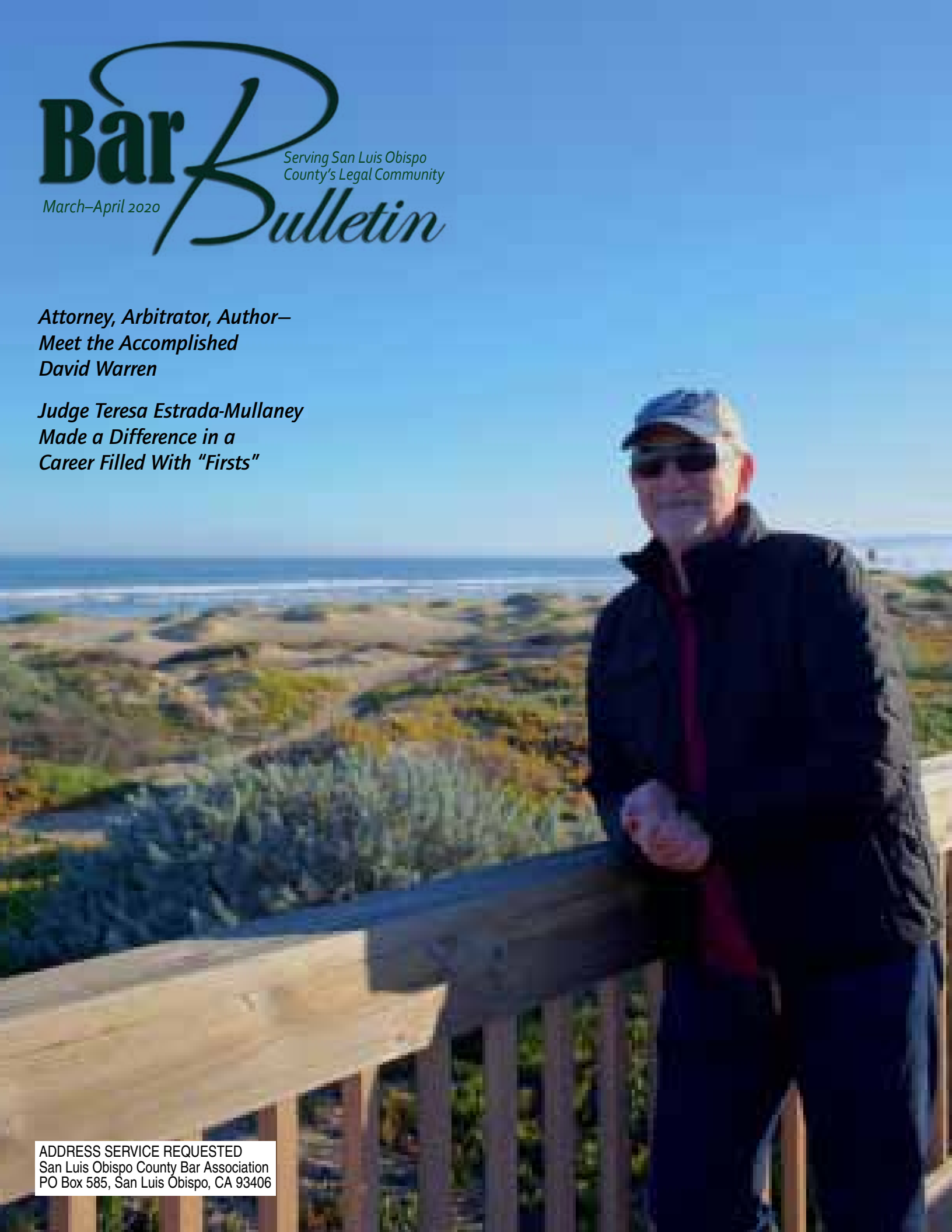
Bar Bulletin
Serving San Luis Obispo County's Legal Community
March–April 2020

Attorney, Arbitrator, Author– Meet the Accomplished David Warren

Judge Teresa Estrada-Mullaney Made a Difference in a Career Filled With "Firsts"



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San Luis Obispo County
Bar Bulletin

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Cover – Attorney David Warren. Photo by Christine Joo.

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President's MESSAGE

by Stephanie Barclay

Vacations & Membership Bring You Benefits…

I am back from Thailand feeling jet lagged but recharged! For the first time in more than six years, I completely disconnected while on vacation. I had no contact with work from the moment I left the airport until the moment I returned to the airport—12 glorious days.

I am one of the few fortunate attorneys who actually loves their job, but it is demanding and neverending, and I have never had good work-life boundaries. It's a problem and I know it. I was determined to disconnect this trip and I succeeded. I turned off all calendar and email notifications, did not set up international wifi or roaming on my cell phone and left my office in the office. I trusted my co-workers to handle everything and I knew I would have a huge stack of work waiting for me when I returned, but no one would be harmed by my absence.

I highly recommend that everyone do this. I returned feeling like I actually had a vacation and could be a better mom to my kids and advocate for my clients. Plan a vacation now. I'm already thinking about my next trip.

The monthly bar meetings are an essential part of bar participation. I am very grateful to San Luis Obispo Bar Vice President Joe Benson for leading the State of the Courts meeting in January. I heard it was an excellent presentation and I am sorry I missed it.

I am really excited about our March 19 speaker, Madeline Howard, who is senior staff attorney from the Western Center on Law & Poverty, a statewide advocacy organization with offices in Los Angeles, Sacramento and Oakland. She comes to San Luis Obispo to discuss changes in housing law (and in case you've been asleep for the past few months, there are a lot of changes).

Howard is the organization's expert on fair housing litigation, unlawful detainer appeals and issues impacting tenants in foreclosed homes. She partners with legal services attorneys on impact litigation to challenge discriminatory housing practices and preserve affordable housing. She travels around the state discussing housing law and the California Tenant Protection Act of 2019.

Then, April 16, Ventura-based trial attorney Matthew Haffner presents "Winning from the Beginning—Jury Selection and Opening Statements." We are lucky to have these out-of-town experts present to us, and I hope you all can take advantage of these opportunities.

On January 25, while it was 74 degrees in Avila Beach, your board of directors met for our annual "retreat" (meeting) at the lovely conference room of Adamski Moroski Madden & Green, LLP to discuss our plans and goals for 2020. At the meeting, a board member shared that some attorneys had questioned the benefit of joining the San Luis Obispo Bar Association.

It took me a few minutes to understand the question and articulate the benefits because, for me, it has always been a given that I would be a member of the local bar where I practice law. I want to work in a community with a strong active bar association that provides networking and continuing education opportunities.

Let's face it, being a lawyer is a tough job, so it's nice to see friendly faces in our court rooms and conference rooms. In order to have those opportunities, it requires that our bar association have dues-paying members. If you want continuing education opportunities, summer socials, holiday parties, specialty MCLE sessions and other networking opportunities, join the bar association because we depend on membership and participation.

And if that's not enough of a reason, we also will be increasing our non-member rates to attend bar events in order to provide further incentive to join. Please check out our new and greatly improved website, www.slobar.org, to sign up for events, find attorneys in specialty areas and access past issues of our Bar Bulletin electronically.

You can update your membership on the bar's website, sign up for events there, and it's a great way for future clients to find you. I use the extended search feature on the website all the time when making referrals.

In fact, you should sign up for our next MCLE now while you're thinking of it. I look forward to seeing you March 19 at the Madonna Inn. ■

Editor's Message

by Raymond Allen

Putting pen to paper is perhaps the hardest task for any lawyer. Oral advocacy is a piece of cake once you have clearly and concisely articulated your thoughts in a brief or motion.

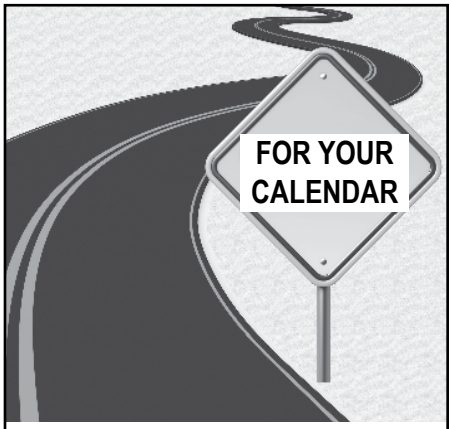
Because writing is admittedly hard work, few members are eager to spend their precious leisure time toiling at the keyboard. It would not be unreasonable to weigh the burden of writing against the probable benefit and come out on the side of gardening, hiking or surfing.

Many a writer has waxed poetic about the intrinsic value of writing. Clearly, for those writers, writing is an existential endeavor. For others, some real world payoff might be needed to motivate. In that vein, I remind all members that writing an article is another avenue for Minimum Continuing Legal Education (MCLE) credits.

Writing is a form of self-study according to MCLE Rule 2.83: A licensee may claim up to half the credit hours required in a compliance period for (A) completing MCLE activities for which attendance is not verified by a provider and the MCLE activities were prepared within the preceding five years; (B) taking an open- or closed-book self-test and submitting it to a provider who returns it with a grade and explanations of correct answers; or (*C) authoring or co-authoring written materials that (1) have contributed to the licensee's legal education; (2) have been published or accepted for publication; and (3) were not prepared in the ordinary course of employment or in connection with an oral presentation at an approved MCLE activity*.

One MCLE credit requires one hour of writing. The topic may be anything that "contributes" to your legal education. You are almost guaranteed publication in the *Bar Bulletin*. Although this is a professional publication with high standards, I am always seeking new content. Finally, the article you submit cannot be work product or a rehashed presentation.

