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Spring 2021



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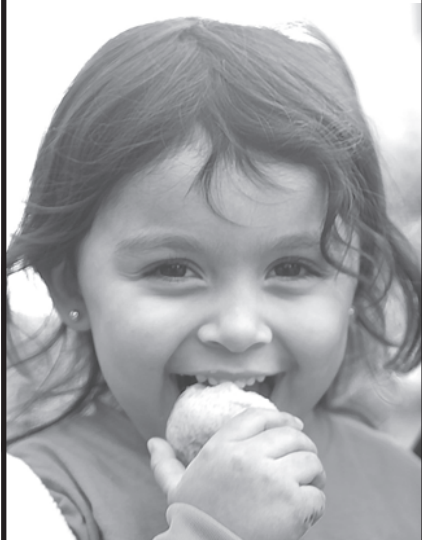
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1 in 5 Alameda County residents experiences hunger.

from the editors



Casey Kaufman



Ron Shingler

A defining feature of the American Experiment is the peaceful transfer of power. Our most recent transition was anything but peaceful. While some politicians and pundits cried *stop the steal* and asserted baseless voter fraud claims, there remained one institution where the truth still mattered — our Courts. Judges summarily rejected more than sixty lawsuits alleging voter fraud based upon a lack of evidence. We proudly dedicate this issue to all judges, particularly those who pre- side in the Alameda and Contra Costa County Superior Courts.

We have a series of beautiful articles written by our members. Sarah Gilson provides insights into Judge Tara Desautels' call to the bench, while David Ratner illuminates Judge Rebecca Hardie's approach to judging during the pandemic. Roseann Torres writes about how Judge Danielle Douglas' experience as a lawyer helps her as a judge. Jayme Walker's interview of Judge Stephen Kaus is insight-

ful and informative, while Casey Kaufman's article on Judge Stephen Pulido discusses his background and recent remote trial experiences.

Moreover, Rick Simons wrote on current issues concerning the admissibility of video evidence, Valerie McGinty has written the appellate report, and we have several recent settlement and verdict submissions. Enjoy! ♦

—Ron Shingler is the founder of Shingler Law, a firm in Walnut Creek comprised of seven professionals who represent people suffering from mesothelioma. Mr. Shingler is the son of an asbestos plant worker. He can be reached at ronshingler@shinglerlaw.com.

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THE Verdict

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- Since 1970 -

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Colleagues and Friends,

Thank you all so much for allowing me to serve as your President in this critical year. I am truly honored to fulfill this role and I want to invite all ACCTLA members to let me know how we can better serve you in these difficult times. I hope that you find this issue of *The Verdict* particularly helpful as we all navigate our practices amidst a global pandemic. Your 2021 *Verdict* editors, Casey Kauffman and Ron Shingler, have done an excellent job of choosing judges that can give you critical information on moving your cases forward in Alameda and Contra Costa Counties. Thanks to all the ACCTLA members who contributed to this important topic.

This issue of *The Verdict* is one of our most important judge's issues to date. The crisis facing the courts is daunting. With the budget cuts under Governor Brown's administration, California courts were already facing delays, staff shortages and untenable caseloads per judge. The coronavirus pandemic has taken the already

beleaguered courts and given them unprecedented challenges to completely overall the way they conduct business. Just as we all have had to adapt to remote proceedings, so too have the courts, but the courts have had to do so with their already insufficient resources. In my experience, Alameda and Contra Costa have done an excellent job with meeting the goal of giving all our clients access to justice. I have been able to get law-and-motion hearings done remotely in a timely manner, and although jury trials have been delayed, they have been set so we can move the cases toward resolution. Going forward, ACCTLA is committed to doing whatever we can to work with the courts and with CAOC to meet the challenges that this pandemic has bestowed and to continue giving our clients their day in court and access to justice.

Of course, no judge's issue would be complete without a profile of our distinguished Trial Judges of the Year, Alameda County Superior Court Judge Stephen

Kaus and Contra Costa County Superior Court Judge Danielle Douglas. Congratulations to both of our Trial Judges of the Year and thank you to both for their commitment to justice.

I look forward to working with all of you this year to address the enormous toll that this pandemic has taken on our practices, from the challenges facing the courts and our clients' access to them, to the stress of isolation, and all of the unprecedented changes, both welcome and unwelcome, that this pandemic has wrought. ACCTLA is working to bring you much-needed camaraderie through our remote programs and we will hopefully be having some outdoor in-person events this year. We have expanded our committee tasked with interfacing with the bench to offer more resources to the courts and promote cooperation between the bench and the bar to meet the challenges we face. We are also committed to giving back and promoting diversity and inclusion in our profession by establishing the first-ever ACCTLA diversity scholarship. Hopefully 2021 is the light at the end of a long, dark tunnel. ♦

Onward,
Jayme

—Jayme L. Walker is a partner at Gwilliam, Ivary, Chiosso, Cavalli & Brewer in Oakland, and represents plaintiffs in employment, civil rights, and wrongful death, and personal injury cases. She has been named by California Super Lawyers as a Rising Star from 2014-2021 and in 2020 was named Top Women Lawyers to Watch.

from the president



Jayme L. Walker

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Trial Judges of the Year



Hon. Stephen Kaus
Alameda County

by Jayme L. Walker

Judge Stephen Kaus was honored as ACCTLA's Alameda County Trial Judge of the Year for 2021. He was kind enough to take time out of a busy virtual court schedule to sit down and talk with ACCTLA members about his background, his experience with virtual trials and running his courtroom during the COVID era.

Judge Kaus is a graduate of UC Berkeley School of Law. He had a varied background of experience as a trial lawyer that has served him well as a trial judge. He started his career as a public defender in the Contra Costa Public Defender's Office for six years. He then went into civil litigation as a partner at the law firm Kaus, Kerr and Wagstaffe, where he practiced a variety of civil litigation. In 1990, he started a solo practice until he joined Cooper, White & Cooper in 1993. He remained at Cooper, White & Cooper

until he was appointed judge in 2012.

The judge was active in the Bar Association of San Francisco, serving on its board of Directors and as chair of a committee on conflict counsel for indigent criminal defendants.

Judge Kaus started as a judge in a general assignment, doing unlawful detainers and miscellaneous criminal matters. He then went to a direct calendar assignment before doing the juvenile delinquency calendar for two years before returning to a Direct Calendar civil assignment. The judge currently presides over Department 19 in Alameda County Administration Building. His trial schedule is 9:00am to 1:15pm Monday through Friday.

ACCTLA members describe Judge Kaus as "intelligent, fair, reads the briefs, and listens to reason" and "brilliant, easy-going, insightful and highly skilled." In

a previous interview, Judge Kaus said that his goal as a judge was to be "to be smart, to be fair, to pay attention and to be polite." ACCTLA members agree that he has far exceeded these goals and it is a pleasure to appear in his courtroom. We are thrilled to honor him as the Alameda County Trial Judge of the Year.

Below are excerpts from my interview with Judge Kaus on February 11, 2021.

Judge, thank you for taking the time to speak with me this morning. I know you've had a really varied and broad background. I want to start way back in the very beginning of why you wanted to become a lawyer and then, ultimately, a judge.

My dad was a lawyer and a judge,¹ and I didn't see that I had any other discernible talents. Law seemed interesting and I liked

Continued on page 10



Hon. Danielle Douglas
Contra Costa County

by Roseann Torres

Judge Danielle Douglas, the ACCTLA Contra Costa County Judge of the Year for 2020, was appointed to the bench six years ago. She previously worked for 13 years as a prosecutor in the Contra Costa County District Attorney's Office, and an additional year as a prosecutor in the San Francisco County District Attorney's Office.

I recently had the pleasure of interviewing Judge Douglas. She shared her experiences as judge, starting with her criminal court assignment, which was followed by her current assignment in family court. We also discussed the past year and how the court responded to the COVID-19 pandemic, and what she expects the future might hold.

Judge Douglas, if we can begin with your career before you were on the bench. It is interesting

that after 13 years as a prosecutor in the Contra Costa District Attorney's office, you became a prosecutor in San Francisco. What made you move and how were the two offices distinct?

Everyone asks that question about why I left. The reason I left the District Attorney's office in Contra Costa was the shift of a new set of policies when a new D.A. arrived. He was also transitioning some supervisors out and replacing with new supervisors. This policy shift and supervisorial shift gave me incentive to try out San Francisco, a city where many in my family live. I was also taking a pay raise and it worked out well in retrospect.

The San Francisco office was surprisingly different. The atmosphere was much less competitive and I attribute that to a couple factors. For one, there weren't as many long timers—instead, people would

come in to get some trial experience and quickly move on to private litigation. When you don't have as many long-term prosecutors, you have less competition for getting assignments. Second, in San Francisco unlike Contra Costa, if you are the prosecutor, you are the underdog. The result is the development of a certain amount of camaraderie among your colleagues as a result of this fact.

When you transitioned to the bench, what did you miss about being an attorney?

I see looking back the transition was not as easy as I expected. I missed being an advocate. I went straight to criminal cases and had been a prosecutor for 14 years. When I began on the bench, I was caught up in analyzing cases and thinking how I would have done things differently. At

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to argue. It was the 60s and the idea was that lawyers could accomplish things. Also, I decided I was too clumsy to be a good doctor.

When you came out of law school, you started at the Contra Costa Public Defender's Office?

Right, which was the job I wanted. I went to a program at law school where Ellen James and another lawyer spoke about being a public defender. They were both in Contra Costa, and that seemed like a great opportunity. So, I decided to take the civil service exam and I did well enough that I got hired. The same day I was hired in Contra Costa, I received a letter from Marin saying my application was not in the top 100, so I wouldn't even be considered.

