EDITOR'S INTRODUCTION

Litigate, Don't Arbitrate?

APR 04, 2019

BY ROBERT ROSBOROUGH

As a mediator, it's not surprising that I am often encouraging folks to explore alternatives to litigation. Of course, any mediator knows that there are situations where mediation is not going to work (even aside from the situation I often face, which is getting families to the table who are not in litigation.) Binding arbitration is different—it's going to work, at least in the sense that there will be a resolution. Leaving aside consumer contracts and the like where arbitration is forced, many commercial contracts include an arbitration provision by the mutual choice of the parties, who see it as preferable to litigation. Howard Ullman urges us to rethink the unthinking inclusion of arbitration in our agreements. An experienced commercial litigator, he points out when arbitration might not work so well. Even if he may not change your mind in a particular instance, reading his article will leave you better prepared for potential problems. And of course, we welcome any and all responses, whether reinforcing his argument or offering a countervailing view.

Also on the litigation front this month, Dannielle Campbell, Houman Chitsaz and Constance Yu review the state of anti-SLAPP motions. I remember when California passed its anti-SLAPP law and many saw it as a welcome antidote to the abuse of the legal process to stifle first amendment rights. Since that time, certainly many of our readers have not been as unaware as I of how far and wide anti-SLAPP motions have spread. The authors give an overview of the procedural requirements and effects of these motions and gamely attempt to assess the evolving law on their use in federal court.

I encourage everyone to read this month's profile of Laurie Vaala-Olsen, Head Librarian of the Marin County Law Library. While you will learn a little about Laurie, you will learn a lot about what a valuable resource the law library is and the many resources and programs it has. And for a change of pace, Tim Nardell (a big thank you to Tim for being guest editor this month) reviews several books, including a legal thriller by Marin lawyer and MCBA member Colin Claxon. Or check out Greg Brockbank's political

column, in which he assesses a few more Democratic presidential candidates, among other things. And if politics gets you down and you need to read something more uplifting, read Barrett Schaefer's profile of the excellent Buckelew Programs or Tim's recap of the annual Pro Bono Appreciation Awards, which includes several pithy quotes, including Sir Winston Churchill's, "We make a living by what we get, we make a life by what we give." I hope that inspires you to give in whatever form works for you. Don't forget that if you are looking for pro bono opportunities, you can turn to the (https://www.marinprobononetwork.org/) Marin Pro Bono Network.

Inequality and Access to Justice

APR 03, 2019

BY CHARLES DRESOW

Income inequality is very much in the news. There is no doubt that income inequality and differences in economic status lead to unequal access to justice. Discussion of unequal access and education on causes and solutions is an important role for our Bar Association. But paramount is for us to work to connect all members of our society to access to justice. At our local level, we must do everything we can to ensure that the most vulnerable of our neighbors have the same ability to find justice in the courts as the wealthiest.

The inequities of power, wealth and advantage run rampant through our society. Much like society at large, the criminal justice system has traditionally struggled in its goal to provide equal justice for all, regardless of financial wealth. The right to counsel at government expense is a bedrock principle that allows an indigent criminal defendant to level the playing field between those with funds and those without. The debate surrounding cash bail reform in California has highlighted the role money still plays in one aspect of our criminal justice system. It is convincingly argued by advocates of bail reform that California's current system of cash bail allows those who have money to quickly buy their release from custody while those who don't have money will languish in jail while waiting for their cases to be adjudicated. This allows a potentially more dangerous individual quick release simply because they have money while an indigent arrested for a less serious offense sits in jail simply because they lack funds to pay bail:<blockquote>In terms of timing, the evidence unequivocally demonstrates that arrestees who post the full amount of bail listed on the Bail Schedule can secure release more quickly than any other category of arrestees. This is true even when an arrestee who posts the full bail amount has been charged with a more serious offense than the indigent arrestee. By way of example only, the Sheriff released on bail within several hours of arrest a person who had been charged in what appeared to be a serious assault case involving an axe and requiring SWAT team management, while an indigent, disabled individual who was also arrested for assault (her "deadly weapon" was a cane) was held in custody

for five days because she could not afford the felony bail. There, the assault charge was ultimately reduced to a misdemeanor, and the individual was released on her own recognizance. Consistent with this example, research indicates that individuals charged with serious or violent offenses who are able to secure release usually do so by posting bail.</blockquote>(Buffin v. City and County of San Francisco (N.D. Cal., Mar. 4, 2019, No. 15-CV-04959-YGR) 2019 WL 1017537, at *5, footnotes and citations omitted.)

A core premise of this argument is that all should have equal access to pre-trial release, regardless of economic status. The use of bail schedules, which set presumptive bail amounts without consideration of ability to pay, leading to pre-trial incarceration for those who can't afford bail, was held unconstitutional by the Federal Court for the Northern District of California:<blockquote>Given the consequences which flow from an extended duration of pre-arraignment detention, the Court finds the deprivation significant. Accordingly, plaintiffs have shown that the Sheriff, through use of the Bail Schedule, has significantly deprived plaintiffs of their fundamental right to liberty by sole reason of their indigence.</blockquote>(Buffin v. City and County of San Francisco, supra, 2019 WL 1017537, at *18.)

The fair administration of justice requires that the playing field be leveled as much as possible for indigent individuals accused of crimes. A critical aspect of this is the right to counsel:<blockquote>That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.</blockquote>(Gideon v. Wainwright (1963) 372 U.S. 335, 344.)

The logic of the bail reformers equally applies to the right to counsel. Ours is not a wealth-based system of justice. It is a fairness and equality-based system. To deny an indigent the right to appointed counsel and allow a wealthier defendant the benefit of a hired attorney would raise the same issues about wealth-based access to justice as cash bail does. The debate and factual conclusions surrounding bail reform would lead one to the conclusion that the right to counsel for an indigent accused of a criminal

offense is safe from challenge or elimination.

Shockingly, that right is under attack. In a dissent joined by Justice Gorsuch, Justice Clarence Thomas argues that the United States Constitution only requires allowing an accused to employ a lawyer and that the Gideon decision is an incorrect interpretation:<blockquote>Third, our precedents seek to use the Sixth Amendment right to counsel to achieve an end it is not designed to guarantee. The right to counsel is not an assurance of an error-free trial or even a reliable result. It ensures fairness in a single respect: permitting the accused to employ the services of an attorney. The structural protections provided in the Sixth Amendment certainly seek to promote reliable criminal proceedings, but there is no substantive right to a particular level of reliability. In assuming otherwise, our ever-growing right-to-counsel precedents directly conflict with the government's legitimate interest in the finality of criminal judgments. I would proceed with far more caution than the Court has traditionally demonstrated in this area.</blockquote>(Garza v. Idaho (2019) 139 S.Ct. 738, 759.)

The language that Justice Thomas uses strongly suggests his belief that the Constitution cannot allow the government to prevent an accused from employing counsel to assist them, but does not require the government to provide a lawyer to an accused who cannot afford one. This interpretation would create another massive inequity in our criminal justice system between those who have money and those who don't. For all the reasons that the bail reform advocates cite, it would logically follow that the right to an appointed counsel for those who cannot afford to hire their own lawyer is a bedrock right that levels the playing field for those who lack funds.

Failing to provide an indigent individual accused of a crime with appointed counsel would create a justice system based more on access to funds than equal treatment of all. As the makeup of the United States Supreme Court changes, the right to appointed counsel may be another liberty interest that faces elimination. This is yet another urgent reason that it is incumbent upon us as individuals and as an association to do everything we can to preserve and protect equal access to justice, regardless of economic status.

