Sonoma County Bar Association

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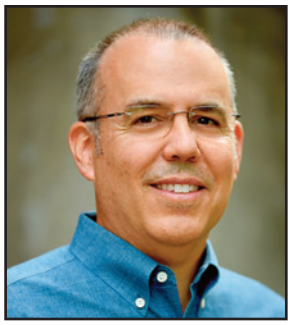
Rendering of New Sonoma County Courthouse (see page 10 for details)



By David Berry, President, SCBA

President's Message: Billie Holiday's *Strange Fruit* and DEI

This article's title is intentionally cryptic. As you will see, it addresses DEI from only one angle: race. Please take my words in the spirit they are intended: DEI has many facets and must be examined from many angles, race being but one. Before I dive in, let me briefly reflect on what has been almost a year of being the SCBA president. It has been an amazing privilege, as we moved to our lovely new offices (please visit; we have a blue accent wall!), began to host *in-person* events, and held an unforgettable Bench Bar Retreat. The state of the SCBA is strong, thanks to our great leadership (Amy Jarvis and her team), our strong executive committee and board, and tremendous volunteers and members. Thank you all! I am very excited for next year!

This next tangent gets closer to the article's title. I love words. I love how simple words, effectively organized, move people. I *love* infomercials. I love podcasts, poetry, and music. I particularly like rap music. Back to podcasts. Recently, I have been listening to *American Scandal*, a podcast series by Wondery. One particular episode hit me like a lightning bolt—because it evoked our DEI efforts in Sonoma County. It is called *The Feds vs. the Activists | Billie Holiday*. Through it, I learned of Holiday's treatment by the FBI, because she began singing a song called *Strange Fruit* in 1939. As I listened, I felt her pain and terror. I wondered *why* she continued to sing the song, knowing that it would lead her further into trouble. I wonder if enough people, today, understand the sacrifices she made to expose racial injustice.

The beginning of *Strange Fruit* paints a haunting picture. "Southern trees bear a strange fruit. Blood on the leaves and blood at the root. Black bodies swinging in the southern breeze. Strange fruit hanging from the poplar trees." It became her signature song and one of the most influential protest songs. The FBI repeatedly tried to stop Holiday from singing it. They seemed to fear the song might lead to civil unrest by encouraging Black citizens to protest the inferior status dominant society had assigned them. To me, *Strange Fruit* is important because of Holiday's use of imagery and artistry to tell a story of abuse and oppression.

Learning about *Strange Fruit* made me recall one of my favorite poems. It was 1951 when American poet Langston Hughes published the poem *Harlem*. Like *Strange Fruit*, *Harlem* uses imagery to speak truth about Hughes's observation of race relations. As a middle school student in Texas in the early 1980s, we had to memorize and analyze the poem as a class project. The teacher gave us the poem with no context, and initially had us try to figure out what it was about. At the time, we were learning about metaphor and imagery. We all understood that the poem was speaking in a code we could not decipher. Ultimately, the teacher provided the context and background. It moved me then. It moves me now. For most of my legal career, *Harlem* has sat in my office very near my workstation. It is a reminder of the power of simple words and the need for artists to focus attention where we need reflection and

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In This Issue

The 2022 Bench-Bar Retreat: A Call to Action

On Friday, October 7, 2022, Sonoma County held its Bench Bar Retreat at the Redwood Empire Food Bank in Santa Rosa. It was an outdoor "big tent" event, literally and figuratively, as the subtitle for this year's retreat was "A Call to Action—Diversity, Equity, Inclusion and Belonging in the Sonoma County Legal Community."

Over 100 members of our bench and bar gathered to hear from a distinguished panel, which included California Supreme Court Justice Martin J. Jenkins, California Appellate Court Justices Teri L. Jackson and Marsha G. Slough, Santa Clara County Superior Court Judge Erica R. Yew, and the Governor's Judicial Appointments Secretary Luis Cespedes.[1]

The crowd was first welcomed by Sonoma County Superior Court Presiding Judge Shelley Averill and SCBA President David Berry. The program was moderated by retired Sonoma County Superior Court Judge Arthur A. Wick, who was the driving force behind this year's retreat and the development of its theme.

All speakers shared their stories, illustrating why having this DEI conversation is so important to them, how they had been subjected to the biases of others, and, even at times, how they were awakened to their own biases. They described experiences where being honest about who they were was difficult, or even impossible, if they wanted to advance in their careers. That each of them faced isolation during their careers was a powerful reality for the audience to hear.

The speakers also noted that telling our stories and engaging in this DEI dialogue helps lead to improved communications between the legal and lay communities, reduces exclusionary thinking, and increases the number of seats at the table of influence. Many of them observed that being authentic to ourselves enables us to view others in that same vein. They urged further education on these issues not only as a means to address biases we encounter in ourselves and others, but also as a path toward forgiveness and guidance for those we observe to be offensive. Understanding what our stories tell us about ourselves will help us accept and honor the stories of others, including those with whom we differ.

Paraphrasing from various comments: Stories make you feel, which is what we remember. Stories are more important to human development than having opposable thumbs: thumbs help us hold on; stories tell us what to hold on to. Stories are the gifts that keep on giving. Luis Cespedes reminded us that sharing our stories shows we have what he referred to as "judicial empathy." "The antidote to discrimination," he posited, is "the ability to see the world from another's perspective," which he viewed as crucial if we are to serve our role as seekers of justice. The message from the speakers was that our individual stories are all important, and learning about and honoring each other's stories leads to better decision-making reflective of our broader community.

The discussion turned to how we might enlarge the awareness of DEI issues to improve our collective understanding of what they might mean. There was a recognition that awareness is growing. Learning critical thinking skills would go a long way toward overcoming biases, especially if we can learn not to take media reports at face value. Pipeline programs are gaining in popularity, which work to educate school children about the legal system and ways in which they can participate as adults. Yet, according to a 2000 survey, as our population grows more diverse, its respective representation within the legal community is expected to diminish. Therefore, outreach efforts need to continue from kindergarten through law school.

We were urged to ask ourselves what we *don't* know when we have that "aha" moment following our own missteps. We all have implicit biases that occasionally surface, no matter how dedicated we may be to avoiding them. The message was that working from the standpoint of love—being open and available to exchange information with each other—can help. Suggestions for how to do that included: look for connections with each other; listen without judgment; be respectfully curious about the views of others; realize that adding people from underrepresented groups does not displace those already there, but—rather—increases the number

1. Speaker bios at: *https://sonomacountybar.org/sites/default/files/202211/HO%204%20of%2011%2C%20Speaker%20Bios.pdf*

The 2022 Bench-Bar Retreat (continued from page 12)

California Supreme Court Justice Martin J. Jenkins (L), California Appellate Court Justices Teri L. Jackson and Marsha G. Slough (middle L & far R) & Santa Clara County Superior Court Judge Erica R. Yew (middle R)

Sonoma County Superior Court Judge Arthur A. Wick (Ret.)

California Supreme Court Justice Martin J. Jenkins with SCBA President David Berry

At Left: Bench & Bar participants

At Left: The Governor's Judicial Appointments Secretary Luis Cespedes.

of seats at the table of influence; take the Harvard Implicit Associations Test[2]; and get involved in a pipeline program. The importance of this "call to action" was summarized well by a law student in attendance: "We as attorneys are working with real people; if we don't know who they are we can't serve them."

And our Governor shares these values. According to Luis Cespedes, the Governor wants a diverse bench, but he recognizes that diversity comes in many forms, including geographic and age diversity. Likewise, the legislature has encouraged the Governor's office to give particular consideration to applicants from diverse and underrepresented populations for the judiciary to better reflect the population coming before the courts. Mr. Cespedes explained why this was so important: We need the population to have confidence in the court system. Currently, only one in five polled have confidence in the U.S. Supreme Court, which is a very dangerous state of affairs because the courts are the last hope for our democracy. To preserve our democracy and judicial system, we need legitimacy from the American people. And when we increase diversity on the bench, when we speak of DEI and equality for all, we speak of preserving our original intentions as a democracy.

After the speakers concluded their presentations, the audience was encouraged to participate in a "breakout" session, at which point tablemates were asked to discuss among themselves the following questions: "What is the one thing you'd like to share about yourself today? Who do you think makes up our community? What do we want our community to look and feel like? Why does our organization care about diversity and inclusion? Why is it an important conversation? What would we gain by being more diverse and inclusive?" Each table chose a reporter, and notes were submitted for review and possible publication. Throughout the day, audience members also submitted written questions to the panelists, which will also be submitted to the panelists for responses to potential publication.

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2. https://implicit.harvard.edu

The 2022 Bench-Bar Retreat (continued from page 5)

It is hard to capture all the messages that were shared by the speakers and audience, but the poem Justice Martin Jenkins read to us is instructive and illustrative:

Dream of Freedom
By Langston Hughes

There's a dream in the land
With its back against the wall.
By muddled names and strange
Sometimes the dream is called.

There are those who claim
This dream for theirs alone —
A sin for which, we know
They must atone.

Unless shared in common
Like sunlight and like air,
The dream will die for lack
Of substance anywhere.

The dream knows no frontier or tongue,
The dream, no class or race.
The dream cannot be kept secure
In any one locked place.

This dream today embattled,
With its back against the wall —
To save the dream for one,
It must be saved for all —
Our dream of freedom!

Conclusion and observation: This year's retreat was a marked change in direction from past retreats. Prior retreats have focused on issues more directly related to the interrelationship between the judges and attorneys, hence the name "Bench-Bar." But this year, personal experiences were shared, courageously so, that emphasized how much bias still exists, how much of our population is still underrepresented in the legal field, how difficult it has been and still is to improve that equation, and how important it is to see the world through the eyes of others. It was not always easy, I'm sure, for those who shared their stories to do so in front of a large audience. Even on a smaller scale, I could imagine that engaging in the topics listed for the breakout discussions could form a dream discussion for some and a nerve-wracking nightmare for others. But as we heard throughout the day, either way, it was important to be at the table.