So, if you are tired of buffet luncheons and are interested in garnering up to 12 MCLE credits, perhaps it *is* time to put pen to paper. Please email your articles to raymondinsf@yahoo.com. ■



BAR BULLETIN DEADLINES for advertisements, payments and articles—

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July/August Issue
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January/February 2021
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March/April Issue
January 25

State of the Courts Reviewed in January

by Raymond Allen

Photos courtesy of Christine Joo

The Honorable Jacquelyn Duffy has succeeded the Honorable Ginger Garrett as Presiding Judge of the San Luis Obispo Superior Court.

On Thursday, January 16, 2020, Judge Duffy presented the State of the Courts address at the Madonna Inn to the local Bar. A crowded room heard Judge Duffy explain the new court assignments for the judges. She also provided some statistical information regarding the operations at the courthouse.

According to Judge Duffy, criminal filings have decreased while jury trials have increased. In 2018, there were 33 jury trials; in 2019, there were 43 jury trials. This paradox might be explained by the Early Disposition Program (EDP) Court. Judge Duffy speculated that the ability of EDP attorneys to quickly address so many cases gave litigation attorneys more time to focus on difficult, serious and unresolvable cases.

Civil filings, domestic violence filings and juvenile filings all increased last year, which kept local attorneys and court staff very busy.

Judge Duffy also discussed some budget issues. The governor's proposed budget contains a 3 percent increase in funding for the courts. Also, the loss of funds caused by indigent criminal defen-

Honorable Jacquelyn Duffy (left) presents Honorable Ginger Garrett a plaque in appreciation for her service as Superior Court Presiding Judge. Below, Michael Pick receives thanks for his year as Bar Association President.

dants' inability to pay fines and court fees will be offset in the governor's budget.[1]

Before turning the microphone over to Court Administrator Michael Powell, Judge Duffy praised the court staff as "the backbone of the court." We are grateful, she said "for everything you do…you are valued and appreciated."

Michael Powell also praised the modest and hard-working court staff. He went through the contributions of each staff member so that all the attorneys understood how important these individuals are to the smooth operation of the courthouse—structurally, economically and administratively.

Powell then discussed projects that are being pursued by the court. He said the governor's proposed budget calls for approximately $2 billion in court construction. In the proposed budget, there is $180 million designated for a trial court capital outlay. A new trial court building is being planned for construction with a tentative completion date for the end of the 2023-2024 fiscal year. Currently, this capital outlay and construction are in the planning stages.

Another project is the digitization of the old microfiche and microfilm documents. This project should take two years. It will be funded by a grant from the judicial commission.

In the end, it appears that the State of the Courts is good. The judicial officers, the court administration and the entire court team seem poised for an amazing new year. ■

[1] *People v. Duenas* 30 Cal.App.5th 1157, 242 Cal.Rptr.3d 268 held that imposing court assessment fees on indigent defendants under the Government Code 70373 and Penal Code 1465.8, and restitution fines under Penal Code section 1202.4(b), is unconstitutional.

Back rows, from left, some of the San Luis Obispo County Bar Association LRIS Committe members: Josh George, Joe Benson, Michael Pick, John Hosford. Trevor Creel. Foreground, from left, SLO Bar Association Executive Director Nicole Johnson, LRIS Executive Director Kerrin Hovarter.

Nicole Norris and John Fricks recruit volunteers to be Mock Trial scorers.

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James Murphy Receives 2019 Trial Lawyer of the Year Award

by Jacqueline Frederick

At the Tort and Trial Annual Review seminar February 6, **James Murphy** received the Trial Lawyer of the Year Award for his work on the *Williams v. Expert Trucking, LLC* case.

For 2019, three nominations were submitted for the annual award to the Central Coast Trial Lawyers Association. Case synopses follow.

Anthony Kastenek and Ranger Wiens of the Harris Personal Injury Lawyers, Inc. firm were nominated for their outstanding verdict in the case of *Shelley v. Ridenour* that was tried in Santa Barbara Superior Court. This case involved a motor vehicle accident with a plaintiff who had suffered similar injuries to her neck and back six months earlier in a slip and fall accident, had a history of mental and physical health issues and a checkered employment history.

Despite these obstacles and an aggressive defense including four expert witnesses to contradict the plaintiff's case, the plaintiff was awarded a verdict in the amount of $264,930.71, which exceeded Plaintiff's Code of Civil Procedure section 998 demand in the amount of $215,000; entitling plaintiff to an additional $60,000 in costs. The defense settled post-trial for $319,000.

James R. Murphy and John Barron were nominated for a win at trial in a case tried in Van Nuys Superior Court, *Williams v. Expert Trucking, LLC.* In the case, a father and son were driving their separate trucks hauling tractors on Highway 1 near Lompoc. A box truck crossed the yellow lines and sideswiped the father's trailer and hit the son's truck head-on, resulting in the cab of the truck being propelled down a 40-foot ravine. The father observed this and believed his son had perished in the crash down the ravine.

The jury awarded the father $1,259,650.50 for his back injuries and general damages. The jury awarded the son $3,272,795.28 for his injuries, economic damages and general damages.

James R. Murphy invested more than $250,000 on behalf of his client and overcame an extremely strong defense where the top pre-trial offer by the defendant was a mere $20,000. The early Code of Civil Procedure section 998 offered to plaintiffs will yield close to another $1 million in interest and trial costs.

Jacqueline Frederick was nominated for the case of *Nodal v. Cal West Rain, Inc*. for a case she took on appeal and won. The jury, after a six-week trial, gave a defense verdict in the Paso Robles branch of the San Luis Obispo Superior Court before the Honorable Judge Donald Umhofer.

The case involved the pressurized explosion of a large section of irrigation pipe that blew off of a vineyard irrigation system striking the plaintiff in the head and propelling his body about 40 feet with the force of the pressurized water. The plaintiff sustained traumatic brain injuries and injuries to his back and neck.

Jacqueline Frederick invested more than $300,000 in the case. Immediately after the verdict was read and the jurors dismissed, Frederick and her associate, Sunny Hawks, who ably served as second chair during the trial, spoke to most of the jurors.

During these discussions and further interviews with jurors by Hawks, it was learned there was a rogue juror who had been untruthful during voir dire, violated his oath and convinced the jurors based on his own alleged experience to disregard the expert testimony presented at trial on liability.

Motions for JNOV and a new trial were denied by Judge Umhofer, and the case was appealed with the assistance of appellate attorney Neil Tardiff. The Appellate Court overturned that decision and has granted plaintiff a new trial.

The decision is a published decision *Nodal v. Cal West Rain, Inc*. 37 Cal. App. 5th 607, published on July 17, 2019, authored by Justice Kenneth Yegan. The opinion addresses issues involving "rogue jurors," juror misconduct and the grounds for a new trial based on such misconduct.

This is the first time since the 1980s that a published decision has come from a San Luis Obispo case, and it has already been used and cited in other cases. ■

Saying Yes to Your Heart's Desires—

Even When You Cannot Justify Them With Logic

by Kara Stein-Conaway

As I write this, I'm having a "pinch me" moment. I'm flying from Sydney, Australia, to Cairns, Australia, to visit the Great Barrier Reef. On my left, my three-year-old son Cameron is snuggled up, sleeping soundly and resting his sleepy head on my left thigh. On my right, my seven-year-old son Jackson is snuggled up, sleeping soundly and resting his sleepy head on my right thigh. Their dad (my husband), Jason, is also napping in his seat across the aisle. I am on an amazing adventure with my husband and my sons.

Having this adventure with them was a dream that I almost didn't allow myself to turn into a reality. Several years ago, I almost allowed my fear to deter me from realizing this beautiful dream that I am now living.

Before I became a mother, I was so scared that I wouldn't be good at it. I was scared that my career-focused nature would lead me to neglect the babies that I had not yet even conceived but that I knew I wanted.

I remember attending a retreat in 2010, where one of the activities was to participate in a trust fall. We climbed a ladder and stood on top of a platform. Before we fell backward off the platform and into the arms of the people below, we verbalized a fear that was holding us back in our lives, something that we needed to release.

For me, it was the fear that I wouldn't be a good mother.

Where did this come from? Why was my fear of becoming a mother—and not excelling at it—so strong?

It was the type of fear that I felt in my throat but also in my heart. I worried that since I wanted to have a career and wanted to make my mark on the world through my work as a lawyer and an advocate, my future babies would suffer from neglect. I feared that I wouldn't give them enough of myself.

I asked myself if it was fair to bring children into the world when I knew that I didn't plan or even aspire to be a stay-at-home mom. I had a stay-at-home mom, so I think part of my fear was that I didn't know what having a career while being a mom would look like. I didn't have an example for that.

I appreciate that there are many women who, like my own mom, choose to stay at home with their children as the next stage of their lives once they had children. But, that wasn't what I wanted for myself. I didn't want to stop my career as a lawyer. The life I envisioned for myself involved me having a career where my professional world would be constantly evolving, where I would be learning new things and facing new challenges, and where I would be continually growing.

The life I was leading as a Los Angeles County Deputy Public Defender during this time was certainly all of those things. I felt fueled and challenged by the work. It was an honor to serve the clients. New legal issues presented themselves daily. I remember in my first year of practice, after talking to jurors after a trial, feeling like I just couldn't believe that I was lucky enough to get paid to do this work.

At the same time, and despite my palpable fears, there was something huge missing in my life. I knew that I wanted to be a mother. I wanted to hold my babies. I wanted to help them grow. I wanted to share adventures with them. I wanted to see the world through their eyes.

My career desires versus my motherhood desires were a challenge that I could not work out as an academic exercise.