Bucking the Conventional Wisdom on Arbitration

APR 02, 2019

BY HOWARD M. ULLMAN

I come at arbitration from the perspective of someone who works as outside counsel at a large firm. In that connection, I have recently worked on arbitrations involving (or purporting to involve) a professional association asserting claims on behalf of its members against a health plan and complex international patent claims between two large companies.

Many have voiced concerns with arbitration from the perspective of employees and consumers (particularly as to class arbitration waivers). But there has been less concern voiced from the perspective of corporate counsel.

From that perspective, I've often heard what "they" say about arbitration. The conventional wisdom is that arbitration is usually a great idea and a boon for companies: it is purportedly faster and cheaper than litigation, providing plaintiffs with less opportunity to obtain burdensome discovery, and narrows or limits lengthy and costly appeals. As a result, outside counsel and in-house counsel often recommend and draft arbitration clauses for both commercial and consumer contracts.

It turns out that the conventional wisdom, even for corporate defendants, is often wrong. Let's explore some of the major reasons why you should think twice (or thrice) before insisting on an arbitration provision, especially in connection with commercial disputes.

Arbitration often isn't faster or cheaper. There are a number of reasons why arbitration often is not more efficient. Frequently, there are preliminary fights about arbitrability itself, which can take time to resolve. Moreover, even with well-drafted arbitration provisions, it can take time to agree on an arbitrator or a panel of arbitrators. Sometimes after you've agreed on an arbitrator or arbitrators, you have to go

back to square one because of scheduling issues or legal conflicts. Furthermore, once you have your arbitrator(s) in place, they often need and get leisurely briefing schedules — ostensibly because they are working on other matters and need the slower pace so that they can get up to speed on the issues. Sometimes, arbitrators ask for multiple rounds of briefing on issues — something a court is less likely to do.

And there is another reason why arbitration is often not faster or cheaper: private arbitrators, typically paid by the hour, have an economic incentive to keep cases percolating. Of course, this is not to say that arbitrators are consciously dragging their feet or padding their bills. But the compensation structure of the industry can indirectly incentivize them not to make abrupt or early decisions, just as brokers who are compensated through commissions on trades may have an incentive to engage in trading in their clients' accounts.

Early resolution is less likely. As a result of some of the above considerations, it is fairly rare to secure an early dismissal of a matter in arbitration. Sometimes an arbitrator will be willing to dismiss a claim or two, but it is unusual to succeed at arbitration's equivalent of a motion to dismiss. Corporate defendants are often surprised by this fact.

Limited discovery is not necessarily in a party's best interests. At first blush, companies are often excited by the relatively limited window for discovery provided in most arbitrations. That is particularly true of non-U.S. companies that are unfamiliar with, or wary of, the more expansive discovery typically available in U.S. court proceedings. However, arbitration's narrower scope of discovery is not always your friend. In particular, arbitrators are often reluctant to allow third-party discovery, even when it is permitted by the applicable rules. It is not uncommon for parties to arbitration to find that they need some information that they cannot obtain, but which they could have obtained through a court's subpoena power. Think carefully about whether you might need third-party information.

On average, the quality of arbitration opinions is not as high as the quality of judicial opinions. Having arbitrated complex cases, including before panels of highly qualified and well-respected arbitrators, my personal opinion is that arbitration opinions are, on average, lower quality than judicial opinions. (Of course there are exceptions to this general observation.) Arbitrators — even those who are highly sought-after — typically don't have law clerks to assist them. Since their decisions are rarely subject

to appeal (see below), they have less incentive to cross the T's and dot the I's. As a result, their decisions often contain boilerplate statements or passages, reflect perfunctory reasoning, and can be rife with factual and legal errors as well as typos. It is somewhat ironic that, priding ourselves on the rule of law and the case system, and having spent centuries building up a respected and independent judiciary, companies nevertheless expect that they are going to get higher quality results through a private system. I suggest that, more often than not, such is not the case.

The narrow window of appeal is not always a good thing. Proponents of arbitration often tout the very narrow window of appeal from an arbitration decision. But that fact is a double-edged sword, especially given some of the drawbacks of arbitration noted above. In particular, given the relatively lower quality of arbitration decisions, companies may live to regret their inability to appeal decisions that are erroneous or flawed.

Arbitration's limitations can be particularly apparent in complex commercial disputes. I am not hostile to all arbitrations. Consumer and employee disputes may make sense to arbitrate. The stakes are often relatively low and the costs of arbitration may indeed be lower than the costs of court litigation. That is especially true if your arbitration clause prohibits class arbitrations (as it may permissibly do). However, arbitrations involving complex disputes between companies frequently encounter the various limitations or difficulties mentioned above. My bottom-line suggestion: the next time you hear the conventional wisdom that arbitration is preferable, think very carefully before you agree.

Practitioners, Beware! California's Anti-SLAPP Motions Can Happen to You: A Practical Overview

APR 02, 2019

BY DANNIELLE CAMPBELL, HOUMAN CHITSAZ AND CONSTANCE YU

California's anti-SLAPP statute can be one of the most powerful tools in any litigator's tool box. Whether you practice in landlord tenant law, family law, business litigation or general civil litigation, claims that arise out of a defendant's protected free-speech or right-to-petition activity under the statute expose the claims to an anti-SLAPP special motion to strike. While California's anti-SLAPP statute is not new, case law construing its breadth and application is everchanging. This article highlights important aspects of California's anti-SLAPP statute, how the law is trending in our state and federal courts, and how some Ninth Circuit decisions foreshadow that its application in federal courts is increasingly untenable and likely to be pulled back.

Background

SLAPP suits, or "Strategic Lawsuits Against Public Participation," are civil complaints or counterclaims in which the alleged injury is the result of petitioning or free speech activities protected by the First Amendment of the U.S. Constitution or California Constitution. To protect petitioning and free speech, many states have enacted legislation, or "anti-SLAPP" statutes, allowing special motions to strike to be raised early in litigation. A successful "anti-SLAPP" motion can eliminate or limit entire causes of action that arise from a defendant's protected activity at the very outset of the case. Moreover, the California version is very broad — sweeping in speech which is of "public interest" regardless of whether or not it takes place in a traditional petitioning or public forum. For this reason,

application of California's anti-SLAPP statute has been controversial. Indeed, within the last four years, courts in Minnesota and Washington have suggested that, in the context of anti-SLAPP litigation, early adjudication of a defendant's affirmative defense of privileged speech is unconstitutional.

California's anti-SLAPP statute was enacted in 1992 and codified in Code of Civil Procedure section 425.16. Over the years, the statute has undergone a few legislative amendments concerning the award of attorney fees, the scope of what constitutes matters of "public interest," the parties' appellate rights to challenge the trial court's ruling, and the jurisdictional 30-day period in which to schedule the hearing on anti-SLAPP motions. In 2003, finding 'disturbing abuse' of the anti-SLAPP statute, the California Legislature exempted certain actions from it. (Code Civ. Proc., § 425.17. All further citations are to the Code of Civil Procedure unless otherwise noted.) Those exemptions include actions brought solely on behalf of the general public; commercial speech; and include special protections for ideas/expressions in gathering, receiving or processing information for communication with the public, speech made by non-profits organizations subsidized 50% or more by the government, or speech associated with dramatic, literary, musical, political, or artistic work or news publications. (§ 425.17, subds. (a)-(d).)

