Bar Bulletin
Serving San Luis Obispo County's Legal Community
May–June 2019

The Appellate Court and the Standard of Review

SB 1300 in the Era of #MeToo and #TimesUp

San Luis Obispo County
Bar Bulletin

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Cover photograph by Danna Dykstra-Coy

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President's MESSAGE

by Michael R. Pick Jr.

Attorneys Act As Coaches and Counselors

There are a diverse number of ways in which we serve our clients, such as formulating the best procedural or transactional strategy, explaining the nuances of the applicable law, finding potential evidence, or providing effective advocacy during litigation. More importantly, however, as attorneys our job is to assist our clients in legal problem solving.

Determining the real solution to a problem does not necessarily require a legal solution or legal guidance.

At the time we as attorneys became licensed to practice law in California, we all took an oath that we agreed to support the Constitution of the United States and California as well as to faithfully discharge the duties of an attorney at law to the best of our knowledge and ability.[1]

Defining an attorney's duties during representation can obviously mean different tasks and approaches for each client. Further, balancing those duties with the ultimate goal can mean that the problem solving may not include traditional legal advice.

Understanding that, the State Bar Board of Trustees proposed new ethical rules that have been recently adopted. This includes what is codified in Rule 2.1 of the California Rules of Professional Conduct, which states:

"2.1 Counselor. Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

In a recent issue of *Los Angeles Lawyer*, Attorney Philip J. Daunt and Arezou Kohana explained what this draft rule meant:

"As drafted, the proposed rules appear to acknowledge the current movement in the law to permit a lawyer to delve deeper into the heart of the matter, i.e., employ the 'coach approach.' This approach goes beyond advocacy and includes counseling clients. Coaching is about honest, heart-to-heart conversations with the intention of empowering clients to break through self-limiting beliefs and patterns. Unlike therapy, which is past-oriented, the coach approach is future-oriented. Coach and client collaborate in moving the client forward from place A (where the client is) to place B (where the client wants to be)."[2]

What this means is that we are not limited to the sometimes narrow "legal" answer, and we can honestly and ethically approach our client's situation with a holistic orientation during representation.

Rule 2.1 infers we are allowed as attorneys to take the 10,000-foot view of the situation and truly explore how to effectively represent a client even if that means guidance outside of a traditional attorney-client relationship.

To me, this is a much more satisfying way to practice law, and likely something we all instinctively do as lawyers. It allows us to look at our clients as a whole and assist as needed, even if that means being a therapist, coach, motivator and/or collaborator.

In this issue, we are fortunate to have some examples of how attorneys in our community have taken this approach and been rewarded in the process. ■

1 Business and Profession Code section 6067.
2 41-June L.A. Law. 52, Los Angeles Lawyer, June 2018

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Save the Date!

The Present and the Future of Sexual Harassment Claims in the Era of #MeToo and #TimesUp

by Veronica Cruz

Photographs on cover, pages 6–7, 11 courtesy of Danna Dykstra-Coy
Photographs on pages 8, 8–9, 10 courtesy of Brittany Anzel App

We are at a tipping point in American history. #MeToo and #TimesUp have sparked a national conversation on sexual harassment in the workplace. According to a survey conducted by Stop Street Harassment, a nonprofit dedicated to ending gender-based harassment, 81 percent of women and 43 percent of men had experienced some form of sexual harassment during their lifetime.[1]

California has always been at the forefront of efforts to combat sexual harassment in the workplace. Recognizing the prevalence of sexual harassment and discrimination on the basis of sex and the ways in which sexual harassment creates a barrier to gender equality in the workplace, California's Fair Employment & Housing Act (FEHA) prohibits discrimination and harassment in the workplace on the basis of "sex," "gender," "gender identity," "gender expression" or "sexual orientation."[2] Given the recent proliferation of sexual harassment claims, driven mainly by the viral hashtags #MeToo and #TimesUp, the FEHA has become much more relevant.

On September 30, 2018, Governor Jerry Brown signed into law several bills aimed at making it easier for victims of workplace sexual harassment to seek justice.[3] The most significant of the new bills is Senate Bill No. 1300. This bill is designed to help women fight workplace harassment. Its detractors, however, point to the unintended consequences of the legislation. This article explores the pros, the cons, and the humans surrounding this legal issue.

Setting the Legal Foundation

The California Constitution protects against employment discrimination and harassment, by both public and private employers, on account of sex, race, creed, color, and national and ethnic origin.[4] Section 8 of Article 1 of the California Constitution specifically provides that a person may not be "disqualified from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color, or national or ethnic origin."[5] California has had this provision in its constitution since 1879.

Under the FEHA, it is an unlawful employment practice to engage in harassment of an employee or other specified person.[6] Specifically, the FEHA prescribes, in part, that it is unlawful for an employer, labor

Dawn Addis, a founder of Women's March and

Morro Bay Councilwoman

organization, employment agency, apprenticeship training program, or any training program leading to employment, to "harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status."[7]

According to regulations interpreting the FEHA, behavior that may constitute sexual harassment includes but it is not limited to verbal harassment, physical harassment, visual forms of harassment or quid pro quo sexual favors.[8]

Employers Have a Duty to Prevent Harassment From Occurring

The FEHA makes it a separate unlawful employment practice for an employer to "fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[9] In other words, under the FEHA, an employer has an affirmative and mandatory duty to take all reasonable steps necessary to prevent discrimination and harassment from occurring. Accordingly, the FEHA imposes a duty on the employer to protect employees from sexual harassment. Failure to prevent sexual harassment from occurring is a separate violation of the FEHA. However, there is no stand alone, private cause of action under this section of the statute, which means the aggrieved employee must plead and prevail on the underlying claim of sexual harassment.[10]

Types of Sexual Harassment

In 1980, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidelines stating that "sexual harassment" is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII). The EEOC Guidelines classified harassment as either "quid pro quo" or "hostile environment." Quid pro quo harassment occurs when submission to sexual conduct is made a term or condition of an individual's employment or is used as the basis for employment decisions affecting the individual. Hostile environment harassment occurs when sexually harassing behavior unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment.[11]

Vicarious Liability

Under the FEHA, if the employee can establish a prima facie case of sexual harassment, the employer is strictly liable for the *supervisor's* harassment, irrespective of whether or not the employer knew or should have known of the sexual harassment and failed to take corrective action.[12]

When a co-worker commits the sexual harassment, the employer is only liable if it knew or should have known of the conduct and failed to take immediate and appropriate corrective actions.[13]

Additionally, the FEHA specifically provides that an employer may also be responsible for the acts of *non-employees*, with respect to sexual harassment, if the employer, or its agents or supervisors, knew or should have known of the conduct and failed to take immediate and appropriate corrective action.[14] The FEHA cautions, however, that in reviewing cases involving the acts of nonemployees, the extent of the employer's "control and any other legal responsibility that the employer may have with respect to the conduct of those non-employees" must be taken into consideration.[15]

Personal Liability

The FEHA also provides that an employee (supervisor or co-worker) is personally and individually liable for any harassment prohibited by the act regardless of whether the employer knew or should have

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San Luis Obispo City Police Chief Deanna Cantrell

known of the conduct and failed to take immediate and appropriate corrective action.[16] FEHA specifically states that any employee of an entity subject to the FEHA "is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[17]

SB 1300

Under SB 1300, a single incident of harassing conduct will be sufficient to create a triable issue regarding the existence of a hostile work environment, provided the harassing conduct "unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile or offensive working environment."[18] In that regard, the California legislature declared its rejection of the United States Court of Appeals for the Ninth Circuit's opinion in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000).

In *Brooks*, the Ninth Circuit affirmed summary judgment for the employer despite plaintiff's claim that a co-worker boxed her against a console, forced his hand under her sweater and bra and fondled her bare breast with his hand. The Circuit reasoned that an isolated incident of harassment by a co-worker will "rarely (if ever) give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship.

