

# Los Angeles Lawyer

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## Accommodating Attorneys

EARN MCLE CREDIT

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## FROM THE CHAIR

In the South of the 1930s, when *To Kill a Mockingbird* was set, Atticus Finch probably would have lost some business over defending Tom Robinson, a black man accused of raping a white woman, Mayella Ewell. The result would be the same today, but for a different reason. Then,

Finch would have lost clients over issues of race. Now, it would be issues of gender.

Questions about Finch and feminism have been around for decades. An early critic of the mostly revered character was Steven Lubet, who wrote in the *Michigan Law Review* in 1999 that Finch structured his cross-examination of Ewell “to exploit a virtual catalogue of misconceptions and fallacies about rape, each one calculated to heighten mistrust of the female complainant.” Concurring in a 2009 article for *The New Yorker*, Malcolm Gladwell wrote that, while “Finch wants his white, male jurors to do the right thing...he dare not challenge the foundations of their privilege,” and so “[h]e encourages them to swap one of their prejudices for another.” (Ironically, Harper Lee’s *Go Set a Watchman*, written before *Mockingbird* but not released until 2015, portrayed an elderly Finch as more racist than even Gladwell suggested.)

Such criticisms have only gained steam in recent years, as satirized by Ashe Schow in the 2014 *Washington Examiner* piece titled “Atticus Finch: American literature’s most celebrated rape apologist.” According to Schow, “[I]f ‘To Kill a Mockingbird’ were taught in women’s studies classes today, Finch would have to be labeled the villain of the book for not accepting at face value an accuser’s tale of rape.” In a critical response to Schow for *bustle.com*, Kristen Scatton nonetheless posited that readers now had to ask, “In light of changing attitudes about sexual assault and violence against women, how do we read *To Kill a Mockingbird*’s trial scene,” and “how does the character of Atticus Finch hold up under this kind of scrutiny?”

Notably, these articles were written before the cultural sea change that followed the recent revelations about Harvey Weinstein and others. In the “post-Weinstein” era, Atticus Finch might not “hold up” as well, except perhaps to us lawyers. Scatton and Gladwell are not lawyers, of course, and they miss a point obvious to those who are. When Finch took on Robinson’s defense, he assumed an ethical duty to vigorously defend his client, whatever else he believed. That an attorney may ethically represent a client who is potentially guilty—even immoral—is axiomatic to most attorneys but seems counterintuitive to many others. The collateral damage to two of Weinstein’s former attorneys illustrates the point. As the allegations against Weinstein exploded, Lisa Bloom promptly dumped him as a client but apparently still felt compelled to go on an apology tour throughout the media, the success of which remains unclear. Similarly, Boies Schiller Flexner, whose chairman David Boies represented Al Gore in *Bush v. Gore* and argued for marriage equality before the Supreme Court, has been pilloried in the media and reportedly lost a number of clients over representing Weinstein. I imagine lawyers have long suffered collateral damage from representing unpopular clients, so this is not quite a “new” normal. But, these cases are a useful reminder that others don’t necessarily assume the distinction between lawyer and client that we lawyers take for granted.

John Keith is the 2017-18 chair of the *Los Angeles Lawyer* Editorial Board. He practices business litigation with the law firm of Fenigstein & Kaufman in Century City.



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## Gloria Allred Founding Partner Allred, Maroko & Goldberg



**GLORIA ALLRED** is a celebrated civil rights attorney whose practice includes representation of victims of discrimination due to sex, race, age, physical handicap, or sexual orientation. She founded and currently serves as president of the Women's Equal Rights Legal Defense and Education Fund. Among the many honors awarded her are: the 1985 President's Award from the National Association of Women Lawyers, the President's Award for Outstanding Volunteerism (presented in 1986 by President Ronald Reagan), the 2014 Lifetime Achievement Award from The National Trial Lawyers, and the 2016 International Women's Forum Women Who Make a Difference Award. Allred has been listed in "Southern California Super Lawyers" from 2004 to 2017 as well as "Best Lawyers in America" from 2011 to 2017. Her television commentaries and show, *We the People, with Gloria Allred*, have been nominated for Emmys. Allred is also the author of *Fight Back and Win: My Thirty-Year Fight Against Injustice—And How You Can Win Your Own Battles*.

**What's the first thing in the morning that brings a smile to your face?** The sunrise.

**What is a typical day?** Every day is very different.

**What about weekends?** I work all of the time unless I'm sleeping or occasionally

with family or friends.

**It's been said you haven't taken a vacation since the 1970s. True?** It's been so long that no one can remember.

**What drives you?** I do have a passion for justice. There are many wrongs that need to be righted, and there are many individuals who have been victims of injustice. I am very aware that I have a heavy responsibility. That's my duty and I plan to use every moment to fulfill it.

**The New Yorker said you may be the most famous practicing attorney in the country. When did you know you were well-known?** People come up to me wherever I am—in the airport, sidewalk, a store...wherever.

**You went to the University of Pennsylvania, married, had a child, divorced, and returned to live with your parents. How did that feel?** Life is what's happening when you're planning other things.

**After earning a master's degree, you moved to Los Angeles to be a teacher. Why L.A.?** I decided that if I was going to be poor, I'd at least like to be poor in the sunshine. My daughter was five years old, and I thought it would be a wonderful place for her to grow up.

**You graduated from Loyola Law School and became a lawyer in 1975. Good experience?** Loyola is where I met my wonderful partners, Michael Maroko and Nathan Goldberg. They were my classmates.

**You dedicated your book *Fight Back and Win* to your partners, crediting them in your battle against injustice. How so?** We work as a team. We could not have won the victories we have won and continue to win without that effort. We're still together more than four decades later.

**As a young woman, you were raped at gunpoint while in Acapulco. Did that incident inform the way you treat women?** It helps me understand what their life is like. Many of my clients call me Mama

Gloria.

**In 1981, California State Senator John G. Schmitz called you a "slick butch lawyer-ess" after you presented him with a black leather chastity belt. You sued him, got \$20,000 and an apology. Was the apology sincere?** I really don't care about apologies, and I donated the money to other organizations whom he had maligned.

**Why the smile on your face?** The irony is that Schmitz was a right-wing, John Bircher type. He always flaunted his so-called family values. It turns out that he had had a child outside of marriage with a student of his. I'm the one who leads a very conservative life style.

**In the 1980s, you sued Flair Dry Cleaners, and they changed their policy of charging women more than men within five hours. Quickest victory?** Yes.

**In 1992, you pressured the U.S. Senate Ethics Committee and urged Oregon Senator Robert Packwood to release his diaries after a newspaper article detailed his history of sexual harassment. Aren't diaries private?** I filed a complaint against him, which led to the investigation of allegations of sexual harassment. The Ethics Committee took it from there.

**You sued the Boy Scouts of America more than 20 years ago for excluding girls, and they changed their policy in October 2017. Trend setter?** Absolutely! We are pioneering civil rights attorneys. We don't wait for a time that it's popular.

**In 2007, you represented Circuit City employees in an age discrimination lawsuit. Are you seeing more of this as baby boomers age?** I think that more victims are aware of their rights and are more willing to assert their rights.

**Is there a change you think is needed in California Law?** I would like the statute of limitations for civil cases for adult survivors of child sexual abuse to be eliminated.



**You went through your own messy divorce. What do you legally advise those about to marry?** Marriage is a business as well as romantic relationship. Sometimes, romance blinds a person to the business aspect. Proceed at your own risk.

**What is the most important part of a relationship?** Honest communication.

**You've sued individuals, small businesses, corporations, and the government. What is the common denominator among them?** Some form of injustice.

**You've called yourself a warrior. What is the first thing you do to get ready for battle?** Whatever you are planning to do or not planning to do, make your client part of the decision-making.

**Do your clients expect you to be a miracle worker?** I say I am a lawyer and not a magician, but we'll do the best that we can.

**It is said you don't shop and don't cook. What is the one thing you enjoy that is not work-related?** Watching *Curb Your Enthusiasm* on the airplane.

**Do you have a favorite exercise?** Well, I exercise my mouth quite a bit, but I'm told that doesn't count. I do run through airports, though.

**Super Lawyer, White House Award, and Emmy—is there something else you want?** Nothing, except to have this gift of life as long I'm permitted to have it.

**What are your retirement plans?** There is nobody who knows me that thinks that I'll retire.

**Are they right?** A hundred percent.

**You always appear to be camera ready. How do you do it?** I get enough sleep, I don't do drugs, I don't drink alcohol, I never smoked, and I'm a pescatarian.

**You've been called a "limelight person." What advice do you give young lawyers in dealing with the media?** They need to understand what this is; it's not Hollywood. It's civil rights.

**Any recent event you're excited about?** In early 2018, Netflix premiered a documentary called *Seeing Alfred*, which was part of the U.S. Documentary Competition at the 2018 Sundance Film Festival.

**Cosby, Weinstein, Louis C.K., Moore, Franken, Trump...is this the nation's tipping point?** This is it. It's not just one moment; it's been building for a very long time. But it doesn't mean it's the end of sexual harassment. It's too severe

and too pervasive.

**What do you make sure to have in your brief case?** Two computers and two cell phones.

**What feature do you wish you could operate on your iPhone?** I do not profess to have the knowledge that I should have about tech. I don't text and I don't have people call me on my cell phone.

**What book is on your night stand?** There is no book on my nightstand. By the time I go to bed, I close my eyes and go to sleep immediately.

**What magazine do you pick up at the doctor's office?** I take my computer and work while I'm waiting.

**What is your favorite restaurant?** Whatever is closest when I am hungry.

**Do you have a hidden talent?** I love to dance.

**What are the three most deplorable world conditions?** Lack of equality for women, poverty, and a lack of meaningful action about climate change.

**Who are your two favorite presidents?** Kennedy and Obama.

**What do you want written on your tombstone?** Here, we are all equal.



## Working together for a more just LA

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## Making Contact: The Benefits of Building a Strong Network

**TOO OFTEN, NETWORKING IS** low on the list of priorities for a young, employed lawyer. Between figuring out the basics of law practice and meeting billable hours, networking can seem a chore necessary only for job seekers. However, the positive relationships that develop from networking can turn into mentorships, business referrals, and friendships. These relationships take time to build, which means the earlier an attorney starts, the more meaningful relationships he or she can form.

Local bar associations are important resources for networking with other attorneys in the area. The Los Angeles County Bar Association (LACBA) Barrister's Section offers many opportunities for young attorneys to connect with each other, as well as more experienced attorneys and the judiciary, e.g., it holds events such as the annual Bench and Bar Reception, which gives young attorneys a chance to connect with state and federal judges in the area. LACBA also has various other sections attorneys can join, based on their practice areas.

Volunteering with one of LACBA's legal services projects (Domestic Violence, Veterans, Immigration, and AIDS) is a great way to gain practical experience and to network with leading attorneys throughout Los Angeles who also volunteer with the projects. To encourage young attorneys to take advantage of these opportunities, LACBA recently changed its dues structure for new admittees and barristers. New admittees now receive LACBA and Barristers section memberships free for their first two years instead of one, and receive their third year for \$50, a free Barristers section, and one free onsite CLE program of up to two hours.

An affinity bar association is a professional organization of lawyers of diverse backgrounds, which may include race or ethnicity, gender, sexual orientation, national origin, religious affiliation, veteran status, and more. Affinity bar associations provide smaller pools of attorneys to connect with, which results in more intimate settings and thus the ability to become acquainted faster. They can also provide unique volunteer opportunities as well as formal and informal mentorships.

For example, the Korean American Bar Association (KABA) holds regular events throughout the year, most of which are free to members. Members are often invited to participate in KABA-sponsored events, such as its monthly legal clinic, which provides free legal counsel to Korean Americans in Los Angeles. Members also attend conferences together—e.g., the National Asian Pacific American Bar Association Conference and the International Association of Korean Lawyers—which helps solidify connections within the group.

Both law firms and various bar associations provide financial help to allow attorneys to attend conferences across the nation and the world, which allows for meeting people from other places as well as reinforcing relationships with those who traveled from the same place. Conferences for those in the legal field exist not only for various affinities but also different practice

areas. Many of them offer CLE credit for California attorneys, which provides an extra incentive for them to attend.

Alumni associations also offer networking opportunities since connecting with individuals outside the legal field is just as important as networking within it. Connecting with undergraduate and law school local alumni groups and getting involved in leadership and volunteer positions within those groups can provide pressure-free environments in which a young lawyer can establish friendships, mentorships, and potential business connections. Various universities also partner with other schools in hosting events, which can further expand networking opportunities.

Outside the established frameworks of bar and alumni associations are various organizations that provide networking opportunities through volunteering. While lawyers are encouraged to engage in pro bono matters, volunteering outside the legal field offers fresh perspectives, with the added benefits of giving back to the community and meeting new people.

Junior League of Los Angeles provides a highly structured environment in which women connect with one another and volunteer for various causes. Locating specific charities and other nonprofits with volunteer programs is an option as well for those who are concerned about the demands of such structures. Reading to Kids, for example, is a nonprofit organization that is always looking for volunteers to read to children at schools on the weekends, with no further commitment beyond each day's volunteering. For those who find the networking aspect of bar and alumni associations challenging, volunteering can be a great way to get started in making new connections.

Taking on leadership positions within these organizations is perhaps the fastest way to connect with their members. Further, it indicates leadership skills to both current and prospective employers, which can be a remarkable benefit for a young and/or inexperienced lawyer. However, a new lawyer would be wise to consider the time commitment needed as well as flexibility, if any, that these positions allow. As these organizations are largely made up of those in similar situations—working professionals in Los Angeles—the required meetings are often organized via conference and video calls as opposed to in-person meetings. However, they still require organizational skills as well as the ability to communicate and manage time well. Furthermore, it is important to determine whether these involvements would create conflict issues with one's employer, its clients, or its expectations of the lawyer.

The legal profession can and does seem like a daunting place for a new lawyer, but it does not necessarily have to be. Establishing a strong network of friends and mentors has the potential to make a legal career much more fulfilling and enjoyable. ■

Yujin Chun is a litigation attorney at Salisian|Lee LLP in Los Angeles and a member of the LACBA Barristers Executive Committee.





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November 17, 2014

Jack Trimarco & Associates  
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Dear Mr. Trimarco:

In the winter of 2010, an environmental disaster occurred off the west coast of the island of Oahu in the State of Hawaii. Heavy rainfall caused millions of gallons of contaminated water—including toxic soil, trash and human medical waste—to pour from the Waimanalo Gulch Sanitary Landfill into the ocean waters. Federal officials launched an investigation into the landfill's operator, Waste Management of Hawaii ("WMH"). The U.S. Attorney's Office alleged there was a conspiracy between members of the WMH and its environmental consulting firm to submit false information to regulators about the adequacy of the landfill's storm water management system.

I represented an employee of the environmental consulting firm hired by WMH to perform construction quality assurance. During the investigation, all evidence pointed to the fact that my client was innocent of any wrongdoing. Nevertheless, the Assistant U.S. Attorney insisted that my client pass a polygraph, or else risk being indicted as a participant in the criminal conspiracy.