By Brian J. Purtill

Brian J. Purtill is the Dean of Empire College School of Law, a mediator with the Arbitration & Mediation Center and an SCBA Bar Journal columnist and committee member.

Hon. Gary Nadler Retires from Bench

In reviewing Judge Gary Nadler's legacy as he begins his retirement from the bench, most would point to his many high-profile accomplishments: representing Al Davis and the Raiders while employed by nationally renowned antitrust lawyer Joseph Alioto; appointment by the Chief Justice to the Judicial Council; his trial victories; recognition by the State of California Assembly for outstanding service to Sonoma County; or perhaps being the constant moving force over thirteen years to bring a new courthouse to Sonoma County. However, when asked about his meaningful accomplishments, without exception, every item he cited lacked prestige, but promoted social justice.

A commitment to social justice appears to be of greatest value to Nadler. Early in his career he developed a program for services to misdemeanor inmates discharged from jail. It coordinated resources in the community to address the recurring problems of this population of the homeless, mentally ill and substance abusers. He developed "Courage to Live," an outreach to middle school and high school students addressing drinking and driving and distracted driving. He was instrumental in creating a treatment court for multiple drunk drivers, seeking a more lasting impact than the standard disposition of these cases.

Judge Elliot Daum noted that Nadler "should be applauded for taking on the political risk of these progressive programs … he has warmth, empathy, compassion for others." Similarly, one of Nadler's oldest friends from law school, Dolores Dalton, commented, "He has always wanted to give everyone the opportunity to be the best they could be."

Nadler was raised in Buffalo, New York, by parents who were kind, liberal and held civil service jobs. There was a strong family ethic of service to others. Some family members had perished in the Holocaust, others survived. "Awareness of that type of oppression, man's inhumanity to man, greatly influenced Gary," Daum observed. At the age of 18, Nadler worked at a summer camp for disadvantaged children. This experience inspired and further nurtured his sensitivity to others.

He completed a degree in urban and environmental studies as an undergrad in Buffalo. A law school catalogue cover depicting the Golden Gate Bridge at sunset mesmerized Nadler and led him to move west and attend USF. Of course, he was a serious law student, but he made time for tutoring struggling students, supporting affirmative action and volunteering at legal aid, advocating for tenants. His legal scholarship was honed by the two years during law school when he worked as a cite checker for Continuing Education of the Bar (CEB).

For two years after passing the bar, Nadler worked as an associate at Alioto & Alioto. Despite the prestige of this position, he disliked the long periods of time working on the road. He wanted a more rural lifestyle, more conducive to marriage and raising children.

Petaluma presented an opportunity to work with Fred Hirschfield. On a handshake, an equal partnership was formed that continued for 16 years. The two remain the closest of friends and, with their spouses, will soon travel Europe by river boat. Hirschfield has no doubt that those skills acquired from years of practicing civil law and trying cases helped form Nadler into an outstanding judge and a superb private mediator. "Gary tried very difficult cases to verdict experiencing losses as wells as wins. He carefully listens, and is patient and open minded," recounts Hirschfield.

Nadler's passion for and command of the law is well known in this legal community. He has taught law for 16 years. At Witkin Judicial College he taught civil discovery, experts, and civil settlements. At USF, he taught evidence, advanced civil litigation, and civil discovery. He co-authored the *Civil Discovery Handbook* for West Publishing. For CEB's *California Civil Discovery Practice* treatise, Nadler wrote two action guides and served as a consultant.

His teaching and writing made him a better lawyer and a better judge; but, more importantly, he loved teaching law students. Jack Sanford was one of Nadler's Advanced Civil Litigation students. Sanford describes Professor Nadler as a "kind, intelligent, awesome guy… energetic, enthusiastic and approachable." Even though he worked a full day and drove to San Francisco to teach a three-hour night class, Nadler thrived on interacting with students.

Hon. Gary Nadler Retires from Bench (continued from page 8)

In 2002, Nadler was appointed to the bench. He immediately established himself as an engaged, thoughtful, and well-prepared jurist. Patrick Emery describes Nadler as an "extremely hard worker who took his responsibility seriously and issued cogent opinions. He is a wonderful, humorous person, who sees the best in everyone." The lack of cynicism in administering justice was one of Nadler's qualities that Brendan Kunkle repeatedly witnessed and appreciated. Like everyone else, Kunkle described Nadler as "scholarly." Kunkle said Nadler distinguished himself through his extensive, well-reasoned tentative decisions. Most identify Nadler as a modest, big-hearted person. Judge Daum pointed out that Nadler was a great mentor with whom he could discuss thorny issues. Nadler would enthusiastically collaborate, sharing theories and giving excellent advice.

In retirement, Nadler's number one goal is to return to playing his guitar. In earlier years, he played blues and ragtime on acoustic and electric guitars. He plans to sharpen up his skills, starting with bluegrass and jazz. Also, at the top of his list are traveling with his wife, Alice, spending more time with his two sons, and researching his family history. An avid sports fan, this next stage of life will allow more time for the Warriors and Giants.

Nadler does not intend to allow the law to dominate this stage of his life, but he has already taken on new legal projects. Settling cases has been one of Nadler's fortes. Among the civil judges, Nadler was often asked to settle the most difficult cases. His settlement skills should be a great foundation for his next venture with the Arbitration & Mediation Center (AMC). AMC mediator Rich Rudnansky observes, Nadler's "lengthy judicial experience, demeanor and superb legal knowledge coupled with his practical approach to issues and the respect that members of the profession have for him will serve the parties well." Bob Murray, who recruited Nadler to AMC, adds that Nadler is curious, modest, sensitive to others and a great listener who can build trust. In another capacity he is consulting to evaluate sexual abuse claims against churches and a university doctor.

While Nadler's retirement is a loss for the Sonoma County Bench, his continuing involvement in the legal community is appreciated and valued.

By Hon. Gayle C. Guynup (Ret.)

Hon. Gayle C. Guynup is a retired Assigned Judge with the Sonoma County Superior Court.

SAVE THE DATE:
Law Week 2023: March 27-31 & April 3-7
Topic: Cornerstone of Democracy

1. What does it mean to have a Constitutional Democracy?
- How to maintain a democracy
- Where has it been lost before

2. Civility: How to have a civil conversation about politics
- Attorneys trained in this way

3. Election Integrity
- Role of the courts in the process.
- Ballot intimidation (DEI component)

4. Freedom of the Press
- Attacks on press
- Informed public is cornerstone of democracy
- Media and Internet

5. Right to Assembly
- Side shows
- Time, Place, and Manner Restrictions
- What are limitations? Wanting people to assemble in the masses, but then January 6th

Email Susan Demers at *Susan@SonomaCountyBar.org* to Volunteer to present at Sonoma County high schools.

The House that Nadler Built

The new Sonoma County courthouse is finally taking shape! The last beam was placed atop the 7-story structure on October 28, 2022. The project has been on the books since 2008 with construction now scheduled for completion by mid-2024. The new facility will replace the existing 57-year-old structure on Administration Drive.

The hills of Sonoma County will be visible from the higher floors. The 15 courtrooms will enjoy natural light from transoms and natural air will flow through the building. This will be the new workplace for approximately 270 Court employees. The building has received a Silver LEED Certification, meaning the design and construction follows international standards for water and energy efficiency, reduced CO_2 emissions, enhanced quality of the interior environment and responsible management of the related resources. The 170,000 square foot facility comes at a cost to the State of $186,354,000. Additionally, the Sonoma County Board of Supervisors has contributed at least $26,000,000 for the project, which includes the costs of a security tunnel connecting the jail to the courthouse.

The State of California is the funder for all court facilities. Financial crises, political maneuvering and a building moratorium have delayed a process that originated with legislation in 2008. Many credit Judge Gary Nadler for his perseverance and skills in ensuring that the State fund and complete this project.

In fact, a few years ago, Patrick Emery was gathering support to name the courthouse after Judge Nadler. He soon learned that an individual has to be dead a minimum of ten years before a State building can bear his or her name.

The current Presiding Judge of the Sonoma County Superior Court, Shelly Averill, profusely praised Nadler: "Judge Nadler was an exemplary leader of the Judicial Branch at both a state and local level…he served as the Chair of the Trial Court Advisory Committee and held a seat of the Judicial Council. Regarding the new courthouse, Judge Averill continued, "Judge Nadler was a leading force behind keeping the Criminal Courthouse Project on the priority list of courthouses that would be built as the state was moving out of the financial downturn. Many Presiding Judges have played a role in the … project over the years it has taken to bring this project to fruition, but Judge Nadler has been the one constant throughout all of the years. The Court and the Community should be forever grateful to his tireless dedication to make this project a reality."

Joining the chorus, Judge Elliot Daum credits Nadler for his successful advocacy in securing the new courthouse: His "outreach into the State community has been a tremendous asset for Sonoma County. The Sonoma County bench and bar have benefited through his participation on the Judicial Council, his actions as presiding Judge, and the countless hours he has devoted to developing relationships to pursue this project."

It has been a complex and torturous path. In 2008, the legislature authorized $5 billion in bonds for courthouse construction and renovation statewide. This augments the courts' contributions to the State Construction Fund and the Critical Needs Fund. A pro rata share of each court fine or fee is deposited in the fund.

In 2009, 41 courthouses were identified as having critical problems: security, safety, physical deterioration and/or inadequate space for dedicated uses. Of these 23 were deemed to have the "most critical need." The Sonoma County Courthouse was on the "most critical need" list for several reasons: its location near four earthquake faults; having been built without the benefit of present day seismic engineering; and inadequate court security because inmates are transported through unsecured public corridors and when transported through "secure" corridors inmates can be mixed with judicial officers and staff.

Our Superior Court jumped on the opportunity presented and started initial plans, site selection and design. In 2012, progress was derailed by Governor Brown's transfer of substantial funds out of the construction fund, a 20% reduction in court filing and a loss of $70 million to Brown's traffic ticket amnesty program. Responding to these cuts, the scope, budget and design of the courthouse had to be reconfigured and the costs reduced by 27%. The legislature then requested the construction projects to be prioritized and Nadler spent untold hours keeping the Sonoma County project high on the list. It was expected the courthouse would be completed by 2020.