And you got a lot of trial time during your time as a Public Defender?

Enough. I wasn't anything like the biggest trial horse in the office, but I had about 7 felony trials and 25 misdemeanor trials, so I got comfortable in the courtroom. The lawyers I worked with are still some of my best friends, so it was a great job.

And then you left the public defender's office to go into private practice. Did you go into civil law at that time and what kind of civil law were you practicing?

It varied. We had a lot of cases that involved insurance coverage and earth movement, which was a hot issue at that time, especially after an amazing day of torrential rain on January 4, 1982. Until the Supreme Court version of the *Garvey*² case about concurrent causation and negligence eliminated our main legal theory, we were able to get first party coverage on landslides. I was working on some class actions on the plaintiff side, including a case that went to the California Supreme Court called

Perdue.³ Computers were just coming in and we had computers but a lot of other lawyers didn't, including the big firms. This was a big advantage. You could generate a lot more work product than was possible with carbon paper and typewriters.

Is there one case, either on civil or criminal, that kind of stands out in your mind as something that was really impactful for you?

It's hard to say one case. In one of my favorites, my client was convicted of criminal fraud and got sued by the people that he supposedly defrauded of millions. We won the civil case because the other

There were a few hiccups technologically, but now I think they're largely smoothed out. We're learning how to put the jurors in the right boxes on the screen and once we got going, the technology was not the problem.

side wouldn't answer the discovery we propounded. Jack Palladino, who was just tragically murdered, did some key investigation on that one.

What is it that led you to want to throw your hat in to become a judge?

Mainly, I really like law, but I was burned out on the business of law. I was not good at marketing. I did not like arguing with partners over financial issues. Also, it was frustrating to have to gauge my work by how much the client could afford. Now, kind of like when I was a public defender, I can do what is appropriate. There might be a case that's a limited jurisdiction case and has an interesting legal issue. Within reason, I can do what it takes.

The courts have been overburdened for a really long time. Do you see any hope on the horizon for court funding or has the impact of COVID been so overwhelming that it's going to be hard to overcome for a long time?

The courts are not adequately funded. Funding was radically cut during the 2008 economic meltdown and I don't think it's ever been restored. We now have four tenths of a research attorney per judge to decide law and motion matters, including complicated summary judgments. We're on our own in the trials, which is fine, but you can't do that and then also properly address 10 law and motion matters a week. It just can't be done. So, we need resources, which I don't believe should come from filing fees. I remember Rose Bird gave a speech at a bar convention during the 1980s and said that it was wrong to expect litigants to fund the courts. Federal Courts don't do that.

I think we've done as well as possible with COVID. We're very fortunate that Judge Desautels is the presiding judge because she is just the right person. She's extremely detail oriented, hardworking and devoted to keeping the courts as open as possible. This is not what she signed up for! We're doing criminal trials live. They use masks and everybody is spread out. It seems to work. In civil, we're doing trials completely on Zoom. The jurors never leave their homes and the lawyers and witnesses are all over the country. I'm in my chambers.

And I wanted you to tell me about that because I know you at least started the asbestos Johnson and Johnson talc trial virtually.

There were a few hiccups technologically, but now I think they're largely smoothed out. We're learning how to put the jurors in the right boxes on the screen and once we got going, the technology was not the problem. I was very nervous whether we

were going to get the right screen views so that the jurors would see the witness and see exhibits, but we got that ironed out. There's even an online program for uploading and introducing exhibits.

Have you had any problems with jurors, having the appropriate internet connection or access to the internet to be able to view the trials and everything they need to see?

Not really. At the beginning of the trial, we had a questionnaire if the potential jurors had appropriate equipment to participate. Almost all did. The attorneys have provided hot spots and Chromebooks to those jurors who needed them. During the power outages last fall, some jurors retreated to their cars and participated on their phones. Our court attendant could look at the jurors and spot any problems, but I thought they were at least as attentive as they are at a live trial, and in some ways have a better view. We also had fewer hardship requests, partly because no one could travel.

I think we're going to end up implementing parts of this even after COVID. For example, in these asbestos cases, there are witnesses from back east. They take three days coming here and going back. But now I don't see why they can't testify remotely if we have an adequate audio-visual setup. People are much more accustomed to viewing others on screens now, sadly.

What's your advice to civil attorneys practicing in your courtroom?

There are trials, and then there's everything else. On motions, I value clear writing and lack of repetition. When something is just repeated, it confuses me because I try to figure out if it is a different point. I guess lawyers think we miss it the first time. I probably thought that as an attorney, but I don't think it is the case.

Judges stereotypically complain about lawyers not being prepared; I haven't generally found that. There are certainly some lawyers who are not used to being in the courtroom and make some poor choices or misstate things. But most lawyers that I've seen do a good job. Certainly, in the larger cases, the lawyers do a good job. Always, be honest and be clear. You are unlikely to get away with stretching facts or law beyond the breaking point.

I saw a quote from you. One of the things that was really important to you is to hear both sides and be polite and be fair. And I think that's exactly what everybody's looking for in a judge. When I've been in your courtroom, I've really appreciated the way you heard both sides out and really were attentive. And you know, it always felt like you were really trying to make the right call. And I always appreciated that. And I was wondering if you think attorneys need to treat each other with more civility and professionalism?

I appreciate your view. But there are also some comments online that sitting through my law and motion calendar is "physically painful." Different strokes. I try to run a comfortable courtroom. I didn't know what kind of judge I would be. I didn't know if I was going to stay awake. I didn't know if I was going to get upset. My first trial, luckily, I had two experienced attorneys. It was a personal injury case with a couple of interesting legal issues including some *Howell* damage issues, which shortly after that became the law. I was happy with it. The trial was smooth and it went well and then I was able to stay on top of it and make decisions that I thought were right. The lawyers did a professional job of presenting the case, so it went smoothly.

Most, but not all, trials have gone well. Sometimes an attorney thinks the

right thing to do is to object to every question, although they are not objectionable and the objections are all overruled. It becomes like background noise.

In the asbestos cases I've been trying lately, the lawyers are very good. They fight very hard. There's a lot of paper. They're very adamant, but when I make a decision, they accept it, generally, and that makes life easier. I mean, if somebody keeps coming back on a decision I made and trying to get me to undo it, it is hard to move on and try the rest of the case. As for civility, rudeness is less common than the popular perception, probably because lawyers are decent people and also because it generally is counterproductive.

As busy as you are, you probably don't have time for a whole lot else, but I wanted to know, who is Judge Kaus outside of the courtroom?

I have two children in their 20s, so we're empty nesters. I used to go to the gym pretty much every morning. Then I started riding my bicycle outside when the gym closed and managed to go over the handlebars and break both elbows. So now I have a Peloton, which my wife told me to get in the first place. I enjoy cooking, I enjoy gardening, both of which I got from my mother, and photography, which I have done since grade school. I am a sports fan, particularly baseball.

A's or Giants?

A's. I grew up in LA and I was a Dodger fan even when they were in Brooklyn, because my father was. Then in 1958, Duke Snider came to LA and I was ecstatic. Eventually, I became an Angels fan as a kind of contrarian move and I kept that through the 70s even though I was up here going to A's and Giants games. When the Haas family bought the A's and Billy Ball happened, I decided they deserved ►

my fandom and I became an A’s fan. I would disqualify myself in any case involving the Oakland A’s.

I saw you did some writing for The Huffington Post. I think your brother’s in journalism too. Do you have an interest in that?

Yes. I can’t explain my brother. I disagreed with a lot of things he said and emailed him constantly. He knew Arianna Huffington and got me a slot where I could blog instead of annoying him. I blogged mainly about politics, law and baseball. When I leave the bench, one of the reasons

would be because I want to resume having a public political opinion.

Thankfully, Judge Kaus mentioned that he does not intend to leave the bench any time soon.

Congratulations to Judge Kaus — the Alameda County Trial Judge of the Year for 2021. It has truly been a challenging year for trial lawyers and judges alike, but Judge Kaus has helped to move cases along and presides over one of the few courtrooms in the Bay Area doing fully remote civil jury trials. ♦


— *Jayne L. Walker is a partner at Gwilliam, Ivory, Chiosso, Cavalli & Brewer in Oakland and President of the Alameda Contra Costa County Trial Lawyers Association. She represents plaintiffs in employment, civil rights, and wrongful death, and personal injury cases.*



¹Judge Kaus’ father was Otto Kaus and was a California Supreme Court Justice from 1981-1985.

²*Garvey v. State Farm Fire & Casualty Co.*, (1989) 48 Cal. 3d 395.

³*Perdue v. Crocker National Bank*, (1985) 38 Cal. 3d 913.



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first you miss being an attorney and the fact that you are calling the balls and strikes. You have less influence in the outcome of the case, for example, what counts to dismiss is the prosecutor’s job and what the plea deal will be, although as judge you have discretion over sentencing. I realized when I started on the bench, this is not my show. Somebody else is putting on the case and, as a judge, you are just making the calls.

In addition, criminal law is very statutory, so as a judge you feel as though you are not helping because the prosecutor is deciding how to manage the case. But when I transferred to family law, I had a completely different experience... the opposite in fact.

In regard to your assignment to family court, did you ever think in law school that you would practice family law? What were some of the early challenges presiding over an area of law that were foreign to you?

In law school, the one thing I said I will never do is family law. I still stand by that decision, because as a 26-year-old graduating from law school, I don’t know if I would have had the maturity to deal with the intense emotions you encounter on a daily basis in family cases. Now, more than 20 years after graduating, I do feel I have the maturity to handle these cases with more life experience and what comes with age. Unlike criminal law, there is a lot of discretion for the judge in deciding cases. As a colleague once said to me, being in family law is the “truest form of judging.” I completely agree.

