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February 2017 - LGBTQ/Diversity and the Law Issue

Guest Edited by Summer Selleck

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA) published 12 times per year -- in six print and 12 online issues.



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# "Can We All Get Along?"

Wednesday, February 01, 2017



Those were the memorable words of Rodney King in 1992, uttered in an effort to quell the riots that took place in Los Angeles following his beating. That was almost 25 years ago. So... how are we doing since then? I would submit that while we have made progress in some areas, it seems to me that contention and anger are more common now than I remember in my 60 years of life.

What is going on? Why can't we all just get along? As a society, we are quick to anger. If the car ahead of us on the freeway is going too slow all too frequently our response is to tailgate and pass by with a choice gesture (no... not a "thumbs up!") to the other driver. What if, instead, we took a deep breath and considered that there may be a very good reason they are going

slow? When opposing counsel is late on their discovery responses, there are some attorneys who are very quick to fire off a nasty meet and confer letter. What if, instead, we picked up the phone (in a spirit of empathy and inquiry) to find out what was going on? Even something as small as the smell of the food in the break room how many times do we find ourselves "annoyed" by the smell of an unfamiliar food instead of being curious about something new and different?

You may be asking yourself, what does this have to do with diversity? Well, quite a bit. Compassion and empathy for others — whether they are like us or not— is at the core of encouraging diversity. These examples show how far we have to go, both in our daily lives and our profession. It takes restraint, effort and practice to get along. The good news is, not only can we do it, but as attorneys we are committed to it. Indeed, as attorneys we have a unique view of what happens in society when we do not commit to these goals. For example, I have an attorney friend who fell on hard times and recently spent a few months in the West County Detention Facility. He now knows what the system is like from the inside and outside. He described how horribly segregated the inmates are required to be— for their own safety.

I found that profoundly sad for many reasons. Some of those reasons were personal. I grew up and began my practice in Hawaii— a place with many diverse cultures, religions and beliefs. That experience showed me better than anything else what riches are to be gained when we open ourselves up to people with different ideas, values and ways of life. Additionally, I overcame an early childhood learning disability; an experience that taught me many valuable lessons, not the least of which was to value those that society considered "different" or "disabled." Other reasons were more systemic and were based on the hope that we, as a larger society, are not headed toward that level of degradation.

As lawyers, we not only have the skills to effect change, but we also have an obligation to change things for the better, both in the legal system and in our society as a whole. We can each do our part to help society and the legal profession be a place of respect, inclusiveness and diversity.

Last year I had the privilege of working with Robin Pearson, former CCCBA President, current leader of the CCCBA Diversity Committee and current chair of the State Bar Council on Access and Fairness. We hosted Paulette Brown, then president of the ABA, to speak at one of our bar events. For those who were able to be there, you may remember what an inspiring speech she gave. Her topic was: "The Status of Women and People of Color Practicing Law Around the World." Among other things, Paulette noted that the legal profession is still one of the least diverse of all comparable professions. She not only pointed out the work ahead of us with respect to being a more diverse bar, she also challenged us to rise to the occasion.

So... what can we do to meet this great challenge? The truth is that there is a lot we can all be doing every day. We can each do our part to understand each other better. We can all benefit from listening and appreciating the views and ideas of those who have backgrounds and perspectives which differ from our own.

We can also use our positions (in our companies, our firms, our communities) to work toward greater diversity and inclusion. For example, last year I served as one of the leaders of the diversity committee for the Corporate Law Department at my company. In that role I encouraged our attorneys to join local and national specialty bar associations and to get more involved in the diversity sections of their local and state bars.

Maybe you are thinking "that is too much," or "I can't do that," or "how can I effect change to help make this world — and profession — more inclusive?"

May I suggest three things that we can do this year to help us increase the diversity and inclusiveness in the practice of law?

1) Make an effort to get to know people who are not like you. Get outside your established group of friends and colleagues and learn something new about someone who is different than you. Join a group that holds opinions different from your own or a group that could benefit from your experiences. Join a specialty bar association or you could join the CCCBA's diversity committee and help us plan more diversity programs and events for the CCCBA.

2) Make an effort to understand implicit bias and how it affects everyday interactions. Read articles about implicit bias or maybe even take the Harvard Implicit Bias Test to better understand your own biases.

3) Make an effort not just to understand people's ideas, opinions or values, but also WHY they hold those ideas, opinions or values. Do this whether you personally share that opinion or not. This will create a better understanding of that person (and increased empathy for that person) which leads to a higher tolerance of differences. This, in turn, can lead to a more peaceful, more diverse professional community.

In the end, diversity, inclusion, compassion and empathy are the keys to creating change. Let's resolve to do our best to get along, understand one another, be peacemakers and treat others like we want to be treated. As we do, life and the law will be rich and full.

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# An Abbreviated History

Wednesday, February 01, 2017



This issue of Contra Costa Lawyer magazine deals with Lesbian, Gay, Bisexual, Transgender and Queer ("LGBTQ") current legal rights and some of the issues facing the community. One integral question to ask is, who created this term, LGBTQ? Is the term LGBTQ merely just a bunch of letters that have been grouped together over the course of time to express differences in gender, orientation and/or sexuality? Are LGBTQ people really all that similar or are they banded together merely by the social construct of difference? On the other hand, might there be one red thread, one common ground that ties these groups of people together?

Societies all around the world have often been interested in grouping things together that are like or similar. Therefore, over time many terms have been forced upon certain groups of people like the LGBTQ community. Some of these classifications that exist in the western cultures are harmless while others have proven to be derogatory. In America, we are so fixated with what a person is or is not that we spend time discussing peoples' masculinity or femininity and sometimes even their sex organs. This seems to be the root of the LGBTQ classification. Anything that is different in sexuality, gender or orientation gets grouped together, but what about the major differences in all of us?

For instance, my road to coming out was likely much different than my gay male friends. Likewise, a transgender person will experience much different discrimination than I might as a lesbian woman. Even in Native American or Inuit culture they have a different term for those that would be classified as LGBTQ in our culture. They call their people two spirited and it is a natural lifestyle further proving that the term LGBTQ is that of a western construct.

Running parallel to the western world's love for strict classifications is also this concept of fear of what is different. Some people fear change, the unknown and some even fear those who are LGBTQ. Religious liberty laws and discrimination have widely emerged as a backlash to the recent victories with marriage equality and anti discrimination laws for the LGBTQ people. Fear of change in many ways has spawned a turn towards homophobic ideas. However, this correlation between religion and sexuality makes no sense to me. I grew up in a devoutly Catholic family and within my family there was an emphasis on love and respect towards all people. Furthermore, I was taught to protect the vulnerable because one never knows who might be targeted and discriminated against next.

