

From the End of Abraham Lincoln's Legal Career to the End of Justice Kennedy's

JUL 08, 2018

BY ROBERT ROSBOROUGH

Summer is in full swing, vacations abound but the Marin Lawyer keeps on going like the Energizer bunny. I hope that summertime might give you even more time to read us. You would be amply rewarded by Eileen Barker and Barbara Monty's article on the role of forgiveness in litigation. As you may know, Barbara and Eileen are experts in this field and they dispel a number of myths about forgiveness and show how helpful it can be in certain cases. Their advice certainly resonates with me as a mediator. They are not making some new age case for universal forgiveness but make a compelling case for the dramatic difference forgiveness can make under the right circumstances in how a case proceeds, what the outcome can be and how your client—and you—feel about both of those things.

We also have some different and interesting criminal justice content this month. Thank you to our guest editor this month, criminal defense lawyer Charlie Dresow, who interviewed writer and journalist Vince Mancini on the effect of the numerous true crime podcasts and documentaries on the public perception of the criminal justice system. In addition to profiling the Executive Director of Alternate Defenders, Inc., Charlie also reviews a new book, Lincoln's Last Trial: The Murder Case the Propelled Him to the Presidency. Just from reading Charlie's review, you'll learn something about how law was practiced in Abraham Lincoln's time and you might pick up some trial technique tips still useful today. I would like to encourage our readers to consider writing more book reviews for the Marin Lawyer. Lawyers are readers and we like to read about lawyers in history and in fiction. And no doubt we could stand to read a few more practical books too, from cybersecurity to managing stress. Share your views and insights with the Marin Bar!

We also have an article from Kristi Edwards aimed especially at our legal professional members. Kristi has long been a leader in legal professional organizations, including the Marin County Legal Professionals Association. She reports on a recent conference and invites everyone to come hear bi-monthly speakers. Many of the CLE topics she mentions are fascinating, from privacy to fake news to the law of Uber and Lyft.

If you missed our popular June member luncheon with Rory Little's excellent Supreme Court roundup, my report gives you a taste of what he talked about and a bit of insight into a few of the term's major cases. You'll also find a link to a short (<https://marinbar.org/docs/mcle/mcba-professorlittlescotusnotes-66-1846.pdf>) pdf of Professor Little's outline for his talk, where you can read a few sentences about the cases he didn't get to.

As always, I welcome your feedback on what you'd like to see in the Marin Lawyer or what you'd like to write for us. Come corner me at the July 18th (<https://marinbar.org/events/?type=event&id=189>) MCBA-CalCPA mixer and tell me what book you'd like to review! And don't forget that you can now print or create a (<https://marinbar.org/marin-lawyer/print-pdf/?id=32>) pdf version of the Marin Lawyer with (almost) one click.

Goings on About Town, Legally

JUL 07, 2018

BY THOMAS BROWN

At press time, the week's top legal highlights include President Trump's next possible Supreme Court nominee, the challenges with migrant family reunification, and the escalating trade war between the United States and China. Closer to home, and on the eve of the County Fair, County employees settled a labor dispute with the County, Judge Haakenson issued a preliminary injunction against the sale of the San Geronimo Golf Course to the County, and the District Attorney's race was headed for a run-off in November between Lori Frugoli and Anna Pletcher.

Even closer to home at the MCBA, we are pleased to welcome Scott Buell as our newest member of the Board of Directors. Scott replaces Toussaint Bailey, who stepped down to head a wealth management firm. Scott is a mediator and trial attorney with prior experience as a public defender in New York City and as in-house counsel for several large insurance carriers. Scott describes himself as someone who has "fought the man" and also "represented the man." We are thrilled to welcome Scott to the Board and look forward to his input on behalf of the membership.

The MCBA Outreach Committee headed by Anna Pletcher and Eva Bennett recently organized a debate at Davidson Middle School. The debate topic was whether the electoral college should be abolished, perhaps a timely topic among Marin's constituents. Special thanks to our three volunteer lawyers who served as judges -- Neusha Ghaedi, Vince DeMartini, and Geoffrey Rotwein. Pocket Constitutions were awarded to the best debaters. Davidson's debate club is new this year, and the MCBA plans to return next year and expand this program to other middle and high schools throughout the County. Thank you all for supporting this project!

On the practical side, one of our local employment class action experts, Edward J. Wynne of Wynne Law Firm, reports that the recent amendments to CCP § 384 require class action practitioners to make sure

cy pres beneficiaries satisfy new standards and adds that Legal Aid of Marin should be kept in mind as such a beneficiary. Wage and hour and class action practitioners should be aware that this will likely not be the only amendment to this statute. Additionally, settlements invoking the statute will need to be vetted by the Judicial Council. This additional administrative layer may very well impact both plaintiff and defense practitioners of the class action and trial attorney bars.

A special shout out to Professor Rory Little who entertained the membership at the June meeting with his annual overview of the Supreme Court's docket and extemporaneous musings on Justice Anthony Kennedy's replacement, triggered by Justice Kennedy's retirement announcement about two hours earlier. We are very fortunate to have Professor Little address the membership and look forward to his contributions every year.

In closing, we move into the second half of 2018 with a full plate of exciting and informative events for the membership. The (<https://marinbar.org/events/?type=event&id=189>) 4th Annual MCBA CalCPA and CFA Society Midsummer Mixer is scheduled for July 18 at the patio on 999 Fifth Street, San Rafael. The July membership meeting will feature a panel discussion about (<https://marinbar.org/events/?type=event&id=184>) Legal Puzzles for Lawyers and Courts from the Gig Economy, to be moderated by Program Co-Chair, Tom McInerney. Please place both events on your calendars.