What made the difference for you in the ability to learn family law from the bench quickly, and how long did it take to feel comfortable in that assignment?

I think it depends on the judge, and it depends on the issues. I will say that I felt comfortable in six months in certain areas like child custody hearings or 3044 presumptions — all of that came very natural because of my experience as a prosecutor and the ability to read people. My experience picking jurors was useful and developed my sense for reading people, which comes in handy.

There are other areas, however, that are so foreign to me I can truly say that I am still learning every day. Discovery is an area that is unique and, in family law, you must know civil procedure well because there is significant discovery in some cases.

On the other hand, domestic violence restraining orders crossed over to my prosecutor background. When it comes to custody cases and what is in the best interest of the child, the family code lays out the factors to apply such that you can catch on quickly. Simply put, it is a formula.

Is there a way to assist new judges who are appointed to family court?

I am learning that this is where the lawyers come in. They do discovery and have voluminous amounts at times, but they must present their case in a way that makes sense to the judge. What I see at times, however, is a voluminous amount of discovery left for the judge to decipher. That is not the way to handle it. It must be properly presented by the lawyers for us to do our jobs well.

On that topic, do you see only new attorneys making that mistake?

I see a strong mentoring and training program in the Contra Costa Bar and I was pleasantly surprised that it does not appear to be an issue with younger attorneys. The Bar does a great job of training new attorneys and we appreciate that on the bench. Another difference in family court is the

respect that counsel have for each other. Many attorneys know that judges hear stories about other counties, yet in Contra Costa County there is no issue because of the high level of professionalism.

Let’s transition and discuss COVID-19, and how you felt when the drastic measures were implemented in response to the pandemic. How did you feel then and how do you feel now?

I felt very helpless because everything happened very quickly and there was not much communication at first. Now I feel we have it together and we have a plan. Today, I just feel overworked, as many others do, but not helpless. Contra Costa moved into action faster than most and we are managing things.

Did you feel there was angst among the litigants and bar due to the lack of communication from the court?

For the most part, I don’t think there has been a problem, and the attorneys have been remarkable. I think the reason Contra Costa is doing so well is the open line of communication between the bench and the bar. Certainly, there are things we cannot communicate, but when we do and do it often, it has made a difference. One example is that we are now using electronic binders. It’s new, but we also offered a training to the bar. We implement and we provide training to the attorneys so it can be successful. This is one difference in Contra Costa that I appreciate as a judge. I think that is what stands out in Contra Costa County that is possibly not happening in other counties.

What are the new practices implemented during COVID-19 that you now realize we should have implemented long before the pandemic?

I personally like the E binders while some judges do not. I work from home on weekends and don’t have to lug a big binder ►

home. The appellate court has gone completely paperless. That happened quite a while ago, so we have to scan the entire file and exhibits, which is a lot of work. So if this E binder will stay, it will be great for appeals and less work for staff to handle.

It is also cost effective for litigants to have the court go paperless. They have to make four copies of trial binders and they can often be thousands of pages. I think the one thing that COVID did is it immediately brought us into the 21st century — doing things we should have implemented a long time ago, and the attitude was “we will get to it” but we never did. I also think that having the ability to do remote hearings, not on court call, has made a huge difference in family court. Just looking at DCSS child support hearings, the appearance rate has shot up. Before the appearance rate was possibly 65-70% and now it is likely 90%. It is interesting to think that there was a concern for litigants not having internet service or devices to make remote appearances. But that turned out to not be an issue. For people who don’t have cars, they are also having an easier time appearing now since Martinez is not public transportation friendly. There are also people who cannot miss work for court, and we have learned their supervisors will give them a break for 20 minutes to appear for court in a quiet place, and that is huge. The same is true for people with daycare issues — they have found a way to secure the time needed to appear remotely.

Overall, we are finding that showing up in person is more prohibitive than having internet and devices. It works for most — not everyone — and it saves money. If the litigant is out of state, they do not have to fly, get a hotel and rental car. Litigants also save on attorney’s fees since there is less travel time billed, and it seems more people can actually afford lawyers now.

Did you find that San Francisco was ahead of the curve concerning the use of technology?

I was surprised it was not more tech savvy at all in San Francisco and, of course, I was working at the hall of justice, a place that if you plugged something in, the lights could go out. On the other hand, I hear Sacramento has installed huge monitors in the courts for zoom hearings; meanwhile, we are still using computers. The Sacramento judges can more easily see the litigants on the large screens and yet I feel that Contra Costa County is doing fine. But when we go to paperless files, we will have to get caught up.

Anything you would like to say to lawyers regarding the impact of COVID-19, that you want them to know since no one knows how long we will work in this style?

Exercise some patience. Right now, lawyers are not seeing the staff and may forget about them. The duties of the court clerks have gone up by 30-40% and they were re-calendaring hundreds of cases as COVID began. There were mistakes of course, but lawyers need to realize they are doing more with less. Going forward, there will still be mistakes made so becoming impatient is not helpful.

I know we will get through this time but realize there are going to be more hiccups. Treat people courteously and know they are not going to get it perfect. Additionally, there are going to be more bumps in the road that are based on budget concerns. Maintaining staff is going to be difficult.

In Contra Costa, we have five judicial seats open — that is lot to be down at once. Then consider we are also down with staffing of each department. My educated guess is we are down to just 80% of our normal staffing levels. I think right now what we are seeing is that we can open the courts in the near future, but

having adequate staffing for services previously provided is a big concern. It will not be the same, and more patience will be needed as things move slowly.

This seems similar to when we reopen gyms and everyone goes running in and there are not enough treadmills, so people are pulling others off after 30 minute. Does this analogy apply to what we can expect at court?

That is a great analogy, and when we started to open last year, things trickled in. But now, in our second year of COVID, firms are up and running in no time and clients want things filed. So it is now a fire hose instead of a trickle. Our resources do not match what the need is right now. Again I will say, be patient. That is the issue I see now. It is a tsunami out there, so be nice to your judges and staff.

My final thoughts concern the difficult job our court reporters now have with virtual appearances. It is very difficult to transcribe remotely, and often we cannot hear the litigants clearly. The lawyers should be cognizant about the mic and ensure it is working. Since family law attorneys want a transcript, they should put some thought into making a good record. Test out your equipment in advance of court. We know there are some headphones that cost \$30, and they work well. Prepare in advance and it will go smoother for all of us. ♦

— Roseann Torres is the owner of Torres Law Group in Oakland since March 2004. The firm handles personal injury matters, and is uniquely positioned with bilingual attorneys who speak Spanish along with all staff. Roseann previously worked as a prosecutor in San Joaquin County and Deputy County Counsel before opening her own firm.



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Hon. Rebecca C. Hardie



by David Ratner

Hon. Rebecca C. Hardie, the recently appointed Presiding Judge of the Contra Costa Superior Court, sits in Department 5. She was appointed to the bench by former Governor Arnold Schwarzenegger on February 18, 2010.

Judge Hardie earned her B.S. degree from Western Michigan University and her J.D. degree from the University of California Hastings College of Law.

The judge began her legal career in 1992, working first as a deputy district attorney in Marin County. She then went into private practice as an associate at Pansky, Markle and Drapiewiski. In 1994, she returned to the public sector as a probation officer with the U.S. Probation Office.

In 1996 she accepted a position as an assistant U.S. attorney. She remained in that position for eight years. She then left to join Pacific Gas and Electric (PG&E). Hardie rose through the ranks at PG&E, ultimately becoming a director.

Judge Hardie is married to Sharon Bunzel, an attorney at O'Melveny and Meyers. They have two children.

Judge Hardie was one of the few openly gay judges appointed by Governor Schwarzenegger.

Judge Hardie, tell us a little about your background and why you came to California.

I am from the Midwest. Both of my parents were educators at Western Michigan University — my mother taught social studies and founded the women's studies program, and my father was a voice teacher. I excelled in sports and became an avid horsewoman at a young age. After graduating college with a major in criminal justice, a group of friends and I loaded a U-Haul and headed to California in hopes of better jobs than what could be found in the Midwest at that time. I worked at a group home for at-risk youth and later in both juvenile and adult probation. I decided, after

several years working as a probation officer, to attend law school.

Thereafter, I worked as deputy district attorney and later as an Assistant U.S. Attorney. Before my appointment to the bench in 2010, I worked as in-house counsel at PG&E and, before leaving, was the director of tort litigation. Since being on the bench, I have presided over criminal matters and spent five years as a juvenile judge, the last two as the Presiding Juvenile Judge before becoming the Assistant Presiding Judge. I became the Presiding Judge of the court in January of 2021.

How has the practice of law changed since you started practicing?

I believe there is much more awareness today about the inequities that exist in the justice system than there was when I was practicing law, not only in criminal justice but civil justice as well. Social and racial inequities have existed for

decades. Now, there is more emphasis on evidence-based practices and data analysis in the practice of many areas of the law — juvenile law, family law, guardianships, and in bail-setting/pre-trial detention and sentencing in criminal cases.

How has your view of the practice of law changed since you started practicing?

Because there is much more awareness about social justice issues and the need for court access, the practice of law has become critical to social change and advancing the need for addressing issues of racial justice and the needs of marginalized communities.

Is the view from the bench different from the view as an advocate? If so, how?

The view from the bench is very different than that of an advocate. The only stake you have in a case as a judicial officer is a reasoned and fair decision that is based on the facts proven by the attorneys or litigants, and the law that applies to those facts. There is no sense of “losing” or “winning” an issue or argument. As a judge, there is no trailblazing, just following established trails and ensuring that the parties have a fair opportunity to be heard and the unbiased application of the law.

What surprised you the most about sitting as a judge?