It's my belief that both the LGBTQ community and its allies have to stand together, empathize with each other and care about one another, so that we can all be safe and live in a community of equality. Not focusing on terminology or classification, but tolerance of all. This way we can effect change globally.

Therefore, it is my goal that we can all perpetuate equality and compassion towards each other, not homophobia or hate or simplistic classifications. Instead, we might want to all



strive to spread understanding, non-judgment and compassion. That is what this issue of the Contra Costa Lawyer magazine is about. It is aimed at creating a deeper understanding of whom your brothers and your sisters are and what we (the LGBTQ community, if you must) are fighting to protect. This issue talks about ways you can help and how we all must focus on evolving society to fit the times, not trying to fit the times to any preexisting ideals in society.

Summer Selleck is a solo practitioner at SC Selleck Law in Walnut Creek. She practices primarily in the areas of Estate Planning, Probate and Criminal Law. Summer Selleck was born and raised in the East Bay. She received her Undergraduate B.A. from UCLA, her Masters in Education from Pepperdine University and her Juris Doctorate from Western State University.

Summer has been a proud and active member of the Contra Costa County Bar Association. She is currently on the CCCBA Board of Directors. She is also a Board Member of the Diversity Committee and a Board Member of California Women Lawyers. She was recently appointed to the Contra Costa County Advisory Council on Aging.

# California Law Protects the Rights of LGBTQs - What You Can Do to H...

Wednesday, February 01, 2017



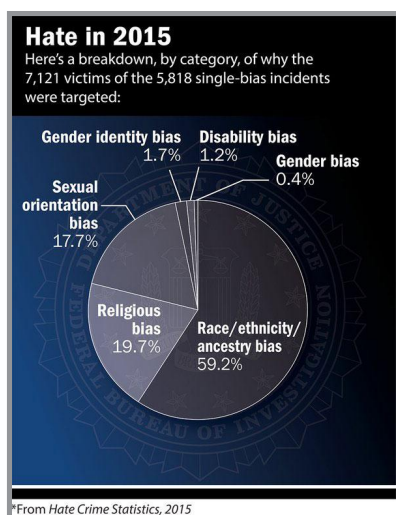
On November 18, 2016, U.S. Attorney General Loretta Lynch responded to reports of increased hate crimes by urging victims to report these crimes to federal authorities for possible prosecution. Attorney General Lynch re-enforced the Justice Department's commitment to prosecuting hate crimes which are illegal under U.S. law.

In 1990, Congress passed the Hate Crime Statistics Act, which required the Attorney General to collect data "about crimes which manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." The attorney general delegated the responsibility to the Director of the FBI, who, in turn, assigned the task to its Uniform Crime Reporting Program (UCR). The UCR has collected hate crime

statistics for 25 years from law enforcement agencies across the country. On November 14, 2016, the FBI released its 2015 Hate Crime Statistics report detailing 5,818 instances of hate crimes involving 7,124 victims of which 19.4% of the victims were targeted based on sexual orientation and gender identity bias. The FBI's statistics estimates that two-thirds of hate crimes are not reported to law enforcement.

The Southern Poverty Law Center ("SPLC") reports that it has received complaints of 867 post-election hate incidents from both the #ReportHate page on the SPLC website and media accounts. These incidents were limited to real-world events and exclude online harassment. SPLC explains that the underreporting problem is surely more severe when it comes to hate incidents that may not rise to the level of criminal violations. Since the election, the lesbian, gay, bisexual, transgender and queer ("LGBTQ") community has experienced harassment by those who allege that the president-elect shares their anti-LGBTQ sentiments. SPLC reports that harassment of LGBTQ individuals has been reported across the country, making up 11% of all reported incidents. A common refrain in anti-LGBTQ harassment is the threat of rescinding the constitutional protections of same-sex marriage. LGBTQ children have not escaped harassment in the wake of the election. Churches that performed same-sex marriages or have banners advertising inclusivity have also been targeted in the wake of the election. The FBI and SPLC's statistics show that hate violence is a prevalent and deadly issue faced by the LGBTQ community.

**1. Report all instances of hate crimes.** Encourage all victims to report hate crimes to their local law enforcement agency. Victims of hate crimes should also be encouraged to also report hate crimes to the FBI and Department of Justice.



California's hate crime statutes, beginning with Penal Code Section 422.55 impose additional punishment for harming, threatening or harassing someone because of the person's disability, gender, nationality, race, ethnicity, religion or sexual orientation. California's hate crimes laws have two major components: First, Penal Code Section 422.6 makes it a stand-alone crime to interfere with another's civil rights, or damage or destroy another's property because that person has one of the characteristics set forth above. Secondly, Penal Code Section 422.7 and Penal Code Section 422.75 provide that if you commit a crime such as assault or vandalism, and you are motivated in part by the fact that the victim has one of the characteristics in the list above, your criminal offense will be considered a "hate crime" and you may receive an enhanced sentence.

**2. Employment and Housing, Public Accommodations, Hate Violence and Human Trafficking.** In 2003, Governor Davis signed AB 196. AB 196 clarified for the purposes of California's Fair Employment and Housing Act (FEHA) that discrimination in housing and employment based on "sex" includes discrimination based on gender. In 2011, Governor Brown signed the Gender Nondiscrimination Act (AB 887). The Gender Nondiscrimination Act directly added "gender identity" to the list of protected classes.

The Department of Fair Employment and Housing ("DFEH") is charged with enforcing California's civil rights laws. DFEH's mission is to protect the people of California from unlawful discrimination in employment, housing and public accommodations, hate violence and human trafficking.

As an attorney, you can help a victim of discrimination by preparing and filing a pre-complaint inquiry with the DFEH. The DFEH can be reached at 800-884-1684 (voice), 800-700-2320 (TTY), California's Relay Service at 711 and by email at [center@dfeh.ca.gov](mailto:center@dfeh.ca.gov).

A victim of discrimination is in most cases required to contact the DFEH within one year of the incident constituting discrimination and file a form titled pre-complaint inquiry. Within 60 days, the complainant and his or her counsel will be contacted by an investigator to discuss the details of the complaint including evidence supporting the complaint. The DFEH will evaluate the evidence and decide whether to accept the case for further investigation. If the DFEH decides to accept the case, it will prepare a complaint form for the complainant's signature. When the complainant returns the signed

complaint to the DFEH, it will be delivered by the DFEH to the respondent.

The respondent is required to answer the complaint and the DFEH will review the answer with the complainant. The DFEH offers free dispute resolution services. When parties can't resolve a complaint, the DFEH continues an investigation to determine if a violation of California law occurred. If the DFEH finds there were probable violations of the law, the case moves into DFEH's Legal Division. At that time, the parties are required to go to mediation. At mediation, the parties have the opportunity to reach an agreement to resolve the dispute and close the case. If the mediation fails, DFEH may file a lawsuit in court.

