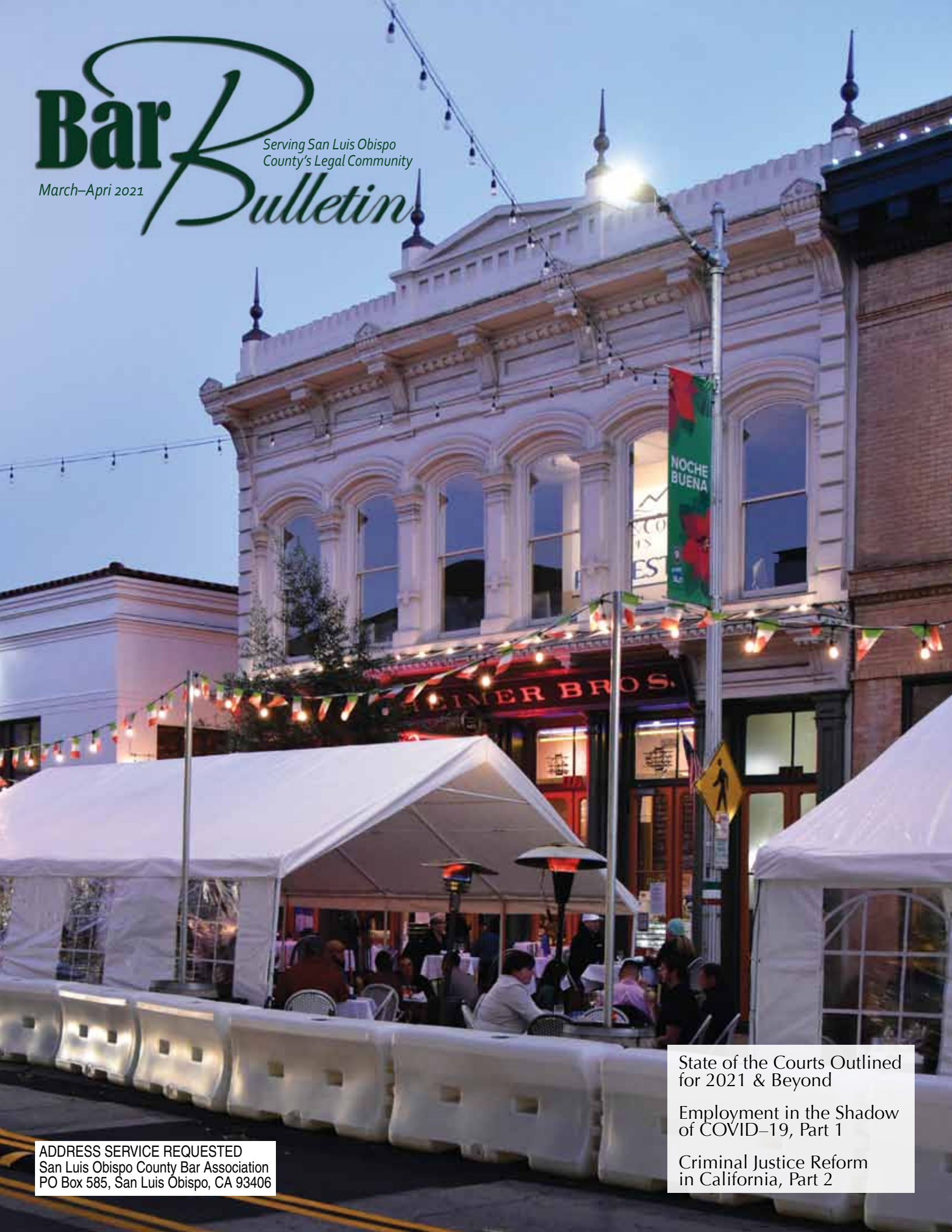
# Bar Bulletin

*Serving San Luis Obispo County's Legal Community*

*March–Apri 2021*




State of the Courts Outlined for 2021 & Beyond

Employment in the Shadow of COVID–19, Part 1

Criminal Justice Reform in California, Part 2

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San Luis Obispo County Bar Bulletin


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*Cover: Many restaurants in downtown San Luis Obispo and the county have adapted their seating to meet outdoor dining requirements during the COVID–19 pandemic, as allowed. Photo courtesy of Chris Borgard.*


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# President's MESSAGE

**by Joe Benson**

## Seek Ways to Balance Out the Job Stress

This is probably not new information for our readers: Working in the legal profession can be a stressful occupation. A 2016 ABA/Hazelden Betty Ford Study[1] found that "*levels of depression, anxiety, and stress among attorneys were significant,*" with 28 percent of the sampled attorneys experiencing symptoms of depression, 19 percent experiencing anxiety and 23 percent experiencing stress.

Added to our routinely stressful jobs is, of course, the pandemic and all that comes along with it, including its impact on our physical and mental health. One way to deal with these increased levels of stress is through physical activity. I know a little something about the positive impacts of physical activity in times of stress, and I would like to share it with you.

In November 2014, I was diagnosed with Stage 4 cancer. At the time of my diagnosis, I felt great. I was training for a half marathon, I had a very uneventful (e.g. boring) family medical history, and I had not (to my knowledge) been exposed to cancer-causing chemicals. To add an extra layer of fun, the diagnosis came a few months after my wife and I had found out that she was pregnant with our daughter, who is now six years old.

As strange as it may sound, having a baby in the middle of it all was truly a wonderful thing. It provided the necessary motivation to push through the terrible parts, while also providing a sense of normalcy and joy when our lives were otherwise surrounded by the sad eyes of family and friends, hard conversations with oncologists about "buying time" and "progression-free survival," and the ebb and flow of emotions that come with those things. As any parent will tell you, a baby does not care about whatever is going on in your life. Our baby daughter's insistence that her needs came first provided a frankly welcome distraction from my illness.

After multiple failed clinical trials and consultations with what seemed like every oncologist in the Southwestern United States, the ultimate path to survival was by way of a nine-hour surgery at UCLA Medical Center and subsequent four-week in-patient immunotherapy treatment.

What was left in the wake of all that was a 36-year-old new father with a body that was a shell of its former self. I had no strength, no confidence, and having lost nearly half my body weight, no clothes that fit. I was also dealing with a very healthy case of anxiety about having a recurrence of the cancer. The phrase "I didn't know something was wrong last time" arose in my mind immediately with any little twinge or ache in my body.

I have now had five years of clean scans and am considered "cured." I feel stronger and healthier than ever. Having gone to the edge and been lucky enough to come back, I like to think that my perspective on life has changed. Relationships matter, community matters and what you do with the precious time you have matters the most.

Why am I telling you all this? It is a real-life example of the

adage that life can change very quickly, and sometimes very dramatically. One moment I was as happy as I've ever been, knowing I was going to be a dad. The next moment I was being told, "We are running out of options" by someone whose profession it is to keep people from dying from the very thing that had unexpectedly invaded my life.

The path back to normalcy after having dealt with that was through physical activity. At first, it was a beginner yoga class on YouTube in my living room. Then I started running again, just around my neighborhood at first and then farther, and then finally I found my way back to a gym. Not a traditional big-box gym, but a boutique studio that specializes in functional training.

*Joe and daughter Carmen*

With the stay-at-home orders, my routine for physical activity during the last year has been centered on riding a Peloton in my garage, playing pickle ball and hiking. Technology available to help you be physically active is abundant. You can find a wide variety of free options on YouTube, and I would recommend exploring the websites listed in the sidebar.

Mental health is just as important. The State Bar of California's Lawyer Assistance Program offers a confidential[2] free professional mental health assessment and consultation at http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program/LAP-Services.

The ability to access resources for mental health continues to expand while the societal stigma of prioritizing mental health is, thankfully, fading away. I would recommend checking out the online options in the sidebar.

Of course, please speak to a professional when necessary.

