court's website. So although there is nothing to stop the parties from requesting a particular panel member if they know of one, what generally happens is that the Program Coordinator selects one who seems suitable and is available.

The Coordinator works with the parties and the mediator to agree a date that works and venue. And the Court then

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issues an order sending the case to mediation on that date.

Whereas participation in the program is voluntary at the outset, the Court makes clear that compliance—including the attendance of all necessary persons—becomes mandatory once the order issues. Parties may be sanctioned if they then do not have all necessary persons show up and take part in good faith. However, I am not aware of a case where a party actually was sanctioned.

"Mediation" or "Settlement Conference?"

While attendance and procedural compliance is "mandatory" following the issuance of the order, I would not call this a "mandatory settlement conference." I think it is still a "mediation." The difference can be a gray one, as I hope to explore in another article. But, briefly, it matters, because "settlement conferences" have less robust confidentiality than "mediations."

The Second District refers to its program as "mediation." But the classification is a bit unclear, as the Court also uses the term "settlement conference" on docket entries and there are some aspects—the use of Court facilities, for example—resembling the hallmarks of settlement conferences. Nonetheless, the program's standard confidentiality agreement adopts mediation rules. So, even though labels don't control, I believe it is a mediation, not a settlement conference.

Timing

The average appeal takes around 14 months from the filing of the notice of appeal to the issuance of an opinion. Parties are encouraged to request mediation at the outset, but you can do so later on. There is no formal cut-off date. Generally, however, it makes sense to mediate fairly early in the appellate process. The more the parties spend on litigating an appeal, the less they may be inclined to settle.

Sometimes, however, the issues become clearer once the briefing has begun. I recall taking part in one oral argument at the Fourth District Court of Appeal in Santa Ana when the Acting Presiding Justice—openly not wanting to decide a difficult case—urged the parties to try to mediate the outcome before his panel had to render an opinion. There followed a mediation in the appellate courthouse a week later conducted by one of the court's senior research attorneys. Unfortunately, that case did not settle.

The setting of a mediation date does not automatically pause either the preparation of the record or—if the record has already been filed—the briefing schedule. However, a pending mediation will doubtless be a relevant factor to bring up if filing an application for an extension of time to file a brief.

Pre-judgment Appellate Mediation

Usually, appeals follow a final judgment in the trial court. However, in limited circumstances, they can occur much earlier. For example, decisions under California's anti-SLAPP statute can mean a case goes up on appeal when it is just getting off the ground. Another example is appeals from orders denying petitions to compel arbitration.

An early, pre-judgment appeal usually places a lawsuit on hold and can provide an opportunity for exploring settlement. So although appellate mediation normally comes after a final judgment, it can take place much sooner.

Keep the Court in the Loop

If the parties are exploring settlement after briefing is complete, they should inform the Court regardless of whether they are in the mediation program. The Court of Appeal does not appreciate investing resources in deciding a case when the parties are actively trying to settle. With all settlements, consult Rule 8.244 of the California rules of court, which sets out the procedures on appeal with "settlement, abandonment, voluntary dismissal, and compromise."

Conclusion

The Second District mediation program is a great resource. It is very efficiently administered. Lawyers embarking into the appellate phase of a case under its jurisdiction should give careful consideration to taking advantage of it. Just remember the parties need to make the first move. You will never get a mediation order from the Court without a request. ■

John Derrick is a full-time Santa Barbara-based mediator and arbitrator who is on the panel of neutrals of Alternative Resolution Centers (ARC), one of California's longest-established ADR providers. He has been on the Second District Court of Appeal mediation panel since 2008. He is also a former Chair of the State Bar's Committee on Appellate Courts. He is a Settlement Master for the Santa Barbara Superior Court, and a CADRe/CMADRESS panelist, and he serves on the mediation panel of the U.S. District Court for the Central District. He is co-chair of the ADR Section of the Santa Barbara County Bar Association and a former editor-in-chief of California Litigation. www.johnderrickADR.com

The Alcoholic Beverage Control Appeals Board: Where ABC Licensees Plead their Case

By Taryn Kinney

The California Alcoholic Beverage Control Appeals Board may be a lesser-known state entity to some, but it has real significance for alcoholic beverage licensees who may at some point face disciplinary action from the California Department of Alcoholic Beverage Control (ABC).

The Board is an entirely separate state entity from ABC. The three-member Board provides quasi-judicial administrative review of ABC decisions regarding issuing alcoholic beverage licenses, license conditions, protests against a license, and violations of law by a licensee. Common appeals heard by the Board involve licensees selling alcohol to minors, drug sales or illegal gambling by a licensee, and protests against the issuance of licenses involving noise ordinances or other community concerns.

Taryn Kinney

If a licensee receives a final decision from ABC, they may have a right to appeal with the Alcoholic Beverage Control Appeals Board. The questions that may be considered by the Appeals Board are limited by the California Constitution and by statute.

The Board hears appeals at monthly hearings, and it decides matters based upon a review of the administrative record, legal briefs, and oral argument presented by the parties. The Board issues written decisions with orders affirming, reversing, and/or remanding ABC decisions. Judicial review of the Board's order may be obtained by filing a petition for writ of review with the California Supreme Court or the Court of Appeal.

Appellants range from billion-dollar corporations to mom-and-pop shops. The same ABC laws apply to all, and all licensees have the same right to an independent review by the Board.

The timeline to file an appeal with the Board is quick – 40 days from ABC's decision (unless the decision is effective immediately, then an appeal must be filed 10 days following ABC's decision). Licensees choosing to file an appeal may represent themselves or be represented by an attorney.

The Board provides all Californians who appeal with an efficient, timely, and approachable appeals process with fair and transparent legal review. The Alcoholic Beverage Control Appeals Board's decisions have broad impacts on business owners, public safety, and across California.