Procedure

To win an anti-SLAPP motion: "[F]irst, the defendant must make a prima facie showing that the plaintiff's 'cause of action . . . aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue.'" (§ 425.16, subd. (b)(1); Kashian v. Harriman (2002) 98 Cal.App.4th 892, 906.) This includes statements made before or in connection with a legislative, executive, judicial or other official proceeding; or statements made in a public forum or in furtherance of the exercise of free speech. (§ 425.16, subd. (e).) Defendant's requirement is satisfied if the suit "potentially impairs the right of free speech." (Beilenson v. Superior Court (1996) 44 Cal.App.4th 944, 950; see also, Baral v. Schnitt (2016) 1 Cal.5th 376; Park v. Board of Trustees (2017) 2 Cal.5th 1057, where factual allegations include both protected and unprotected conduct, the court's inquiry focuses on whether or which act is subject to the anti-SLAPP motion.)

Second, if defendant meets this threshold showing, the cause of action shall be stricken unless plaintiff

can establish 'a probability that the plaintiff will prevail on the claim.' (Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal.4th 12, 21 (Simpson) (internal citations omitted).) The burden shifts to plaintiff to bring forward admissible evidence establishing a probability of success on the merits.

Application and Evidentiary Issues

California's "Special" Motion to Strike under its anti-SLAPP statute has some unique evidentiary features. To meet its burden, plaintiff cannot rely on allegations in the complaint, but must set forth evidence that would be admissible at trial. However, unlike in a summary judgment motion, Plaintiff's burden in the second step of the anti-SLAPP analysis is to demonstrate a probability of prevailing on its challenged causes of action, not simply to show a triable issue of fact or law. Unlike later dispositive motions, plaintiff may have little or no opportunity to conduct discovery to gather such evidence and therefore must rely on its own evidence and declarations to defeat the special motion to strike.<blockquote>Precisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high: We do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law. Only a cause of action that lacks 'even minimal merit' constitutes a SLAPP.</blockquote>(Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal.App.4th 688, 699.)

Because defendant's filing of a special motion to strike immediately stays discovery, plaintiffs frequently have difficulty in producing admissible evidence without seeking at least limited discovery to meet their burden. (§ 425.16, subd. (g).) Thus, Plaintiffs may also face the cost of requesting and conducting discovery in order to adjudicate the special motion to strike.

Request for Discovery

Rulings on anti-SLAPP motions are immediately appealable (see §§ 425.16, subd. (i), 904.1, subd. (a)(13)); hence, trial (and appellate) courts are forced to adjudicate the "merits" of a case in evaluating the second-prong (plaintiff's probability of prevailing) before the facts can be fully

developed in the trial courts. The result is an uneasiness about whether potentially meritorious cases are being summarily dismissed without sufficient due process. As Justice Werdeger has observed, appellate courts, in numerous published decisions, are making substantive law on an incomplete or underdeveloped record. (See Aguilar v. Avis Rent a Car System, Inc. (1999) 21 Cal.4th 121, 149 (dis. opn. of Werdegar, J.) "For an appellate court to adjudicate an important First Amendment case on such a sketchy record is unfortunate.")

Code of Civil Procedure section 425.16(g) provides that courts, "on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding" the discovery stay provisions of the anti-SLAPP law. This exception exists to allow discovery necessary to defeat an unmeritorious anti-SLAPP motion.

To obtain discovery under section 425.16(g), the plaintiff must demonstrate that the party from whom discovery is sought possesses evidence needed by plaintiff to establish a prima facie case, along with some explanation of what additional facts the requesting party expects to uncover. (1-800 Contacts, Inc. v. Steinberg (2003) 107 Cal.App.4th 568, 593.)

Early Determinations in Hybrid Cases in which Factual Allegations include both Protected and Unprotected Speech/Conduct.

In 2016, the California Supreme Court's opinion in Baral v. Schnitt changed the then-established jurisprudence in determining whether a special motion to strike applies to a "mixed" cause of action — that is, a cause of action that is predicated on facts that would constitute protected activity and unprotected conduct — which at the time was determined by the "gravamen" or the "principal thrust" of the claim. (Baral v. Schnitt (2016) 1 Cal.5th 376 (Baral).) Since Baral, over 200 appellate and federal district court cases have cited the Supreme Court's decision.<blockquote>After Baral, when deciding whether claims based on protected activity arise out of protected activity we do not look for an overall or gestalt 'principal thrust' or 'gravamen' of the complaint or even a cause of action as pleaded. Indeed, the Baral court did not use the terms 'principal thrust' or 'gravamen' as a way to describe whether claims are subject to being struck under the anti-SLAPP statute. Employing terms frequently used by Courts of Appeal in anti-SLAPP cases, our high court in Baral indicated that the proper approach is to determine whether an allegation or claim of protected

activity is 'merely incidental' or 'collateral' to a cause of action. [Citation omitted] Claims that are merely incidental or collateral are not subject to section 425.16.</blockquote>(Sheley v. Harrop (2017) 9 Cal.App.5th 1147, 1168-71.)

A year later, in Park v. Board of Trustees (2017) 2 Cal.5th 1057, the Supreme Court again clarified that a special motion to strike does not arise where the protected activity is incidentally involved, rather the claim may be struck if the petitioning activity itself is the wrong complained of. In hybrid cases where statements are made in an official proceeding, or raise a public issue or concern that relates to or leads to challenged conduct, the issues of free speech and alleged unlawful conduct are interwoven and so are issues with the application of the SLAPP. "A claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (Park, 2 Cal.5th at 1060; see also, § 425.16, subd. (a).)

The problems are further compounded if the complained of speech or conduct is in the context of a commercial transaction, as commercial transactions are exempted from the anti-SLAPP statute. (§ 425.17, subd. (a); Simpson, 49 Cal.4th at 30; see also L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles (2015) 239 Cal.App.4th 918, 930.) "Under the two-pronged test of section 425.16, whether a section 425.17 exemption applies is a first prong determination." (JAMS, Inc. v. Superior Court (2016) 1 Cal.App.5th 984, 993.) If a plaintiff demonstrates that its claims fall within the commercial speech exception, the anti-SLAPP analysis ends—plaintiffs are not required thereafter to demonstrate a probability of success on the merits. (See Demetriades v. Yelp, Inc. (2014) 228 Cal.App.4th 294, 305 fn.8.)

Split of Authority in Federal Circuit Courts

Presently, three federal circuits—the First, Fifth and Ninth—apply state anti-SLAPP laws and procedure to federal courts in their circuits. Three federal circuits—the DC, Tenth and Eleventh Circuits—do not permit state anti-SLAPP laws to apply to federal courts in their circuits. In early December 2018, the U.S. Supreme Court denied certiorari in an appeal from a case in the Tenth Circuit holding that state anti-SLAPP law does not apply in federal court under an Erie analysis. (AmeriCulture Inc. et al. v. Los Lobos Renewable Power LLC et al., No. 18 89.)

As described more fully below, the Ninth Circuit is grappling with California's anti-SLAPP statute and its application under the Federal Rules of Civil Procedure (FRCP).

Ninth Circuit Standards for Applying Anti-SLAPP Procedure in Federal Court

The application of California's Anti-SLAPP statute in federal courts is becoming murkier and more limited with each coming new appellate opinion. The Ninth Circuit's efforts to circumscribe California's anti-SLAPP statute within the FRCP appears increasingly strained as recent opinions have further limited the scope of the statute in federal courts. Moreover, some justices on the Ninth Circuit have recently voiced their outright opposition to the application of California's anti-SLAPP statute in California's federal courts.

The Ninth Circuit has long applied California's anti-SLAPP statute in motions to strike a claim in cases filed in federal court on diversity jurisdiction. In doing so, federal courts are ostensibly applying a state's procedural rules in federal court on the theory that the procedures set forth by the statute are not in conflict with the FRCP. However, the tide is turning from the Ninth Circuit's earlier decisions that allowed a much wider application of the statute.