The House that Nadler Built (continued from page 10)

Governor Brown struck another blow in 2016, when he declared a moratorium on all courthouse projects remaining on the "most critical need list." He redirected $1.4 billion of the courts' construction funds to the state's general fund. This was most vexing to our Court which had contributed annually to the state construction fund. In fiscal year 2015, our court contributed $1.52 million to the fund; last year $876,353 was deposited. In 2018, courthouse funding was restored and ground breaking was celebrated in June of 2021.

The architectural firm for the structure is Richard Meier & Partners. Meier is internationally renowned for his extensive incorporation of light and open space in his designs. Among hundreds of projects, the firm designed the Getty Center in Los Angeles, the Barcelona Museum of Contemporary Art and San Jose City Hall. During the great recession, San Francisco hosted an Architectural Fair. Richard Meirer & Partners was among the presenters. Judge Nadler was in attendance at the Fair and was attracted to the design and use of natural light and light colors for their projects. This feature is readily apparent in the face of the building, the ground level jury assembly room and the courtroom lighting.

The new courthouse under construction (courtesy of Sonoma County Superior Court)

By Hon. Gayle C. Guynup (Ret.)

Hon. Gayle C. Guynup is a retired Assigned Judge with the Sonoma County Superior Court.

President's Message (continued from page 3)

improvement. Here is *Harlem*:

> What happens to a dream deferred?
> Does it dry up
> like a raisin in the sun?
> Or fester like a sore—
> And then run?
> Does it stink like rotten meat?
> Or crust and sugar over—
> like a syrupy sweet?
>
> Maybe it just sags
> like a heavy load.
>
> *Or does it explode?*

I have always seen *Harlem* as a sanitized depiction of racial oppression. I can *see* the grape becoming a "raisin in the sun" and I almost *taste* the "syrupy sweet." Even the "explode" part at the end seems somehow antiseptic and non-threatening.

Fast forward to 1988, when rap group N.W.A. released its debut album *Straight Outta Compton*. I bought the cassette shortly after it came out. By now, I know the album well. It *immediately* caused huge controversy, because it told a massively disrespectful story about law enforcement. For me, at 18, it was earth-shaking. My lived experience was that law enforcement was a blessing. Seeing a police officer made me feel safe. It still does. I have never felt like a target of any bad conduct from the police. When I got the cassette, I carefully listened to the songs, many of which tell stories of bad treatment *by* the police.

At first, I did not get it. It seemed like it was describing a world that *could not* exist. I was offended. But then I began living life as an adult. Ultimately, I lived in Los Angeles. I began to understand how different members of our community see the world very differently. As art, what N.W.A.'s album did was shine a *different* light onto law enforcement. It gave a voice and gritty context to how some people experience law enforcement differently. Art can help us bridge the gap so that we gain greater understanding. For me, N.W.A. did just that.

Billie Holiday, Langston Hughes, and N.W.A. give me a better perspective on the long path DEI efforts have taken through history. They used art to tell the story of oppression and struggle through the lens of race. There are, of course, countless mediums and lenses the DEI struggle takes. If we hope to make meaningful progress down the DEI path in our local legal community, we *must* understand the history of the struggle. We must appreciate how far we have come, how many folks have sacrificed for our progress, and how much work remains until our entire community *understands* and *believes* that we *all* belong here *together*.

I am grateful Kinna Crocker will be next year's SCBA president. She has worked tirelessly on DEI issues for many years and is the perfect choice to guide us into a bright future. I look forward to stepping into a supporting role as our organization moves toward that future.

SCBA Winter '22 "Movers & Shakers"

If you have new information about yourself or any other SCBA member, please send to SCBA "Movers & Shakers" at ***info@sonomacountybar.org****. Include position changes, awards, recognitions, promotions, appointments, office moves, or anything else newsworthy. If your firm sends out notices to the media, please add* ***info@sonomacountybar.org*** *to the distribution list.*

Sandra Acevedo has moved her office to 775 Baywood Drive, Suite 117, in Petaluma . . . **James Carroll** moved his office to 3450 Mendocino Avenue, Suite A, in Santa Rosa . . . **Julie Levy** has moved her office to 3554 Round Barn Blvd., Ste. 303, in Santa Rosa . . . **Debra Robertson** is now with Rodman & Associates, PC. In Santa Rosa . . . **Karen Donavan** is now with East Bay Municipal Utility District, 375 11th St. in Oakland . . . **Robert Jackson** has retired from Santa Rosa City Attorney's office . . . **Judge-elect Oscar Pardo** received an early appointment to his seat on the Sonoma County Superior Court. He started his assignment on December 12th.

Meet Carla Rodriguez: Sonoma County's New District Attorney

In 2021, after a long career as a trial attorney and a few years as a supervisor, I decided to run for office. District Attorney Jill Ravitch had announced her retirement. The primary motivation behind my decision was simple: To ensure that the DA's office would continue to prioritize victims' rights and public safety over politics. I start my new job on January 3, 2023.

As the elected District Attorney, it is my duty to serve the citizens of Sonoma County by responsibly prosecuting those who commit crime, and by upholding victims' rights in court. The ultimate goal is to see that justice is served. While justice is not easily defined, my main objective is to ensure that every person who becomes involved in the criminal justice system is treated fairly, equitably, and free from bias of any kind.

The District Attorney's Office has over 135 dedicated employees who work tirelessly to uphold our mission. The staff includes 55 attorneys, an Investigations Bureau, a Victim Services Division, the Family Justice Center, and countless support staff.

Having been a prosecutor for over 25 years, I have seen crime trends ebb and flow. I have seen the children and grandchildren of people that I prosecuted enter the criminal system. I am acutely aware that filing criminal charges can negatively impact the rest of a person's life.

I began my career at the Sonoma County District Attorney's office in 1997. This was during the "tough on crime" era when laws were intended to eradicate the increase in violent crime caused by drug trafficking, gang activity, and recidivism. Simply put, a person charged with any felony could be sentenced to state prison. This included convictions for nonviolent felonies such as drug possession, possession of stolen property, and commercial burglary.

Inevitably, the prisons became dangerously overcrowded. A disproportionate number of Black and Hispanic inmates were incarcerated. The "tough on crime" laws needed to be less rigid and more equitable.

Times have changed. Through a series of legislative measures and ballot initiatives, California sentencing laws have changed. The role of a prosecutor has changed. While we are still fundamentally trial attorneys, a modern prosecutor serves many other functions: social worker, advocate, community engager, empathizer, and support person. With this in mind, here are the issues that I am focused on as I prepare for my new role.

Alternatives to Incarceration

There are several opportunities for those arrested for a crime to exit the criminal justice system without sustaining a criminal record. The District Attorney's office has historically provided pre- and post-filing diversion for criminal defendants charged with low-level misdemeanor crimes. In addition, defendants have been availing themselves of statutory drug and military diversion programs for years.

In 2018, Penal Code section 1001.36 was amended to create a new mental health diversion program for people charged with felonies and misdemeanors. It is up to the trial court to decide if a person is both eligible and suitable for the program. Successful completion of the program results in dismissal of the case and expungement of the arrest. A defendant must consent to participate in mental health diversion in order to qualify.

AB 3234, effective January 1, 2021, created a new court-initiated misdemeanor diversion program pursuant to Penal Code section 1001.95. Under this section, and over a prosecutor's objection, the court may offer diversion to a person charged with most misdemeanors. Under this section, a divertee can also earn a dismissal and expungement upon successful completion.

As District Attorney, my goal is to divert more low-level offenders at the pre-filing stage. I want them to receive services that are meaningful and impactful. This is especially important for juveniles and transitional-aged youth who come into contact with the criminal justice system, many of whom face huge obstacles in life. If we can prevent people from getting embroiled in the criminal justice system, and if we can provide them with support and tools to move forward in life, justice will be served.

Meet Carla Rodriguez (continued from page 14)

Mental Health

Sonoma County is in the midst of a mental health crisis. At any given time, half the inmate population in the jail is housed in a mental health module. Emergency rooms are filled with people admitted on 5150 holds pending medical clearance. The Crisis Stabilization Unit is full. There is a large population of mentally ill people in Sonoma County who routinely cycle in and out of these three locations.

Our prosecutors have become social workers. They regularly receive phone calls from frantic family members asking what they can do for their mentally ill loved ones who are out of control. The county needs more options.

In the criminal justice system, when a person who is mentally ill commits a crime, that person is often found to be "incompetent to stand trial" (IST). This is a growing group of people; the pandemic was catastrophic to everyone's mental health, people continue to self-medicate with dangerous drugs that exacerbate psychotic symptoms, and there are not enough services to go around to address our needs.

Further, the Legislature seems intent on shifting responsibility to the courts and counties to address the mental health crisis, as evidenced by a series of new laws.

SB 317 repealed and amended Penal Code 1370.01, effective January 1, 2022. The measure was described in the Senate as "providing increased treatment options tailored to each defendant." Instead, the new law effectively ends court-ordered treatment and criminal prosecution of IST misdemeanants. If a misdemeanant is found incompetent, the court has one of two choices: either refer the defendant to mental health diversion or dismiss the case. (A court may also refer an IST defendant to an "assisted outpatient treatment facility" as envisioned by Laura's Law if diversion is not successful, but the Sonoma County Board of Supervisors chose to opt out of this program years ago.) Since SB 317's inception, misdemeanor diversion could not be granted without a defendant consenting to the program. As a result, misdemeanor cases are routinely dismissed as our judges have no other option under the law. This includes driving under the influence cases, low-level sex

(Continued on page 16)

Meet Carla Rodriguez (continued from page 15)

offenses, violations of restraining orders, and other crimes. This conundrum will fortunately be corrected in future clean-up legislation.