As attorneys, we can help protect the civil rights of the LGBTQ community and all victims of hate crimes. "The best way to not feel hopeless is to get up and do something. Don't wait for good things to happen to you. If you go out and make some good things happen, you will fill the world with hope, you will fill yourself with hope," Barack Obama.

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# LGBTQ Family Protection After the 2016 Presidential Election

Wednesday, February 01, 2017



The election of Donald Trump as President has surprised and shocked many people. In light of statements made by President-elect Trump and many of his supporters during the campaign, as well as some of his announced appointments, the LGBTQ community has had grave concerns about possible negative policy changes affecting LGBTQ people during the next U.S. presidential administration.

Of paramount concern is whether couples will continue to have the protection of legal marriage. In the landmark United States Supreme Court case *Obergefell v. Hodges*, [1] the Court held in a 5–4 decision that the

fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. According to a Gallup survey it is estimated that there are now about 491,000 same-sex married couples in the United States [2] so approximately one million people would be immediately impacted by the loss of marriage equality.

Couples who are already married are not in danger and there are no additional steps which they need to take to protect their marriages. There is not a realistic possibility that same-sex couples' marriages will be invalidated. There is a strong legal argument that if a marriage is valid when entered, it cannot be invalidated by any subsequent change in the law. See for instance *Strauss v. Horton* [3] the post-Proposition 8 California Supreme Court ruling which held that although Proposition 8 successfully amended the state constitution to prohibit same-sex marriages, any marriages performed before it went into effect would remain valid. So people who are already married should not be concerned that their marriages can be taken away.

To the contrary, it is important that they continue to live their lives as married couples, holding themselves out as such in all situations. In addition, all married couples should make sure that they have planned for what will happen if one of them passes away, through effective estate planning. This could be through a will or trust, or by designating one's spouse as a beneficiary on financial accounts. Couples should also execute advance healthcare directives. If either spouse is older or has a disability, they have rights under Social Security and Medicare and may be able to receive more benefits as a spouse than on their own. If eligible for spousal Social Security benefits, one should apply as soon as possible because the start date for these benefits is tied to the initial date of application.

A secondary concern is whether individuals who are not currently married will still be able to do so in the future, or will this right be lost under the new administration. Getting married is a very important and personal decision, with a multitude of social, financial and

legal implications, including over 500 state and over 1,000 federal rights, responsibilities and obligations which flow from the marital relationship. It is therefore not a decision to be taken lightly and it is not recommended that a couple rush into marriage so as to secure the relationship before the next president has been sworn in. It is highly unlikely that the U.S. Supreme Court will in the near future overturn its 2015 *Obergefell* decision requiring marriage laws to be equally applied to all couples regardless of gender. The doctrine of *stare decisis* means that courts generally will respect and follow their own prior rulings, and the Supreme Court very rarely overturns an important constitutional ruling so soon after issuing it. For instance, there was a seventeen year time lapse between *Bowers v. Hardwick* [4] which upheld the constitutionality of a Georgia sodomy law criminalizing sex in private between consenting adults and *Lawrence v. Texas* [5] which struck down a Texas sodomy law, explicitly overturning *Bowers* and finding that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the 14th Amendment. Furthermore, although the new administration is very conservative, neither Donald Trump nor anyone associated with his campaign has indicated any serious or immediate intention to try to turn back the clock on the freedom to marry and the great majority of Americans now strongly support marriage equality. [6] Clients can be safely advised that it is unlikely that the fundamental right of same-sex couples to marry will be challenged or that the Supreme Court would revisit its 2015 holding that same-sex couples have that fundamental right.

However it is urgent to emphasize that marriage equality does not necessarily create parentage equality. Under California law a child born to either partner during a marriage is presumed to be the legal child of both of the marital partners, [7] and both partners can go on the birth certificate immediately upon their child's birth. But merely being identified on the birth certificate does not guarantee protections if legal parentage is challenged in court, and the marital presumption of parentage is rebuttable. In some jurisdictions this presumption is very easy to rebut through evidence of the lack of a genetic connection. This means that being married to a birth parent does not automatically ensure that one's parental rights will be fully respected if they are ever challenged, particularly if the family travels outside of California. There is no way to guarantee that both partners' parental rights will be respected by a court unless they have obtained an adoption or court judgment of parentage. Without this, a non-biological parent could lose any right to their child if something happens to the other parent or if they break up in an "unfriendly" jurisdiction.

The consequences of this could be extremely dire. In the event of the birth parent's death or disability, the child could end up in foster care or with a relative instead of being able to stay with the surviving parent. If a known donor is used in the conception process, depending on the situation, the donor could be considered to be a legal father unless any rights he may have are terminated via an adoption. If a parent ends up receiving Medicaid, TANF, or other government benefits, the government could bring a court case to declare the donor a legal father and require him to pay for the benefit the child receives. Should the couple break up in a jurisdiction which refuses to recognize the parenting rights of one of the partners, that parent could be denied all rights to custody or even visitation.

It is therefore strongly recommended that all non-biological parents get a second parent adoption court order recognizing that they are a legal parent, even if they are married and even if they are listed as a parent on the birth certificate. In a recent decision, *V.L. v. E.L.* in March 2016, the U.S. Supreme Court ruled that under the Full Faith and Credit Clause, Alabama must recognize the adoption decree previously granted to a same-sex couple

by a Georgia state court, regardless of how that court came to its conclusion granting the decree. Thus a family will be secure and fully protected once an adoption has been finalized, regardless of where they subsequently travel or move. To facilitate this, California now has a streamlined step-parent adoption process which allows couples who were married or registered as domestic partners at the time one of them gave birth to use a simplified and expedited process to protect the non-birth parent's rights. This law allows [8] for the filing of papers in court for stepparent adoption with the adoption being granted without the time and expense of a home investigation, background check or court hearing.

There are many changes and challenges ahead as we navigate the new realities under the incoming presidential administration. It is important to know and understand the legal protections that are available to the LGBTQ client community as we approach this new period and consider what actions need to be taken.

[1] Obergefell v. Hodges (2015) 576 U.S. \_\_\_, 135 S.Ct. 2584

[2] "Same-sex Marriages in U.S. since Supreme Court Ruling Estimated to Be 123,000," CBSNews, accessed November 23, 2016, <http://www.cbsnews.com/news/same-sex-marriages-us-supreme-court-ruling-estimate/>.