This was one of the moments in my life when I channeled my bravery. I felt the fear, and I chose to do it anyway. I followed my heart instead of letting my inability to logically solve this problem stop me from pursuing something that was so clearly calling on my heart.

In 2012, two years after I fell backward for the trust fall, and four years after becoming a lawyer, I fell deeply into motherhood and into love with my first child.

On November 8, 2012, I gave birth and gave life to my precious baby, Jackson.

When I met him and Iooked into his beautiful eyes, I knew I had arrived. My heart expanded, and I felt totally at peace. The anxiety from before was no longer with me in that moment. I knew that I was exactly who he needed.

I recently reflected on how motherhood has transformed me as I snuggled my then six-year-old Jackson at bedtime on the night before his seventh birthday. I breathed him in, just as I had done on November 8, 2012, when I had met him for the first time.

Seven years ago, I was me, but there was a part of me that had not yet come to life. Seven years ago, I was not yet a mother. As I celebrated Jackson's birth and as I said goodbye to my six-year-old, and hello to my seven-year old, I also honored and celebrated my own ever-expanding capacity for love.

My second son, Cameron, joined our family March 28, 2016. Every

morning, he nestles his sweet little body against me for a morning snuggle. I feel his precious three-year-old chest rise and fall, and with each breath, love fills me and breathes out of me.

Recently, when I got home from work one night, dinner was over, teeth were brushed, and my big kid, Jackson, had already fallen asleep.

I don't like to miss sharing the bedtime ritual with my children. The bedtime ritual involves me getting to hear about their days and getting to nurture them with stories and snuggles. It's a time of re-connection and it feels sacred.

Staying organized, completing work ahead of the deadlines, and maintaining focus are some of the measures I put in place to help me avoid missing bedtime with my children. Even with all of my best planning, I sometimes miss the bedtime rituals and I sometimes arrive home after one or both of my children are already asleep.

When I arrive home from work after one or both of my children are already asleep, those fears I had from before having children resurface. I feel like I am neglecting my children. I feel like I'm not giving them enough of me. I try to ignore those feelings and distract myself from those feelings, but honestly, those are the feelings that come up for me.

So, on this particular night, after being with those feelings of inadequacy, having arrived home after Jackson was already asleep, I turned my focus to my baby, Cameron, who was awake and eager for my attention.

Cameron picked out his book and curled up next to me on the couch in his room. We read the book, and when it was done, the following conversation took place:

Cameron: "Mama, you at work all day?"

Me: "Yes."

Cameron: "You looking at me and my pony picture at your office?"

Me: "Of course. I love the pony picture of you at my office, Cameron. I'm a lucky mama that I get to see your picture at my office and come home after work and snuggle with you, too."

Cameron: "I'm a lucky Cameron that you're my mama."

Even though on this night the time I shared with Cameron at bedtime was short, it was precious and the words he spoke to me were the kindest words he could have used. I was feeling inadequate and he reminded me of something that I knew but had momentarily forgotten —I am enough.

Becoming Jackson and Cameron's mother expanded my heart in a way that not only increases my capacity for loving my children but also increases my capacity for loving others and for loving myself.

Becoming their mother inspired me to open my own law firm, which allows me to design a work schedule so that I can be there for my clients and also be there for my children. Since becoming a mother, I have become a more compassionate human being. As a business owner, I get to create a culture of kindness and empathy for my clients that I know serves them well during difficult times in their lives.

This doesn't mean that there won't be some late nights at the office. There will be those nights. Knowing that I get to contribute to the world in a way that fuels my heart is also something special that I get to model for my boys. Showing them that I can be their mother and be present in their lives while also having a career that gives me purpose in a different way is important to me. I see myself as a multi-dimensional woman, and I want them to see all the possibilities that they have in their lives, too.

As I celebrate the kind and joyful human beings I am privileged to mother, I also honor and celebrate my own ever-expanding capacity for love and kindness.

Sometimes we just need to take the leap and trust that we'll figure it out.

Cameron (3), Jackson (7), Jason and Kara Stein-Conaway on their recent trip to Australia.

Imagine the beauty in the world, in ourselves and in others that is available to be awakened by following our hearts, and by taking the leap even when it cannot always be justified by logic.

Is there something calling on your heart that you can say yes to, even if you can't justify or figure it out with logic? I challenge you to take a step toward it and see where that takes you. You can probably find a way to make it work in conjunction with your career, like I did.

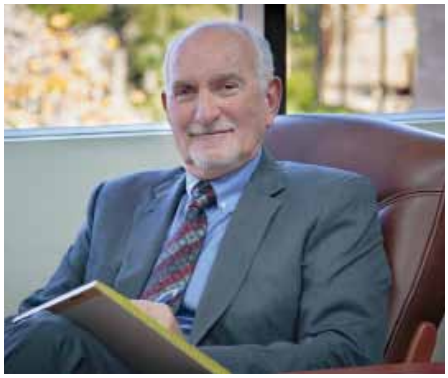
I fully believe that as lawyers, when we are taking care of ourselves, our families, and those we love, it's from that space that we contribute most meaningfully to the world and to the lives of our clients. It's a win-win. ■

Editor's Note: Kara Stein-Conaway and Jeff Stein practice criminal defense together at the Stein-Conaway Law Firm, P.C. in San Luis Obispo; visit www.steinconawaylaw.com. This is the second in a series of articles designed to explore the intersection of women, business, law and family.

Creative Arbitration—

Put These Ideas to Work for Your Clients

by David P. Warren



As an attorney representing parties for the bulk of my career, I arbitrated many matters as an advocate for both plaintiffs and defendants. Three years ago, I stopped representing clients and have been exclusively working as an Alternative Dispute Resolution (ADR) provider.

There have been numerous articles written about the advantages and disadvantages of arbitration in various contexts, but for purposes of this article, we assume that you are proceeding to arbitrate, either because there is a pre-dispute arbitration agreement or based upon an election to arbitrate once the dispute arises.

My experience over the years has provided tools for conducting arbitrations in a streamlined and often creative manner. What do I mean by creative? I mean it is often overlooked that the proceeding can be tailored to specific issues and needs of a case.

Arbitration is a creature of contract. In some instances there is a pre-dispute agreement that calls for arbitration of disputes. These days, such provisions are common in employment matters, business, and commercial disputes and real estate and construction matters. If there is such a pre-dispute agreement, the parties sometimes forget that they still control with whom and in what manner the arbitration is carried out. If there is no pre-dispute agreement, the parties have a blank canvass and can design the proceeding to meet their needs.

In either case, the parties and their counsel control who will arbitrate the matter. If there is an organizational provider or specific arbitrator designated that counsel do not favor, they can agree to make a change. The parties can select an arbitrator who is right for their matter and whom they believe will give both sides a fair shot. Likewise, the parties can determine the location for the hearing and can select the rules that will govern the process (e.g. Warren Mediation, Arbitration and Investigation Arbitration Rules, AAA Rules or JAMS Rules).

In the process of moving the case toward hearing, the nature and extent of permissible discovery can be specified by agreement or, if it remains to be determined, structured in the first scheduling conference with the arbitrator. The arbitrator's goal in conducting such a call is to define discovery parameters that are consistent with allowing the parties what they need to properly prepare for the hearing, while expediting the process as much as possible.

As the parties prepare for the hearing, when a discovery dispute arises, telephonic or in-person hearings can be promptly scheduled, argued and the dispute resolved. Ultimately, if the case does not settle, most arbitrations are set for somewhere between one day and two weeks, depending on the issues to be addressed and the extent of percipient and expert testimony and other evidence to be introduced.

One of the advantages of arbitration is that, while judges have a number of matters to handle each day, at the time of the arbitration hearing, the parties get the arbitrator's full attention for consecutive days, start to finish. But from the outset of the arbitration proceeding, consideration should be given to the structure of the proceeding based on the unique issues presented and how they can be best resolved.

So, once the parties have resolved disputes, conducted discovery and are prepared to put on the case, what can be done with the actual arbitration hearing and the award? Here are some ideas.

- The normal arbitration is similar to any bench trial. The arbitrator conducts the hearing and considers the evidence, its admissibility and the weight it should be given.
- By agreement of the parties, the way in which the award is determined can be modified in creative ways that serve the unique issues of the case.
- Mini-maxi arbitrations contemplate that the award will not fall below a minimum agreed amount to protect the claimant's ability to recover some amount, and the award may not exceed an agreed amount to limit the respondent's exposure. The arbitrator can be made aware of

the mini-maxi amounts or not, as the parties choose.

For instance, the agreement might provide that notwithstanding the award of the arbitrator, the award shall not exceed $150,000 nor be less than $20,000. Claimant is assured some recovery and respondent has a cap. Attorneys' fees can be included in limitations or left to the arbitrator to determine.

- One process that many are familiar with is "baseball arbitration," in which each side picks a number and the arbitrator must select one of those numbers.
- An alternative process involves each party selecting an outcome and providing it sealed. The arbitrator reaches an award, and the number submitted by the party that is closest to the arbitrator's award becomes the award.
- One more variation--using one of the above processes, allowing the parties the ability to submit their proposed numbers at the close of the presentation of the evidence, rather than at the outset, so that they can consider how the evidence came in before committing to a number.
- Another creative procedure allows the parties to use the arbitration hearing and award to facilitate a settlement along lines they define by agreement in advance. While many cases settle prior to hearing (the numbers are similar to those in civil actions in the court, often in excess of 90 percent), in a number of instances there is one or two significant issues that seriously affect case valuation and thereby prevent settlement; the parties simply do not agree on the interpretation or impact of a significant issue(s).