Misdemeanor cases are not the only ones being impacted by the legislative changes to the mental health system. Under SB 184, effective June 1, 2023, a felony defendant who is found competent to stand trial must first be considered for placement in a local diversion program, community treatment program, or outpatient treatment program before being sent to a state hospital. The law contains a "growth cap" provision, which provides that counties that send too many defendants to the state hospital in a fiscal year can be fined the state hospital's daily rate.

On December 1, 2024 the Community Assistance, Recovery and Empowerment (CARE) Act will go into effect in Sonoma County. Governor Newsom touted the new law as a cure for the homeless crisis by enabling loved ones, first responders and mental health workers to force those suffering from mental health problems to receive treatment.

The CARE Act essentially creates a civil petition process by which a person suffering from schizophrenia or other psychotic disorder may be court-ordered to participate in a treatment plan and accept county services. If a court finds that a county failed to provide proper services, the county can be fined up to $1,000 a day, not to exceed $25,000 for each violation. However, if the conservatee decides not to participate in the program, there is no remedy.

Taken as a whole, our county has some work to do. One of my most important jobs as District Attorney will be to collaborate with the courts, probation, our behavioral health experts, and the Board of Supervisors to address the growing mental health crisis, in an effort to ensure that proper funding is allocated to the necessary mental health services.

Fentanyl

People are dying from fentanyl. Fentanyl is a highly addictive synthetic opioid, 100 times more powerful than morphine. Fake prescription pills look exactly like legitimate prescription drugs, and can be easily purchased by anyone with a smartphone. The Drug Enforcement Administration estimates that four out of every ten fake pills contain a potentially lethal dose of fentanyl.

The increasing rate of opioid-related overdoses in Sonoma County is astonishing. In 2017, there were a total of 12 fentanyl and other substance-related deaths; by 2020, this number had risen to 80 (a 566 percent increase). As the pandemic wore on, the numbers continued to rise. In 2021, 122 people died in Sonoma County from opioid-related overdoses, with fentanyl being the sole toxic substance behind 109 of these deaths.

The District Attorney's office has been working with a number of federal agencies in an effort to reduce fatal overdoses in our county. You may have seen our billboards warning of the dangers of fentanyl. Share this information with your loved ones.

We prosecute criminals who harm others through the use of deadly drugs. In August 2022, a Sonoma County judge sentenced a defendant to 16 years in prison for hindering efforts to assist two men who fatally overdosed in his home. We have an open murder case against the parents of a toddler who died from exposure to fentanyl. The District Attorney's Office has and will continue to hold people accountable who contribute in any way to opioid abuse in Sonoma County.

Wage Theft

I routinely asked people on the campaign trail what issues impacted their quality of life in Sonoma County. A common complaint emerged from these conversations. Whether it be domestic cleaners, restaurant workers, construction employees, or farmworkers, people routinely told me stories about getting cheated out of their fair pay. It became clear that vulnerable workers, many of whom are undocumented, were afraid to report wage theft for fear of retaliation and as a result, not being able to provide for their families.

Assembly Bill 1003 was passed in 2021. Effective January 1, 2022, it created new Penal Code section 487m, which states that the intentional theft of wages in specified amounts is punishable as a felony. "Theft of wages" is defined as the intentional deprivation of wages, gratuities, or other compensation by unlawful means, knowing that the employee is due that compensation.

Meet Carla Rodriguez (continued from page 16)

The District Attorney's Environmental and Consumer Fraud division already actively investigates and prosecutes crimes involving worker's compensation fraud, insurance fraud, and other forms of white-collar theft. In light of Penal Code section 487m, I will actively encourage referrals to our office relating to wage theft of any kind, and will be conducting community outreach to support these efforts.

The Realities of Sentencing Reform

My primary duty as District Attorney is to promote public safety through the equitable prosecution of criminal offenders. Justice is often equated with a lengthy state prison sentence. Most members of the public don't realize that state prison is no longer a sentencing option for most felony convictions.

In 2011, Assembly Bill 109 was enacted in response to the United States Supreme Court ordering California to reduce its prison population. Also known as "realignment," AB 109 changed the punishment for more than 500 felonies, providing that time be served in "local prison" (county jail) as opposed to state prison. AB 109 also provides the option of including a built-in period of "mandatory supervision" in a defendant's sentence. Technically, under the new law a person can be serving their "local prison" sentence while out in the community.

Proposition 47, billed as "The Safe Neighborhoods and Schools Act," was passed by voters in 2014. It reclassified several felonies as misdemeanors including lower-level theft crimes such as forgery, vehicle theft and larceny of items less than $950 in value. It also created the new misdemeanor crime of "shoplifting," which effectively precluded anyone from being charged with felony burglary for entering a commercial establishment with the intent to steal. Not surprisingly, many local businesses are targeted by thieves who know not to steal more than $950 in a single day.

These are but two examples of the new paradigm in California sentencing laws. I will seek the assistance of local law enforcement agencies to identify repeat offenders and, by working together, hold them accountable under the current law.

These issues are just the tip of the iceberg, and new ones will certainly arise. Thank you for allowing me to continue my career in public service as your next District Attorney.

By Carla Rodriguez

Carla Rodriguez is a Chief Deputy District Attorney in the Sonoma County D.A.'s Office and the District Attorney-Elect. She is currently the President of Sonoma County Women in Law and a member of the Sonoma County Bar Association Archives Committee.

See Ms. McCullum's article on page 30

SCBA Welcomes Our New Winter 2022 Members!

Colleen Aslin, Redwood Empire Law & Mediation (RELM)
Natasha Berg, Abbey, Weitzenberg, Warren & Emery P.C.
John Cabiener, Law Student
Jennifer Carmody, Wine Country Family Law
Dena Dowsett, Assistant Dean of Admissions and Marketing, Monterey College of Law (MCL)
Steven Dowsett, Steven R Levy, Attorney at Law
Trina Dresden, Smith Dollar
Caycie Favier, C. Bradford Law Firm
Colin Frey, Community Law Clinic
Natividad Yasmin Guillen Anguiano, Law Student
Bianca Levy, Law Student
Karalynn Mills, Law Student
Travis Ransom, Geary, Shea, O'Donnell, Grattan & Mitchell PC
Joseph Wiedman, Law Office of Joseph F. Wiedman
James Woods, Woods Group Solutions

Sonoma County Women in Law 2022 Scholarship Recipients

Sonoma County Women in Law would like to congratulate its 2022 scholarship recipients: Christina Oliver and Danielle Hansen.

The Honorable Gayle Guynup Scholarship assists a deserving law student with an interest in promoting women's access to, and involvement in, the legal system. Ms. Oliver, a second-year law student at Santa Clara Law School, has been awarded $4,500. Similarly, the Community Advocacy Scholarship (funded with generous contributions from the Sonoma County Board of Supervisors grant funds) assists a deserving law student who has demonstrated involvement in and dedication to serving the community. Ms. Hansen, now in her third year at Empire College School of Law, was awarded $1,500.

Honorable Gayle Guynup Scholarship Recipient

Christina Oliver

Christina Oliver's desire to become an attorney is rooted in her experience as a child of divorce. She credits her mother as a strong influence in her life, who raised her to value education, be a hard worker, and pursue her goals relentlessly.

Ms. Oliver is a first-generation college graduate, graduating from Sonoma State University a semester early, with cum laude honors and department distinction. While attending college she obtained an unpaid judicial internship with a family court judge. After graduating from college, Ms. Oliver began working as a business immigration analyst, preparing nearly 300 visa petitions and filings which honed her writing skills to present USCIS with the strongest case for the clients her firm represented.

She serves on the board of Santa Clara Law's Women & Law Association as the Co-Alumni Relations Chair where she is organizing a professional mentorship program and will be serving as a mentor for a 1L member of the Women & Law Association.

On receiving the scholarship, Ms. Oliver stated, "I am so honored and grateful to have been selected to receive the Honorable Gayle Guynup Scholarship. It is such a privilege to have the opportunity to attend law school and build the skills necessary to one day be a resource for those in the community seeking access to the legal system. It is my goal to not only be a great attorney, but also a great mentor who is dedicated to giving back."

Community Advocacy Scholarship Recipient

Danielle Hansen

Danielle Hansen's aspiration to become an attorney "stems from wanting to advocate in a section of our society where I think folks need the most relief, the law."

Ms. Hansen's life drastically changed when she entered the foster care system as a child. Through that experience, Ms. Hansen gained strength, resilience, and developed the ability to advocate for herself and others. Discouraged by the lack of support for foster youth while attending college, Ms. Hansen co-designed and implemented two separate foster youth support programs, one at the Santa Rosa Junior College (Bear Cub Scholars), and one at Sonoma State University (Seawolf Scholars). Ms. Hansen also fundraised, wrote grants, advocated at the state capital, and partnered with various community organizations to develop additional resources to fill in gaps of services for foster youth.

In addition to attending law school and raising her two stepsiblings whom she adopted, Ms. Hansen works at Community Support Network, a local non-profit, as their development & training manager, where she advocates on behalf of transitional-aged youth, with a focus on those in danger of homelessness.

As a first-generation college graduate, and first in her family to pursue a legal career, Ms. Hansen was grateful for the financial help the scholarship will provide: "Thank you for investing in my future and helping me to pursue a law degree that will allow me to aid our community for the better."

Please consider making a donation to Sonoma County Women in Law to help provide future scholarship opportunities. Make donations to The Honorable Gayle Guynup Fund for Scholarships—Expendable, 120 Stony Point Rd., Ste. 220, Santa Rosa, CA 95401. Donations go towards supporting deserving law students to make it possible for them to complete their legal education.

By Kristin Horrell

Kristin Horrell is Deputy County Counsel and Scholarship Chair of Sonoma County Women in Law.

Sonoma County Bar Association

Announcing Food from the Bar Winners!

Redwood Empire Food Bank and SCBA are pleased to announce the winners of our first-ever Food from the Bar!