[3] Strauss v. Horton (2009) 46 Cal.4th 364, 93 Cal.Rptr.3d 591

[4] Bowers v. Hardwick (1986) 478 U.S. 186

[5] Lawrence v. Texas (2003) 539 U.S. 558

[6] Mitchell, Travis. "Changing Attitudes on Gay Marriage." Pew Research Center's Religion & Public Life Project. 2016. Accessed November 23, 2016. <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/>.

[7] Calif. Family Code §7611(a)

[1][8] Calif. Family Code §9000.5

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# The Evolution of Parentage Law and Recognition of LGBTQ Families an...

Wednesday, February 01, 2017



Juvenile dependency proceedings are designed to protect the safety and well-being of children. The judge's responsibility is to ensure the safety of children and be the guardian of the constitutional rights of parents. One of the first issues the judge presiding over dependency proceedings must address is the determination of parentage. Determining parentage not only has implications for those seeking to assert parental rights and for the child who has a parent-child relationship with certain adults, but it also has a significant effect on relatives who have statutory preference for placement of children removed from a parent's custody and placed in foster care. Parentage findings have a direct impact on the pool of potential "legal" relatives for a child who is removed from his or her parents in

a dependency proceeding. There is a strong policy interest in placing a child with relatives who may afford a child a sense of belonging to a larger, extended family when the parents are attempting to reunify or when they fail to do so. The parentage determination has become more complicated and challenging as family compositions have changed. LGBTQ families, in particular, have faced unique challenges in the face of evolving parentage law.

The Uniform Parentage Act (UPA) was adopted by the California Legislature in 1975 and is codified in the Family Code. Under the UPA, legal parentage is based largely on the existence of a parent-child relationship rather than the legal relationship between the parents, of principal importance under common law. It is clear from the UPA that the intention of the statute is to legitimize children (who were, under common law, considered illegitimate when born out of wedlock) and facilitate legal parentage. Under common law, most states had rules relating to parentage that penalized children born out of wedlock. The UPA, though it advanced the rights of many unmarried heterosexual couples, was initially interpreted by courts in such a way as to limit findings of parentage to one natural mother and one father (whether biological or presumed based on a legal marriage or social relationship with the child). Thus, prior to the recognition of same-sex marriage in California, same-sex couples could not avail themselves of the marital presumption under the UPA and, absent a second parent adoption, it was nearly impossible for two persons of the same sex to both establish parentage, even in cases where it was clear that the couple intended to establish a parent-child relationship and the couple took steps to conceive a child through reproductive technology. *See, e.g., Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831.

By 2005, same-sex couples began to enjoy expanding parentage rights with the enactment of the California Domestic Partner Rights and Responsibilities Act (DPA), codified in Family Code section 297.5(d). This Act made clear the Legislature's intent that the same rules that apply to determining the parentage of children born to married parents must be applied to children born to registered domestic partners. The California



Supreme Court further expanded protections to children and same-sex couples in three decisions involving couples who were not registered domestic partners. *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108; *K.M. v. E.G.* (2005) 37 Cal.4th 130; *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156. These cases recognized the importance of providing legal protections to children regardless of the legal status of the relationship between the parents and of recognizing the need to preserve the existing biological and social relationships between parents and children.

More recent legal advances have afforded even greater protections for children and parents in same sex and other non-traditional relationships. Now, with marriage equality, a same-sex married couple is automatically presumed to be the legal parents of a child born during the marriage, just as with a married heterosexual couple. In 2013, Governor Brown signed into law Senate Bill 274, which allows more than two persons to be found to be the legal parents of a child. This bill came in response to a 2011 appellate decision in a juvenile dependency proceeding in which the Court of Appeal reversed a trial court's finding that the child had three parents: a presumed mother, a biological mother and a presumed father. *See M.C.* (2011) 199 Cal.App.4th 784. The Court found that there was no legal support for dual paternity or maternity, and that a child could not have three legal parents under the UPA and applicable caselaw. In response, SB 274 permits a court to find more than two persons with a legal claim to parentage if recognizing only two legal parents would be detrimental to the child.

The majority of families involved in juvenile dependency proceedings are not the traditional nuclear family as defined under common law. Parents are typically unmarried, have not registered as domestic partners, and have more often than not failed to seek court determination of legal parentage prior to child welfare involvement. Social workers, attorneys for parents and children, and judges have had to keep abreast of the changing legal landscape to ensure that non-traditional families, and in particular LGBTQ families, receive proper notice of dependency proceedings to assert parentage claims and to encourage family members to come forward as potential caregivers, providing both temporary care and in some cases a permanent home through adoption or legal guardianship for the child.

For unwed same-sex couples with children, the failure to seek determination of legal parentage can lead to unanticipated consequences for these families. Not only do these parents face possible loss of custody and visitation rights but the child may suffer long-term emotional harm by the disruption of strong emotional connections with important adults in the child's life. A child may lose his or her connection with an adult who the child knows as a parent, or placement with a safe, loving relative who, because parentage has not been determined, may not meet the statutory definition of "relative" with a preferential claim to placement under the applicable statutory scheme in dependency proceedings. Parentage findings in dependency proceedings is complicated because there are often competing claims of parentage and many social workers and courts may be reluctant to recognize more than two parents as legal parents. Fortunately for children and families in California, the legislature and courts have placed great emphasis on the bond between children and those who assume the role of a parent, and the need to acknowledge the expanding definition of family.

***Judge Rebecca C. Hardie*** was appointed to the bench in 2010 and presided over criminal matters for three years before moving in 2013 to a juvenile assignment, where she currently serves. She presides over both dependency and delinquency proceedings and

*assumes the role of Presiding Juvenile Judge on January 17, 2017. Prior to her appointment, Judge Hardie worked as both an adult and juvenile probation officer, a deputy district attorney, an Assistant United States Attorney, and in-house counsel as Director of Tort Litigation for Pacific Gas & Electric Co.*

# Considerations in Domestic Violence Restraining Order Cases Involvi...

Wednesday, February 01, 2017



California Family Code sections 6200-6390 govern restraining orders issued under the Domestic Violence Prevention Act (DVPA). Restraining orders can be granted against a current or former spouse, a current or former dating partner, the parent of one's child, or certain other family members, including both blood relatives and relatives by marriage. "The purpose of [the DVPA] is to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable [them] to seek a resolution of the causes of the violence." [Family Code § 6220.]

A judicial officer can issue an *ex parte* emergency protective order if a law enforcement officer presents reasonable grounds to believe there is an immediate danger of domestic violence, that a child is in danger of abuse or of being abducted, or that an elder or dependent adult is in immediate danger of abuse. [Family Code § 6250.] These emergency orders are typically issued telephonically and may last up to seven calendar days.