In 2012, you conducted a polygraph examination of my client, unequivocally establishing that no deception was indicated. The Assistant U.S. Attorney then demanded that my client pass a polygraph examination administered by FBI agents in Honolulu. The FBI alleged my client failed their polygraph examination, but you responded with a thorough and compelling critique demonstrating how the FBI's polygraph examination was deficient and should be disregarded.

Last year, I was notified by the U.S. Attorney's Office of the District of Hawaii that their office would not seek an indictment of my client, nor would any charges against him be pursued. I believe your carefully and competently constructed polygraph examination and critique of the FBI's polygraph results played a central role in our advocacy that prosecution should be declined in my client's case.

Sincerely,

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## The Shriver Act Advances the Cause of Civil *Gideon*

**IN THE EARLY 1960s**, a poor drifter named Clarence Gideon, possessed of minimal formal schooling and a lengthy criminal record, was arrested and tried for burglarizing a pool hall in a small town in the Florida panhandle. Gideon knew enough about the legal system to request a court-appointed lawyer for his criminal trial, but the trial court declined his request, leaving him to talk to the jury and cross-examine the accusing witnesses all by himself. Unable to impeach his accusers' credibility or point out contradictions in their testimony, Gideon soon found himself a convicted felon, sentenced to five years in state prison. The Florida Supreme Court affirmed Gideon's conviction, finding that his request for a court-appointed lawyer had been properly denied.

While in prison, Gideon studied the legal system. Acting in *propria persona* (or, as he put it, "in proper person"), Gideon hand-wrote a petition for certiorari<sup>1</sup> to the U.S. Supreme Court, which agreed to hear the case. By this time, the Supreme Court had already decided in *Betts v. Brady*<sup>2</sup> that government-paid counsel was not required in felony cases, except when there were special circumstances (for instance, if the defendant was illiterate or mentally disabled). But the days of *Betts* were numbered: future Supreme Court Justice Abe Fortas argued on behalf of Gideon that even highly competent and well-educated defendants were no match against the power of the state in criminal cases and that the Constitution guaranteed free legal representation to all defendants who were charged with felonies. Ultimately, the Supreme Court unanimously agreed with Fortas, holding that the denial of a state-paid lawyer in such circumstances violated the due process clause of the Fourteenth Amendment. Thanks to *Gideon v. Wainwright*,<sup>3</sup> states are now required to provide free legal counsel to indigent defendants who are charged with a felony.

In the case of Clarence Gideon, having a lawyer made all the difference in the world. While in the wake of *Gideon* several hundred convicts were released from Florida prisons, the state chose to retry Clarence Gideon. Following the summation by Gideon's court-appointed lawyer, the jury took only about an hour to render a full acquittal.

It cannot be overemphasized that having a lawyer improves access to justice.

But what about civil cases that threaten the loss of a person's basic human needs? One sitting jurist has encapsulated the next frontier of *Gideon* as follows:

In the criminal context, a defendant facing the risk of incarceration is, at the very least, entitled to an attorney as a constitutional right. There is, however, no such corresponding right in the vast majority of civil cases. Yet, civil cases deal with many matters that we hold perhaps just as dear as our own personal freedom, including custody of our children, our physical safety, our ability to work, and our need for shelter.<sup>4</sup>



This concern has given rise to the movement generally known as "Civil *Gideon*," a phrase coined in the late 1980s by federal Judge Robert W. Sweet.<sup>5</sup> Today, many in the "access to justice" field prefer the phrase "Right to Civil Counsel" over "Civil *Gideon*," in order to distinguish the movement from criminal law matters and the widely reported shortfalls in government funding for public defenders. Regardless of the label, the goal of the movement is perhaps best and most simply stated in a 2015 resolution adopted by the Conference of Chief Justices and the Conference of State Court Administrators, which calls for "100 percent access to effective assistance for essential civil legal needs." As far back as 2006, the American Bar Association had similarly urged "federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction."<sup>6</sup>

**Toby Rothschild practices ethics and professional responsibility law on behalf of legal services programs in California.**



The struggle to guarantee counsel in civil cases involving basic human needs has been played out in courts and legislatures across the country. In California, a right to court-appointed counsel has historically been recognized in a number of noncriminal matters initiated by the state. These include situations involving minors in juvenile delinquency proceedings,<sup>7</sup> for those committed to prison after a Youth Authority commitment,<sup>8</sup> for parents with children in out-of-home care,<sup>9</sup> in specified circumstances for minor respondents in juvenile dependency proceedings,<sup>10</sup> for parents in proceedings to declare children free from parental custody and control,<sup>11</sup> for a noncustodial parent accused of neglect in stepparent adoption proceedings,<sup>12</sup> for defendants in proceedings prosecuted by the state to determine paternity,<sup>13</sup> for defendants in actions to reimburse counties for child support payments under Welfare and Institutions Code Section 11350, for people seeking to overturn certification for intensive treatment for mental health disorders,<sup>14</sup> and in several other situations. Yet, a guaranteed right to counsel in cases involving the potential loss of housing, in child custody cases, and in guardianships and conservatorships remains mostly illusory.

### **Lassiter**

Those hoping for a judicial fiat that would find a right to civil counsel in the federal Constitution must grapple with a 1981 decision in a case called *Lassiter v. Department of Social Services of Durham County*.<sup>15</sup> In that case, the U.S. Supreme Court determined that an indigent parent facing termination of parental rights, in a proceeding initiated by the state, had no due process right to counsel. Due process, the Court held, guarantees a right to appointed counsel only when the indigent litigant “may be deprived of...physical liberty” if he or she loses the case. Unlike *Betts*, *Lassiter* has exhibited remarkable staying power in the three-and-a-half decades since its issuance.

The California Constitution, however, may hold promise for a different result. Within California, a framework for possible future judicial determination of a civil right to counsel was promulgated four years after *Lassiter*, by way of a concurring and dissenting opinion from the California Court of Appeal in the case of *Quail v. Municipal Court*.<sup>16</sup>

The majority opinion in *Quail* is about as pedestrian as it gets. Poor Mr. Quail was evicted from his home, and he filed an appeal to try to overturn the eviction judgment. However, in a pattern that has

become all too familiar in present-day Los Angeles County, there was no court reporter present for the trial, so the aggrieved tenant had to follow the complicated and labor-intensive process of obtaining a “settled statement” for his appeal. This process essentially requires all parties and the trial court to cooperate in recreating an ad hoc version of the court reporter’s trial transcript. Ultimately, the court of appeal’s decision in *Quail* simply remanded the case back to the appellate departments of the superior court to conduct further work on the settled statement. Nothing controversial there.

Yet, it was Mr. Quail’s request for appointed counsel, to be paid by the government—a request which was denied by trial and appellate courts alike—that led to the (partial) dissent, penned by Justice Earl Johnson. Justice Johnson explained that he would have appointed counsel for Mr. Quail for two reasons: first, that Mr. Quail was not only indigent but also suffered from mental disabilities, and, second, more comprehensively, because the California Constitution guarantees state-paid counsel in such cases. The route by which Justice Johnson reached this latter conclusion is fascinating.

Justice Johnson’s dissenting opinion emphasizes that a common law right to counsel in civil cases has existed in California since 1850 and that this right was implicitly recognized by the California Supreme Court in 1919. A digression is in order here. It is a little known fact that, since the adoption of the California Constitution in 1850, the “rule of decision in all the courts of this state”—unless contravened by positive law—is the common law of England. This is so despite the fact that, as of 1850, the United States had long since thrown off the shackles of British imperialism and had established its own common law by judicial decisions throughout the states of the union. Today, this rule is expressly laid out in California Civil Code section 22.2: “The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.”

Justice Johnson’s dissenting opinion in *Quail* firmly establishes that English common law before 1850 provided indigent civil litigants with a right to the assistance of appointed counsel without charge. Citing to the 1917 case, *Martin v. Superior Court*, Justice Johnson quotes Blackstone who wrote that ““paupers...are, by statute...to have original writs and subpoenas gratis, and counsel and attorney assigned them

without fee; and are excused from paying costs....””<sup>17</sup> Marshall, another leading British commentator, wrote, ““With a view to enable such poor persons as have not ability to pay the expenses incidental to the prosecution of an action to enforce their rights, they may, upon such inability being shown, be admitted to sue in forma pauperis. When so admitted the plaintiff is exempt from the payment of court fees, and he is entitled to the service of counsel, and of an attorney, who render their services without reward...””<sup>18</sup> Justice Johnson’s source for these quotes was none other than the California Supreme Court.

In 1917, the California Supreme Court expressly ruled in *Martin* that indigent California litigants were entitled to the same in forma pauperis rights conferred on indigent litigants in England prior to 1850, at least as regards payment of court costs.<sup>19</sup> The supreme court acknowledged that no California statute provided for a waiver of court costs, instead resting its decision on English common law rights as set forth in the writings of Blackstone and Marshall. Because the petitioner in *Martin* already had his own lawyer, the “right-to-counsel” component of English common law was not ripe for review. Nonetheless, the court held that indigent Californians were entitled to a waiver of court fees specifically because that right existed under the common law of England prior to 1850. Justice Johnson’s dissent explained that the logical extension of *Martin* is to grant a right to civil counsel, as well as fee waivers, since the right to appointed counsel likewise existed under English common law.

To the chagrin of those hoping for a decision vindicating a constitutional right to civil counsel, Justice Johnson was always just one vote short. He was in a 2-1 minority in *Quail*, and Quail’s petition for state supreme court review of the denial of his request for counsel garnered only three of the necessary four votes. As Justice Johnson noted in his dissenting opinion: “When some resourceful, lucky indigent lay person finally reaches the California Supreme Court with this issue, the reasoning of *Martin*...should also render choate the right to free counsel in civil cases. Certainly, “English cases prior to 1850...had expressly recognized such a right.”<sup>20</sup>

### **Shriver Act**

To this day, 33 years after *Quail*, we still have no definitive word from the California Supreme Court on the subject of a guaranteed right to civil counsel. For the time being, then, the ball remains in the legislature’s court. Indeed, the California State legislature has acted. In 2009, California

enacted the nation's most comprehensive right to counsel law: the Sargent Shriver Civil Counsel Act, codified at Government Code Sections 68650 et seq. The law establishes numerous pilot projects, funded by increases in court fees, as collaborative ventures between legal service providers and their local superior courts. Many of the projects are colloquially referred to as "Shriver Projects." These projects provide legal assistance and judicial system innovations to help low-income individuals and families facing critical legal problems involving basic human needs. The act also calls for analysis, evaluation, and reports to the legislature, to assess whether the

state needs to provide counsel in other areas in order to ensure equal access to justice. The fundamental goal of the act, and the right to counsel movement as a whole, is to ensure that court cases are decided on the merits, and not on the basis of which party is represented by counsel and which is not.

Ten pilot projects were established in the first five years of the Shriver Act. These programs have provided legal counsel to nearly 27,000 individuals facing the loss of their homes, child custody disputes, or the urgent need for guardianship or conservatorship services. Perhaps the most visible part of the program, at least in Los

Angeles County, is devoted to housing services—essentially, help defending poor people against evictions. Services provided under this branch of the Shriver Act have covered over 73,000 household members.

### Independent Evaluation

Late last year, as required by law, the Judicial Council reported to the California State Legislature the findings of an independent evaluation of the progress of the pilot programs established under the Shriver Act.<sup>21</sup> Those findings clearly established that one of the primary goals of the legislation—to improve the administration of justice by providing free legal counsel in civil cases in which basic human needs are at risk—is being met by Shriver Act lawyers.

The Judicial Council's independent evaluation specifically found that eviction is one of the most critical civil justice issues for low-income individuals. This stands to reason: the loss of housing poses a wide range of short- and long-term risks and consequences for individuals and their families. Homelessness often follows eviction; children's education and well-being are hampered, as families may be uprooted and required to move their children from school to school; and even personal mental and physical health can be adversely affected.

Among eviction cases that received full representation by Shriver Act counsel, the evaluation reported positive outcomes: 1) significantly fewer eviction cases ended with default judgments for eviction, a finding that illustrates a fundamental proposition known to judges throughout the state, viz., that many self-represented litigants lack the basic knowledge or resources needed to file a simple answer in court; 2) once a formal court appearance was made, Shriver Act counsel routinely helped tenants to avoid evictions; 3) most eviction cases ended up settling, thereby providing more certainty for both landlords and tenants; and 4) Shriver Act services supported long-term housing stability. The higher rate of settlement agreements among Shriver Act clients, and the terms of those agreements, improved housing stability.

The Shriver Act pilot projects also handled child custody cases for litigants who qualified. Child custody cases are complex, emotionally charged, contentious, and have the potential for life-altering implications for families and children. Three programs lent Shriver Act services to self-represented parents facing opposing parties with lawyers, when sole custody of a child or children was at issue. Sadly, about half of these cases presented elements of domes-

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tic violence, real or alleged. The evaluation found that cases involving Shriver Act representation improved the administration of justice and resulted in a greater number of collaborative outcomes: A higher proportion of Shriver Act cases resulted in settlement, judicial involvement in settlement conferences increased the rate of settlement, having attorneys on both sides of a child custody dispute increased collaboration between the parties, and significantly fewer Shriver Act cases experienced subsequent requests to modify court orders.

Finally, improving family stability through the establishment of guardianships and conservatorships was the goal of one of the Shriver Act projects. Qualifying cases typically involved significant risk factors for children or disabled persons. Once again, the Judicial Council's independent evaluation highlighted the benefits to society obtained by implementation of a right-to-counsel regime. Court proceedings in Shriver Act cases were more efficient, and translated into cost savings for the court. The combined efforts of Shriver Act representation and probate facilitators reduced court costs by an average of 25 percent per case. First, Shriver Act lawyers were able to successfully file guardianship petitions in cases in which the absence of legal counsel may have otherwise

resulted in an undesirable status quo ante. Secondly, the pilot project helped prevent the need for additional governmental services. Ask any judge, and he or she will tell you that these contested cases in which all parties are being represented by counsel uniformly proceed more efficiently and with superior outcomes, when compared with cases involving pro se litigants. In short, access to justice and the administration of justice are both improved when lawyers are part of the equation. Indeed, equal justice for all can only be truly achieved when there is equal access to justice.

To date, the Shriver Act has been shown to achieve the superior outcomes desired in our legal system. While a guaranteed right to civil counsel in cases involving the potential loss of basic human needs is not (yet) the law of the land, the Shriver Act has demonstrated that the right to civil counsel is a critical element of society's aspirational goal of equal justice for all. ■

<sup>1</sup> National Archives Catalog, Handwritten Petition for a Writ of Certiorari from Clarence Gideon to the Supreme Court of the United States (1961), available at <https://catalog.archives.gov/id/597554> (last viewed Jan. 30, 2018).

<sup>2</sup> *Betts v. Brady*, 316 U.S. 455 (1942).

<sup>3</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>4</sup> Hon. Anna Blackburne-Rigsby, *Ensuring Access to Justice for All: Addressing the "Justice Gap" Through*

*Emphasis on Attorney Professionalism and Ethical Obligations in the Classroom and Beyond*, 27 GEO. J. LEGAL ETHICS 1187, 1189 (2104).

<sup>5</sup> Hon. Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998).