Finally, on a personal note, I want to recognize Yvette Martinez, who is leaving the Marin County District Attorney's Office after 14 years to pursue a career with the California Attorney General. Yvette handled some of the most significant criminal cases brought by the DA's office over the past years, is a great friend, and an excellent prosecutor and trial attorney. She will be missed by the entire District Attorney's Office, myself, and many in Marin's legal community.

As always, please let us know any ways we can help with your practice or respond to any questions about the Marin County Bar Association.

See you around the Courts.

Best,

Tom

Forgiveness: A Collaborative Assessment of the Value of Forgiveness in a Litigation Practice

JUL 06, 2018

BY EILEEN BARKER AND BARBARA MONTY

Eileen begins the discussion. It is not unusual for a plaintiff's lawyer to encounter clients whose anger clouds their judgment and prevents them from making good decisions, much less a good impression. After all, every plaintiff is a person whose well-being has been disrupted by the actions of another. Plaintiffs need monetary settlements but sometimes also need peace and closure on what may have been one of the most difficult experiences of their lives.

Forgiveness has the potential to introduce an element of humanity and healing that has been absent from the legal field. This is vital when many in society hold cynicism and mistrust towards the legal system, and many lawyers report great dissatisfaction with their jobs, wishing for careers more in line with their values.

In the past several decades, a severe crisis in the legal profession has been well documented, one that includes widespread burnout, career dissatisfaction, and high rates of alcohol and substance abuse, divorce, depression, and suicide. These problems are reversed when lawyers adopt a new approach to law that embraces "(1) a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. (Daicoff, Law as a Healing Profession, 6 Pepperdine Dispute Resolution Law Journal 1 (2006).)

By recognizing the larger issues implicated, plaintiffs' lawyers have the opportunity to restore dignity and leadership to the legal profession, and to fulfill the highest ethical duty of a lawyer: To serve the best interests of the client.

What is forgiveness?

Forgiveness is a decision not to pursue resentment, retribution or revenge. It means letting go of the desire to blame and the need to be right. It enables a person to make peace with painful things that have happened or are happening to them. At the same time, there are many misconceptions about forgiveness, including the following:

Forgiveness is a sign of weakness. Forgiveness isn't for the weak. It takes courage to forgive. Archbishop Desmond Tutu put it like this: Anyone who thinks forgiveness is weak hasn't done it.

Forgiveness means what happened is ok. Forgiveness does not mean poor behavior is condoned or excused. Nor does it negate the need for accountability and justice, or the right to seek reparation and wholeness.

Forgiveness means I have to forget what happened. Forgiveness does not mean living in denial. It is important to fully acknowledge what occurred and learn from the experience, in order to make sure it doesn't happen again.

The other person doesn't deserve to be forgiven. Forgiveness is not done for the other person. It is done solely for the benefit of the one forgiving. It enables the release of toxic emotions that are incredibly destructive to one's health and well-being.

A person should forgive. Forgiveness is a choice, one that each person must make for himself or herself. Sometimes, people need time before they are ready to forgive, and it's not something that should be rushed or forced.

Forgiveness means reconciling with the other person. Forgiveness and reconciliation are two different things. When forgiveness occurs, it can open the door for reconciliation, but it is possible to forgive without reconciling.

Some things are simply unforgivable. We often resist forgiveness on the grounds that what happened is too egregious to be forgiven. Forgiveness expert Fred Luskin says nothing is per se unforgivable: Our major obstacle is not the offenses themselves but the lack of tools with which to work. We only imagine it is the nature of the offense that is unforgivable. However, if any of us look around we will find people who have forgiven the very same offense.

<h4>What if the other person won't apologize?</h4> While bilateral forgiveness requires an apology or show of remorse, unilateral forgiveness is always available. We all have the ability to forgive at any moment, without any pre-conditions. The other person does not need to apologize, be available, or even be alive.

Few people realize the high price they pay when they don't forgive. In the past 30 years, there has been extensive scientific study showing that holding onto anger and resentment takes a serious toll on our physical and mental health. Scientists have demonstrated that just thinking about a conflict or grudge increases the risk of heart attack, cardiovascular disease, stroke, diabetes, and a myriad of other serious diseases. At the same time, chronic stress weakens the immune system and can give rise to depression and psychological disorders.

Conversely, many of the leading medical institutions in the United States, including Johns Hopkins Medical Center, the Mayo Clinic, and the University of California San Francisco espouse the benefits of forgiveness and note that these benefits seem to increase with age, including:

- Healthier relationships
- Greater psychological well-being
- Less anxiety, stress, and hostility
- Stronger immune system
- Improved health
- Higher self-esteem and less depression
- Clearer thinking and creativity
- Increased hope, trust, happiness, and gratitude

<h4>When do you consider forgiveness?</h4> While it is important for plaintiffs' attorneys to understand the relevance of forgiveness in legal disputes, this is not to say that forgiveness will be appropriate in every case or with every client. That is certainly not the case.

Forgiveness is most likely to have relevance for a client when some or all of the following factors are present:

- The client has suffered a particularly deep loss.
- The client's anger is getting in the way.
- He/she is unable to participate effectively in mediation, deposition, or settlement discussions.
- The client's suffering seems disproportionate to what occurred.
- The client's resentment is over an event that happened long ago.

Forgiveness can help the client resolve intense emotions, think clearly, and make smart settlement decisions. By defusing intense emotions, it can enable the client to make a better impression in mediation and be a more effective witness at deposition or trial. The client who forgives is likely to be easier to work with and, ultimately, happier with the results.

