

From Politics to Wellness

OCT 04, 2018

BY ROBERT ROSBOROUGH

With mid-term elections just over a month away, it seems fitting that our October issue of the Marin Lawyer has several articles that touch on politics. For his President's Message this month, Tom Brown chatted with outgoing District Attorney Ed Berberian, who reflects on his time in office and the challenges and pleasures of that role. Many thanks to our Guest Editor this month, Greg Brockbank, himself a (former) politician and eternal political activist, who profiles fellow activist Dotty LeMieux. I know Dotty from our overlapping service as board members of MCBA, not as an activist, and I found it fascinating that her experience as a politician (one in particular) is what inspired her to become a lawyer. Greg also authored his bi-monthly political column. If you haven't reviewed all of the propositions we'll be voting on next month, Greg's column is a great place to start. He also opines about Congress and which way each house might go. And of course, he takes a look at the local Marin races, noting the (large) cast of characters and offering insight and opinion when he has them. I want to reiterate that any and all of those opinions are his own, not those of MCBA or anyone else associated with MCBA, and MCBA does not endorse candidates for any office. Even if I disagree with an opinion, I find I come away better informed.

As for content unrelated to politics, the prolific Mr. Brockbank has also authored a useful primer on handling a residential eviction case. Even though landlord-tenant law is not my practice area, I am still asked about landlord-tenant law with some regularity, as I'm sure many of you are as well. I find it helpful to at least know the basics of how it works in the real world. Reading Greg's article has the added bonus that if you had any hesitation before, you might now feel confident in volunteering, whether through Lawyers in the Library, Legal Aid of Marin, the Canal Alliance or elsewhere, where landlord-tenant advice is needed. And if you aren't sure where to volunteer, I'd like to remind you of the still new Marin Pro Bono Network. A collaborative effort of volunteer legal services organizations in Marin in partnership with the Marin Community Foundation, the Network helps match volunteers with volunteer

opportunities. You can learn more about it (<https://www.marinprobononetwork.org/>) here.

Arthur Harris and Kevin Williams authored a useful primer on preparing a certificate of independent review. For our non-trusts and estate members, probate law raises a presumption of fraud or undue influence when people make certain gifts, such as to their caregivers (or lawyers). A certificate of independent review is supposed to eliminate that presumption (in other words, it shifts the burden of proof back to someone claiming fraud or undue influence.) But while the law sets out what the certificate says, it says nothing about what is required to support it. Harris and Williams offer detailed guidance, much of it gained from their own litigation experience, on what an attorney preparing a certificate really needs to do.

Finally, I want to mention lawyer wellness. I attended the Joy in the Law Conference last Friday along with well over 100 others. Clearly wellness is a significant concern for us. The Marin Lawyer has run occasional articles on wellness and I invite our readers to submit more articles on the topic or to (rrosborough@montywhitelaw.com) get in touch with me about what you'd like to read. On a broader level, MCBA is working on incorporating wellness programs into the benefits of membership. It's possible you might encounter me in my role as a meditation teacher before too long. In the meantime, I'll continue editing the Marin Lawyer and I always welcome your feedback.

A Farewell Chat with Ed Berberian

OCT 03, 2018

BY THOMAS S. BROWN

As we enter the final weeks of election season, I thought it would be an opportune time to sit down with District Attorney Edward S. Berberian. Ed and I discussed some of his highlights and challenges as District Attorney, the current election, his retirement plans, and what he will miss most about the job.

Beginning with the obvious question, "Why retire?" Ed answered simply, "42 years and family." Ed cited his wife's support for his career and said that it was clearly past time for him to devote more to his family, which includes four adult children and eight grandchildren. Despite his career in the legal field, none of his kids wanted to touch the law: two have followed paths in education, one works for a veterinary hospital and the fourth is a stay-at-home dad, a career Ed will pursue shortly.

Ed started out as a Fine Arts major at the University of Arizona but was always fascinated with the engagement of the courtroom. He elected to go to law school at the University of San Francisco and then embarked on a career in the Marin County District Attorney's Office. Ed remarked that the only place to get real courtroom experience was working in a public law practice where you are dealing with judges and juries on a regular basis and becoming a prosecutor satisfied his desire to consistently be in a courtroom.

Ed was appointed to serve as District Attorney in January 2005 when Paula Kamena retired prior to the expiration of her term. Ed went on to serve three terms as the elected District Attorney. When asked to mention a few of his career highlights, Ed brightened up and mentioned the partnership between the District Attorney's Office and the Jeannette Prandi Center that addresses the dangers of social media and texting. Using students from San Marin High School's drama program, the DA's Office has produced mini-movies which have been shown to over 7,000 middle school and high school students in Marin County over the years. Ed was very proud of this program which has brought much needed

awareness to the County's youth about the legal and illegal use of social media. He also noted the District Attorney's Service Dog program in which the office uses a highly trained canine to help children who are victims of violent and other offenses disclose traumatic events and testify in these highly charged and emotional cases. Ed also regularly met with the survivors and family members of victims of violent crimes to counsel and advise them on how the judicial process works and to discuss the resolution of these high profile and often challenging cases. I recall several occasions where Ed took the time to meet with family members in my cases to let them know why the office elected to file (or not file) specific charges. This is part of the job that the public does not see but is critically important to the criminal justice system.

Other projects implemented during Ed's tenure include the process of sending prosecutors around the state to argue at parole hearings and the creation of the High Tech Task Force, one of only five forensic task forces in the state. Another of Ed's significant practical accomplishments was the decision to do away with the over 30-year practice of not making sentencing commitments in felony cases. This was widely accepted by line prosecutors, the criminal defense bar and the bench. Keeping in touch with his belief that he would not ask his staff to do anything he was not willing to do, Ed continued to prosecute cases individually as the elected District Attorney, including trying a five-defendant murder case in Novato in 2011. The absorption of the mediation program by the DA's Consumer Unit and the gun buy-back program are two other programs that Ed has championed as District Attorney.

As for challenges or disappointments, Ed identified a high profile case that involved the second amendment and observed that one of the most significant challenges for a prosecutor is having to tell those affected by a case why the office has elected to make a specific decision or why the office cannot pursue a case. These decisions often frustrate the law enforcement and family members who are closely invested in the outcome of a case.

With respect to the ongoing contested election for District Attorney, Ed remarked that law enforcement is a local responsibility and that politics must be ignored as much as possible for a District Attorney to be effective. He acknowledged that DAs are elected officials and that it is not always easy to ignore politics, but that should be a secondary focus to the true purpose of the job, which is to analyze the facts of an individual case in determining how justice is best served in prosecuting or not prosecuting a case. Ed cautioned against the temptation to make a statement about legal issues based on current polling, as

the opinions of your constituents can and will change over time and it does a disservice to the position to try and implement policy changes based on what is currently popular. I asked Ed why he did not originally endorse a candidate as is common in local elections and he said that since there were multiple candidates, including two from within the office, he felt it was his responsibility as a leader to not divide the office in some way. There have been obvious disagreements among the office but he felt that overall the staff has handled the matter very professionally, a welcome occurrence in light of prior contested elections. Ed is now formally endorsing Lori Frugoli, as he believes that Lori has the requisite experience and is most familiar with what is involved in managing the District Attorney's Office on a day-to-day basis.