Upon written *ex parte* application, a judicial officer may issue a temporary domestic violence restraining order protecting the applicant, other named family or household members, and animals. [Family Code § 6320.] A hearing on the temporary restraining order must occur within 25 days. After a noticed hearing, the court can issue a domestic violence restraining order after a hearing that can last up to five years. [Family Code § 6345(a).]

LGBTQ people and some others working with survivors of abuse sometimes use the terms "domestic violence" and "intimate partner violence" interchangeably. In recent years a growing awareness has emerged about intimate partner violence in LGBTQ relationships. [1] The official website of the judicial branch contains materials on this issue that provide valuable guidance to practitioners and bench officers. [2]

Unique issues can arise in the context of domestic violence restraining order cases involving LGBTQ litigants. In some cases the person seeking protection (or a witness) may not be "out" about their sexual orientation or gender identity. Since most court proceedings (including hearings on restraining order requests) are open to the public, an abuse survivor or a witness may fear being "outed" during the course of a public restraining order hearing. Moreover, a perpetrator of abuse might use the other party's or a witness's "closeted" status to dissuade them from giving public testimony, or to discourage the protected party from pursuing a restraining order request in the first place. An abuser could attempt to "out" a party seeking protection or a witness as a means of

control or intimidation.

In appropriate cases, when “necessary in the interests of justice and the persons involved,” the Court can order a portion of a trial as to any particular fact to be held in private, with only the bench officer, court personnel, the parties, attorneys and witnesses present. [Family Code § 214.]

As a practical matter, the Court is unlikely to order part of a hearing to be closed on its own motion in order to prevent undue stress or embarrassment of any witness or party because it may not be immediately apparent that it is in the interests of justice to do so—or that these concerns are present. Unfortunately, self-represented litigants may not know that they can request a partially-private hearing. In those cases where counsel are present, a succinctly-phrased request made to the Court outside the presence of witnesses for partial closing of the hearing under Family Code § 214 could alert the Court to these potential concerns. It is unlikely that the *entire* hearing would be ordered closed, but a portion of a witness’s testimony could be taken in private if the court makes the appropriate findings.

In addition, either party to a restraining order hearing is entitled to have a support person present who can sit with them at counsel table if the party is self-represented. [Family Code § 6303(b).]

LGBTQ persons seeking restraining orders may be concerned about implicit bias or gender or sexual orientation-based stereotypes coming up during the hearing. Some practitioners have reported that it is not uncommon in restraining order requests involving LGBT individuals for one side (or the Court) to suggest that “mutual” restraining orders be issued. However, the Legislature has carefully limited the Court’s authority to issue “mutual” orders at all, and in practice such orders are rare. [Family Code § 6305(a).] Unless both parties personally appear at the hearing both having made prior written requests on the required Judicial Council forms AND the court makes a number of detailed mandatory findings, issuing mutual restraining orders is strictly prohibited. Appellate courts routinely ensure that trial courts adhere closely to these legislative mandates. [See *Isidora M. v. Silvino M.* (2015) 239 Cal.App.4th 11; *J.J. v. M.F.* (2014) 223 Cal.App.4th 968; *Monterosso v. Moran* (2006) 135 Cal.App.4th 732.]

There are increasingly numerous resources available to assist us in becoming familiar with the particular concerns facing LGBT persons involved in situations where intimate partner violence is present. [3] It is important for attorneys representing parties seeking protection and parties who may be subject to restraining orders, advocates of abuse survivors, support persons for people seeking restraining orders and for those opposing them, and bench officers to become familiar with the particular issues and concerns LGBT people involved in restraining order proceedings can have. In addition, the statutory framework of the DVPA and the manner in which restraining order hearings are conducted under the Family Code provide ready-made options for courts to use in ensuring that these hearings are fair to all sides and that parties are afforded due process.

***Christopher R. Bowen*** has been a Judge of the Superior Court of California, County of

*Contra Costa since December 2010. He is currently Supervising Judge of the Family Law Division. Judge Bowen is a member of Bay Area Lawyers for Individual Freedom (BALIF), the National LGBT Bar Association, and the International Association of LGBT Judges. He speaks frequently on Family Law topics, including restraining orders. In August 2016 he was in a panel discussion at the annual Lavender Law Conference called "LGBTQ Domestic Violence: Out of the Closets and Building a Movement." The idea for this article was inspired by his participation on that panel, and he wishes to thank Terra Russell Slavin, Debra Murphy, Anya Lynn-Alesker, and Mieko Failey who were the other panel participants.*

[1] Two Studies that Prove Domestic Violence is an LGBT Issue  
<http://www.advocate.com/crime/2014/09/04/2-studies-prove-domestic-violence-lgbt-issue>  
(retrieved December 8, 2016.)

[2] [http://www.courts.ca.gov/documents/lgbtq\\_final\\_12-4.pdf](http://www.courts.ca.gov/documents/lgbtq_final_12-4.pdf)

[3] <https://lalgbtcenter.org/health-services/mental-health/intimate-partner-domestic-violence>

# A Brief Overview of the Transgender Employee in California &am...

Wednesday, February 01, 2017



The ensuing provides a brief overview of the current status of the California Transgender population, rather startling statistics concerning discrimination faced by the Transgender community in the workplace as well as developing law in California for which a MCLE Self-Study Elimination of Bias one (1) unit of credit test is available hereinafter.

## I. A Brief Overview California Transgender Status

Adult persons who identify as transgender as of June 2016 is slightly under 1.4 million in the United States. This number is nearly double what it was four years prior. Adult identifying transgender persons are approximately 0.76% of the California population or

218,000 in California. California ranks the second (2nd) largest population in the U.S. for identifying transgender adults.

In December 2016 the largest survey examining the experiences of transgender people in the United States was issued. The report provided a detailed look at the experiences of transgender people across a wide range of categories including employment. The findings reveal disturbing patterns of mistreatment and discrimination. For example:

- The unemployment rate among respondents (15%) was three times higher than the U.S. population (5%).
- One in six (16%) respondents who have ever been employed reported losing a job because of their gender identity or expression in their lifetime.
- In the past year, 27% of those who held or applied for a job during that year reported being fired, denied a promotion, or not being hired for a job they applied for because of their gender identity or expression.
- 30% of respondents who had a job in the past year reported being fired, denied a promotion, or experiencing some other form of mistreatment related to their gender identity or expression.
- 77% of respondents who had a job in the past year took steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job.

With these sobering statics, an overview of California employment laws is discussed in brief.

## II. Overview of California Workplace Protections

### A. California's Fair Employment and Housing Act ("FEHA")

As of January 1, 2004, California's Fair Employment and Housing Act (FEHA) made it

illegal for an employer with five or more employees to fire, fail to hire, or discriminate in any way against employees who are or are perceived to be transgender or gender non-conforming.