Invest in your health with the same approach you invest in a new hire, upgrading your office technology or in client retention. Make it a priority. You never know when life may change very dramatically. ■

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**Footnotes**

[1] https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_other_mental.8.aspx

[2] Business and Professions Code §6234

**Websites That Encourage Physical Health**

- **Peloton** – https://www.onepeloton.com/
- **Apple Fitness +** – https://www.apple.com/apple-fitness-plus/
- **Mirror** – https://www.mirror.co/
- **Crossrope** – https://www.crossrope.com/
- **Barry's** – https://www.barrys.com/
- **Le Sweat** – https://tv.le-sweat.com/
- **The Sculpt Society** - https://thesculptsociety.com/
- **Orangetheory Fitness** – https://www.orangetheory.com/

**Websites That Encourage Mental Health**

- **Headspace** – https://www.headspace.com/
- **Happify** – https://www.happify.com/
- **Moodfit** – https://www.getmoodfit.com/
- **Calm** – https://www.calm.com/

## The San Luis Obispo County Bar Association Endowment to Assist Persons of Color in Pursuit of a Career in the Legal Profession

As of February 5, 2021 — 54 gifts received totaling $41,335

Scholarship eligibility criteria and donation details are posted at www.slobar.org.
For more information, please contact Executive Director Nicole Johnson at slobar@slobar.org.

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Josh George
Matthew Guerrero
David & Sharon Juhnke
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George, Cyr & Christakos, Inc.
Eric Dobroth
Jacqueline Vitti Frederick
Patricia Gomex & Frank Seiple
William Herreras
Douglas Heumann
& Eveline Blanchett
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Danielle Plevel
Roderick A. Rodewald
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Martin Tangeman
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## Jurist — to $50

Jan Howell & Steven Marx
Hutkin Law Firm APC
Ken Jorgensen
Abby Lassen
Teri Sherman
Law Office of Stephen M. Stern, PC
Keolamaikalani Taniguchi
Katie Zwarg

# Editor's Note

**by Tara Jacobi**

Did you take a writing class in school? Okay, so I remember grammar school English class, but it didn't really focus on writing, how to write and all the different types of writing. I remember my high school English class as well. We had to write, but the teacher didn't instruct us on how to go about putting your thoughts on paper. Flash forward to college. With my philosophy classes, I had to write more so than with my political science classes. Yet, again, my professors demanded papers on philosophical theories but they didn't tell me how to organize my thoughts or find clarity.

I took women's history class. We had to keep and turn in journal entries. I was very honest in my writing and struggles throughout the semester. One day the professor asked my permission to read an entry of mine to the class. As a student on the reserved side, it was difficult for me to hear my inner thoughts floating through the classroom that day but he said, "You are good at this." It must have planted a seed.

My first semester of law school, I had to take the usual—but one not so usual class—that stands out: criminal law/legal analysis/writing I. Yes, it was a writing class, albeit in the context of criminal law and just touching on the tip of the iceberg as to how to write for our audience—the courts. After this experience, I was on my own. I did receive some instruction from a partner, but not a lot. He shared with me his practice of reading a motion backward before submitting it. It has something to do with waking up the brain to better catch mistakes. It works.

The Institute for Excellence in Writing (IEW), teaches students from third grade to high school how to write. Whether it be summarizing references, inventive writing, essays, critiques, literary analysis or technical writing, they almost have it all covered.

A former music teacher who learned the craft from Canadian professors, takes a scientific approach to writing well. He, being Andrew Pudewa, founded the institute, which is now based in Oklahoma.

The IEW program requires students to write with a checklist that includes varying how you start sentences, using quality words, employing alliteration, conversation, quotation, simile or metaphor and advanced punctuation. I had never come across this type of instruction. I have also taken writing classes with Gotham Writers based in New York City. I loved these classes. Still, my education or hobby-like endeavors with writing never brought me to this kind of how-to with such detail and clarity. I took it upon myself to become an IEW instructor. It wasn't easy. Did I say easy? That is probably a banned word. I should use a more descriptive term. I didn't learn to write in this manner until college.

The writers I've known and writing groups I've belonged to all seem to have a love-hate relationship with writing. The one common thread is that they can't not do it. I once spent a sleepless night in Maine because I had something in my head that I just had to put on paper. It turned out to be a poem that won a contest. One of my greatest joys.

Whether you write an amicus curiae brief, which speaks to the Court, a speech to your PTA that changes school policy, legislation that changes lives, a love letter, a document that forms a government, a treaty that brings governments together, your mother's eulogy, a writ of habeas corpus or your thoughts in a journal, you've put letters to words to thoughts to ideas and birthed a story, a story maybe only you can tell.

Please submit your narratives to Tara Jacobi at slosafire@icloud.com. ■

# State of the Courts Outlined for 2021 & Beyond

**by Presiding Judge Jacquelyn Duffy**

In January 2020, I gave my first State of the Court address to members of our legal community. I had been presiding judge for two short weeks and was full of optimism about 2020. The Governor had just released his proposed budget, with a 3 percent increase to courts statewide.

As we gathered together over lunch that day, none of us had any idea that a deadly virus was rapidly spreading around the world and would soon profoundly affect our lives. By March, schools would close and a state of emergency would be declared. Shelter-at-home orders would be issued by the county and the state. Grocery shelves would soon be emptied of everyday staples like toilet paper and hand sanitizer. A trip to the store suddenly became ominous.

Amidst the uncertainty caused by the pandemic, our bench quickly met to discuss what steps needed to be taken to keep people safe. By mid-March, we knew that the virus was in our community and in our courts. On March 16, we submitted our first request to the Chief Justice, Chair of the Judicial Council, for emergency orders under Government Code section 68115. We are now up to our 12th extension request.

In response to the pandemic, the Chief Justice began issuing advisories and statewide orders to help the trial courts remain "open in crisis," since our courts provide essential services. In April, the Judicial Council adopted several Emergency Rules of Court to assist with operations during this unprecedented time.

Across the state, courts struggled to develop new procedures in the face of a global health crisis. In San Luis Obispo, we sent two-thirds of our staff home, drastically reduced non-urgent operations, and temporarily closed our courthouses in Grover Beach and Paso Robles. Our foremost goal was to protect our staff and all court users while maintaining access to justice. It wasn't an easy task.

Before long, video appearances became our new normal. We all learned to navigate video platforms like Zoom, despite the many challenges of weak Internet connections, handling documents and exhibits, and accommodating witnesses from remote locations, including from across the world. Our IT team, headed by David Naccarati, raced from courtroom to courtroom to quickly set up the technology our courts needed to keep operations going.

Many were frustrated when court operations were revised on a weekly, and sometimes daily, basis. Please understand that our courts were trying to keep operations moving forward while constantly being presented with new challenges. One presiding judge in another county compared the experience to trying to fix your car while driving on a highway at high speeds and simultaneously trying to dodge obstacles on the road. None of us had ever experienced a pandemic. Courts throughout California were creating safety procedures without a playbook, knowing that every decision made could impact the health and safety of court staff and all court participants.

In San Luis Obispo, the legal community came together quickly to find solutions to the many challenges faced. Our courts were able to create new and innovative ways to handle calendars and cases through collaboration with attorneys and all of our justice partners.

### *JUDICIAL ASSIGNMENTS*

Seven judges are assigned to the Criminal Division, with Judge Baltodano as the supervising judge. The remaining judges are Judge Covello, Judge Duffy, Judge Federman, Judge Harman, Judge Marino and Judge van Rooyen.

Six courts handle combined felony and misdemeanor calendars and all criminal jury trials. The seventh court is a felony Early Disposition Court (EDP) presided over by Judge Harman, and staffed by Probation, Drug and Alcohol Services, and Behavioral Health. The Criminal team also handles Mentally Disordered Offenders (MDO) who are receiving treatment at Atascadero State Hospital as a condition of their parole. The Criminal team presides over hundreds of MDO court trials each year.

Judge Federman was given the honor last year of being asked

to sit on assignment with the Second District Court of Appeals in Los Angeles. Her absence is being filled with a temporary assigned judge. We're delighted she was given this opportunity and, since she continues to work remotely from San Luis Obispo, we have the added benefit of seeing her on a regular basis.

The Criminal team's major accomplishments in 2020 include close collaboration with the criminal justice partners to address modifications in court operations and the need for an Emergency Bail Schedule; successfully transitioning to video appearances by counsel, defendants at the County Jail, patients at Atascadero State Hospital, and inmates incarcerated in prisons across the state; and resuming criminal jury trials in June 2020 after a 90-day statewide suspension. Prior to summoning jurors, the Court instituted several Covid-19 precautions to ensure the safety of all court participants. Fourteen jury trials have been completed to date, including some that lasted several weeks.

Three judges are assigned to the Civil Division, with Judge Coates as the supervising judge. She is joined by Judge Garrett and Judge Hurst. The Civil judges preside over two courts in San Luis Obispo and one in Paso Robles. They also handle probate and mental health cases. Commissioner Kraut presides over the Small Claims calendar and Traffic cases in Grover Beach.