At the same time, forgiveness will be of help to the lawyer when some or all of the following factors are present:

- The lawyer is burned out by legal practice, chronically stressed.
- The lawyer's anger is greater than the client's.
- The lawyer is embroiled in his/her own conflict(s).
- The lawyer suffers from depression and/or addictive behavior.

Lawyers who practice forgiveness are better able to align their work with their values, feel energized by their work, attain greater career satisfaction, and achieve work/life balance. They are also better able to understand the emotional nuances of cases, which enables them to be more creative and effective.

How does forgiveness apply to litigation? Barbara's thoughts.

We lawyers have a professional responsibility to act in our clients' best interests. Representing plaintiffs, we often think that obtaining the most money is the goal. While this may be true to a great extent, sometimes what is in the best interest of our clients may be to resolve the case before trial, or before litigation has begun, even if this results in a smaller dollar recovery for both clients and us.

Several years ago, I attended a workshop on "Forgiveness," thinking that being able to forgive would help my clients. I had noticed that some clients still suffered even after they "won" their

cases. They were not able to let go of the pain of the case, regardless of what settlement was achieved. I wanted to know if there was something else I could do for clients to help ease their suffering besides getting them a monetary award.

In this workshop, I learned that “forgiveness” does not mean that one condones bad behavior or minimizes pain, but that one can actually let go of feeling pain, anger, and victimization. If one could do this, one could make better choices and move on with one’s life.

I then started reading about forgiveness, taking more trainings and doing forgiveness work myself. Through working on myself, I learned that while I do not generally think of myself as a victim, I too was holding on to hurt feelings as a result of bad things having been done to me and some instances in which I did not forgive myself for the way I handled a situation. The more I worked on myself, the more I came to see how I could incorporate the principles of forgiveness into my work as a litigator and as a mediator. Now the power of forgiveness informs all of my work. There is no going back to the old ways; I have been transformed.

Here are some examples of how elements of forgiveness have affected my litigation and mediation work:

Commercial

In a several day, multi-million-dollar commercial case I was mediating between two former business partners, defendant offered a very large settlement figure and even apologized for what he had done. To everyone’s surprise, plaintiff rejected the offer. Plaintiff told me that the money and apology would not satisfy him. He was so angry that he wanted to bankrupt his former partner and put him out of business. The litigation process had fueled his anger, and his emotions had taken over the mediation and settlement negotiations. Attorneys for both sides were frustrated.

Towards the end of the day, with the permission of plaintiff and his attorney, I met with the plaintiff alone. I am not a therapist or psychiatrist, but through my own experience, I thought there may have been some “back story” that was causing plaintiff to hold on to his anger and to sabotage his opportunity for an excellent settlement.

After plaintiff worked with me for a little over an hour, he discovered that what was preventing him from settling was that he was actually angry with himself. He wanted to make sure the defendant was seen as the “bad” person so he could remain the “good victim.” By remaining the “victim,” he could continue to avoid taking responsibility, and remain perceived as the innocent.

Once he realized that he was angry with himself, he was ready to resolve the case and to consider forgiving himself. He realized that his severe anger with his partner was partly fueled by his embarrassment about not having put certain agreements in writing and not vetting key employees. He was not forgiving himself for his part in the breakup of the once successful company. Once he was able to see his part and acknowledge his anger with himself, he could move on.

When he left the mediation, he realized that he still had some work to do on himself, if he became willing to do so. He accepted the settlement offer and the apology. He considered forgiving his former partner and, more important, himself.

In this case, I knew attorneys for both parties well and they felt they had nothing to lose in trusting me to try something new to resolve the case. Plaintiff was willing to meet with me alone because we had already worked on this case for a couple of days, and he knew that I was not taking anyone’s side. Both parties benefited from plaintiff’s willingness to consider forgiveness.

Sexual abuse

In a sexual abuse case in which I represented plaintiff, settlement was thwarted by my client’s desire for revenge. My client felt like the victim. She wanted to go to trial to regain some power over her life, and the only way she saw to stop being a victim was to publicly expose her former boyfriend. She felt that if the judge and jury could see what a bad person he was and punish him, then she would feel powerful, and would have achieved justice. We had a skilled mediator who helped plaintiff feel some power in confronting the defendant, who made a generous settlement offer. The case did not settle at the mediation.

We had a strong case. I was concerned, though, that the experience of a trial might cause more emotional damage to plaintiff. She thought that settlement meant that she was “giving in” and therefore losing power. She believed she could feel power only by making defendant suffer publicly, and

she did not see that power was within herself. After many discussions, my client allowed me to meet with her therapist. Together, we worked on a plan to help plaintiff forgive the former boyfriend, and let go of the power his behavior still had over her.

She was able to walk away from this situation and this lawsuit with a very good settlement. She felt that justice had been done. She was not forced to make her intimate life public at trial, and she could focus her energy on feeling more powerful. Forgiveness for her did not mean condoning defendant's behavior or refusing a high settlement. She recognized that she could be powerful by forgiving, by letting go of the power her hurt and anger had over her life.

Tree and view dispute

In mediating tree/view cases, what often fuels the dispute is not always the obvious issues of the rights of neighbors to have views or to keep their trees. Sometimes, just acknowledging the presence of anger, of hurt feelings, of misunderstanding, or perceived victimization helps to soften rigid positions.

In tree cases especially, having each party physically "see" the views of the other is helpful, as it helps the neighbors view each other's cases. I have each side literally stand in the yards and homes of the other party to get a feel for the importance of a view, or privacy, or a tree's beauty. As a mediator, I spend almost all the time in joint sessions and moderate a discussion among the neighbors. This frank and open discussion, while not easy, is key to help the parties understand the motivations of the others, and often leads to forgiveness and willingness to compromise. The actual law and local ordinances often have less impact on resolution than letting go of the anger and hurt.