In United States ex rel Newsham v. Lockheed Missiles & Space, the Ninth Circuit upheld the application of California's anti-SLAPP statute in federal courts, after determining that no conflict existed between the statute and the FRCP. (United States ex rel Newsham v. Lockheed Missiles & Space (9th Cir. 1999) 190 F.3d 963, 973.) Although the Newsham Court seemingly permitted wide application of California's anti-SLAPP statute in federal court, Ninth Circuit opinions now limit the statute's application and have started a dialogue as to whether the statute belongs in Federal Court at all.

In Makaeff v. Trump University, LLC, the Ninth Circuit overturned a trial court's denial of plaintiff's motion to strike, reversing and remanding the case. (Makaeff v. Trump University, LLC (9th Cir. 2013) 715 F.3d 254 (Makaeff).) However, in doing so, the Ninth Circuit court published what many insiders consider an influential concurring opinion by then Chief Judge Alex Kozinski, with Judge Richard Paez joining, that cast doubt as to the future viability of California's anti-SLAPP statute in the Ninth Circuit. Judge Kozinski flatly concluded that "Newsham is wrong and should be reconsidered." (Makaeff, supra, 715 F.3d 254, 272.)

In reaching this conclusion, Judge Kozinski first noted the interplay between the use of a state's substantive and procedural rules in federal court, explaining that in diversity jurisdiction cases, federal courts can apply state's substantive law, but always apply the federal court's procedural rules. Moreover, even by applying the state's substantive right, if a procedural conflict arises, then federal law and precedent is clear, the FRCP govern. This is true even if the application of such procedural rules affects the outcome, and thus are substantive when applied.

With the general rules in mind, Judge Kozinski criticized specific aspects of the Newsham opinion, taking exception to both Newsham's determination that California's anti-SLAPP statute confers substantive rights to litigants and that it does not conflict with the FRCP. He strongly rebuffed application of the anti-SLAPP statute, stating bluntly: "Newsham was a big mistake" because the California anti-SLAPP statute "cuts an ugly gash through the orderly process" of federal courts. (Makaeff, supra, 715 F.3d 254, 274.) Judge Paez's separate concurrence added to the debate, by pointing to the state-by-state variations in anti-SLAPP legislation, all with different standards, which raises concerns of forum shopping by litigants.

Most recently, in 2018, the Ninth Circuit once again took on California's anti-SLAPP statute in Planned Parenthood Federation of America, Inc. v. Center for Medical Progress, further limiting the application of the statute. (Planned Parenthood Federation of America, Inc. v. Center for Medical Progress (9th Cir. 2018) 890 F.3d 828, amended (9th Cir. 2018) 897 F.3d 1224 (Planned Parenthood).) Seemingly following Judge Kozinski's advice, the Planned Parenthood court determined two distinct routes for a federal court to review an anti-SLAPP motion. First, if the motion is based purely on legal sufficiency, then the motion can be resolved by an FRCP 12(b)(6) motion. Second, the court also held that if the motion is based on factual sufficiency of plaintiff's claim(s), then the court should use Rule 56 to review the motion and discovery shall be allowed, with opportunities to supplement evidence based on factual challenges, before any decision is made by the court.

So the question is: What features of California's anti-SLAPP statute remain in federal court and for how long? After the Planned Parenthood case, the answer is hazy, but what is clear is that the application of the statute will apply much differently in state court than federal court, where FRCP rules 12(b) and 56 standards are used to review the motion.

Concluding Thoughts

An anti-SLAPP motion to dismiss or limit the scope of a case at its onset can serve as a powerful tool for defendants in cases where plaintiff's action arises from an alleged act by defendant(s) that is in furtherance of defendant's right of petition or free speech in connection with a public issue. Anti-SLAPP motions have been successfully used in unfair competition or defamation suits, and if successful not only result in dismissal of an entire lawsuit (or substantially limiting the claims) but also entitle successful defendants to attorney fees. The filing of the special motion to strike immediately stays discovery and any discovery motions. Hence, even if not successful, an anti-SLAPP motion can frustrate a plaintiff's case, especially in California state courts, adding cost in terms of interjecting substantial motion work, akin to summary judgment proceedings at the onset of the case, and stalling out a case by staying plaintiff's discovery while permitting defendant to conduct discovery on issues related to the motion. Thus, practitioners faced with either filing or defending a case that deals with speech and public issues should carefully consider and analyze the scope and effect of a special motion to strike on their case because it can apply differently depending on how defendant's alleged conduct is characterized.

A Brief Look at Marin's November City Council Races, and a Further Look at the 2020 Democratic Presidential Candidates

APR 01, 2019

BY GREG BROCKBANK

Disclaimer: The views below are that of the author and do not necessarily reflect that of MCBA and its members.

<h4>FOUR CITY COUNCILS IN MARIN HAVE ELECTIONS SCHEDULED THIS NOVEMBER</h4>

This year will have the fewest Marin elections in an odd-numbered year in perhaps a century, as we finish the last of the migration of local elections from odd-numbered to even-numbered years, required by a law a few years ago in cases where the difference in turnout between odd-numbered and even-numbered years is too great, as in Marin. In the future, there will be no regularly scheduled Marin elections in odd-numbered years, although there could occasionally be special elections.

The last of these regular odd-year races (the others have all moved already) will be held in November in Novato, Fairfax, San Anselmo, and Larkspur, and the filing period, as usual, runs from mid-July to mid-August, for two to three seats on each council. If past history is any judge, maybe one or two of these will not have an election on the ballot after all, if the same number of candidates file as there are

seats ("no contest"). But the big one is Novato, where two incumbents seem like a sure bet to win re-election, but the third is controversial, and will be challenged (although it's an at-large election, at least for now), and it looks already like it will be a close race.

Here's a story lawyers may love (or not). A few years ago, the Legislature amended the California Civil Rights Act to allow lawyers to file suit against a city or school district if it holds at-large elections instead of district elections, and it has a history of few or no candidates of color getting elected. Only one attorney I know of, Kevin Shenkman of Malibu, has ever threatened to file suit and he has been systematically going through the large (and now medium-sized) cities and school districts (many large ones already have district elections, but most medium-sized ones do not), sending them letters, showing his research on why they qualify to be threatened with a lawsuit, saying that, as per the law, his damages would be capped at $30,000 if they agree to move to district elections within 90 days. If they don't, he can file the lawsuit and the damages could and would be ten to one hundred times that, and the city is likely to lose. Most cities cave and change soon after they get his letter, as the city of San Rafael did last year, and the most recent recipients, the city of Novato and the Novato and San Rafael School Boards, will likely do so as well. The only real question is whether they can do it in time for this November's election, or like San Rafael, wait until 2020 for it to take effect, since their next council election isn't scheduled until then anyway.

<h4>A FURTHER LOOK AT SOME OF THE 2020 DEMOCRATIC PRESIDENTIAL CANDIDATES</h4>

In my last column two months ago, I wrote a few pages about the Democratic primary race generally, including some criteria and theories on what it will take to win the general election, and did one-page profiles of four of the candidates whom I thought were likely the strongest at that point (see (https://marinbar.org/news/article/?type=news&id=408) here for the archived article on the MCBA website). Well, two months later, I still think those same four candidates are likely the strongest, and poll the best, but of course I've had some further thoughts about them. I also profile more briefly a few of the next strongest tier of candidates.