In 2020, the Civil team successfully transitioned to Zoom for court trials, motion hearings, and calendar matters. They also created a joint committee with the Bench and the Bar to address pending civil concerns, including settlement of cases. A long list of attorneys and mediators have generously volunteered to assist with settling cases.

Two judges and a court commissioner are assigned to the Family Law Division, with Judge Peron as the supervising judge. She is joined by Judge Guerrero and Commissioner Childs. The Family Law team presides over two courts in San Luis Obispo and one in Paso Robles.

In addition to their local assignments, Judge Peron is currently the Associate Dean for the statewide Judicial College and is set to begin her two-year term as the Dean in October. Commissioner Childs teaches the Primary Assignment Orientation for judges newly assigned to Family Law throughout the state.

Among their many accomplishments in 2020, the Family Law team successfully transitioned to remote hearings and trials; resumed domestic violence trials in April; and updated Family Law Case Resolution Conference procedures to limit the times litigants and counsel have to appear for mandatory six-month, 12-month and 18-month reviews.

Judge Crandall presides over both the Juvenile Protection and Juvenile Justice calendars. Through close collaboration with the juvenile justice partners, he was able to address pandemic issues in early March via comprehensive meetings that kept the juvenile court open through remote hearings, avoiding any backlog of trials and contested hearings.

### *BUDGET*

On January 8, 2021, the Governor released his proposed budget for the 2021/2022 fiscal year. However, among the many lessons of 2020, it is evident that the January proposed budget may end up looking nothing like the May revise, or the final budget in June.

*San Luis Obispo County Presiding Judge Jacquelyn Duffy in court. Photo courtesy of Mark Nakamura, Nakamura Potography.*

For now, the judicial branch is cautiously optimistic. The Governor's proposed budget recognizes that courts have needed to "***radically change… operations to protect the public from the spread of Covid-19 while also maintaining access to justice***." Consequently, the proposed budget includes a 3.7 percent increase (or $72.2 million) in funding for general trial court operations. However, there will be no restoration of the $200

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million reduction to the judicial branch budget this fiscal year. Our local court has managed the cuts through a combination of mandatory furloughs and other austerity measures, but the impact on court operations has been significant.

The budget also includes support for the Chief Justice's newly established Pandemic Early Disposition Calendar Program to address the backlog of criminal jury trials, expansion of the Ability-to-Pay program, and funding for court facilities and deferred maintenance.

### *FUTURE CHALLENGES CREATED BY COVID-19*

Most of the Court's challenges moving forward are related to backlogs caused by the pandemic and budget constraints. The Civil team has been processing a backlog of defaults and default judgments, but their efforts have been hampered by staffing shortages. The Family Law team has been severely impacted by vacancies created by the departure of Family Court Services mediators, affecting the issuance of longterm orders and delaying mandatory custody evaluations.

Addressing the backlog of jury trials remains a formidable challenge. While criminal trials resumed in June after a 90-day statewide suspension of all jury trials, physical distancing can only be safely accomplished in the two largest courtrooms in San Luis Obispo for trials involving in-custody defendants. Civil jury trials are scheduled to resume in February in the Paso Robles courthouse. To further complicate matters, jury turnout has been extremely poor, with many potential jurors understandably expressing concern about contracting the virus.

One of the Court's most difficult challenges is the ongoing impact the pandemic has had on court staff. Some employees have been exposed to the virus or have had to shelter at home if medically fragile. Others have had parents, spouses or other close family members become ill or need to be hospitalized. Many have modified their work schedules to accommodate young children who are learning from home while schools are closed.

On top of everything else, staff are trying to make ends meet while coping with mandatory furloughs that amount to a 5 percent pay cut. As frontline workers, court staff are being asked to do more with less in the midst of a global pandemic. Please remember that when interacting with them. Like everyone else, they are exhausted, and yet they understand they are vital to the administration of justice.

### *CHANGES BROUGHT ABOUT BY COVID THAT ARE HERE TO STAY*

It is likely that video appearances in certain types of proceedings will continue after the pandemic ends. The use of online hardship questionnaires has also made the jury selection process more efficient, allowing potential jurors to postpone their service without first appearing in court.

I am grateful to all of our bench officers for their commitment to maintaining access to justice during a difficult year. Court Executive Officer Michael Powell exemplifies steady leadership and is always willing to consider suggestions and proposed solutions, no matter how novel. He and Assistant Presiding Judge van Rooyen were involved at every stage of the decisions made during this last year. Judge van Rooyen will be the presiding judge next year.

I especially want to thank our legal community for maintaining patience and flexibility as we continue to navigate a new course together. Although the virus still gives us cause for concern, there are signs of a better future. A vaccine is being administered in our community, and mask usage and physical distancing have become part of our daily routines.

Inspiration lies all around us. I am constantly inspired by everyday citizens willing to serve as jurors during a global pandemic, including incoming Bar President Joe Benson; lawyers who approach a rapidly changing court with patience and good humor; and staff who come to work every day ready to serve the public, regardless of the extreme personal challenges they face at home.

On January 20, 2021, a young poet named Amanda Gorman powerfully addressed the nation with words of wisdom and hope. To borrow a phrase from her poem:

***"So while once we asked,***
***how could we possibly prevail***
***over catastrophe?***
***Now we assert***
***How could catastrophe possibly***
***prevail over us?"*** ■

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# Employment in the Shadow of Covid-19: Part 1, Compliance and Adjustment

**by Jane Heath**

**Photos courtesy of Chris Borgard**

***Editor's Note**: Jane Heath, who wrote this article in November 2020, reminds us that employment law is in flux at this time, and there may be recent changes that have superseded the article's information.*

On March 16, 2020, the governor of California announced a shutdown of all but the most essential activity. Businesses scrambled as the guidance changed from day-to-day and sometimes hour-to-hour. The months that followed fundamentally altered the way many businesses function as we moved from stay-at-home to modified, limited interactions in a commercial environment we barely recognize: full of masks, partitions, hand sanitizer, decals on the floor, remote work and reduced capacity. Learning the rules, implementing changes and adapting the workforce has been a daunting task for most businesses.

San Luis Obispo County attempted to get ahead of the curve, issuing its own stay-at-home orders a few days before the statewide order went into effect. Initially, there was considerable confusion as SLO County's designation of what businesses were "essential" differed from the state guidelines. As an example, the county guidelines deemed legal services essential as applied to providing services to essential businesses, but the state did not. In the months since, that never really changed, although lawyers and firms adapted to continue providing services without personal interaction and with mostly closed courts. Eventually, the county withdrew its own orders, yielding to the state guidelines and reopening strategies.

Businesses stepped up and tried to function in the terribly uncertain environment. Nowhere have the adjustments been more profound than in employment, which may never return to pre-COVID-19 norms. This article focuses on where we are as of the time of writing, tempered always with the knowledge that things have, and will, change in a heartbeat, so what is true today may not be by the time you read this.

## Compliance

The first hurdle for California businesses trying to cope with stay-at-home orders is compliance with the myriad regulations and programs. Before Congress acted on the stimulus package that made Small Business Administration (SBA) and the ubiquitous PPP (Paycheck Protection Program) loans available, businesses had to reduce or eliminate payroll. That led to decisions whether to reduce hours, lay off or "furlough" employees without pay.

The CARES Act enhanced state unemployment benefits, adding $600/week and extending the maximum term from 26 to 39 weeks. In many cases, layoff was a better option for both employers and employees if the business could not open: employees obtained benefits, and employers eliminated payroll costs. However, layoff meant all accrued paid time off would have to be paid out in cash on the date of termination. (Labor Code §201)

For some businesses with extensive benefits packages and/or large numbers of employees, the cash needs were daunting at a time when there was little revenue. Those who did not lay off were left with potentially extending enhanced leave benefits to employees affected by COVID-19, including healthy employees with school-aged children. (Called the Families First Coronavirus Response Act, "FFCRA," federal leave with pay was extended to all employers). Workers, however, struggled to meet financial obligations with the two-thirds pay available under some provisions of the FFCRA.

When SBA and PPP funds became available, and businesses figured out ways to reopen, some employers tried to hire back their employees and met resistance—because workers could make more money on unemployment, or because they feared public contact putting them at greater risk of contracting the virus, or both. Employers were then faced with the distasteful prospect of documenting that they had offered the job back and the employee declined, placing unemployment benefits in jeopardy.