"By hypothesis, the employer will have had no advance notice and therefore cannot have sanctioned the harassment beforehand.

And, if the employer takes appropriate corrective action, it will not have ratified the conduct. In such circumstances, it becomes difficult to say that a reasonable victim would feel that the terms and conditions of her employment have changed as a result of the misconduct." *Id.* at 924.

The result would be much different, the Circuit stated, if the offender was a supervisor rather than a co-worker: "[A] sexual assault by a supervisor, even on a single occasion, may well be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim."

In rejecting *Brooks*, the legislature made it clear that the *Brooks* opinion should not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the FEHA.

"That the perpetrator's conduct no longer needs to be severe and pervasive," said Jennifer Adams, "is incredibly beneficial to women." Adams is the Executive Director of RISE San Luis Obispo County. RISE is a local organization that assists women through sexual assault, sexual abuse and intimate partner violence programs. She is a long-time advocate for women's issues. Adams applauds the legislation.

"Inappropriate behaviors are often on a spectrum," she said. "It can be heckling to assault." The gravamen of workplace sexual harassment is "disregard for personal space" and the objectification of women.

SB 1300 specifically affirmed the holding in *Reid v. Google, Inc.*

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Jennifer Adams, Executive Director of RISE San Luis Obispo County. Photograph courtesy of Megan Riviore.

Women's March speaker Dr. Leola Dublin Macmillan

50 Cal. 4th 512 (2010) in its rejection of the "stray remarks doctrine." In *Reid*, the plaintiff (52) had a Ph.D. in computer science and was a former associate professor of electrical engineering at Stanford University. During his time at Google, he had been called "obsolete" and "too old to matter," that he was "slow," "fuzzy," "sluggish" and "lethargic," and that he did not "display a sense of urgency" and "lack[ed] energy."

Google, argued these comments were unrelated to his termination for lack of production and, therefore, should not be considered. SB 1300 provides that the existence of a hostile work environment depends upon the "totality of the circumstances."[19] As such, a single discriminatory remark may be relevant, circumstantial evidence of discrimination."[20] This can be good for men and women.

"The truth is," says Adams, "most of the time there is no complaint. Most of the time women suffer in silence. What women put up with is unbelievable. This law, in connection with other cultural shifts, is going to open it up."

Rejection of "the casting couch," or quid pro quo sexual harassment, by celebrities in the entertainment world has become a new impetus for workplace harassment complaints. The continued elevation of the privileged and chauvinistic white male feels more like a death rattle than a celebration. It is sad. Meanwhile, the valor of Dr. Christine Blasey Ford, Alyssa Milano, Gwyneth Paltrow, Ashley Judd, Jennifer Lawrence, Uma Thurman and scores of other women, encourage a new generation of women's advocates. The personal stories, coupled with the legal work begun by Justice Ruth Bader Ginsberg and continued through the operation of laws like SB 1300, marches us to a new place. The leaders of this march, moreover, seem unencumbered by the compunction to make nice as they make change.

SB 1300 also makes it clear that the legal standard for sexual harassment should not vary by type of workplace.[21] Accordingly, "[i]t is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past."[22] Adams points out, for instance, that the restaurant industry has long been an example of egregious workplace harassment for women. "Women have long been expected to tolerate sexual harassment from customers, co-workers and bosses."

Further, SB 1300 affirmed the decision in *Nazir v. United Airlines, Inc.* 178 Cal. App. 4th 243 (2009) that hostile working environment cases involve issues "not determinable on paper."[23] Accordingly, harassment cases will rarely be appropriate for disposition on summary judgment."[24]

SB 1300 provides that a prevailing defendant is prohibited from being awarded

fees and costs unless the court finds the action was frivolous, unreasonable or groundless when brought or that the plaintiff continued to push the action forward after it became frivolous, unreasonable or groundless.

Lastly, the bill, with certain exceptions, will prevent an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, from requiring an employee to sign a release of a claim under the FEHA or a non-disparagement agreement or similar document with the goal of denying the employee the right to speak up. Any such document will be considered contrary to public policy and unenforceable.[25]

On the Other Hand

Gordon Bosserman is partner at Andre, Morris and Buttery, specializing in employment law defense. He is concerned about restricting settlement agreements. "Ninety-nine percent of all civil cases, including those involving claims of sexual harassment, settle. As a result, settlement agreements releasing an employer from liability or requiring the employee to keep the settlement confidential have historically been very important. Commencing January 1, 2019, there has been a dramatic change in the laws that control settlement agreements in cases involving sexual harassment.[26]

"Civil Code section 1670.11," which is part of SB 1300, "makes any provision in a contract or settlement agreement 'void and unenforceable' if it attempts to prevent a person from testifying in a criminal or administrative proceeding involving a claim of sexual harassment.

"Code of Civil Procedure section 1001 prohibits any provision that would prevent the disclosure of facts about sexual harassment, sexual discrimination or retaliation over reporting such acts. The law also prohibits a stipulation for a court order not to reveal such facts. However, if it is the claimant who requests, and the government is not a party, the claimant's identity can be shielded."[27]

Since the social opprobrium connected with this type of conduct cannot be prevented, settlements become much less likely. Cases on both ends of the spectrum, the frivolous and the abhorrent, are less likely to resolve in a legal climate that does not allow for confidential settlement.

Moreover, SB 1300 amends the tax code so that no tax deduction is allowed for any settlement related to sexual harassment or sexual abuse claims if the settlement includes a non-disclosure (confidentiality) provision. And, attorneys' fees (after December 22, 2017) related to sexual harassment settlement agreements or payments are not tax deductible.

"In the future," concludes Bosserman, "employers will have to decide how important it is to try to achieve confidentiality over such claims."

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Conclusion

Notwithstanding those concerns, SB 1300, and its associated laws, reflects societal and cultural change. SB 1300 will impact employers, employees and the courts, particularly employers as it greatly increases the potential liability from harassment and discrimination claims. For example, this new legislation will lower the plaintiff's burden of proof under FEHA by recognizing that "[a] single incident of harassing conduct" can establish a hostile work environment "if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile or offensive working environment."

In my opinion, SB 1300 increases the potential liability of employers and provides more protections for employees in the workplace. The laws in place provide relief to a certain extent, but they still pose many barriers, particularly for women trying to bring claims for workplace sexual harassment.

Further, they do reflect the realities, complexities and nuances of what really occurs in the workplace and what sexual harassment victims often experience. SB 1300 does away with many of the barriers that impede victims now and provides them a much easier path to bring their complaints forward. By focusing on the totality of circumstances and emphasizing that these types of cases should not be decided on "paper," victims have much greater chances of receiving meaningful relief.

The #MeToo and #TimesUp movements are permeating all areas of society and bringing changes to the legal framework. Without a doubt, SB 1300 will remove legal obstacles and lead more victims of sexual harassment to come forward. Without a doubt, the pendulum is swinging hard. Without a doubt, the time is nigh. ■

Veronica Cruz is an associate attorney with Kazerouni Law Group, APC, where she represents employees in cases involving discrimination, sexual harassment, retaliation and wrongful discharge.

In addition to employment law, Cruz fights for consumers facing unfair debt collection practices, illegal credit reporting and various other consumer rights violations committed by large companies.

Cruz was recently recognized by the Los Angeles County Bar Association as a Hispanic Heritage Month Honoree.