In those circumstances, consider a creative settlement agreement that contemplates settling the case with two settlement numbers. One number becomes the settlement amount if the arbitrator rules for claimant on the issue in question and the other amount becomes the basis for settlement if the arbitrator rules for respondent on the critical issues. The arbitration hearing can then be limited to a specific period of time, or specific witnesses and documentary evidence, and the arbitrator asked to make findings only on the specific issues involved.

The arbitrator need not know the settlement numbers; only what he or she is being called upon to determine. The process can reduce a three- or four-day arbitration to a single day and fill in the missing piece in the settlement agreement. This process gets the parties what they need and substantially limits the time and expense involved.

- Whichever process you employ, I recommend that you ask that the arbitrator provide a reasoned opinion so that you and your client can determine how the arbitrator reached his or her conclusions.

NOTE—AB 51

Of import is that that AB 51 has been signed into law effective January 1, 2020, adding new LC Section 432.6, precluding employers from compelling mandatory arbitration of FEHA and Labor Code claims in California. In employment litigation based on FEHA or Labor Code claims, it means that employers will have to decide whether to step back from such requirements or take on the new law. Challenges to the new law are expected based upon the policies underlying the Federal Arbitration Act.

One other thought I will leave you with pertains to the rights of the parties to challenge an arbitration award. One of the basis for such challenges comes from Code of Civil Procedure Section 1286.2(a)(4), providing that an award is subject to attack when an arbitrator exceeds his or her powers. One way that can happen is when an arbitrator issues an award that violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy. *Richey v. AutoNation, Inc.*, 60 Cal.4th 909, 916 (2015).

It is frequently postulated that additional rights to challenge an arbitration award can be obtained by provisions in the arbitration agreement requiring that arbitrator "follow the law." When the arbitrator blatantly departs from prevailing law, there is then a significant argument that the arbitrator's powers were exceeded.

I hope the foregoing ideas will be of assistance to you in determining a creative means of dispute resolution, and I wish you the best in obtaining favorable results in arbitration for your clients! ■

Editor's Note: David P. Warren has been an attorney for 41 years. He is an ADR professional at Warren Mediation, Arbitration and Investigation. Warren arbitrates and mediates business and commercial, partnership, employment, real estate, professional liability, personal injury and other matters. He also serves as a discovery referee and undertakes workplace investigations. His full biography and information about the business is available at his website, warrenarb.com.

SECRET LIVES OF LAWYERS

David Warren Writes for the Thrill of It

by Raymond Allen

Photo courtesy of Christine Joo

Editor's Note: "Secret Lives of Lawyers" is a recurring column. The goal is to highlight interesting things lawyers do to find balance or achieve fulfillment. If you would like to be included, or know of a lawyer that has an interesting side, please contact the Bar Bulletin *editor.*

David Warren is a local lawyer. He received his undergraduate degree from California State University Fullerton. He then walked across the street and attended Western State University law school. In 1978, he passed the California State Bar examination. For perspective, in 1978 Jimmy Carter was President of the United States.

Early in his career, Warren served as in-house counsel for Sears, Roebuck and Co. There he litigated a variety of matters throughout California and oversaw litigation in nine states. Thereafter, he formed a partnership in the Pasadena law firm Smith and Warren. For 15 years he litigated and counseled for that firm. His emphasis was employment law, business law and real estate law. He has represented employees and employers in connection with private industry and public employment matters including discrimination, retaliation, whistle-blowing and public policy claims, and wage and hour matters.

Currently, Warren provides mediation, arbitration, investigation and training services to clients. In mediation he helps parties find their way without recourse to litigation. As part of his arbitration practice, he provides discovery dispute resolution. He reviews internal investigations to make sure they have been thorough and appropriate. He also provides training to reduce work-related liability.

Separate from his tremendous work as a lawyer, mediator and arbitrator, Warren has a not-so-secret passion—writing.

Warren Writes Because He Must

Warren has just completed his sixth novel. He has been writing since at least junior high school. "I knew at an early age two things: I wanted to be a lawyer and I loved to write."

Growing up, Warren was captivated by the first-person narrative of J.D. Salinger's "Catcher in the Rye." He also loved the novels of Charles Dickens. In different ways, and for different audiences, both Salinger and Dickens explored the complexities of social interactions. Warren began to appreciate the creative aspect of writing.

"Creating a story with believable characters that moves the reader, and convincing a judge that my client's position is the right one, have both remained my passions ever since. After 40 years of lawyering, a career that I love, I am also still obsessed with writing."

Writing Thrillers and Mysteries

"I write mystery/thriller and legal thriller genre books, with twists and turns and the unexpected, and plots driven by real world characters —real people facing what seems like more than they can handle."

Like a veritable yin and yang symbol, Warren seeks to develop complete characters with both good and bad qualities. He writes about "characters that are in situations over their heads and beyond their control, often related to character flaws and human mistakes that drive their decisions. But the flaws are only part of the character and the same person can sometimes find extraordinary courage in the worst of situations.

"In my opinion," says Warren, "one of the biggest mistakes writers often make, is painting characters as perpetually good guys or bad guys with no socially redeeming qualities—but one-dimensional characters aren't compelling because humanity doesn't work that way. Real people have many positive attributes, but make mistakes and bad decisions along the way; sometimes serious ones. We are not all white hats or black hats, and we are more than the sum total of our misjudgments."

His most recent book, "Temptation's Prisoners," is about yielding to temptation and how it affects the intertwined characters.[1]

"Temptation's Prisoners" is Warren's sixth book. Prior books include "Imploded Lives," "The Whistleblower Onslaught," "Altering Destiny" and "Sealing Fate." All of his novels are available at Amazon and Audible.com. All can be seen and are described at his author website, DavidPWarrenbooks.com.

Writers With Influence

Warren's writing has been influenced by a wide variety of reading, from non-fiction and biography to other mystery/thriller writers. He enjoys the historical and biographical work of David McCullough (John Adams, 1776, The Wright Brothers, etc.), Walter Isaacson (Einstein, Steve Jobs, Da Vinci, The Innovators), and fiction writers like Nelson DeMille, Scott Turow and some John Grisham.

"I also like Stephen King. He is a writer who provides good descriptions and has a natural flow, particularly when his focus is less on horror and more on mystery and intrigue. I have enjoyed some of Gillian Flynn's work. I also still enjoy reading arbitration and mediation briefs!"

The Writing Process

"For me," he says, "writing is therapeutic. I start to write and three hours will disappear in a heartbeat. When I am not arbitrating, mediating, working as a discovery referee or engaged in workplace investigation, I am creating characters, plots and working on the next book."

The novel, says Warren, "starts with a premise and some idea about characters. I build on that."

He typically has one book that he is writing and another behind it that he is outlining. "I will work for over a year on each book. It only becomes stressful when it nears publication and I want it to be exactly right in all respects before it is published. Then I obsess about making the final product the best it can possibly be—even though by that point I have already done about fifteen rewrites."

When he edits, he asks himself two questions: "Is it necessary; does it add anything." If not, it gets redlined.

Warren is a tough critic. He discarded his entire first novel. "I did not like it, so I scrapped it in its entirety." His first published novel, "Sealing Fate" (2004) took two and a half years to write. He was working 100 hours a week as an attorney and wrote in his spare time.

Although he could probably retire from the law and write full time, he does not. "I still like being a lawyer," he says.

The Denouement

"I think every author has a desire to make a lasting impact on his or her readers—and yes, find some immortality with their work. I certainly do feel that way. A good deal of what I write is about the human condition and struggle—weakness, character flaws, as well as the strength and courage we find within us when we need it most. All the qualities that make us vulnerable, strong, determined and capable of undermining ourselves along the way.

"I want the reader to identify with and feel close to the protagonists; to be rooting for the character(s) and feel delighted when some inspirational resolution results, in part from the amalgam of strengths and weaknesses that comprise the character. We all want something to believe in and we all root for those we identify with and care about."

Warren is another great example within our legal community of a complex and interesting lawyer. From the outside, a mild-mannered mediator doing his best to help you and your client settle a civil case. Inside, however, beats the roaring heart of an author. He is the creator of fictional worlds. Creators possess divinity by their very nature. When we read fiction we enter their world. Fiction is not false. Fiction is simply beyond the empirical. It is allegory. It is illustrative. It is archetypal. As a result, fiction reveals the deeper truths about us. Fiction is forever. ■

[1]*Please see a review of "Temptation's Prisoners" by Heather Sutton Buckley on page 16.*

"Temptation's Prisoners" — A Book Review

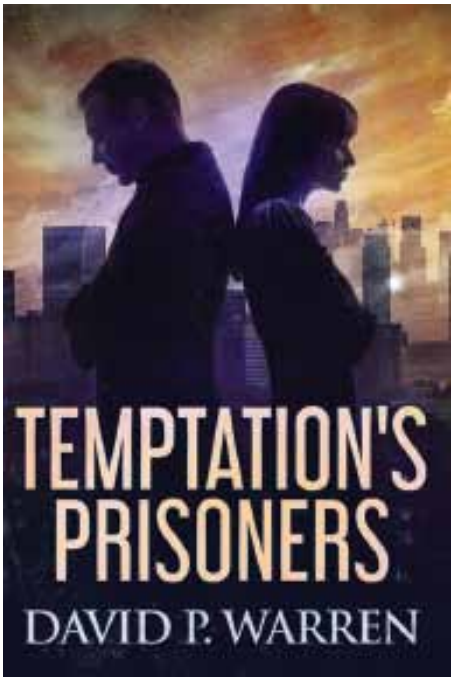
by Heather Sutton-Buckley

Author photo courtesy of Christine Joo; book cover photos courtesy of David Warren

"Temptation's Prisoners" by David Warren immediately captivates as two entrepreneurial law partners—Paul Braddock and Adam Mason—contemplate their respective workloads and the challenges they face connecting with their spouses. Flash forward three months and Paul Braddock is planning an escape from imminent death at the hands of unknown bad guys with his wife, Beth Braddock. I began reading "Temptation's" on a cold morning in January and finished by dinnertime. I have not read a book in one day since Gillian Flynn's "Gone Girl."