If the business could remain open, but with reduced hours and/or services, maybe only able to provide "curbside" delivery of goods, the issue of manpower was even more complicated. Many businesses were carrying full-time employees without enough work

*Cuesta College Jazz Big Band practices outside during COVID–19 restrictions on indoor gatherings.*

or revenue to sustain them, so they considered rotating furloughs, keeping employees on the payroll but without work or pay for a period of time.

California law, however, treats a furlough exceeding one pay period as a layoff.[1] So, if the lack of work persisted more than two weeks, employers would have to pay out accrued paid time off (PTO). (Labor Code §201) Contrary to their desire to reassure employees, employers were advised not to call a layoff "temporary," as that could imply a promise of rehire that the employer may not want to honor. Employers began to recognize that they would need a smaller and more reliable staff going forward, so some employees would not be rehired.

There was also the issue of what to do with "exempt" salaried employees, who must be paid at least twice minimum wage for full-time employment, regardless of actual hours worked. If expectations were reduced, the salary could still not fall below the minimum or the exemption would be lost and the employer must pay hourly and arrange for compliance with meal and rest breaks and paperwork requirements, according to applicable Wage Orders.[2]

Some employers converted exempt employees to hourly, reducing compensation and hours.They were cautioned, however, that those employees could not be converted back and forth at the employer's whim as business needs adjust, so they should be regarded as a longer-term change. In some cases, layoff was preferable.

Employers quickly had to learn more about unemployment insurance than ever before. Some employers took advantage of EDD (Employment Development Department) "work share" agreements to replace employees' lowered income, temporarily, but then they were constrained if the business did not recover quickly enough.[3] Other employees applied for partial unemployment when hours were reduced.[4]

In addition to the existing requirements for posters and training of employees (e.g., five or more employees), sexual harassment training is required by 12/31/20),[5] COVID-19 added new requirements for postings specific to the virus.[6] Employers struggled to get and to stay in compliance with employment laws.

Staying abreast of the laws and regulations affecting employment remains challenging. Employers are encouraged to locate a reliable source of information and consult it frequently. The California Chamber of Commerce, Society for Human Resources Management and industry-specific organizations such as the California Restaurant Association are all good options. There are many more, including local employment attorneys. Be sure that the source differentiates between federal and state law. The general rule is that in case of conflict, the rule most beneficial to the employee will be followed.

*Continued on page 14*

However, if the federal government has established supremacy in a particular area (such as immigration) then federal law must be followed.

## Adjustment

Over time, many definitive sources of information have developed to assist employers with COVID-19 compliance, including city, county and state websites and the CDC. Though issues remain, and new ones arise every few weeks (see, for example, AB 685 Cal-OSHA changes—a discussion for another day), businesses that can operate have made, and are continuing to make, adjustments to survive.

The COVID-19 work environment requires employers to adopt new policies, added to those already required by law. Since 1991, Title 8 of the California Code of Regulations, §3803, has required California employers to adopt an Injury and Illness Prevention Program (IIPP).[7] Most policies, however, did not contemplate a potentially serious, contagious respiratory virus. As restrictions eased and businesses reopened, employers scrambled to adopt or augment policies to cover the advice being promulgated for keeping the workforce safe and sometimes in order to reopen. (Local rules vary; find SLO County's here.[8])

Employers wondered, "Can I check employees for fever before they enter the workplace?" (Yes). "What do I do if an employee comes down with the virus? (Follow CDC guidelines.[9]) "Can I insist employees be tested?" (Yes). "Who pays for it?" (Probably you). "Can I require that employees tell me where they're going and quarantine after traveling?"(Maybe).

All of those questions can be answered in a well-tailored policy. Any employer who has not already done so is encouraged to look at their IIPP, or adopt one if they don't have one already, and add specific polices applicable to the pandemic. Consider the specific needs and most likely paths to exposure for your employees and the public you serve, and tailor the available options accordingly. Above all, when you make or change a policy, document it. Not every issue requires amending your employee handbook. In many cases an email to affected employees will suffice, but save it so you can refer back and enforce the policy.

Advising employees of changes and explaining reasons is critical. If employees do not understand the employer's actions, they will supply their own assumptions. It is never too late to communicate or document. If there was a failure to adopt, implement or enforce policies at the outset, start now.

The most dramatic adjustment, which may well be here to stay, is remote work. Industries that resisted employees working from home were immediately forced to rethink that position in March. After some initial confusion, most non-essential businesses could continue working if their employees worked from home, but still cannot open their offices to the public. For many, that made the difference between folding the tents and keeping revenue coming in. With schools not re-opening in the fall, employees welcomed remote work as a way to supervise on-line learning without missing work. As restrictions eased, and businesses re-opened, many companies, even very large ones, have come to view remote work as a benefit to their bottom-line, dramatically reducing overhead costs. Of course, the transition is not without challenges.

Employers with work-from-home policies already in place had a big advantage. It is critically important that such policies be adopted and implemented as soon as possible. In the scramble to make it possible for employees to work from home, many businesses were consumed with the practical details and did not take time to formalize the rules for both employer and employee to follow. They, therefore, had to address each new situation as it arose.

On the other hand, now that employers have experienced some of the pitfalls of remote work (e.g., lower productivity and accountability), the policies should write themselves, right? The key is to sit down and think about every challenge encountered in having


*Food to go or eat outside brings a distanced crowd*

employees work remotely and document the solution as a policy. As long as employers do not adopt or enforce policies that are discriminatory or unreasonable, it is far better to have a written policy and implement it than to wing it. Not only does it make it easier to uniformly apply rules for the workforce, it is the best defense in the event of a claim—that the employer had a policy, implemented it and enforced it consistently and without unlawful discrimination.

California employers have a duty to provide a safe working environment. That is sometimes overlooked when employees are working from home. The same considerations for the workplace apply when an employee works at home. Is the work space adequate for the work to be completed safely? In the case of office staff, it is a good idea to have staff photograph their workspace


*to Woodstock's Pizza in San Luis Obispo.*

and send it to the employer. The employer should review the photo and ask the employee to correct anything that appears unsafe (monitor or CPU balanced precariously? obvious ergonomic issues such as an inadequate chair, etc.?). Remember that the safe environment is the employer's responsibility, so if a different chair or desk setup is required, the employer must furnish it. When you are satisfied, save a copy of the work space photo in the employee's personnel file.

In addition to making sure the environment is safe, California employers must reimburse employees for business use of personal resources. (Labor Code §2802) So, if the employee is using their own cell phone or landline to do the employer's business, or using their wifi for work, they must be reimbursed for the value of that use. *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137.

There is no hard and fast rule about how much to pay. The employer can come up with a reasonable formula. That can be done by estimating the percentage of time the employee uses their own equipment or services, and pay a percentage of their actual expense. Or use a reasonable estimate of the value of comparable services and pay based on that. Or, the employer can furnish at their expense whatever equipment or services the employee needs. Be sure it is identified as a business reimbursement when it is paid to the employee and not just added to the wages, where it is subject to payroll taxes and withholding.

We have only scratched the surface of workplace issues raised by COVID-19. As the virus ebbs and flows, and businesses face reopening, closing, reopening again, and legislatures catch up with new challenges, the only constant will be change. In Part 2, we will explore the legislated and practical changes employers must make to manage liability and conflict in the new normal workplace. ■

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## Footnotes

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***Jane Heath, AWI-CH,*** *practices as a sole practitioner in Morro Bay, specializing in business and real property, with particular emphasis on employment matters for employers. As a certificate holder issued by the Association of Workplace Investigators, she also provides comprehensive investigation of workplace issues, including sexual harassment, discrimination and violation of employment policies.*


# Local Lawyers Needed to Support New Alternative Licensure Program

**by Dean Mitchel L. Winick**

In response to the challenges facing law graduates as a result of the COVID-19 pandemic, the California Supreme Court adopted a temporary supervised provisional licensure program effective November 17, 2020. Under Rule 9.49, law school graduates between December 1, 2019, and December 31, 2020, are eligible to become provisionally licensed lawyers without sitting for the bar exam. However, local lawyers and law firms will play a critical role in order to make this program successful.

To be licensed as a provisional licensee, an applicant must either be employed by a licensed California lawyer, have a conditional offer of employment, or have been accepted as a volunteer in a law office. Under the rules of the new program, provisionally licensed lawyers must practice law under the supervision of a licensed California attorney, complete the State Bar New Attorney Training program, and if they have not previously passed the Multistate Professional Responsibility Examination (MPRE), take four hours of legal ethics training.