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1. (https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment)
2. Cal. Gov. Code § 12940(a) and Cal. Gov. Code. § 12940(j)(1)
3. Senate Bill No. 1300 (Approved by Governor Brown on September 30, 2018. Filed with Secretary of State on September 30, 2018.)
4. Cal. Const. Art. I, § 8
5. Id.
6. Cal. Gov. Code §§ 12940, et seq.
7. Cal. Gov. Code § 12940(j)(1)
8. Cal. Code. Regs. § 11019(b)(2)(A-D)
9. Cal. Gov. Code § 12940(k)
10. Cal. Code Regs. § 11023(a)(2)
11. Meritor Sav. Bank, FSB v. Vinson (1986) 477 U.S. 57, 65 (holding that the harassment, although it had failed to result in a tangible employment action, created an environment which was offensive to the plaintiff and was therefore actionable under a hostile work environment sexual harassment claim.)
12. State Dept. of Health Services v. Sup.Ct. (McGinnis) (2003) 31 Cal App. 4th 1026, 1042; Myers v. Trendwest Resorts, Inc. (2007) 148 Cal. App. 4th 1403, 1420
13. Cal. Gov. Code § 12940(j)(1)
14. Id.
15. Id.
16. Cal. Gov. Code § 12940(j)(3)
17. Id.
18. Cal. Gov. Code § 12923(b)
19. Cal. Gov. Code § 12923(c)
20. Id.
21. Cal. Gov. Code § 12923(d)
22. Id.
23. Cal. Gov. Code § 12923(e)
24. Id.
25. Cal. Gov. Code § 12964.5(2)(A)
26. These laws went into effect on January 1, 2019.
27. Code of Civil Procedure section 340.16 also increases the statute of limitation for sexual harassment claims to 10 years from 3 years.

Mock Trial in San Luis Obispo Is a Real-Life 'Captain Marvel' Story

by John Fricks

Over the weekend, before this article went to press, a local attorney, an unabashed fan of the Marvel Cinematic Universe, enjoyed watching the latest MCU offering of "Captain Marvel" with his kids. (*Ed. note*: *That attorney is the author of this article if you didn't see through that transparent construct*.)

Though the movie had to work through some of the dramatic baggage common to origin stories, "Captain Marvel" was a delight. Not only is it rocketing toward $1 billion in ticket sales, but it is the first female-headed movie in the MCU (following DC's Gal Gadot-led "Wonder Woman" last year).

Mock Trial (MT) in San Luis Obispo County is a true "Captain Marvel" story. Not only was our local program started in 1998 by the SLO Women's Lawyer's Association, but also it has been championed by women professionals ever since. Fully 37 of 78 (47 percent) of our scoring attorneys were women; also 9 of 25 (36 percent) of our MT judges this year were female.

And, the next generation of future "superheroes," our MT student participants, are coming... an estimated 65 percent of all MT student participants are girls. So, when female "graduates" of our MT program go on to save the world by, say, defeating Thanos, ala Captain Marvel, or even as doctors, lawyers, activists, politicians or in professions we cannot yet conceive, those of us who have had a minor role in *their* origin story can feel a measure of delight as well.

This year, San Luis Obispo High repeated as county champions. In an upset, Paulding Middle School defeated perennial winner, Laguna Middle School as the junior high champs. Bragging rights go to attorney coaches Ann Wilson, Carrie Winter and Melodie Rivas Beard of SLO High and Scott Lewis of Paulding.

Special thanks go to our donors—

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- Mr. and Mrs. Marco Rizzo.

Also, we thank our participating judges and commissioners—Hernando Baltodano, Erin Childs, Tana Coates, Timothy Covello, Jacquelyn Duffy, Michael Duffy, Rita Federman, Matthew Guerrero, Leslie Kraut, Barry LaBarbera and Craig van Rooyan. ■

On the Transition From the Trial Court to the Appellate Court (or the Importance of the Standard of Review)

by Justice Martin Tangeman

Introduction

Three years ago I was appointed to the Court of Appeal for the Second Appellate District, Division Six, after sitting for 14 years on the San Luis Obispo County Superior Court. I am occasionally asked about my thoughts and observations regarding the differences between these respective roles. While my time on the appellate court thus far has been brief, and I have much to learn, certain fundamental differences have become evident. Some differences were expected, but others were unanticipated. Included in the latter category is the lesser role played by the appellate court in determining the outcome of a case on appeal, as compared to the trial court's role. That subject is the focus of this article.

The Search for Error

Someone once said that trial judges are embarked on a search for the truth; whereas appellate justices are embarked on a search for error. When I first heard this, I discounted it. After all, it seemed to diminish the importance of my new role as an appellate justice. Experience, however, has shown me the truth and wisdom of this adage. I believe it is a lesson worthy of sharing with trial and appellate lawyers. It is an important distinction, and informs both lawyers and judges alike of the limits of appellate authority to change the outcome in a given case.

To state the most obvious point, the trial judge sits alone and is granted authority to render decisions without convincing (or even consulting) anyone else. One notable exception, of course, occurs in deciding factual issues in the context of a jury trial. Even then, however, trial judges can sometimes exercise their authority as a "13th juror," can order judgment notwithstanding the verdict or a new trial, or can act to increase or decrease jury awards. In contrast, the power of a single appellate justice is minimal to nonexistent. Yes, we can file dissents in hopes of having some future impact on the legal analysis used by the California Supreme Court or other appellate courts, but the immediate outcome of the case before us remains completely unaffected by our words and pronouncements.

Standard of Review Sets the Limits on the Appellate Court

Even when we act with the majority, however, our power as an appellate court is circumscribed. By way of example, I suggest that nothing is more important to defining the significant distinctions between the respective roles of trial judge and appellate justice as the applicable standard of review. As succinctly stated by Presiding Justice Arthur Gilbert in *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018 (*Jackson*):

"However convoluted the facts, or complex the issues, the standard of review is the compass that guides the appellate court to its decision. *It defines and limits the course the court follows in arriving at its destination*. Deviations from the path, whether it be one most or least traveled, leave writer and reader lost in the wilderness." (Italics added.)

To better illustrate my point, a brief review of the most common standards of review is instructive, including, the substantial evidence standard, the abuse of discretion standard, and *de novo* review.

Substantial Evidence Standard

When the question posed in an appeal is whether substantial evidence supports the judgment or order, our authority as appellate justices is severely circumscribed. As a reviewing court, we ask only whether the record contains evidence that supports the trial court's findings. The evidence need not be convincing, dispositive or even determinative. It need only be reasonable in nature, credible and of solid value. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51.) In criminal cases, we review the entire record in the light most favorable to the prosecution to determine whether it contains evidence which is reasonable, credible and of solid value. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) If so, we must affirm.

Despite this clear limit on our authority sitting as an appellate panel, appellants often

ask us to reverse a trial court because (at least in their view) overwhelming evidence of a convincing nature supports their version of the truth; but our response is consistent—the issue is not whether some evidence or inference supports the losing party, but whether substantial evidence exists in the record to support the judgment or order. We do not reweigh the evidence or resolve evidentiary conflicts (*People v. Yeoman* (2003) 31 Cal.4th 93, 128), and the testimony of a single witness, even an interested party, is sufficient to support the trier of fact's findings (*People v. Young* (2005) 34 Cal.4th 1149, 1181). After all is said and done, the trier of fact is "not required" to "accept defendant's [or anyone else's] version of what occurred." (*People v. Garcia* (1969) 275 Cal. App.2d 517, 522.) Thus, we are required to uphold a trial court's judgment or order when the record contains supporting evidence, even when, in our opinion as a reviewing court, the evidence can be more reasonably reconciled with a contrary finding. (*Id*. at p. 521.)