BERNIE SANDERS

Bernie may be the big dog in the race so far (although he may be supplanted, if only narrowly, by Joe

Biden, who will likely announce in early April), by virtue of his having gone from no-chance unknown too-far-left Democratic Socialist to nearly knocking off prohibitive favorite Hillary Clinton, receiving 46% of the popular vote in the primaries and caucuses, and 46% of the delegates. In my opinion, he was surprisingly gentlemanly in the debates specifically, and the campaign generally, and didn't damage Hillary, although some die-hard Hillary fans still try to blame him for her loss to Trump.

He was shockingly popular (then, and still is), even though he proposed ideas that one would think would be rejected as too radical (e.g., single-payer health care, free college tuition, and $15/hr. minimum wage), but those and other ideas have gained traction during his campaign three to four years ago, and thereafter, and in fact are considered fairly mainstream Democratic ideas now, endorsed by other (progressive) Democratic presidential candidates as well. His ability to raise a ton of money from mostly small donations (which he's already doing again this year, having raised six million dollars online within 24 hours of announcing, and is about to pass one million donors already) also gives him great power, as his ability to not seek donations from PACs and the ultra-wealthy make him look good, and less beholden to special interests.

He's the same old Bernie, although with slight tweaks from his last campaign (e.g., talking more about his personal background, and trying to connect with non-white voters more by talking more about race, instead of just class), and in fact I heard him speak in the park above Fort Mason in San Francisco on March 26th. But this time he faces a large number of other candidates, many of whom are also quite progressive and espouse similar positions (unlike last time, when the relatively moderate Hillary was the only other serious Democratic candidate). But he's likely to be to be in the top two to three throughout the campaign, if not the frontrunner.

KAMALA HARRIS

I sometimes still see her listed as the frontrunner, but usually she's behind Joe Biden and Bernie in the polls, as she currently is in Iowa (where the nation's first caucuses are a mere 10 months away). Willie Brown called her announcement and campaign rollout in January a "Cadillac," and she has in fact done well, considering she's only been in the Senate for two years, and was relatively unknown nationally before she announced for President. Women candidates, and candidates of color (or both), often excite the Democratic base, as Kamala does, and some think of her as Obama 2.0—a highly

charismatic candidate who can do what Obama did in '08 and '12.

In addition to lacking name recognition nationwide (she's well-known and well-liked in California), she seems to lack a signature issue, although she recently came out with a proposal to substantially raise teacher salaries—an unusual proposal for a presidential candidate, but one that will likely be quite popular. I still think her biggest liabilities are that she's spent the first 13 of her 15 years in public office as a high-level prosecutor (San Francisco D.A. and California A.G.), and some of her past positions in those roles may not sit well with the emerging progressives, even though she talks and takes positions like a progressive now.

ELIZABETH WARREN

I was a huge Elizabeth Warren fan four years ago when many of us tried to draft her to run, and she demurred (presumably because she'd only been in the Senate for about two years at that point). But she's always been seen, and still is, as a progressive champion to many, and in fact has some exciting and different proposals, such as a wealth tax on net worth over a certain number of millions (as opposed to an income tax), and campaigns as someone who doesn't hold fundraisers just for wealthy people (Bernie doesn't either, but he can afford not to, and as he points out, rich people wouldn't support him anyway). This may hurt her by making her unable to be financially competitive, and in fact she hasn't gotten much traction recently in the polls.

JOE BIDEN

As of this writing, Joe hasn't announced yet, but he's expected to shortly, and he may well be the frontrunner immediately upon his announcement. He does have an impressive resume (36 years in the Senate, chairing important committee like Foreign Affairs and Judiciary), but his primary popularity comes from his service as Obama's VP from '09 through '16. But when he ran for president previously, he never got much traction, is definitely prone to gaffes, and there are a few unpleasant things he's done which may disappoint people (e.g., plagiarism accusations in college and the Senate, harsh treatment of Anita Hill when she testified about being sexually harassed by then-SCOTUS nominee Clarence Thomas in 1991).

BETO O'ROURKE

Beto may or may not remain in the top four to five candidates (according to some polling), as he only has three terms in the House (where he didn't accomplish much), lost a Senate race last fall to the most hated man in the US Senate, has a quite moderate voting record (although he now talks like a progressive), and has taken significant campaign contributions from special interests. But he is tremendously charismatic, raised a ton of money from throughout the country during his Senate campaign (maybe hatred for Ted Cruz?), and is understandably trying to strike while the iron is hot, although some would rather he run for Senate again in 2020 instead, taking on Republican incumbent John Cornyn, although Cornyn's more popular than Ted Cruz, and is currently polling at 62%. Supporters say if O'Rourke could do so well in quite-red Texas, maybe he could win lighter red or purplish Southern states like Florida, North Carolina or Arizona. Still others say he'd be an excellent VP candidate, particularly if one of the older candidates gets the nomination, and others say he'd be a good fit with Kamala Harris.

CORY BOOKER

Cory was yet another superstar in college and law school (academically and in sports in college), was a key volunteer and program leader professionally, and a very popular Newark Mayor (having literally saved someone by pulling them out of a burning building) when he was elected to the Senate in 2014. He's also a physical fitness fanatic and a vegan. His signature issue is urban renewal, stemming from his background even before he was a very activist mayor in this area. But high achievement in college and professionally (including the legal profession, and even politically) don't always equate to superstardom as a presidential candidate, and while many people thought his keynote speech at the Democratic National Convention in 2016 was fantastic, I may be in the dissenting minority.

Some say he's the true Obama 2.0, not Kamala Harris, but in any case, Harris gets the edge in the charismatic, energetic, ambitious African-American Senator sweepstakes—she is polling better and raising more money, and will certainly get a large pile of delegates in California's March 3 primary in 11 months. Maybe VP or cabinet material, or maybe he stays in the Senate, and runs for President again in the future? He's an impressive candidate, but in this impressive field, he's in my second tier.

KRISTEN GILLIBRAND

Kristen was a moderate Democratic Congresswoman representing a moderate district in upstate New York, when she was appointed to fill Hillary Clinton's Senate seat in 2009 when the latter resigned to become Obama's Secretary of State. In the Senate, she says she can be more progressive, which is more aligned with her natural views, since she represents the entire state, which is more liberal than her former Congressional district. She, too, is an attractive (that's not a gender-specific term for me; I'm as likely to say that about a male candidate like Cory Booker or Beto O'Rourke), charismatic, ambitious Senator, but her problem has always been that there are too many other people in her lane(s), including Elizabeth Warren (Northeastern, progressive, woman), and Kamala Harris (progressive, woman).

Her signature issue (movement?) is #MeToo, and she has been Congress' most prominent voice in calling for perpetrators to pay the price for their misdeeds. She played a central role in ending Al Franken's career, something many Democrats strongly disagreed with her on. She also may be hurt in the primaries by her 10-year legal representation of Big Tobacco before she entered politics, and her formerly conservative votes, but her relative youth would be a good contrast to Trump, as is her "unfiltered" style, which voters seems to like. My bottom line on her, like Cory Booker, is that she is a very strong candidate in a very strong field, but may only be in the second tier, and her polling and fundraising support that thesis.

OTHER CANDIDATES

Minnesota Senator Amy Klobuchar, Congresswoman Tulsi Gabbard, Washington Governor Jay Inslee, and former Secretary of Housing and Urban Development Julian Castro are all impressive candidates as well, but again, in this very impressive field, I put them in the third tier. The odds of any of them catching everyone in the second tier (O'Rourke, Booker, Gillibrand), much less the first tier (Sanders, Biden, Harris, and Warren), seem slim. There are even longer long-shots, including some really interesting ones (e.g., South Bend Indiana Mayor Pete Buttigieg, and entrepreneur Andrew Yang), but they'd mostly have to be considered fourth tier, in my opinion, and that of most other pundits, I think.