"Temptation's" follows the criminal shenanigans of two couples, Paul and Beth Braddock and Adam and Chris Mason, as they make one insanely life-threatening decision after the other, and then the other—until you want them all to meet their demise behind bars or worse.

Adam Mason is a gambling addict who embezzles from his wealthy, trusting, elderly client and becomes embroiled in a money-laundering scheme masterminded by an elusive antagonist, Alexandros. Adam's wife, Chris, is a therapist who gives in to temptation by sleeping with her dangerously manipulative patient. Paul and Beth Braddock seem to naively and selflessly support their troubled friends without much deep thought. The novel's hero, Jason Shepard, is motivated throughout "Temptation's" by his desire to avenge his wife's murder.



As a former Special Agent with Army CID and detective with the San Francisco Police Department, Shepard is well-equipped for the task. He's tall, dark and handsome with an air of mystery. Early in the novel, Shepard appears emotional and vulnerable during his first grief counseling session with his new therapist, Chris Mason. Shortly thereafter, we learn that Shepard has been hired to investigate Chris' husband, Adam, for embezzlement. Paul, Beth and Shepard unwittingly unite in their quest to bail Adam and Chris out of trouble, no matter the cost.

I had lunch with David Warren about a week after I finished "Temptation's." Warren is living my dream and I was hungry for insight. I also wanted to know what motivated him to write this story.

"To entertain," he said simply. "With characters and a story line that is believable and unpredictable." He thinks about tension and surprises, twists and turns, as he writes. I particularly liked the way Warren wrote action scenes and artfully raised the stakes for each character as the novel progressed. After reading "Temptation's," a line from Walter Scott's "Marmion" comes to mind: "O what a tangled web we weave when first we practice to deceive!"

In "Temptation's," Warren aimed to show "how temptation can manifest—how mistakes can be compounded." His characters are multi-dimensional; their motivations somewhat far-fetched. In Warren's words, he does not like characters "that are all bad or all good." He likes real people, no super-heroes. "I wanted the reader to despise the bad guy [Alexandros]," Warren said with a smile. I told him I eventually despised all of the characters and wished they'd all gone to prison. Warren chuckled, "That's the former prosecutor in you."

I followed up on my character flaw assessments in an email to Warren after our lunch meeting. Shepard was the most likely character to emerge from the tangled web with his moral compass intact, but even he made preposterous and reprehensible decisions in the end; decisions to benefit his newfound, despicable friends.

Warren wrote, "I like the fact that you were disturbed by the characters' behavior—emotional

involvement in the story is the other reaction I want. Deciding who you like, who you don't and who is getting away with something (as well as who is competent and who is naïve) gives the reader an emotional stake in the story."

David P. Warren, Esq., is an experienced trial attorney, advocate and negotiator, bringing 41 years of experience and dedication to his Arbitration, Mediation, Investigation and Training ADR practice in San Luis Obispo. Naturally, Warren enjoys weaving current legal issues into his work.

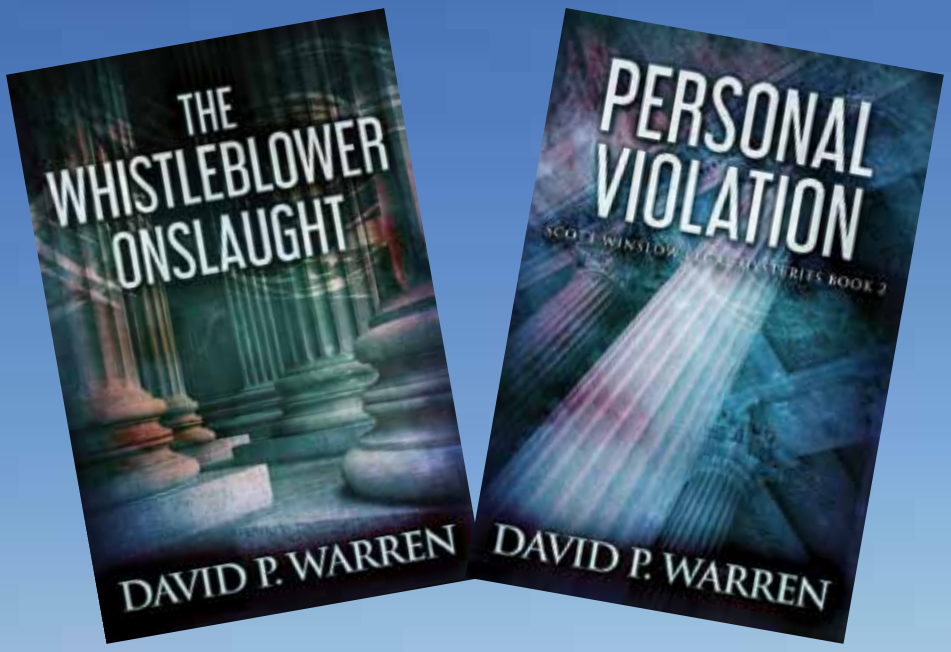
He was fascinated by *Carpenter v. United States*, a landmark United States Supreme Court case concerning the privacy of historical cell phone location records. In *Carpenter*, the Court held that the government violates the Fourth Amendment to the United States Constitution by accessing historical records containing the physical locations of cell phones without a search warrant.

In "Temptation's," Beth Braddock and Chris Mason consent to Detective Marshall Jennings' search and seizure of their cell phones without a warrant. They are dumbstruck when Jennings debunks their alibi for the murder of Chris' jilted lover with cell phone location data.

I really enjoyed "Temptation's Prisoners" and intend to read David Warren's other titles. He is our small town's master of suspense! I admire his ability to plan and execute a novel with confidence and create tension on every page. "Temptation's Prisoners" soon will be re-released without the frequent and somewhat distracting typographical errors present in the current version. The audio book of "Temptation's Prisoners" should be available by the time this review is published.

Warren's books are all available in audio format at Audible.com. Visit DavidPWarrenbooks.com for more information about amazing stories by attorney, investigator, arbitrator and mediator David P. Warren ■

Heather Sutton-Buckley is the managing attorney at the Buckley Law Firm. She practices in the areas of criminal and family law. She is also a fiction writer.



Have you met...?

William Frederick

After graduating from UC Irvine, William Frederick volunteered as a teacher through World Teach for a year in a small pueblo, Pasacaballos, Colombia. Colombia is where his grandmother was from.

While in Colombia, Frederick applied to law schools. He entered and graduated from Boston University School of Law in May, 2018, and passed the July 2018 Bar exam. Upon passing the Bar, he worked at the Santa Barbara County District Attorney's office in Santa Maria.

Recently, he joined his mother in the family firm—the Frederick Law Firm. Frederick looks forward to bringing his experiences to his practice for the betterment of the community he loves.

Shane R. Kennedy

Born and raised in San Luis Obispo, Shane Kennedy graduated from San Luis Obispo High School in 2009, where he played center on the 2009 PAC 7 league championship basketball team and winning volleyball team. He played basketball for San Francisco State University and Hancock College before graduating in 2014 from Cal Poly with a B.A. in philosophy and a minor in law and society.

Kennedy graduated from Western State College of Law (2019) in Irvine. He then returned to San Luis Obispo in August 2019 with the professional experience he gained while living in Southern California and working at several business, corporate, civil litigation and real estate law firms during his law school career.

He is currently working with his father, Matthew S. Kennedy, a business, banking, corporate and real estate attorney in San Luis Obispo, gaining experience to counsel clients and provide the best possible solution to their legal issues.

Kennedy and his wife, Brooke (Cal Poly Class of 2012), are excited to be back living and raising a family in the town where they met because of the close-knit community and beauty that this special town on the Central Coast provides. When not in the office, Kennedy enjoys spending time with his family, traveling and being outside playing beach volleyball or hiking the many beautiful trails in the county.

Alex Newsum

An attorney at McCormick Barstow LLP, Alex Newsum practices primarily in the areas of family law, real estate and employment litigation. He was admitted to the California State Bar in 2016 and worked in McCormick Barstow's Fresno office for three years prior to relocating to San Luis Obispo. In Fresno, Newsum represented a diverse range of clients including insurance companies, physicians and farmers.

Newsum is an avid outdoorsman and enjoys hiking, kayaking and fishing. Most of all, he enjoys spending quality time with his wife, Candice, his daughter, Raya (3 years old), and son Silas (1 year old). He is pleased to be in the SLO area and looks forward to getting involved in the local community, including the Bar Association.

Amy Schroder

After graduating from the University of California Irvine magna cum laude with a B.A. in political science, Amy Schroder attended Chapman University School of Law in Orange. At Chapman, she earned her JD and then LL.M. in trial advocacy.

Following law school, Schroder worked as a prosecutor for the Orange County District Attorney and an attorney in private practice. In addition to volunteering as an attorney-coach for her local CRF Mock Trial team, she has been an active member and on the board of numerous Bar Associations, including the Orange County Bar Association, West Orange County Bar Association (Secretary), North Orange County

Bar Association, Orange County Women Lawyers Association, and The William P. Gray Legion Lex American Inn of Court (Secretary).