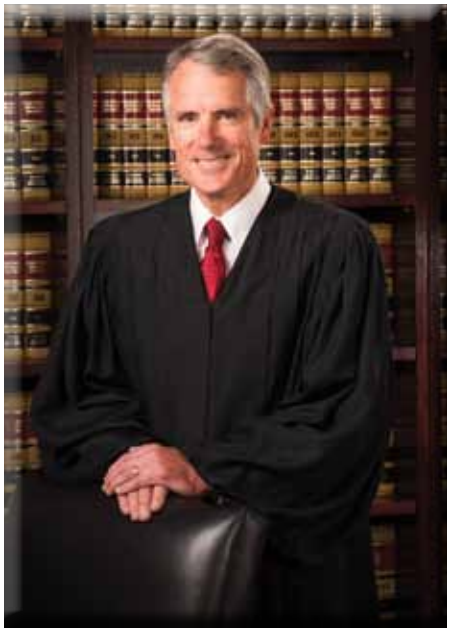
Here, then, the power of the trial court is abundantly clear, for only it (or the jury) has the power to weigh and decide credibility issues. Once that decision is made the outcome is, at least in the great majority of cases, preordained. It is the rare case indeed in which there is no reasonable or credible evidence supporting the trial court's findings.

Abuse of Discretion Standard

A similar outcome awaits appellants seeking to reverse a trial court's ruling based on the abuse of discretion standard. We are required to give abundant deference to the trial court under this standard of review. One has only to articulate that standard to realize the extent of the burden facing those appellants who seek to convince an appellate court to overturn the trial court's judgment or order where this standard of review is applicable. In these cases, our function is limited to an examination of the ruling and to ask whether it exceeds the bounds of reason, or is arbitrary, whimsical or capricious. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

I, for one, have never heard it argued that a trial judge acted in a whimsical manner, and it is hard to imagine such a case. Proving that a trial judge acted capriciously would also seem to set a very high standard. And if you have ever argued an appeal involving this standard of review before Division Six, you have likely had these questions posed to you: "Counsel, are you arguing that no reasonable trial judge would have ever made such a ruling? That this judge acted so arbitrarily as to exceed the bounds of reason?"

It is the rare case in which an appellate court will overturn a trial judge's ruling on the grounds that it was so irrational that it exceeded "the bounds of reason." Thus, when this standard applies, the power to determine the outcome rests primarily in the hands of the trial judge, and we have little ability to change that outcome. (Of course, there is a notable exception when it can be successfully argued that the trial court was unaware that it had any discretion to act, or acted in a manner beyond its legal authority, either of which confers power upon the appellate court to find an abuse of discretion. These exceptions are, however, necessarily limited in their application.)



Justice Martin Tangeman

***De Novo* Standard**

When we are presented with a question which is purely one of law, we will examine the question *de novo*, or independently. Thus, only when the correct standard is the non-deferential *de novo* standard, where the appellate court exercises its independent judgment, does the power of the appellate court equal that of the trial court. I suppose under these circumstances that trial judges would say that our authority not only equals but exceeds theirs, simply because we have "the last word." But even then, we cannot act alone in reaching this decision but must convince (or be convinced by) at least one colleague. And even when we are charged with the duty to exercise our independent judgment, the trial judge's ruling will be carefully considered, because

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it "often is most helpful and illustrates the important role trial courts play in shaping the law. We are not averse to using all the help we can get." (*Jackson*, *supra*, 128 Cal.App.4th at p.1018.)

In Summary

In summary, I have concluded that in those cases in which we employ the substantial evidence standard or the abuse of discretion standard, which together constitute the majority of cases we see on appeal, the real power to determine the outcome rests primarily in the trial court. It is there that the search for truth is conducted and the truth is determined. In those cases our review is limited to a search for error, and we are constrained to provide abundant deference to the trial court, because a judgment or order of the trial court is presumed to be correct, and all presumptions and intend-ments are in favor of the judgment or order. (*Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1327.) If the issue is one of credibility or the exercise of discretion, we have a very limited role to play.

This is not to minimize the important role of the appellate courts, especially when our task is to interpret statutory and constitutional mandates and decide purely legal issues. But the great majority of cases are not decided on purely legal issues, but rather on the application of law to disputed facts. And where the facts are disputed, our role is a limited one. In those cases, the real power to decide the outcome of a case lies with the trial courts. Bearing this lesson in mind, I will offer some modest suggestions to appellate advocates.

As noted above, the standard of review is often determinative in the success or failure of an appeal. It is, therefore, crucial that advocates not only understand the applicable standard, but that they clearly articulate that standard at the outset of any legal discussion contained in the appellate briefs. Because it "is the compass that guides the appellate court to its decision" (*Jackson*, *supra*, 128 Cal.App.4th at p.1018), this bears special emphasis in any article, like this one, that discusses the standard of review.

Those who neglect the importance of articulating the applicable standard in their briefs face the prospect of defeat without consideration of the merits of their claims. As recently stated by a panel of appellate justices in affirming a civil judgment without discussing the merits: "[Appellant's] counsel fails to articulate the standard of review on appeal, in and of itself a potentially fatal omission. Arguments should be tailored according to the applicable standard of appellate review." [Citation.] '*Failure to acknowledge the proper scope of review is a concession of a lack of merit*.'" (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948, italics added.)

Practice Tip for Trial Attorneys

So my advice to advocates is this: don't underestimate the importance of getting it right at the trial court level. Don't count on an appellate court to come to your aid in reaching a different, or "better," decision. If you do file an appeal, be sure to begin your legal analysis with a reference, supported by legal citations, to the applicable standard of review. Better yet, give careful consideration to the standard of review before you file an appeal in order to save yourself and your clients from the substantial costs, both personal and financial, of appellate litigation. Because in most cases, i.e., those in which the substantial evidence or abuse of discretion standards apply, it matters not whether appellate justices would have made the decision you advocated for at trial.

For it is the trial court that has the last word in deciding credibility issues. That is where the real power lies in substantial evidence cases. Likewise, given the broad discretion conferred on trial courts in the multitude of cases involving the exercise of discretion, it is the trial court that wields the power to determine the outcome, as long as it falls within the considerably wide "bounds of reason." It is of crucial importance, then, that these fundamental distinctions in legal authority between trial and appellate courts be recognized and respected. ■

The Honorable Martin J. Tangeman sits as an appellate justice on the Second Appellate District, Division Six. In 2015, he was appointed to the appellate court by Governor Edmund "Jerry" Brown. In 2001, Justice Tangeman was appointed to the bench as a Superior Court Judge. Prior to his appointment, he was a partner at Sinsheimer, Schiebelhut and Baggett. In 2012, he was awarded the Frank J. Pentangelo Award by the San Luis Obispo County Bar Association for his contributions to the Bar Bulletin.

The Third Time's a Success (As Were the First Two)!

by Stephen D. Hamilton, Certified Family Law Specialist

The 2019 San Luis Obispo County Minor's Counsel Training was held in Pismo Beach on February 16 and 17, 2019. This was the third iteration of the program and the most successful to date.

What Is Minor's Counsel?

"If the court determines that it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding…." Cal. Fam. Code §3150(a). While most custody cases do not require minor's counsel, there are those cases where their appointment is a necessity.

When appointed pursuant to Cal. Fam. Code §3150, minor's counsel acts as any other attorney would on behalf of a client. They have the right to prepare and file pleadings, conduct discovery, examine witnesses at hearings and trial and engage in settlement discussions. They also have unfettered access to the medical, mental health and academic records of their minor clients.

Training Requirements

In order to be appointed as minor's counsel, an attorney must receive 12 hours of initial training. Cal. Rules Courts, Rule 5.242(c). To remain eligible for appointment as minor's counsel, an attorney must complete an additional 8 hours of training each year thereafter. Cal. Rules Courts, Rule 5.242(d).

Both the initial and annual training must address:

- The statutes, rules of court and case law regarding child custody and visitation;
- The special issues that arise in representing children, including information regarding the stages of child development;
- How to communicate with children at various developmental stages and present their view;
- Being able to understand and address the complex issues of substance abuse, family violence and the effects of childhood trauma (also known as Adverse Childhood Experiences, or ACES).

These are all important subjects; however, they are not areas of practice easily accessible to San Luis Obispo County attorneys.