We also discussed the relationship between the prosecutors and the Marin County Bar Association. Ed, who along with deputy district attorney Otis Bruce, has served as President of the MCBA, said that it was a "tough nut to crack," as traditionally, the prosecutors have not looked outside the office. He has tried to change this a bit, paying for the bar membership for his attorneys and encouraging the attorneys to become more engaged in the community that they represent on a daily basis.

His retirement plans include taking each of his grandchildren on high school graduation trips. As a precursor, Ed and his wife recently celebrated their 50th wedding anniversary by taking the entire family on a Disney cruise.

Looking back on his career, Ed said that he would miss the people in the office and felt that the most rewarding part of the job has been helping people who are often at the lowest points in their lives.

I asked Judge Haakenson about Ed's retirement, who had this to say: "I have known Ed for all of my 26 years working under Frank Lloyd Wright's blue roof. As a young prosecutor, I was privileged to know him as a colleague, a boss, a mentor, and a friend. He is one of the longest serving public servants Marin County has ever seen, and has consistently served the county with honor and distinction. He is also one of few elected District Attorneys who has taken a hands on approach, personally trying some of the most difficult cases in the county, while simultaneously heading the office. The citizens of Marin are lucky to have had Mr. Berberian at the helm of the DA's office for so long. He will be missed."

Please join me in congratulating Ed Berberian on a career of public service well served and a retirement

well earned. All the best, ESB!

Continuing this theme of transition, we are pleased to announce the proposed slate of officers and directors for 2019. The officers include the following: Charles Dresow, President; Susan Feder, President-Elect; J. Timothy Nardell, Treasurer; Robert Rosborough, Secretary; and Dave Feingold, 5-Year Past President. The new directors are: Michael Chaput, Habib Bentaleb, Kelley Reid, Sarah Leger, and Ahtossah Fullerton. The slate was formally announced at the September membership meeting and will be voted on at the upcoming October meeting, which features the (<https://marinbar.org/events/?type=event&id=212>) Annual Judges Luncheon. We look forward to seeing you then.

Finally, a brief comment about the recent roll-out of our ListServ program. We piloted the ListServ program with one of our sections, which found it a very useful tool for communicating with section members about legal issues, referrals, and other matters. We apologize for not briefing the membership more fully during the roll-out but the feedback we have received is that this is something that the membership would find beneficial. We will roll out the ListServ again in the next couple of months. We will give detailed instructions when we do but we will ask members to “opt in” in order to join. The default format will also be a single daily digest with the prior day’s emails, with the option to switch to real-time receipt. Because of the (affordable) system we use, our dedicated staff have to manually log each of these choices but we trust that this approach will encourage use of the ListServ and create a convenient forum for member dialogue.

As always, please let me know if there is anything we can do to assist your practice. See you around the courts.

- Tom Brown

What Lawyers (and Landlords and Tenants) Need to Know About Residential Evictions

OCT 02, 2018

BY GREG BROCKBANK

NOTICES: An eviction complaint cannot be filed unless the landlord serves proper notices first (and attaches them to the complaint). The most common notice is a Three-Day Notice to Pay Rent or Quit, served on a tenant behind on the rent. Other common notices include the Three-Day Notice to Cure Covenant or Quit (when a tenant is violating the lease in some other way), and, of course, the 30-Day (or 60-Day, for tenancies of more than one year) Notice to Quit, used when a landlord wants to evict a tenant who is on a month-to-month rental agreement who is not behind on the rent or otherwise violating the lease. Landlords or property managers usually do these notices themselves, but often hire attorneys to “draft” the complaint.

UNLAWFUL DETAINER (UD) COMPLAINT: Like most complaints these days, this is a multi-page, fill-in-the-blanks-and-check-the-boxes form approved by the Judicial Council of California. It lays out all the needed allegations, and usually a copy of the lease is attached to it, along with the required notice, and the proof of service of that notice. Other forms needed for this initial filing include a special summons, which is Judicial Council Form SUM-130, and a Civil Case Cover Sheet.

ANSWER TO UNLAWFUL DETAINER (UD) COMPLAINT: The Answer is a similar form, in which the tenant responds to the allegations in the UD Complaint by listing the numbers of the paragraphs that the tenant admits or denies. Unlike most complaints, which have a 30-day period in which to answer, a UD Complaint must be answered within five days of being served in order to avoid having a default taken. Other defenses often listed include uninhabitability of the premises, discrimination, and retaliation.

REQUEST FOR A TRIAL DATE: Another difference from most lawsuits is that there is rarely any discovery in an eviction lawsuit; a landlord's attorney usually requests a trial date immediately after the Answer is filed, almost regardless of what the Answer says. And still another difference from most lawsuits is that a trial must be set within three weeks of the request, instead of the many months it takes in most lawsuits.

DEFAULT FORMS: If the tenant fails to file an Answer within the five days, the landlord can file a Request for Entry of Default, which means the tenant is thereafter prohibited from filing any further response and the landlord automatically wins. The landlord's attorney also files a Judgment and a Writ of Execution (these two forms would also be needed after the trial if the tenant does answer the complaint, unless the tenant wins at trial). He also gives the Sheriff a letter of instructions (on the sheriff office's form, which you can get at the window in their office at 1600 Los Gatos Drive off Lucas Valley Road), and a final Five-Day notice is then promptly posted on the tenant's door, at the end of which period the tenants are bodily removed by the Sheriff (if they haven't already vacated the premises, which they usually have) while the Landlord or his locksmith changes the locks.

SETTLEMENT: Like most lawsuits, the vast majority of these cases are settled, in recent years in Marin at a mandatory settlement conference usually held the afternoon before trial. Although this may well add \$1000 or so to a landlord's legal fees, it avoids having to prepare for trial (where cases usually settle anyway). In fact, nearly all cases settle at this stage, resulting in a several-page written agreement. Usually the terms revolve around two major issues: when the tenant moves out, and how much money is paid (and when). Sometimes a landlord is primarily interested in getting the tenant out right away and is willing to waive some or all of the past due rent. In other cases, landlords want every penny of the rent due from the tenant, plus all their costs and attorney fees as well – although it is often hard to collect any money at all, even with a court judgment.

FILING FEES AND ATTORNEY FEES: Fees to file both the UD Complaint and the Answer vary, depending on the amount of past due rent, but usually are \$240 and \$225, respectively. Attorney fees, from the initial consultation, to form preparation, to settlement negotiations, to court appearances, are usually charged at \$300-\$400 per hour here in Marin at present, and may take anywhere from an hour to advise a landlord or tenant on how to represent themselves in their case, to 5-10 hours to represent them and draft and file papers, and appear in court as necessary.

VOLUNTEER TO PROVIDE LEGAL ASSISTANCE: Now that you lawyers out there know how to handle an eviction case, you can try your hand by volunteering for Legal Aid of Marin to provide legal advice and negotiate settlement at the UD settlement conferences. Or volunteer through MCBA's "Lawyers in the Library" program, giving (usually) low-income residents free 20-minute consultations in the Law Library at 20 No. San Pedro Road in San Rafael every other Thursday afternoon (sign up in advance), on a wide variety of topics, including landlord-tenant law. Both of these programs need more landlord-tenant attorneys.