To remain licensed after June 1, 2022, provisional licensees must take and pass the California Bar Exam at the minimum new passing score of 1390, recently reduced by the Supreme Court from 1440.

**Other Alternative Licensure Proposals Pending…**

The State Bar Provisional Licensing Working Group is also considering extending the supervised provisional licensing program to prior bar examinees who scored 1390 or higher on any previous California Bar Exam taken within the past five years. Supporters of the proposal argue that since the California Supreme Court has reduced the measure for the "minimum competency for the first year practice of law" from 1440 to 1390, examinees within the past five years who scored below 1440, but above 1390, should be eligible to participate in the provisional licensure program.

Since these examinees have already met the current 1390 exam score standard, upon successful completion of their supervised provisional license period (proposed to be 12 to 24 months), these licensees would become fully licensed without having to retake the bar exam.

**New 1390 "Cut Score" Challenged…**

In addition to the proposal for retroactive eligibility for provisional licensing, a recent study conducted by Monterey College of Law under a grant from the AccessLex Institute suggests that the recently announced 1390 minimum passing score should be reconsidered by the California Supreme Court. The results of the study indicate that using California's current 1390 cut score to determine eligibility would qualify relatively few previous examinees for the provisional licensing program. At a 1390 qualifying score, the total number of eligible participants within the five-year retroactive period would be approximately 1,802 previous examinees.

However, using the national median cut score of 1350 as the qualifying score, the number of eligible participants would significantly increase to 4,180. Alternatively, using New York's cut score of 1330 as the qualifying score would increase the number eligible to 5,030 and as many as 6,226 previous examinees would be eligible to participate if a qualifying score of 1300, a score used by multiple other U.S. jurisdictions, was used.

**Should Diversity Be Considered …**

Another consideration for the Court is whether the provisional licensing program should provide the opportunity to improve the diversity of those eligible for licensure. The data from the recent AccessLex study indicate that using 1390 as the qualifying score would have very little effect on improving the diversity of new lawyers. However, selecting a qualifying score of 1350—the national median score, 1330—the cut score used by New York, or 1300—the cut score used by five

other states, would significantly increase the diversity of the examinees eligible to participate in the proposed alternate licensing program.

**Reminder, It Is Not About Public Protection…**

A recently released AccessLex Institute report titled, *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards,* was presented to the Supreme Court in October and determined that maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Caucasians.

**For More Information…**

Obviously, there are many potential changes on the professional licensure horizon, stay tuned!

For more information about the details of the supervised provisional licensing program, go to: https://www.calbar.ca.gov/Portals/0/documents/admissions/Provisional-License-FAQs.pdf

For a full copy of *A Five-Year Retroactive Analysis of Cut Score Impact: California's Proposed Supervised Provisional License Program*, go to: https://arc.accesslex.org/cgi/viewcontent.cgi?filename=0&article=1056&context=grantee&type=additional

For a full copy of *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, go to: https://arc.accesslex.org/cgi/viewcontent.cgi?filename=2&article=1055&context=grantee&type=additional

**For assistance in employing a San Luis Obispo College of Law graduate eligible for provisional licensure, contact Assistant Dean Dena Dowsett at ddowsett@slolaw.org.** ■

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*Mitchel L. Winick is president and dean of the nonprofit, California accredited, law school system that includes Monterey College of Law, San Luis Obispo College of Law, and Kern County College of Law. He is the former chair of the State Bar Law School Council, former chair of the Committee of Bar Examiners Rules Advisory Committee and served on the State Bar Task Force on Admissions Regulation Reform.*

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# Doing Good Matters...

## SLO Legal Assistance Foundation Doubles in Size With New Staff & New Services

**by Stephanie Barclay, SLOLAF Legal Director**

A flurry of successful pre-pandemic grant writing efforts resulted in San Luis Legal Assistance Foundation (SLOLAF) hiring two new attorneys and two legal assistants between October 2020 and January 2021, doubling the organization's staff and ability to serve SLO County's most vulnerable residents.

SLOLAF's largest grant to date, the Shriver grant, is a three-year partnership grant with the San Luis Obispo County Superior Court, which includes free legal assistance in the areas of landlord-tenant, conservatorships of the person, guardianships and elder abuse. The grant funds two full-time SLOLAF attorneys and a legal assistant to provide services ranging from limited to full-scope representation. The Court will hire a self-help attorney to assist with unlawful detainers and conservatorships. The Court will also hire a Housing Settlement Master for unlawful detainers.

In October 2009, the Governor signed the "Sargent Shriver Civil Counsel Act," which created pilot programs (Cal. Gov. Code § 68650) for the right to counsel in cases affecting basic human needs such as domestic violence, deprivation of child custody, housing and elder abuse.

The bill's findings stated that "Due to insufficient funding from all sources, existing programs providing free services in civil matters to indigent and disadvantaged persons, especially underserved groups such as elderly, disabled, children and non-English-speaking persons, are not adequate to meet existing needs." It then stated that "Legal counsel shall be appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs in those specified courts selected by the Judicial Council as provided in this section."

All Shriver pilot projects involve one or more legal services agencies working in collaboration with the local superior court. The purpose of the pilot projects is to improve court access, increase court efficiency and improve the quality of justice. Individuals with an income at or below 200 percent of the federal poverty level are eligible for services.

Eight Shriver pilot programs began in 2012 throughout California, covering housing, custody and guardianship. The Shriver pilots were originally set to sunset after six years. In June 2016, however, the Governor signed legislation making the Shriver pilots permanent. In 2020 funding was increased and two additional awards were granted. SLOLAF applied and was one of only two new grantees awarded the Shriver grant. SLOLAF is the first organization in the State to include an Elder Abuse Project in its Shriver program.

SLOLAF attorney Sadie Weller hit the ground running as the Shriver Housing attorney. She was hired a year ago as SLOLAF's first full-time staff attorney to do a combination of housing, veteran's work and senior legal services. When the Shriver Housing position became available, it was a natural fit for Weller, who had previously done tenant defense work for a legal aid organization in San Francisco before moving back home to San Luis Obispo.

SLOLAF hired Estate, Trust and Probate attorney Alexandra Morgan from Orange County to handle the conservatorships, guardianships and elder abuse restraining orders under the Shriver grant. Before private practice, Morgan worked for 10 years as a Deputy County Counsel for Orange and San Joaquin Counties.

Carmen Ortiz, bilingual legal assistant, joined SLOLAF to assist the Shriver team with intakes and litigation support.

SLOLAF hired attorney Tara Jacobi in the position Weller vacated. Jacobi is helping low-income homeowners at risk of foreclosure, homeless veterans and low-income seniors.

In addition to the Shriver grant, SLOLAF was also awarded a partnership grant from the California State Bar to run a Rental Self-Help Clinic at the Court. When the Court's self-help center opens up for in-person appointments, the Rental Clinic coordinator will assist low-income, self-represented landlords and tenants three days a week at the San Luis Obispo Superior Courthouse and two days a week at the Paso Robles Courthouse. The Clinic is expected to launch in March.

While all of these services are greatly needed in San Luis Obispo County, the timing of the additional funds to help tenants facing eviction could not have been better. SLOLAF's housing calls have been up 300 percent since the pandemic, and we are extremely grateful for the funding to provide greater assistance to San Luis Obispo County residents in need.

SLOLAF Executive Director Donna Jones said, "What an honor for SLOLAF to receive the Shriver Grant and Partnership Grant. These coveted grants are given to organizations that have proven their merit over time and can successfully carry out the intent of the grants. For SLOLAF to be in this position highlights the immeasurable hard work put in over past years by our staff. SLOLAF is committed to growing in a sustainable manner and strives to fill unmet needs in our county as appropriate funding opportunities are made available to us. These new grants and services fit the bill perfectly." ■

SLOLAF
SLO LEGAL ASSISTANCE FOUNDATION
— Providing access to justice since 1992 —

HERSTORY

# The Importance of Telling Her Stories

**by Lisa Sperow, J.D.**

*Photo courtesy of author*

***"How important it is for us to recognize and celebrate our heroes and she-roes!"***
***—Maya Angelou[1]***

As a child I was an avid reader of memoirs. Many of my favorite books were written by women recounting their childhood adventures in settings and times that were very different from my own experience growing up during the 1970s and 1980s in Southern California. I found these books enchanting and inspirational, whether it was exploring the American frontier through the lens of Laura Ingalls Wilder, or small-town life in Minnesota through Maud Hart Lovelace's Betsy and Tacy series, or the beauty of Prince Edward Island through the Anne of Green Gables books by L.M. Montgomery.