Schroder now resides in San Luis Obispo with her "Cal Poly alum" husband. She's looking forward to getting to know and working with the members of the San Luis Obispo Bar.

Andrew Weiss

For 38 years, Andrew Weiss practiced civil litigation in Fresno and the Central Valley, but in 2019 he retired and moved to the Central Coast. Specializing and board-certified in medical malpractice defense, Weiss always seemed to have a case or two going on in the Central Coast counties. In 2011, he and his wife, Lauri, bought a small home in Shell Beach, and the more time they spent there the more they wanted to retire there.

To ease the transition from full-time trial attorney to idle retiree, Weiss began volunteering at the San Luis Obispo Legal Assistance Foundation (SLOLAF), where he continues to work one half-day a week counseling senior citizens on a wide range of issues. He finds it rewarding to be able to use his experience to help others who are often in very difficult situations and cannot afford an attorney. Shortly after moving here, he also got the opportunity to volunteer as a civil settlement conference judge and has been handling a steady flow of cases in the SLO and Paso Robles courthouses.

Born in Los Angeles and raised in Orange County, Weiss earned his undergraduate degree at Cal State Fullerton in 1977 and is a 1980 graduate of the UC Davis King Hall School of Law. He had formal mediation training at Pepperdine in 2015. He is a Fellow of the American College of Trial Lawyers and a longstanding member of ABOTA. He served as President of the Fresno County Bar Association in 2009, the Association of Defense Counsel of Northern California and Nevada in 2011, and the San Joaquin Valley Chapter of ABOTA in 2018.

He and Lauri love to take long road trips, which include a month-long drive across America this March. He enjoys gardening and playing ukulele—he plays with SLO Strummers, a local ukulele group. He has two children, one stepson who is a local pharmacist, and two grandchildren.

Weiss is pleased with the mix of legal involvement and leisure time he has in retirement and is grateful for the warm reception he has received from the SLO legal community.

"SLOLAF is thrilled to have Andy join our team of attorney volunteers," said Stephanie Barclay, Legal Director for SLOLAF. "Although he cannot represent our clients in SLO Superior Court because he is volunteering as a settlement conference judge, Andy has helped so many of our clients by advising them about the litigation process and the merits of their claims so they can make informed decision about how to proceed. We have received so many thank you letters from clients who Andy has helped."

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, raymondinsf@yahoo.com, for inclusion in an upcoming issue.

Teresa Estrada-Mullaney—
Breaking the Mold & Making a Difference

by Dean Jan Howell Marx

Dean Marx photo courtesy of Renoda Campbell; additional photos courtesy of Teresa Estrada-Mullaney

Who was the only minority judge in San Luis Obispo County during the 20th century? Who was the first local woman judge? First Latino judge since Romualdo Pacheco was appointed in 1853? First woman Deputy District Attorney? First woman to prosecute a local murder case? First DA to get DNA evidence admitted at trial locally? Was it possible for only one person to have done all that?

The answer is yes, and that person is the Honorable Superior Court Judge Teresa Estrada-Mullaney. Perhaps, if you are a new attorney or newcomer since 2012, you may not have had the opportunity to meet or appear before this extraordinary trailblazer for women and Latinos in our legal community.

Let me introduce my friend to you. It may be hard, especially for young women attorneys with so many female colleagues, to imagine the challenges she faced as the first and only woman and/or Latino in our District Attorney's Office and later in the judiciary. This modest, petite and soft-spoken woman's success in meeting all of these groundbreaking challenges was way beyond what the dominant culture in that day thought was possible for women, let alone mothers or Mexican-Americans.

Her breakthrough example is an abiding inspiration for our region. I deem myself very lucky to have had a chance to work with her and to have gotten to know her personally.

On my first day as a new Deputy District Attorney, I had no clue what I was supposed to do. District Attorney Christopher Money instructed me to just follow DDA Teresa Estrada-Mullaney around, copying what she did and how she did it. That was a phenomenal experience for me. She was calm, skilled, diligent, tenacious, hardworking, assertive and courageous.

I remember her maintaining her concentration and avoiding distraction during the preliminary hearing of an accused multiple rapist, whom she later convicted with then-rare DNA evidence that she fought to get admitted. When the defendant tried to intimidate her by giving her the "evil eye" on the stand, she exhibited such cool by simply taking a step back, thus blocking his line of vision with her investigator. Facing up courageously to evil like that, while insulating yourself…a lasting example for me ever since.

Reflecting on how the legal profession has changed since she first started practicing, she is pleased how much it has changed for women attorneys and judges. Now, locally, nearly half of practicing attorneys are women and many are Latinas. It is especially gratifying to see how the local bench has transitioned from just one woman for 10 years, when she was appointed in 1992, to an equal number of women and men today.

Here is a bit of how her story has unfolded, told to me one day over lunch.

Teresa Estrada-Mullaney was born in Los Angeles, the daughter of Mexican immigrants with Spanish as her first language. She learned English in the first grade. Her father earned U.S. citizenship through World War II service in the Army. She credits her parents for instilling a strong work ethic and deep appreciation of education. Low-income neighborhoods in Southern California were where she grew up. She developed self-confidence at an early age, due in part to participation in the Girl Scouts and being mentored by a kindly troop leader, who gave her a uniform.

During her sophomore year at Mount St. Mary's College (now University), she married Loyola University grad student and future teacher, then administrator, John F. Mullaney, Jr. She took a break from school after their son, John III, was born. It was at Loyola Marymount University where she finished undergraduate work, making the Dean's list.

Her immediate goal was to join her husband as a school teacher of Spanish. A hiring freeze derailed that idea. Instead, her younger brother having started law school, "sibling rivalry" motivated her new career path. She told me she could not have followed through with this decision without the full support and encouragement of her husband and son.

Waiting four years before starting law school, she worked as a waitress then as a caseworker for the Department of Social Services to earn money to cover expenses. It was thrilling to be accepted to attend UCLA, though the commute would be another challenge—a 100-mile round trip from home in Huntington Beach to Westwood during her three years in law school.

In her second year at UCLA she established the first Quarter-Away internship at the Orange County Public Defender's Office. Ironically, she worked with a deputy Public Defender named Frances Munoz. Estrada-Mullaney greatly admired her, as did the Governor; she would be appointed to the Orange County bench as the first Latina judge in the history of California. The year was 1978 and the Munoz appointment awoke a new dream for Estrada-Mullaney.

After law school and passing the bar, she applied at both the Public Defender's and District Attorney's offices and was hired by the Orange County District Attorney as the first Latina attorney in that office. Her first day on the job she was told by a receptionist to sit in the corner and wait for her supervisor. After a while, she noticed other new hires congregating in another part of the lobby. When she went back to the reception desk to inquire why she was in a separate area, the answer was, "Because you're a secretary and those are new lawyers."

In 1981 she and her family moved to San Luis Obispo County because John's family lived in the Bay Area and because this was "such a beautiful place." District Attorney Christopher Money hired her to become the first woman Deputy District Attorney in our county. She soon distinguished herself as a prosecutor, not only for her legal expertise, diligent preparation and zealous advocacy, but also for her compassion and determination to see justice done.

Although she was the lone woman attorney in the office for four years, there were a few women in the legal community who offered support, especially defense attorneys Patricia Ashbaugh and Suzan Boatman, as well as civil attorney Barbara McCallum. She recalled that an unnamed male judge, seeing her against Suzan Boatman, said he was looking forward to a "cat fight." The women remained dignified, ignoring the insult.

Honorable Superior Court Judge Teresa Estrada-Mullaney

Estrada-Mullaney was assigned difficult, emotional cases, such as domestic violence, rape, sexual assault and child victimization. In 1984 she was assigned to the DA's Molestation Prosecution Team and prosecuted roughly 50 cases. Interviewing the children about their cases—wherever they felt most comfortable—drew upon her ability to communicate well with them. Her calm, reassuring manner and compassion for the victims enabled her to gain their trust, unearth the facts and successfully prosecute the perpetrators. She prosecuted three murder cases in 1988-89.

In 1991, during a six-month trial before the late Judge William Fredman, she argued extensively and successfully for the admission of then-novel DNA evidence (Kelly Frye hearing now Daubert with witnesses from the FBI for the hearing) in a multiple rape and sexual assault case. This first local reliance upon DNA evidence to prove connection of the defendant to the rapes and assaults was later upheld on appeal. The defendant was sentenced to 72 years to life, again upheld on appeal. Judge Fredman was her role model and mentor. She thought the world of him with respect and admiration.

In 1992, well-known and distinguished Deputy District Attorney Teresa Estrada-Mullaney made local headlines when she, a Democrat, was appointed to the Municipal Court bench by Republican Governor Pete Wilson. Judge Fredman had promised to swear her in, but sadly died one week before the Governor announced her appointment. Estrada-Mullaney thus became not only our county's first female judge, but also the first local Latino judge in nearly 140 years and the first minority judge in the 20th century.

At the enrobing, she started off by welcoming everyone in her first language, Spanish. It was thrilling to be able to make a difference for women and Latinos, but this was tempered by the awareness of the challenges a woman might face breaking into the judicial "Men's Club." One of her fellow judges told her she was not a Latina because she "was assimilated." Her response was telling him that he did not think of her as a Latina because she did not fit his stereotype of one.

Through her hard work, high ethical and intellectual standards, compassion, and balanced, commonsense perspective, she overcame any initial awkwardness, winning her colleagues' and the community's respect. She became known for her command of the courtroom, procedural acumen and insistence on civility and decorum.