In one case, one party did not want to cut down or even prune his tree, because he had constructed a shrine to his deceased wife under the tree, where his wife had spent much of the last months of her life. Cutting the tree to him was symbolic of letting go of his wife's memory. Once his uphill neighbor understood these feelings, we were able to reach a compromise, by which the view was enhanced and the tree protected.

<h4>What part do emotions play?</h4>You may think that delving into the area of emotions is the purview only of trained psychiatrists, and that we as lawyers or mediators have no business going into this area. No one says that you must do this. However, I have found in my litigation and mediation practices that in many conflicts there is more driving the case than the law and the apparent facts. Often

there is an emotional “back story” of some hurt, anger, and unresolved feelings that keep the case going. It is easy to see this in divorces, family disputes over inheritance, neighbor disputes, elder abuse, and sexual harassment. I have also observed in personal injury, business, cannabis, and landlord-tenant cases that underlying feelings of betrayal, victimhood, powerlessness, and the desire to punish can keep a case going much longer than is good for the parties. Sometimes these feelings are fueled by lawyers, even by those who sincerely want the best for their clients.

The point is not to be weak or let the wrongdoer off the hook. Rather, the goal is for plaintiffs to let go of the power the negative feelings have over them, to face those feelings, and to move on to a more satisfying life.

ACT

I find it useful to keep three thoughts in mind, in the form of the acronym “ACT.”

A is for “ALL”

All things can be forgiven. Victims of apartheid in South Africa, who were tortured, were involved in the Truth and Reconciliation Commission after the abolition of apartheid. Thousands of victims of gross violations of human rights forgave the perpetrators for their own welfare and for the good of the country. Mothers in Northern Ireland publically forgave the murders of their children. Rape survivors forgive their perpetrators. Certainly our clients are able to forgive opposing parties in legal conflicts. Sometimes our clients need only to learn that letting go does not mean they are weak. Sometimes they need to realize that all things can be forgiven.

C is for “CHOICE”

Forgiveness is a choice. People can choose to hold on to resentment and anger, or choose to forgive and lower their blood pressure, decrease the risk of heart disease, heal faster, and be emotionally healthier. People can choose to feel like a victim or a hero in their own lives.

T is for “TIME”

For some people, just knowing it’s good for them is enough for them to just let go and forgive and go on with their lives. For others the process will take some time and they let go gradually. Some will have to work with coaches and therapists and to learn about the process. For me, I had to intellectually come

to the realization through working through a formal process. I was surprised that I was holding on to self-blame. Now, I catch myself when I feel I am holding on to some anger or resentment and I can let go. Everyone's timeline may be different, but everyone is capable of forgiveness.

<h4>How is forgiveness being used? The authors join together.</h4>There are many ways to help plaintiffs forgive, and each plaintiff's lawyer needs to find their comfort level and what best fits their practice and personality. Here are some of the ways lawyers are already doing this at a basic level:

1. Putting questions about "forgiveness" on the intake forms.
2. Recognizing the emotional "back story" in various cases and how this plays out in resolution.
3. Helping plaintiffs to take power and stop feeling like the "victim."
4. Learning about forgiveness so they are prepared to give an educated response if a client expresses a desire to forgive.
5. Doing their own forgiveness work so they know what may be involved.
6. Putting forgiveness on the menu of options available.
7. Talking with clients about the benefits of forgiveness in appropriate cases.
8. Providing referrals to forgiveness coaches when needed.
9. Using the teachings of forgiveness to inform their work and help clients move forward, without necessarily even mentioning the word "forgiveness."
10. Enlisting the help of the mediator in recognizing the emotional component of the case and the role of forgiveness.

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The True Crime Genre and Public Perception of the Criminal Justice System

JUL 05, 2018

BY CHARLES DRESOW

True crime stories have always fascinated the general public. Truman Capote's *In Cold Blood* was enormously profitable and is generally accepted as spawning the modern genre of true crime. No matter what the medium—print, video documentary, miniseries or podcast—the genre focuses on tracing an actual crime from commission through trial and aftermath. Explorations of cold cases and documentaries challenging the correctness of convictions are both popular sub-genres.

Some true crime documentaries and podcasts are now being released during the pendency of a proceeding rather than after the criminal justice system's role has ended. These pieces shine a particular spotlight on the criminal justice system and the individuals who populate it. I reached out to my friend Vince Mancini, who is a graduate of Columbia's non-fiction MFA program, is the Senior Film and Culture Writer for Uproxx and a true crime podcast connoisseur, to discuss how he sees the new entrants into the true crime genre impacting the criminal justice system.

Does the true crime genre's coverage and analysis of the criminal justice system impact popular culture?

It's a little early to say exactly how true crime and investigative documentaries are influencing pop culture, other than that their success spawns more of them. True crime never went totally out of fashion, but it definitely seems to be having a renaissance thanks to the greater access to documentaries from the streaming services and the growing popularity of the podcast as a medium. A serialized podcast is a great medium for these kinds of stories.

What impact on the general public's understanding of the criminal justice system will there be from true crime stories focusing on wrongful convictions or on the theme of unjust convictions that must be righted?

I'm mostly speculating here, but I imagine the popularity of these kinds of wrongful conviction stories will lead to a greater awareness among the general public that the criminal justice system isn't as fair/impartial/infallible as we like to imagine. Cops can be wrong. Prosecutors can be wrong. Or even corrupt. Even DNA evidence can be wrong, and ballistics is nowhere near the exact science we once imagined. I have to imagine there's a greater awareness of that. We had *The Fugitive*, sure, but for a long time the dominant impression of the police was *Dragnet*, *Law and Order*, *Homicide*, *CSI*, *NCIS*, et al., i.e., high tech, by the book, hyper-competent. I have to think that with *Making a Murderer*, *Serial*, *In the Dark* -- and going back a little further, *Paradise Lost* -- there's a much higher awareness of how wrong the justice system can get it, and of the kinds of screwups cops and prosecutors can make, and the different types of pressure they're under.