Sitting as a judge is a vastly different role than litigating cases and representing a party or a side as an advocate. A judge cannot advocate for any side and cannot be driven by a “desired” outcome. I truly enjoyed advocating a position and litigating cases, but now as a judge I much prefer the role of an impartial arbiter of the facts and ensuring the law is applied fairly and impartially.

What pleases you the most about being a judge?

There are many great things about being a judge, but the best and most important aspect is the sense of providing justice by giving litigants their “day” in court and rendering decisions based on the evidence and the law without any regard to outside pressure or obligation. Some decisions are more difficult than others because you know there will be significant ramifications for the person (or persons) before you but, in the end, it is a great sense when you render a decision after giving careful consideration to the evidence and arguments by both (or all) sides in a matter.

What disappoints you the most about being a judge?

Sometimes it is difficult when the law does not permit a judge discretion in the decision-making for particular issues. Although discretion can lead to abuses, discretion can also allow latitude to render a decision that is more “just” in certain circumstances, especially as it relates to sentencing issues in criminal cases.

What can lawyers appearing in court do to make the judge's job easier?

Attorneys who come to hearings prepared — with a good grasp on the facts relevant to the issue(s) to be decided and with cited authority for their positions — make a judge's job much easier. Hearings are more productive for everyone involved when issues are presented in briefs in advance of hearings. It is also helpful when the parties are able to remain respectful of one another even when they may be far apart on the issues in a case.

What should judges do to make lawyers' jobs easier?

Judges should always maintain a dignified and respectful forum in which attorneys

and litigants can seek redress. It is also helpful for attorneys if a judge communicates her expectations in terms of briefings, submissions, and courtroom behavior.

Do you think our judicial system is adequately explained to litigants? If not, whose responsibility is it to make the system more transparent?

The courts have a responsibility and vital role in educating about the judicial system and process and allowing access to the judicial system. Over the last several years, there has been a heightened awareness and emphasis on assisting self-represented litigants in navigating the complexities of the court system. Although the public has some basic understanding of the criminal justice system, the issues addressed through the court system are much broader, whether it's a matter of caring for an elderly parent, a loved one with a mental disorder, stepping in to seek custody of a child, seeking recovery for the tortious conduct of another, resolving an employment dispute, or seeking safe haven from a domestic violence situation or maintaining safe housing. Courts now offer extensive online and self-help resources. Local bar associations and community programs have also taken on significant roles in educating the public and providing links to essential services for court users.

What are the most challenging aspects of serving as Presiding Judge?

I have only just begun my tenure as the presiding judge, but given the pandemic, the most significant challenge thus far has been balancing the need to keep our courts open to the public, the tremendous responsibility of ensuring the safety of court employees and court users, and the rights of litigants in timely resolution of their cases. The COVID-19 pandemic has upended “business as usual.” Our Court was one of the first in the state to close ►

down operations in March of 2020 as the pandemic hit our community. We implemented new technology and offered most types of hearings remotely. In addition, we undertook safety precautions by significantly reducing the number of people permitted in our courthouses, and mandated social distancing and facial masks at all times. We were able to resume court business in a relatively short timeframe, even conducting over 80 jury trials between May and December of 2020. When COVID-19 infection and death rates spiked in December, we made the difficult decision to suspend jury trials and limit physical access to our four courthouses. We have reviewed that decision several times since December, most recently on February 10, when we again extended the suspension and limited physical access until March 1. We have consulted our county Health Services several times over the last year and have incorporated their suggestions and CDC guidance in our court operations.

Do you perceive that a difference exists between law and justice? If so, what can the judiciary do to either eliminate or mitigate the differences? If the law is applied equally to all, then there is justice. However, there exists years of inequity in the application of the law. Awareness and education is key in confronting the issue of equal justice for everyone. Laws have evolved over time and so must those who are part of the justice system, whether in the role of police officer, probation officer, prosecutor, defense attorney or a judge. The judiciary must continue to reflect and educate itself and lead on the issue of equality and justice.

Do you think our (county, state, federal) judicial systems serve marginalized communities adequately? If not, what can and should be done to improve this?

There is still much work to be done to serve marginalized communities but educating the public about the legal system and working toward more access helps serve those who otherwise have been unrecognized and underserved historically. There have been tremendous strides in expanding access to the judicial system. The recent events relating to systemic racism and social injustice have caused more awareness for the need to change and to the importance of this work.

Why did you want to become a judge?

I have spent most of my professional years in public service related to our justice system. I worked with at-risk youth in a group home setting, as a probation officer for juveniles and adults, and as a prosecutor. I have a deep respect for our judicial system, and becoming a judge was the next logical step for continuing to serve and give back to the community.

How has COVID-19 changed our judicial system?

Our judicial system is not known for being nimble and quick to adapt to change. The pandemic tested judicial leaders to be creative and to think “outside the box” in finding ways to balance the safety of court personnel and the public, while also being mindful of constitutional and statutory rights of litigants. The judicial system has had to quickly change and incorporate technology that, although embraced by many in the private sector, was not utilized by the government or judicial system.

What will the post COVID-19 new normal look like for Contra Costa County Superior Court? I believe that remote hearings, via Zoom or other platforms, will continue to be utilized by the Court and litigants well beyond the end of the pandemic. Judicial officers and court users have discovered significant benefits gained by the use of

remote technology. It can provide more “access” for litigants who are employed, tasked with providing care to dependents, or who have limited transportation; attorneys can appear in multiple “locations” while utilizing Zoom, Bluejeans, or Courtcall, reducing costs otherwise passed on to paying clients; and the proceedings tend to run more efficiently because people do not have shuffle through security checkpoints and in-and-out of courtrooms.

What beneficial changes in the Contra Costa County Superior Court have been either brought about or accelerated by COVID-19?

As previously mentioned, moving much of the court business to remote platforms has allowed much greater court access to attorneys and the community. For disadvantaged communities, there is no longer the need to figure out how to get to and from a courthouse or having to choose between losing wages or jeopardizing employment because of time taken off from work in order to attend court proceedings that would have previously taken hours (including transportation and endless waiting for a case to be called). ♦

— *David Ratner is a founding partner of Ratner Molineaux, LLP in Walnut Creek. The firm primarily represents victims of sexual assault, sexual harassment, gender, disability and other forms of discrimination. Before opening his California practice, David was managing partner of Morelli Ratner PLLC in New York, where he tried personal injury, medical malpractice, mass tort pharmaceutical cases and employment matters. He is on the Board of Directors of the Contra Costa County Bar Association and a member of the Labor and Employment and Senior Section leadership teams.*



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ACCTLA Judges' Nights Through the Years



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Hon. Tara Desautels



by Sarah Gilson

One might assume, seeing the confidence with which Presiding Judge Tara Desautels approaches the many challenges of her role, that she has always had this destiny in mind for herself. We have all known young gunners — youth who knew what they wanted and were driven to achieve their goals, seemingly upon emerging from the womb. One might assume it takes being a young gunner to get to a bench of such distinction. In Judge Desautels' case, one would be wrong.

It was never an inevitability that the Honorable Tara Desautels would become Presiding Judge of Alameda County. If you knew her as a child, you might actually be surprised by her life's direction. Even into her teens, she was painfully shy, with a crippling fear of public speaking. The thought of sitting before a crowd on a pedestal, all eyes and ears on her, would have been abhorrent to the young woman. Even as a law student, still completely unsure of where her life would lead or even what she wanted out of a career, speaking in front of her classmates remained a nightmare.

In fact, it was only in overcoming this fear that Desautels discovered what eventually became her path to the bench. Although speaking before an audience filled her with dread, the act of teaching and forging a one-on-one connection with individuals felt both safe and rewarding. She found that she really enjoyed explaining her thoughts and opinions and, in return, learning from her individual exchanges with others. She made a conscious and dedicated effort to apply this sense of connection when speaking before her classmates, and thereby little by little fought through a fear she never imagined she would overcome. So long as she remembered to connect with each person in her audience, and imagined public speaking as a process of teaching and learning, she could bear it, and even enjoy it.

There are shades of this lesson to be found in Judge Desautels' work on the bench. When asked what she appreciates most in litigators who have appeared before her, she says that it is essential they believe in what they are arguing — that

they are fully connected to the case they are trying to make. While Desautels notes that she has seen a variety of litigators over the course of her career and, from a judicial perspective, values the diverse styles of presentation across the Alameda County bar, it is a simple fact that arguments made for the sake of speaking, entirely performative as versus connective, simply sound less true. A jury comprised of individuals who are each learning and participating in a "conversation" will be more engaged than a faceless crowd being spoken at.

Many judges undoubtedly consider their profession a *calling*. In Desautels' case, this was quite literal. Although she had transitioned from the District Attorney's office into private practice, Judge Desautels was active in the broader legal community through her work with CALICO, an organization she speaks of with great pride, which assists children who report abuse by providing a holistic, compassionate method to the investigation of those claims and the provision of ►



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Judy Hissong is the President of Nesso Strategies. A former law firm Chief Operating Officer, she helps firms become more profitable by advising leaders in strategic and leadership development challenges. Her mission is "world domination for Good." By creating actionable, lightbulb moments that leaders want to share and spread, she intends to improve the world one person at a time. When she's not speaking, training and consulting, Judy teaches quarterly online workshops and facilitates Leaders Lab, a free monthly video conference that enables small groups of leaders to brainstorm strategies and solutions to work through common issues that keep firms stuck.

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Teresa Li is a trial attorney with Law Offices of Teresa Li, PC where she focuses on catastrophic personal injury cases. She has recovered over \$15 million for injured parties. She has been repeatedly selected by SuperLawyers Magazine as Super Lawyers Rising Star from 2014-2020.