Preparing a Proper Certificate of Independent Review

OCT 02, 2018

BY ARTHUR HARRIS AND KAVIN WILLIAMS

When confronted by an elderly transferor wishing to make a disposition of assets to a caregiver or new companion, every competent estate attorney must reflexively obtain a California certificate of independent review. See *Butler v. LeBouef*, 248 Cal. App. 4th 198, 210 (2016). The CIR is considered a simple solution to a problem with big consequences. Indeed, failure to obtain a CIR when circumstances warrant one will likely lead to a malpractice action. *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 313-15 (2004).

However, the virtually undefined CIR process is fraught with risks for the practitioner retained to draft and execute the CIR. Legal challenges to the CIR should all but be expected from disappointed beneficiaries. If they succeed, the certifying attorney may find themselves exposed to a malpractice claim. See *In re Estate of Winans*, 183 Cal. App. 4th 102, 116 (2010).

It is critical for the certifying attorney to apply the utmost care in properly developing a CIR from initial retention, to drafting and execution of the instrument with a notary and independent witnesses. The Probate Code sets forth the generic requirements for an independent attorney's execution of a CIR (Cal. Prob. Code Section 21384), but in practice other pitfalls exist beyond the text of the Probate Code. Below are five potential liability traps not readily apparent in the text of the Probate Code that certifying attorneys should be wary of when executing a CIR.

Inadequate Privacy in Counseling Session

The simplest step in the CIR process is ensuring that all of your interactions with the transferor are completely private. A CIR can fail if the confidentiality of the counseling session is at all compromised.

The text of the Probate Code requires the transferor be counseled outside of the presence of any heir or proposed beneficiary, but this should not imply a limitation to the privacy required for the counseling session. The best practice is to eliminate any other lawyers, family members, caregivers or even physicians from being present when you are counseling the transferor on the CIR.

The task of the certifying attorney is to ensure that the transferor understands the implications of the transfer, requiring absolute frankness from the transferor. *Winans*, 183 Cal. App. 4th 179. Complete privacy is expected to attain forthright responses from a transferor. California case law has found that even the presence of neighbors in an adjacent room who could potentially overhear the conversation could cause the CIR to fail. *Beck v. Rogers*, G044119 (Cal. Ct. App. Sept. 15, 2011), as modified on denial of reh'g (Oct. 6, 2011). Therefore, absolute precaution should be taken to preserve the confidentiality of your client meetings in order to protect the sanctity of the transferor counseling sessions.

Failing to Document

A CIR alone is inadequate to defeat a challenge to its sufficiency. *Conservatorship of Pers. & Estate of Anderson*, A132474 (Cal. Ct. App. May 17, 2013). Documenting the certification process is an implied requirement for executing a valid CIR. See *Id.* (CIR fails in part because “there is not evidence of what counseling Husband received before [attorney] executed the certificate”); see *Winans*, 183 Cal. App. 4th at 117 (CIR fails in part because “There is no evidence, for example, [the certifying attorney] discussed with [transferor] his decision to exclude appellants”).

Given the likelihood of a challenge, estate planning attorneys should construct a detailed evidentiary record of all of their investigation efforts in anticipation of a dispute over the validity and enforceability of the CIR. Detailed, contemporaneously taken notes should account for every portion of the CIR process including (1) the scope of the investigation into any fraud or undue influence exerted on the transferor, (2) the review of the prior donative instruments and the proposed new amendments paying particular attention to any changes in the transferor’s estate plan, (3) conversations with any beneficiaries, spouse, other family members, care givers, or close friends who can give insight into the transferor’s testamentary capacity and intent, (4) conversations with other professionals working with the transferor including any attorneys drafting the amendment the CIR is intended to support and any medical professionals interviewed to gain insight into the transferor’s mental state, and (5) the contents and

context of the certifying attorney's counsel to the transferor. See *Estate of Anderson*. In reality, copious comprehensive note taking in conjunction with the development of a CIR has moved beyond simply reasonable prudence, but is a necessary component of enforcing a CIR in a later probate action. See *In re Estate of Walters*, B199241 (Cal. Ct. App. Mar. 23, 2009).

Inadequate Counseling of the Nature and Consequences of the Transfer

While not a difficult step if done properly, ensuring the transferor understands the “nature and consequences” can be a challenge as the Probate Code provides little guidance. At a minimum, the code requires that the transferor understand the effect the transfer will have on the transferor's heirs and other beneficiaries under a prior instrument. But the certifying attorney must also ensure that the transferor understands the nature of the property bequeathed, that an ordinarily disqualified person will receive the property, and the natural objects of the testator's bounty will not receive the property. *Winans*, 183 Cal. App. 4th at 178. Attorneys should stress to the transferor the parties that will not receive the property so that they fully understand they are eliminating a bequest that was part of a prior estate plan. *Id.*

Again, it is imperative that the certifying attorney document all discussions with the transferor regarding the proposed changes in their estate plan and how it will impact their beneficiaries because the certifying attorney's notes will essentially speak for the transferor and their intent after their death in any future probate actions.

Relying Solely on a Single In-Person Meeting with the Transferor

Attempting to determine whether a transfer is the result of undue influence is probably the most difficult portion of the CIR process. Courts have held that a sufficient attempt requires doing what is reasonable under the circumstances. *Estate of Anderson*. But an independent attorney hired to execute a CIR will not have any prior knowledge of the transferor's background and, unfortunately, many cases of CIR invalidation show the executing attorney failed to sufficiently investigate the transferor's background to make a knowledgeable statement about the transferor's capacity to contract. In reality, attorneys are not trained to recognize the complex, subtle psychological and physiological changes related to aging. Yet, these changes are central to increased geriatric susceptibility and vulnerability to undue

influence and coercion that a CIR is intended to protect against. Id.

The best practice evaluation may require attorneys to do more than simply look for capacity indicators in a meeting or two because the transferor who appears lucid to the laymen attorney may still be the subject of undue influence. An investigation should search for signs such as unexplained withdrawal from normal activities, unusual depression, changes in financial condition, belittling or threatening behavior by companions, and recently strained relationships with family members. Conducting this type of investigation would include interviewing the transferor's family members, friends, and caregivers and evaluating them for their impact on the transferor's change in testamentary intent. Further, a best practices investigation might also require an examination of the transferor's medical records and discussions with her physicians regarding any conditions or diseases the transferor suffers from that may impact her mental state. Id.

The point: the best practices evaluation process may go far beyond two or three meetings with the transferor in order for the certifying attorney to obtain a well-rounded picture of the transferor's capacity and ensure that no outside influences are impacting their testamentary intent.