What type of relationship do the reporters or authors of these true crime stories have with the lawyers, judges and other real-life individuals who populate the stories?

Lawyers and journalists are doing the same job in a lot of ways: trying to tell a compelling story. It's symbiotic, because journalists rely on lawyers for access and lawyers rely on journalists for exposure. I suppose you can speak to what the danger for lawyers is, but for journalists the danger is always that you won't do your due diligence and you'll get fed a false story. And it only takes getting caught in one lie or screwup to forever destroy your credibility. Lawyers have the burden of advocacy, which to some degree the writer doesn't, but on the flip side the journalist has the responsibility of truth telling.

How fair and/or accurate are the modern true crime podcasts, documentaries and other types of true crime media?

From what I've seen so far as someone who is pretty well immersed in these things, most of the journalism has been pretty top notch, with a lot of non-profit and public radio and public media journalists doing a thorough and fair job. As it becomes more of a business though, I do worry that

someone is going to get sloppy and fudge facts and then sort of ruin it for everyone. And of course, there's a limit to what exposure can accomplish.

Do you think that true crime documentaries that showcase injustices or attempt to overturn a real world conviction can have an impact?

Brendan Dassey [from Making a Murderer] has gotten a few more appeals and hearings, but from what I understand, he's still in prison. Which is kind of incredible. So I think there's a greater awareness of how damned hard it really is to right a wrong.

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Today's true crime stories are increasingly shining a spotlight on the failings of the criminal justice system and challenging the public image of that system as infallible, an image built in part by other modern media portrayals. While it remains to be seen what the long-term effect on that image will be, perhaps it will help create a more accurate perception in the broader public's mind.

Report from the Marin County Legal Professionals Association

JUL 05, 2018

BY KRISTI EDWARDS

I recently returned from the 84th Annual Conference of Legal Secretaries, Inc. (LSI) held in North Hollywood, California. The Marin County Legal Professionals Association (MCLPA) was well represented at this conference for legal support staff from across the state. In addition to plenty of networking opportunities and attending to the business of the corporation, the conference offered plenty of useful and topical Continuing Legal Education, all taught by expert attorneys.

The Complex Trust seminar was very valuable to me, as I work in an estate planning office and draft trusts for my attorney's review. I also attended the Fake News and Common Sense: a First Amendment Discussion seminar given by Jeremy Geltzer. Mr. Geltzer has written several books on the effect of media, particularly motion pictures, on freedom of speech. His presentation was fascinating and somewhat chilling, considering current events. Other timely seminars included: The Surprising Origin, Continued Relevance, and Uncertain Future of Privacy in Our Data Driven Age; Asylum/Special Immigrant Juvenile Status; and Transportation Network Company Law (Uber, Lyft).

The conference also offered separate workshops for each of the different organization officer positions, which provided useful training and great ideas for local associations, including in advertising and social media. MCLPA received first place in local associations of our size for increase in membership this last year: a 27% membership gain raised our 2017-2018 membership to 14 members – small but mighty!

MCLPA also won a free ticket to the CCLS (California Certified Legal Secretary) Study Group. This was quite welcome as one of our members is currently studying for this certification which requires passing an all-day exam covering seven topics: California legal procedure; legal terminology; legal computations; skills; ability to communicate effectively; reasoning and ethics; and law office administration. To learn

more about this excellent program, visit (<http://www.lsi.org/>) LSI's website.

Jennifer L. Page, CCLS, of Ragghianti Freitas, was appointed Executive Advisor to the Executive Committee of LSI. This appointment comes after serving LSI over 12 years: four years on the Legal Specialization Sections and two years each as LSI Treasurer, Secretary, Vice President, and, most recently, President. That represents a tremendous commitment, an immense amount of volunteered time, a lot of travel, and at least a million emails delivered to her inbox.

I was honored to be appointed to a second term as LSI Parliamentarian by incoming President Heather Edwards from San Fernando Valley LSA. Prior to serving the past two years as Parliamentarian, I served LSI as 2016 Annual Conference Co-Chair and three years as the Legal Specialization Sections Probate Section Leader. Quite a few emails have passed through my inbox during this time as well.

Both of our journeys through LSI started with membership in MCLPA, where Jennifer and I have served in many capacities. Our commitment to MCLPA and LSI demonstrates the value we see in membership in these associations, and we look forward to working with associates from across California to spread the word about the educational opportunities and benefits of membership in LSI.

Every other month on the second Thursday, MCLPA holds a dinner meeting with a guest speaker at 6 p.m. at Sam's Restaurant in Novato. Check our (<http://www.mclpa.org/>) website for further information or contact (kledwards@justice.com) me. We welcome new members and guests. The topic of discussion often qualifies for CLE. The next LSI Quarterly Conference will be within driving distance, August 17-19, 2018, in Stockton, CA. CLE will be the focus of that conference and there will be seven seminars to choose from, covering Civil/Criminal Grand Juries, Probate/Estate Planning, Federal Law, Criminal/Family Law, Law Office Administration, Specialty Law, and Civil Litigation. If you cannot spare the time to attend a conference, LSI is offering a multitude of online CLE webinars. I recently attended the California Style Manual v. Blue Book webinar given by Mary Ann Moylan. Please contact (kledwards@justice.com) me or visit (<http://www.lsi.org/>) LSI's website for dates, times and topics.