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care for victims. Through this work, she maintained personal connections with members of the Alameda County bench; and when within a single week she was called by not one, but two of those judges urging her to apply for a vacancy with the Court, she decided to seek out a position with the judiciary.

As it turns out, her peers in the legal community have consistently pushed her in the right direction throughout her career, as her position as Presiding Judge was similarly inspired. The job is daunting, and one cannot fault her for hesitating to seek it out. Once again, she only put her name in the race at the urging of her peers, who knew that Desautels' commitment to seeing institutional change both inside and outside the judiciary would make her an effective administrator. Unsurprisingly, acting as administrator of the Alameda County judicial branch is not a glamorous role. It is no secret that the judiciary has struggled through endless budgetary restrictions, hiring freezes and furloughs. Quickly Desautels learned that she was responsible for leading the judiciary through that financial bramble. And most difficult, she learned that every budgetary line item represented the livelihood and contribution of a member of the judiciary's staff — not a single dollar went to waste — and every penny went to Court employees. Balancing a budget is a gruesome task where a lack of funds meant a lack of critical staffing.

Now Judge Desautels has overseen Alameda County's judiciary through one of its greatest challenges, and the County has emerged as a nationwide leader in judicial evolution and progress in the face of the pandemic's adversity. Alameda is on the forefront — reopening its civil cases to remote and virtual trials during the summer of 2020, where other courts

remain closed to this day. Judge Desautels and her peers have taken great advantage of this challenge — enacting procedures and programs that would otherwise have taken years to implement. Judge Desautels noted this unforeseen but welcome consequence of the pandemic — it has allowed the normally excruciatingly slow animal which the judiciary represents to evolve at a remarkable (and admirable) rate. In response to the pandemic lock down, the criminal branch has established an informal hearing calendar, handling procedural matters at a rate of 100 to 200 cases per day. In a society where nearly every individual has access to a cell phone and internet connection, Alameda County's move to remote calendars has opened the (virtual) courthouse doors to an expanded population of citizens seeking justice. Criminal and family law courts are seeing a massive increase in participation from proper litigants — people who previously had to find child care — take off time from work, navigate public transport systems and the imposition of waiting in marble hallways for an afternoon or longer to submit papers or appear before the Court. Judge Desautels is optimistic that in the future, when Alameda County is able to return to a traditional in-person calendar, it will still keep in place these procedures that have increased access to our courts, courts which she believes have evolved more in the past 11 months than in the 11 years prior.

No conversation with Judge Desautels about Alameda County's judiciary can occur without mention of the court staff who have made its survival possible. She emphasizes that every advancement achieved by our courts in this time has been due to the clerks and staff who have learned and adapted on a dime. For all the novel efficiency that litigants have enjoyed, court staff has borne the burden,

processing the paperwork for those 100 to 200 criminal cases daily, becoming fluent in a variety of video platforms to manage juries and litigants and assisting members of the community engaging for the first time with our court systems. The Court has, by necessity, become increasingly rigid in its calendars simply to give overworked staff the chance to keep up between hearings and appearances. For the first time in years, the Court has lifted its hiring freeze, and is bringing in additional support where most needed, in appreciation of how far above and beyond its staff have worked to keep the system alive. Another silver lining to come from this challenging year.

As a civil litigator, I have felt blessed to practice in a county willing to adapt to our shared circumstances, which understands that access to the justice system is essential and worthy of all of our best efforts. I am grateful to Judge Desautels for her commitment to change, her passion for progress and her critical support of the judges in our county who have led the way in advancing remote technology as a tool to benefit our community as a whole. Although she says she was never destined for the role of Presiding Judge, there is little doubt she was the right person for the job. ♦

— *Sarah Gilson is a trial attorney with Maune Raichle Hartley French and Mudd LLC. She has litigated mesothelioma cases for over 12 years, bringing several to verdict in Alameda County. She recently tried the first virtual trial to begin in Alameda County since the pandemic, which happily ended in the first Plaintiff's verdict awarded in a trial conducted via Zoom in the State of California. She is a Bay Area native and working mom of twin toddlers.*



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Hon. Stephen M. Pulido



by Casey Kaufman

Alameda County Judge Stephen Pulido is a product of the East Bay, where he has essentially lived his entire life. He is affable, interesting, generous with his time, and one of those people who feeds on human interaction and understanding. Judge Pulido took the bench in 2007 after a 28-year career in family law and, more recently, has conducted four remote trials since the COVID pandemic began. He has more experience in this area than most civil judges in California. During his interview, he was open, candid and eager to share these experiences with attorneys, and I am grateful for his insights. Overall, it was clear that Judge Pulido is a huge proponent of remote hearings and trials and urges attorneys not to be afraid of this new process.

BACKGROUND

Judge Stephen Pulido was born in Oakland and grew up in Castro Valley. All of his grandparents immigrated to the United States from Spain and worked hard in labor-related jobs to provide for their families. His father was a cabinet maker with his own cabinet shop, and his mother was a homemaker. While at Canyon High School in Castro Valley, he recalls talking

a lot in study hall and being told that he should be a lawyer. He had always wanted to be a teacher, but after getting into politics, the law became very appealing.

Judge Pulido was the first in his family to attend college. He attended UC Riverside for two years, and then transferred to UC Berkeley. He graduated from the Hastings College of the Law in 1978. He has been married to his wife, Kellie,

for 37 years, and the pair have two children and five grandchildren. Kellie is a teacher at a private preschool that includes special needs students. When his children were younger, Judge Pulido made it a point to attend their sporting events and participate in other school activities. He also served on the Board of Trustees for the Pleasanton Unified School District for four years.

Judge Pulido also shared that he had a kidney transplant in 1990 and is coming up on the 31st anniversary of that life-changing procedure. According to his doctors, this makes him one of the longest surviving kidney recipients. His kidneys currently function normally, which is helpful because his doctors “don’t know what to do with him” given the lack of medical precedent for such a longstanding survivor!

CAREER IN THE LAW

Judge Pulido’s legal career was shaped by a lucky meeting between his father and well-known Castro Valley family law attorney, Betty Browner. The two had mutual friends and the meeting happened to occur at a watering hole across the street from the courthouse. Betty knew that Judge Pulido was applying for law school and asked that he contact her right away. Ms. Browner had attended law school later in life (she became a lawyer in 1968 at age 50), but at the time was one of the few women to graduate from Hastings and was a pioneer in family law. She and Judge Pulido clicked immediately and kept in close contact.

Judge Pulido clerked for Ms. Browner in her Hayward office after his 1L year and the two never parted ways. He became an associate after he graduated and was eventually elevated to partner. During these early years, he met Connie Sheehan in 1982 who began working at the law firm as a legal secretary as she awaited bar results. Notably, Ms. Sheehan’s daughter is Judge Pulido’s wife, Kellie. When Connie Sheehan came to the firm, Judge Pulido noticed one of her family photos and made a flattering comment about his future wife. The pair met soon after and the rest is history.

After Ms. Sheehan passed the bar exam, she returned to the group to form Browner, Pulido, and Sheehan in Hayward. The firm stayed together until 1998, when Ms. Browner and Ms. Sheehan decided to retire. Thereafter, Judge Pulido was the sole owner of the firm until he became a judge in 2007.

JUDGESHIP

Judge Pulido was approached by the Honorable Barbara Miller, who inquired about his interest in becoming a judge. He had practiced family law for 28 years and had accepted several pro-tem assignments. He applied to Governor Gray Davis for a judicial appointment, but Governor Davis was soon recalled and replaced by Arnold Schwarzenegger. Judge Pulido thought his chance of a judgeship had left with Governor Davis, but was surprised to learn that Governor Schwarzenegger wanted to place Democrats on the bench in Alameda County. He reapplied and was quickly approved. Judge Pulido took the bench on February 2, 2007, and recently celebrated his 14th anniversary. While on the bench, Judge Pulido has served in juvenile dependency, as the family law Presiding Judge, and has been in the civil direct calendar department for the past seven years, which included serving as a Chief Supervising Judge of Civil for two years.

“I just love it,” he said several times during our conversation. He cherishes the human interaction and, in his 14 years on the bench, has had “very, very few days” that he hasn’t looked forward to being a judge, and not just in the courtroom. Judge Pulido believes that he and other judges have an ongoing responsibility to “go out in the community to let people know what we do.” He

takes this responsibility seriously and, among other activities, remains very active in East Bay high school mock trial competitions.

REMOTE TRIALS IN THE TIME OF COVID

Since in-person court appearances ground to a halt in March of 2020, Judge Pulido has remotely conducted one court trial and four jury trials to verdict. He was the first judge in Alameda County to conduct a remote trial and is a vocal proponent of the process. I spent a significant amount of time talking to him about his observations and suggestions.

Do you believe that the virtual trial experience increases or decreases diversity of the jury members?

Overall, I think it actually increases accessibility and diversity. I realize it’s not perfect, but juries love remote trials. Most people have the ability to appear remotely. It creates some issues sometimes, but they love being in their house. They get up and come to their computer, they don’t have to drive in and find or pay for parking. When I was in Oakland, it was a nightmare sometimes with the jurors having to run out of the room to go feed meters. I am definitely seeing a more diverse jury pool.

What about attendance and participation of prospective jurors?

A. In the trials I have done, I’ll tell jury services that we need 60 or 70 jurors, and guess what? I get more! I have one where we wanted 60 jurors and 80 showed up. So we’re getting better attendance.

I have also seen less frivolous reasons for not being on a jury. I think the [prospective jurors] were honest; more honest about things, and didn’t really try to get ►

out of jury service. I attribute this partially because of the convenience of being in their own home. I have observed them as very upfront and honest about biases and other juror concerns as well.

Have you noticed anything on the other side, where the remote process is cutting out people that were better represented when trials were in person?