<sup>6</sup> Report of the ABA Task Force on Access to Civil Justice to the House of Delegates, Recommendation at 1 (Aug. 7, 2006), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/l\\_sclaid\\_06A112A.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_sclaid_06A112A.authcheckdam.pdf).

<sup>7</sup> *In re Gault*, 387 U.S. 1, 41 (1967); WELF. & INST. CODE §634.

<sup>8</sup> WELF. & INST. CODE §1781.

<sup>9</sup> *In re Christina H.*, 182 Cal. App. 3d 47, 49 (1986); *Cleaver v. Wilcox*, 499 F.2d 940, 944-945 (9th Cir.1974); cf. WELF. & INST. CODE §317(b).

<sup>10</sup> WELF. & INST. CODE §317 (c).

<sup>11</sup> *In re Jacqueline H.*, 21 Cal. 3d 170, 174, 176 (1978).

<sup>12</sup> *In re Jay R.*, 150 Cal. App. 3d 251, 260-65 (1983).

<sup>13</sup> *Salas v. Cortez*, 24 Cal. 3d 22, 34 (1979).

<sup>14</sup> WELF. & INST. CODE §§5254.1, 5276

<sup>15</sup> *Lassiter v. Department of Soc. Servs. of Durham County*, 452 U.S. 18 (1981).

<sup>16</sup> *Quail v. Municipal Ct.*, 171 Cal. App. 3d 572 (1985).

<sup>17</sup> *Id.* at 580, citing *Martin v. Superior Ct.*, 176 Cal. 289, 294 (1917).

<sup>18</sup> *Quail*, 171 Cal. App. at 580, citing *Martin*, 176 Cal. at 294.

<sup>19</sup> *Martin*, 176 Cal. at 294.

<sup>20</sup> *Quail*, 171 Cal. App. 3d at 581.

<sup>21</sup> Letter from Martin Hoshino, Administrative Director, Judicial Council, to Diane F. Boyer-Vine, Legislative Counsel, et al., regarding Evaluation of the Sargent Shriver Civil Right to Counsel Act (AB 590) (Aug. 4, 2017), available at <http://www.courts.ca.gov/documents/lr-2017-JC-Shriver-civil-right-to-counsel.pdf>.

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## Recent Amendments Clarify Voir Dire Conduct in Civil Matters

**VOIR DIRE LITERALLY MEANS** “to speak the truth.”<sup>1</sup> The modern French translation of voir dire is “to see and say”; therefore, voir dire is to *see* prospective jurors and hear what they have to *say* in response to questions about their prospective service as a juror.<sup>2</sup> In the modern jury system, voir dire is the process by which prospective jurors are questioned about their backgrounds and potential biases before being chosen to sit on a jury. It is the process by which attorneys select, or perhaps more appropriately reject, potential jurors on a case. Allowing attorneys sufficient time to conduct voir dire is essential to ensuring a fair and impartial jury because it is the only opportunity attorneys have to question jurors about potential bias.

Historically, as trial judges on civil cases became concerned about the amount of time spent on voir dire, attorneys on both sides of the aisle, as well as the judiciary, became concerned about arbitrary (or unreasonable) time limits being imposed on voir dire.<sup>3</sup> When arbitrary or unreasonable time limits were imposed, the trial attorney’s ability to identify biased jurors arguably became just as arbitrary.<sup>4</sup> In response, the legislature recently amended Section 225.5 of the Code of Civil Procedure, making it clear that unreasonable and inflexible time limitations shall not be imposed on voir dire in civil cases.<sup>5</sup> The amendments further clarify that trial counsel shall be permitted supplemental time for questioning potential jurors when certain factors are triggered, counsel shall be allowed to make a brief opening statement before voir dire, and requests to use juror questionnaires shall not be arbitrarily refused.

Similar amendments have recently been made to the statutes governing voir dire in criminal proceedings. The focus of this article, however, is on the amendments regarding voir dire in civil trials and methods for civil practitioners to utilize the amendments in conducting voir dire.

### Right to an Unbiased Jury

The importance of having sufficient time to conduct voir dire is rooted in the constitutional right to an unbiased jury. Over 100 years ago, the California Supreme Court recognized that the “right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.”<sup>6</sup>

The California Supreme Court noted that, “[w]ithout an adequate voir dire the trial judge’s responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate voir dire impairs the defendant’s right to exercise peremptory challenges where provided by statute or rule....”<sup>7</sup>

As the U.S. Supreme Court has also stated:

Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the

part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.<sup>8</sup>

The California Constitution guarantees parties a trial by an impartial jury as “an inviolate right.”<sup>9</sup> California law requires jurors to be able to fulfill their role with “entire impartiality.”<sup>10</sup> The impartiality of the jury is an “essential attribute” of the historic right to a jury trial, without which the substantial right to a jury trial is violated. “We therefore conclude that the real essential attributes of the so-called common-law jury trial were at all times ‘number, impartiality and unanimity.’”<sup>11</sup>

As incorporated into the statutory language, the purposes of voir dire are, among other things: 1) to select a fair and impartial jury and 2) to assist counsel in the intelligent exercise of both peremptory challenges and challenges for cause.<sup>12</sup> In utilizing voir dire for these purposes, counsel must be allowed a “liberal and probing examination to discover bias and prejudice with the circumstances of each case.”<sup>13</sup> “Counsel should at least be allowed to inquire into matters concerning which...the population at large is commonly known to harbor strong feelings that may...significantly skew deliberations.”<sup>14</sup>

Only by allowing thorough voir dire can a party intelligently assess whether to challenge a juror for cause. Challenges for cause can be made based upon: “(A) General disqualification—that the juror is disqualified from serving in the action on trial; (B) Implied bias—as, when the existence of facts as ascertained, in judgment of law disqualifies the juror; (C) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.”<sup>15</sup>

### Rules and Standards

Under Section 225.5 and Rule 3.1540 of the California Rules of Court, the trial judge in a civil case begins voir dire with an initial examination. After the completion of the trial judge’s examination, counsel for both parties have the right to conduct questioning.

Rule 3.1540 provides: “Examination of prospective jurors in civil cases” states that, “(b) In examining prospective jurors in civil cases, the judge should consider the policies and recommendations in standard 3.25 of the Standards of Judicial Admin-

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istration.”<sup>16</sup> Standard 3.25 is a rather lengthy direction to the trial judge that “the examination of potential jurors should include the following areas of inquiry and any other matters affecting their qualifications to serve as jurors in the case.”<sup>17</sup>

Standard 3.25(a)(1) provides, in relevant part, that:

The examination of prospective jurors in a civil case...should include all questions necessary to ensure the selection of a fair and impartial jury.... During any supplemental examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover possible bias or prejudice with regard to the circumstances of the particular case.

Standard 3.25(a)(2) provides, in relevant part, that:

In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria: (1) any unique or complex elements, legal or factual, in the case, and (2) the individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.<sup>18</sup>

Standard 3.25(c) directs the trial judge to actually tell jurors that “the parties are entitled to have a fair, unbiased, and unprejudiced jury.” It includes various topics to be covered by the trial judge during voir dire, and the list is extensive. Examples include: the nature of the case, including alleged injuries or damages; whether the juror feels the type of case should be brought into court for determination by a jury; whether the juror or anyone with whom the juror has a significant relationship has ever sued in connection with a similar case; whether any of the parties, witnesses, or attorneys come from a particular national, racial, religious group (or may have a different lifestyle) that would affect the juror’s judgment; or the all-encompassing question of whether there is any other reason that might make the juror “doubtful they would be a completely fair and impartial juror in this case.”<sup>19</sup> Each of these areas of inquiry is designed to elicit honest responses from potential jurors that may shed light on potential bias.

It frequently may take longer than five minutes per juror for an attorney to follow up on the topics covered by the judge. In fact, many of the topics produce answers by potential jurors that require extensive follow-up by an attorney, which is recognized by Section 222.5: “The fact that a

topic has been included in the judge’s examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.”<sup>20</sup>

It is critical to note that Standard 3.25 starts by directing the trial court to tell jurors that “the parties are entitled to have a fair, unbiased, and unprejudiced jury” and ends with the trial court’s asking if there is any reason “that might make them doubtful they would be a completely fair and impartial juror in this case.” As such, blanket time limits with little flexibility affected trial counsel’s ability to follow up on these topics and uncover potential bias.<sup>21</sup>

In fact, a new trial can be granted when a juror conceals during voir dire “a bias, belief or state of mind which prevents a juror from following the court’s instructions and acting in an impartial manner.”<sup>22</sup> Also, the imposition of arbitrary time limits on voir dire can be argued to constitute an irregularity in the proceedings that may support a new trial.<sup>23</sup>

### Section 222.5 Amendments

Section 222.5 was enacted in 1990 to include procedures governing the selection of a fair and impartial jury in civil trials.<sup>24</sup> These procedures were designed to ensure that a party had sufficient opportunity to question the jury and prohibit unreasonable and arbitrary time limits for attorney voir dire.<sup>25</sup> Even with recent amendments to Section 222.5, trial counsel in civil matters were still concerned that unreasonable and arbitrary time restrictions were being imposed on attorney examination during voir dire. These restrictions prompted California SB 658, which sought to amend section 222.5 and foreclose arbitrary time limits on attorney voir dire.

The author of the proposed statutory amendments noted:

The selection of an unbiased jury serves all parties and is crucial to maintaining the integrity of our courts. Currently, judges are setting blanket, arbitrary, and unreasonable time limits for voir dire. Judges use their discretion to set these limits even though CCP §222.5 specifically states not to set blanket time limits. SB 658 would address the issue of unreasonable and arbitrary restrictions on attorney examination of potential members of a jury. Liberal and probing voir dire is necessary to ensure that the Seventh Amendment right to a jury trial is meaningful. The current statute was intended to prohibit these limitations, but its enforcement has eroded in the quarter century since its pas-

sage. Attorneys have reported that in some courts there are arbitrary limits of 20 or 30 minutes for voir dire in unlimited civil jurisdiction cases. Such limits contradict the original intent of the statute.<sup>26</sup>

Effective January 1, 2018, Section 222.5 has been amended to reflect the strong policy prohibiting restrictive time limits on voir dire in civil trials. In fact, the recent amendments make clear that unreasonable and inflexible time limitations shall not be imposed on voir dire. Even though the scope of attorney examination during voir dire is left to the sound discretion of the trial judge, the judge is required to consider the enumerated factors, which include the following: the amount of time requested by trial counsel; any unique or complex elements—legal or factual—in the case; length of the trial; number of parties; number of witnesses; and whether the case is designated as a complex or long cause. These considerations are meant to fashion the scope of voir dire towards the circumstances of the “unique case” that is before the court.<sup>27</sup>

The amendments to Section 222.5 also make clear that counsel shall be permitted supplemental time for questioning jurors when any of the following factors are shown: individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case, composition of the jury panel, and an unusual number of for cause challenges. For instance, unanticipated responses to the topics listed in Standard 3.25 may prompt the need for additional time to question prospective jurors.

Prior to the recent amendments to Section 222.5, a party could request that it be allowed to make a brief opening statement before voir dire. However, the statute was not clear as to whether allowing this mini-opening statement before voir dire was mandatory upon attorney request.<sup>28</sup> Amended Section 222.5 states that, if requested by a party, a brief opening statement shall be allowed by counsel for each party prior to voir dire, thereby removing any doubt as to whether granting an attorney’s request for a mini-opening is mandatory or not. By presenting in a nonargumentative manner the liability and/or damage issues or unique circumstances the jury will be asked to decide, the mini-opening statement affords counsel an opportunity to more efficiently question jurors during voir dire.

Finally, as an additional tool to more efficiently question jurors within time allotments, amended Section 222.5 provides



that a trial judge should not arbitrarily or unreasonably refuse to submit written questionnaires when requested by counsel. The contents of questionnaires must be approved by the court. As such, opposing counsel desiring to use a juror questionnaire are encouraged to work together in submitting mutually acceptable questions. The statutory amendments also make it clear that parties shall be given reasonable time to evaluate the questionnaire responses before oral questioning commences.

### Uncovering Potential Bias

Because Section 222.5 mandates that counsel should be permitted to conduct a “liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case” and “in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause,” it is critical for counsel to identify the unique “circumstances of the particular case” that require more time to conduct a “liberal and probing examination.” One method to identify the unique circumstances that require more time is to identify the applicable CACI Instructions and ask for preinstruction.

In fact, it is prudent to ask the trial judge if the key jury instructions can be read and discussed with jurors. It is improper to ask “any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law.”<sup>29</sup> But one of the directions in Standard 3.25(c) is that the trial judge will ensure jurors “will, without reservation, follow the court’s instructions and rulings on the law and will apply that law to the case.”<sup>30</sup> A juror will need to know what the law is before the judge and counsel can make sure the jury will follow the applicable jury instructions.

On this issue, the California Supreme Court held that “a reasonable question about the potential juror’s willingness to apply a particular doctrine of law should be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial.”<sup>31</sup> The supreme court reasoned that a juror’s blanket promise “to follow whatever instructions the judge may give” may not disclose an attitude or bias towards a specific law that has not been identified. For example, “although nearly everyone adheres to the proposition that the law should be obeyed, a substantial number of motorists, when confronted with the 55-mile-per-hour speed limit...demonstrate that attitudes expressed in the abstract are not always applied in,

or on, the concrete.”<sup>32</sup> The court ultimately held that the defendant could ask prospective jurors in a murder case in which the defense was self-defense: “Would you willingly follow an instruction to the effect that a person has a right to resist an aggressor by using necessary force and has no duty to retreat?”<sup>33</sup>

The supreme court also confirmed that a trial judge can preinstruct prospective jurors during voir dire on key instructions of law.<sup>34</sup> Therefore, counsel should ask permission of the court to read key jury instructions and ask for sufficient time to question prospective jurors on whether they understand the instruction and will they follow the instruction if it is given by the court.

Another important issue which frequently takes a significant amount of time to discuss with prospective jurors is the topic of damages and, more specifically, a prospective juror’s ability to award damages. Although there is not a significant amount of relevant case authority on the topic, a leading treatise confirms that plaintiff’s attorneys are usually permitted to question prospective jurors as to their ability to return a large verdict if supported by the evidence.<sup>35</sup> If counsel represents the plaintiff, he or she should inform the court before trial of the intention to discuss this topic with prospective jurors and the need for sufficient time to do so.

### Submitting a Brief Before Trial

Every good trial attorney is aware that a civil trial can be won or lost in voir dire. After spending years and thousands of dollars (and sometimes hundreds of thousands of dollars) on costs alone to get a case ready for trial, the critical process of voir dire should not be rushed. Fortunately, with enactment of the recent statutory amendments, it is hopeful from the legislative record that a proper balance between the court’s discretion in guiding proper questioning of prospective jurors in a civil trial and counsel’s ability to conduct thorough and meaningful voir dire can be achieved.<sup>36</sup>

As such, a brief submitted before trial is an effective way to outline the amendments and applicable principles. The brief can cite amended Section 225.5 and outline the issues in the case requiring the estimated time for voir dire. The brief can request that a mini-opening statement be allowed, as well as the use of jury questionnaires.