COMMUNITY PROFILE

Laurie Vaala-Olsen and the Marin County Law Library

APR 01, 2019

BY TIM NARDELL

This month the Marin Lawyer spotlights Laurie Vaala-Olsen, head librarian at the Marin County Law Library. Tim Nardell interviewed her and learned not just about her but even more about what's happening at the library.

Marin Lawyer: First, tell us a little bit about yourself. How did you come to be a librarian and how did you get involved with the Marin Law Library?

Laurie Vaala-Olsen: I hate to admit it, but my work in the legal field dates back to the 1980s when I worked as a litigation paralegal for a San Francisco law firm. I also managed their recruiting program for summer associates. In 1985, I moved to what was then the San Rafael law firm of Bianchi, Engel, Keegin & Talkington, where I worked primarily as a litigation paralegal for about nine years. I left to raise my family and was out of the work force for about 10 years. I had just begun working again as a freelance paralegal when my family was transferred overseas for my husband's work. Upon my return, I enrolled in the ABA-approved paralegal program at San Francisco State to update my knowledge and skills and received my paralegal certificate in 2010. I was volunteering at the Marin County Law Library and working part-time for a few solo practitioners when I realized that I preferred library work to paralegal work. When the opportunity arose to work at the Law Library, I seized it and here I am.

Marin Lawyer: What is the mission of the Marin County Law Library?

Laurie Vaala-Olsen: Its mission is to provide legal professionals and the general public alike with access to legal information resources in a variety of media, research assistance and the technologies needed to

give practical expression to the law, while maintaining a flexible and supportive presence that fosters the ends of community service and social justice.

Marin Lawyer: How does the Law Library get its funding?

Laurie Vaala-Olsen: It is funded by a small portion of first-paper filing fees in civil, family and probate cases and those revenues have been in decline for several years. Prior to 2008, county law libraries were able to request annually from their boards of supervisors up to a $3 increase in the portion of civil filing fee that they received, which served as a hedge against inflation. In 2008, local control of filing fee increases was removed from the counties and transferred to the state and the portion of filing fees that each county law library was receiving in 2008 was permanently frozen. That change unfortunately coincided with the mortgage crisis and the Great Recession. Remarkably, our filing fee revenue did not begin its precipitous decline until the 2010-2011 fiscal year, but it has declined 34% since that time. We were forced to cut numerous subscriptions, reduce operating hours and lay off staff.

Marin Lawyer: The MCBA has been working hard with the library to support the Lawyers in the Library program for the last couple years. How would you say the program is doing?

Laurie Vaala-Olsen: Lawyers in the Library is a robust program that has been a tremendous success. Over 90 attorneys have volunteered to staff the twice-monthly clinics since the program's inception in October 2016. We try to staff four attorneys for every clinic, but sometimes that is a challenge. Mee Mee has been remarkable in her ability to find attorneys to staff the clinics when we experience a cancellation or limited sign-ups for a given clinic. Many attorneys have volunteered on several occasions. Most program participants come seeking help with family law and landlord/tenant matters, but we also see a significant number of people seeking help with employment, probate and estate planning and various civil and small claims matters. We collect exit surveys from the patrons after their meetings with the attorney volunteers and the overwhelming response is one of gratitude for the program and the assistance they received. Many patrons have commented that they feel more confident in their ability to handle their problems armed with the information and guidance they received from the volunteers.

Marin Lawyer: What new projects are you working on this year at the Law Library?

Laurie Vaala-Olsen:

• We developed a strategic plan with the assistance of professional facilitator Ulla-Britt Jonsson, who volunteered her services. A significant outcome of the planning process was the acknowledgement that our ability to provide services depends on sufficient funding, so we discussed ways to increase funding, such as seeking grants, lobbying for State funding, and seeking support from the legal community and the community at large through fundraising. Trustee Jonathan Frieman established a 501(c)(3) Nonprofit Friends Group for the Law Library to focus on fundraising efforts and he is looking for a few more members to join the board.

• We replaced our old Excel spreadsheet catalog of publications with a new interactive catalog, so it is no longer necessary to download a spreadsheet in order to search for a book.

• We are working on developing a program to offer MCLE classes.

• We are working on building awareness in the community that the Marin County Law Library is a public library open to everyone.

• We recently added a new consumer law database covering 20 subject areas to our public access computers and we are developing a broader range of print resources for self-represented litigants.

Marin Lawyer: What challenges is the Law Library facing this year?

Laurie Vaala-Olsen: The Law Library faces funding challenges as filing fee revenue continues to decline and publications and operating costs rise steadily every year. Over 90% of our budget comes from filing fee revenue, so fundraising to supplement the gap between income and expenses is necessary. Although the law library has a small revenue stream of additional funds from copy and print charges, conference room rentals and proctored exam fees, it does not begin to make up for the decline in filing fee revenue.

Marin Lawyer: What successes have you had recently that our members should know about?

Laurie Vaala-Olsen: I am a member of the Council of California County Law Librarians ("CCCLL") and we lobbied extensively for more than four years to obtain additional funding for county law libraries from the State Legislature. That advocacy effort resulted in a one-time budget allocation of $16.5 million to fund all county law libraries statewide last year. The amount that the Marin County Law Library

received served to bring our fiscal year 2017-2018 filing fee revenue up to the amount we received in fiscal year 2008-2009. We used the funds to purchase the software program to upgrade the catalog and to add or restore numerous publications to our collection, including California Forms of Pleading and Practice, updated Nolo Press titles, publications for self-represented litigants and several Nutshell books. In addition, we purchased a subscription to the National Consumer Law Center online database and 20-volume print collection.

Marin Lawyer: Is there anything else that our membership should know about the law library?

Laurie Vaala-Olsen: We are advocating for another funding allocation for county law libraries in the 2019 State Budget and in continuing years. A stable funding source would make it possible to develop an annual budget with revenue projections that we could better rely on, which in turn would facilitate planning for new programs and expansion of our services, such as restoring weekend hours.

Marin Lawyer: What do you enjoy most about working and living here in Marin?

Laurie Vaala-Olsen: I love working in the community where I live, especially the short commute! Although I am a transplant from the Midwest, I have lived in Marin for more years than I care to reveal, and I am still amazed at and appreciative of the variety of cultural and recreational diversions at my fingertips. I can be out on a hike enjoying the rugged, natural beauty of the area in the morning, and dine at a fine restaurant followed by attendance at an exceptional theater production in the evening. I love to cook and bake so I enjoy the wonderful array of cuisine the Bay Area offers as well.

BOOK REVIEW

Noteworthy Books, Briefly Noted

APR 01, 2019

BY TIM NARDELL

In those moments of free time after finishing work on that summary judgment motion or prospectus, or after reading those hundreds of pages of case law, commercial contracts, discovery motions, or trust documents, it's nice to pick up a good book before getting sucked into the maelstrom of the 24-hour news cycle or pulled into the Netflix/cable-TV vortex. Here are a few books that I've checked out over the past few months that have helped keep me engaged in the world of ideas.

<h4>Enlightenment Now, by Steven Pinker</h4>Steven Pinker is a linguist and cognitive scientist at Harvard University. He's also an exceptional writer, who has been brave enough to wander from his academic specialties to tackle big social problems. His latest book is a full-throated defense of the Enlightenment values of reason, science, humanism, and progress against the dark forces of sensationalism and demagoguery.