The FEHA also prohibits “harassment” on the basis of gender identity or gender expression, regardless of the employer’s size. Harassment occurs when a supervisor, co-worker, or non-employee in a workplace subjects one to hostile, offensive, or intimidating behavior because of gender identity or gender expression.

The FEHA uses the phrases, “sex, gender, gender identify and gender expression” to define transgender. Gender expression is defined by the law to mean a “person’s gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” There are two kinds of gender transitions, social transition and physical transition. Social transition involves a process of socially aligning one’s gender with the internal sense of self such as changes in name and pronoun, bathroom facility usage, participating in activities such as sports teams. Physical transition refers to medical treatments an individual undergoes to physically align their body with internal sense of self such as hormone therapies or surgical procedures. A transgender person does not need to complete any particular step in a gender transition in order to be protected by the law.

On February 17, 2016, the California Department of Fair Employment and Housing (“DFEH”) issued guidelines on transgender employee rights. Pursuant to said clarifications, an employer may ask an employee/applicant as to their employment history, for references and non-discriminatory relevant questions. However, an interviewer should not ask questions designed to detect a person’s sexual orientation, gender identity, including marital status, spouse’s name, or relation to household member. Further, employers should not ask questions about a person’s body or whether they plan to have surgery.

Additionally, the law prohibits an employer from denying an employee the right to dress in a manner suitable for that employee’s gender identity. A transgender employee should be allowed to serve in a sex-segregated job based on their gender identity. An employer who requires a dress code must enforce it in a non-discriminatory manner. Though a job assignment can be based on sex so long as the assignment is otherwise in compliance with state law.

All employees have a right to safe and appropriate restroom and locker room facilities. Including the right to use a restroom or locker room which corresponds to the employee’s gender identity regardless of the employee’s assigned gender at birth. If possible, the employer should provide an accessible unisex bathroom for use by any employee regardless of reason, though use should be a matter of choice not requirement. Violations of the FEHA create a private right of action for the individual victim for which the individual may seek assistance through the DFEH or through an individual attorney.

## **B. California Political Activity Laws – “Coming Out”**

California Labor Code Sections 1101 and 1102 prohibit employers from preventing an employee’s political activity, or punishing an employee due to that employee’s political activity. The California Supreme Court has interpreted “coming out” by lesbian, gay, and bisexual employees to constitute protected political activity. Likewise, if one discloses gender identity or openly transitions from one gender to another, the employee may



argue that these actions are protected political acts.

### **C. Bay Area Specific Laws**

Several local Bay Area cities such as San Francisco, Oakland, City and County of Santa Cruz, have laws that prohibit gender identity discrimination in employment. Usually, these ordinances cover only employers within the locality, although some such as San Francisco extend coverage to employers who do business with the municipality. An employee should review the city and county in which they live for applicable laws and related agencies.

## **III. Conclusion**

The number of those who identify as transgender is growing in California. As a community, transgender people face frequent employment discrimination, which leads to high rates of unemployment. Education of employment rights and duties is an important element in prevention and resolution.

**Earn one hour of Elimination of Bias MCLE credit by answering the questions on the Self-Study MCLE test. Send your answers, along with a check (\$30 per credit hour for CCCBA members / \$45 per credit hour for non-members), to the address on the test form. Certificates are dated as the day the form is received.**

***Beth W. Mora** is owner of MORA EMPLOYMENT LAW, a law firm dedicated to representing victimized employees. She is a zealous and skilled advocate for those facing a range of employment law issues. In every case she handles, Ms. Mora is committed to aggressively pursuing her clients' best interests while treating each person she serves with integrity and compassion.*



# Reparative Therapy: An Old Conflict Returns with New Skirmishes Ahead

Wednesday, February 01, 2017

Reparative therapy is based on the conviction that same-gender attraction and gender identity shifts result from emotional damage and that psychological counseling can repair or reprogram these sexual “disorders.” This perspective is in direct opposition to a growing number of studies that highlight hormonal and biological differences among individuals attracted to the same gender. Biological studies on same-gender attraction have shown correlations with biological markers such as birth order [1]; RH Factor [2]; and finger length [3]. However, genetic influences cannot be seen as genetic determinism. Same-gender attraction and transgender identity are likely the result of a mixture of biological and social factors.

Many who oppose expressions of same-gender attraction on religious grounds insist that sexual orientation (and now gender identity as well) can be reprogrammed through therapeutic interventions [4]. While these interventions have been condemned by all major health and mental health professional associations the resurgence of conservative political leadership has renewed these debates. For instance, the 2016 National Republican Party platform advocated teaching the Bible in public schools and that “lawmakers use religion as a guide when legislating”.

Reparative therapy techniques received heightened attention in December 2014 when 17 year old Leelah Alcorn’s suicide made headlines. Leelah’s family rejected her transgender identity and sent her to religious-based reparative therapy. The teen responded by walking in front of a semi-truck. Her prescheduled suicide note later appeared online:

*“The only way I will rest in peace is if one day transgender people aren't treated the way I was, they're treated like humans, with valid feelings and human rights. Gender needs to be taught about in schools, the earlier the better. My death needs to mean something. My death needs to be counted in the number of transgender people who commit suicide this year. I want someone to look at that number and say "that's fucked up" and fix it. Fix society. Please.”*

Leelah’s plea highlights the suffering and pain that accompany these questionable efforts to change a person’s gender and sexual orientation.

## What does the research say?

Dr. Robert Spitzer was a leading psychiatrist of the 20th century, who pioneered the removal of homosexuality as a mental disorder from the influential Diagnostic and Statistical Manual (DSM) in 1973. It shocked many when Spitzer agreed to review the efficacy of reparative therapy techniques in 2004. Equally shocking -- and upsetting to many -- was Spitzer’s finding that the therapy appeared to have evidence of effectiveness.

His key finding was that men who had undergone reparative therapy had expanded the range of their sexual behavior [5]. Spitzer's publication of his findings reignited many debates about the role of mental health research, such as how psychological constructs like sexual attraction can be measured in psychological research. Many criticized the leaps in logic that Spitzer made in finding that men attracted to the same gender can also have sex with women somehow constitutes evidence of a "cure" of homosexuality. In the year before his death Spitzer revised his findings and issued both a retraction and an apology to the LGBTQ community. However, many conservative groups continue to rely on Spitzer's review, and view his retraction as illustrating the power of the "homosexual lobby." Spitzer's retraction was likely influenced by the World Health Organization's report issued in May 2012 by the Pan American Health Organization [6]. A key finding was that:

"Since homosexuality is not a disorder or a disease, it does not require a cure."