The Judicial Council publishes form questionnaires, which can be used in certain civil cases and also can be attached to the brief. Counsel should be prepared to discuss these issues with the court before

trial, including the need for preinstruction on key jury instructions. If there is a need for supplemental time to question jurors, it is important to clearly identify the specific issues precipitating the need for additional time and tactfully request that additional time from the judge. ■

<sup>1</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>2</sup> *People v. King* 195 Cal. App. 3d 923, 932-933 (1987).

<sup>3</sup> A.B. 1403, Sen. Jud. Comm. (2011-12 Reg. Sess.), as amended Sept. 2, 2011, [hereinafter A.B. 1403] (“This amended version is the consensus result of a working group of plaintiff attorneys, defense attorneys, and judges....The new amendments clarify that trial courts cannot impose blanket, across-the-board time limits to voir dire an entire jury panel.”).

<sup>4</sup> *Id.*

<sup>5</sup> CODE CIV. PROC. §225.5.

<sup>6</sup> *Lombardi v. California St. Cable R. Co.*, 124 Cal. 311, 317 (1899).

<sup>7</sup> *In re Hinchings*, 6 Cal. 4th 97, 110 (1993) (citation omitted).

<sup>8</sup> *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

<sup>9</sup> CAL. CONST. art. I, §16.

<sup>10</sup> CODE CIV. PROC. §225(b)(1)(C).

<sup>11</sup> *People v. Richardson*, 138 Cal. App. 404, 408-409 (1934).

<sup>12</sup> CODE CIV. PROC. §222.5; *Bly-Magee v. Budget Rent-a-Car Corp.*, 24 Cal. App. 4th 318, 324 (1994).

<sup>13</sup> *Bly-Magee*, 24 Cal. App. at 324.

<sup>14</sup> *People v. Williams*, 29 Cal. 3d 392, 406-408 (1981).

<sup>15</sup> CODE CIV. PROC. §225.

<sup>16</sup> CAL. R. OF CT. 3.1540.

<sup>17</sup> STANDARDS RELATING TO EXAMINATION OF PROSPECTIVE JURORS IN CIVIL CASES §3.25.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> CODE CIV. PROC. §222.5.

<sup>21</sup> A.B. 1403, *supra* note 3 (“Not only is voir dire of two minutes or less per prospective juror inadequate to uncover potential bias, it is difficult, if not impossible, to preserve a record on appeal that a juror concealed bias.”).

<sup>22</sup> *Tapia v. Barker* 160 Cal. App. 3d 761, 765 (1984).

<sup>23</sup> CODE CIV. PROC. §657.

<sup>24</sup> A.B. 3820 (Brown, ch.1232, Stat. 1990).

<sup>25</sup> *Id.*

<sup>26</sup> S.B. 658 (2017-18 Reg. Sess.), Sen. Rules Com., as amended May 9, 2017 [hereinafter S.B. 658, May 9]

<sup>27</sup> S.B. 658 (2017-18 Reg. Sess.), Sen. Jud. Comm., April 24, 2017.

<sup>28</sup> S.B. 658, May 9, *supra* note 25.

<sup>29</sup> CODE CIV. PROC. §222.5.

<sup>30</sup> STANDARDS RELATING TO EXAMINATION OF PROSPECTIVE JURORS IN CIVIL CASES §3.25(c).

<sup>31</sup> *People v. Williams* 29 Cal. 3d 392, 410 (1981).

<sup>32</sup> *Id.* at 410 n.14.

<sup>33</sup> *Id.* at 398.

<sup>34</sup> *People v. Elliott* 53 Cal. 4th 535, 559 (2012) (“The trial court correctly informed the jury about the rules governing circumstantial evidence and correctly informed the jury about the governing standard of proof beyond a reasonable doubt.”).

<sup>35</sup> WEGNER, ET AL., CAL. PRAC. GUIDE CIVIL TRIALS AND EVIDENCE, §5:312 (2017). (“For example, in a case involving a \$1 million damage claim, plaintiffs’ counsel may ask:— ‘Assuming liability is established in this case, would you be able to return a verdict for \$1 million?’— ‘Would you require a higher standard of proof on liability in order to return such a verdict?’”).

<sup>36</sup> S.B. 658 (2017-18 Reg. Sess.), Sen. Jud. Comm., Unfinished Bus., as amended Aug. 22, 2017.



by KEVIN RIVERA

# ACCOMMODATING *Attorneys*

The interactive process that a law firm establishes to assist disabled staff is key to selecting appropriate accommodations

**LAW FIRMS** and other legal employers in California have an affirmative legal duty under state and federal law to provide reasonable accommodation to their attorneys with disabilities unless doing so would cause undue hardship. According to the most recent data provided by the Equal Employment Opportunity Commission, 35.3 percent of EEOC claims filed in California in 2017 were based on disability, surpassing the number of claims filed based on any other protected characteristic, including race, sex, color, religion, national origin, or age.<sup>1</sup>

Similarly, the California Department of Fair Employment and Housing (DFEH) reported that the majority of employment-based discrimination claims it received in 2016 were based on disability.<sup>2</sup> This is not surprising given the complexity of the law on accommodating individuals with disabilities. Providing reasonable accommodation to attorneys with disabilities lifts barriers to employment faced by disabled attorneys and serves the larger goal of enabling legal employers to diversify their workforce.

## Reasonable Accommodation

A California employer's duty to provide reasonable accommodation to individuals with disabilities is principally derived from two laws, the federal Americans with Disabilities Act (ADA)<sup>3</sup> and the California Fair Employment and Housing Act (FEHA).<sup>4</sup> The ADA prohibits private sector employers from discriminating against employees on the basis of disability and requires employers to provide reasonable accommodation to qualified applicants and employees with disabilities, unless doing so would cause undue hardship.<sup>5</sup> Like the ADA, the FEHA requires employers to provide reasonable accommodation for the known physical or mental disability of an applicant or employee, unless doing so would impose an undue hardship.<sup>6</sup> One major difference between the FEHA and ADA is that while the ADA applies to employers with 15 or more employees,

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the FEHA applies to employers who regularly employ just five or more employees.<sup>7</sup>

Under the FEHA, an employer has an affirmative duty to provide reasonable accommodation(s) for the disability of an applicant or employee unless it can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.<sup>8</sup> Thus, an employer's duty with respect to disabled attorneys encompasses two distinct yet related obligations: to make "reasonable accommodation" and to engage in an "interactive process." "Reasonable accommodation" refers to a modification or adjustment to the work environment that enables an employee to perform the essential functions of the job he or she holds.<sup>9</sup> An "interactive process" consists of a dialogue between an employer and employee to assist the employer in selecting an appropriate accommodation.<sup>10</sup>

### **Undue Hardship**

If providing a reasonable accommodation for an employee's disability would impose an undue hardship on the employer, the accommodation is not required.<sup>11</sup> The FEHA defines "undue hardship" as "an action requiring significant difficulty or expense" when considered in light of several factors: the nature and cost of the accommodation; the employer's ability to pay for the accommodation; the type of operations conducted at the facility; the impact on the operations of the facility; the number of employees and the relationship of the employees' duties to one another; the number, type, and location of the employer's facilities; and the geographic, administrative, and financial relationship of the facilities to one another.<sup>12</sup>

While the cost of an accommodation and an employer's ability to pay for it are factors used to assess undue hardship, the determination cannot be made by making a cost-benefit analysis.<sup>13</sup> For example, if an organization's only in-house intellectual property attorney with significant experience and expertise requires two months off as a reasonable accommodation to recover from back surgery, and his or her caseload cannot be handled by the organization's other attorneys, the company might engage a legal staffing agency that places highly specialized attorneys in-house on a temporary basis. Granting the leave would not be an undue hardship if the firm has the financial ability to hire a qualified temporary attorney through the staffing agency, even if the cost of doing so will be more than what the company would have paid to the disabled attorney for the same period of time. This is because

whether the cost of a particular accommodation imposes an undue hardship depends on the employer's resources and ability to pay, and not on the accommodation's benefit to the employer and attorney in relation to its cost.

Undue hardship includes "reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business."<sup>14</sup> Law firms and other employers, however, should exercise caution when denying an accommodation based on undue hardship, as "[t]he bar for undue hardship is 'high.'"<sup>15</sup> If the determination is later challenged in court, the employer will have to present "proof of actual imposition or disruption" that would have resulted from granting the accommodation.<sup>16</sup> "Hypothetical or merely conceivable hardships cannot support a claim of undue hardship."<sup>17</sup> Whether a reasonable accommodation will cause undue hardship should be based on a case-by-case basis, careful analysis, and be meticulously documented.

### **Interactive Process**

FEHA regulations provide that the employer must initiate the interactive process when any of the following conditions occur.<sup>18</sup>

**A disabled applicant or employee requests reasonable accommodations.** Importantly, an attorney need not mention the words "reasonable accommodation" when making a request. Any plain English request will suffice. For example, an associate attorney might tell a partner at the firm that his or her migraines are making it difficult to complete tasks on time, that walking from the office to the courthouse is difficult due to a leg injury, or that he or she cannot sit at the office desk for long stretches of time due to back pain flaring up. Each of these would constitute a request for reasonable accommodation, triggering the employer's duty to initiate the interactive process.

**The employer becomes aware of the need for an accommodation through a third party or by observation.** Even if an attorney does not say he or she is disabled or request an accommodation, the employer must nonetheless initiate the interactive process if the employer learns of the need for an accommodation. For example, if an in-house attorney's spouse calls the attorney's boss to advise that the attorney was rushed to the hospital due to a heart condition requiring surgery or an attorney is observed coming into the office in a wheelchair with his or her arm in a cast, either scenario would trigger the employer's duty to start the interactive process.

**A disabled employee has exhausted leave under state or federal law or under the employer's leave policy, and the employee or employee's health care provider indicates that further accommodation is necessary.** Often, an employee's doctor will place an employee on medical leave for a duration that exceeds the amount of leave the employee is entitled to by law or under the employer's leave policy. Employers are required to take a request for such additional time off as a request for accommodation. For example, in a hypothetical situation, an in-house attorney is out under the Family and Medical Leave Act due to a serious health condition, and his or her leave entitlement ends on June 1,<sup>19</sup> and, on May 30, the attorney submits medical documentation to the supervisor indicating that he or she must remain off work until June 25, the employer is required to interpret the doctor's note as a request by the attorney for accommodation for the period starting June 2.

### **Medical Documentation**

If an attorney's disability or need for accommodation is not obvious, his or her employer may require the attorney to provide "reasonable medical documentation" from a health care provider that confirms the existence of the disability and the need for accommodation.<sup>20</sup> In this instance, the employer may require documentation that contains the name and credentials of the attorney's health care provider, a statement that the attorney has a physical or mental condition that limits a major life activity, and a description of why the attorney needs a reasonable accommodation.<sup>21</sup>

The attorney must then cooperate "in good faith" and provide the documentation.<sup>22</sup> If an attorney provides insufficient documentation in response to the employer's initial request, the employer must explain why the documentation is insufficient and give the attorney an opportunity to provide supplemental information in a timely manner from his or her health care provider.<sup>23</sup> Importantly, all such medical information and records obtained during the interactive process must be maintained in a medical file separate from the attorney's personnel file, and must be kept confidential.<sup>24</sup>

### **Accommodations for Attorneys**

An employer is required to consider any and all reasonable accommodations of which it is aware or that are brought to its attention, except for those that create an undue hardship.<sup>25</sup> Thus, the employer should consider all potential accommodations and assess their effectiveness in enabling an attorney to perform the essen-



# MCLE Test No. 276

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at <http://www.lacba.org/mcleselftests>.

1. Disability discrimination was the most reported employment-based discrimination claim made to the California Department of Fair Employment and Housing in 2016.

True  
False

2. Disability discrimination was the third most reported employment-based discrimination claim made to the Equal Employment Opportunity Commission (EEOC) in California in 2017.

True  
False

3. The California Fair Employment and Housing Act (FEHA) applies to employers only if they have 10 or more employees.

True  
False

4. An "interactive process" consists of a dialogue between an employer and employee to assist the employer in selecting an appropriate reasonable accommodation.

True  
False

5. An employer has no obligation to provide a reasonable accommodation to an employee if doing so would cause undue hardship.

True  
False

6. An employer's duty with respect to disabled individuals encompasses two distinct yet related obligations: to make "reasonable accommodation" and to engage in a "communicative dialogue."

True  
False

7. An undue hardship determination may be based on a cost-benefit analysis.

True  
False

8. Employers should be cautious when denying an accommodation based on undue hardship because it is a high bar to meet.

True  
False

9. An employer is required to engage in an interactive process only if an employee specifically requests an accommodation.

True  
False

10. An employer may require an employee to provide medical documentation as part of the interactive process.

True  
False

11. All medical information and records obtained during the interactive process must be maintained in a medical

file separate from the attorney's personnel file.

True  
False

12. The FEHA regulations provide an exhaustive list of all possible types of reasonable accommodations an employer must consider.

True  
False

13. An employer may not require an attorney to take a leave of absence as an accommodation if other reasonable accommodations are available.

True  
False

14. Providing a reduced schedule may be a reasonable accommodation.

True  
False

15. An employer is never required to allow an attorney to bring an animal that provides emotional support into the workplace as a form of reasonable accommodation.

True  
False

16. Permitting a disabled attorney to work from home for a short duration may be a reasonable accommodation.

True  
False

17. An employer does not have to reassign a disabled attorney to a different supervisor as a reasonable accommodation if the current supervisor causes the attorney to experience stress.

True  
False

18. An employer is not required to provide an indefinite leave of absence as a reasonable accommodation.

True  
False

19. An employer has no obligation to provide any further reasonable accommodation once the attorney is no longer disabled.

True  
False

20. The EEOC has taken the position that a law firm has no obligation to lower its billable hours requirement as a form of reasonable accommodation for a disabled attorney.

True  
False

## MCLE Answer Sheet #276



### ACCOMMODATING ATTORNEYS

Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Phone \_\_\_\_\_

State Bar # \_\_\_\_\_

### INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.

2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.

3. Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

Los Angeles Lawyer  
MCLE Test  
P.O. Box 55020  
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-study activity.

5. For future reference, please retain the MCLE test materials returned to you.

### ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

- |     |                               |                                |
|-----|-------------------------------|--------------------------------|
| 1.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 4.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 5.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 6.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 7.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 8.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 9.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
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| 11. | <input type="checkbox"/> True | <input type="checkbox"/> False |
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| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |

tial job functions.<sup>26</sup> Although an employer is required to consider an employee's preferred accommodation, it has the ultimate discretion to choose among effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.<sup>27</sup>

FEHA regulations provide a nonexhaustive list of examples of the different kinds of accommodations that employers may

provide to employees in general, irrespective of industry or the type of work performed.<sup>28</sup> Attorneys with disabilities often require reasonable accommodations similar to those required by employees in other business environments. However, law firms and other legal employers may face unique challenges when providing reasonable accommodation to their attorneys, taking into account factors such as billable-hour requirements, demanding caseloads, and the ability to work under pressure.

secondary office, allowing the attorney to work at the closer office on the days he or she has physical therapy appointments may be a reasonable accommodation.