Enlightenment Now expands on Pinker's 2011 book, The Better Angels of Our Nature, which examined the history of violence and demonstrated that contrary to popular misconceptions, rates of violence have declined exponentially from pre-industrial to contemporary, post-industrial societies. In his latest book, Pinker uses an impressive array of demographic data to examine broader measures of human well-being. A hundred years ago, human lifespans were far shorter, and most people were far poorer, less healthy, and less educated. Pinker demonstrates that through advances in technology and medicine, social advances such as the spread of mass literacy, and political advances such as the spread of democracy, life has gotten better for the vast majority of people in the world by every material measure. Pinker argues that available demographic data also show that life has gotten better on less material measures as well. Why is it, then, that people don't feel much better and, in fact, according to some measures, actually are more pessimistic than in prior generations? The paradox of our time is that life has never been better for the vast majority of humans alive today and yet many people, particularly in

the advanced industrial countries like the United States that have benefitted most from progress, feel a deep anxiety that the world is "going to hell in a handbasket." This, Pinker argues, is a big lie that needs to be proven wrong.

Pinker is not Panglossian in his outlook. He worries that current popular mistrust of science—exemplified by movements such as the rejection of immunization—and the spread of demagogic nationalist and identity politics, threaten the developments that we have achieved with Enlightenment reason. Progress isn't guaranteed. Pinker admits that there are existential threats to our society such as climate change and weapons of mass destruction that did not threaten prior generations and that urgently need to be addressed. However, Pinker argues that the way to solve our problems is through more science, better education, and more democracy, not through undue pessimism, appeals to exaggerated past glories, tribalism, or Nietzschean-style elitism.

I think Enlightenment Now may be looked back on as one of the most important books of the decade. Pinker's message is simple: Rational debate and the scientific method have worked to solve social problems in the past, and elites need to embrace those traditions to solve the problems that the world currently faces. The power of Pinker's book stems from the depth of the research behind it (endnotes take up the last third of the book) and his precise but delightfully readable style. And when your eyes are too tired to keep reading, the graphs are amazing. Enlightenment Now is a must-read for anyone interested in contemporary social problems, which, I think, includes most lawyers.

<h4>The Browns of California: The Family Dynasty that Transformed a State and Shaped a Nation, by Miriam Pawel</h4>At this moment when Jerry Brown has, it seems, retired from politics for good, it is fitting to look back at how he and his family shaped and were shaped by this State. Miriam Pawel, who has previously written a biography of Cesar Chavez, does an admirable job of recounting the Brown family saga over more than a hundred years of California history.

Pawel starts by telling the story of the first Brown ancestors in California. One side of the family ran an inn at the edge of the Coastal Range, in Colusa County. The other side of the family ran a gambling hall and cigar stores in turn-of-the-century San Francisco. It's kind of an every-Californian family story of seeking opportunities in a new land. These opening chapters of the book give a good idea of what life was like in California for the Browns and many other ordinary and extraordinary families.

The story then shifts to the remarkable rise of Jerry's father, Pat Brown. Without a college education, Pat went from night school, a legal apprenticeship and the hurly burly of city politics, to work his way to become San Francisco district attorney, state attorney general, and then governor. As Pawel tells it, Pat built his political career on natural gregariousness and old-fashioned, backroom politics. She reminds us of some of Pat Brown's remarkable accomplishments as governor. It was a "can do" time of big projects, and Pat Brown could take credit for some of the biggest. He spearheaded the California Water Project, which engineered a system to take unimaginable quantities of water from the Delta, through the Central Valley and over the Tehachapi Mountains to slake the thirst and fire the development of Southern California. He also led the expansion of the University of California system to make it the greatest system of public education in the world. Believe it or not, a UC education was free in Pat Brown's day.

Pat reached the zenith of his political career at the beginning of the Sixties, when previously way-out-west California was moving towards the center of the political map of the United States. Pat couldn't quite make the transition to the national political scene that his contemporaries from the Republican Party — Richard Nixon and Ronald Reagan — were able to make; and so, after two terms as governor, Pat retired to Los Angeles.

That was exactly the moment when Jerry Brown got into politics. By Pawel's telling, Jerry was, in a way, the polar opposite of his father. Jerry was introspective and intellectual, where his father was outgoing but always somewhat insecure of the fact that he had never gotten a college degree. Jerry wanted to do things his own way, at the same time that he couldn't get past the fact that he shared the same name as his father and was the beneficiary of the family dynasty. In a few short years, Jerry rose from community college trustee, to secretary of state, and then to governor.

Of course, as we all know, Jerry Brown has broken the record for time served as governor, with two terms, from 1975 to 1983; and two more terms, from 2011 to 2019. What I found interesting in Pawel's telling was the extent to which Jerry started his political career espousing the limits of government and fiscal responsibility, themes for which he became better known during his most recent reign. These themes got lost to the public along the way, when he got stuck with the label "Governor Moonbeam" — based on a visionary idea that California could lead the world in space exploration and

should develop its own public/private satellite program. But in those early years, Jerry saw that California's economic future was in advanced technology. He noted presciently, "I see the future of America, and California, tied to the ability to store, retrieve, and transmit ever greater amounts of data at ever higher rates of speed…I'm going to do what I can to make sure that America does take the leadership position and that California is at the lead of this scientific-technological trajectory." Pawel does an admirable job of chronicling Jerry's early rise and fall and his long gestation and political rebirth, all guided by the mantra that he learned as a Jesuit seminarian: age quod agis — "do what you are doing." She also tells the story of Kathleen Brown, who for a moment seemed like she was also destined to be governor, with perhaps even higher political aspirations. Pawel reminds us that California was the testing ground for the now nationally proven technique of mobilizing anti-immigrant fervor and fears. Kathleen bravely spoke out against Prop. 187 during her campaign, but lost the race for governor.

Pawel ends her saga with the end of Jerry Brown's career in politics and his return to the same lands in Colusa County that his ancestors had settled more than a hundred years ago. In her telling, the story of the Brown family has become the story of California, so it is fitting that it should leave off, but not end, at the frontier homestead where Pat Brown's mother was raised.

<h4>Gone Missing, a Marin County Mystery, by Colin Claxon</h4>Lastly, I want to give a shout out and a tip of the hat to Colin Claxon, a longtime Marin lawyer, and a longtime member of the MCBA. In his debut novel, Claxon weaves a rollicking legal thriller out of a real-life Marin County court case.

The first half of Gone Missing is set in 1973, and Claxon artfully paints a picture of how it was to live and practice law in Marin back then. It was, in Claxon's telling, a time when pot-smoking hippies roamed the land, when the county courthouse dominated the heart of downtown San Rafael, when courtroom security was non-existent, and when lawyers could charm their way past the clerks to chat with the judge and get their orders signed. First, we ride along with John Meagor, a first-year law student spending his summer working as a private investigator. His assignment is to infiltrate a gang of squatters living the "hippy lifestyle" in an abandoned summer cabin in West Marin, take a three-year-old boy from his young mom—who is too busy trying to find herself to care for the boy—and return him to his straight-laced East Coast dad.

Mission accomplished, we get to the heart of Claxon's story: the courtroom drama. Claxon delights in the blow-by-blow of litigation through the eyes of Will Grant, a young Marin lawyer who's hired to represent the dad for the child custody battle. We ride along through the process of obtaining an emergency custody order, preparing the witnesses, and the jab and parry of the trial testimony in the courtroom of the Honorable Homer J. Halsey. Along the way, we are treated to some great quips of attorney wisdom from Claxon's alter ego: "With the law, he thought as he stepped off the curb, everything is urgent and everyone is in a hurry;" "Hey, five figures are better than four, and both are better than a defense verdict;" and "There are times when an attorney asks one too many questions….This was one of them." But, as in many courtroom dramas, the most dramatic moments occur outside of the witness box, and we learn that justice is sometimes long deferred.