In 1996, she was (and still is) the only woman in this county to win a contested election to a vacant Superior Court seat. I was honored to work on her campaign with her campaign manager/husband, John, and many supporters. It was a challenging campaign between two very qualified candidates. She attributed some of the success to precinct walking as well as endorsement by elected officials of both parties.

It has become a matter of pride for her that she has served on all

Continued on page 22

Teresa Estrada-Mullaney

CONTINUED

judicial assignments available—criminal, civil, family and juvenile—a rare accomplishment. Also, she has been upheld on appeal on every jury trial throughout her career. Her most important civil case was the Paso Robles earthquake wrongful death jury case in 2008. For three years, she presided over Juvenile Court, finding it very rewarding to help children overcome their problems and situations. Each of those years, she joined the wards for Christmas dinner at Juvenile Hall.

In 2006, she was asked to serve on the California Supreme Court's committee on judicial ethics, continuing to serve until her retirement. It was a "fantastic experience" being part of the team proposing changes to improve the code of judicial ethics.

On her retirement in 2012, District Attorney Gerry Shea issued the following statement. "Judge Estrada-Mullaney has been a trailblazer and a role model for so many people in our community. Our office has great appreciation for her service to the county, first as a dedicated prosecutor for 11 years and then for the past 20 years, as a thoughtful, no-nonsense and even-handed judicial officer."

As criminal defense attorney Jeff Stein wrote in the SLO County *Bar Bulletin* in 2012, "One of the abiding qualities that is desperately needed for public prosecutors and judges is the gift of reflection and judgment, allowing the selective use of the powers of the state, insisting not just on what can be imposed but what is just and equitable. As an observer present in these days, I can attest to the willingness Terry showed, when evidence could be mustered, to allow defendants a chance to work out of the troubles they had encountered. It served the goal we now think of as restorative justice, reintegrating defendants into the fabric of the community. It felt like Justice was being served."

Since retirement she continues to work in the Assigned Judges Program, handling hearings and trials around the state, including her "home court" San Luis Obispo County.

In 2013, I nominated her, and she won the California Women Lawyers Association Joan Dempsey Klein Distinguished Jurist Award. This statewide award recognizes a woman who has achieved excellence as a jurist, has a longstanding record of vigorous service and is an inspiration to women lawyers of California.

Throughout her fulfilling, but high-stress career, she has sought life/work balance by devotion to family and pursuing her hobbies of ballroom dancing, gardening and traveling, more so during retirement. Her most recent trip was to Egypt in December 2019. For 2020 she and John have trips plannedto the Caribbean, Alaska, Europe, Tahiti and Texas, where they will visit their son, who is a financial advisor.

John F. Mullaney, Jr. and Teresa Estrada-Mullaney

Judge Estrada-Mullaney visits Egypt in December 2019.

Our community owes a debt of deep gratitude to this remarkable woman, not only for her professional achievements in the legal arena, but also for offering inspiration to everyone who struggles to overcome barriers on the path to fulfilling their highest potential. Thank you, trailblazer, Honorable Teresa Estrada-Mullaney! ■

This is the second in a series of articles by Jan Marx that will focus on the achievements of women in the legal profession. You will recall her last article was a review of Barbara Babcock's book "Woman Lawyer: The Trials of Clara Foltz." Jan Marx is the Campus Dean at San Luis Obispo College of Law.

2nd U.S. Supreme Court Takes Up the First 2nd Amendment Case Since *Heller* in 2008

by Allan J. Mayer

The New York Statute and the Procedural History

New York State Rifle and Pistol Association vs. the City of New York may change the law with regard to the 2nd Amendment in many states, including California. The United States Supreme Court is currently considering a New York statute that prohibits possession of a handgun absent a license. An individual with a premises license for a handgun may not remove the handgun from the address specified on the license, except he or she may transport the handgun directly to and from an authorized small arms range or shooting club within the city of New York. The ammunition is to be carried separately.

Plaintiffs sought to remove their handguns from the licensed premises to travel to shooting ranges outside of the City of New York (City). One plaintiff wanted to transport the handgun to a second home outside the City. Plaintiffs are seeking a declaration that the restrictions imposed by the laws, rules and regulations of New York are unconstitutional.

The case was argued and submitted before the nine justices of the U.S. Supreme Court on December 2, 2019.

It is the history and machinations of this case as well as the present conservative majority of this Supreme Court that makes a prediction of the final outcome difficult and important.

The case started in the U.S. District Court for the Southern District of New York. The judge ruled for the defendant, City of New York. Plaintiff appealed. The Second Circuit ruled unanimously for the City. Both decisions were based upon intermediate scrutiny.

The plaintiffs moved and obtained by writ of certiorari, the right to be heard in the Supreme Court. Soon after, the City agreed to repeal the law and moved to dismiss plaintiff's case. The issue, they argued, should be deemed moot.

The U.S. Supreme Court, however, denied the motion to dismiss on the grounds of mootness after a full briefing and hearing oral arguments. The case was marked submitted for decision on December 2, 2019.

To ascertain whether a government action (often a law or a regulation) violates the U.S. Constitution, a federal court first chooses the appropriate level of scrutiny. The three levels of scrutiny are strict scrutiny, intermediate scrutiny and rational basis.

In American constitutional law, strict scrutiny is the highest and most stringent standard of judicial review, and results in a judge striking down a law unless the government can demonstrate in court that a law or regulation uses the "least restrictive means" to achieve the purpose.

Lower levels of scrutiny, such as "intermediate scrutiny" (the law must advance an important government interest and must do so "by means that are substantially related to that interest") have generally been applied by lower courts to uphold gun-control restrictions, on large-capacity magazines.

Will This City of New York Case Set a 2nd Amendment Strict Scrutiny Test?

Strict scrutiny is the most worrisome option for states whose laws uphold gun control restrictions. Ever since *District of Columbia v. Heller*, litigants have battled over the appropriate level of scrutiny to apply to regulations affecting 2nd Amendment rights.

Applying "strict scrutiny" means the law must use "narrowly tailored" means to advance a "compelling governmental interest." If that level of scrutiny is applied, most gun-control laws would no longer be valid. However, silencers would still be excluded under strict scrutiny because silencers do not add to the functionality of the gun and would often be used for criminal activity.

Some federal courts have allowed several states, such as California, to uphold gun control by applying the intermediate scrutiny test. The two federal courts (U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals) that heard this case applied intermediate scrutiny.

If the Supreme Court Justices thought the lower federal courts were correct in applying intermediate scrutiny, they could have [1] denied certiorari, or [2] accepted the party's agreement and dismissed on grounds of mootness. Instead, the Court heard the case after a full briefing. This action created more work for the court.

Since *Heller,* the Court composition has changed. The Court is now composed of a majority of conservative justices. Justice Brett M. Kavanaugh wrote a 50-plus page dissenting decision wherein he argued the 2nd Amendment permitted open carry of an AR14 assault rifle on the streets of Washington, D.C. Justice Neil Gorsuch said during argument that he was skeptical of the City's "herculean, late-breaking efforts to moot the case." Justice Samuel Alito Jr. and Gorsuch were "ready to decide the case saying that the repeal of the law did not settle every question before the Court."

Conclusion

I believe the Court intends to change the level of scrutiny on 2nd Amendment cases from intermediate to strict. If the U.S. Supreme Court applies strict scrutiny to New York City's gun-control law, it will have enormous implications.

For example, there are two gun-control cases in the Ninth Circuit Federal Court of Appeals which are stayed by order of the court, pending the outcome of this case.

If the U.S. Supreme Court holds that strict scrutiny applies to the 2nd Amendment, then the Ninth Circuit Court of Appeals will have to rule for less restrictive gun-control laws and, most importantly, almost all of the California laws and regulations concerning guns may be unconstitutional. ■

Editor's Note: Opinions and conclusions in this article do not necessarily reflect the opinions of the San Luis Obispo County Bar Association, its Board of Directors, or the editor and staff of the Bar Bulletin. *Opposing thoughts regarding this or any opinion contained within any article are welcome.*

"The Time Is Now"
SLO Women's March Held January 18, 2020

Photos courtesy of Brittany App

For the fourth year, thousands of Central Coast women assembled at Mitchell Park to hear speakers and performers and to walk through downtown San Luis Obispo in support of women's rights, human rights, civic engagement and social and environmental justice. This year also marks the centennial anniversary of the **19th Amendment** giving women the right to vote. ■


FIGHT
GIRL
ERA
IS LONG
OVERDUE
THE TIME IS NOW
WOMEN'S
MARCH


I'm
WITH
HER

"Taking Up the Cause" of Financial Elder Abuse

Improving Access to Justice— A Policy & Practice Perspective

by Todd A. Porter, J.D., M.P.P.

Those engaged in advocacy on behalf of elders and dependent adults have certain immutable qualities. As a group we are fiercely independent. We advocate for the rights and independence of others as a reflection of our core cultural values. Our liberty is precious. Predators seeking financial gain target elders as a profitable class of persons to abuse. To deprive an individual of their economic independence is the theft of their personal dignity. Such acts are an affront to our sensibilities and a threat to our communities.

California Welfare and Institutions Code (WIC) has incentivized interested persons to engage civil practitioners to *"take up the cause"* of our abused and neglected elder and dependent adult population through the Elder Abuse Dependent Adult Civil Protection Act (EADACPA). One distinct aspect of EADACPA is financial elder abuse. This article seeks to begin a dialogue within our legal community in order to expand access to justice for the elder population as to the problem of financial elder abuse.

A. Financial Elder Abuse—A Policy Perspective

Public policy may be defined as the vision of government officials in response to a condition considered to be a public problem. The identified public problem creates a demand for formal policy statements in varied forms including legislation and executive orders. Legislative policy statements such EADACPA are implemented and subsequently measured by the policy outcomes generated.