Kristi L. Edwards, CCLS

LSI Parliamentarian

Legal Assistant to Froneberger & Leviloff

Annual Supreme Court Review with Professor Rory Little

JUL 04, 2018

BY ROBERT ROSBOROUGH

If you are an MCBA member and a fan of Michael Krasny on KQED, you might have heard Professor Rory Little twice in one day. In the hour between Professor Little's appearance on Forum, commenting on the opinions the U.S. Supreme Court released in the final days of its term, and his popular annual commentary on the Supreme Court term for MCBA's June membership luncheon, Justice Kennedy announced his retirement (which a number of us heard on the radio as breaking news as we drove to the luncheon), giving Professor Little no shortage of things to talk about. This despite the fact that the Court issued the fewest number of signed majority opinions after full briefing and argument since the Civil War or earlier. Professor Little noted that the Court has granted review for next term at a higher pace so far, perhaps chagrined by criticism of its low output.

Professor Little observed that it was a term of narrow decisions and that the Court "punted" on several major cases. Two of these punts stood out. In *Masterpiece Cakeshop* (where a baker refused to bake a wedding cake for a gay couple), the court reversed a decision in favor of the gay couple after finding that the Colorado Human Rights Commission that first heard the case had expressed hostility to religion, thus not giving the baker a fair hearing that acknowledged a sincere religious belief. That was still a significant ruling but without making clear how far the cakeshop owner's free exercise right extends. Indeed, it appears that an appropriately neutral Commission may be able to rule against a baker under similar circumstances. The other standout was the dismissal of the two partisan gerrymandering cases on the basis the petitioners had no standing (decided the morning of the luncheon.) For those unfamiliar with the background of the cases, Justice Kennedy had suggested in an earlier gerrymandering case that he was open to finding partisan gerrymandering unconstitutional if there were a method to determine when it had occurred. That method may now exist based on the work of certain

mathematicians. But for reasons unknown, the Court did not rule on the merits and with Kennedy's retirement, it is possible that the issue will remain undecided for a long time even though the decisions left open the possibility of standing to challenge one's own political district rather than a state's districts as a whole.

In addition to ruling narrowly, the Court was also, perhaps not surprisingly, polarized, with nearly one-third of its decisions decided by a vote of five to four. Of those decisions, Justice Kennedy voted with the more conservative justices in all but two. Nonetheless, his replacement is expected to be a hardline conservative and in those areas where Kennedy strayed from conservative doctrine such as gay rights and abortion, his replacement is unlikely to do so. Professor Little pointed out that Gorsuch's replacement of Scalia has already shifted the court to the right. Scalia sometimes voted with the more liberal justices in criminal cases and free speech cases, among other areas, and Gorsuch has consistently voted to the hard right. Gorsuch was in the majority in all but two five-four decisions. He has also written a lot of opinions—17. Professor Little also referred to Justice Kagan as “leading from the side,” writing concurrences in the punted cases, among others, that offer future guidance as to what the law could be.

Professor Little spent the remaining time discussing just a few of the major cases, starting with *Trump v. Hawaii*, the travel ban case. The Court upheld the Trump administration's third try at a travel ban on citizens from certain, mostly Muslim-majority, countries. The majority used a deferential standard of review because of the national security concerns involved, finding that there was ample legitimate basis for the ban and that Trump's anti-Muslim statements did not invalidate that basis. Of note was the majority's comment that *Korematsu* (the decision upholding the internment of Japanese during World War II) was “gravely wrong” and had “no place in law under the Constitution.” Also of note were comments in the majority's opinion in *Masterpiece Cakeshop* not strictly necessary to the decision, noting that “it is a general rule that [religious and philosophical] objections do not allow business owners and others in the economy and in society to deny protected persons equal access to goods and services.”

The Court also decided several Fourth Amendment cases, foremost among them *Carpenter v. U.S.*, which broke major new ground in Fourth Amendment law. The issue in *Carpenter* was whether the government needs a search warrant for “cell-site location information” (i.e., information from

telephone companies about the location of an individual's phone.) Past Fourth Amendment cases have held that information in the hands of third parties, such as phone companies and banks, had already been "shared" and thus did not require a warrant. Justice Roberts, joining the Court's more liberal justices, held that in the modern era, vast amounts of data held by third parties raised "great privacy concerns" and that in certain circumstances, including the case at hand, a large amount of data obtained from third parties could still require a warrant. He took pains to comment on many circumstances where this would not be the case, including cell-site data from a shorter time period, but of course there will be many questions now on when a warrant is required. Professor Little used another Fourth Amendment case to comment that he hypothesizes that petitioners have the best shot at changing existing law when our "everyday experience" produces expectations that conflict with the law, referring to a case (*Byrd v. U.S.*) where the Court held (9 – 0) that the driver of a rental car (with permission from the renter) had a legitimate expectation of privacy even though he was not on the rental agreement.

Finally, Professor Little discussed *NIFLA v. Becerra*, decided the day before the luncheon, where the Court struck down a California law requiring certain notices from "pregnancy crisis centers" on First Amendment grounds. These centers are run by anti-abortion groups and sometimes provide medically-licensed services and sometimes do not. The Court found for both types of centers that California's law requiring them to provide notice of the potential availability elsewhere of abortion services, including publicly funded services, violated the First Amendment as "compelled speech." Thomas' opinion for the five-member majority throws into question vast areas of First Amendment doctrine, not to mention government regulation, despite the Court's statement that, "We do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." Professor Little pointed out that it is hard to square this statement with the reasoning of the majority, noting the large number of legally required notices in many circumstances. [Editor's Note: From my perhaps cynical perspective, I wonder if the Court, while claiming the opposite, is deliberately opening up large amounts of government regulation to question on First Amendment grounds never before envisioned.]