The WHO statement is at the heart of current debates over reparative therapy and at the center of our ongoing "culture wars." If same-gender attraction and transgender identity are sinful, and sick, they should be corrected. If they are part of a normal range of human behavior, then individuals should be given support, acceptance, and legal protection as minorities who have experienced longstanding prejudice.

It is now established that LGBT people are included under discrimination protections within the American legal system. In 2008, the California Supreme Court ruled in *In re Marriage Cases* (2008) 43 Cal.4th 757, that Proposition 22 was invalid. However what is often forgotten is that the decision also declared that due to the historical nature of discrimination based on sexual orientation, under the equal protection clause of the California constitution, California courts must use the higher standard of "strict scrutiny" when reviewing claims of discrimination. This made California the first state to apply this standard of review finding that "like gender, race and religion – sexual orientation represents a constitutionally suspect basis upon which to impose differential treatment". These ideas set out by the California Supreme Court were then further supported in the US Supreme Court decision validating the legality of gay marriage and further supporting the concept of strict scrutiny in *Hollingsworth v. Perry* (2013) 133 S.Ct. 2652.

### **So what does this have to do with reparative therapy for LGBTQ people?**

As Leelah's story highlights, reparative therapy creates increased risk and suffering for LGBTQ youth. If a treatment is unwarranted (and legal protection instead is needed) reparative therapy should have legal restrictions. In fact, efforts to reduce harm caused to youth such as Leelah Alcorn and many other LGBTQ people have now led to the banning of reparative therapy in several states.

In 2012 California passed the first bill restricting reparative therapy. Currently it is illegal in California for a licensed mental health provider to offer reparative therapy to anyone under the age of 18 and violation can lead to a revocation or review of a provider's license to practice.

New Jersey, District of Columbia, Oregon, Illinois and Vermont and some local municipalities have also issued bans. In the European Union, the country of Malta recently made a similar ruling.

The rights of professional licensing groups to issue these bans have been tested in the courts. The US Appeals Court, in *Welch v. Brown* 58 F.Supp. 3d 1079 (E.D. CA 2014), unanimously ruled that California's ban was legal and the US Supreme Court declined review. The licensing bans were then unsuccessfully challenged in New Jersey; the US

Supreme Court again declined review.

Reparative therapy will continue to be at the center of new disagreements about sexual orientation. With a new, conservative federal administration moving into power it is likely that these culture battles will continue with renewed vigor over the next four years. For those who see gender identity and sexual orientation through the filter of social construction, there is a comfort with the evolution of gender identity and acceptance of legal recognition for same gender relationships. For those who view same-gender sexual love and gender binary variations within religious or conservative framing, there is a desire to return to more traditional perspectives where these are viewed as conditions to be cured.

Legal precedents barring these “cures” are now coming into place but the pressures on mental health providers and legal advocates to sustain these advances will likely increase over the next four years.

It is hoped that we can hear Leelah Alcorn’s call to resist efforts to further stigmatize and pathologize gender identity and sexual orientation. To use her words: “ that’s f-ed up and fix it. Fix society. Please.”

[1]Blanchard, Ray and Lee Ellis. “Birth Weight, Sexual Orientation And The Sex Of Preceding Siblings.” Journal of Biosocial Science, vol. 33, 2001, pp. 451-467

[2] Ellis, Lee, Christopher Ficek, Donald Burke, et al. “Eye color, Hair Color, Blood Type, and the Rhesus Factor.” Archive of Sexual Behavior, 2008 vol. 37 doi:10.1007/s10508-007-9274-0

[3] Williams, Terrance J., Michelle E. Pepitone, Scott E. Christensen, Bradley M. Cooke, Andrew D. Huberman, Nicholas J. Breedlove, Tessa J. Breedlove, Cynthia L. Jordan & S. Marc Breedlove. “Finger-length Ratios and Sexual Orientation.” Nature vol. 404, pp. 455-456, 30 March, 2000 doi:10.1038/35006555

[4] “NARTH What We Offer.” National Association for Research & Therapy of Homosexuality (NARTH), retrieved 2016

[5];Spitzer, Robert. “Can Some Gay Men and Lesbians Change Their Sexual Orientation?” Archive of Sexual Behavior, vol. 32, pp.403-417

[6]“Cures’ For An Illness That Does Not Exist: Purported Therapies Aimed At Changing Sexual Orientation Lack Medical Justification And Are Ethically Unacceptable.” Report Pan American Health Organization, Regional Office of the World Health Organization, published 2012

**Ben Barr** has worked as a nonprofit manager and community organizer for more than thirty years. He received his Ph.D in Social Welfare from the University of California, Berkeley and his MSW from the University of Washington. Prior to his work with the RCC, Ben worked in Utah as Salt Lake Valley Health Department’s HIV/AIDS manager and before that he served as Executive Director at AIDS Project Utah and then the Utah AIDS Foundation. He also served as a founding board member of the Utah Harm Reduction Coalition and a Community Organizer for the Seattle-Based Gay City Health Project. Ben recently received a lifetime achievement award from the Utah Pride Center for his contributions to the development of health and service programs for Utah’s LGBTQ community. He is also adjunct faculty in the CSUEB School of Social Work and teaches courses in Social Policy, Research and Program Evaluation.

# Difficult Year Ahead and How You Can Help

Wednesday, February 01, 2017

From state legislation singling out transgender youth for harassment to a new presidential administration that has pledged to target Muslims, immigrants, people of color, women, people with disabilities and so many other members of our communities, we know that 2017 will be a difficult year for transgender people.

Already, in the wake of Trump's election, requests to Transgender Law Center's helpline have doubled. People fear they'll be denied identity documents that reflect who they are, that they or their family will be deported or detained, that they will lose their health care, and even that they will be in danger of violence when they are just going about their day – a reasonable fear given that three transgender people have already been murdered in these first few weeks of 2017. We do not know for sure what is coming, but we know that we need committed attorneys to work with us now more than ever.

To respond to the growing requests for support post-election, Transgender Law Center is working hard to increase our capacity to provide direct services and connect community members with legal resources. We are launching some new initiatives and expanding the programs we already provide.

Here are just a few ways you can help:

- We are restructuring our legal information helpline to increasingly rely on skilled volunteers. We are especially in need of attorneys who can commit a few hours a week to answering questions from community members relating to identity documents, healthcare, discrimination in schools and public accommodations, and more. This is a direct and immediate way to put your legal knowledge and skills to use.
- We are launching a brand new project, TIDE (Trans Immigrant Defense Effort), to connect transgender and gender nonconforming immigrants facing deportation or seeking immigration relief with pro bono attorneys who will be trained by TLC and supervised by experienced mentors. If you are interested in learning more, please visit <https://transgenderlawcenter.org/programs/tide> to see how you can help us address this critical need.
- We are looking for lawyers who can volunteer at in-person legal clinics or otherwise work with transgender clients one-on-one to help with a range of issues including name and gender changes, updating ID documents, criminal record expungements, complaints regarding police misconduct, and other criminal justice matters.
- We also need volunteers to organize in-person legal clinics—in your community, at your law firm, or in a neighboring underserved area—where community members can meet one-on-one with trained volunteer lawyers or law students.
- We are looking for potential partners on the ground in different states across the country to help fight back against proposed anti-trans legislation or local ordinances that might emerge in your area, including by serving as legal observers at protests.