Genesis of the San Luis Obispo County's Minor's Counsel Training

Our local training program began as a direct response to Presiding Judge Ginger Garrett's concern there were not enough experienced, trained attorneys willing to represent minors in family court. Apparently the lure (in most cases) of earning $85 an hour in order to be reviled by one or both parents was not incentive enough for local counsel to travel to Sonoma or Los Angeles for a weekend to obtain the required training. We were literally down to one attorney, who had announced they were at capacity. An acute need for other attorneys to fill the void was identified. And the conclusion reached was this need could only be filled if the annual training was provided locally.

Year One

In our first year, the training was sponsored by the San Luis Bar Association Family Law Section. We were able to cobble together four hours of child custody instructional videos and eight hours of live programming. Total attendance was 37 attorneys, with San Luis Obispo and four adjacent counties represented. The program speakers included what continues to be the core educators in the program: The Honorable Erin M. Childs, Attorney Gregory F. Gillett and myself.

Year Two

The Second Annual San Luis Obispo County Minor's Counsel Training was far more ambitious. We moved from a cramped court room to the Cliff's Hotel and Resort in Pismo Beach. Sponsored again by the Family Law Section, the event was marketed statewide. As a result, we had 101 registrants representing 28 different counties and three local judicial officers attend.

In addition to the local team of educators, we recruited speakers with a statewide reputation.

The Honorable Mark Juhas from Los Angeles County agreed to attend and present. We also had Philip Stahl, a psychologist and custody evaluator, whose reports and opinions are extremely well regarded. He was joined by Rebecca Stahl, an attorney and author, who addressed trauma-informed decision making when representing children in family court.

The 2018 Minor's Counsel Training exceeded expectations. And word got out that San Luis Obispo County was the place to go to get your annual minor's counsel training. As one attendee put it: "I have attended a number of MCLE conferences for minor's counsel, but the conference in Shell Beach was the best by far. It was especially helpful because of the focus on the attorney and how to help them do their job rather than just going over laws and procedures. This conference was the 'Crown Jewel' of all conferences and I hope to attend every year."

Year Three

The Third Annual Minor's Counsel Training was just completed in February. It is clear that we have firmly established this event as the premier minor's counsel training in California. This year the event was sponsored by the Family Law Section of the *California Lawyers Association*, which allowed us to market to the more than 4,000 attorneys who are members of the section. We had 140 registrants who practice in 30 different counties throughout the state. The venue was at maximum capacity.

We recruited the Honorable Thomas Trent Lewis of the Los Angeles County Superior Court to speak this year. He is a rock star among family law judicial officers. Judge Lewis addressed "Evidentiary Issues for Minor's Counsel," including the significant issue of how to keep children out of the courtroom. We also had presentations by Mary Kelly Persyn of the Persyn Law & Policy group. She addressed how to "Relate, Represent and Advocate for Child Trauma Survivors." Her second presentation addressed the significant issue of the secondary traumatic stress that can be experienced by minor's counsel who represent child trauma victims.

We also had an extremely entertaining and informative presentation by Cheryl Scott, the Manager of Fresno County Superior Court Family Court Services. Scott was extremely adept at using humor to educate minor's counsel on how to best interact with Family Court Services. As always, we had stellar presentations from our local team of Commissioner Childs and Gregory Gillett. I will not comment on my own performance.[1]

Fourth Annual San Luis Obispo County's Minor's Counsel Training

Given the success of our training, I can confirm there will be a fourth training program. When the last registrant left the presentation hall, Commissioner Childs, Gregory Gillett and I began planning for next year.

Collectively, we understand the Minor's Counsel Training serves a vital need for our local courts. It provides the education necessary for attorneys to carry out the thankless but incredibly rewarding task of representing the most vulnerable people in family court: the children. That is why, in February 2020, there will be a Fourth Annual San Luis Obispo County Minor's Counsel Training. ■

Third Annual SLO County's Minor's Counsel Training at The Cliffs.

[1] Although in fairness to my ego and my reputation, I did receive the following evaluation back: "Error! Main Document Only. Hi Stephen: Thank you for the excellent Minor's Counsel training; it was one of the best, if not the best seminar that I have attended for many years. Of course, your presentations were the best I heard so I guess that makes you best of the best." I have sent that attendee a free registration for 2020.

— vs. 1440 1350 — Revisiting the California Bar Exam "Cut Score"

by Dean Mitchel L. Winick

The traditional arguments in favor of maintaining an artificially high minimum passing score for the California Bar Exam seem so easy to defend. In the name of "public protection" we should require that the state only license the smartest and most capable lawyers. After all, how can "dumbing down the test" be in the best interest of the public or the profession? But these so-called policy arguments, seemingly righteous, lofty and logical, do not reflect the actual legal questions that need to be asked.

The licensing standard for passing the California bar exam should be a cut score that reflects the reasonable threshold for the "minimum qualifications for the first-year practice of law." This standard is well established by the Court and the Committee of Bar Examiners. Therefore, the legal question is whether the result of continuing to use 1440 as the minimum passing score in California meets the required licensing standard. Enforcing the appropriate standard serves a critical role in protecting the public, providing access to justice, and supporting diversity of the bench and bar.

Before we get into the details of who passes the California exam at 1440, lets do a logic check. Does anyone really believe that 60 percent of all law school graduates from across California and the U.S. and 68 percent of lawyers licensed to practice law in other jurisdictions are *unqualified* for the first-year practice of law in California?

That is what we are supposed to believe from the results of the July 2018 bar exam. Forgive me, but that sounds more like protecting a home-state monopoly than protecting the public. The 1440 minimum passing score, when compared to the national mean score of 1350, results in California denying licensure to 20 percent more examinees than every other major jurisdiction, despite the fact that the California threshold licensing standard is purportedly measuring the same entry-level qualifications as all other jurisdictions.

Furthermore, California's July 2018 examinees actually outscored the nation on the Multistate Bar Exam. As reported by the state bar, the mean scaled Multistate Bar Examination score on the July exam in California was 1404 compared with the national average of 1395. In fact, examinees on the California exam have outscored the national mean score on the Multistate Bar Exam every single year over the past 10 years. However, during this same period, the California scoring system appears to have artificially manufactured the lowest passing rate in the country.

For the California bar exam results to be valid, the argument would need to be made that practicing law in California is so unique and difficult that fewer than one-third of attorneys licensed and practicing in any other state, regardless of experience, and only 40 percent of law school graduates, despite scoring the highest MBE test scores in the country, *can qualify as a first-year lawyer in California.* Excuse the repetition, but this continues to sound more like protecting a home-state monopoly than any legitimate effort to protect the public.

So why didn't the California Supreme Court adjust the cut score back in 2017 when the same arguments were presented? In 2017, the "ask" was that the Court declare an emergency and invoke its inherent authority over attorney licensing in order to reset the cut score. In hindsight, this may have been asking the Court for too great of a leap at the wrong time. After all, the equivalent of the 1440 cut score had been in place for 60 years; there was only one recent bar exam result that dropped so precipitously to set off alarms (July 2015—43 percent pass rate); the change from a three-day to a two-day bar exam had just been introduced; the California State Bar was in the midst of being cloven in half to separate regulatory and trade association functions; and the Bar had just reported to the Court that a "focus group" study (using only 20 lawyers) determined that a cut score anywhere between 1388 and 1440 had a 95 percent chance of being valid.

In the broader context, it was likely that there was just too much going on for the Court to move precipitously, so they did as courts do—they deferred judgment on the merits and asked for more information. It is important to note that the

Mitchel Winick. President and Dean of Monterey College of Law

Court did *not* actually rule on any of the specific legal or policy challenges presented in the substantive briefs from the ABA law schools, California Accredited law schools, or others. They deferred comment, took no action and asked for more information.