For more information on filing an appeal, guides, forms, pertinent laws, videos, and informational materials translated into several languages, please see the ABC Appeals Board's website, abcab.ca.gov. ■

Taryn Kinney has been Executive Officer of the Alcoholic Beverage Control Appeals Board since July 2019.

Disclaimer: Information contained in this article is not legal advice and should not be relied upon as legal advice. Before making any personal or business decisions, please consult with a private attorney.

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Strategies for 'Lawyering Well' During Well-Being in Law Week

By Robin Oaks

Robin Oaks

You're invited to attend a week-long event of speakers in late October who will share evidence-based strategies and topics about lawyering well. Each day at noon (12:00 – 1:15 pm) by Zoom, starting on Monday, October 28, 2024, and each day through Friday, November 1, 2024, a line-up of nationally recognized professionals will present on a wide range of fostering well-being topics for legal professionals. MCLE credits will be provided, including wellness competence, elimination of bias, and ethics. Also, plans are being made to have a drawing that will include at least a dozen wellness/well-being books, gift certificates, and products for lucky attendees.

As the SBCBA Well-Being Director and Chair of the Well-Being section, throughout this past year I've met professionals who are enthusiastic advocates for fostering well-being in the legal profession. I've also met skeptics (even some cynics) who are on the fence about whether well-being in law matters at all. Is lawyer well-being an oxymoron? I'm convinced that attending the well-being in law week event will broaden your perspective about why well-being and wellness practices do indeed help us live and work better – and support lawyering well.

As lawyers, we are trained to be skeptical, to question everything and believe almost nothing, focusing mainly on how to problem solve and defend, analyze all positions, and make predictions to assess risk and prevent future harm. Legal "thinking" creates mindsets that we bring not only to our lawyering, but also to how we live life. The questions we ask repeatedly as part of our trade often create neural pathways that keep us focused on what has or could go wrong – instead of on how to thrive. Understanding the research and practices that support well-being may help us see beyond the half empty cup, allowing us to have a much needed, refreshing sip from the glass half full. One mindset focuses on problems, the other on possibilities.

Legal "success" is not just the opposite of failing to make a living or not being profitable. Lawyering *well* means a lot more than you might have considered. "Well" means more than the absence of illness. It's defined as being healthy, fighting fit, vigorous, in tip-top condition, and robustly alive. It also means being skillful, competent, effective, wise, successful, accomplished, and fully living. I've chosen the speakers and their topics for the well-being in law event because they provide a well-spring of resources that can support, benefit, and energize your life as a lawyer.

The California Bar understands that in order to support lawyer competence more than strategies for prevention are needed. Lawyers are required to have MCLE *competence* education that covers preventing and detecting mental and physical problems, but now they have the option to learn about thriving, stress management, and optimal performance (i.e., wellness and well-being).[1]

So, consider giving yourself an hour each day for a week in late October to step away from thinking about what can go or is wrong, and explore instead some strategies for optimizing lawyering well. How exactly might the specific topics presented during the well-being in law event benefit your legal practice? Let me spark your interest by highlighting what the five speakers will cover.

TOPIC: Psychological Well-being for Legal Professionals: What is it and how do we find it?

Speaker: Dr. Nicole Alea Albada, Ph.D., Professor/Researcher UCSB Psychological and Brain Sciences Department, Director for Education and Outreach of UCSB's Center for Aging and Longevity Studies, Director of the Thinking About Life Experiences (TALE) Lab.

Dr. Albada will discuss different ways of conceptualizing what fostering well-being is all about. She will discuss changes in the patterns of these two types of well-being that are typically seen across adulthood and our careers. Hedonic well-being is about feeling good in the moment, and eudaimonic well-being is about striving to experience a sense of living a life of engagement, healthy relationships, meaning, and excellence. Dr. Albada will highlight the various ways that psychologists measure well-being, ranging from popular self-report measures to analysis of people's memories for their lived experiences. The audience will be

asked to consider their well-being pathways across their legal career timelines, and how thoughts and mindsets affect fostering and experiencing well-being.

Dr. Alba is the Director for Education and Outreach of UCSB's new Center for Aging and Longevity Studies, which "brings together researchers, scholars, and educators from multiple disciplines in an effort to improve the human experience by augmenting health span, ameliorating age-related diseases, advancing the vitality of an aging population, and investigating the societal impact of extended longevity." The TALE lab (Thinking About Life Experiences lab in Psychological and Brain Sciences, which Dr. Alba heads) uses a "multi-method approach to ask questions about human experiences. Understanding the many facets of what contributes to well-being from a scientific perspective helps us optimize our functioning, longevity, and sustainability as human beings and legal professionals.

TOPIC: Unlearning Silence to Unleash Our Talents and Support Legal (and Life) Success

Speaker: Elaine Lin Hering, J.D., facilitator, speaker, and author of *Unlearning Silence, How to Speak Your Mind, Unleash Talent, and Live More Fully* (2024).

Having a seat at the table in legal environments doesn't mean that voices will be heard or that it's easy to speak up. This presentation will explore the many meanings of silence in the workplace and how *unlearning silence* in our lives promotes successful legal practitioners, contributes to legal work environments of belonging and inclusion, and supports engagement and life satisfaction. Ms. Hering will help us understand how we silence ourselves, we silence others, and we are silenced in workplaces and in ways that negatively impact us. Most importantly, she will provide guidance regarding what to do about it.