If you missed this lively and entertaining luncheon, you can still learn a bit more about the Supreme Court's term (and some cases granted for the upcoming term as well) from the brief notes Professor Little prepared that morning and has kindly allowed us to post as a pdf for you to download

(<https://marinbar.org/docs/mcle/mcba-professorlittlescotusnotes-66-1846.pdf>) here.

Mary Stearns

JUL 04, 2018

BY CHARLES DRESOW

Charlie Dresow sat down with MCBA member Mary Stearns, the director of Alternate Defenders, Inc., to learn more about her, what life is like as ADI's director and a little about ADI itself.

Tell us about yourself.

I graduated from USF Law School in 1988. I worked for several years with private criminal defense firms and public defenders' offices in San Francisco and Contra Costa County. I have performed trial work in five Bay Area counties, including second chair in a death penalty trial and have assisted in death penalty appeals. Since the mid-1990s, I have worked as a solo criminal defense attorney in San Francisco and San Rafael. In approximately 2006, I took on a one-quarter-time position at Alternate Defenders Incorporated. ADI is a non-profit entity that provides criminal defense attorneys for indigents when a legal conflict disqualifies the Public Defender's office from handling their cases. In 2016, I became the director for ADI. In this role I manage our panel of attorneys and have contact with Marin County public defenders and district attorneys (management and line deputies), judges, clerks, sheriffs who run the jail, the Court Executive Officer, Marin County Budget Analysts, Marin County Jail Mental Health, directors of other conflict offices and public defenders in other counties.

What Does a Typical Day on the Job Look Like?

There are always phone calls from defendants and ADI attorneys - with a variety of issues to discuss. After one of these calls, I often need to meet or contact prosecutors, public defenders and/or judges to consider changing courtroom procedures or appointment procedures. The main purpose of ADI is to supply attorneys for criminal cases. Oftentimes, we need to have an attorney in court on a half-day or

one-day notice from either a court clerk or a public defender. Occasionally there is a case where all ADI attorneys are either unavailable or have a conflict so I have to contact attorneys and conflict offices outside of Marin County to locate an attorney. This can be time consuming and somewhat challenging. I also spend a significant amount of my time setting up MCLE seminars – I contact the speaker, make the flyer, invite criminal defense attorneys in the Bay Area. In order to make sure ADI is keeping up with best practices, I meet with other conflict office directors to discuss current developments in indigent defense and conflict panel management. I also review bills submitted by attorneys and experts in murder cases. Sometimes, the legislature imposes new laws and we have to respond and protect the rights of defendants. Finally, I also prepare monthly reports for our Board of Directors and communicate with our Peer Review Committee.

How Does ADI Operate?

As noted, ADI's main purpose is to provide attorneys for indigent criminal clients when the public defender has a conflict. ADI also provides attorneys in writs of habeas corpus and misdemeanor appeals. The public defender or court contacts ADI and then we contact independent attorneys who have the appropriate experience required for the case. ADI has approximately 30 attorneys on our panel and we get from 35 to 75 new cases per month. ADI has expanded services and now provides attorneys for L.P.S. (mental health) cases and Penal Code 1473.7 motions (a new immigration law). We provide MCLE classes for our attorneys and have a Peer Review Committee that reviews new applicants and handles any issues related to the competency of our attorneys. The Peer Review committee is made up of highly experienced criminal defense attorneys and a retired judge. The committee members play a significant role in setting our standards and making sure ADI attorneys are providing the highest possible level of indigent defense.

Do You Participate in the Cases Themselves?

I have tried over 30 trials in a variety of counties and jurisdictions from misdemeanor DUI's to murders but I do not handle any of ADI's cases myself. Although I am not a supervisor and the ADI attorneys are not employees, I am available to discuss legal strategy on their cases. I can also connect younger attorneys on our panel with more experienced attorneys for advice and mentorship.

Tell Us More About ADI's Educational Programs.

I organize ADI's MCLE programs. We provide free MCLE seminars to criminal defense attorneys, and at times, provide seminars for others in the criminal justice system, including probation officers and judges. We have had seminars on criminal discovery, new laws, immigration, bail law, forensics, substance abuse, basic defense practice, jury selection, cross-examination, juvenile sexual offenders, misdemeanor trial practice, and emerging issues in criminal defense. We are pleased to offer these classes free of charge and they are open to attorneys from other counties.

NovatoSpirit: Helping Children Through Sports

JUL 04, 2018

BY CHARLES DRESOW

NovatoSpirit, a 501(c)(3) public charity, is giving a boost to Novato's most vulnerable children by working to improve their physical and mental health through sport and exercise. According to the Novato Unified School District, about 2,600 Novato students are living in poverty, and at least 130 of them are homeless. Poverty can magnify health problems, and many of these children struggle with health issues, such as asthma, obesity, diabetes, motor-skill difficulties, speech delays, anxiety, depression and PTSD.

The negative effects from some of these distressing health issues can be alleviated by regular exercise, but most after-school fitness and sports programs are beyond the financial reach of impoverished families. To help families overcome this financial barrier, in 2005, Marian Huntington founded KarmaSpirit, which does business as NovatoSpirit. Since then, she and fellow Board Directors Alison Moore, RN, and Suzanne Daggert, CPA, have helped hundreds of kids participate in carefully selected after-school programs offering karate, taekwondo, dance and soccer.

NovatoSpirit's goal is to make a long-term impact on children's lives by making fitness an important and regular feature. It does this by enabling each participant to practice an activity for five years. This is costly: each NovatoSpirit child requires an average of \$5,000 of funding over those five years. But the health impacts are immense.