I have to say no to that. We have those who may not have the technology to attend, but they're not denied because they can still go into a COVID-safe courtroom and appear remotely from there. We have loaned computers and some attorneys have actually provided computers to jurors. I think that we, in Alameda County, are on the cutting edge right now and we have made it work. It's not perfect and we're not doing a ton because there can be only so many civil trials at the same time. Some of that has to do with staff shortages and budget restrictions. I don't want to discount personal trials — I love personal trials. But there is little lost when participating in remote trials

What are some of the challenges you've experienced in your jury trials?

The overriding thing here are technical limitations and glitches. One of my court attendant's jobs is to watch the jury and let me know if there is a problem, or if a juror has left. I've had jurors just leave; they just get out of their chair. One thing I stress to the jury pool to start with is this is still a trial. You may be at home. You may be in your kitchen. But it's still a trial and you have to take it seriously. There are also unavoidable glitches on the internet connection that you have to accept. I had one juror who lost her internet connection every time a BART train went

by. I had a witness yesterday that kept getting phone calls, and every time she got a phone call, it interrupted the proceedings. And those are going to be there and we do the best we can. To be fair, there are a lot of courtrooms in Alameda County that really aren't conducive to really good jury trials either because of their physical layout.

I'd like to discuss specific parts of the trials, and to get your impressions on how they translate to the virtual experience. Do you have any comments or suggestions about opening statements?

We have loaned computers and some attorneys have actually provided computers to jurors. I think that we, in Alameda County, are on the cutting edge right now and we have made it work.

The attorneys have to address the lack of the ability to be in a courtroom or be walking around to interact with the jury when doing a trial via remote. The jury sees the attorney's faces very well though. I think that a properly done PowerPoint presentation helps a lot. The attorneys are also able to see each juror's face much more closely on remote in gallery view and can watch individual reactions. I've been very impressed with some of the PowerPoints and how attorneys have been able to show exhibits. You definitely have to keep the interest going in a situation like this, which can be easier on remote in my opinion.

The attentiveness in remote jury trials of the jury is pretty darn good because they know we're watching the jurors from

the courtroom. I'm impressed by the attentiveness of these jurors on these remote trials.

How about when witnesses are testifying? Do you find that emotion can be conveyed on remote?

I do think it gets conveyed. And then, you know, I'm now debating in my own mind whether it is more conveyed when the face is close up [on the screen] or when they're on the witness stand, sometimes far from jurors. So who knows what has more impact. But emotion is certainly not lost because it comes through on the remote screen.

What about issues with displaying evidence to the jury?

We've had to get a bit creative to address these issues. We had to address the question of how do we show an exhibit to the witness that's not been admitted yet or agreed to be admitted. The attorneys asked if they could go into a breakout room and just show the witness the exhibit there. I said no. That's normally done in front of a jury. The solution was to email the exhibit to the witness who was able to see it and then lay the foundation. And then, once it's in evidence after that, you can do screen share for everybody to see. Remote jury trials do present opportunities for enhanced evidence presentation with practice and preparation.

And closing argument?

Just like opening, but I think more in closing, the jury is now back to the trial. Some attorneys move about the courtroom in an in-person trial, which of course they can't do remotely. Attorneys have had a lot of success using the visual presentation skills in an appropriate manner to keep and capture the attention of the jurors. Frankly, while closing still works in remote, it may be a little less effective than in person. ►



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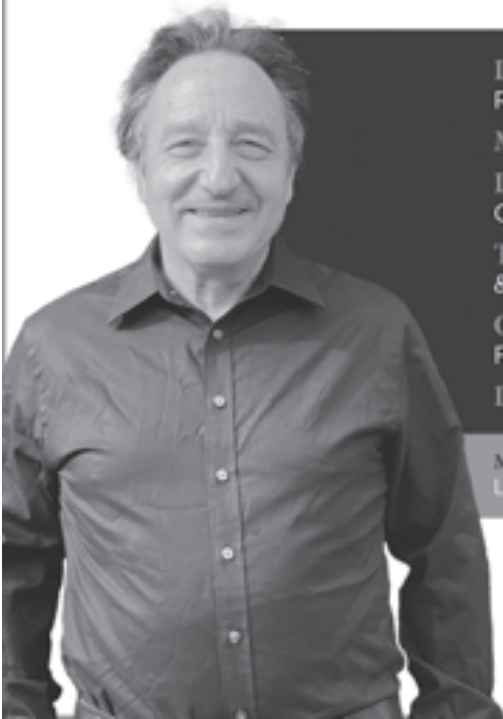
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PHYSICIAN DEFENSE

How does juror deliberation work? Have you learned of any issues related to the remote process?

They all deliberate in the breakout room, and if they have questions, they chat with my court attendants. They are provided jury instructions, the verdict form and copies of the exhibits that went into evidence. If they had a question, need instructions or need a read back, it has all worked really well. No problems with deliberations or reaching a verdict, and I don't see where it's any different.

Given your experiences, do you have any advice for attorneys who are going to be involved in a remote trial?

First, in order for a remote jury trial to work, there has to be a clear protocol that says here's what the judge does, what the clerk does, what the court attendant does, what jury services does, and what the attorneys do. It has to be very clear. Even though it is forever changing right now, that is alright because we are learning.

Second, you've got to have cooperation and communication between everybody — attorneys, the court, jury services and IT (thank God for them at the court).

Third, is patience. You've got to have patience because we are all going to be tried in that way, and patience is extremely important.

Fourth, you have to have early preparation. You can't just wake up on Monday and think everything's going to work. Even with early preparation, you're going to have issues. My message to the attorneys preparing for a remote trial is that they need to work with everybody and do the best they can with the available technology and production of evidence.

Attorneys have to understand where we are on remote trials, the challenges of the remote trials, and the advantages and disadvantages of remote trials. But they

also need to understand that they're very much part of the process and whether it's going to be successful or not. Even attorneys who are initially against remote trials realize that, at the end, it wasn't that bad of an experience.

What are your views about remote trials and proceedings as we move forward, beyond our current public health challenges?

We're doing remote trials mainly for safety purposes. When we do open up the courts again — which we will — it's got to be with the balance of safety and proper staff and budget. In fact, Alameda County just amended Local Rule 1.90¹ regarding remote proceedings, which gives judges the discretion to order proceedings and trials to be conducted remotely as long as they are within the law. Don't assume that a remote trial is going to be a nightmare, because they turn out pretty darn well. I'm proud of our county and that we've been able to step up and do these trials because even though they are limited in number, they do work.

I like personal interaction, but I do believe these remote proceedings and trials in general are here to stay to some degree. I'm not saying they're going to completely take over in-person trials. I think ongoing remote proceedings can actually increase access as long as they've got the technology available.

Any final comments about remote trials that you want to share?

Don't be afraid of remote trials. I kind of was because my grandkids know more about technology than I do. But don't be afraid of it, just try to work with it. My biggest frustration is the ever-changing part of it. Once we get a consistent protocol in place, it will be much better. Now I look forward to them; I even ask for them.

I also noticed that attorneys get along better in a remote trial. They are more polite to each other and tend to work together better. I've seen a lot more cooperation and civility.

Last question. In your trials that have gone to verdict in the remote setting, do you believe that the result would have been the same had they been in person?

Going through them in my mind, yes. And I've not heard anyone make the argument to me otherwise. In my recent post-trial motions, JNOV, etc., no basis of any argument was how some things would have been different if it were an in person as opposed to remote. I honestly can say that I don't see where there would have been any different outcome. ♦



— Casey Kaufman represents plaintiffs in the areas of personal injury, product liability, mass torts, and actions against public entities at his law firm, Kaufman Law (caseykaufmanlaw.com). He is a member of the California, Arizona, Washington State, and Washington D.C. bars, is rated AV Preeminent by Martindale-Hubbell, and is recognized by Super Lawyers and Best Lawyers. He is a member of the Board of Directors for the ACCTLA and the CAOC and past chair of the CAOC New Lawyers Division.

¹Rule 1.90. Remote proceedings (a) Discretion to order remote proceedings to the extent consistent with current law, the court may conduct proceedings, including trials, remotely. (b) Technology and conduct in remote proceedings Remote proceedings may be conducted through telephonic or videoconference applications. Parties and counsel must comply with directions provided by the court regarding specific remote technology and participant conduct. (c) Prohibition on recording or transmitting remote proceedings Participants may not record or transmit any portion of remote proceedings without advance written permission of the judicial officer. (d) Violations. Any violation of this rule may result in sanctions, including but not limited to termination or continuance of the proceedings.

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Some New Video Rules and Evidence from 2020

by Rick Simons

The new year always brings attorneys many new developments in areas of the law. This year, two new cases and a 2020 urgency statute addressed novel questions about issues involving video evidence.

The statutory change is to CCP sec. 2025.310, and relates to depositions. Part of several COVID-related court enactments included in SB 1146, the amendment to 2025.310(a) authorizes both the deponent and the deposing attorney to elect to have the reporter appear remotely. 2025.310(b) authorizes each attorney to appear by virtual technology if they so choose, although personal appearances continue to be permitted. The changes went into effect immediately upon the Governor's signature last September.

People v. Tran (2020) 50 Cal. App. 5th 171, addressed the “novel and important” issues of admissibility of expert forensic testimony using enhanced videos. Tran was convicted of assault and mayhem for his part in a melee involving several individuals in the San Diego Gaslamp Quarters. The events were captured in different parts and from different angles by multiple surveillance cameras and cell phone video. At trial, the prosecution presented a certified forensic video analyst as an expert witness. The expert showed a composite video of all of the different cameras’ recordings, synchronizing them, unifying different heights and widths of the cameras’ angles, correcting blurring and unifying various color filters, pixels, and ratios. The expert then placed colored arrows in the composite videos to identify the same individuals seen at different times from different angles in the multiple views. The expert provided testi-

mony as to what he did in the preparation of the composite video, and how he concluded certain figures were the same individuals in multiple angles and times. Tran objected to the “doctored” video. After an Evidence Code section 402 foundational hearing, the trial court admitted the video and testimony. On appeal, the Fourth District Court of Appeal panel performed a lengthy analysis of the different types of video evidence used by experts, and affirmed the judgment.