Elaine Lin Hering, a lawyer, has worked across six continents with organizations and individuals to build skills in communication, collaboration, and conflict management. She has facilitated executive education at Harvard, Dartmouth, Tufts, UC Berkeley, and UCLA, and is the former Advanced Training Director for the Harvard Mediation Program and a Lecturer on Law at Harvard Law School. She coaches women and minorities navigating executive leadership in majority white spaces, and has spoken at conferences ranging from the Auschwitz Institute on Peace and Reconciliation to the Global Leadership Summit.

Do you feel you can speak up about what matters and for what you or others need? What can we do to promote finding our voice, aligning with our truth in how we do our legal work, and learning how to listen to become more effective legal communicators? Ms. Hering's thought-provoking and engaging talk will explore bringing more authenticity, engagement, peace, and leadership into our legal life and work environments.

TOPIC: How Mindfulness and Emotional Intelligence Impact Judicial Decision-making and Ethics, and Buffer Law Practice Stressors

Speaker: Judge Jeremy Fogel, Director of Berkeley Judicial Institute, Berkeley Law School.

Apart from health and wellness benefits — mindfulness practices allow one to remain present and engaged when dealing with routine legal tasks, help to recognize and mitigate unconscious assumptions, and manage and regulate one's emotions in stressful situations. Judge Jeremy Fogel will explore how "a judge's decisions frequently are made in and affected by an atmosphere infused with emotions and passions that can confound the detached rationality with which decisions—at least in theory—are supposed to be made." This presentation will share practices about mindfulness and emotional intelligence skills, and highlight their importance for lawyers and judicial decision-making. Slowing down mental processes to notice what one is thinking and feeling, and then responding and engaging with emotional intelligence—and compassion, positively promote ethical and civil conduct, buffer work stressors, and optimize legal outcomes.

In 2018, Judge Jeremy Fogel, previously a District Court Judge, became the first Executive Director of the Berkeley Judicial Institute, at Berkeley Law School. The Institute's mission is to build bridges between judges and academics and to promote an ethical, resilient and independent judiciary. Judge Fogel has served as a faculty member for the Federal Judicial Center since 2002 and has been a lecturer at Stanford Law School for many years. Among his major areas of interest that his presentation will cover are judicial ethics, judicial decision making (including effective ways to teach judges mindfulness and about unconscious bias and the impact of emotions) and judicial and legal professionals' wellness.

TOPIC: Successfully Overcoming Procrastination and Writer's Block

SPEAKER: Meehan Rasch, J.D. and David Rasch, PhD, psychologist and author of *The Blocked Writers Book of the Dead: Bring Your Writing Back to Life!* (2010)

Law is a particularly writing-heavy profession. However, lawyers, law students, and law professors often struggle with initiating, sustaining, and completing legal writing projects. Even the most competent legal professionals experience periods in which the written word just does not flow

freely. Dr. David Rasch and his daughter, attorney Mehan Rasch, provide guidance for legal writers who are seeking to understand and resolve writing blocks, procrastination, and other common writing productivity problems. Dr. Rasch and Ms. Rasch will explore in their presentation the complexities of the legal writing process, common writing productivity issues, and practical tools for improving legal writing productivity. Whatever kind of legal writer you are, this presentation will cover common writing challenges and help identify how best to make lasting changes.

Dr. Rasch is a psychologist with over thirty years of experience assisting writers with productivity issues, and has worked as a therapist, workshop leader, writing consultant, Director at Stanford University's Faculty Staff Counseling Center. He currently works as Ombuds at Stanford and UC Santa Barbara. He has published several articles, including, one with his daughter, attorney Meehan Rasch, that focuses exclusively on legal professionals and procrastination: Overcoming Writer's Block and Procrastination for Attorneys, Law Students, and Law Professors (published in New Mexico Law Review). Meehan Rasch has worked as an appellate attorney, was a 2011-12 Wydick Fellow at University of California Davis School of Law (King Hall), and has taught law students as an adjunct instructor of legal writing and advocacy at University of Southern California Gould School of Law.

TOPIC: A Cardiologist's Holistic and Evidence-based Guidance for Managing Stress and Lawyering and Living "Whole-Heartedly"

SPEAKER: Dr. Jonathan Fisher, M.D., FACC, author of Just One Heart, A Cardiologist's Guide to Healing, Health, and Happiness (2024)

Dr. Jonathan Fisher, a practicing cardiologist, will present about the connection between mind-body and *heart* for stress management—and what factors truly contribute to wellness, a successful and rewarding professional practice—and a happy life. He will address the similarities of stressors doctors and lawyers face and how this can take a toll on one's thriving as a professional. Dr. Fisher will share his personal and professional story about "trying to hide anxiety, depression, and burnout from others: burnishing the image of a 'perfect' student and a 'perfect' doctor." His paradigm shifting insights reveal the importance of learning what he describes as the "seven timeless traits of the heart." Based on his personal quest to discover the roots of healing and happiness, Dr. Fisher's talk provides a compelling argument to make positive psychology practices and strategic well-being interventions a cornerstone of one's professional life and to promote wholehearted living for holistic health and vitality,

Dr. Fisher's presentation will bring to a close the well-being in law week-long event (the last day is Friday, November 1, 2024, Noon-1:15). November 1st happens to appropriately be "National Love a Lawyer Day." So, consider attending this week-long event with a mindset of curiosity and with an intention of caring for lawyers, for your clients, legal colleagues, judges, legal professionals and staff—and for yourself. Participate through Zoom and hear speakers share from a (w)holistic, multi-dimensional perspective how well-being strategies can benefit your legal practice, your life, and our legal profession and community. ■

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

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WELL-BEING IN LAW WEEK
MONDAY OCT 28 – FRIDAY NOV 1, 2024

SAVE THE DATES for five days of Well-Being Speakers Co-hosted by Robin Oaks, SBCBA Director of Well-Being, Attorney, Well-Being Coach/Trainer/Consultant

Five days of nationally recognized speakers presenting about well-being in law each day at noon by Zoom. Earn MCLE Credits (5 hrs. total.) Wellness Competence, Ethics and Elimination of Bias.