Not Engaging with Other Professionals

The Probate Code does not include a requirement that a certifying attorney engage with other professionals as part of developing and executing a CIR. However, it is becoming more apparent that the best practice CIR evaluation process includes engaging with the transferor's physicians to gain their insight into the transferor's current mental state. As the medical and psychological reasons which make an elderly transferor susceptible to undue influence and fraud are not intuitively discernible to lawyers, a certifying attorney using best practices would not rely solely on the findings of his or her own investigation. Receiving and documenting the opinions of medical professionals who work with the transferor would be helpful in the certifying attorney's evaluation process. These opinions provide strong evidentiary support as to the reasonableness of the investigation and support the ultimate determination that the CIR is valid and enforceable. See generally id.

Conclusion

Best practices aside, here is the inescapable truth: no matter how thorough your CIR evaluation process, unhappy displaced beneficiaries will contest the change in donative transfer, which means future litigation over the CIR is virtually unavoidable. Therefore, not only should you cultivate a comprehensive CIR development plan, but you should also weigh your execution of a CIR against involvement in future litigation where your previous representation will be challenged regardless of the numerous steps taken to ensure that the transferor's testamentary intent was met. The reality is that not all representations are created equal and CIRs, fraught with their abundance of pitfalls and only limited guidance available in the Probate Code, have the ability to expose attorneys to a higher level of malpractice claims than other representations, a detriment that should be thoroughly considered when evaluating whether to execute a CIR in the first place.

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Politician, Then Lawyer: A Profile of Dotty LeMieux, Political Activist

OCT 01, 2018

BY GREG BROCKBANK

I have been informally polling people for decades on what percentage of members of Congress are attorneys, and most people usually guess about 80%. The truth is that it's always been closer to 20%, give or take, but people often mistakenly assume that lawyers have an advantage in running for and winning high elective office, even though they are hardly even over-represented. Nor are attorneys over-represented among political activists, although there are of course a few of us. One of those is Dotty LeMieux, who stepped down at the end of last year after three years on the MCBA board. Indeed, Dotty is one of the super-activists, involved in several major Marin political organizations, including the Marin Democratic Party.

Dotty has been an attorney with a solo practice in Marin for over 30 years, increasingly specializing in neighbor law, CEQA and tree law. She and her husband, noted forensic forester Ray Moritz, lived for nearly 30 years in Bolinas, but then moved to Fairfax nearly 15 years ago.

Unlike most lawyer-politicians, Dotty started as a politician, serving about 30 years ago on the Bolinas Community Public Utility District (BPUD), an important political force in that tiny community. She subsequently ran for the College of Marin Board of Trustees (twice) and the Marin County Board of Supervisors (also twice), the first time in the latter race coming so close to long-time incumbent Gary Giacomini that he declined to run for reelection again four years later. And in the second election for that seat, Dotty came in first in the June primary, only to lose in the November runoff to Steve Kinsey.

But Dotty didn't let any grass grow under her feet. The end of her career as a politician did not diminish her role as a political activist. She has been intimately involved with numerous organizations in Marin, including as First Vice Chair of the Democratic Central Committee of Marin, and as a long-time board member of the Marin Women's Political Action Committee. She has been involved with too many campaigns to count. In fact, she heads up her own campaign consulting firm, Green Dog Campaigns, which has guided many local elected officials to victory at the polls.

Dotty, how did you first decide to become an attorney?

While on the BPUD, a large developer sued the board, a community planning group and the County of Marin because of a water moratorium that kept him from developing a large luxury development at the edge of the cliff overlooking the ocean. He sued us in federal court for a "taking." I was sued, along with fellow board members, as an individual. We ultimately prevailed. And the land is now the southern entrance to the Pt. Reyes National Seashore. That got me interested in environmental law.

What made you want to serve on the Bolinas Public Utilities District board of directors?

It was the de facto government of Bolinas. Anything having to do with utilities or water came before the board, including all development proposals. It was where the action was and I wanted to serve my community.

You went on to run for other public offices, and although you didn't win, you have consistently been involved in many of Marin's major political organizations, and are a campaign consultant in your own right. What makes you continue to do that kind of work, both as a volunteer, and a paid consultant?

I love helping good candidates get elected and see their agendas come to fruition. I especially love helping women candidates and those who are new to the political process. It's Democracy 101. Being an attorney comes in handy when candidates need advice on campaign finance filings, appropriate language for ballot statements or drafting ballot measures. I recently joined the California Political Attorneys Association, and in recent years have been more active in campaign law generally.

What does the future look like for you, and do you spend much time thinking about retirement? And what would that look like?

I spend no time thinking of retirement. I love what I do, both in the legal and political arenas. This year I am on a team helping the Democratic Party make sure our elections in California are fair and free. Nothing could be more important in a democracy, which seems so fragile these days.

The Political Junkie Looks at the November Election - Marin, Statewide, and National - Partisan and Nonpartisan Races

OCT 01, 2018

BY GREG BROCKBANK

<h4>LOCAL NONPARTISAN RACES</h4>

DISTRICT ATTORNEY

This very hot race continues to get hotter, even though the June election results made Lori Frugoli (48+%) the frontrunner, and made Anna Pletcher (30%) the underdog, after Pletcher was predicted to come in first by me. Not only do they have opposite styles -- straightforward vs. passionate -- you can count on Frugoli to continue most policies, but not push the progressive edge like Pletcher would. Frugoli's 48+% of voters in June will shrink to about 30% of the expanded pool of voters in November, but of course Pletcher will have to get a pretty high percentage of all those new voters to overcome the lead Frugoli will have amongst those who already voted for one of them and will do so again in November.

Recent press coverage has included Frugoli's court challenge of Pletcher's use of the Marin Democratic Party's endorsement in her ballot statement, alleging it was contrary to the law banning the listing of a candidate's political party in a nonpartisan race; the judge agreed she shouldn't have used it, but allowed it anyway based, at least in part, on the untimeliness of the objection. In a separate dispute, Pletcher claims Frugoli misled voters in printed campaign material saying, in large

print, that she was “the only Dem,” but then in smaller letters below “endorsed by every former D.A.” Obviously, Frugoli’s not the only Dem. Full disclosure: I’ve endorsed Pletcher.

<h4>SCHOOL BOARD AND SPECIAL DISTRICT RACES</h4>

In addition to the DA’s runoff, we are seeing one of the largest group of races that we’ve seen in decades, because most of the local city councils, school boards, and special districts have been forced to move their elections from odd-numbered years to even-numbered years, purportedly to increase turnout (higher in even-numbered years), but which results in a bigger load on the elections office, and ultimately, the voter, not to mention the candidates seeking volunteers and contributions while competing with partisan and large-district candidates in the same election for the first time.

With most of the few dozen school board and special district races moving to this November’s ballot for the first time, added to the dozen or so races traditionally in November, there are many more potential races. Most go uncontested, and not onto the ballot, because there are no more candidates in a given race than there are seats available. But this year, nearly 20 school board members declined to run for re-election (a larger than usual number), causing even more candidates to file to replace them, and so we have more contested races.