I also loved reading biographies of personal heroines such as Nellie Bly, Clara Barton and Anne Sullivan. Maybe that is one of the reasons I did not notice the lack of female stories being told in my classroom. Luckily, others did notice and sought to fill this void in the American education system by telling the stories of women who have played significant roles throughout American history by creating at first a week and later a month dedicated to Women's History.

In honor of March being Women's History Month, I decided to look at how and why Women's History Month was created and the role its founders hoped it would play in expanding knowledge about the contributions of women throughout American history.

I firmly believe that our understanding and knowledge of past events is key to shaping our future, and it is critical that our study of history includes the experiences and contributions of people of all genders, races, religions and backgrounds. The more diverse and complete our knowledge is of the past, the richer our future will be.

The seeds of Women's History Month were planted in 1978 when a school district in Sonoma County, California, sought to remedy the fact that in the 1970s the contributions of women were rarely studied or discussed in K-12 classrooms.[2] To bring some attention to the role of women in America, it hosted a weeklong celebration of women's contributions to culture, history and society, which included presentations, an essay contest and a parade.[3] A week in March was chosen to coincide with International Women's Day.[4]

The importance of this event was widely recognized, and similar celebrations soon spread to other communities throughout the country, culminating in 1980 when the Women's History Project led an alliance of women's groups and historians that successfully lobbied the federal government to achieve national recognition of Women's History Week. In response to their effort, in 1980, President Jimmy Carter issued the first presidential proclamation designating a week in March as Women's History Week.

In issuing this proclamation, President Carter stated: "From the first settlers who came to our shores, from the first American Indian families who befriended them, men and women have worked together to build this nation. Too often the women were unsung and sometimes their contributions went unnoticed. But the achievements, leadership, courage, strength and love of the women who built America was as vital as that of the men whose names we know so well."[5]

Congress soon became involved and passed an authorization requesting the president to proclaim the week of March 7, 1982, to be Women's History Week. President Ronald Reagan did so and noted: "American women of every race, creed and ethnic background helped found and build our Nation in countless recorded and unrecorded ways. …As leaders in public affairs, American women not only

worked to secure their own rights of suffrage and equal opportunity but also were principal advocates in the abolitionist, temperance, mental health reform, industrial labor, and social reform movements, as well as the modern civil rights movement."[6]

In 1987, Congress switched from requesting presidential proclamations that one week in March be set aside to recognize Women's History to requesting the entire month of March be dedicated to "celebrate the contributions women have made to the United States and recognize the specific achievements women have made over the course of American history in a variety of fields."[7] Every year since then, presidential proclamations have been issued designating March as a month dedicated to acknowledging and celebrating the many and myriad contributions of women to our country.

Each year the National Women's History Alliance selects a different theme for the month. This year's theme, "Valiant Women of the Vote: Refusing to Be Silent," is meant to recognize and honor the important roles of multi-cultural suffragists and voting rights activists to our nation. The theme seems particularly poignant in response to the turbulent events surrounding our recent election, which culminated in the ceiling shattering election of Kamala Harris as our Vice President.[8] The theme is also a continuation of the 2020 theme, "Valiant Women of the Vote," and a nod to 2020's centennial anniversary of the passage of the 19th Amendment that granted women the right to vote.[9]

In addition to the nationwide celebrations, an effort has been made to create a place to archive materials related to women's role in history. In 2018, the Smithsonian American Women's History Initiative was created as a place to "create, educate, disseminate and amplify the historical record of the accomplishments of American women."[10]

Its website: https://womenshistory.si.edu/about is an excellent resource to find information about exhibits, events and news releases relating to a wide variety of women's voices and contributions. It is important to note that these materials are available year-round and should not just be saved for March!

Finally, as I researched this topic and thought about writing this article, I became curious to see if there are any studies showing whether Women's History Month has achieved its initial goals of providing more stories to American school children that highlight women's contributions. My unscientific survey of polling my 17-year-old son and 20-year-old daughter and their friends resulted in the sad finding that none of them seemed to know that March was Women's History month.

I then wondered if celebrating Women's History Month may not be as important in the 2020s because women are being included more in American history classes today than in the 1970s and 1980s. Anecdotally that seems to be the case, however, a 2017 study by The National Women's History Museum called, *Where Are the Women: A Report on the Status of Women in the United States Social Studies Standards,* noted academic studies have found that women and minorities are still grossly underrepresented in U.S. history textbooks, while taking a detailed look at the status of women in textbooks and curriculum throughout all 50 states.[11]

Thus, although my admittedly limited investigation was unable to determine the true impact Women's History Month may have had on increasing knowledge about the vital role women have played and continue to play throughout American history, I still think that it is important to continue those efforts started in Sonoma County 43 years ago to celebrate the achievements of American women and continue to provide platforms to tell their stories. For, as Laura Ingalls Wilder said, "Maybe everything comes out all right, if you keep on trying. Anyway, you have to keep on trying; nothing will come out right if you don't."[12]

Locally, the San Luis Obispo County Women Lawyers Association recognizes Women's History Month every year by presenting the Outstanding Woman Lawyer (OWL) award during its March membership meeting, which occurs the first Wednesday in March. This award is given to honor a local woman lawyer with seven or more years of work experience who actively promotes the advancement of women in our community. If you are interested in finding out more about the OWL award's

*Continued on page 22*

past recipients or want to nominate someone for the 2021 OWL award, you can go to their website: http://www.wlaslo.org/owl-awards. ■

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### Footnotes

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*Lisa Sperow, recipient of the 2020 OWL Award, provides pro bono representation for low-income individuals with tax controversies as the Executive Director of the Cal Poly Low Income Taxpayer Clinic; visit: https://www.cob.calpoly.edu/litcweb/.*

# News From ABOTA

Roger Frederickson, a partner with Frederickson Hamilton, LLP has been elected the 2021 President of the California Coast Chapter of the American Board of Trial Attorneys (ABOTA).

Founded in 1958, ABOTA is a national association of experienced trial lawyers and judges, dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment.

ABOTA fosters improvement in the ethical and technical standards of legal practice so that litigants may receive more effective representation.

Frederickson is an associate member of the Chapter and has been practicing law for almost 30 years, 25 of which have been in the area of civil litigation. He has tried more than 30 jury trials during that period. He is also a Judge Advocate in the U.S. Army Reserve and is currently Senior Defense Counsel for the Western United States encompassing California, Arizona, Nevada, Hawaii and Guam. ■

# Q & A Criminal Justice Reforms Enacted in California, Part 2

**by Kara Stein-Conaway and Jeffrey Stein, Stein-Conaway Law Firm**

*While the nation is looking for criminal justice reform, California has enacted legislation to address certain issues. Asking prosecutors and criminal defense attorneys will give readers insight into what is happening in their worlds. This is the second part of the article, which started with the perspective of Chef Deputy DA Lisa Muscari in the January–February* Bar Bulletin. *The perspective of criminal defense attorneys Jeffrey Stein and Kara Stein-Conaway begin here and will wrap up in the May–June bulletin.*

### *AB 2542 California Racial Justice Act*

*What are some of the practical implications of AB 2542?*

The law purports to eliminate discrimination in the criminal justice system, but at the same time it potentially discriminates against victims and witnesses. The nine-page, single-spaced, eight-point law was passed by the Legislature with very little discussion, debate or analysis.

*What are the benefits of AB 2542?*

A panacea that this bill will eliminate discrimination in the criminal justice system.

#### Defense Thoughts

The law prohibits the state from seeking or obtaining a criminal conviction or imposing a sentence on the basis of race, ethnicity or national origin. The defense must prove by a preponderance to prevail. (Legislative summary as amended August 25, 2020.)

The comment of the author in the Assembly floor analysis (8-31-20) describes the underlying justification for the legislation as follows.

"The California Racial Justice Act is a counter-measure to a widely condemned 1987 legal precedent established in the case of McCleskey v. Kemp. Known as the McCleskey decision, the U.S. Supreme Court has since required defendants in criminal cases to prove intentional AB 2542 Page 4 discrimination when challenging racial bias in their legal process. This established an unreasonably high standard for victims of racism in the criminal legal system that is almost impossible to meet without direct proof that the racially discriminatory behavior was conscious, deliberate and targeted. The Court's majority, however, also observed that State Legislatures concerned about racial bias in the criminal justice system could act to address it."