Members: $120 for week-long package, or $30 per session; Non-Members $140/$35. Students/Legal Staff discounted rate $90 week-long package. Visit https://sblaw.org/well-being-in-law-week/ to register.

Day One – Unlearning Silence to Unleash Our Talents and Support Legal (and Life) Success
Elaine Lin Hering, JD

Day Two – Psychological Well-Being for Legal Professionals: What is it and how do we find it?
Nicole Alea Albada, PhD

Day Three – How Mindfulness and Emotional Intelligence Impact Judicial Decision-Making and Ethics, and Buffer Law Practice Stressors
Judge Jeremy Fogel

Day Four – Successfully Overcoming Procrastination and Writer's Block
David Rasch, PhD
Meehan Rasch, PhD

Day Five – A Cardiologist's Holistic and Evidence-based Guidance for Managing Stress and Lawyering and Living "Wholeheartedly"
Jonathan Fisher, MD

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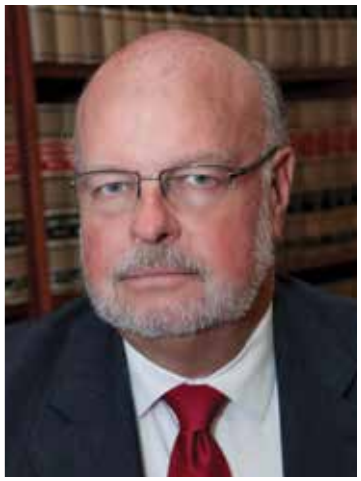
Majority Concurrences

By Robert M. Sanger[1] and Sarah S. Sanger[2]

Sarah S. Sanger



Robert M. Sanger

Introduction

This *Criminal Justice* column arises from the discovery of a "majority concurrence" which appears to be an anomaly in California case law. The case was involved in a brief recently filed by one of the authors in the Court of Appeal for the Second Appellate District.[3] The "majority concurrence" was of note but not outcome determinative to the briefing of that case. However, the unusual nature of a "majority concurrence" gave rise to a discussion between the two of us which generated further research on the broader issue of the legal significance of such an opinion. So, we share it here for further discussion.

The Opinions of People v. Flores

The anomaly—a "majority concurrence"—is found in the case of *People v. Flores* (2024) 15 Cal.5th 1032 (*Flores*), which was decided May 2, 2024. In *Flores*, the Supreme Court of California issued a unanimous opinion authored by Justice Corrigan accompanied by a concurring opinion authored by Justice Evans and signed by five of the seven Justices. This is quite a rare occurrence in any modern multiple judge court and certainly in California's Supreme Court. The full legal significance of such a concurrence by a majority seems to be unresolved.

The opinions in *Flores* are particularly striking in that the opinion of Justice Corrigan and the opinion of Justice Evans are not inconsistent. The holding of the case turns on the finding that police officers lacked reasonable suspicion for an investigative stop of the defendant based on the totality of the circumstances. All of the justices agreed with Justice Corrigan that the totality of the circumstances did not support reasonable suspicion and, in the "majority concurrence," the five Justices simply expanded the factual and social basis for the holding.

The facts involved officers coming upon Mr. Flores in a "known narcotic[s] area" and "gang hangout." Mr. Flores was standing alone next to a vehicle in a cul-de-sac. Mr. Flores moved behind the car and ducked down, eventually appearing to be tying his shoe. He was ordered to stand and was handcuffed based on suspicion that he was "loitering for the use or sales of narcotics." From here his backpack and car were searched leading to the location of a revolver and some drugs. Although Health and Safety Code section 11532 makes it a crime to "loiter in any public place in a manner and under circumstances manifesting the purpose and with the intent to commit" the Court, in Justice Corrigan's lead opinion, found that the statute "cannot supplant the standard of reasonable suspicion mandated by the Fourth Amendment."

Justice Evans, in her "majority concurrence," agreed with the opinion of Justice Corrigan which she and all of the other Justices had signed. Justice Evans, with the concurrence of four others, said, "I write separately to explain why one's attempts to avoid engaging with the police— in whatever lawful manner—must be viewed with care and caution when evaluating the legality of a detention." The concurrence emphasizes that, while Justice Corrigan's opinion recognizes that racial disparities in policing may have an impact on the totality of the circumstances analysis, Justice Evans and her colleagues find substantial evidence in the literature to allow developing "arguments about how racial disparity in policing might inform one's decision to avoid contact with the police." In other words, the "majority concurrence" finds that racial disparity in policing can form the basis for determining the objective reasonableness of the responses of "many Californians" when confronted by police.

Justice Evans' view is expressed as the view of a majority of the Court. Justice Corrigan, in the unanimous opinion, does not go as far in acknowledging racial disparity but does not preclude it. To the extent that Justice Corrigan did not want to go that far, her opinion could have been a concurrence offered in response to the more expansive (what

would then be) opinion of the Court. The court would still be unanimous in the result and, what became a "majority concurrence" would have clearly had the force of law.

One explanation for the way the *Flores* opinions finally played out may be that this case was an opportunity for the Court to voice a strong unanimous opinion recognizing the potential injustices associated with coercive police interaction with people in the community. Justice Corrigan is the senior member of the Court and one respected for a conservative judicial philosophy. The opinion, drafted by Justice Corrigan and joined by a unanimous Court, does certainly have gravitas.

One could speculate that Justice Evans and her colleagues felt that they could add the additional social research and more direct language relating to racial disparity in policing in a concurrence without taking away from the unanimity of Justice Corrigan's important opinion. That might account for this unusual configuration of the opinions but it does not answer the question of whether the "majority concurrence" has the force of law. We respectfully believe that it does.