#### **Providing assistive aids and services.**

For attorneys who are blind or have vision loss, their employer might provide a qualified reader or a computer screen-reading program. For those who are deaf or have hearing loss, the employer might provide

visior's standard oversight of the employee's job performance does not constitute a disability under the FEHA.<sup>29</sup>

**Permitting a disabled attorney to work from home.** For many attorneys, much of their work involves using a computer and communicating via phone and e-mail, which usually can be performed anywhere with an Internet and phone connection. Permitting these attorneys to work from home for a short duration may be a reasonable accommodation, depending on the circumstances. However, if an attorney's essential job functions include collaborating closely with other attorneys in the office and supervising filings, permitting a telecommuting arrangement may not be reasonable.

FEHA regulations provide that employers may also be required to provide reasonable accommodation for the "residual effects of a disability."<sup>30</sup> For example, an attorney may need a schedule change to permit him or her to attend follow-up appointments with a health care provider.

#### **Leaves of Absence**

If an attorney cannot perform the essential job functions or otherwise needs time away from the job for treatment and recovery, holding the position open so the attorney may take a leave of absence may be a reasonable accommodation. Similarly, providing an attorney leave on an intermittent or reduced-schedule basis to obtain planned medical treatment may also be a reasonable accommodation.<sup>31</sup> Employers are not required to provide paid leave, but they may elect to do so. If the attorney can work with a reasonable accommodation other than a leave of absence, the employer cannot require the attorney to go on leave.<sup>32</sup> Importantly, an employer is not required to provide an indefinite leave of absence as a reasonable accommodation, meaning an employer need not provide an open-ended leave with no return date.<sup>33</sup>

In determining the amount of time off to provide, if any, the employer may consider factors such as the size of the employer's organization, how busy the attorney's practice is, and whether the attorney's workload can be distributed to other attorneys at the firm without burdening their workloads. For example, a large law firm with attorneys in multiple offices may be better able to provide a four-month leave of absence as a reasonable accommodation than a small firm with just five attorneys. Because there are no bright-line rules in the statutes or case law as to how much leave, if any, should be provided, this is a heavily litigated area in failure-to-accommodate cases. Therefore,



provide to employees in general, irrespective of industry or the type of work performed.<sup>28</sup> Attorneys with disabilities often require reasonable accommodations similar to those required by employees in other business environments. However, law firms and other legal employers may face unique challenges when providing reasonable accommodation to their attorneys, taking into account factors such as billable-hour requirements, demanding caseloads, and the ability to work under pressure.

Following are various examples of reasonable accommodations that may be provided to attorneys with disabilities.

**Making existing facilities readily accessible to and usable by disabled attorneys.** This may include providing accessible office space, break rooms, and restrooms, acquiring or modifying furniture, equipment, or devices, or making other similar adjustments in the work environment. For example, a firm may need to provide an attorney with a wheelchair-accessible desk and arrange furniture in the office to clear a path so that the attorney can easily maneuver about in a wheelchair.

**Transferring an attorney to a more accessible office building.** If a law firm has more than one office location, temporarily transferring an attorney to a different office may be a reasonable accommodation. For example, if an attorney has weekly physical therapy appointments near his or her firm's

a qualified notetaker or sign language interpreter, or use real-time captioning technology (a service similar to court reporting in which a transcriber types what is being said at a meeting or event into a computer that projects the words onto a screen).

**Job restructuring.** This method may include reallocation or redistribution of an attorney's nonessential job functions. For example, a litigator's essential job functions may entail legal research, drafting briefs, and taking depositions, and non-essential job functions may include entertaining clients, updating the firm's legal blog, and serving on the firm's hiring committee. Temporarily reassigning these non-essential functions to another attorney may be a reasonable accommodation.

**Modifying supervisory methods.** An employer may need to modify the ways in which it exercises supervisory oversight of an attorney's performance as a reasonable accommodation. For example, for an attorney with a learning disability, this might mean that instead of requiring that a brief be completed by a certain date, the supervising attorney may set different deadlines for completing the fact, law, and analysis sections, or using daily, weekly, and monthly task lists. Modifying supervisory methods does not require assigning an attorney to a new supervising attorney. An employee's inability to work for a particular supervisor due to anxiety or stress related to the super-



it is important that employers carefully document their analysis when determining the appropriate amount of time off to provide and its impact on the employer's business operations.

### Billable-Hour Requirements

Like the ADA, the FEHA regulations provide that where a quality or quantity standard is an essential job function, an employer is not required to lower the standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its quality or quantity standards.<sup>34</sup> The EEOC has taken the position, with respect to the ADA, that "a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable-hour requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement."<sup>35</sup> Thus, under the ADA and FEHA, a law firm's billable-hour requirement may be an essential job function tied to a quantity standard, and a firm would have no obligation to reduce or waive its billable-hour requirement as an accommodation.

However, a law firm may not penalize an attorney for failing to meet its billable-hour requirement if the firm has granted the attorney leave as an accommodation and the attorney's failure to meet the hours requirement is due to taking the leave. The EEOC has advised that penalizing an attorney in such instance would amount to retaliation for the attorney's use of a reasonable accommodation, would violate the ADA, and would render the leave an ineffective accommodation.<sup>36</sup> An employer should also exercise caution if it plans to give an attorney an unsatisfactory performance review when the attorney was out on leave for a significant portion of the review period. Otherwise, it may violate the ADA and FEHA, and amount to retaliation. Instead, the employer should delay the evaluation for several months until after the attorney has resumed a normal workload, thus enabling the firm to conduct a more accurate review of the attorney's work.

Attorneys with disabilities may require a range of accommodations to perform the essential functions of their jobs. Legal employers can take a number of steps to create a climate in which their attorneys feel comfortable requesting an accommodation and to ensure that attorneys and managers are aware of their legal obligations. At a minimum, employers should have clear, written policies and procedures

in place for handling accommodation requests and that confirm the employer's commitment to nondiscrimination and providing reasonable accommodation. Employers can also ensure that their attorneys and other employees receive proper training on the interactive process and reasonable accommodation requirements. ■

<sup>1</sup> U.S. Equal Emp. Opportunity Comm'n, EEOC Charge Receipts by State (includes U.S. Territories) and Basis for 2016, available at [https://www1.eeoc.gov/eeoc/statistics/enforcement/state\\_17.cfm](https://www1.eeoc.gov/eeoc/statistics/enforcement/state_17.cfm).

<sup>2</sup> California Dep't of Fair Emp. and Housing, 2016 Annual Report (2017).

<sup>3</sup> 42 U.S.C. §§12101 *et seq.*

<sup>4</sup> Gov't CODE §§12900 *et seq.*

<sup>5</sup> 42 U.S.C. §12112(b)(5)(A).

<sup>6</sup> Gov't CODE §12940(m).

<sup>7</sup> 42 U.S.C. §12111(5)(A); Gov't CODE §12926(d).

<sup>8</sup> CAL. CODE REGS. tit. 2, §11068(a).

<sup>9</sup> Nealy v. City of Santa Monica, 234 Cal. App. 4th 359, 373 (2015); CAL. CODE REGS. tit. 2, §11065(p).

<sup>10</sup> Gov't CODE §12940(n); CAL. CODE REGS. tit. 2, §11069(a).

<sup>11</sup> Gov't CODE §12940(m).

<sup>12</sup> Gov't CODE §12926(u). The Job Accommodation Network (JAN) provides cost information for reasonable accommodations at <http://askjan.org/links/faqs.htm> and <http://askjan.org/media/LowCostHighImpact.doc>. The California Department of Rehabilitation, at [www.dor.ca.gov](http://www.dor.ca.gov), offers programs that may offset the costs of accommodations.

<sup>13</sup> U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), #45.

<sup>14</sup> EEOC v. Placer ARC, 114 F.Supp.3d 1048, 1058

(E.D. Cal. 2015).

<sup>15</sup> *Id.*

<sup>16</sup> EEOC v. Abercrombie & Fitch Stores, Inc., 966 F. Supp. 2d 949, 962 (N.D. Cal. 2013).

<sup>17</sup> *Id.*

<sup>18</sup> CAL. CODE REGS. tit. 2, §11069(b).

<sup>19</sup> The Family and Medical Leave Act (FMLA) and analogous California Family Rights Act (CFRA) provide up to 12 weeks of unpaid leave per year to employees who meet certain eligibility requirements and who work for employers with 50 or more employees. An employer's obligation to provide reasonable accommodation exists independently of its duty to comply with the FMLA, CFRA, and other leave laws.

<sup>20</sup> CAL. CODE REGS. tit. 2, §11069(c)(2).

<sup>21</sup> CAL. CODE REGS. tit. 2, §11069(d)(5)(A),(B).

<sup>22</sup> CAL. CODE REGS. tit. 2, §11069(d).

<sup>23</sup> CAL. CODE REGS. tit. 2, §11069(d)(5)(C).

<sup>24</sup> CAL. CODE REGS. tit. 2, §11069(g).

<sup>25</sup> CAL. CODE REGS. tit. 2, §11068(e).

<sup>26</sup> CAL. CODE REGS. tit. 2, §11069(c)(7).

<sup>27</sup> CAL. CODE REGS. tit. 2, §11069(c)(8); Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 228 (1999).

<sup>28</sup> CAL. CODE REGS. tit. 2, §11065(p).

<sup>29</sup> Higgins-Williams v. Sutter Medical Found., 237 Cal. App. 4th 78, 84-85 (2015).

<sup>30</sup> CAL. CODE REGS. tit. 2, §11068(g).

<sup>31</sup> CAL. CODE REGS. tit. 2, §11069(d)(9).

<sup>32</sup> CAL. CODE REGS. tit. 2, §11068(c).

<sup>33</sup> CAL. CODE REGS. tit. 2, §11068(c).

<sup>34</sup> CAL. CODE REGS. tit. 2, §11068(b).

<sup>35</sup> EEOC, Reasonable Accommodations for Attorneys with Disabilities (2011), available at <https://www.eeoc.gov/facts/accommodations-attorneys.html>; see also, Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 405-406 (2002) (lawyer who could not meet law firm's minimum billable hours requirement would not be performing an essential function of position).

<sup>36</sup> *Id.*



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by Lisa R. Pruitt and Rebecca H. Williams

# RURAL JUSTICE

**While Southern California can boast well over 100,000 attorneys, a mere 1,500, about 1 percent, serve its rural inhabitants**

**WHEN** Californians think “rural,” their initial association is probably the Great Central Valley—the food basket for the state and, indeed, the nation. Southern California, on the other hand, evokes images of urban enclaves like Hollywood and Beverly Hills, the sprawling suburbs of the San Fernando Valley, and, for the wider region, the beach life. Rural communities, however, are scattered throughout California, including the state’s southern third. All Southern California counties—Los Angeles, Orange, San Diego, Imperial, Riverside, San Bernardino, Ventura, and Santa Barbara—are considered metropolitan, signifying a county population of 100,000 or more.<sup>1</sup> Yet many of these counties—especially in the Inland Empire—are massive in terms of land area and include significant pockets of rurality.

Although Southern California is home to 113,023 attorneys, nearly 99 percent (111,545) of them practice in urban areas.

Fewer than 1,500 attorneys (barely above 1 percent) work in the region’s rural zones. The ratio of attorneys to urban residents is 1 to 188, while each rural lawyer serves nearly four times as many residents, or 1 to 704.

Some three million people—more than eight percent of California’s population—live in rural areas and small towns.<sup>2</sup> Like their urban counterparts, rural Californians often struggle for access to affordable and safe housing, steady and fair employment, adequate healthcare, immigration advice, educational opportunities, and public assistance.<sup>3</sup> While these challenges are not unique to rural places, the demographic characteristics associated with rural communities (e.g., less educated, older, higher rates of disability) and their geographic features (sparse populations and small population clusters, sometimes isolated from metropolitan areas by mountains and deserts) are often barriers to legal service delivery.

Relatively few lawyers serve rural Californians, and the California Commission on Access to Justice would like to see that change.

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HADI FARAHANI





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NEXT 300 MILES •

The commission seeks to raise urban lawyers' awareness of their rural counterparts. A key reason for doing so is that attorneys in places like Los Angeles are well situated to alleviate rural access-to-justice deficits throughout Southern California.

### The Rural Socioeconomic Scene

While about one-sixth of Americans reside in rural locations, rural America is home to just 2 percent of small law practices.<sup>4</sup> This imbalance aggravates the justice gap along the rural-urban axis. In recent years, the *New York Times* and the *ABA Journal*

percent of rural Americans did so;<sup>10</sup> child poverty rates were 19 percent and 22 percent, respectively.<sup>11</sup> California data for 2008-12 reveal a similar disparity in poverty rates between urban and rural populations. While California's urban poverty rate was 17.5 percent in the wake of the Great Recession,<sup>12</sup> the rural poverty rate was 18.9 percent.<sup>13</sup> Rural economies also have been slower to rebound in the decade since the crisis.<sup>14</sup> The rural population also includes disproportionately high percentages of veterans, the elderly, and people living with disabilities—all highly vulner-

then-chair of the commission, the report recognizes that rural Californians confront a wide range of legal issues, often without counsel.<sup>18</sup> Indeed, rural Californians get the short end of legal aid funding, as illustrated by the fact that just \$18.56 per poor person goes to serve those in rural counties, compared with a mean of \$44.43 per poor person in the state's seven most urban counties (including Los Angeles and Orange), and \$26.43 in counties with mixed rural and urban populations.<sup>19</sup> Since the report's publication, the rural-urban funding gap has widened, with rural funding tumbling

County	Attorney Count	Total Population	Residents per Attorney	Area in Square Miles	Attorneys per Square Mile
Imperial County	167	177,026	1,060.04	4,481.67	0.037
Los Angeles County	62,775	9,969,234	158.81	4,546.65	13.807
Orange County	19,406	3,086,331	159.04	811.91	23.902
Riverside County	3,928	2,266,899	577.11	7,303.05	0.538
San Bernardino County	2,756	2,078,586	754.20	20,105.13	0.137
San Diego County	18,856	3,183,143	168.81	4,271.01	4.415
Santa Barbara County	1,876	431,555	230.04	2,860.11	0.656
Ventura County	3,233	835,790	258.52	1,868.12	1.731
<b>Total for Southern California</b>	<b>112,997</b>	<b>22,028,564</b>	<b>194.95</b>	<b>46,247.65</b>	<b>2.443</b>

have featured front-page stories on this increasingly acute phenomenon.<sup>5</sup> Several states have begun to probe the details of their rural lawyer shortages<sup>6</sup> and to develop strategies for ameliorating these rural deficits. Most notably, in 2013, South Dakota became the first state to pay attorneys annual stipends for moving to and practicing in underserved rural counties.<sup>7</sup>

A shortage of attorneys is hardly the only challenge facing rural residents. A recent *Wall Street Journal* article ran the startling headline, "Rural America is the New 'Inner City,'" replete with charts illustrating how rural places now lag behind even center cities (never mind suburbs and small cities) in numerous measures of well-being, e.g., percentage of adults with college degrees, percentage of males 16 and older with jobs, teen pregnancy, and mortality caused by cardiovascular disease, cancer, and chronic lung disease.<sup>8</sup>

Thus, it should come as no surprise that rural poverty rates exceed those in urban areas, and this has been the case for decades.<sup>9</sup> While 13 percent of urban Americans lived in poverty in 2015, 16.7

able populations with distinct legal needs.<sup>15</sup>

In part because of these vulnerabilities, many rural Americans need legal advice to secure state and federal benefits to which they are entitled.<sup>16</sup> The same is true, of course, for rural Californians, including those in Southern California. Although a higher percentage of rural Californians live in poverty, a lower percentage of them receive government aid, such as Temporary Assistance to Needy Families.<sup>17</sup> This mismatch may be due to lack of legal assistance in securing such benefits, suggesting just one type of rural legal need that too often goes unmet.