Together we:
- **Raised $157,725**
- **Volunteered 496 hours**
- **Collected 1,732 pounds of food**

First Place: **Abbey, Weitzenberg, Warren & Emery**
39,543 Points

Second Place: **Retired Judges and Other Has-Beens**
36,542 Points

Third Place: **Smith Dollar, Disability Services & Legal Center, and Legal Aid Of Sonoma County**
27,594 Points

Abbey, Weitzenberg, Warren & Emery volunteer team.
Photo courtesy of Redwood Empire Food Bank

Top Fundraiser Award:
Abbey, Weitzenberg, Warren & Emery
$36,875

Most Volunteer Hours:
Abbey, Weitzenberg, Warren & Emery
228 Hours – 1,140 Points

Most Food Collected:
Abbey, Weitzenberg, Warren & Emery
479 Pounds

Kick-Off Award:
Smith Dollar, Disability Services & Legal Center, and Legal Aid Of Sonoma County
$100 On Day One

Most Creative Award:
Smith Dollar, Disability Services & Legal Center, and Legal Aid Of Sonoma County
Mac's Deli Food and Funds Drive

Per Capita Award:
Retired Judges and Other Has-Beens
$3,900 raised per team member

Small Dollar Award:
Smith Dollar, Disability Services & Legal Center and Legal Aid Of Sonoma County
75 Donations $100 or under

Week Six Winner: Smith Dollar, Disability Services & Legal Center, and Legal Aid Of Sonoma County ($25,335)

Week Five Winner: Abbey, Weitzenberg, Warren & Emery ($1,800)

Week Four Winner: Shapiro, Galvin, Shapiro and Moran ($8,000)

Week Three Winner: Abbey, Weitzenberg, Warren & Emery ($600)

Week Two Winner: Abbey, Weitzenberg, Warren & Emery ($2,050)

Week One Winner: Friedemann Goldberg Wargo Hess LLP ($1,100)

Thank you to all the participating teams for your time and effort throughout this campaign:

Abbey, Weitzenberg, Warren & Emery; Anderson Zeigler, A PC; Berry & Fritzinger, P.C.; Carle, Mackie, Power & Ross LLP; Dickenson Peatman & Fogarty P.C.; Disability Services & Legal Center; Friedemann Goldberg Wargo Hess LLP; Perry, Johnson, Anderson; Legal Aid Of Sonoma County; Mac's Deli; Miller & Moskowitz; Retired Judges and Other Has-Beens; SCBA Criminal Law Section; SCBA DEI Section; Shapiro Galvin Shapiro & Moran; Smith Dollar; Sonoma County District Attorney's Office; Spaulding McCullough & Tansil LLP; Welty, Weaver & Currie; Wine Country In-House Counsel.

SCBA Celebrates its 100(+1) Anniversary

Back on February 12, 1921, 32 members of the bar (out of the 42 total in the county) gathered to formalize the creation of the Sonoma County Bar Association. On September 16, 2022, SCBA was (finally) able to celebrate our 100(+1) year anniversary. That's 100 years of serving the legal community, 100 years helping support and improve Sonoma County's system of justice, and 100 years of building strong relationships between the bench and the bar.

Today, there are about 1,400 attorneys practicing in Sonoma County, about half of whom are members of SCBA. On September 16th, 123 people turned out to celebrate with us. We sipped wine, nibbled delicious food (with the luckiest attendees discovering the dessert buffet downstairs), and enjoyed stories of days gone by… all before the amazing backdrop of the Paradise Ridge Winery.

This was an easy-going event. Guests had free reign of the Paradise Ridge grounds, but most stayed close to the action on one of several outdoor patios or around the display table of memorabilia presented by SCBA's Archive Committee. President David Berry had a few words to say on this landmark achievement before calling all the Past Presidents to the stage along with Stephanie Hess, SCBA's 2021 President. Stephanie having been unable to host any events for the past two years, David took the opportunity to present her with a plaque commemorating and thanking her for her service to the Board and SCBA in 2021. SCBA's 2020 President Michelle Zyromski, who was not able to attend, will also be honored with a plaque for her service during the pandemic.

SCBA has weathered much in the past 100 years. I have every confidence we'll continue to ride out whatever else is thrown at us for the next 100. It's been an honor to watch this organization grow in my (relatively) short time here. I thank all of you for making this organization what it is today!

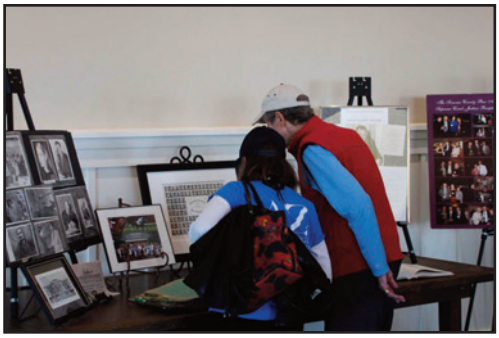
By Amy Jarvis

Amy Jarvis (she/her) is SCBA Executive Director. Amy has been with SCBA since 2010, poking her nose into just about every aspect of the organization before being promoted to Executive Director in 2019.

L to R: Sponsor Rose Zoia, COD honoree & SCBA Past President Tom Kenney, SCBA Past President & sponsor Mitchell Greenberg, SCBA Past President & sponsor Stephanie Hess, SCBA Past President & sponsor Rachel Dollar, and SCBA Past President & sponsor Glenn Smith

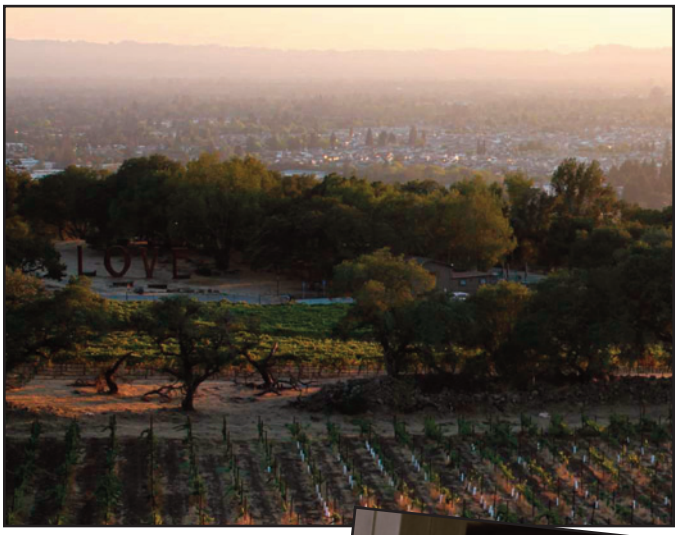
L to R: Paige Hein, District Attorney Carla Rodriguez & Lynnette Brown

SCBA Executive Director Amy Jarvis with event sponsors Tricia Seifert & Michael Seifert



Attendees explore the SCBA archives for a look back over the past 100 years

Former SCBA Executive Director Peter Steiner and wife Vera chat with Timothy Hannan



View from Paradise Ridge Winery

At Right: Event Sponsors Lee Bartolota & Michael Green enjoy the view, wine and good conversation

Attendees share in thanking Past President Stephanie Hess for her service in 2021

Photography pages 20 & 21 courtesy of Josh West

Sonoma County Bar Association

A Big "Thank You" to our 100th Anniversary Sponsors!

Platinum Level: $2,000

Abbey, Weitzenberg, Warren & Emery, PC
Carle, Mackie, Power & Ross LLP
Clement, Fitzpatrick & Kenworthy
Geary, Shea, O'Donnell, Grattan & Mitchell, P.C.
Spaulding McCullough & Tansil LLP

Gold Level: $1,000

Anderson Zeigler
Berry & Fritzinger, P.C.
Dunst Law Offices
Friedmann Goldberg Wargo Hess LLP
Hansen & Miller
JLF Reporting, Inc.– Certified Shorthand Reporters
SCBA Labor & Employment Section
SCBA Paralegal & Legal Support Section
Smith Dollar PC
Zyromski Konicek LLP

Silver Level: $500

Compassionate Divorce
Emerick Law Offices
Evans Kingsbury LLP
Flack Law, PC
JAMS
Law and Mediation Offices of Marie Maiolo Muchow
Law Office of Walter Rubenstein
Redwood Empire Law & Mediation (RELM)
Shapiro, Galvin, Shapiro & Moran

Bronze Level: $250

England Law
Law Office of James F. DeMartini
Mike Tunick Legal Videography
SCBA Barristers Club
SCBA Criminal Law Section

Originalism and its Adversaries

In June, as the Supreme Court's annual session came to a close, court watchers—already shaken by an unprecedented leak indicating *Roe v. Wade* was likely to be overturned—received word that a New York law imposing a "proper cause" requirement for persons desiring an unrestricted license to carry a pistol or revolver in public was no more. The Supreme Court's decision not only reaffirmed the holdings of *Heller*[1] and *McDonald*[2] that the right to keep and bear arms was an individual liberty, it also terminated lower court use of what is known as means-ends or interest balancing scrutiny—that is, courts would no longer be permitted to weigh the right protected by the Second Amendment against the government's purpose when infringing upon that right.[3]

Critics reacted strongly. President Biden commented that he was "deeply disappointed" in the Court's decision, which he said "contradicts both common sense and the Constitution."[4] New York's governor said the decision "isn't just reckless, it's reprehensible."[5]

The New York Times, denounced the decision as "a vision of the Second Amendment that is profoundly at odds with precedent and the dangers that American communities face today, upending the longstanding practice of letting States decide for themselves how to regulate gun possession in public."[6] The Supreme Court's decision, said the *Times*, reveals "the vast gulf between ideologues on the court and those Americans—ordinary people and their representatives in Congress—who want this country to be safer from guns."[7]

The Court's critics are not without their own ideological leanings. The critics favor what they believe to be a more pragmatic approach to interpreting the Constitution, with ample consideration for the values generally embraced by those on the left. Their favored approach is one that developed eighty years ago, when President Franklin Roosevelt succeeded in replacing more traditional justices with "new and younger blood," possessing what he characterized as "personal experience and contact with modern facts and circumstances under which average men have had to live and work."[8]