Fast-forward to today and we are at a different place. There have been two more two-day California bar exams with alarming results, including the 40 percent pass rate in July 2018 that is the lowest in 67 years. The state bar has been forced to report out (in response to a *California Public Records Act* request) updated race/ethnicity exam results that give rise to serious "disparate impact" legal questions created by the use of 1440 vs. 1350. A recent Bar-sponsored performance study has refuted the argument that LSAT and UGPA admission policies were the primary cause of plummeting bar pass rates, and a separate state bar-sponsored report confirmed that there was no relationship between high cut scores and reducing the number of unethical disciplined lawyers.

Even more troubling, the recently released state bar statistics from the July 2018 bar exam indicate that if the national standard of 1350 were applied in California, the passing rate of white examinees would increase approximately by 43 percent, Asians by 64 percent, Hispanics by 68 percent and Blacks by 125 percent. This type of statistical differential by race/ethnicity for a mandatory, pre-employment state licensing exam is a textbook definition of the type of "disparate impact" that the California Courts have found unconstitutional in previous employment cases.

Protection of the public requires that California citizens have access to qualified lawyers who reflect the diverse communities of California, meet rigorous academic standards, pass a comprehensive moral character review, and pass the mandatory Multistate Professional Responsibility Exam. No one is arguing otherwise. Public protection also requires a bar exam minimum passing score that properly reflects the legal standard set by the court and meets the constitutional requirements for equal protection for all examinees under California law.

Finally, it is important to note that adjusting the minimum passing score to meet the appropriate legal standard is not "dumbing down the test." The same rigorous, multi-dimensional bar exam will continue to be used. The test will not change. However, the uncontested facts on hand—a disproportionate failure rate of otherwise qualified examinees when compared to national standards and the apparent adverse impact on protected classes—provides more than enough reason for the California Supreme Court to reconsider the current scoring of the California bar exam in order to fulfill its obligation to protect the public, provide access to justice, and support diversity of the bench and bar. ■

Mitchel Winick serves as President and Dean of Monterey College of Law, a private, nonprofit, California Accredited Law School system that also includes San Luis Obispo College of Law and Kern County College of Law. Winick is the former chair of both the State Bar of California's Law School Council and the Committee of Bar Examiners Rules Advisory Committee.

Editor's Note: In full disclosure, I teach Torts at the San Luis Obispo College of Law. The views expressed by Dean Winick do not necessarily reflect the views of the Bar Bulletin*, the San Luis Obispo County Bar Association or its Board of Directors.*

Obviously, not all attorneys agree with the arguments of Dean Winick. For an opposing viewpoint, I refer readers to articles written by attorney Steven Chung at https://lawyerist.com/california-bar-examination-score/ or https://abovethelaw.com/2019/01/the-california-bar-exam-pass-score-should-remain-the-second-highest-in-the-land/.

More importantly, if you disagree and would like to submit an article regarding the cut score, please send the article to raymondinsf@yahoo.com.

Editor's Message

As the editor of our *Bar Bulletin*, I take seriously the ethical responsibility of publishing accurate information. In the March–April 2019 issue, I wrote an article entitled "2019 State of the Courts."

In that article I wrote: "Judge Garrett told the attending attorneys that every single judge received his or her first choice of assignments. That means, said Judge Garrett, each judge has chosen *you*, like an ugly adopted child."

I want to make clear that Presiding Judge Ginger Garrett did not say the phrase, "like an ugly adopted child" in her sentence. I wrote that phrase in an attempt to add humor to the piece. When I wrote the line I thought the lack of quotation marks made it clear enough that the phrase was written by the writer, not spoken by Judge Garrett. In retrospect it is not so clear and not so funny. Most of us know Judge Garrett as a kind and thoughtful bench officer. She would never say such a thing about adopted children, even in jest.

Later in that same article I wrote about the statistics provided by Court Administrator Michael Powell. He gave statistics regarding the cases annually processed by the courts.

At the end of that statistical section, I wrote: "Of all those cases, 2,253 ended with a court trial and 35 ended with a jury trial. Criminal defense attorney Ilan Funke-Bilu had four of those jury trials."

The line regarding Mr. Funke-Bilu was not said by Mr. Powell. Again, I added that line to humanize what I considered a rather boring section on numbers. However, I failed to consider the position of the court. Except during a judicial campaign, the court cannot be perceived to favor or endorse any attorney.

I apologize to Judge Garrett and Mr. Powell for the placement of my editorial asides. I appreciate in retrospect the disservice I perpetrated upon them. I also apologize to any readers who were confused by the editorial flourishes. In the future, I shall endeavor to clearly separate fact from editorial comment.

I am committed to producing a highly professional legal publication. I want the articles to be entertaining, informative and, where possible, both. I want the articles to benefit the practicing attorneys, staff and bench officers of our community.

As a result, I appreciate any and all feedback regarding the content of the *Bar Bulletin*.

—Raymond Allen

Status of Capital Punishment in California: Can the State Kill You, Now?

by Raymond Allen

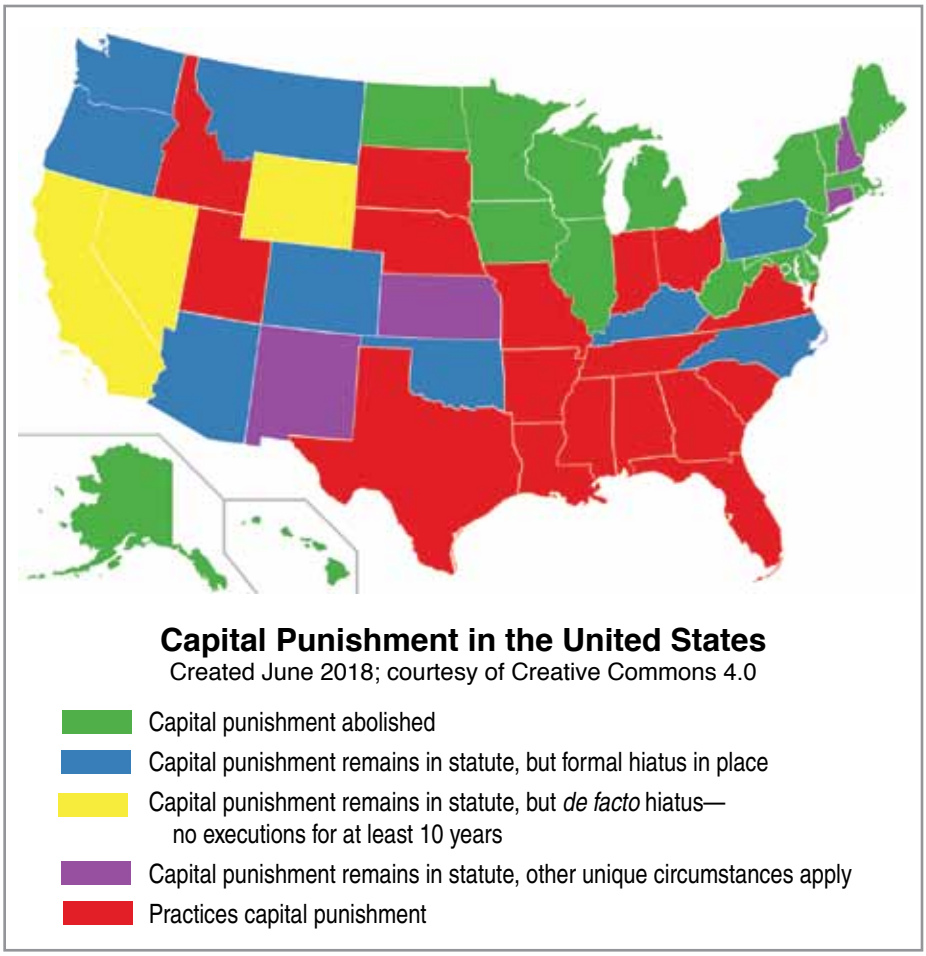
In April 2015, I wrote an article on the status of the death penalty in California with my intern, Conor Mulvaney. We gave a summary of the death penalty's history in California, noting that there had been no executions since 2006.