### Improving Rural Civil Justice

Concerns about rural access to justice have held the attention of the California Commission on Access to Justice for some time, and in 2010, the commission published a pathbreaking report, *Improving Civil Justice in Rural California*. The 76-page document has become a national standard-bearer on rural access issues. Compiled and published under the leadership of Justice Ronald B. Robie, Third District Court of Appeals and

to \$14.72 per poor resident and urban funding rising to \$47.23, nearly three times the rural rate.<sup>20</sup>

The report also enumerated some of the challenges that rural Californians disproportionately face. Rural residents are more likely to live in manufactured and/or temporary housing,<sup>21</sup> either of which is more often characterized by living conditions that violate housing and safety code regulations.<sup>22</sup> Rural residents are also more likely to experience home foreclosure without proper legal counsel.<sup>23</sup>

Like their urban counterparts, workers in rural areas need legal counsel when they experience labor violations. In particular, rural California is home to hundreds of thousands of agricultural workers, a significant percentage of whom live in rural areas.<sup>24</sup> Many seasonal laborers in the food and agriculture industry, for instance, are unaware of their rights or are unable to enforce them without legal assistance.<sup>25</sup> Often undocumented, these individuals are especially vulnerable to exploitative and substandard working and housing conditions.<sup>26</sup> These workers are also less likely

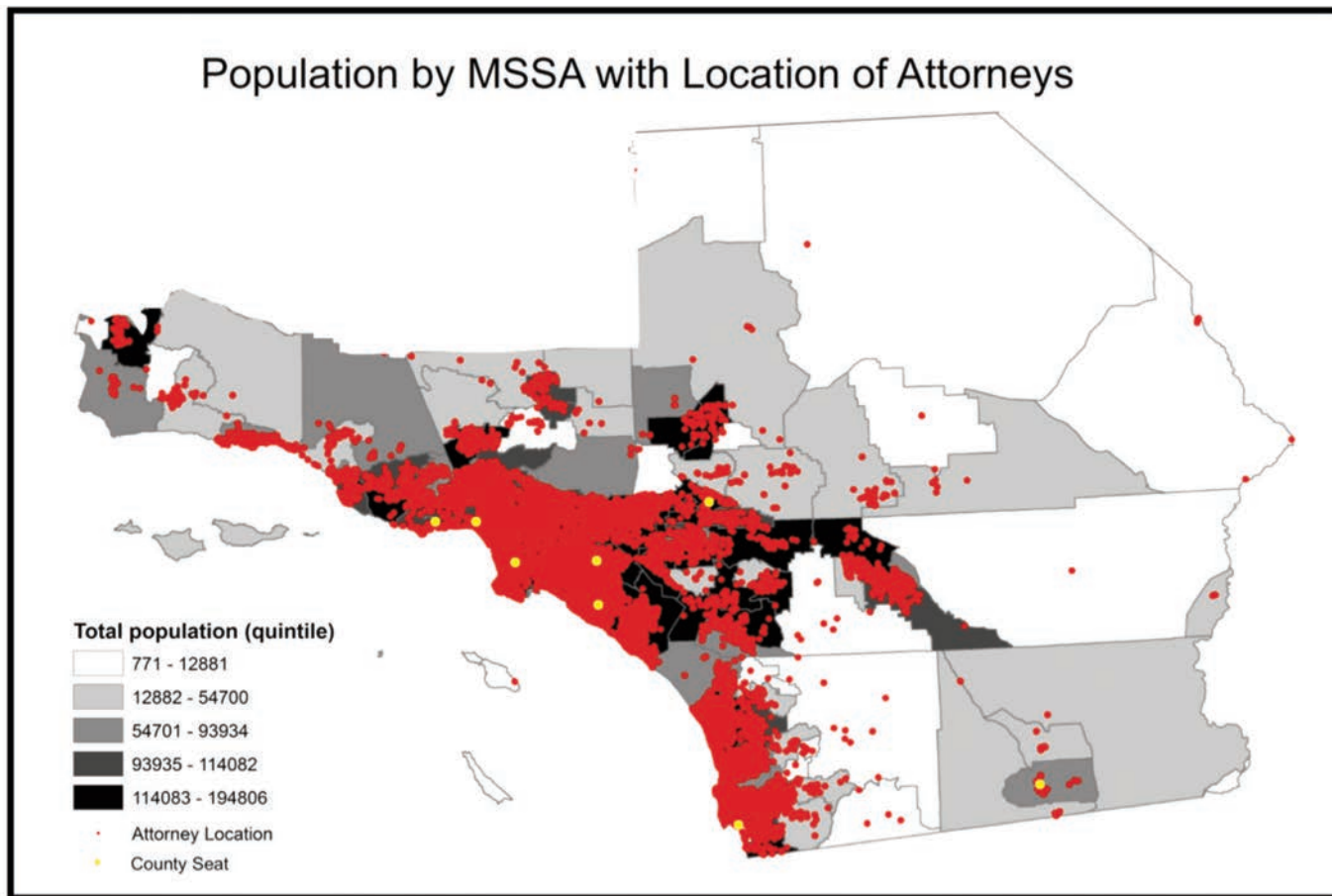


to ask for legal assistance due to language barriers or out of fear for what will happen if they disclose their immigration status.<sup>27</sup>

Rural communities are almost by definition geographically isolated from population centers and services offered there. The dearth of public transportation in rural places can render burdensome, if not prohibitive, travel to and from institutions that provide all sorts of services—including health care, social services, and legal assistance.<sup>28</sup> Lack of accessible legal advice means vulnerable populations may be less able to get other services, avoid consumer

the problem has not been analyzed until recently.<sup>33</sup> An ex officio member of the California Commission on Access to Justice, Professor Emeritus James W. Meeker of the School of Social Ecology at UC Irvine,<sup>34</sup> and his students, Xiyue Wang and Carrie Reiling, analyzed California's 2016 attorney address data utilizing the concept of Medical Service Study Areas (MSSAs) to differentiate points along the rural-to-urban continuum. The MSSAs are clusters of census tracts.<sup>35</sup> The MSSA taxonomy divides states into subcounty geographical units, which are then categorized as "urban," "rural,"

about 23 million people living within an area that spans almost 49,000 square miles. More than 95 percent of Southern California residents live in areas categorized as urban under the MSSA scheme, while less than five percent reside in rural and frontier areas. The distribution of attorneys, however, is even more lopsided. As noted above, Southern California is home to more than 113,000 attorneys, of whom just one percent practice in rural and frontier areas. The distribution of attorneys in relation to population and poverty rates is depicted in the table on page 28.



fraud, and maintain their independence.<sup>29</sup>

Aggravating this lack of face-to-face access is the fact that rural folks are also less likely than urban residents to have access to technology, including cell phones, computers, and Internet access—especially broadband.<sup>30</sup> Only 58 percent of rural Californians have Internet access, compared with 63 percent of their urban counterparts.<sup>31</sup> These deficits in technology infrastructure impede access to self-help resources, educational materials, and government websites.<sup>32</sup>

#### Attorney Availability

While anecdotal evidence has for some time suggested a shortage of attorneys in California's rural areas, data quantifying

or "frontier." Urban MSSAs have a population ranging from 75,000 to 125,000, reflect recognized community and neighborhood boundaries, and have similar demographic and socioeconomic characteristics.<sup>36</sup> Rural MSSAs have a population density of fewer than 250 persons per square mile with no population center exceeding 50,000, and "frontier" MSSAs have a population density of fewer than 11 persons per square mile.<sup>37</sup>

Using these simple categories to examine closely eight Southern California counties reveals the stark disparity between the number of lawyers practicing in the region's urban centers and those in rural and frontier areas. MSSA data for the entire region from 2010 reveals a total population of

The spatial impediments to accessing legal assistance are even more dramatic when one considers the vastly greater land area that rural and frontier attorneys in Southern California must cover. Just over 17 percent of Southern California's land area (8,049 square miles) is "urban," as defined by the MSSA scheme. By contrast, around 36 percent (17,775 square miles) is categorized as rural, and more than 47 percent (22,945 square miles) is frontier. Because plentiful urban attorneys are concentrated within a relatively small area, Southern California's urban areas average a robust 13 attorneys per square mile. Rural areas, however, average one attorney for every 7.25 square miles, and frontier areas average one attorney for every 373

square miles. Thus, residents of rural and frontier areas in Southern California are grossly underserved. The map on page 29 illustrates this phenomenon. Every red dot represents an attorney, and each yellow dot is a county seat. The lighter the background, the lower the population density.

When viewed on a county-by-county

largest city and county seat, El Centro. Just 20 attorneys practice in the other four Imperial County MSSAs combined, though they are collectively home to more than half of the county's population. For residents living outside the county seat, traveling to the nearest attorney is, at best, an inconvenience.<sup>42</sup> Those who are undocumented

While Southern California's inland counties account for the majority of the region's rural land area, the rural attorney shortage is also evident in coastal areas. Among Southern California's coastal counties, all but one—the entirely urban Orange County—feature rural or frontier MSSAs in which attorneys are in short supply.

## **With abundant data detailing rural justice deficits in Southern California, Los Angeles attorneys and firms looking for pro bono opportunities need look no further than the rural communities in their own backyards.**

basis, Meeker's data spotlight particular regions of Southern California in which the rural attorney shortage is most acute. For example, in Imperial County, there are several socioeconomic and demographic factors that create a particularly great need for accessible and affordable legal assistance. Imperial County is by far the most rural Southern California county, with no urban MSSAs. The county's population is more than 80 percent Hispanic, its economy is largely agricultural, and many of its residents are migrant workers.<sup>38</sup> Because agricultural labor is highly seasonal, Imperial County has one of the highest unemployment rates in the nation—about 20 percent.<sup>39</sup> Imperial County also has the highest percentage of rural poor among the eight Southern California counties examined. Nearly one in four residents live below the poverty line.<sup>40</sup> Additionally, residents of Imperial County are geo-physically isolated from the rest of Southern California. The county is bordered by mountain ranges to the north and west, desert (and a different jurisdiction, Arizona) to the east, and Mexico to the south.<sup>41</sup>

### **Unmet Need**

These circumstances suggest a great unmet need in Imperial County, in which just 167 lawyers practice. (These attorney data figures include not only attorneys in private practice or otherwise accepting clients but also include judges, prosecutors, public defenders and others employed by public agencies.) With the fewest attorneys among all Southern California counties, Imperial County has a very poor attorney-to-resident ratio: each attorney serves an average of 1,060 residents. Compounding matters, the vast majority of Imperial County attorneys—147 of them (88 percent)—are clustered within a single MSSA, the county's

will face additional challenges. Due to its proximity to the Mexico-U.S. border, border patrol agents and checkpoints pepper the main thoroughfares to and from El Centro.<sup>43</sup>

Other Inland Empire counties also present significant access-to-justice concerns. San Bernardino County is the largest county in the contiguous United States with a landmass greater than Rhode Island, New Jersey, Delaware, and Connecticut combined.<sup>44</sup> It stretches from the city of San Bernardino to the Nevada border, encompassing a significant portion of the San Bernardino Mountains and Mojave Desert. It also includes, by far, the greatest amount of rural territory among all Southern California counties: nearly 20,000 square miles—96 percent of the county—are rural or frontier.<sup>45</sup> Such geographic vastness presents significant logistical, transportation, and financial challenges for those living in the county's far-flung reaches.

Only 255 attorneys work in rural parts of San Bernardino County, and seven of the county's 26 MSSAs have fewer than 10 attorneys each. The situation is further aggravated by the concentration of the county's attorneys in the southwest corner of San Bernardino County, where most urban MSSAs are located. Traveling to meet a lawyer is a particular burden on the 21 percent of San Bernardino County's rural and frontier residents who live near or below the poverty line.<sup>46</sup>

San Bernardino County's neighbor to the south, Riverside County, has a smaller rural land area (5,778 square miles), as well as a smaller rural population (73,659). However, Riverside County also has the fewest rural attorneys—just 65—among all Southern California counties. As a result, the average rural Riverside County attorney serves 1,133 residents and nearly 90 square miles.

Even Los Angeles County—home to California's most populous city and the second most populous in the nation—has the second largest rural population among Southern California counties, with nearly 200,000 rural residents.<sup>47</sup>

### **Call to Action**

As the data indicate, Southern California is not without some distinctly rural access-to-justice challenges. Some of these arise, in part, from the dramatically uneven distribution of lawyers across the region. While rural residents would doubtless benefit from attorneys who live and work in their communities,<sup>48</sup> an important short-to-midterm strategy is to take advantage of existing urban resources, channeling some of those resources to the region's rural pockets. As a starting point, Los Angeles lawyers can help ameliorate rural deficits by doing pro bono work in rural communities. The American Bar Association strongly encourages pro bono work, recommending that lawyers provide at least 50 hours of pro bono legal services per year to “persons of limited means” or to “charitable, religious, civic, community, governmental and educational organizations” that serve those of modest means.<sup>49</sup>

With abundant data detailing rural justice deficits in Southern California, Los Angeles attorneys and firms looking for pro bono opportunities need look no further than the rural communities in their own backyards. Indeed, the opportunity to serve rural clients should appeal to urban lawyers. UCLA law professor Richard L. Abel has observed that “[l]awyers prefer to do pro-bono far removed from their paying work, substantively and often geographically, partly to avoid conflict of interest (actual and positional), and partly for the sake of novelty.”<sup>50</sup> Rural Southern



California features an abundance of the novelty factor for Los Angeles attorneys willing to step outside their metropolitan comfort zones.