Tracey Hessel, MD, Lead Pediatrician of Novato's Marin Community Clinic, has been a longtime champion, stating, "I have been grateful to have the opportunity to work with this outstanding program and consider it to be an amazing resource for my patients and a force of positive change for our community." The pediatricians at the Community Clinic are just one of many groups that refer

eligible children ages seven to eighteen to NovatoSpirit. Others include the pediatricians at Kaiser Permanente; social workers from the county and North Bay Community Services (formerly the Novato Human Needs Center); volunteer court-appointed special advocates from Marin CASA; mental-health specialists from the county, Seneca Center, and the Center for Domestic Peace; staff from homeless shelters, such as Homeward Bound and Gilead House; and schoolteachers. NovatoSpirit's valued partners have included the County of Marin; the City of Novato; the Novato Police Department (which serves several NovatoSpirit kids through their educational summer camps and Explorers Program); the Canal Alliance; and Santa Rosa Junior College's Extended Opportunity Programs & Services (EOPS).

NovatoSpirit achieves effective and lasting positive health impacts with children, says founder Huntington, through five key components: mentorship with a skilled and compassionate athletic instructor; a safe learning environment where all children are watched to ensure no bullying or destructive behaviors occur; continuity of positive physical action over a five-year period; and frequent two-way communication between the families and Huntington, so she can listen and be responsive to their needs; and full participation of parents and caregivers in transportation, spectatorship and conferences with athletic instructors.

The success of NovatoSpirit's programs is reflected in the praise from the participants in its multi-year programs, and from their parents. (To read some of their testimonials, please visit the "Testimonials & Letters" section of (<https://www.novatospirit.org/testimonials-and-letters/>) www.novatospirit.org.) More in-depth testimonials from the children are highlighted in Huntington's newest book, *Movement and Mentorship, Helping Kids Heal through Sports*, which will be published in Spanish and English, available this Fall on Amazon.

To learn more about NovatoSpirit's mission to help children in need, visit its (<https://www.novatospirit.org/>) website or feel free to email Marian Huntington at (marian@novatospirit.org) marian@novatospirit.org. Donations are much appreciated and can be mailed to NovatoSpirit, 936 Seventh Street, Suite B, Postal Mailbox 236, Novato 94945.

Abraham Lincoln: Criminal Defense Lawyer

JUL 01, 2018

BY CHARLES DRESOW

An entire library could be filled with the literature of Abraham Lincoln, covering virtually every facet of his life, both real and imagined. Volumes would range from the scholarly, like Carl Sandburg's six-volume biography, to the not-so-scholarly, such as Abraham Lincoln Vampire Hunter by Seth Grahame-Smith. Dan Abram's and David Fisher's recently published, *Lincoln's Last Trial: The Murder Case that Propelled Him to the Presidency* would be a valuable addition to this library, covering a lesser-understood part of Lincoln's life. The book has a place on your bookshelf not only for illuminating Lincoln's legal career but for the practical advice it contains for the trial attorney.

Lincoln's Last Trial begins with a description of Lincoln's life as a lawyer who rode the circuit, handling all forms of cases, including both prosecuting and defending criminal matters. Prior to the Civil War, few counties had formal prosecutor's offices. When a criminal matter needed to be tried, the local government would hire a private lawyer as the prosecutor and if a judge wasn't available, a lawyer or trusted local citizen would be appointed to sit as judge for that case only. Trials were sometimes held in rooms above taverns, in barns, or inside the taverns themselves. Apparently even bedrooms sometimes doubled as courtrooms.

After discussing Lincoln's legal training, the authors describe how in his pre-presidential career he served in all roles of the criminal justice system as it existed at that time: Like most attorneys of that period, Lincoln had no specialty; he dealt with both civil and criminal cases. When called upon he would sit as a judge, act for the community as a prosecutor or represent individuals with a gripe, a claim, a need or a criminal charge.

Although I found the description of the pre-Civil War legal practice fascinating, the best part of the book describes Lincoln's defense of Peachy Quinn Harrison during his murder trial. Lincoln's defense of Harrison was closely followed in the local media as both Harrison and the victim were from prominent families. Largely gathered from a transcript of the trial only discovered in 1989, the book describes Lincoln's trial strategy and courtroom prowess.

The national spotlight also focused on the trial because Lincoln was at that time a dark-horse presidential candidate. His recent debates with Stephen Douglas had propelled him to the national spotlight and a trial loss could have knocked him right out of it. The authors make a good case that Lincoln's presidential aspirations were riding along with the verdict and they effectively incorporate the trial into the broader history of pre-Civil War United States.

I highly recommend the book both for those with general historical interest in Abraham Lincoln and for practicing attorneys, who can glean trial practice tips still useful today. First of all, Lincoln always spoke plainly to the jury. He did not use the flowery prose of the day. Rather he spoke to the jury just like he was talking to some friends. Most importantly, Lincoln understood that most cases turn on one significant point and, "[h]e willingly conceded those points he couldn't win or that made little difference, building up goodwill with the judge and jury that might pay off when he pounced on the salient issue." The book describes in detail how in multiple cases, Lincoln had an uncanny ability to identify the turning points of a case and win those turning points while conceding unnecessary arguments. Another related lesson from the book for trials lawyers is to understand and identify those turning points prior to jury selection and pick jurors who would be more likely to side with you on the critical issues.

I enjoyed reading this book. The authors did a fantastic job of weaving Lincoln's last significant trial as a defense attorney into the looming presidential election and national strife. It is fascinating to read how Lincoln tried cases to juries and ponder how much of that experience built his amazing ability to communicate with the masses.