COLLEGE OF MARIN

Although sleepy in recent years, and relatively fresh off passage of a second facilities bond measure, the College Board race attracted a larger than usual number of candidates for three seats (incumbent Brady Bevis resigned earlier this year, and the board declined to appoint a replacement since the election was coming up soon): long-time incumbents Wanden Treanor and Diana Conti, and new candidates Suzanne Brown Crowe, Andrew Cullen, George Rothbart and Robert Ovetz. Cullen lacks a ballot statement (a serious error, indicating a non-serious candidate, or a completely unfunded one), and Rothbart and Ovetz are current or former faculty members with little track record or capacity for winning, leaving Crow as the only strong new candidate. Full disclosure: I served on that board from ‘89-’07, and have endorsed Treanor, Conti, and Crow.

SAUSALITO-MARIN CITY SCHOOL BOARD

Often controversial, this year's race features two incumbents and five new candidates running for three seats, most of them on two different slates (with an incumbent on each). Incumbent Ida (Times) Green (daughter of long-time politico Betty Times, now deceased) is running with Bonnie Hough, known among progressive activists for 30+ years, and incumbent Josh Barrow is running with Kurt Weinsheimer and Jennifer Irwin, with Nathan Scripps apparently not connected to either slate, and Peter Romanowsky, a perennial candidate.

The Ida Green slate advocates for the needy children in the public school in Marin City – MLK – even though that school already has lots of special funding for its many high-needs students. The other slate, with incumbent Josh Barrow, represents four of the five school board members who think more funding ought to go to the Willow Creek Charter School, since it has more students (and, perhaps, more voters?), and presumably less special funding than MLK. But as in all races, the winners will probably be the ones who garner the most prestigious endorsements (individuals, groups, the Marin Democrats, the women's political caucus, the IJ), and can raise enough money to send mailers and tell the voters about them along with their accomplishments and positions on the issues.

But the dynamics of this race are more complicated than this. There's an Attorney General's investigation started two years ago and still not completed, regarding board favoritism of Willow Creek over MLK. And there are distinct racial overtones, amongst the board, the community, and the student body demographics of the two schools. I've endorsed Green and Hough.

TAMALPAIS UNION HIGH SCHOOL BOARD

This district is unusual in that, despite having some controversy about losing a superintendent recently, deficit spending, and whether the parcel tax measure they put on the ballot (also this November) should be an extension or an increase, none of the three incumbents are running for re-election, leaving the field up to four new candidates: Barbara McVeigh, Dan Oppenheim, Cynthia Roenisch, and Kevin Saavedra. The latter three are well-experienced with the district, and formed a slate, whereas the first one is an interesting new candidate who might not be ready for this now.

NOVATO SCHOOL BOARD

Two incumbents – Derek Knell and Maria Aguila – are running for re-election, but the third, Shelly Scott, is stepping down because she was just elected in June as the next Assessor-Recorder. Three new candidates are running as well: the impressive Diane Gasson (endorsed by the Marin Women's PAC and the Marin Democratic Party), Hunter Azadeh, and Toni Shroyer's husband Jim Shroyer.

SAN RAFAEL SCHOOL BOARD

Two highly accomplished (on and off the school board) incumbents, Rachel Kertz (one term) and Natu Tuatagaloa (four terms) are running for re-election to their two seats (I've endorsed both), but are challenged by Jon Marker, a young activist in San Rafael with good ideas and good experience, considering he's literally and figuratively 20 years behind the two excellent incumbents. There will probably be a seat on this board for him someday soon, perhaps when his pre-school kids start in the district, but probably not this year.

DIXIE SCHOOL BOARD, AND TWO SMALL WEST MARIN SCHOOL BOARDS

In Terra Linda's Dixie District (which is having yet another controversy about changing the district's name), incumbent Brad Honsberger is running for re-election, but two of his colleagues aren't, leaving two open seats. Impressive newcomers Megan Hutchinson and Brooks Nguyen were endorsed by MWPAC, and I hear good things about the final candidate, Mike Moaveni, as well. The Shoreline School District has incumbent Timothy Kehoe running for re-election, and four other candidates, as there is an open second seat in this race. And the three incumbents in the Bolinas-Stinson district are facing challenger Stephen O'Neal for one of their three seats.

MARIN HEALTHCARE DISTRICT

This large district (all of Marin except Novato and West Marin, like MMWD), which has always been held in November of even-numbered years, has had controversies for decades, with "recent" ones including control of the hospital by Sutter (and anti-Sutter folks proved right that Sutter didn't have our best interests at heart), and continuing a private board that really runs the hospital (won by the pro-Sutter folks, because the docs needed to serve on it really don't want the public scrutiny of a

publicly-elected position); the publicly-elected board appoints the private board members, and has more control over it than they used to.

In recent years, in particular, there have even been elections with no challengers, but this year two of the three incumbents, both long-term (Jennifer Rienks and Larry Bedard), are running, with one additional seat open due to the remaining incumbent declining to run for a second term. Two surgeons and a realtor are also running, but one of them lacks a ballot statement (he left it to the last minute and had an emergency surgery?), and the realtor, Melissa Bradley, is running for reasons which many people still find confusing, in a self-admitted time of crisis and change in her life. She'll self-fund a campaign, but so far she's failed to impress. I support Rienks, and am thus far undecided on Bedard and the two surgeons.

MMWD

Another race with traditional November-of-even-numbered-years elections, and also one with often highly contested and high-profile races. Most districts elect all their members district-wide ("at large"), but MMWD is an exception (along with the Shoreline School District, and the Marin County Board of Education), which elects its members by district ("divisions"). Three divisions' member's terms are up, and all three filed to run for re-election. One-term incumbent Larry Bragman drew no challenger, but Cynthia Koehler drew Joby Tapia, a relatively unknown official with a Marin property owners' association.

But the interesting one is that, out of the blue, another long-time incumbent, Jack Gibson, was challenged by long-time San Rafael Schools trustee Greg Knell, who has a long and good track record on the school board, and in numerous other things, and is politically very savvy. But I don't think that will be quite enough to overcome Jack's long-time successful incumbency. (I support Gibson and Koehler).

NO. MARIN WATER DISTRICT, FOUR SANITARY DISTRICTS, AND TWO FIRE PROTECTION DISTRICTS

Veteran incumbent Rick Fraites and newly appointed incumbent Jim Grossi are being challenged by Tina McMillan, a Novato activist. Four sanitary districts have races, all because one lone challenger in each

district is challenging all the incumbents in each district running for re-election: Crystal Yezman in Las Gallinas Valley, Gary Butler in Novato, Sid Daru in Richardson Bay, Omar Arias-Montez in Tiburon District #5. Similarly, in the Stinson Beach Fire Protection District (FPD), challenger Will Mitchell is challenging the two incumbents for one of their seats, and the Novato FPD, where an incumbent stepped down (about the only one in all the special district races, other than the healthcare district), incumbent Bill Davis and new candidates Bruce Goines and Richard Hamilton are vying for the two seats.

<h4>MARIN'S PARTISAN RACES FOR CONGRESS AND LEGISLATURE</h4>

As I said in my last article two months ago, it was not surprising that all three incumbents in these races won handily (72-80%): Democrats Jared Huffman for Congress, Mike McGuire for State Senate, and Marc Levine for State Assembly. Their four challengers were all relatively unknown and poorly funded, making their campaigns almost invisible, and the three incumbents might not have needed to campaign at all for the primary. Or the November election either.