Urban bar associations can encourage attorneys to fulfill their pro bono responsibilities, at least in part, by serving rural clients.<sup>51</sup> Attorneys and firms based in metropolitan areas can jump-start their rural pro bono efforts by partnering with rural bar associations and nonprofits serving rural communities.<sup>52</sup> Such collaborations can effectively leverage the vast resources of the urban bar with the cultural know-how of rural practitioners and organizations.<sup>53</sup>

Another way rural communities can capitalize on urban resources is to use technology in innovative ways that connect rural clients with those resources. In addition to using online resources for legal aid, rural clients could also connect to urban lawyers via video conferencing, phone calls, e-filing, faxing, e-mail, or other electronic means.<sup>54</sup> Clients benefit when they avoid the cost of unnecessary travel.<sup>55</sup>

OneJustice is an example of an organization that literally drives urban attorneys to meet the legal needs of rural communities. Through its Justice Bus Project, OneJustice transports attorney and law student volunteers from urban Los Angeles, San Diego, and Orange County to rural areas in Southern California.<sup>56</sup> Volunteers typically partner with local legal aid organizations to staff free legal clinics and offer counseling on a variety of issues tailored to the communities' needs.<sup>57</sup> Since its inception, the Justice Bus Project has brought almost 2,000 volunteers into rural and underserved areas, providing legal services to more than 5,000 low-income Californians.<sup>58</sup>

OneJustice also harnesses the power of technology and the local expertise of rural community organizations to connect urban attorneys with rural immigrants via Rural Immigrant Connect, an innovative project created out of a partnership between OneJustice and Silicon Valley-based Fenwick & West.<sup>59</sup> The program enables Bay Area and Silicon Valley attorneys to assist Central American and Mexican immigrants living in the rural Central Valley by pairing attorneys from these urban law firms with rural immigrant clients.<sup>60</sup> After an initial in-person meeting, attorneys communicate with their clients primarily through videoconferencing.<sup>61</sup> OneJustice facilitates this communication by placing laptops at rural community organizations in the Central Valley, providing clients with easy access and in-person technological support.<sup>62</sup>

The program provides both substantive and cultural competency training for pro bono attorneys, from mentor attorneys

with expertise in immigration law to video trainings attorneys can view online, at their convenience.<sup>63</sup> While the program is currently limited to the Central Valley, OneJustice aims to use data from Rural Immigrant Connect to create a model that can be replicated across the United States.<sup>64</sup> It is easy to imagine a similar program connecting Los Angeles attorneys with immigrants in the Imperial Valley and other rural pockets of Southern California.

### California Rural Legal Assistance

California Rural Legal Assistance (CRLA) is another organization that has built relationships with urban law firms to facilitate the provision of pro bono services to rural populations. CRLA has more than 20 offices and 50 staff attorneys, but it covers thousands of square miles of rural, agricultural California.<sup>65</sup> The organization fosters partnerships with large urban firms whose attorneys can volunteer in rural field offices, take client referrals, offer clinics, or advise CRLA staff attorneys.<sup>66</sup> One such law firm, for example, worked with CRLA in 2015 in "challenging an Imperial Valley School district's discriminatory discipline practices, working to end the criminalization of homelessness in the town of Manteca, and representing a trafficking victim with an immigration matter."<sup>67</sup> The collaboration allowed the firm's attorneys to benefit from working on unique cases for inspirational clients, and CRLA clients benefitted from the firm's experience in litigating complex legal matters.<sup>68</sup>

Southern California law schools in Los Angeles and beyond can also play critical roles in meeting the needs of rural communities. A great starting point is to increase student awareness of the extensive career and public interest opportunities in rural communities.<sup>69</sup> Law schools can pique student interest in rural practice by offering coursework relevant to rural legal issues or incorporating rural perspectives into classroom discussions.<sup>70</sup>

Schools should also encourage experiential learning opportunities in rural communities, whether through school-sponsored clinics or independent summer programs.<sup>71</sup> Students participating in the Community and Economic Development Clinic at the UC Irvine School of Law, for example, had the opportunity to represent farmworkers living in a substandard mobile-home park in Riverside County's Coachella Valley.<sup>72</sup> The Legal Services Corporation and Equal Justice Works sponsor Rural Summer Legal Corps, a program offering law students "intensive training from poverty law experts on housing, domestic violence, public benefits, migrant

farmworkers, Native American, and family law."<sup>73</sup> That training prepares students for summer placements with civil legal aid organizations in rural locales across the United States.<sup>74</sup> Law schools can also play a critical role with their loan repayment assistance programs. When law schools provide this sort of fiscal support, qualifying law graduates have fewer financial worries about the potential precariousness of rural practice, and all who desire to make careers doing public interest work—which should include private practice in under-served rural locales—are more likely to realize that goal.<sup>75</sup>

Finally, the report, *Improving Civil Justice in Rural California*, recommends that rural areas ramp up recruitment and retention efforts for both novice and experienced attorneys.<sup>76</sup> Law schools can assist in this effort by collaborating with or sponsoring attorney incubator programs to prepare new attorneys for rural practice.<sup>77</sup> Incubator programs, which have proved very successful in Los Angeles,<sup>78</sup> Orange County,<sup>79</sup> and San Diego,<sup>80</sup> provide new law school graduates with practical legal experience and knowledge of how to manage a law practice.<sup>81</sup> Such programs could productively target those open to serving Southern California's rural areas, and they could tailor curricula to rural practice. Because incubators focus on equipping lawyers to market themselves to and serve low-income and modest-means clients, they produce the sort of truly practice-ready professionals rural areas so desperately need.<sup>82</sup>

The 2010 report recognized that filling the gaps in rural access to justice will require simultaneous implementation of a range of strategies, including a coordinated effort among key stakeholders. These stakeholders include legal aid providers, self-help centers, local bar associations, county law libraries, and rural community leaders, along with the legal education community and key personnel in the judicial system.<sup>83</sup> The human capital and resources of California's rural communities, however, will not alone be sufficient to meet the growing legal needs of these communities. Urban lawyers and resources will be necessary to alleviate rural justice deficits. ■

<sup>1</sup> CAL. EMP. DEV. DEP'T, CALIFORNIA COUNTIES AND METROPOLITAN AREAS (Nov. 2015), [http://www.labormarketinfo.edd.ca.gov/file/maps/Counties\\_MetrAreas.pdf](http://www.labormarketinfo.edd.ca.gov/file/maps/Counties_MetrAreas.pdf).

<sup>2</sup> Housing Assistance Council, Rural Data Portal, <http://www.ruraldataportal.org/> (roll cursor over California on U.S. map) (last visited Sept. 6, 2017). The HAC defines "rural" as "less than 16 housing units per square mile (.025 housing units per acre) and "small town" as 16 to 64 housing units per square

mile (.025 to 0.1 housing units per acre), and a low degree of commuting to a metropolitan core area. See also CAL. COMM'N ON ACCESS TO JUSTICE, IMPROVING CIVIL JUSTICE IN RURAL CALIFORNIA 6 (2010) [hereinafter RURAL JUSTICE], [http://www.calbar.ca.gov/Portals/0/documents/accessJustice/CCAJ\\_2010\\_FINAL\\_2.pdf?ver=2017-05-19-133105-073](http://www.calbar.ca.gov/Portals/0/documents/accessJustice/CCAJ_2010_FINAL_2.pdf?ver=2017-05-19-133105-073) (reporting that, according to the 2000 U.S. Census, seven percent of California's population lived in rural California).

<sup>3</sup> RURAL JUSTICE, *supra* note 2, at 25-29.

<sup>4</sup> See Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. Rev. 466, 469 (2014) [hereinafter Pruitt & Showman].

<sup>5</sup> Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. TIMES, Apr. 8, 2013, available at <http://www.nytimes.com>; Lorelei Laird, *In rural America, there are job opportunities and a need for lawyers*, ABA JOURNAL, Oct. 1, 2014, available at <http://www.abajournal.com>.

<sup>6</sup> See, e.g., Lisa R. Pruitt, et al., *Justice in the Hinterlands: Arkansas as a Case Study for the Rural Lawyer Shortage and Evidence-Based Solutions to Alleviate It*, 37 U. ARK. LITTLE ROCK L. REV. 573 (2015); Kathryn Hayes Tucker, *GSU Access to Justice Center Maps Rural Lawyer Gap*, DAILY REPORT, Sept. 6, 2017, <http://www.dailyreportonline.com>.

<sup>7</sup> See South Dakota Unified Judicial System, Programs & Services, Rural Attorney Recruitment Program, <http://ujs.sd.gov/Information/rarprogram.aspx> (last visited Sept. 4, 2017).

<sup>8</sup> Janet Adamy and Paul Overberg, *Rural America Is the New 'Inner City'*, THE WALL ST. J., May 26, 2017, available at <https://www.wsj.com>.

<sup>9</sup> See DAVID L. BROWN & KAI A. SCHAFFT, RURAL PEOPLE & COMMUNITIES IN THE 21ST CENTURY: RESILIENCE AND TRANSFORMATION 193-94 (2011).

<sup>10</sup> U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015 6 (2016).

<sup>11</sup> See RURAL JUSTICE, *supra* note 2, at 22.

<sup>12</sup> The Rural Data Portal Report, Economic Data, 2013, California: Rural & Small Town Areas, <http://www.ruraldataportal.org> (Select "State," select "California," select "Rural," select "Economic Data," select "Individual Poverty Status," select "Get Report").

<sup>13</sup> *Id.*, California: Urban Areas, <http://www.ruraldataportal.org> (Select "State," select "California," select "Urban," select "Economic Data," select "Individual Poverty Status," select "Get Report").

<sup>14</sup> See U.S. DEP'T AGRIC., RURAL AMERICA AT A GLANCE, 2016 edition, available at <https://www.ers.usda.gov/webdocs/publications/80894/eib-162.pdf?v=42684>.

<sup>15</sup> See RURAL JUSTICE, *supra* note 2, at 28-29; see also Terrence McCoy, *Disabled, or Just Desperate? Rural Americans Turn to Disability as Jobs Dry Up*, WASH. POST Mar. 30, 2017, available at <http://www.washingtonpost.com>; E. Helen Berry, *The Seniors are Coming! Oh Wait, They're Here*, RURAL VOICES, Fall 2013, at 8-10, available at <http://www.ruralhome.org/storage/documents/rural-voices/rv-fall-2013.pdf>.

<sup>16</sup> See LEGAL SERVICES CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 24 (2017), available at <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>; see also RURAL JUSTICE, *supra* note 2, at 9.

<sup>17</sup> William O'Hare & Kenneth Johnson, *Child Poverty in Rural America*, 4 (1) REPORTS ON AMERICA 16, Mar. 2004, available at <http://www.prb.org/pdf04/ChildPovertyRuralAmerica.pdf>.

<sup>18</sup> See RURAL JUSTICE, *supra* note 2, at 8-9.

<sup>19</sup> *Id.* at 11, app. A.

<sup>20</sup> Letter from Cal. Comm'n on Access to Justice to Legal Servs. Trust Fund Comm'rs (Oct. 12, 2016) (on file with authors).

<sup>21</sup> RURAL JUSTICE, *supra* note 2, at 8.

<sup>22</sup> THE HOUSING ASSISTANCE COUNCIL (HAC), MIGRANT

AND SEASONAL FARMWORKING HOUSING INFORMATION SHEET (2003), available at <http://www.ruralhome.org/storage/documents/farmworkers.pdf>.

<sup>23</sup> See RURAL JUSTICE, *supra* note 2, at 8.

<sup>24</sup> Geoffrey Mohan, *To keep crops from rotting in the field, farmers say they need Trump to let in more temporary workers*, L.A. TIMES (May 25, 2017), <http://www.latimes.com>. See Ilene J. Jacobs & Patrick Saldaña, *Farmworker Homelessness in Imperial County, CA*, 21 RURAL VOICES 14, 14-15 (2016), <http://www.ruralhome.org/storage/documents/rural-voices/rvmarch2016.pdf> (estimating that there are anywhere between 386,725 and 1 million agricultural workers in CA, with between 5,501 and 8,000 in Imperial County alone).

<sup>25</sup> See RURAL JUSTICE, *supra* note 2 at 8; see also Lisa R. Pruitt, *The Rural Landscape: Space Tames Law Tames Space*, in THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY, Stanford U. Press (2014).

<sup>26</sup> See RURAL JUSTICE, *supra* note 2, at 25-26.

<sup>27</sup> *Id.*

<sup>28</sup> See Pruitt & Showman, *supra* note 4, at 485-87.

<sup>29</sup> See RURAL JUSTICE, *supra* note 2, at 9.

<sup>30</sup> *Id.* at 23. See also Jennifer Levitz and Valerie Bauerlein, *Rural America is Stranded in the Dial-Up Age*, WALL ST. J., (June 15, 2017), <https://www.wsj.com>.

<sup>31</sup> RURAL JUSTICE, *supra* note 2, at 23.

<sup>32</sup> *Id.*

<sup>33</sup> See Pruitt & Showman, *supra* note 4, at 494.

<sup>34</sup> Professor Emeritus of Criminology, Law and Society, Ph.D., J.D.

<sup>35</sup> See Office of Statewide Health Planning and Dev., Medical Service Study Areas, <https://oshpd.ca.gov/MSSA> (last visited July 20, 2017) [hereinafter Medical Service].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Rob Chell, *JFON on the Border: Imperial Valley JFON celebrates Grand Opening and First Clinic*, IMPERIAL VALLEY JUSTICE FOR OUR NEIGHBORS, Mar. 15, 2017, <http://www.jfoniv.org/news/2017/3/28/jfon-on-the-border-imperial-valley-jfon-celebrates-grand-opening-and-first-clinic>.

<sup>39</sup> *Id.*

<sup>40</sup> U.S. Census Bureau, Quick Facts United States, <https://www.census.gov> (search "Imperial County") (last visited Sept. 5, 2017).

<sup>41</sup> See Chell, *supra* note 38.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> MARIA ABESA, ET AL., IMPROVING ACCESS TO JUSTICE FOR SELF-REPRESENTED LITIGANTS IN SAN BERNARDINO SELF-HELP CENTERS, UCLA LUSKIN SCHOOL OF PUBLIC AFFAIRS 10 (May 4, 2016), [http://www.lewis.ucla.edu/wp-content/uploads/sites/2/2016/09/2015-2016\\_Abesa\\_Cordi\\_Kudo\\_APPSelf-Help\\_comp.pdf](http://www.lewis.ucla.edu/wp-content/uploads/sites/2/2016/09/2015-2016_Abesa_Cordi_Kudo_APPSelf-Help_comp.pdf).

<sup>45</sup> According to the HAC, 98 percent of San Bernardino County's landmass is rural. RURAL JUSTICE, *supra* note 2.

<sup>46</sup> See MEDICAL SERVICE, *supra* note 35.

<sup>47</sup> U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 2014.

<sup>48</sup> See Larry R. Spain, *Public Interest Law: Improving Access to Justice: the Opportunities and Challenges of Providing Equal Access to Justice in Rural Communities*, 28 WM. MITCHELL L. REV. 378 (2001).

<sup>49</sup> MODEL RULES OF PROF'L CONDUCT R. 6.1 (2014).

<sup>50</sup> Richard L. Abel, *Just Law? in THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 296, 307 (Scott L. Cummings ed., 2011).

<sup>51</sup> RURAL JUSTICE, *supra* note 2, at 55-56.

<sup>52</sup> See *id.* at 45.

<sup>53</sup> LEGAL SERVICES CORP., REPORT OF THE PRO BONO TASK FORCE 6-7 (Oct. 2012), available at <https://www.lsc.gov> [hereinafter REPORT].

<sup>54</sup> See RURAL JUSTICE, *supra* note 2, at 54-56.

<sup>55</sup> *Id.* at 54; see also Legal Servs. Corp., Access to Justice in Rural Areas, Skype Clinic for Rural Service

Delivery, <https://www.lsc.gov> (last visited Sept. 5, 2017).

<sup>56</sup> OneJustice, Our Programs, Pro Bono Justice, <https://onejustice.org> (last visited Aug. 20, 2017) [hereinafter Pro Bono Justice].

<sup>57</sup> See Legal Aid Ass'n of Cal., OneJustice Justice Bus Project and Partners Provide Housing Legal Services in Indio Area (Oct. 1, 2013), <http://laaonline.org/pub/14433/onejustice-justice-bus-project-partners-provide-housing-legal-services-indio>.