The second half of Gone Missing fast forwards twenty-five years, as we follow the now grown-up boy on grown-up adventures in sophisticated D.C. society, his travels to the charming Chesapeake Bay region, and fly fishing on the McCloud River. The dominant theme in the second half of the book is that old author's trick, the power of coincidence.

According to Claxon, the first half of the book is based on a real-life case—a trial he could never forget. The details of the case and the setting of Marin in the 1970s echo his actual experience. The second half of the book is Claxon's fantasy ending to that story. This is Claxon's first novel, at age 80. He says that he is enjoying a busy retirement from legal practice, but he surely has more stories to tell, so stay tuned.

Buckelew Programs

APR 01, 2019

BY BARRETT SCHAEFER

Buckelew Programs helps people with mental health, addiction and related behavioral health challenges. Clients are able to lead healthier and more independent lives, strengthening families and our communities in the process. As a past board member of Buckelew, I feel a proud and personal connection to this tremendous nonprofit that makes a powerful difference in the lives of so many in the North Bay.

Founded in 1970, Buckelew operated Marin County's first 24-hour residential mental health treatment facility, providing supported housing for six adults. Since then, it has grown to help nearly 10,000 people each year in Marin, Sonoma, Napa, Mendocino, and Lake Counties. It is now the North Bay's largest provider of community-based mental health and support services and is a critical component of the area's healthcare safety net.

It is easy to see why Katrin Ciaffa, an employee of Buckelew Programs for over 20 years, finds the work meaningful and rewarding. "Just literally this morning, I spoke with a mother who said Buckelew saved her daughter's life," said Ciaffa. "She told me her daughter is not just in recovery now but is even giving back to the community too."

It is not just Ciaffa who feels passionate about what she does. Says Ciaffa, "Everybody here is really dedicated. It is wonderful to work for an organization that makes such a difference in the lives of so many, giving people with mental health or substance use disorders hope and the tools to live a full, healthy life."

Buckelew tailors treatment and support services to the unique needs of each individual and encourages the active collaboration of loved ones and other supporters. It has found that its approach of focusing on

the needs of the whole person promote recovery, resilience and hope. To help clients access a continuum of care for these often multiple, interrelated needs, Buckelew substantially increased its scope of services and capabilities by joining with the Helen Vine Recovery Center (2011) and the Family Service Agency of Marin (2012), now called Buckelew Counseling Services.

While a Board member, I watched first-hand the then-Family Service Agency of Marin's program making a difference one family at a time. From behind a one-way mirror, a psychologist watched a young father play with his toddler-age daughter (the father had consented in advance to my silent visit behind the mirror). The psychologist gave real-time parenting instruction into a microphone connected to the father's earpiece. The mother had been serving time in prison for substance abuse-related issues and he was the sole parent and had no appreciable parenting experience at all. Not only was this a truly moving experience, but I will always remember how genuinely appreciative the father was for the psychologist's care, insights and advice.

Today, Buckelew provides a wide range of services for both adults and children, including counseling programs for all ages; detox and drug and alcohol addiction treatment, especially for those with commonly co-occurring mental health issues; assistance for families experiencing difficulties due to mental health or substance-abuse related circumstances; a regional suicide prevention program; and for adults with mental illness, employment programs and housing with support services tailored to each individual's needs. The organization currently has a staff of nearly 200 with an annual budget of approximately $12 million.

MarinScapes, Buckelew Programs' annual signature fundraiser, celebrates art that changes lives. The 31st annual four-day fine art exhibit and sale runs from June 20 to 23 at the historic Escalle Winery in Larkspur. The renowned Seager/Gray Gallery of Mill Valley is curating a special exhibit entitled, "The Invented Landscape." Many of Marin's favorite landscape artists will also be featured.

For more information on MarinScapes, including sponsorship opportunities, or to donate to Buckelew Programs, you can contact Katrin Ciaffa at (415) 491-5705 or (katrinc@buckelew.org) katrinc@buckelew.org, or go to (http://www.buckelew.org/) www.buckelew.org.

Pro Bono Lunch Roundup

APR 01, 2019

BY TIM NARDELL

Legal Aid of Marin and MCBA hosted the 2019 Pro Bono Appreciation Awards lunch on Wednesday, March 28 at MCBA's favorite lunchtime haunt, the McInnis Park Club Restaurant. More than one hundred turned out as the skies cleared momentarily. Scattered showers of bar members and Legal Aid staff mixed it up with sprinklings of local dignitaries, judges, and honorees. The occasion: to celebrate the generosity and hard work of this year's recipients of the Wiley W. Manuel Award—awarded to attorneys and community volunteers who have donated 50 hours or more of their time to pro bono work for underserved communities through the offices of Legal Aid of Marin.

Legal Aid of Marin Executive Director, Stephanie Haffner greeted guests and thanked the sponsors before Jonathan Gertler, President of the Board of Directors of Legal Aid, started the party rolling with some opening remarks. Then Laurie Joyce, Pro Bono Director for Legal Aid, did a fabulous job of welcoming and honoring the award winners. Topping the list were Makenzie Dunckel (330 hours) and Zack Garrison (267 hours). Makenzie and Zack both are law students who dedicated their summers to helping with labor law and housing rights claims. Other award winners included Christine Mullen (167 hours), who brought her property management and administrative skills to bear on whatever needed to be done at Legal Aid; Andrew Johnson (120 hours), who brought both accounting and legal skills to bear on helping with development work, while studying for the Bar; Karen Karlow (88 hours), who has staffed Legal Aid's unlawful detainer walk-in clinic for the past five years; Sahar Priano (66 hours), who transitioned straight from her studies at UC Berkeley to help with client intake for low-wage workers at Legal Aid's worker's rights clinic; and Robert Harris (57 hours), who has devoted time one Thursday a month, year after year, for longer than anyone at Legal Aid could recall, to do the exit interviews for the Marin Community Court and intake interviews at the Legal Aid offices. He provided the best quotes of the afternoon:

• "To whom much is given, much is required." (Luke 12:48)

• "The service that we render to others is the rent we pay for our room on this earth." (Horace Walpole)
• "We make a living by what we get, we make a life by what we give." (Sir Winston Churchill)

Laurie also called out Robert Harrison of Keegan Harrison LLP for special recognition. Rob has volunteered at the Whistlestop senior center one afternoon per month for the past 13 years. Last December, he passed on his volunteer spot to an associate of his firm to keep up his good work. Family Law Heroes Michael Samuels and Birgit de Frondeville also received special recognition for their volunteer work.

Judge Beverly Wood who has devoted years of service to Marin Community Court introduced honoree Judge Paul Haakenson who was recognized for his commitment and service to the Unlawful Detainer Mandatory Settlement Conferences. As the keynote speaker, Judge Haakenson never disappoints in his public speaking. This time, there were no SNL-worthy videos or “Top 10 lists.” Instead, he gave a memorable and moving speech about times from his own career as a lawyer, and from his own time on the bench, when he has seen the importance of community service and pro bono work. Judge Haakenson reminded us that Marin has developed a statewide reputation for the generous volunteer work provided to the Courts and the community. He also reminded us that work that might seem to judges or lawyers as just another day at the office can have a profound impact on someone’s life.

While the satisfaction of helping others should be its own reward, a good time was had by all in thanking the award recipients and the many others who have given their time over the past year to Legal Aid of Marin and other worthy pro bono efforts. The food was pretty tasty too.