Opinions, Concurrences, Dissents and Voting Paradoxes

Under the informal rules followed in the United States Supreme Court before coming under the direction of the third Chief Justice, John Marshall, the Justices all rendered their individual opinions.[4] Following briefing and oral argument, the Justices would conference and, eventually, deliver their separate opinions *seriatim*. This was the tradition in England, in some of the states and was followed in early decisions of the United States Supreme Court, itself.

The idea behind *seriatim* opinions was that the litigants, lawyers, judges and public would benefit from the independent thinking of each of the justices. It was a more-or-less intellectual discussion conducted transparently. The process sought to demonstrate the wisdom and work that went into the legal analysis. Ultimately, the judgment could be determined—that is, who won or lost—even if the rationale was not abundantly clear. As precedent for the lawyers, judges and the public, it was not that helpful and sometimes not that helpful to the actual litigants.

We are now all familiar with Chief Justice Marshall's transformation from *seriatim* opinions to "opinions of the court," "concurrences," and "dissents." Opinions of the Court are generally the source of the judgment (affirmed, reversed, granted, denied) but also the source of the reasoning of the majority of the court. It is fundamental that, except in instances of direct review or original jurisdiction, the United States[5] and California Supreme[6] courts are courts of review. Their role is not necessarily to correct error in judgments below but to decide issues that are of broader significance for future benefit.

Therefore, it is important for reviewing courts, particularly the highest courts of their jurisdictions, to make principled decisions.[7] Those decisions, through the crafting of considered opinions, give lawyers, lower courts and the public guidance as to the principles to be applied and how to apply them. Of course, it is not that simple. Opinions can be well written or not so well written. They can be convoluted or obscure owing to compromise, or even uncertainty as to what the court really intends to hold for the future.[8]

The majority opinion of the court also can be affected by concurrences and dissents. It is simple enough if the majority makes a clear decision based on undisputed facts and declares what the law is and how it is applied to these facts. However, concurrences and dissents can sometimes help clarify but can also muddy the water. There are plurality decisions where there is no clear agreement among a majority of the justices as to the legal or constitutional basis for the judgment. Or there can be majority opinions that are undercut by concurrences or dissents. These cases have been called "voting paradoxes."[9]

A typical form of a voting paradox occurs where the majority agrees on a judgment and some justices join in one part but not another part of the opinion requiring a scorecard to determine if there is a majority for any particular legal theory. It is even possible for a dissent from the judgment to concur with judges in the majority that a particular legal theory applies while disputing the outcome. Multiple opinion cases may not command a majority as to the law or constitutional provisions that apply or how they apply to the facts of the case. That may create a plurality or just plain confusion as to whether the majority agreed on a judgment but not on one theory over another.[10]

Generally, however, it is believed that the opinion of the court, signed on to by a majority of the Justices, is precedent —it is the law. Concurrences and dissents are, generally, regarded as the musings of individual justices which may give rise to a change in policy in a later Term or, at least, provide support for those who wish to disagree with the majority opinion and, perhaps, propose legislation.

In fact, there are numerous cases in which courts have stated emphatically that concurrences and dissents are not precedent. The cases usually point out that the views expressed in a lone concurrence or dissent do not carry the weight of precedent because they are the view of a Justice or Justices who are in the minority. In those cases, the non-majority concurrences or dissents can be cited for persuasive value but have no precedential effect. In *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231, as modified on denial

of rehiring (Sept. 5, 2007), for instance, the court of appeal held that an opinion does not have precedential value on points where there is no agreement by the majority.[11]

The Majority Concurrence

So, what is a "majority concurrence?" One answer is that it is a majority opinion and can be cited as precedent. The California Constitution article VI, section 2, states that, "Concurrence of 4 judges present at the argument is necessary for a judgment." There is no provision regarding the writing of opinions or the significance of an opinion of the court as opposed to one labeled a concurrence. The California Supreme Court developed traditions which have resulted generally in a majority opinion in a given case with one or more concurrences or dissents which may or may not be joined by other justices but which are not joined by a majority.

Just as in the United States Supreme Court, there are conferences in the California high court in which the cases are discussed before assignment for writing. Memos, draft opinions and other correspondence occurs while the opinions are crafted to gain the adherence of other justices. Occasionally, dissents gather enough votes to become the majority opinion and, what was the majority, becomes a dissent.[12] On other occasions, opinions are fragmented with concurrences establishing a majority, or sometimes just a plurality, as to some sections or legal theories and not others.[13]

Whatever may be the vicissitudes of opinion writing, the opinions are eventually published and lawyers, judges and the public have to deal with them. Scholars can debate why they came about. However, generally, the majority opinion is just that and concurrences and dissents are minority views that do not constitute majority precedents.[14]

Conclusion

The question is whether these rare "majority concurrences," such as in *Flores* have the force of precedent. They do not fall to the reasoning that they are lone concurrences or dissents and therefore not precedential. They are more than just persuasive or just indications of the direction in which a minority of justices want to see the law go or what might be proposed for future legislation. These majority concurrences are a statement of the law agreed upon by a majority of the court. Absent authority for the proposition that the label "concurrence" renders the opinion any less an opinion of the majority, it is our opinion that they are precedent and citable as such. ■

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Verdicts & Settlements

Wilmot v. Caltrans, et al.