EADACPA has declared elders an identifiable disadvantaged class whose cases of abuse are seldom prosecuted as criminal matters and where too few civil cases are brought due to problems of proof and lack of incentives. (WIC § 15600(h)). The intent of the legislature is to enable interested persons to engage attorneys to *"take up the cause"* of abused elders. (WIC § 15600(j)). EADACPA addresses varied forms of abuse and neglect of both dependent adults and elders. One aspect of EADACPA is financial elder abuse. The legislature has incentivized the civil prosecution of financial elder abuse through WIC §15657.5.

Age Group	1960	2000	2010	2050 (est.)
65+ (% of population)	16.6 million (9.2%)	35 million (12.4%)	40.3 million (13%)	88.5 million (19.8%)
85+ (% of population)	929,000 (0.5%)	4.2 million (1.5%)	5.5 million (1.7%)	19 million (4.2%)

The demand for action to address financial elder abuse is fueled by an exploding increase in the size of our elder population. Advances in medicine and nutrition have resulted in an increase in life expectancy in the United States. The growth of the U.S. elderly population is illustrated by the table above.

Over the course of 90 years the population of persons 85 years or older will increase from less than 1 million to 19 million, while the population of those over 65 years (the statutory age for an elder) will increase from over 16 million to over 88 million. The demographic expansion of the elderly population is a primary driver of financial elder abuse. Elders are a growing "target rich" environment for financial predators.

The opportunity to financially abuse elders is a separate and challenging issue. Along with an increase in life expectancy came the gradual decline of the multi-generational home in the United States. Elderly persons often live alone or have very small groups with whom they interact. Relative isolation is a primary risk factor for financial elder abuse. A fact difficult to accept is an inevitable cognitive and physical decline as we age. Cognitive decline creates challenges for estate planning practitioners in balancing the free will and liberty of individuals against the reality of predators exerting undue influence upon a vulnerable population.

B. **Civil Litigation—A Practice Perspective**

Penal Code § 368 makes elder abuse a crime. Yet the legislature has declared criminal prosecutions insufficient to remediate the harm of financial elder abuse and had provided for civil actions as a further deterrent to abuse. WIC § 15610.30(1) defines financial elder abuse to include a person who takes, secrets, appropriates, obtains or retains real or personal property of an elder for a wrongful use or with intent to defraud, or both. WIC § 15610.30(a)(2) has extended liability to those who assist perpetrators in such acts. WIC § 15610.30(a)(3) has recognized undue influence as a basis for financial elder abuse.

Undue influence is statutorily defined by WIC § 15610.70. Undue influence includes the concept of excessive persuasion that overcomes free will and results in inequity. In examining undue influence, the court may consider issues related to the vulnerability of the victim, the influencer's apparent authority and the actions or tactics used by the influencer and the inequity of the result. (WIC § 15610.70(a)(1)-(4)).

EADACPA has provided a set of litigation tools designed to assist civil litigants to redress financial elder abuse. These include the following.

• A preponderance of the evidence standard of proof along together with the recovery of attorney's fees and costs (WIC §15657.5(a)).

• Where it is proven by a preponderance of the evidence the defendant is liable for financial abuse, AND where it is proven by clear and convincing evidence that the defendant is guilty of fraud, oppression, malice OR recklessness, the additional recovery of other compensatory damages and all other remedies at law which includes the survival of general damages such that the limitations of Code of Civil Procedure § 377.34 do not apply (WIC §15657.5(b)).

• A four-year statute of limitation which accrues based upon the date of discovery of the facts constituting the financial abuse (WIC §15657.7).

• A writ of attachment as a statutory tool to preserve assets for a potential recovery (WIC §15657.01).

• An expansive list of persons who may assert standing after an elder's death, which may include a successor in interest (CCP §§377.30-377.32) or potentially other "interested persons" (CCP § 15657.3(d); Prob. C. §48).

Despite these litigation tools and incentives available to litigants and attorneys, too few take up the cause of financial elder abuse and actively engage in this area of practice. Why? Elders often have a difficult time articulating their abuse and are conflicted or fearful of moving forward. Often the sums of money involved are modest when considering the cost and time commitment of litigation. Indeed, all my own experience practicing under EADACPA has come after the death of an elder or dependent adult and has involved substantial damages. An elder abuse practice, like family law, can be emotionally challenging and draining for a practitioner.

C. Third Party Liability for Financial Abuse & Institutional Mandatory Reporters

When considering whether an instance of financial elder abuse is economically viable, a practitioner should evaluate the potential liability of third persons or entities who may have "assisted" in the abuse. Financial abuse of an elder included the circumstance where a person or entity has assisted in the taking, secreting, appropriating, obtaining or retaining real or personal property of an elder for a wrongful use OR with intent to defraud, OR both. (WIC § 15610.30(a)(2)). In addition, a person who assists another in such prohibited acts through undue influence is also liable for financial abuse (WIC § 15610.30(a)(3)).

An evolving legal issue is the extent of institutional liability for financial elder abuse. Mandatory reporters of financial elder abuse include all officers and employees of financial institutions as defined in WIC § 15630.1 (effective January 1, 2018). Civil penalties may be imposed, but only if a civil action is brought by the Attorney General, district attorney or county counsel.

Anne Marie Murphy has authored an excellent article which appears in the May/June edition of *Forum Magazine*, Volume 49, Number 3, at pages 34-36, entitled "Financial elder abuse: Holding institutions liable for aiding and abetting abuse." Murphy highlights the case of *Das v Bank of America* (2010) 186 Cal. App. 4th 727, and notes that the defenses used to avoid institutional liability may not be available due to certain amendments to EADACPA not in effect at the time of the acts described in *Das.* Thus, a financial institution may be liable where the institution *should have known* of suspected financial abuse of an elder.

Impact litigation against financial institutions could be warranted under the right set of facts, but a more impactful course of action would be to proactively engage institutions in the form of public speaking engagements to further inform them of their reporting obligations as well as their potential liability under the act.

Continued on page 29

D. Suggestions for an Economically Viable Model for Civil Practitioners

If I suggest a proposed model for the civil prosecution of financial elder abuse cases, it comes from some limited litigation experience in addition to my own observation, reflection and a desire to build out a financially viable and sustainable model with others in our legal community. The desire is to expand access to justice to elders in our community and redress a public harm. I suggest and observe the following.

• **Screening elder abuse cases has standalone value.** Financial elder abuse is grossly underreported. There is value in screening financial abuse cases even if representation is declined. Part of a perpetrator's cover is the knowledge that a very small percentage of cases are reported and investigated. A robust financial elder abuse practice, where a larger volume of cases are screened in our community will provide disincentive to the perpetrators of such abuse. As time goes by our culture may shift. As more cases are screened, financial predators will be put on notice that their actions will be scrutinized.

• **A thoughtful screening form and a method for declining representation**. One of the benefits of this area of practice is the breadth of standing to bring such an action. Broad standing makes conflicts of interest more problematic. Transmission of letters of declining representation present a challenge where an elder's mail and email may be monitored and/or intercepted.

• **Certain types of financial elder abuse may be better suited toward an economically viable civil litigation practice.** I generalize the types of financial elder abuse as follows:

(1) Consumer fraud cases which include the purchase of annuities, reverse mortgages, and the gouging of elders with respect to goods and services including such things as home improvement contracts;

(2) Persons outside the context of family whose actions and motives are unquestionably improper and self-evident; and

(3) Family and friends, whose motives may be mixed. This may be a strange intersection between real caring and devotion along with questionable financial activity. This last type of case may prove the most difficult to manage as the defendant is more likely to be emotionally ardent in their position.

• **An open source of forms to be shared between practitioners.** To be commercially viable a practice would need to be economically efficient. A good practice would require a set of thoughtful forms, including model fee agreements (hourly and contingent or a combination of both); model screening forms; model pleadings, includ-ing complaints, discovery; various motions including motions for provisional relief as well as post-trial motions for attorney fees and costs.

• **Utilization of the law to streamline litigation**. A practitioner may file an action as a limited civil case, which provides for streamlined discovery including a one deposition rule and a limit of no more than 35 of any combination of interrogatories, request for admission or demands for inspection. These limits are designed to reduce litigation and expense and delay. (Code of Civil Procedure §§90-98).

San Luis Obispo Superior Court local rule of court, Rule 26.00 recently amended, effective January 1, 2020, has extended the use of the uniform system of [nonbinding] arbitration to include all unlimited civil actions where the amount in controversy does not exceed $50,000 as to any plaintiff. The cost of arbitration is in the amount of $250 (Local Rule 26.02), which could be an effective means of obtaining an early, inexpensive, albeit not binding, ruling on a contested matter.

E. Conclusion: A Call to Take Up the Cause

I further suggest the following.

• A coordinated effort by civil litigation practitioners, law enforcement, interested outside agencies, mandatory reporters and other interested persons and entities to use the civil litigation tools of EADACPA to better address the scourge of elder financial abuse.

• A community-wide collaboration to create an open source "litigation tool kit" available to interested practitioners, which would include screening forms, fee agreements, various pleadings, etc., to be shared and updated based upon changes in the law and real-world litigation experience.

• The formation of an informal professional support group amongst interested practitioners, to meet at designated times and places, in order to provide resources and support one another in our litigation efforts.

To those that may be interested in collaborating to build out a private sector civil litigation model to address financial elder abuse, please contact me at toddporter@outlook.com. ■

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 deadines noted 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.

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January–February issue deadline	11/25
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