*What are some problematic implications, if any, of AB 2542?*

This law largely ignores the race, ethnicity or national origin of the **victims or witnesses** to the crimes, deprives all members of society of justice, notwithstanding indisputable and overwhelming evidence of an offender's guilt, and could apply to upend any future conviction in California despite a lack of any showing the state actually sought or obtained a conviction based on race, ethnicity or national origin.

There are five major problems with this bill.

First, the bill is unfair and unjust because it would require vacating a conviction, no matter how serious the crime, without any showing that the **alleged bias** had any impact whatsoever on the outcome of the trial, or that the defendant was deprived of a fair trial.

For example under this bill, if in a murder case, an officer exhibited a racial bias against the defendant, the case would have to be reversed, regardless of whether 50 people saw the defendant commit the murder, the jury was aware of the bias, the officer did not testify, and the person murdered belonged to the same racial group as the defendant. The lack of a requirement of **showing of prejudice** will undoubtedly generate a challenge that it is violative of article VI, section 13 of the California Constitution. The bill is riddled with so many inadequately defined and legally unprecedented terms, there is no chance that courts will be able to figure out consistent standards for determining whether a violation occurred.

For example, the bill would prevent or overturn a conviction if "[t]he defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities or national origins who commit similar offenses and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity or national origin in the county where the convictions were sought or obtained."

"More serious" or "similar" are undefined. The bill does not state how to calculate the alleged disparity

*Continued on page 24*

between groups. Is it data showing disproportion going back five years, 10 years or more? This presupposes that there even is any data showing disproportionate treatment. What are the parameters? The bill gives no guidance. The phrase more "frequently sought, obtained or imposed" is vaguely defined as meaning statistical evidence or aggregate data that demonstrates a "significant difference" between the comparative groups. What is the percentage for "significant difference?" The statute leaves it entirely up to the individual judge to decide without any guidance. This will lead to inconsistency in how this is interpreted and carried out by each individual judge.

Second, the law imposes heavy costs on local counties without any reimbursement to identify, locate, review and redact potentially thousands of files, just to provide relevant discovery.

Third, the wrong version of AB 2542 was passed. To avoid a conflict with AB 3070, AB 2542 was written in a way so that the provision that allowed a violation of section 745(a) based on race, ethnicity or national origin being a factor in peremptory challenges would only become operative if AB 3070 was enacted and it became "effective on or before January 1, 2021." It won't, because AB 3070 now does not go into effect until January 1, 2022. And the provision of AB 2542 that was not intended to go into effect if AB 3070 passed (passed but delayed) will now go into effect. Moreover, because of its broad and ambiguous language, this provision will be difficult to interpret and reconcile with the provisions of AB 3070 that go into effect in 2022.

In other words, one of the primary reasons for delaying implementation of AB 3070 (e.g., to allow training to occur on the new guidelines) will be undermined since (i) even if it was possible to figure out how to apply the new standard imposed by AB 2542 regarding jury selection, there will be insufficient time to train on it, and (ii) the standard will only be in effect for a year so that a whole new set of trainings will have to occur again in 2021 to prepare for the new standard under AB 3070.

For example, AB 2542 makes it a violation for "[r]ace, ethnicity or national origin [to] a factor in the exercise of peremptory challenges" without explaining what it means for membership in one of those groups to have been a factor. If a juror is challenged because the juror provides answers indicating the juror could not be fair due to the racial or ethnic background of the defendant, a victim or a witness, will "race or ethnicity" be deemed to be a "factor" in the exercise of the challenge? The law is silent on this.

Fourth, the law could easily result in unintended consequences. For example if, hypothetically, a defendant was Hispanic and the data showed that Hispanic defendants who committed sexual assault disproportionately received more severe sentences than all other groups for this offense, but the data also showed that Hispanic defendants received more severe sentences than any other group when the victims of the sexual assault were Hispanic victims, a Hispanic defendant would be entitled to a lesser sentence because his victim was Hispanic. (And the same would potentially hold true for a defendant in any group when the victim is of the same group as the defendant.)

Fifth, the law is not even-handed. It purports to make it a violation for a prosecutor to use race, ethnicity or national origin as a factor in exercising peremptory challenges—**even if no purposeful discrimination occurred**. But defense attorneys are given carte blanche to engage in this conduct without being a violation.

**Defense Thoughts**

The legislature is a policy-making body, charged with assessing the need for legal changes to assure systemic equity. This is their action to implement that obligation.

*Additional thoughts on AB 2542? None.*

### *AB 3070 Juries: Peremptory Challenges*

*What are the practical implications of AB 3070?*

This legislation has been delayed and will not go into effect until January 1, 2022.

*What are the pros and cons in changes regarding jury selection that AB 3070 might bring about?*

Peremptory challenges shall never be used to improperly exclude potential jurors based on their race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affliction. Nothing is more fundamental to our system of justice. This law is nothing less than an upheaval of the California jury selection process. While this law will not go into effect until January 1, 2022, even before the delay, Chief Justice Tani Cantil-Sakauye created a working group that will consider whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection.

One problem with the law is that, if a potential juror expresses a distrust of or has had a negative experience with law enforcement, that is presumptively an invalid reason for a prosecutor to exercise a peremptory

challenge. However, the same rule does not apply to the defense if a potential juror trusts and respects law enforcement or has had generally positive experiences with police.

The second problem is that the standard used is "substantial likelihood," which would allow for a finding of an improper peremptory challenge even when a judge determines it is more likely than not that there was no discrimination.

Third, the law infers ill intent without any basis. The law does **not** require purposeful discrimination and punishes purported *unconscious thought*. It **presumes** implicit, institutional and unconscious bias has impacted the jury selection process without any evidence that a particular prosecutor possesses bias, subconscious or otherwise.

Fourth, the law mandates evidentiary presumptions without any support or evidence. Instead of requiring some showing that a reason given for exercising a peremptory challenge is invalid or a pretext for bias, the law *automatically presumes* that a litany of seemingly valid reasons are presumed to be invalid. These commonsense reasons include expressing a distrust of law enforcement, having a close relationship with a criminal, being inattentive and providing unintelligible answers. This presumption runs contrary to existing California court precedent, where it is presumed that a peremptory challenge is proper unless otherwise shown.

Fifth, the law runs counter to long-standing Supreme Court precedent. It allows for untimely objections, meaning objections made well after a jury has been selected and jeopardy has attached. Our Supreme Court has long held that, "to be timely, a *Batson/Wheeler* objection must be made **before** the jury is sworn."

Sixth, the law will have unintended consequences. It could hinder the prosecution in cases where persons of color have been victimized by presumptively invalidating challenges to jurors who may distrust key witnesses (e.g., police officers).

Seventh, the law may be unconstitutional. The motivation for creating a list of challenges that is intentionally and clearly tailored to make it difficult for the prosecution, but not the defense, to excuse jurors in all but a few cases may be pure. However, it skews challenges in a way that destroys the balance needed for a fair trial as required by due process and thus is likely to be challenged on grounds it violates section 29 of Article I of the California Constitution, due process.

*Additional thoughts on AB 3070?*

Justice will not be served if jurors are selected who have expressed an unwillingness to perform their most basic task, i.e., to fairly assess the evidence, and attorneys have been discouraged from exercising challenges for legitimate reasons because of the presumption of discriminatory use.

**Defense Thoughts**

In a year where George Floyd died at the hands of apparently abusive police practices and the nation was swept by an outpouring of social unrest simmering since the founding of the nation, few topics garner as much rhetoric as this one.

The Supreme Court, both U.S. and California, recognized the issue of prosecutorial practices in jury selection to selectively increase the prospects of conviction by reducing the representation of minority communities in *Batson v. Kentucky* (1986) 476 U.S. 79, 89 and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.

The problem has been that the remedy for evident discriminatory selection has been elusive to make work. A report that had great impact on the legislative deliberation in this arena was prepared at UC Berkeley School of Law and lays out the history of abusive, discriminatory practices that compelled reform. A google search will locate it easily for informative reading: *Whitewashing the Jury Box: How California Perpetuates the Discriminatory: Exclusion of Black and Latinx Jurors***.** The documented and detailed demonstration of the abusive practices made evident in the report, in the assessment of the legislators and the governor, led them to conclude that the time for effective remedial tools had come to impact and reduce the practices. This reform legislation is the chosen vehicle of that reform.