SANTA BARBARA SUPERIOR COURT, DEPARTMENT 4

Case Number:	22CV00456
Type of case:	Auto/Bicycle/Dangerous Condition of Public Property
Type of proceeding:	Jury Trial
Judge:	Donna Geck
Length of trial:	2.5 Weeks
Length of deliberations:	1.5 days
Date of Verdict or Decision:	March 20, 2024
Plaintiff:	Ronald Wilmot
Plaintiff's Counsel:	Lawrence Marks, Mardirossian & Akaragian, LLP, and Bradford D. Brown, Esq, Law Offices of Bradford D. Brown, APC
Defendants:	State of California Dept. of Transportation (Caltrans) and Susan McCurnin (Driver)
Defendants' Counsel:	Defendant Caltrans: Jeremie Ginelli, Esq., Sandeep Singh, Esq, Michael Harrington, Esq., Helen Cramer, Esq, of California Attorney General. Defendant Susan McCurnin, Marc Shapiro, Esq., of Hanger, Steiner, Shapiro, and Ash
Insurance Carrier, if any:	State of California Department of Transportation (Caltrans) (Self Insured), Susan McCurnin (Allstate)
Experts:	Plaintiff Ronald Wilmot, Matthew Pifer, MD, Orthopedic Surgeon; Shakir Shatwani, PhD, Highway Design; Joellen Gill, Human Factors; Christopher Gayner, MA, Accident Reconstruction. Defendant Caltrans, Daniel Davis, MD, Orthopedic Surgeon; Rajeev Kelkar, PhD, Accident Reconstruction, Nevin Sams, PE, TE, PTOE, Highway Design. Defendant McCurnin, Rocco Calderone, MD, Orthopedic Surgeon: Benjamin Molnar, PE, Accident Reconstruction.

Facts and Contentions: On 01/03/2021 plaintiff Ronald Wilmot and his three friends were on a round trip 50-mile bike ride from Santa Barbara to Gaviota that required the cyclist to travel north and then south on the US 101. The entire route is a Designated California Bicycle Route by defendant California Department of Transportation. All but 400 feet of the entire route contains 8' to 10' wide bicycle lanes. On the southbound return of US 101 at the Arroyo Quemada Bridge, the bicycle lane merges into the number 2 (slow) lane of travel for the length of the 400 foot bridge. Cyclists traveling 10 to 15 mph must share the road with automobiles traveling at speeds between 55 and 70 mph. As the cyclist traversed the bridge that day, three of the four cyclists were hit from behind by co-defendant Susan McCurnin, who testified that she never saw the cyclists before impact, even though their bicycles were equipped with flashing red rear tail lights, and they were wearing bright green jerseys and waiving their left hands up and down, in an attempt to warn oncoming motorists.

Plaintiff introduced substantial evidence that Caltrans was aware of the dangerous condition of both the approach to

the bridge, and the bridge, as early as the late 1960's and had further designed and planned a bypass to the bridge in 1999 that would separate cyclists from motor vehicles. The bypass was never completed, and the plans remain unused even now, some 24 years later. Caltrans had installed overwhelming signage as southbound traffic approached the bridge, yet none of the signage warned motorists that bicyclists would occupy the slow lane of travel.

Plaintiff Wilmot's claim against Caltrans was twofold. 1.) that the bridge constituted a dangerous condition of public property, and 2.) that the signage was inadequate to warn motorists of the dangerous condition. That the bridge constituted a concealed trap to unsuspecting motorists like Susan McCurnin.

Summary of Claimed Damages and medical treatment:
Ronald Wilmot was the only cyclist injured in this accident and he sustained major injuries, including an open fracture of the left tibia and fibula with open reduction internal fixation, skin graft, and placement of hardware, 7 fractured ribs with a pneumothorax (punctured lung), and a lumbar compression fracture. Plaintiff claimed $753,000 in past medicals and $100,000 in future medicals. The court did not allow Howell reductions.

Summary of Settlement Discussions: Plaintiff demanded $450,000.00 from defendant McCurnin and $2,900,000.00 from defendant Caltrans.

Defendant McCurnin offered her automobile policy limit and defendant Caltrans offered $25,000 and then eventually increased their offer to $200,000.00 before trial. Plaintiff asked the jury for $12,833,000.

Result: By a vote of 12 to 0, the jury awarded plaintiff $3,830,000.00. The most important finding is that the jury found the bridge constituted a dangerous condition of public property and additionally that Caltrans failed to warn motorists of a dangerous condition. The jury found McCurnin 70% at fault and Cal Trans 30% at fault. Plaintiff is hopeful that the findings against Caltrans will force Caltrans to build the bypass to the bridge that was promised over 24 years ago. Plaintiff will be seeking costs and interest.

Montecito Country Club, LLC v. Kevin C. Root et al

SANTA BARBARA SUPERIOR COURT, DEPARTMENT 4

Case Number:	21CV02227
Type of case:	Real Property / Easement / Quiet Title
Type of proceeding:	Court Trial—Jury Waived
Judge:	Donna Geck
Length of trial:	2 Weeks
Date of Verdict or Decision:	July 30, 2024
Plaintiff:	Montecito Country Club, LLC
Plaintiff's Counsel:	A. Barry Cappello, Leila J. Noel, Richard Lloyd of Cappello & Noël LLP.
Defendants:	Kevin C. Root, Jeannette P. Root and All Persons claiming any Legal, Equitable Rights, Title, Estate, Lien or Interest in the Property
Defendants' Counsel:	Geoffrey Norton, Norton & Melnik, APC; Charles N. Shephard, Greenberg, Glusker, Fields, Claman & Machtiger LLP
Experts:	Plaintiff: Chet Williams, Chet Williams Golf Course Design. Defendants: Tom Pearson, Pearson Golf Design

Facts and Contentions: Plaintiff is the owner of the Montecito Country Club clubhouse and surrounding golf course at 920 Summit Road (the "Club".) Defendants own an adjacent property at 1059 Summit Road bordering current 14th green, the southern-most portion of which was burdened by an express recorded easement for "cart path and greenskeeper

truck purposes." For decades, the Club used the easement, created by a 1977 grant deed when the Club sold the parcel to a purchaser, for a cart path and to maintain a boundary hedgerow separating the golf course from the 1059 Summit Road property.