But politicians at almost all levels derive much of their power from how much money they raise, even if they themselves don't need it; it can then be passed on to more needy colleagues in swing districts. So, even if the incumbents don't need to fund-raise to win their own re-election, they do. And three of the June challengers face the incumbents again in November (even though two of them are also Democrats), because of our relatively new "top-two" primary system which puts the top two vote-getters on the November ballot, regardless of party. With the incumbents heavily favored in each race, it will be:

- Huffman versus Dale Mensing (again), the same unknown Republican from a northern county Huffman soundly defeated four years ago;
- McGuire versus Democrat Ronnie Jacoby, a frequent candidate (and former one-term Santa Rosa City Councilmember) who ran against Levine two years ago; and
- Levine versus Democrat Dan Monte, a first-time candidate this year who is a long-time progressive activist who claims that Levine is not progressive enough for many or most in Marin and Sonoma. Monte particularly cites Levine's failure to support SB562, the most recent single-payer health care bill, and other issues. Full disclosure: I'm Monte's campaign treasurer.

<h4>STATEWIDE RACES</h4>

U.S. SENATE

Running against an incumbent U.S. Senator in your own party is always tough, especially when the incumbent has served 26 years, is widely respected (even among many Republicans), and can raise substantial money. Challenger Kevin de Leon (who just stepped down as State Senate President Pro Tem, and will be termed out of the Legislature at the end of the year) knew this going in, but he also knew that many in the Democratic Party preferred him because Feinstein doesn't oppose Trump forcefully enough or vote often enough against his nominees. De Leon was nearly endorsed by the California Democratic Party at their convention in February (I was there as delegate, as I've been for over 30 state conventions, and I supported him), but he was in fact endorsed by the party at its Executive Board meeting in July by a surprisingly large margin. But he did not do well in the June election, losing 44.2% - 12.1% to Feinstein, and may well lose by a similar margin in November. The moral of the story is that the State Democratic Party Convention delegates are considerably more progressive than the rank-and-file Democratic voters, and the party's Executive Board members are more progressive still.

GOVERNOR

Gavin Newsom (33.7% in June) has been the frontrunner wire to wire – first to enter the race, first in fundraising, and first, consistently, in the polls. However, his lead in June was narrower than predicted, and although many thought he'd face former Assembly Speaker, former L.A. Mayor, and fellow Democrat Antonio Villaraigosa (13.3%) in November, Villaraigosa faded down the stretch. Instead, Newsom (whom I've always supported) faces Republican John Cox (25.4%), who came on strong at the end, was endorsed by Trump, and looks and sounds good (for an unknown Republican), even though he's never held elected office, despite several attempts (including the presidency), mostly from another state. Although Newsom's lead was narrower than expected in June, he is expected to get most of the votes from the other three major Democratic candidates and win handily in November.

LT. GOVERNOR

The top two vote-getters in June, as expected, were former Ambassador (to Hungary) Eleni Kounalakis

(24.2%) and State Senator Ed Hernandez (20.6%). Hernandez is the “traditional” candidate, being termed out of the Legislature after 12 years, which is where most statewide office candidates come from, but he doesn’t seem to be very well-known and/or very well-liked. Kounalakis is something of an indefatigable campaigner, and I support her, even though it isn’t very clear who is the most progressive. They both campaign as progressives.

ATTORNEY GENERAL

One of the great surprises in the June election for many of us was how poorly Dave Jones did in June (15.4%), considering that he is a two-term Insurance Commissioner who jumped into the race nearly two years before appointed incumbent Xavier Becerra was even appointed (to fill the rest of Kamala Harris’ term after she was elected to the U.S. Senate), locked up most of the local activists’ support, and raised considerable money early. But he came in third (after a relatively unknown Republican, Steven C. Bailey with 24.5%), and is out of the November runoff. In November, Becerra has the advantage of incumbency (albeit appointed), and the high profile of his many legal battles (mostly winning ones) with the Trump administration, not to mention being a Democrat in California.

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

Although Marshall Tuck is a Democrat (technically, this is the only statewide nonpartisan position), the State Democratic Party is quite cool to him, since he ran against incumbent Tom Torlakson (who is now terming out) four years ago, and is primarily known as a strong supporter of charter schools, something an increasing number of Democrats are growing suspicious of (especially the for-profit variety). But Tuck (37.0%) successfully portrayed himself as a successful school reformer against his Democratic Party-endorsed opponent Tony Thurmond (35.6%), a relatively new (and, like Tuck, young) Richmond Assemblyman. The same two face off again in November and it could again be close.

STATE TREASURER

State Board of Equalization member (and former S.F. Supervisor) Fiona Ma (44.5%) was relatively unopposed for this open seat, and faces Republican Greg Conlon (20.8%) in November. She will presumably beat him handily.

STATE INSURANCE COMMISSIONER

This is the only statewide race where a non-Democrat was the top vote-getter in June. Steve Poizner (41.1%) held the seat as a Republican for one term until he ran for Governor eight years ago, taking hard right positions as a gubernatorial candidate, which damaged his centrist reputation. He's now an "independent," more recently called "Decline to State," and properly now called "No Party Preference," and could win in November, given his lead in June against relatively unknown Democratic State Senator Ricardo Lara (40.5%).

SECRETARY OF STATE

Incumbent Alex Padilla (52.6%) will face relatively unknown Republican Mark Meuser (31.0%), and should cruise easily to a second term.

STATE CONTROLLER

Incumbent Betty Yee (62.1%) also won handily in June, and will face Republican Konstantinos Roditis (33.9%) in November. Yee is heavily favored for a second term as well.

<h4>STATE BALLOT MEASURES</h4>

As a result of a relatively new law, only statewide ballot measures ("propositions") put on the ballot by the Legislature appear on the June ballot in even-numbered years, and the more contentious and hard-fought campaigns, put on by citizen signatures, appear in November. There were five in June, a few more than usual, and there will be 11 in November: four bond measures (or bond authorization measures), Props 1-4, (1 and 2 were placed on the ballot by legislators, along with Prop. 7], and eight individually placed on the ballot by their supporters. They run from 1-12, but there is no Prop 9 (the controversial advisory measure about splitting the state) because it was removed from the ballot by a court a couple months ago.

PROP 1 – AUTHORIZES BONDS TO FUND HOUSING ASSISTANCE PROGRAMS

With California's average house costing 2.5 times the national average, and rent 50% higher, and homes being built at only a fraction of the rate of jobs created (especially in the Bay Area, including Marin), the problem is getting worse instead of better. This proposition would authorize \$3B in bonds (which would be in addition to the \$2B California gets for housing projects from the federal government), ultimately costing about \$6B total with the interest over a 35-year period at \$170M/yr. Although some say we have too much bonded indebtedness, others say that we have the right amount, as debt is being added in the same proportion to the state budget as old bond debts are being paid off. Although only modest funding has been raised for the measure, there is no funding reported for the opposition, and no reported opposition.