*Continued on page 27*

### *AB 1950: Probation: Length of Terms*

*What are the practical implications of AB 1950?*

This law would drastically shorten the proba-tion period in all criminal cases, including when an offender is convicted of a serious or violent felony, which would in turn hurt crime victims and reduce opportunities for the rehabilitation of offenders.

*What are the potential benefits and/or detriments, if any, to AB 1950?*

Current law gives judges discretion to decide the appropriate length of a probation period based on factors such as the seriousness of the offense, the offender's criminal history, how much restitution the offender owes the crime victim, and what type of rehabilitative programming the court orders under existing law. If a judge believes that only two years of probation is appropriate, the judge can order that length of probation. Current law also permits judges to terminate probation early.

Pursuant to existing Penal Code Section 1203.3, a probationer who completes court-ordered programming and pays restitution to a crime victim can always ask the court to terminate probation early. Judges routinely grant these types of termination motions. Limiting probation to two years in all felony criminal cases is simply unnecessary when the courts already have the power to choose an initial period of probation that is appropriate for a particular case and to terminate probation early if an offender completes all probation conditions early.

This cap on one-year probation for misdemeanors doesn't apply to any offense that includes specific probation lengths within its provisions. For example, under PC 1203.097, terms of probation are already set for domestic violence, child endangerment under PC 273a, PC 166(c), VC 23152/3, PC 502 and others. The two-year limit on probation for felonies does not apply to violent felonies (PC 667.5(c)) nor to an offense that includes specific probation lengths within its provisions nor to grand theft under PC 487(b)(3), embezzlement under PC 503, and PC 532a, false financial state-ments if the amount is greater than $25,000.

*Additional thoughts on AB 1950? None.*

#### Defense Thoughts

Existing law generally has set terms of probation at up to five years for felonies and up to three years for misdemeanors. No historically recognized rationale existed for these terms to have been embedded in the law, and the legislature, in assessing the value earned for the duration set, felt it to be unjustified as a burden-benefit analysis. The Senate Rules committee's floor analysis (as amended 6-10-20) cited the input from the Drug Policy Alliance as follows to amplify their reasoning.

The Drug Policy Alliance writes: The purpose of the bill is to end wasteful spending, to focus limited rehabilitative and supervisory resources on persons in their first 12 to 24 months of probation and reduce the length of time that a person might be subject to arbitrary or technical violations that result in re-incarceration. A robust body of literature demonstrates that probation services, such as mental healthcare and substance use disorder treatment, are most effective during the first six to 18 months of supervision. A shorter probation term, allowing for an increased emphasis on rehabilitative services, would lead to improved outcomes for people on probation and their families.

Furthermore, this bill does not take the "teeth" out of probation or the courts. If a person on probation fails to comply with treatment or other conditions set by the court during a probationary period, the court may revoke the person's probation until the person is back in compliance. The period during which the probation is revoked does not count toward release from probation, thereby extending the period of supervision. Additionally, this bill does not change the power of the court to order a period of incarceration in addition to probation supervision and conditions, nor does the bill change the probation periods for AB 1950 Page 8 for any offense in which the length of probation is mandatory or specified in the relevant statute.

### *AB 3234: Public Safety*

*What are the practical implications of AB 3234?*

Penal Code sections 1001.95–1001.97 will be added, creating a "Court Initiated Misdemeanor Diversion" program in which the court in its discretion, and over the objection of the prosecutor, would be empowered to grant diversion on almost all misdemeanors (including violations of 23152 VC and misdemeanor violations of 23153 VC… DUI and misdemeanor DUI with injury). This law allows almost any misdemeanor defendant to apply for diversion.

This bill also addressed elder parole and changes the current law, Elderly Parole Program. Currently, the law authorizes a review of the parole suitability of inmates who are 60 years of age or older and who have served a minimum of 25 years of continuous incarceration and lowers the age to 50 as "elderly" and available

*Continued on page 29*

# Central Coast Reverie

## Montaña de Oro State Park

*Chris Borgard*

**Editor's Note**

As Joe Benson said in this issue's President's Message, it's vital to seek ways to balance out the stress that comes with being in the legal profession.

*Bar Bulletin* photographer, Chris Borgard, specializes in landscape photography and offers this visual toward that goal.

**Photographer's Note**

This past year more than ever, I think many people have struggled with feelings of loneliness and isolation.

To me, this photograph is symbolic. Though the bench on the beach may be empty, the flocks of numerous shore birds remind us that others are experiencing the same struggles of existence. And the silver lining in the cold, growing marine layer clouds might be a reminder that we all may need some solitude, at times, to help reflect and refocus our own busy lives. – CB

to an inmate who had served 20 years of continuous incarceration.

*What are the potential benefits and/or detriments, if any, to SB 3234?*

This law allows a court to grant diversion for misdemeanor offenses, including DUIs, elder abuse and firearms offenses.

These grants of diversion are subject to almost no restrictions or qualifying criteria, and the period of diversion prior to dismissal is limited to a maximum of 24 months. No minimum period is specified. Further, there is no limitation placed on the number of times that diversion pursuant to this section may be granted to a particular defendant, nor are any guidelines set forth or limitations imposed on how an individual court chooses to exercise its discretion in granting diversion pursuant to this section. There is, however, an exclusion of a small number of misdemeanor offenses (e.g., registerable sex offenses, violations of domestic violence statutes PC 273.5, PC 243(e), and stalking PC 646.9, etc.) from eligibility.

Specifically with DUIs, this broad-ranging authority of courts to grant diversion without limitation on DUI offenses potentially has a serious impact on the ability of the criminal justice system to deal with chronic and repeat DUI offenders. AB 3234 places no limitations whatsoever on the eligibility of repeat DUI offenders for diversion. There is the real threat that a defendant may avoid being identified as a high-risk, chronic, impaired driver who poses an extreme danger to public safety. Current requirements after conviction include participation in education and sobriety programs and install ignition interlocks, etc., which could easily be circumvented in the diversion program, further jeopardizing roadway safety.

*Additional thoughts on SB 3234?*

As noted, a subsequent DUI would not be able to be charged as a repeat offense since the first DUI would have been deemed never to have occurred after completion of diversion. This new law allows this diversion windfall to be offered to repeat offenders, which means that new offenses, including felonies, will no longer be able to allege the priors because they did not result in a conviction, but were diverted. This removes the important sanction for recidivist DUIs and puts more lives at risk on our highways by significantly reducing the sentence exposure for a would-be recidivist.

The law has a significant negative fiscal impact on California. This new law directly conflicts with federal highway funding programs, "potentially subjecting the state and California taxpayers to the loss of untold millions of dollars in highway funding that is critically necessary to maintain and expand our roadway infrastructure," said Vern Pierson, President of the California District Attorneys' Association.

"AB 3234 makes sweeping changes to public safety policy and could cost California untold millions in transportation funds, yet this bill was not granted a hearing in either the Assembly or Senate Public Safety Committees, nor in any Appropriations Committee. The circumvention of procedural due process was breathtaking as are the provisions of the bill," Pierson added.

**Defense Thoughts**

The Senate Floor Analysis (as amended 8-24-20), dated 8-31-20, in the comment section, characterized the reasons for empowering the court with the authority to divert as follows.

AB3234 provides judges with the discretion to provide diversion to individuals charged with misdemeanors they deem appropriate for such a program. Diversion programs that are successfully completed allow a person to avoid the lifelong collateral consequences associated with a criminal record when they are seeking employment or housing. Diversion programs typically require individuals to fulfill strict requirements, including participating in a rehabilitation program. This proactive approach has shown to yield better recidivism rates than merely prosecuting and jailing an individual.

The clear implications are that the legislature reposes great trust in the court to carry out the mission of implementing the ends of justice. The fact that the legislation deprives prosecutors of veto power over this diversionary process suggests that the legislature has concerns about the system's ability to work effectively, were prosecutors to be empowered with that authority.

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**Continued…** The defense team continues their exploration of Additional CA Criminal Legislation and Defense Legislative Changes of Importance in the May–June Bar Bulletin.

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## Bar Bulletin Editorial Policy

Contributions to the *Bar Bulletin* must be submitted electronically in Microsoft Word format directly to the 2021 Editor at:

**slosafire@cloud.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.

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.

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

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| January–February issue deadline | 11/25 |
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| May–June issue deadline | 3/25 |
| July–August issue deadline | 5/25 |
| September–October issue deadline | 7/25 |
| November–December issue deadline | 9/25 |

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