As part of a 2016 Jack Nicklaus course re-design, the Club removed the cart path but continued to use the easement area as a golf course rough and to maintain the boundary hedgerow. In September 2020, Defendants removed the existing hedgerow and landscaping, installed a new hedge on the property line, re-graded the easement area, and installed a retaining wall precluding access to the easement area.

Plaintiff contended the encroachments were performed without permission or consent, and that in addition, Plaintiff had expanded the use of the express easement by prescription to include the maintenance of the existing boundary hedgerow and accessory landscaping. Defendants contended the Club abandoned the easement as part of the 2016 re-design and/or that the 2016 changes had rendered the use of the easement infeasible, and also contended they received permission from the Club's groundskeeper to install the encroachments.

Result: The Court found for Plaintiff on all causes of action. The Court found there was insufficient evidence of abandonment, non-use or incompatible acts; no release of the easement sufficient to comply with the statute of frauds, and no evidence Defendants had received permission or consent. The Court also found Plaintiff had expanded its easement rights by prescription to include the maintenance of the boundary hedgerow and accessory landscaping, consistent with the historical use. The Court determined Defendants encroachments were unreasonably interfering with the Club's easement, and ordered the encroachments removed and the original condition restored at Defendants' sole expense. Plaintiff is seeking costs.

The Santa Barbara County Bar Foundation is seeking nominations for the

2024 Legal Community Appreciation Award

The Award annually honors a legal professional (whether a local lawyer, judge, paralegal, secretary, or court staff) who has provided an outstanding contribution to the local legal system, either through achievement of professional excellence, volunteer service, or other commitment to the local legal community for a significant period of time.

If you have someone in mind that deserves this recognition, please send your nomination by October 7, 2024, with an explanation of why, to the SBCBF at sbbarfoundation@gmail.com.

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Santa Barbara County Bar Association

SBCBA

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ANNUAL DINNER

THURSDAY | 14th NOVEMBER (NEW DATE)
El Paseo Restaurant
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6 pm | Reception
Dinner to follow at 6:30 pm

Awards Presentation Honoring:

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Russell Ghitterman
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2024 MCLE Series Schedule
12:15-1:15 p.m.

Date	Topic(s)	Credit Hours
May 22	*David Mann of the Other Bar* – A Conversation on Attorneys and Substance Abuse (Competence Credit)	1.0*
June 26	*Jennifer Lee* – Technology in the Practice of Law (Technology Credit)	1.0*
July 24	*Dr. Keisha Clark* - Recognition and Elimination of Bias (Elimination of Bias Credit)	1.0*
August 28	*Doug Ridley* – The Complete Attorney (Ethics Credit)	1.0*
September 25	*Civility in the Legal Profession – It's Importance & Why We Need It* (Civility Credit)	1.0*
October 23	*Robin Oaks* - Professional Burnout Among Lawyers & How to Address It	1.0*

* Indicates California State Bar Specialty Credit

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- Individual MCLE: $45.00

***Membership may be purchased at** https://sbwl.org/join-sbwl/

Sanger and Sanger, *continued from page 26*

Endnotes

1 Robert Sanger has been practicing as a litigation partner, now principal shareholder at Sanger Law Firm, P.C., in Santa Barbara for over 50 years and is a Certified Criminal Law Specialist (40-year Certificate: Ca. State Bar Bd. of Legal Specialization). Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is an Associate Member of the Council of Forensic Science Educators (COFSE) and is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization.

2 Sarah Sanger is an associate lawyer in the Sanger Law Firm and focuses her practice on appeals and writs. Ms. Sanger graduated Phi Beta Kappa with a degree in Philosophy from U.C. Santa Barbara and then obtained her law degree from the University of California, Berkeley School of Law. She is currently a Member of the Board of Governors and Treasurer of California Attorneys for Criminal Justice (CACJ) and a member of the CACJ Amicus Committee.

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

3 *People v. Campos* (2d Crim. No. B330784 on appeal from the Los Angeles Superior Court, Case No. TA159029-01) (Sarah Sanger, attorney for Appellant, awaiting oral argument).

4 See, e.g., *Georgia v. Braislford*, 2 U.S. (2 Dall.) 402 (1792).

5 United States Supreme Court Rule 10: Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

6 California Rules of Court, rule 8.500, subdivision (b): Grounds for review

The Supreme Court may order review of a Court of Appeal decision:

(1) When necessary to secure uniformity of decision or to settle an important question of law;

(2) When the Court of Appeal lacked jurisdiction;

(3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

(4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

7 For an historic discussion of this elusive and aspirational view of transcending immediate results and relying on reasoning and analysis, see, Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harvard Law Review 1 (1959).

8 *Bush v. Gore* 531 U.S. 98 (2000) is such a case. Although it was a *per curiam* decision, the five separate opinions cast doubt on whether there was doctrinal agreement among the majority of the justices. There was certainly no expectation that the opinion would do much to educate lawyers, judges or the public in future controversies.

9 See, generally, David S. Cohen, "Precedent-Based Voting Paradoxes, 90 Boston University Law Review 183 (2010)

10 See, *Furman v. Georgia* (1972) 408 U.S. 238 (1972), where there were seven written opinions. The consensus of a majority was that the death penalty as then practiced in the United States was constitutionally flawed but the legal rationale for that conclusion was essentially a jigsaw puzzle to be argued about, interpreted and reinterpreted for decades.