PROP 2 – AUTHORIZES BONDS TO FUND EXISTING HOUSING PROGRAM FOR INDIVIDUALS WITH MENTAL ILLNESS

This is not for a new "loan" (bond authorization), but instead authorizes the state to issue bonds against 2004's Prop. 63, popularly known as "the millionaire's tax," which provided county funding for mental health services. In 2016, the Legislature authorized \$2B in bond funding for the homeless from this very millionaire's tax, but their plan has been held up in court, and Prop 2 this year is a way to properly "authorize" it. No formal opposition.

PROP 3 – THE WATER BOND

Bond authorization measures may well be becoming more frequent, and water bonds (this one's for \$8.9B) are a frequent bond subject, usually passing handily, especially since the funding is titled as going to "Water Supply and Quality, Watershed, Fish, Wildlife, Water Conveyance, and Groundwater Sustainability and Storage." Supporters range from The Nature Conservancy to the State Chamber of Commerce, from the Assn. of Calif. Water Agencies to the Ag Council of CA, and Dianne Feinstein (who's been working on state water issues for decades). The only opposition listed on the Official Voter Information Guide pamphlet, just out, is a Central Valley taxpayers group, but the League of Women Voters also opposes it, and there is never a shortage of critics for any plan amongst farming and environmentalist factions for California's precious and diminishing water.

PROP 4 – THE CHILDREN’S HOSPITAL BOND

This is for \$1.5B, but it follows separate authorizations for children’s hospital bond funding in ’04 and ’08 – just 12 and 16 years ago. And this additional money is earmarked for eight specified private nonprofit children’s hospitals, comprising the California Children’s Hospital Assn., which sponsored this measure, is paying for the campaign, and will receive the funding. Although there is no opposition campaign funding reported, the League of Women Voters opposes it, on the grounds that public money ought not be used to support private facilities.

PROP 5 – PROPERTY TAX TRANSFER

This is yet another in a seemingly endless series of “patches” to now-40-year-old Prop 13, because people keep wanting to expand it (although most wouldn’t say that), or at least make its benefits more “fair.” At some point, we should perhaps admit that it may have been a bad idea to begin with, creating growing inequities and continuing to unfairly limit local government revenue. Right now, someone over age 55 can move their long-held home’s low assessed value (tax basis) from one primary residence to another one (and with a few exceptions, only in the same county), only if the new home costs less, and only once in their life. This measure would remove all of those restrictions, and allow such transfer to all counties, regardless of the cost of the new home, and regardless of how many times the taxpayer has done it before, despite the loss of revenue to local governments. Modest funding of \$7M or so has come from various realtor organizations, and there is no opposition funding reported, although opponents include the League of Women Voters, the CA Teachers Assn., and at least four major Bay Area newspapers.

PROP 6 – THE GAS TAX REPEAL

Last year, the Legislature finally succeeded in passing (by a two-thirds vote) a comprehensive transportation funding and repair bill (SB 1), which included slightly increased car registration fees and gasoline taxes, for the first time in years or decades. The resulting \$5B/year (eventually) is now starting to flow into every county in the state, and those counties, including Marin, are coming to increasingly rely on it for major projects (e.g., completing the Novato Narrows). But few things anger right-wing anti-taxers like increased gasoline taxes, however modest and overdue, so they put this measure on the

ballot to repeal those gas taxes. If it passes, and it may (although an article last week said the campaign to repeal the tax is running short of steam and cash, and dropping in the polls), then the flow of new money would stop shortly after it's started to come in. Supporters include the state Republican Party and taxpayer groups (who've contributed \$3.6M), and opponents include the State Democratic Party, the state Chamber of Commerce, the Sierra Club, and the League of Women Voters, and have raised \$29M.

PROP 7 – PERMANENT DAYLIGHT SAVINGS TIME

This is an advisory measure which would allow the state legislature to approve permanent year-round daylight savings time, but only if federal law authorizes it, requiring a change in a 1949 federal law. States are all over the map, with two permanently on Standard time, and others, including California, interested in permanent daylight savings time. Schoolchildren would have to go to school in the dark in winter, but proponents argue that switching back and forth twice a year is stressful, unhealthy, and costly. Some say it will save some electricity, but others say that will be offset by increased air conditioning costs. The Democratic Party supports it.

PROP 8 – LIMITS ON DIALYSIS CLINICS' REVENUE & REQUIRED REFUNDS

Two chain dialysis clinics – DaVita and Fresenius -- do the majority of dialysis treatments, and are accused by this measure's proponents of gouging private patients with insurance, charging them several times as much as their negotiated rates for Medi-Cal and Medicare. The proponents propose capping rates, and refunding fees if their profits exceed a certain amount calculated by a complex formula. Yes, it interferes with capitalism, and yes, it restrains private industry with regulated rates. The Democrats support it, and the Republicans oppose it, with labor union SEIU providing virtually all of the proponents' \$17.4M, while the two clinic chains and one other company are the major contributors (\$52.7M) to the opposition, along with the Republican Party.

PROP 10 – THE AFFORDABLE HOUSING ACT (REPEALS THE COSTA-HAWKINS ACT)

This measure has been predicted by some to be the hottest and most expensive campaign on the state's ballot this year. When a dozen or so (mostly larger, older) cities started to pass rent control

measures, the 1995 Costa Hawkins Rent Control Act limited rent control to existing buildings – meaning no rent control on buildings first occupied starting 1/1/96. It also made rent control inapplicable to single-family homes and condos, and mandated “vacancy decontrol”: landlords can now raise a long-rented but now vacant unit back up to market value, rather than be forced to pass that unit’s low rental amount to the new tenant. Prop 10 would remove all those restrictions, and would allow cities to have their existing or new rent control laws apply to new buildings, single-family homes, and condos, and even mandate vacancy control if they choose. Among the unsurprising list of supporters (the Democratic Party, the League of Women Voters, and various large unions) is the CalAIDS Foundation, controversial because of its controversial founder and his huge donations to various state ballot measures, and who has in fact funded nearly all of the \$13.3M to date. The opposition has raised \$36.7M, mostly from the California Apt. Owners Assn.

PROP 11 – AMBULANCE EMPLOYEES’ PAID ON-CALL BREAKS, TRAINING AND MENTAL HEALTH SERVICES

This would amend the Labor Code to allow private ambulance employees to remain on call during meal and rest breaks. Although the law generally allows for breaks without being on call for most employees, it hasn’t been enforced with ambulance employees, until a 2016 California Supreme court case caused employers to start to change, and also prompted this measure, with employers claiming 25% more ambulances would be needed otherwise. Supporters include, primarily, employer American Medical Response (who has funded the \$3.6M raised to date), and the Republican Party, while the State Labor Union, Teachers Union, and Democratic Party oppose it (although with no funding to date) on the grounds that private ambulance companies shouldn’t be allowed to carve out an exemption from California labor laws.

PROP 12 – FARM ANIMAL CAGES

Although no humane person could object to a bill that mandates slightly better conditions for the poor animals raised for meat and eggs, this measure is controversial. In some ways it improves conditions for pigs and veal calves -- although leaving a lot of time to institute the changes -- and attempts to make more specific the conditions mandated by Prop 2 in 2008, but there is much that is lacking. For chickens, it only demands one square foot for each and allows cages, which Prop 2 did not. Although the largest

animal rights groups support Prop 12, many such groups do not. This really comes down to a political question: could a better bill be passed in the future?