Tran distinguished between computerized animation that illustrates expert testimony from computer simulations presented by experts. The former, said the Court, is like a chart or diagram used by an expert witness to explain their opinions, and is subject to the “fair and accurate” test of admissibility. The latter is itself substantive evidence presented as an expert’s opinion. Computer simulations

are subject to the standard *Kelly-Frye* test applied to new or novel scientific evidence or opinions. The admissibility of computer animation, however, is viewed through the issues of relevance, foundation, and Evidence Code section 352 prejudice versus probative value. The Court found the video to be very probative, because it made sense of multiple views and simultaneous scenes recorded from different angles, a task that the jury would find extremely difficult without the harmonizing of the disparate recordings in a manner that preserved the accuracy of each. The Court could not find any prejudice, because the expert had only identified individuals with colored arrows where there was a clear visual basis to do so — an article of clothing or hat, a personal feature, or a different simultaneous view that clearly showed who an actor was. In some of the scenes, Tran was not identified with an arrow because the expert

was unable to state who the individual was from the recordings with the requisite professional certainty.

Everything from vehicle related collisions to sidewalk injuries to sports injuries in today’s world is often recorded by multiple videos, each with different technical properties. The *Tran* court provides a pathway for a forensic video expert to present multiple recordings of the same events in a synchronized manner to provide the jury with the best opportunity to see for themselves. Trial counsel are a step ahead if they gather every possible source of video and audio recordings early in their investigation to prepare their case.

Lastly *People v. Troy Son* (2020) 56 Cal. App. 5th 689, also a Fourth District case although a different division and panel, addressed the admissibility of the investigating detective’s testimony commenting on the edited video of the crime. The video was taken from a neighbor’s surveillance system’s four cameras. The detective also commented upon older videos of the same neighborhood that purportedly showed the defendant scouting the scene in days before the crime was committed. At the 402 hearing, the detective testified that she had watched the video over 50 times, including in slow motion, and on several occasions had seen details that were not obvious in her initial viewings. The defendant objected on the grounds of the secondary evidence rule (Evid. Code sec. 1523), improper lay opinion, and section 352.

The Court rejected the secondary evidence argument because the video itself was admitted into evidence on the foundation of the neighbor’s testimony. Since the challenged testimony was not to “prove the content” of the video, but to point out important details that might easily be missed and to prevent the jury from having to consume extensive time viewing the

video dozens of times looking for details. The Court also rejected the lay opinion objection on the grounds that she was not offering opinions, only describing what she observed in the video. The Court found this type of narrative to be no different than any eyewitness’ testimony about what they observed. Even if the testimony was opinion, the Court added, it was helpful and therefore properly admitted “to tease out the details” of the video.

Finally, the Court dismissed the 352 objection as there was no evidence of prejudice to defendant. There was no dispute that the details of the video pointed out by the witness were accurate, and therefore there was no prejudice to weigh against the probative value of the detective’s narrative.

2020’s new statute and its two new cases are just the latest efforts to address the ever-increasing role of video in our practices and trials... 2021 promises to bring many more. ♦

— Rick Simons of *Furtado, Jaspovice & Simons* has specialized in child sexual assault cases since 2002, and has obtained historic verdicts against *The Bishop of Oakland, The Salesian Society, and Jehovah’s Witnesses*. He is a Past President of CAOC, former SFTLA Trial Lawyer of the Year, 2005 CLAY Award winner, and from 2004-2006 served as Liaison Counsel for the plaintiffs in the coordinated clergy abuse cases known as “Clergy III.”



— ACCTLA CALENDAR OF EVENTS —

Tuesday, April 27, 2021 • Noon
Micro... and Aggressive? – MCLE (Zoom)

Thursday, May 13, 2021 • Noon
Virtual Trials: How to Prepare and What to Expect – MCLE (Zoom)

Wednesday, May 26, 2021 • Noon
Liens (working title) – MCLE (Zoom)

Thursday, May 27, 2021 • 9:30am
Morning Meditation with Jayme Walker (Zoom)

Thursday, June 10, 2021 • Noon
Ask a Psychologist! – MCLE (Zoom)

July 2021
TBI Symptoms Treatment with TMS – MCLE (date/time tbd)

Thursday, September 30, 2021 • 5:30 - 7:30pm
Late Spring Social – Trader Vic's

Thursday, November 4, 2021
Fall Social (TBD)

Thursday, January 20, 2022
Judges' Night – Rotunda

Appellate Report

Five Cases to Know from 2020

by Val McGinty

***Shipp v. Western Engineering, Inc.* (2020) 55 Cal.App.5th 476**

Holding: Highway contractors owe motorists a duty of care to manage traffic rerouting safely.

Background: The plaintiff was driving on a road where construction was being done. The driver two cars ahead of the plaintiff was trying to turn left but could not because oncoming traffic, which was stopped by the construction crew's flagger, was blocking the intersection. The plaintiff was rear-ended and sued for negligence and loss of consortium. The trial court granted summary judgment and the Third District reversed.

Key Points: The court cited admissions by defendant's employees that a duty of public safety to the motoring public is the foremost concern on a road construction project. The court analyzed "duty" in two ways: (1) the court looked at the considerable duties imposed on a highway contractor and concluded that a duty was owed under that analysis; (2) the court looked at the Rowland factors and held that a duty was owed under that analysis also. The court held that the accident did not need to occur inside the construction zone because it was caused by the contractor's negligence and the defendants had conceded it was "adjacent" to the construction zone. And the fact that a third party's negligence was also a cause of plaintiff's injuries did not excuse the defendants from their duty of care.

***Sharufa v. Festival Fun Parks, LLC* (2020) 49 Cal.App.5th 493**

Holding: Waterslide operator must be treated as common carrier.

Background: The plaintiff fractured his hip and pelvis riding a waterslide at Raging Waters. The plaintiff sued for negligence and products liability. The trial court excluded the engineer's opinion that going down the slide on your stomach could lead to injury because you go faster on your stomach than you do on your back.

Key Points: The Sixth District reversed and held two things: (1) On negligence, the question was what duty was owed. The plaintiff said it was a common carrier duty of utmost care, higher than a duty of ordinary care. The defendant said the primary assumption of risk doctrine applied because it was an inherently dangerous recreational activity, so the duty was only not to increase the inherent risks, lower than duty of ordinary care. Here, because of the lack of rider control (as opposed to the *Nalwa v. Cedar Fair* case with bumper cars), the common carrier duty applied. However, even though the plaintiffs won on duty, the court said there was no triable issue on breach or causation because there was no evidence to show that sliding on his back would increase the risk. The exclusionary ruling on the declaration was not challenged on appeal and, in any event, the exclusionary ruling appeared to be correct because the declaration failed to lay a foundation for any:

expertise in waterslides; or expertise in how a rider's body position affects velocity. So, the summary adjudication of negligence claim was upheld.

But the court did reverse summary adjudication of the products liability claim. The question there was whether Raging Waters was supplying a product or delivering a service. And because the record was "insufficiently developed to answer the legal question of whether the primary purpose of the parties' transaction was to use a product," summary adjudication of the claim was error.

***Judd v. Weinstein* (2020) 967 F.3d 952**

Holding: Imbalance of power between successful Hollywood producer and aspiring actor entitles actor to protection from sexual harassment under California law.

Background: In this case, Ashley Judd sued Harvey Weinstein for sexual harassment. Weinstein had arranged for a breakfast meeting at a hotel restaurant but instead summoned her to his private suite and asked if he could massage her. When she refused, he asked if she would watch him shower. After she rebuffed his advances, he ruined her chances of being in the Lord of the Rings movies, telling the directors he'd had a "bad experience" with Judd and that she was a nightmare to work with. She sued in state court under Civil Code Section 51.9, which imposes liability for sexual harassment in any business service or professional

relationship that is substantially similar to the enumerated examples in the statute. After it was removed from state to federal court, the district court granted a motion to dismiss.

Key Points: The Ninth Circuit reversed, holding that the relationship between Judd and Weinstein was indeed "substantially similar" to the examples enumerated in the statute because there was an "imbalance of power" in the relationship so as to render the statute applicable.

***Szarowicz v. Birenbaum* (2020) 58 Cal. App.5th 146**

Holding: Triable issues of fact preclude summary judgment on whether the primary assumption of risk doctrine bars liability for violent body-check during no-check hockey game.

Background: A hockey player was injured during a game and sued for injuries. Summary judgment was granted under the primary assumption of the risk doctrine, but the First District reversed.

Key Points: The court held that, even under the primary assumption of risk doctrine, you can be liable if you increase the risk inherent in the sport. Although the trial court ruled that checking was an inherent risk in the sport, the court of appeal reasoned that not all checking is the same and that the plaintiff had demonstrated triable issues and therefore had the right to present his case. The court also reinstated the intentional tort claim, noting that primary assumption of risk doctrine likely does not apply to an intentional tort claim.

***Blue Fountain Pools & Spas Inc. v. Superior Court* (2020) 53 Cal.App.5th 239**

Holding: Claims of hostile work environment not time-barred.

Background: The defendant in this case sought summary adjudication of a hostile work environment claim on the grounds that it was time-barred and the motion was denied. The defendant took a writ to the Fourth District, urging their statute of limitations argument but the Fourth District denied the writ.