We explained that the reason was two-fold: one, a challenge to the protocols regarding administration of the lethal drugs necessary to kill someone had been sustained by Marin County Judge Roy Chernus; and two, the length of time between sentence and the execution of the death penalty was deemed a cruel violation of the Eighth Amendment by United States District Court Judge Cormac Carney (*Jones v. Chappell*).

It was Lao Tzu or Jon Bon Jovi who once said: the more things change, the more they stay the same. Much has changed since 2015. Conor Mulvaney is now an attorney practicing civil law in San Diego. But much remains the same. The State of California still cannot kill anyone currently sitting on Death Row.

At this juncture, there are three main hurdles affecting execution of convicted inmates.

The first hurdle is related to the protocols necessary to administer the deadly injection. In June 2015, the United States Supreme Court held that the sedative midazolam may be a part of a lethal injection protocol. In California, the California Department of Corrections and Rehabilitation (CDCR) agreed to file with the Office of Administrative Law (OAL) draft regulations of its lethal injection protocol for review pursuant to the Administrative Procedures Act (APA).



The OAL twice disapproved CDCR protocols to implement the lethal injection process. OAL said the regulations did not meet the standards set forth in Government Code section 11349.1 and APA requirements.

In November 2016, the voters, tiring of the delay in implementation of the protocols and wanting the resumption of the death penalty, passed Proposition 66, the Death Penalty Reform and Savings Act. That law, which took effect in October 2017, exempted the state's execution standards from the Administrative Procedure Act.

Notwithstanding Proposition 66, executions remained in a stayed posture. In March 2018, Don Thompson wrote, "Battle to Resume Death Penalty in California Clears First Hurdle." In that article he noted that although Proposition 66 passed, the injection protocol continues to

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face considerable opposition. Three Marin County lawsuits regarding the Constitutionality of the injection methodology were pending. In addition, inmate Jarvis Jay Masters, who was convicted in July 1990, and the nonprofit organization *Witness to Innocence*, challenged the new regulations on the grounds that the injection process is inherently cruel and unusual.

The second hurdle was another Eighth Amendment challenge. The duration of time between sentence and execution, Judge Cormac Carney held, was cruel and unusual. His successor, Judge Richard Seeborg, is now responsible for deciding if the new appellate process is any more humane than its predecessor. Executions remain stayed on Eighth Amendment grounds pending the outcome of *Morales v. Kernan*. Considering that 737 inmates await the execution of their sentence, some from as far back as the late 1970s and early 1980s, it is hard to imagine that a federal judge will soon declare that the requirements of the Eighth Amendment were met for them.

Recently, a third hurdle, a moratorium, has stifled Proposition 66. On March 13, 2019, Governor Gavin Newsom announced that he will not carry out executions of inmates during his time in office. Executive Order N-09-19 stated that "whereas California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer" and whereas the death penalty was "unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation" an "executive moratorium shall be instituted."

The executive moratorium simply means that no death penalty will be enforced during Newsom's administration. It does not mean that the death penalty is repealed. It also does not mean sentences are commuted. It does not mean prisoners are freed.

Newsom also repealed the new lethal injection protocols that were again before the OAL. This act might have the greatest impact considering how difficult it has been for the OAL and CDCR to generate protocols.

The final part of the executive order has the most visual impact: the executive order required that the Death Chamber at San Quentin be closed. As a consequence, once again, it must be concluded, that although the State of California has the death penalty, the State of California cannot kill you. Let's see where we are in another four years.[1] ■

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[1]. Ironically, in the interim between my first article and this update, 23 death row inmates have died in prison. Most died of natural causes, two died of suicide, two died of acute drug toxicity, some were killed by other inmates, and several deaths are pending determination of cause.

Only one California inmate, Alfredo Rolando Prieto, was executed. Prieto was convicted in California for a 1990 rape and murder. DNA later linked him to a 1988 double homicide in Virginia. Virginia sought and was granted extradition. In September 2015, he was executed after exhausting his appeals.

Pros & Cons of Allowing Impaneled Jurors to Ask Questions

by Stephen F. Wagner

In this article I will address the issue and trending practice of allowing impaneled jurors to ask questions during the presentation of evidence. The current state of the law, as endorsed in our California jury instructions (both civil and criminal), permits impaneled jurors to ask questions during the presentation of a case. Another authority for this practice is *California Rules of Court*, Rule 2.1033.

I am a proponent of allowing juror questions, but feel that strict rules of engagement must be in place to ensure a fair trial. My goal here is to address some of the pitfalls and to impart some practice tips.

In criminal cases, the power source, or authority, for this practice can be found in CALCRIM 106, entitled, "Jurors Asking Questions." In civil cases, the power source, or authority, can be found in CACI 112 and 5019, entitled "Questions from Jurors." Most trial judges will include these instructions in the "pre-instruction" phase, meaning that the sitting jurors are empowered with this knowledge before the presentation of evidence. I chose the word "empowered" so as to cater to my theme, which is one of caution and control.

CALCRIM 106 reads as follows: "If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through the bailiff. I will discuss the question with the attorneys and decide whether it may be asked. Do not feel slighted or disappointed if your question is not asked. Your question may not be asked for a variety of reasons, including the reason that the question may call for an answer that is inadmissible for legal reasons. Also, do not guess the reason your question was not asked or speculate about what the answer might have been. Always remember that you are not advocates for one side or the other in this case. You are impartial judges of the facts."

CACI 112 reads as follows: "If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.

"Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

"Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin."

CALCRIM 106 is not a "required instruction." However, it is routinely given. The "Bench Notes" state "[T]his instruction may be given on request." This means that it should set the stage for a pretrial discussion centered on the appropriateness of this practice. If one party requests that CALCRIM 106 or CACI 112 be given, then a pretrial discussion should ensue. In other words, trial counsel has an opportunity to address this pretrial.

It is interesting to note that the Cal Rules of Court address "Juror Questions" as follows: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury." (See, *Cal. Rules of Court* 2.1033)

The value and importance of marshaling the process of the submission of questions by jurors, the fielding and vetting of questions and the issuance of cautionary instructions about the process simply cannot be overstated. Trial counsel should expect that CALCRIM 106

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or CACI 112 will be given, especially in light of the "should be given…" language residing in the Cal Rules of Court provision, which really reads like a directive.

Although there is built-in cautionary language in these instructions, which does appear to place jurors on notice that not all of their questions will be asked, trial counsel must be prepared to address the matter of protocol in pretrial motions and pretrial bench conferences. This area of concern is well within the ambit of pretrial motions (Motions *In Limine*). The overarching goal of trial counsel must be to ensure that jurors do not assign any blame, fault or suspicion on trial counsel if, and when, their questions are not asked. CACI 112 appears to address this concern in a more direct fashion, stating, "[B]ecause the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked."

A Few Practice Pointers

In pretrial moving papers, consider addressing the following topics:

- How the jury should be instructed on the mechanics of asking questions; including when potential written questions should be submitted and how to handle a large volume of questions.
- Seek permission to broach this topic in jury selection (active "voir dire")
- Insist the instructions make clear that the judge makes the call and serves as the gatekeeper.
- Insist the vetting of questions submitted by jurors be conducted on the record.
- Insist the actual written questions be preserved as a part of the trial record.

The above suggestions or pointers are what I would call "party neutral," meaning that both sides in a contested matter should equally recognize the value of these preemptive strategies. As a zealous advocate neither attorney should ever risk their case being usurped, by a misguided jury. There should be universal and bipartisan concern over this issue. The absence of filtering measures and protocols could easily and unjustly impact the right to a fair trial.