<h4>CONTROL OF CONGRESS</h4>

U.S. SENATE

The national obsession (at least among even the mildly politically interested) with who will control each house of Congress after the November elections has been going on for nearly two years now, since Trump's election. And we'll know, at last, in about a month. Remember two guidelines, which are working at cross purposes this election:

- If the President is unpopular, almost always the other party gains seats in the mid-term elections;
- Democrats usually do worse in mid-term elections because too many of their voters don't bother to vote except in presidential elections; the key to their success is getting them to vote this time, even though failure to do so was a major cause of the 2016 shocker.

Also remember that the Senate elections have very different factors than House races, especially this year, so success in one house may not necessarily imply equal success in the other. And keep in mind the terrible map faced by the Senate Democrats this year: ten incumbents facing re-election in red states won by Trump ("the endangered Dems"), and only one Republican incumbent seeking re-election in a (barely) blue state (Dean Heller, in Nevada), won narrowly by Clinton.

We've known that for nearly two years, but in recent months, most of the endangered Dems have polled more and more strongly, even in deep-red states, so that only 2-3 are considered in danger now, and they are all toss-ups. Nevada has also been a toss-up, but there have been at least a couple other surprise states that were considered safely red, but in which the Democrat is now leading narrowly – Arizona and Tennessee.

In both cases, there is no incumbent seeking re-election in those races; the seats are currently occupied by Jeff Flake and Bob Corker, respectively, who declined to run for re-election (some say they couldn't win because they didn't embrace Trump). If the endangered Dems all prevail (still a tall order, but looking better all the time), and the Democrats can flip red seats not only in Nevada, but also in Arizona

and/or Tennessee, then that would give them up to 52 seats, and the majority. But all those races are close, and the Democrats may not be able to run the table. Some think Democratic Congressman Beto O'Rourke can beat Ted Cruz in Texas, and it's close, but Texas is still pretty red.

HOUSE OF REPRESENTATIVES

How big will the Blue Wave be, if any? And last month (or last year) doesn't count – only next month. Many or most of these races will be played out in rural areas of numerous states, but most of the surprisingly large number of swing seats in play (Republicans in swing districts frequently bailed, sensing the Blue Wave and their own defeat) are in only a few states, including California, where Democrats already enjoy a 39-14 edge in the congressional delegation. But while there are other possible Democratic pickups, focus early on has been put on the seven Republican-held seats in districts won by Hillary Clinton – all of whom are considered highly endangered. In fact, two Republicans have resigned, so the strong Democratic candidates in those two Districts are running for an open seat, and the Democrats are favored in a few others, unless they're a toss-up.

Trends and statistics worth watching include:

- Demographic shifts in support. Blue-collar workers were always a bastion of the Democrats, but they have been migrating to Republicans in recent years – especially Trump. On the other hand, suburban women leaned pretty Republican until recently, and have been trending blue rapidly – a trend which may be accelerating because of the Kavanaugh hearings.
- Generic polls. They ask whether a voter would generally prefer a Democratic or a Republican as their Congressional representative, without a name attached. Although not a perfect poll, Democratic leads have ranged from 12-14 points (a year ago, and again now) to just a few (a few months ago).
- Parties' enthusiasm level. So far, the Democrats also have a big lead here, with voter turnout much bigger than four years ago (the last mid-term primaries), and some cases hugely so, and much bigger than the Republicans' modest increase. Presumably, that will be true in November as well, barring some Trump Administration "October surprise."
- Pollsters and Pundits. House races aren't polled as often (or at all) as Senate races, but several prominent pundits rank the competitiveness of House seats, above and beyond just the percentages of Democrats and Republicans. In recent months, and increasingly, more and more of the crucial few dozen swing seats keep moving in the Democratic direction (from "leans Republican" to "tossup" to

“leans Democratic”).

- Republican divisions to look at for the future. Even most Republicans would probably have been unlikely to predict how thoroughly Trump would have taken over the Republican Party, and certainly not most Democrats, but here we are. But Republican House candidates’ need to embrace Trump may cause problems with moderate voters (who mostly don’t like Trump), and cause those Republicans to lose general elections – if not next month, then in 2020.
- Democratic divisions to look at for the future. Too much was probably made of the Bernie-Hillary split; of course progressives want more progressive candidates, and moderates want more moderate ones, and both think their candidates are likely to win more elections. But in some districts (usually moderate ones), clearly moderates are a better choice, while in safe blue districts, progressives can often win.

Prediction: Senate: tossup; House: leans Democratic

Note: The views expressed in this article are opinions of the author and are not intended to reflect those of MCBA nor is this column an endorsement of any candidate.

Judge Orrick: A Career Advancing Justice

OCT 01, 2018

BY GREG BROCKBANK

At the regularly scheduled MCBA general membership lunch meeting on September 26, MCBA Board President Tom Brown interviewed US District Court Judge William Orrick in an informative and highly interesting program. Even if, as an attorney, one doesn't follow the federal courts very closely, one almost can't help but to have heard the Orrick name – perhaps because of his famous father, who served as a federal judge for many years, or his grandfather, for whom the eponymous law firm in San Francisco is named.

And like his father, the current Judge Orrick was motivated by public service (the father in the Kennedy administration, the son in the Obama administration). The current Judge Orrick started as a civil rights lawyer—he went to work right out of law school for a legal aid firm in Georgia (starting salary: \$11,000) because it had a good reputation for mentoring civil rights attorneys. He never considered working in his father's famous firm in part because he did not want to be famous for something he had nothing to do with. Eventually, he ended up at the Coblentz law firm in San Francisco, where he specialized in the area of "complex commercial litigation," which he admitted tells you nothing.

Judge Orrick touched on his feelings about becoming "politically active," his deliberations as a judge, and the challenges he faces in both criminal and civil cases. The criminal attorneys that appear before him are almost always professional, experienced and competent, but the civil attorneys are more of a mixed bag. He finds that he is getting more caustic about such things as attorneys' inability to handle discovery without needing to enlist him to settle disputes, and he shakes his head at attorneys who hear his tentative rulings and then in oral argument fail to address any of the tentative reasons for ruling against them.

Judge Orrick also talked about his case management conferences and his caseload, which includes the full range of subject matter from antitrust cases to civil rights cases. A sadly memorable recent trial for him was a RICO gang case in San Francisco's Western Addition in which the jury found five defendants guilty. That case is on appeal. Aside from showing a pervasive lack of opportunity, the evidence involved several murders that, according to the prosecution, were not about money or territory but respect—they happened purely because someone had dissed someone else. He noted that sentencing raised challenging issues in light of the age of the defendants, the severity of the crimes and the environment the defendants were raised in.

Asked about possible changes to his docket in the future, the judge cited an old saying by his father that what judges have done and continue to do hasn't changed much, and probably won't in the future: dispensing justice. Finally, when asked about the Justice Department generally in light of the current political environment, Judge Orrick reflected on his experience in Main Justice and his confidence in the high quality and non-partisan nature of the career civil servants there, no matter the administration, who strongly believe in the Department's mission: advancing justice.

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