Key Points: The opinion had three central holdings: (1) The plaintiff presented evidence of several incidents of sexual harassment that occurred in the one-year period preceding her termination — that is, during the limitations period. Accordingly, even if the court concluded that incidents outside the limitations period cannot be the basis for liability, it would still have been improper for the trial court to dismiss her cause of action. (2) The defendant purchased the business and took over operations midstream during the alleged tortious conduct. Thus, even if the conduct of prior management made further complaining futile, the arrival of new management created a new opportunity to seek

help. Therefore, the plaintiff could show a continuing violation with respect to all the complained-of conduct that occurred during defendant's ownership of the company. (3) There is a factual dispute over whether and when the plaintiff's employer made clear that no action would be taken and whether a reasonable employee would have concluded that more complaining was futile. On this record, where the plaintiff continued complaining about harassing conduct and tried complaining to different people, the question must be put to the jury. ♦

— Valerie T. McGinty is a certified appellate specialist with a focus on affirming plaintiffs' verdicts on appeal. She serves on the boards of ACCTLA and CAOC and was CAOC's 2016 Marvin E. Lewis recipient and CAOC's 2014 Streetfighter of the Year; she is a Super Lawyer and is rated AV Preeminent on Martindale Hubbell.



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P.C. v. Steve Nelson and Eastside Union High School District

**Santa Clara County Superior Court
Settled February 12, 2021 for \$1,250,000**

The plaintiff was a 14-year-old high school track athlete when she entered into a relationship with the 18-year-old assistant track coach. The head coach, Steve Nelson, suspected something was going on and asked plaintiff if there was. She denied it. The assistant track coach went on to have abusive relationships with two other young high school girls. When he was 21 and the plaintiff was 17, she came forward and told Nelson about the abusive relationship, which led to a criminal investigation that revealed the two other victims. Plaintiff suffered severe emotional distress, including PTSD from the abuse.

Got News?

If you have any member news that you'd like to share, please email it to:

Ron Shingler

ronshingler@shinglerlaw.com

- or -

Casey Kaufman

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Plaintiff's Attorneys

Jayme L. Walker and Winston Moody
Gwilliam, Ivary, Chiosso, Cavalli & Brewer
Omar Habbas, Habbas & Associates

Plaintiff's Experts

Dr. Lynn Ponton

Defense Attorney

Eric Bengston, Davis & Young, APLC

Defense Expert

Dr. Richard Shaw

Lu v. Mediola

**Santa Clara County Superior Court
Settled February 25, 2021 for \$500,000
Policy Limits**

The 38-year-old plaintiff was injured after being rear ended in stop-and-go traffic on 101 near San Jose. Plaintiff underwent several spinal injections and a lumbar fusion at L4-L5. She had a previous lumbar fusion at L5-S1 due to spondylolisthesis from 20 years prior and had degenerative disc disease. Defense claimed it was a low-speed accident and plaintiff had a long history of pre-existing back pain and two prior car accidents. Plaintiff claimed that the pain had resolved with limited treatment after the two prior accidents, but that following this accident she had become a chronic pain patient



and could not care for her toddler twin boys. The plaintiff intends to pursue a UIM claim.

Plaintiff's Attorneys

Jayme L. Walker and Winston Moody
Gwilliam, Ivary, Chiosso, Cavalli & Brewer
Ivan Golde, Law Offices of Ivan Golde

Plaintiff's Experts

Dr. Alekos Theologis
Orthopedic Surgeon, UCSF
Dr. Richard Nolan (chronic pain)
Pat Mason, Economist

Defense Attorney

Michael Budra
Law Offices of Shawn C. Moore
Dr. Russell J. Andrews, defense expert (neurosurgeon)

Doe Skilled Nursing Facility Patient ("SNF") v. Roe SNF

\$2,000,000.00 Confidential Settlement
A 90-year-old woman admitted for rehabilitation suffered severe embolic stroke due to failure to administer anticoagulation as ordered. Doe had long-standing diagnosis of atrial fibrillation managed with Coumadin to reduce stroke risk. Doe lived independently and handled her own Coumadin care. Doe suffered a spontaneous compression at L3 leading

to E.R. presentation. After diagnosis, she was transferred to SNF.

SNF received orders for Coumadin. On day three of admission, SNF obtained an INR (demonstrates clotting times influenced by Coumadin) that was too high. So SNF was to increase Coumadin. Six days later, Doe had a severe stroke. INR essentially demonstrated Doe had no Coumadin in her system. SNF records showed only a single missed dose of Coumadin during the admission.

Doe contended SNF falsified its records and hired a forensic electronic charting analyst. SNF withheld records leading to numerous discovery fights. Doe also hired a toxicologist/pharmacologist to establish the Coumadin could not have been administered as ordered given the INR values.

The matter resolved for \$2,000,000 on the eve of trial, a premium over the straight MICRA value of the case due to elder abuse allegations.

Plaintiff's Attorneys

Michael E. Gatto
Law Office of Michael E. Gatto (*Co-Lead*)
Karman Guadagni
Stebner & Associates (*Co-Lead*)

Judson Brandeis, M.D., filed an action against the Diablo Valley Oncology & Hematology Medical Group for wrongful termination and intentional infliction of emotional distress. Dr. Brandeis' employment was governed by a Related Professional Employment Agreement (RPEA). At a board meeting on November 16,

2018 — of which Dr. Brandeis did not receive notice — DVOH terminated Dr. Brandeis without cause and the 90-day notice of termination required by the RPEA. The matter went to arbitration at JAMS. On December 7, 2020, the Honorable Cecily Bond (*ret.*) found that DVOH had violated its contract with Dr. Brandeis and had caused him to suffer severe emotional distress, and therefore awarded Dr. Brandeis \$719,948.00. She also awarded him \$53,304.30 in costs and \$696,605.50 in attorney fees.

Plaintiff's Attorney

Daniel Horowitz

Defense Team

Gordon & Rees

Jonathan Brand Mediation Services
Member - Contra Costa Superior Court ADR Panel



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Elise R. Sanguinetti is a founding partner of Arias Sanguinetti Wang & Torrijos with offices in the San Francisco Bay Area, Los Angeles, Las Vegas and Montreal. Her main focus of expertise is serious injury, wrongful death cases, civil appeals and legal malpractice.

She exclusively represents plaintiffs in civil litigation, and holds an AV rating with Martindale-Hubbell and has been named a California Super Lawyer every year since becoming eligible. Elise has been recognized as one of the top plaintiff's lawyers in California and for the past eight years she was named one of the Top 50 Women Lawyers in the Bay Area. Elise graduated from the University of San Francisco School of Law where she earned her Juris Doctor (J.D.). She was admitted into the California state bar in 1997. When not in the courtroom, she is a frequent speaker at nationwide seminars and writes articles that are featured in various legal publications. Her copious amount of work has been recognized with numerous awards from various organizations. Elise is a past-president of the American Association for Justice (AAJ), a past-president of the Consumer Attorneys of California (CAOC), and a past-president of the Alameda Contra Costa Trial Lawyers Association.



Jamie G. Goldstein is a partner with Arias Sanguinetti Wang & Torrijos in the Bay Area office and has been with the firm since its inception in 2015. Ms. Goldstein focuses her practice in the areas of wrongful death, personal injury, civil rights, medical malpractice, product liability, and mass torts. She was named a Rising Star 7 times and a Super Lawyer since first being eligible in 2019. Ms. Goldstein is an active member in numerous organizations both locally and nationally that protect the rights of her clients. Throughout her career Ms. Goldstein has handled numerous complex litigation matters and has tried cases resulting in multi-million dollar verdicts. Ms. Goldstein received her undergraduate degree from the University of Illinois and her Juris Doctor (J.D.) from Chicago Kent College of Law. She began her practice in Chicago, Illinois in 2005 and relocated to California in 2014. She was admitted to the Illinois State bar in 2005 and the California State bar in 2015.

Date and Time

Thursday, May 13, 2021 - Noon

Location

Zoom – details provided following registration

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Cassie Springer Ayeni has handled plaintiff-side ERISA litigation, claims, and appeals since 2002, with a focus on disability employee benefits. She has been recognized on the *Northern California Super Lawyers* Top 100 and Top 50 Women lists. She was named a "Top 40 under 40" *Daily Journal* attorney in 2014, and a *Recorder* Top 50 Attorney "On The Fast Track" in 2012. She is proud to serve on the ACCTLA Board.



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Certified Specialist, Appellate Law

State Bar of California, Board of Legal Specialization



Charles Dell'Ario has been representing individuals and small businesses in the California and federal courts since 1974. Beginning in 1997, Mr. Dell'Ario has specialized in appellate matters and has participated in over 250 appeals in the California Courts of Appeal, Supreme Court of California, Ninth U.S. Circuit Court of Appeals and the United States Supreme Court.

Fighting the Good Fight for Plaintiffs

Despite the limitations created by the pandemic, I continue to fight successfully for tort plaintiffs in the appellate courts. In connection with my trial lawyers, ACCTLA-member Todd Walburg and co-counsel Celine Cutter, I established the duty of public agencies to maintain their streets and roads free of dangerous conditions that would increase the risks of recreational cycling. Our client was grievously injured when her bike struck a large pothole, throwing her to the pavement. The defendant argued she had assumed the risk of its bad roads. (*Williams v. County of Sonoma* (2020) 55 Cal.App. 125.)

Former ACCTLA and CAOC President Micha Liberty and I have teamed to fight the cause of school children victimized on account of their disabilities. The Supreme Court of California granted our petition for review and will decide the issue of first impression whether the state Unruh Act applies to the 7 million public school children. The high court only grants about 55 of the 3,500+ petitions it receives each year.

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