This more pragmatically liberal approach to interpreting the Constitution was one that had been advocated for decades by progressive thinkers on and off the bench. President Wilson—then a historian and attorney—had complained as far back as 1885 that "modern conditions required government action that original constitutional restraints impeded."[9] A like sentiment in time began to appear in the opinions of increasingly progressive members of the Court. In a decision involving the Treaty Power, Justice Holmes observed that interpretation of the Constitution should not be bound by the attitudes of those a hundred years earlier, but must instead be approached "in the light of our whole experience."[10] Speaking of the Contract Clause, Chief Justice Hughes said that the Court need not "insist that what the provision of the Constitution meant to the vision of [former days] it must mean to the vision of our time."[11] In a decision involving the Spending Power, Justice Cardozo dismissed concerns that the power is properly confined to national as opposed to local concerns. Times, he suggested, had advanced beyond the more constrained view of constitutional authority typifying a more primitive age.[12] It was left to Justice Brennan following the triumph on the bench of liberal pragmatism to define the modern view of the Constitution as one of supreme adaptability. Viewing the more traditional interpretive approach as suited only for "a world that is dead and gone," Brennan said the job of the Supreme Court was essentially to adapt the Constitution's "great principles to cope with current problems and current needs."[13]

1. *District of Columbia v. Heller* (2008) 554 U.S. 570 ("*Heller*").
2. *McDonald v. City of Chicago* (2010) 561 U.S. 742 ("*McDonald*").
3. *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 597 U.S. __, 142 S.Ct. 2111.
4. Nina Totenberg, "Supreme Court Strikes Down N.Y. Law that Restricts Concealing Carrying of Guns, *https://www.npr.org/2022/06/23/1102995474/supreme-court-opinion-guns*, June 23, 2022.
5. *Id.*
6. "The Supreme Court Puts Gun Rights Above Human Life," *The New York Times*, June 25, 2022. *https://www.nytimes.com/2022/06/25/opinion/supreme-court-gun-control-bill.html.*
7. *Id.*
8. Roosevelt, Nothing to Fear: The Selected Addresses of Franklin Delano Roosevelt, 1932-1945 (1946), p. 99.
9. Moreno, The American State from the Civil War to the New Deal: Twilight of Constitutionalism and the Triumph of Progressivism (2013), p. 130.
10. *Missouri v. Holland* (1920) 252 U.S. 416, 433.
11. *Home Building & Loan Association v. Blaisdell* (1934) 290 U.S. 398, 442.
12. *Chas C. Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 586-586.
13 . William J. Brennan, "The Constitution of the United States: Contemporary Ratification," 27 S. Tex. L. Rev. 433 (1986), at 437.

Originalism and its Adversaries (continued from page 22)

The older view of the Constitution as a limitation on governmental power was essentially discarded.

Just as the more traditional view of constitutional interpretation generated criticism from pragmatic liberals, so too did pragmatic liberalism generate criticism once it came to define the dominant juristic outlook. The counter-critique grew strongest after the Warren Court advanced a very broad conception of certain liberties supposedly protected by the Constitution, further eroded the limits of federal power over economic life, and then all but invented rights neither mentioned in the Constitution nor even alluded to by the Founding generation. The critics of pragmatic liberalism concluded that it had in essence become a mechanism for imposing via court order particular outcomes consistent with cutting-edge left-leaning agendas.[14] The "right to privacy" was the most salient example of the Court's alleged errors. The Court spoke of the needs of women due to social ostracism, economic privation and an overpopulated planet, but in creating a right unknown to previous generations it struck down laws in every State in the Union that were the product of legislative majorities sustained over the course of many decades, notwithstanding periodic changes in party control.[15] These majorities had consistently viewed (with some exceptions) the deliberate termination of a pregnancy not as a right but as a crime. To these critics the Court was using its power to impose a view of the Constitution unique to its members and vastly attenuated from what society itself defined as either necessary or moral.

Post-Warren Court originalism developed from a fairly unsophisticated critique of the judicial activism of a left-leaning judiciary into an interpretive method based on a

(Continued on page 24)

14. Writing in 1990, Robert Bork noted that "the intellectual class has become liberal, and that fact has heavily influenced the Court's performance. For the past half-century, whenever the Court has departed from the original understanding of the Constitution's principles, it has invariably legislated an item on the modern liberal agenda, never an item on the conservative agenda." See Bork, The Tempting of America: The Political Seduction of the Law (1990), p. 130.

15. See *Roe v. Wade* (1973) 410 U.S. 113; and *Doe v. Bolton* (1973) 410 U.S. 179.

Originalism and its Adversaries (continued from page 23)

vision of the Constitution rooted in the discoverable views of those who drafted and ratified it that must be honored lest laws be erroneously struck down or wrongly allowed to remain in force. Those objecting to originalism have wondered how meaning is to be discerned from the minds of the Framers when the materials left behind are ambiguous, occasionally non-existent, and often contradictory.

Originalism, however, is not as opponents have often characterized it. According to Professor Keith Whittington, originalism is "focused less on the concrete intentions of individual drafters of the constitutional text than on the public meaning of the text that was adopted."[16] It is, he notes, "the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals."[17] Individual drafters may have had particular views about how the Constitution ought to be construed, but the words used by the drafters certainly had a general meaning at the time that was more or less agreed upon. Otherwise the text itself would have been meaningless both to the voters who ratified it and the drafters themselves. An originalist interpretation involves an attempt to understand what is referred to as the original public meaning of the text, which at times devolves into an exploration of the definition of particular words and phrases as generally used and understood during the Ratification era. Aiding the originalists in their commitment to a search for an objective meaning of the text as understood by the founding generation is the Framers' inclusion of Article V and the process whereby the Constitution could be altered. It would be the peoples in the states or their representatives in Convention who would change the Constitution, not non-elected judges.

The recent decision of the Supreme Court regarding New York's carry regulation goes well beyond discerning the meaning of the actual text of the Constitution as understood by the generation of the Framers. The Court had already interpreted the essential meaning of the Second Amendment in the *Heller* and *McDonald* decisions. Looking at the fairly plentiful historical source material available to it, the Court established in those two cases that the right to keep and bear arms was an individual liberty protected against infringement by both the state and federal governments, included the right to possess operational handguns in the home for the purpose of self-defense, and that any review of restrictions on the right generally started with a presumption that the restriction at issue was invalid.[18] In the case involving New York's public carry regulation—*New York State Rifle & Pistol Association, Inc. v. Bruen*—the Court considered the types of infringements that are compatible with the original understanding of the Amendment.

Lower courts had adopted a two-step framework of analyzing Second Amendment challenges: determining if a law at issue regulates activity that falls outside of the Amendment's protective scope, and if it does not, determining how close the law comes to the core of the Second Amendment right and the severity of the law's burden thereon. Depending on how close the right at issue is to the core of the Second Amendment, the lower courts used either strict or intermediate scrutiny, which in essence involved weighing the government's interest in regulating firearms against the individual's right. In rejecting the interest balancing approach, Justice Thomas and the Court's majority stated that once a right to bear arms is acknowledged to exist, any regulation of the bearing of arms can only be justified if it is "consistent with this Nation's historical tradition of firearms regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"[19]

Balancing tests are standard constitutional procedure. First appearing in the context of Dormant Commerce in the 1940s, the Supreme Court subsequently adopted such tests to address government interests impacting the First Amendment, Due Process, Equal Protection, and even the Privileges and Immunities protected by Article IV.[20] Such tests, however, are hardly required by the Constitution and were, in fact, an innovation of pragmatic liberals who rejected an earlier view that the Constitution's presumptions against state action were highly resistant to challenge. In rejecting interest balanc-

16. Keith E. Whittington, "The New Originalism," 2 Geo. J.L. & Pub. Pol'y, 599 (2004), at p. 609.

17. Id., at p. 610.

18. *Heller*, *supra*, 554 U.S. 570; and *McDonald*, *supra* 561 U.S. 742.

19. *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, at p. 2126.

20. See, e.g., *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761; *National Association for the Advancement of Colored People v. Alabama* (1958) 357 U.S. 449; *Harper v. Virginia Board of Elections* (1966) 383 U.S. 663; *Frontiero v. Richardson* (1973) 411 U.S. 677; and *Toomer v. Witsell* (1948) 334 U.S. 385.

Originalism and its Adversaries (continued from page 24)

ing, Justice Thomas explained that in *Heller* "we assessed the lawfulness of [a] handgun ban by scrutinizing whether it comported with history and tradition. Although we noted that the ban 'would fail constitutional muster' 'under any of the standards of scrutiny that we have applied to enumerated constitutional rights, we did not engage in means-end scrutiny when resolving the constitutional question. Instead, we focused on the historically unprecedented nature of the District's ban, observing that 'few laws in the history of our Nation have come close to [that] severe restriction.'"[21]

But why history as the principal method of determining constitutionality? The Court has frequently relied on history to determine the nature and scope of other protected rights.[22] For the originalist, history makes it possible to apprehend, or attempt to apprehend, the intention of those who ratified particular constitutional provisions. In historical evidence is found indicia of the original public meaning of relevant constitutional terms. It is also, in Justice Thomas's view, less difficult and more legitimate a method of interpretation "than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of [particular] restrictions,' especially given their 'lack [of] expertise' in the field."[23]

The Court's historical approach, says Thomas, "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[24] He explains that "when a challenged regulation addresses a general societal problem that has persisted since the 18th Century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[25] Likewise, he continues, "if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."[26]

At the heart of the New York regulation of the public carrying of handguns was the "proper cause" requirement, which is rooted in a legislative concern about gun-related violence, primarily in urban areas. Those who wished to obtain a carry permit for self-defense purposes were required to demonstrate that they had a special defensive need for a weapon—a demonstration in practice that seldom satisfied the reviewing magistrate. In examining the requirement, Justice Thomas explained that "following the course chartered by *Heller*, we will consider whether 'historical precedent' from before, during and even after the founding evidences a comparable tradition of regulation."[27]