Scenarios Highlighting the Need for Swift Intervention

Setting: Plaintiff's Case In Chief

Assume that you are conducting the direct examination of a percipient witness to an automobile collision and that you have moved methodically through the juror rapport and foundation phase. You have deftly created great anticipation and you are just about to ask the witness to recount her/his observations and, boom, a number of written questions are passed up to the jury rail or maybe the bailiff is flagged down by a juror.

Setting: Defense Cross-Examination of Same Percipient Witness

Assume that you are conducting cross-examination and you've got the witness on the ropes. You're getting concessions and you've exposed inconsistencies. You're actually channeling *My Cousin Vinny* or truly having a "Perry Mason" moment, and, boom, a flurry of written questions is passed forward.

I chose these two scenarios because they illustrate what I call "momentum buster" moments. These two examples also serve to highlight the importance of caution, control and the need for a set protocol. Moreover, both scenarios could easily unfold in either a criminal or civil trial setting.

Just think of the chaos and disruption that could result if there were no pretrial discussions or rules of engagement in place when written questions are passed forward by jurors. It is my position that in the above two examples, counsel should not be

forced, urged or directed to field the juror's written question(s) immediately or on the spot. Instead, counsel should be permitted to continue the direct examination and wait for an appropriate time for a recess. This is when the vetting, per CALCRIM 106 or CACI 112 should occur. Although both CALCRIM 106 and CACI 112 appear to be in harmony, at least to the extent that both address the vetting process, CACI 112 takes better steps to explain that the judge makes the call. Trial counsel must see the value of this safety measure. Remember, you do not want members of the jury to think that you "round-filed" one of their probing questions.

Conclusion

Each one of the pointers can be distilled down to the need to manage the expectations of each impaneled juror relative to their ability to submit written questions. It is best to prepare for trial as if CALCRIM 106 or CACI 112 will be given. By resorting to some of the above practice pointers you should be able to ensure that rules of engagement are firmly in place. On this topic my mantra is "safety first." ■

Editor's Note: Stephen F. Wagner, Deputy District Attorney, San Luis Obispo County, is a subject matter expert in Vehicular Homicide cases. He has served as an Adjunct Professor at Monterey College of Law and San Luis Obispo College of Law since 2003. He was the 2018 Mother's Against Drunk Driving (Southern California Chapter) "Prosecutor of The Year" and he is a two-time recipient of the "Outstanding Faculty Award" (Monterey College of Law).

Have you met…?

Jessie Hancox

Jesse Hancox is an associate attorney with Sullivan Law Corporation. He focuses on Estate Planning and Business Transitions. Prior to moving to San Luis Obispo County, he worked in Ventura County.

Hancox earned his Juris Doctor next to the beaches of Malibu at Pepperdine University School of Law in 2013. He earned his Bachelor's degree in Psychology at California State University Northridge in 2009, graduating cum laude in only two years.

The Hancox family moved from Thousand Oaks to Templeton in summer 2018, after a decade's worth of family vacations at Lake Nacimiento.

When not at his office near the sea in Los Osos, he and the family explore the beaches and fresh air throughout the Central Coast. ■

Note

If you are a new member of the San Luis Obispo County Bar Association and would like to be introduced to others in the organization, please contact the *Bar Bulletin* editor for inclusion in an upcoming issue.

Thanks for Pardoning Our Dust… We Reopened May 1st

by Joseph Kalet

The San Luis Obispo County Law Library began a remodel February 13, 2019.

During the remodel, we moved temporarily to the third floor mezzanine of the County Courthouse. Upstairs in our temporary location, there were more than 300 hardcopy books, including Rutter Group practice guides, CA. Forms of Pleading and Practice, Miller & Starr, NOLO guides, CEB practice guides and more. In addition to the hardcopy books, there were four public computers with free access to WestLaw-Next, CEB and the Internet. Computers and a printer remain available for public use.

The remodeled law library opened May 1 in conjunction with Community Law Day. Community Law Day events are conducted across the country to help youth and adults understand how the law keeps us free and how our legal system strives to achieve justice. Every year, since 1958, the President of the United States has issued a Law Day proclamation recognizing the importance of this day.

Now that we've reopened, the law library will feature Mandatory Continuing Legal Education (MCLE) events for attorneys and paralegals, a weekly "Lawyers in the Library" Legal Resource Clinic (LRC), and a conference room available for meetings or depositions. We also plan to present lectures on topics of interest to the public and the local legal community. Further, the law library will possess an updated catalogue of books.

Finally, the San Luis Obispo County Bar Association Board of Directors will consider sponsorship/naming opportunities for furniture and equipment. We are very grateful to have already received some outstanding donations from the Baltodano Law Firm. We are still hoping for, amongst other items, a contribution of a large-screen TV/wall monitor in order to hold Skype or online teleconferences and meetings.

Please contact the Law Library staff at (805) 781-5855 or lawlibrarian@slocll.org to make a financial or equipment contribution. Your name or the name of your firm may receive a permanent place in our law library.

The Law Library staff truly appreciates all the patronage and support from the local legal community. We strive to reciprocate by providing an important service to the public and the legal community. Please feel free to contact the Law Library staff with ideas or suggestions so we may improve your Law Library experience. Thanks again for all your support! ■

Bar Bulletin Editorial Policy

Contributions to the *Bar Bulletin* must be submitted electronically in Microsoft Word format directly to the Editor at:

raymondinsf@yahoo.com

Footnotes will not be published; any essential notes or citations should be incorporated into the body of the article. Contributors are encouraged to limit the length of their submitted articles to 2,500 words or less, unless the article can be published in two parts in successive issues.

The *Bar Bulletin* is published six times per year:

- January–February
- March–April
- May–June
- July–August
- September–October
- November–December

To ensure consideration for inclusion in the next scheduled edition, articles, advertisements and payments must be received by the 25th of the month, as stated at right.

The *Bar Bulletin* reserves the right to reject or edit any contributions. By submitting contributions for publication, contributors consent under this policy to the editing of their work, the publication of their work and the posting of their work online. Contributors must include an e-mail address and/or telephone number, as they may be contacted during the editorial process.

Your submission of photographs to the *Bar Bulletin* authorizes their publication and posting online. All photographs must be submitted in .jpg or .pdf format with a resolution of not less than 300 dpi via e-mail or, for large files, WeTransfer. Please include the photographer's name and that you have permission to use the photograph.

The San Luis Obispo County Bar Association does not pay contributors for their submissions.

Opinions expressed in the *Bar Bulletin* do not necessarily reflect those of the San Luis Obispo County Bar Association or its editorial staff. The Bar Bulletin does not constitute legal advice or a legal resource and must not be used or relied upon as a substitute for legal counsel that may be required from an attorney.

Bar Bulletin Advertisement Policy

All advertisements in the *Bar Bulletin* must be submitted in .jpg, tif or .pdf format with a resolution of not less than 300 dpi. Flyers or announcements for the opening, closing or moving of law practices, upcoming MCLE programs or other events put on or sponsored by organizations other than the San Luis Obispo County Bar Association are considered advertisements, and therefore subject to this policy and to all applicable advertising rates.

The cutoff dates for accepting advertisements, payments and articles are as follows:

January–February issue deadline	11/24
March–April issue deadline	1/24
May–June issue deadline	3/24
July–August issue deadline	5/23
September–October issue deadline	7/25
November–December issue deadline	9/23

Information on advertisement sizes and rates can be found online at **www.slobar.org.** All advertisements must be prepared prior to publication. Contact Nicole Johnson at (805) 541-5930 regarding methods of payment accepted.

2019 Bar Bulletin
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HAVE AN ARTICLE FOR THE COUNTY BAR ASSOCIATION'S BULLETIN?

Do you know that writing an article for the Bar Bulletin counts toward CLE credits? Please e-mail article ideas or articles for consideration in Word format to Raymond Allen at raymondinsf@yahoo.com.