<sup>58</sup> Pro Bono Justice, *supra* note 56.

<sup>59</sup> Renée Schomp, *Bridging the Justice Gap with Technology*, ONEJUSTICE (June 16, 2016), <https://onejustice.org/2016/06/bridging-the-justice-gap-with-technology> [hereinafter Schomp].

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> ONEJUSTICE, RURAL IMMIGRANT CONNECT & THE PRO BONO ATTORNEY, [http://one-justice.org/clientimages/53135/rural%20immigrant%20connect\\_onejustice%20\(pro%20bono%20attorney\).pdf](http://one-justice.org/clientimages/53135/rural%20immigrant%20connect_onejustice%20(pro%20bono%20attorney).pdf) (last visited Aug. 21, 2017).

<sup>64</sup> See Schomp, *supra* note 59.

<sup>65</sup> See REPORT, *supra* note 53, at 7.

<sup>66</sup> California Rural Legal Assistance, Inc., Pro Bono Assistance, <http://www.crla.org/pro-bono-assistance> (last visited Aug. 20, 2017).

<sup>67</sup> CALIFORNIA RURAL LEGAL ASSISTANCE, INC., CRLA 2015 ANNUAL REPORT: PATHS TO JUSTICE 16 (2015), available at <http://www.crla.org/sites/all/files/content/uploads/AnnualReports/CRLA-AR-181016.pdf>.

<sup>68</sup> *Id.*

<sup>69</sup> See Amanda L. Kool & Lisa R. Pruitt, *It's Time to Heed the Call of Rural America*, NAT'L L. J. 82 (May 1, 2017) [hereinafter Kool & Pruitt]; Christyne J. Vachon & Robin Runge, *Planting Seeds and Getting into the Field: The Role of Law Schools in Ensuring Access to Justice in Rural Communities*, 59 S.D. L. REV. 616 (2014).

<sup>70</sup> Kool & Pruitt, *supra* note 69.

<sup>71</sup> *Id.*

<sup>72</sup> Rina Palta, *Coachella Valley Trailer Park with Sewage Problem to Get Overhaul*, KPCC (Feb. 19, 2016), <http://www.scp.org/news/2016/02/19/57762/sewage-overflow-problem-in-coachella-trailer-park>.

<sup>73</sup> Rural Summer Legal Corps Program, <https://rurallegalcorps.org> (last visited Aug. 21, 2017).

<sup>74</sup> *Id.*

<sup>75</sup> See Kool & Pruitt, *supra* note 69.

<sup>76</sup> See RURAL JUSTICE, *supra* note 2, at 52.

<sup>77</sup> See Lisa Pruitt, et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 12 HARV. L. & POL'Y REV. (forthcoming 2018).

<sup>78</sup> See Los Angeles Incubator Consortium, What is Los Angeles Incubator Consortium?, <https://www.laincubatorconsortium.com> (last visited Sept. 9, 2017).

<sup>79</sup> See Lawyer Entrepreneur Assistance Program, <http://incubator.legal-aid.com> (last visited Sept. 9, 2017).

<sup>80</sup> See California Western School of Law, Access to Law Initiative, <https://www.cwsl.edu/clinics-and-programs/access-to-law-initiative> (last visited Sept. 9, 2017); Thomas Jefferson School of Law, The Center for Solo Practitioners—A Lawyer Incubator Program, <http://www.tjsl.edu/tjsl-alumni/incubator-program> (last visited Sept. 9, 2017).

<sup>81</sup> INCUBATOR GUIDE: A PUBLICATION OF THE CAL. COMM'N ON ACCESS TO JUSTICE, 3 (2014), available at <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/2014%20Incubator%20Guide.pdf> [hereinafter INCUBATOR GUIDE].

<sup>82</sup> See Laura Dym Cohen, et al., *Launching the Los Angeles Incubator Consortium*, 83 U. MO.-K.C. L. REV. 861 (2014); see also INCUBATOR GUIDE, *supra* note 81.

<sup>83</sup> INCUBATOR GUIDE, *supra* note 81, at 51-56.



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**Monday, May 21, 2018**

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- Opportunity for tent set-up on a tee box
- Recognition during dinner

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One Player and Tee or Green Sign \$1,350

Tee or Green Sign \$1,000

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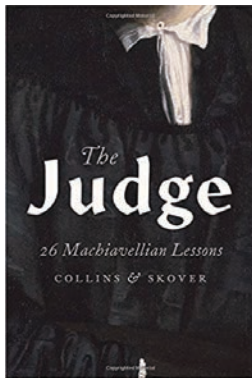
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## The Judge: 26 Machiavellian Lessons



**The Judge: 26 Machiavellian Lessons**  
By Ronald K. L. Collins & David M. Skover  
\$27.95, 296 pages  
Oxford University Press, 2017

The U.S. Supreme Court has become politicized—hardly a novel observation. Nevertheless, what does a politicized Supreme Court mean for the rule of law?

In *The Judge*, Professors Ronald K.L. Collins and David M. Skover take the politicized-court observation further, suggesting the Supreme Court has always been political and, more broadly, that the law itself may be an unavoidably political institution. *The Judge* examines consequences of the twin possibilities that the Supreme Court is political and the law itself is politics. Using a kind of sly irony, it draws, or lures, the reader into collaborating in the examination.

Before one even opens *The Judge*, its subtitle, *26 Machiavellian Lessons*,

hints at an ironic approach, seeming to promise a manual akin to *The Prince*—the treatise that made “Machiavellian” synonymous with “hypocritical,” “cynical,” and “unprincipled.” The authors are joking, right? They cannot seriously be proposing to counsel judges—judges sitting, or aspiring to sit, on our nation’s highest court, no less—in Machiavellian arts. Can they?

Maybe. Through 26 “constructive provocations” (p. xxi) (corresponding to *The Prince*’s 26 chapters), *The Judge* professes to instruct judges, by example, in artifices that the high court’s leading lights might have applied, Machiavellian style, to magnify their own fame and enlarge their power. Some of the examples and models are offered with manifest sarcasm, some with genuine admiration, and some in between. It is in trying to make sense of the ethical in-betweens that the reader is compelled, in *The Judge*’s words, to “think...think hard” (p. xxii) about what it means, or would mean, if the law is, or might be, mere power politics.

The power wielded by a judge or justice is the ability to shape the law to one’s liking. It is achieved by knowing how best to have one’s decisions honored. The most honored decision in American law may be *Marbury v. Madison*,<sup>1</sup> a decision *The Judge* describes as “infused with Machiavellian craft” (p. 10). Why? For starters, Chief Justice John Marshall should have recused himself. As secretary of state under President John Adams (a job Marshall kept while also serving as chief justice), Marshall issued *Marbury*’s disputed commission as a justice of the peace. *Marbury* could have been decided without creating a judicial power to invalidate federal laws, hence principles of judicial restraint dictate it should have been so decided. By crafting a decision that appeared to make judicial review necessary, Marshall “outmaneuvered [President Jefferson], trumped

Congress, empowered the Supreme Court, and secured a lasting legacy for himself and the cause of judicial supremacy” (p. 14).

More recently, Justice William O. Douglas earns high Machiavellian marks for *Griswold v. Connecticut*,<sup>2</sup> in which he discovered (or created) penumbral constitutional rights, and a bare majority of the high court struck down Connecticut’s anticontraceptive law as a violation of the penumbral right of privacy. *The Judge* declares *Griswold* “a paradigmatic case...of unprincipled decision making” (p. 69).

At the other end of the political spectrum, Chief Justice William Rehnquist earns a place among Machiavellian exemplars for deconstitutionalizing the Earl Warren Court’s decision in *Miranda v. Arizona*.<sup>3</sup> This Court unanimously ruled the warnings required by *Miranda* are constitutionally mandated safeguards against encroachments on the privilege against self-incrimination. But in a series of decisions starting in 1974, majorities on the Burger and Rehnquist courts unyoked what they termed *Miranda*’s “prophylactic rules” from the Fifth Amendment privilege per se.<sup>4</sup> Dutifully reaffirming *Miranda*’s holding that a violation of its requirements is a constitutional violation, these decisions held that a violation of the rules does not trigger all the consequences triggered by a violation of the amendment itself.

The endpoint of that line of cases is Rehnquist’s majority opinion in *Dickerson v. United States*. *Dickerson* offered a chance to overrule *Miranda*. But Rehnquist, although a foe of *Miranda*, declined to do so, citing stare decisis. Privately, Rehnquist called stare decisis “pretty much a sham” (p. 77). In *Dickerson*, though, he reasoned that *Miranda* and its progeny were constitutional decisions that could not lightly be discarded. He noted, however, that the progeny had reduced *Miranda*’s impact. *The Judge* declares *Dickerson* a brilliantly Machiavellian maneuver. In it, Rehnquist effectively dismantled *Miranda* but avoided a frontal attack on *Miranda* and, with it, on the doctrine of stare decisis. By bowing to stare decisis, the Chief preserved his power over the law’s future by preserving the protection the doctrine would give his own decisions.

Justice Antonin Scalia dissented in *Dickerson*, predicting the decision would delight “[t]hose to whom judicial decisions are an unconnected series of judgments that produce either favored or disfavored results.”<sup>5</sup> Justice Scalia charged that, far from reaffirming *Miranda* or honoring precedent, the *Dickerson* majority radically revised *Miranda* and improperly manipulated the doctrine of stare decisis. But Justice Scalia pulled off similar revisions and manipulations in *District of Columbia v. Heller*.<sup>6</sup> In doing so, he earned his own chapter in *The Judge*.

*Heller*, which struck down a D.C. gun control law as violative

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of the Second Amendment, performed a more radical surgical operation than *Dickerson* did. *Dickerson* and its forbears merely decoupled *Miranda*'s judicially announced rules from the express prohibitions in the Fifth Amendment. *Heller* decoupled some express language in the Second Amendment ("A well regulated militia being necessary to the security of a free State") from the rest ("the right of the people to keep and bear Arms, shall not be infringed"). *The Judge* declares the resulting conclusion—that the Second Amendment right to bear arms is a personal right, constraining government's authority to restrict gun possession—"a glorious monument exemplifying the gains to be reaped if one is willing to manipulate the law while smugly claiming fidelity to it" (p. 75).

Crafting decisions is only one way that *The Judge* describes how justices remake the law and build fame and power for themselves. The various nonjudicial means of accomplishing these ends include horse-trading with colleagues, publishing books, giving addresses, and appearing on TV.

The justice who used the broadest array of strategies for impacting the law, and used them most effectively, may have been Justice Oliver Wendell Holmes. Holmes is the justice for whom *The Judge* comes closest to expressing unalloyed admiration, free of irony or ambiguity. Through penetrating legal reasoning and skillful use of language, inside and outside of judicial opinions, Holmes shaped First Amendment law, made crucial contributions to constitutional law generally, and built a lasting legacy. He was both a giant in American law and a flawed and controversial man. The authors' analysis of how Holmes's human flaws, coupled with his legal brilliance, contributed to his impact on legal culture is a high point of *The Judge*.

Throughout, *The Judge* is intriguing and thought-provoking. Its thoroughgoing scholarship (63 pages of footnotes) is kept readable—fun, in fact—by the ironic, guess-when-we're-joking approach. The most recent of some half a dozen collaborations by the authors (including, notably, *The Trials Of Lenny Bruce*—a must-read), *The Judge* pulls the reader into an illuminating, sometimes troubling, and always engrossing conversation about the way the law is shaped in America's highest court. ■

<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>2</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>4</sup> See *Dickerson v. United States*, 530 U.S. 428, 437-38 (2000).

<sup>5</sup> *Id.* at 444-45.

<sup>6</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).



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## Warrantless Border Searches Pose Risk to Attorney Confidentiality Duty

**IT MAY COME AS A SURPRISE** to many lawyers that a warrantless border search of their electronic devices by a U.S. customs officer is lawful. Border search can be conducted without probable cause, and state laws are inapplicable. Pursuant to the holding of *Carroll v. United States*,<sup>1</sup> U.S. customs officers can simply demand to inspect the cellphone or laptop of any person, presumably including lawyers, without probable cause. Individuals travelling to the United States historically have been subject to intrusive search and seizures. The Fourth Amendment to the U.S. Constitution provides that searches without prior approval by the courts are unreasonable. Fourth Amendment protections also have been held to apply to electronic devices.

*United States v. Arnold*<sup>2</sup> involved the warrantless search of a nonlawyer's electronic devices containing child pornography. While U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) have protocols to follow regarding lawyers, these laws presumably could be applied to permit a U.S. customs officer to search the contents of a lawyer's electronic devices at the border without reasonable suspicion.

CBP Directive 3340-049A was revised on January 4, 2018, and it does provide some improved protections for lawyers. However, it still provides that a CBP officer in the course of a "basic search," with or without suspicion, may examine an electronic device and review the information encountered at the border. A CBP officer can demand passcodes of electronic devices, but they cannot be kept subsequent to the search.

However, pursuant to the recently revised directive, a reasonable suspicion of unlawful activity is required during an "advanced search" in which an officer connects external equipment to copy the contents of electronic devices. An officer may perform an advanced search of an electronic device with supervisory approval.

Lawyer assertion of attorney-client privilege will not prevent search of his or her electronic devices. Pursuant to paragraph 5.2.1.2 of the new directive, once attorney-client privilege has been asserted, the officer will contact the CBP associate chief counsel office to ensure the segregation of privileged material to ensure that it is handled appropriately. Such information can be read, copied, and shared without a subpoena or a warrant issued pursuant to probable cause and distributed to other law enforcement agencies, including the Internal Revenue Service.

Lawyers' phones, laptops, and other electronic devices routinely contain attorney-client privileged information. E-mail correspondence, case notes, and financial information are normally kept on such electronic devices. Thus, exposure of confidential client information to a warrantless border search can be a breach of the duty of confidentiality. Business and Professions Code Section 6068 states that a lawyer must maintain client confidential information at every peril to himself or herself. Model Rule 1.6 of the American Bar Association states:

(a) A lawyer shall not reveal information relating to the repre-

sentation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

Paragraph (b)(6) provides an exception to the rule when a lawyer reveals information "to comply with other law or court order." However, paragraph (b)(6) provides little comfort when attorney-client information is revealed pursuant to warrantless searches upon reentry to the United States.

Because lawyers have a duty to protect attorney-client privileged information, such a breach can give rise to legal malpractice as well as potential disciplinary action by the State Bar.

Until the courts provide clear guidance for policies and procedures to prevent seizure, lawyers must take precautions when travelling outside the United States with their electronic devices.

For now, it appears that the only viable option for lawyers to ensure the confidentiality of client information when travelling outside the United States is to obtain cellphones and laptops that have not been used in connection with the representation of their clients. The additional cost and inconvenience of obtaining cellphones and electronic devices that do not contain attorney-client information is minimal compared with the potential breach of a lawyer's duty to preserve client confidentiality. ■

<sup>1</sup> *Carroll v. United States*, 267 U.S. 132, 154 (1925).

<sup>2</sup> *United States v. Arnold*, 523 F.3d 941 (9th Cir. 2008).

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