One law analogous to New York's regulation was said by New York's attorneys to have been the English Statute of Northampton. Justice Thomas discounted the relevance of this law—noting that it was enacted 450 years before ratification of the Constitution and appeared to have been primarily concerned with the wearing of armor and brandishing of launcegayes.[28] The statute did not appear to relate to smaller weapons such as daggers, which are most analogous to handguns in terms of size and use among the medieval populace as a weapon of self-defense.[29] The statute's relevance is further diminished by its construction in the 17th century by Chief Justice Herbert as one criminalizing the public carrying of weapons only when motivated by an intent to terrify the King's subjects.[30]

In the history of Colonial America, Justice Thomas and the Court found little evidence of attempts to regulate public carrying of firearms. New York pointed to restrictive regulations from three colonies, but these, said Thomas, were not analogous to New York's law. "Far from banning the carrying of any class of firearms, they merely codified the existing common law offense of bearing arms to terrorize the people."[31] Three additional statutes from the period between 1786 to 1801 similarly punished the carrying of weapons, but, again, only when one brandished them for the purpose of intimidation and terror.[32]

(Continued on page 26)

21. *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, at p. 2128.
22. See Ruth Bader Ginsberg's majority opinion in *Timbs v. Indiana* (2019) 586 U.S. __, 139 S.Ct. 682.
23. *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, at p. 2130.
24. *Id.*, at p. 2131.
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. *Id.*, at pp, 2139-2140.
29. *Id.*, at p. 2140.
30. *Id.*, at p. 2141.
31. *Id.*, at p. 2143.
32. *Id.*, at p. 2145.

Originalism and its Adversaries (continued from page 25)

There is better evidence, says Thomas, of a tradition of regulation after the ratification of the Second Amendment. Among the laws passed by States regulating the carrying of weapons was a set of laws known as surety statutes, which New York argued are closely analogous to the law it was attempting to defend and reflective of a limitation on the right to keep and bear arms known to the Founding generation. These laws required "certain individuals to post bond before carrying weapons in public."[33] According to Justice Thomas, instead of being laws that limited carrying rights, they were not bans at all and applied only to persons who were threatening to do harm.[34] Those subject to the law were required to prove they had special need for their weapons, and if they couldn't do so they were required to obtain written promises from friends that they would be liable for harm traceable to the carrying of firearms. Far from prohibiting public carry, these laws protected the right even among persons who were considered to be untrustworthy or potentially dangerous.

Moving to the Antebellum Era, Justice Thomas observed that rather than demonstrating a tradition of strict regulation of public carry rights, the historical record reveals only that public carry was subject to reasonable regulations. Under the common law (traceable to the Statute of Northampton), "individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left available the option to carry openly."[35] These laws, observed Thomas, were a far cry from "New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose."[36]

Not everyone on the Court approved of the majority's use of history in discerning whether New York's law was consistent with the original understanding of the Second Amendment. Justice Breyer's dissenting opinion certainly provides a counterpoint to the Originalist position, and sheds some light on the real and perceived shortcomings of the originalist approach. As a pragmatic liberal, Justice Breyer believes that the governmental interest that motivated the enacting of New York's law ought to be provided greater respect, consistent with a tradition that permits restrictions on fundamental rights when government interests are weighty and narrow enough to justify them. While he agrees that history "can often be a useful tool in determining the meaning and scope of a constitutional provision…the Court's near exclusive reliance on that single tool today goes much too far."[37] The majority's excessive focus on history he characterized as too narrowly directed at supporting historical evidence without much cognizance of evidence that doesn't fit with its crafted narrative. Indeed, he said, the contradictory nature of the historical record is perhaps one of the most fundamental defects in the court's historical approach. Almost of equal concern to Breyer is the difficulty lower court judges will likely have in engaging in the kind of historical analysis now required by the Court. "Judges," he notes, "are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians. Legal experts typically have little experience answering contested historical questions or applying those answers to resolve contemporary problems."[38] And what is a judge to do when faced with contradictory evidence, or expert historical opinions that interpret the historical materials differently?[39] Finally, there is the issue of greatest concern to the late Justice Brennan: the relevance of history "when it comes to modern cases presenting modern problems."[40]

The challenges posed by an embrace of the originalist perspective are not unknown to originalists. The greatest of these challenges, acknowledged Justice Scalia back in 1989, "is the difficulty of applying it correctly."[41] When done properly, "the task requires the consideration of an enormous mass of material.… Even beyond that, it requires an evaluation of the reliability of that material.… And further still, it requires immers-

33. *Id.*, at p. 2148.
34. *Ibid.*
35. *Id.*, at p. 2150.
36. *Ibid.*
37. *Id.* at p. 2174 (Breyer, J., dissenting).
38. *Id.*, at p.2177.
39. *Ibid.*
40. *Id.*, at p. 2180.
41. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989), at 856.

Originalism and its Adversaries (continued from page 26)

ing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer."[42]

For its adherents, however, originalism remains superior to what came before, in part because there is no consensus on what is to replace it, and also because when attempting to discern a difference between the values that a judge personally thinks most important and those values that are "fundamental to our society" it is easy to confuse the one with the other. As such, the adoption of modern social values as the principal criterion of constitutional jurisprudence leads to what Scalia called the "judicial personalization of the law."[43]

Delving into the original meaning of constitutional terms and discovering the scope of both individual liberties and governmental powers in the history of the early Republic, thus, may be a more objective approach than what Brennen, Breyer and other pragmatic liberals would prefer, though admittedly it places significant limits on the ability of legislatures to solve problems they believe are in need of remedy. Restricting legislative power, of course, was a principal objective of the Framers when creating the Constitution, and it's one that will challenge the patience and creativity of legislators so long as originalism continues to influence judicial decisions.

By Rex Grady

Rex Grady has been Professor of Constitutional Law and Legal History at Empire College since 2007, is employed at the law firm of Robins Cloud, LLP, and is the author of seven books, the most recent of which is The Best Versed Man in Law: Duncan Wellington Perley and Law's Fate on the Far Western Frontier.

42. *Id.*, at pp. 856-857.
43. *Id.*, at p. 863.

Dean's List: Report from Empire College School of Law

In this column, Brian J. Purtill, the Dean of Empire College School of Law, reports on the state of the school, students, staff, and faculty, as well as updating readers on various developments in the law he finds entertaining. Happy reading!

School News: As earlier reported, we are in the process of replacing the current law school entity with another. Empire College School of Law and Monterey College of Law are now meeting regularly to implement the plan for the coming year. Applications are being accepted for Spring and Fall classes in the new Monterey branch, to be named Empire College of Law, which will be operated at the same campus on Cleveland Avenue. Applications and inquiries are up, so we expect a robust new class next year to complement the growing population we've experienced the last two. The administrative staffs of the two schools are working together seamlessly to make this transition an easy one, and we look forward to the next four years as we teach out our current students, welcome the new ones, and complete the transition.

Student News: We started 25 students in our Criminal Law, Contracts, and Torts classes this Fall, making for dynamic classroom discussions. We are still offering the option of attending and teaching via Zoom, although each week more and more professors and students are returning to campus. We just selected Alison Alcocer, Nicholas Carrera and Colin Gibson as our Traynor Moot Court Competition team. This is a statewide competition in which Empire has scored quite highly over the years, even taking home top honors. We expect great things from them (no pressure!) and will keep you all posted.

Faculty News: Community Property Professor Pat Grattan has retired from teaching; we greatly appreciate his enthusiasm and dedication to our students and wish him well in his future endeavors. Santa Rosa family law attorney Thomas Wright will be taking up the class; he team-taught the course last time with Mr. Grattan and received rave reviews from his students. Welcome, Professor Wright! We are also pleased to report that eleven of our faculty members were honored in their areas of practice as "Lawyers of Excellence 2022" in Sonoma Magazine's Nov/Dec 2022 issue. Congratulations to Deborah Bull, Michael Fallon, Irene Flack, Robert Rutherford, Monica Lehre, Carmen Sinigiani, Shawn Bunyard, Tina Wallis, Michael Green, Brendan Kunkle, and Laura Rosenthal.

RECENT CASE: Wine and pizza lovers, lovers of free enterprise and advertising, and anyone who ever purchased something needing assembly which arrived without all its parts, will enjoy the recent decision *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, Real Party in Interest, Bogle Vineyards, Inc.* (2022) 82 Cal. App. 5th 337, filed August 17, 2022. The case involved a part of the Alcoholic Beverage Control Act contained in what is referred to as the "tied house" provisions, prohibiting manufacturers of alcoholic products from giving outside sellers "any premium, gift, free goods, or other thing of value" in connection with the sale of their products. The intent of the law was to prohibit alcohol manufacturers from unduly influencing such retailers, thereby obtaining favorable treatment of their products over other competing brands. The case in point: Bogle Vineyards supplied Raley's Supermarket with a pizza oven to include in an advertising display of its wines. At the administrative level, the ABC Board found easily that the pizza oven was a "thing of value". But the Court of Appeal reversed that decision, concluding there was insufficient evidence to support that finding. As we all know, if you can't use the thing you just received or it's missing essential parts, it's of no value. Here, the pizza oven was inoperable when delivered to Raley's, was never used by Raley's (it was meant for outdoor use with a propane tank), had missing parts (although they were obtainable if desired), and in fact was not even retained by Raley's (it was removed at some point to an unknown location). Since there was no evidence that Raley's attached any significance to the pizza oven at all, the letter and purpose of the statute would not be met by classifying it as a "thing of value." So Bogle was vindicated, received its costs on appeal, and I'm sure later celebrated the victory at the Raley's store manager's pizza party.

May you all stay warm and have a peaceful holiday season this winter!