11 See, e.g., Ryan M. Moore, "I Concur! Do I Matter?: Developing a Framework for Determining the Precedential Influence of Concurring Opinions," 84 Temple Law review 743.

12 For example, Justice Scalia wrote what he thought was to be a monumental opinion striking down the Affordable Care Act. However, Chief Justice Roberts switched his vote and wrote for the Court. Scalia converted his opinion to a dissent bearing signs that it was intended as the opinion of the Court, e.g., leaving references to the Ginsberg "dissent" which, of course, was a concurrence when the dust settled. *National Federation of Independent Business v. Sebelius*, 567 U. S. 519 (2012).

13 See, e.g., *Yates v. United States*, 574 U.S. 528 (2015) where Justice Ginsberg's opinion garnered four votes but the judgment was affirmed by Justice Alito who would reverse on different grounds.

14 See, Lewis A. Kornhausert and Lawrence G. Sager, "The One and the Many: Adjudication in Collegial Courts," 81 California Law Review 1 (1993).

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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.

Well-Being

Oaks, *continued from page 22*

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 For "competence" education (2 hours MCLE requirement), attorneys must take at least one hour of education in "prevention and detection of those mental or physical issues that impair a licensee's ability to perform legal services with competence" (i.e., prevention and detection education subcategory), and now also have the option of education in 2) strategies "addressing physical and mental *wellness and well-being"* (i.e., wellness competence education subcategory).

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October

2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1 Legal Aid Foundation's 65th Anniversary Celebration	2	3	4	5
6	7	8	9	10 World Mental Health Day	11	12
13	14 Columbus Day/Indigenous Peoples' Day	15	16 Boss's Day	17	18	19
20	21	22	23 SBWL Presents MCLE: "Professional Burnout Among Lawyers & How to Address It"	24	25	26
27	28 SBCBA Presents MCLE: "Well-Being in Law Week" Begins	29	30	31 Halloween		

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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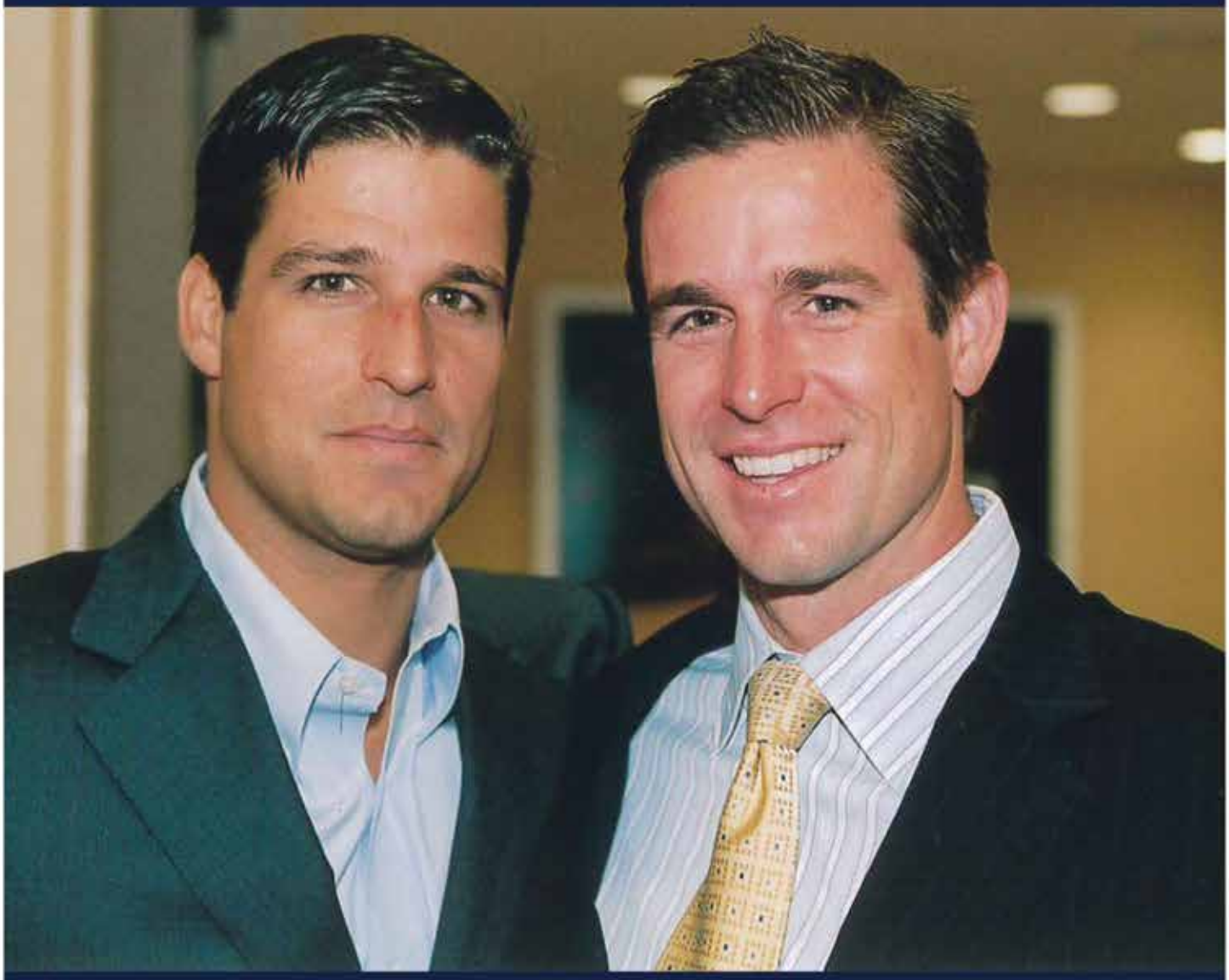

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