Volunteer Attorneys & Non-Profits Hold LGBTQI Legal Clinic

On November 12, 2022, a team of volunteer attorneys led by Kinna Crocker partnered with local nonprofit groups, North Bay LGBTQI Families, and Positive Images LGBTQIA+ Center to host a free legal clinic at Empire College School of Law. The volunteer legal team, including Beki Berrey, Monica Lehre, and Jane Gaskell, served approximately two dozen individuals by assisting with forms and procedures for securing legal parentage between parents and children, as well as legal name and/or gender marker changes for both adults and youth. Spanish translation and childcare were also available at the clinic to make the services accessible to more of the population. Jane Gaskell observed about the experience: "The overriding sense I felt from everyone was a palpable excitement about the possibility of leaving behind what was an obviously painful relationship with their old identity and starting anew with an identity that was true to their real self."

L to R: Monica Lehre, Beki Berrey, Kinna Crocker, Jane Gaskell, Ana Flores Tindall & Sal Andropoulos (photo courtesy of Emily Gaines)

"In light of the US Supreme Court ruling in *Dobbs v. Jackson* overturning the right to abortion, and comments in the concurring opinion that LGBTQIA+ rights could/should be attacked, it is more important than ever to secure the rights of LGBTQIA+ families and people," said Crocker, who reached out to the nonprofits with the idea of hosting the clinic after seeing a notable increase in calls from community members seeking these services. For LGBTQIA+ parents, concerns about potential threats to family relationship recognition have created a renewed sense of urgency around formalizing those critical ties.

In California, people who are married or in a state-registered domestic partnership are automatically legal parents to children born during the marriage/partnership. However, these documents are not court orders, and only a court order will be recognized across state lines. For people who are married/registered domestic partners at the time of the child's birth, the second parent adoption process results in the necessary court order. For those who are unmarried/unregistered domestic partners at the time of the child's birth or who conceived via reciprocal IVF (one spouse/partner provides genetic material and the other carries the child in pregnancy), the legal parentage process results in the necessary court order.

Concerns also exist among people in need of gender-affirming legal name and/or gender marker changes, especially considering the wave of anti-transgender legislation and sentiment sweeping state governments across the country. "Free legal help in LGBTQIA+ specific areas is difficult to find locally. Making these services available at no cost, particularly for populations who disproportionately lack access to them, has an immeasurable impact on our community members' actual and felt sense of safety," said Sal Andropoulos, a member of the North Bay LGBTQI Families Parent Leadership Group and Board Member with Positive Images, which has been supporting the mental health of LGBTQIA+ people in Sonoma County since 1990. "We are so thankful to the attorneys who gave their time to provide these vitally important services in support of our local community."

The co-sponsoring organizations hope to offer these services more regularly going forward, and to potentially expand the range of LGBTQIA+ legal issues encompassed in future clinics. Attorneys interested in volunteering to be a part of these efforts can contact Kinna Crocker at *crocker@crockerfamilylaw.com*.

By Chelsea Kurnick & Sal Andropoulos

Chelsea Kurnick is Board Chair of Positive Images and Sal Andropoulos is a member of the North Bay LGBTQI Families Parent Leadership Group and Board Member with Positive Images

When Nurses Go Criminal

For the twentieth straight year, nurses lead Gallup's annual ranking of professions for having high honesty and ethics, with 81% of participants ranking the honesty and ethical standards of the nursing profession as "high/very high." Compared to the lawyers' honesty and ethical rank of 19% in the same field, it is an appealing characteristic for the average attorney when contemplating including a nurse in the legal team.

But what does nursing have to do with the legal realm? Many nurses are now turning to a career path known as legal nurse consulting. These nurses bridge a gap between healthcare and law by using their nursing experience to assist in legal cases. Legal nurse testifying experts have been used in an official capacity since the 1980's, when, in *Maloney v. Wake Hospital Systems*, the court held that "the role of the nurse is critical to providing a high standard of health care in modern medicine. Her expertise is different from, but no less exalted, than that of the physician."

A competent legal nurse consultant has at least five years of experience in the field. They also may be certified in their specialty, such as being recognized as a Certified Emergency Nurse or Certified Critical Care Nurse. Certifications are achieved after a dedicated amount of time in a specific specialty and then sitting for a national examination (hint, look at the post-nominal letters after the nurse's name—nurses are proud of their certifications). Other legal nurse consultants may be involved in a teaching capacity, either didactic or clinical. Some legal nurse consultants are published, which may lend more credibility to their stature as an expert in their field. Attorneys must deliberately review the legal nurse consultant's curriculum vitae to determine if that expert is a good fit for the case.

Most attorneys are comfortable and familiar with using nurses as expert witnesses in both plaintiff and defense cases, including cases involving personal injury, wrongful death, medical malpractice, and criminal law. However, legal nurse consultants offer legal assistance and consultation in a plethora of other ways. Besides being testifying experts, they may:

- Attend independent medical examinations as a legal observer (who happens to have a nursing background)
- Determine long-term medical requirements and estimated costs for that care (commonly referred to as "life care planning")
- Conduct client interviews
- Write deposition questions
- Draft legal documents in medical cases under the guidance of an attorney
- Educate attorneys and paralegals about healthcare standards and protocols as they relate to ongoing cases
- Research current professional literature in healthcare
- Review cases to identify strengths and weaknesses (screening a case for merit)
- Prepare chronologies for medical records for ease of reading and heightened understanding of the case timeline
- Locate, vet, and work with expert witnesses in a variety of specialties, usually healthcare-related

Attorneys who utilize legal nurse consultants enjoy a cost-effective method to receive an unbiased medical opinion and/or review regarding the standards of care for their case. Instead of utilizing a physician to ascertain the merits of a case, a legal nurse consultant is available at a fraction of the cost. Legal nurse consultants also assist attorneys in delving through complex medical charts, deciphering the importance of what is documented in medical jargon versus recognizing the nuances of what is not in the record. As natural teachers, they use those skills to educate the attorneys in layperson terms about the technicalities of the case. As nurse experts, legal nurse consultants can read between the lines of a medical chart, often catching subtle deviations from standards of care that may not be noticed by untrained personnel.

Legal nurse consultants can also recommend what policies/protocols the attorney should request that may be pertinent to their case, as well as propose what types of medical specialties may be utilized as experts for the case. They are objective and analytical, and they are not hired because they will give the "right answer" to their attorney-client. Rather, they seek truth within the medical chart and depositions, striving to bolster their expert medical opinions with evidence-based practices and up-to-date medical literature.

Having established that legal nurse consultants can save the attorney time by sifting through medical records and money by receiving expert consultation at a fraction of the cost of physicians, it is pertinent to discuss that there are two types of employment for legal nurse con-

When Nurses Go Criminal (continued from page 28)

sultants: those who work as independent legal nurse consultants and those who work "in-house" or for a law firm. In-house legal nurse consultants work more behind-the-scenes, and they tend to screen cases for merit, locate experts, and provide life-care planning. Independent legal nurse consultants typically prefer to work for both plaintiff and defense attorneys, and they may be more apt to do testifying expert work. To locate independent legal nurse consultants, attorneys may use word-of-mouth recommendations by other attorneys who have utilized a legal nurse consultant in their practice or through their in-house legal nurse consultant. Listservs are excellent resources for attorneys and nurses to share experts. Independent consultants may also be located by searching online expert directories such as SEAK, The American Association of Legal Nurse Consultants (AALNC), or simply by a Google search.

The legal nurse consultant always endeavors to uphold the honest and ethical ideals of the nursing profession. Juries and clients inherently trust nurses and feel secure with them, a fact many attorneys have discovered since utilizing legal nurse consultants in their practice. Attorneys are also finding that legal nurse consultants are an exceptional asset to the legal team due to the many roles they may fulfill in the legal territory, begetting a successful attorney-nurse relationship as the attorney utilizes their neutral, impartial expert opinions.

By Marilyn McCullum

Marilyn McCullum, BSN, RN, CEN is the owner of McCullum Legal Nurse Consulting in Santa Rosa with experience in trauma and emergency medicine. She can be contacted at McCullumLegal@gmail.com or www.McCullumLegal.com.

Remembering Peg Anderson

Family law attorney Margaret L. Anderson died on November 3, 2022. Peg, as she was known by her friends, was 74 years old.

Peg started her career in law as a legal secretary for Petaluma litigator Robert W. Mackey. While working as a legal secretary, Peg attended and graduated from the University of San Francisco Law School, and passed the California bar exam in 1977. She immediately went into practice with Irv Piotrokowski.

Peg became legendary in her representation of family law clients. She had a brilliant mind that superbly understood data and spreadsheets. Her intense and relentless pursuit of the evidence earned her a well-deserved reputation as an aggressive litigator. Starting around 2002, however, Peg embraced the collaborative law model, and spent the remainder of her career settling cases and staying out of court.

All attorneys, and particularly family law attorneys, owe Peg a debt of gratitude for her contribution to the law in the case of *Silberg v. Anderson*.[1] In that case, Peg was sued by the husband of one of her clients for failing to disclose Peg's personal relationship with the court-appointed child custody evaluator. After the trial court sustained Peg's demurrer, the California Court of Appeal reversed, holding that parties to a divorce, under certain circumstances, can sue the attorney for their spouse. Peg was not willing to accept that result, and enticed retired judge William B. Boone to represent her before the California Supreme Court. Judge Boone was successful and obtained a reversal from the California Supreme Court, holding that the litigation privilege of Civil Code section 47 bars claims against attorneys for litigation conduct. This precedent has saved many family law attorneys from defending claims from their client's ex-spouses.

Peg was a long time resident of Sebastopol, and a member of the Community Church of Sebastopol. Peg sustained and recovered from a cerebral aneurysm in 2004. In about 2017 she was diagnosed with Alzheimer's Disease. Peg retired from the practice of law near the end of 2018, and moved out of state to be with family.

Peg's imposing physical stature, standing at over six feet, was more than matched by her stature as an attorney and fellow human being.

By Greg Jilka

Greg Jilka is a family law and real estate litigation attorney in Santa Rosa. Peg Anderson and Greg Jilka were friends for more than 45 years.

1. *Silberg v. Anderson* (1990) 50 Cal.3d 205.

Thank You to the 2020-2022 Volunteers Who Helped Carry SCBA Through the Pandemic!

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