In general, volunteers who have some degree of prior knowledge or experience with trans communities and issues will be able to contribute most readily, but if you are committed to learning more, we can provide training. A good place to start is to attend a cultural competency training such as the class we recently hosted with PLI, available free online.

Sign up for our Cooperating Attorney Network, and we will follow up with opportunities to help.

We cannot do this work without the support of committed volunteers and pro bono attorneys. We are immensely grateful for the ranks of attorneys who volunteer their time and expertise to help us protect the rights and lives of transgender people.



***Ilona Turner*** joined Transgender Law Center as legal director in January 2012. Before that, she was a staff attorney at the National Center for Lesbian Rights (NCLR), where her work frequently focused on issues affecting transgender clients. She previously practiced law at Cohen, Weiss, & Simon LLP in New York City, representing unions, union-run health and retirement plans, and employees. In the early 2000s she worked as the lobbyist for Equality California, where she helped to shepherd groundbreaking legislation that prohibited housing and employment discrimination against transgender people and dramatically expanded the rights of domestic partners in California.

# Bar Soap

Wednesday, February 01, 2017

Here we are starting another new year. Seems as though we just started 2016 and here we are in 2017. I know, I know, many of you just want to put 2016 behind you. But many good things happened in our wonderful Contra Costa County legal community in 2016.

If it is January I am preparing for trial. Not sure how that always seems to happen, but once more I spent the vacation time between Christmas and New Year's Day, preparing for a jury trial. At least this year it is in Contra Costa Superior Court. That makes it a little less stressful. Although I must say, trials have become much more stressful in the past few years. Anyone disagree?

I keep mentioning the MCLE Spectacular and indeed it was once again spectacular. The attendance at the event is truly amazing and it is always the time to catch up with old friends and acquaintances, as well as to earn those required credits. You better get there early as the main hall completely fills up for the morning breakfast session. As an aside, it was nice to see so many retired attorneys who still keep up with the required continuing legal education requirements. So, is one really retired from the practice of law if one keeps the license current? Not sure what I will do when that day comes. And you?

The Contra Costa Bar Association Holiday party was a hit, as was the Robert G. McGrath American Inn of Court holiday party. Attending the local Bar party is a great way to get to know the members of the Bar

Board, and to get to know the hard working staff members of the Bar. Those are the folks who make it all run so smoothly. I highly recommend membership in the local Inn of Court. I have been in it from day

one and it has been a wonderful experience; and one can earn legal education credits at each meeting, most of which are the harder to get specialty credits like ethics. For years we had six meetings a year. Now we have eight. Between the MCLE Spectacular each year and the Inn of Court meetings, you can get all your required continuing education credits.

And speaking of holiday parties. I attended the Emison Hullverson holiday party in San Francisco. I think every plaintiff's counsel in the City attended. I was all dressed up. I think when you really make it as a successful personal injury lawyer, you no longer have to dress up for holiday parties. I think I counted two other attorneys with neck ties. Hope springs eternal.

The 2017 Contra Costa Superior Court Judicial assignments came out awhile back. Lots of changes. Jill Fannin is the new Presiding Judge. Barry Baskin is the Assistant Presiding Judge. That means in two years Barry Baskin will be the PJ. In my civil world, Steven Austin is taking Jill Fannin's spot and all else in civil remains the same.

Still not getting the flow of jury trial results I need for a "Civil Jury Verdicts" column, so I will report a couple of trials in this "Bar Soap." Steve Knuppel reported a trial he had in Alameda County Superior Court. DB Lin Construction v. Wang, Case No. HG15768198 was tried before the Honorable Robert McGuiness. Factually the case involved a home renovation gone bad. Steve Knuppel represented the homeowner defending a claim for payment and prosecuting a cross complaint for defective workmanship. Nancy Weng and Palani Rathinasamy served as co-counsel with Steve. Alexander Chen of Irvine



represented the contractor. The jury returned a verdict of \$124,410 in favor of the homeowner for breach of contract and negligence. The usual post-trial motions are pending.

Banta et al v. City of Walnut Creek et al was tried in the United States District Court, Northern District, San Francisco before the Honorable Charles R. Breyer. Case No. 3:13-CV-00342-CRB. Plaintiffs were represented by Larry Peluso of Topanga, Anthony Luti of Hollywood and Dennis Wilson of Burbank. Noah G. Blechman and Amy S. Rothman of the McNamara firm of Walnut Creek, represented the defendant City and police officers. Anthony Banta was shot and killed by Walnut Creek police officers after a confrontation. The police had been called to an apartment in Walnut Creek by Banta's roommate and the roommate's girlfriend. When the police arrived, they were confronted by Banta who was holding a large knife. Banta jumped down a staircase towards the officers and the police fired. Plaintiffs demanded \$15 million in their complaint. The jury returned a defense verdict. As an aside, I was the Hearing Officer in the Coroner's Inquest related to that Banta death.

I think I made a bit of fun last column with the plethora of organizations and awards given out to lawyers. Guess what folks? I was recently selected as a 2017 member of "Lawyers of Distinction." Can you top that? Just kidding. I know there are many such awards. I just had not heard of "Lawyers of Distinction." I think I get a customized plaque, among other things.

And finally, speaking of new organizations, I joined the Walnut Creek C.E.R.T. recently. That is the Community Emergency Response Team. Went through the training program and several advanced classes in communications and medical treatment. Believe it or not I actually got my HAM radio license and an actual radio. All interesting and fun. Pleased to join a number of citizens helping the community in the event of a disaster. Also surprised and pleased to see a number of attorneys already involved in the C.E.R.T. program.

As many of you know, I am a member of the State Bar Mandatory Fee Arbitration Panel. Several times a year I arbitrate fee disputes between clients and counsel. Nice to know someone reads my Bar Soap columns, as Attorney Lorraine M. Walsh advised she saw the mention of my role as a fee arbitrator and she is also on the panel. In fact, she is a member of the Mandatory Fee Arbitration Committee and currently serves as the Vice Chair. Recently Lorraine wrote an article on the subject for the Daily Journal, with a MCLE test included. Now I know whom to call when I have a question about fee arbitrations and legal malpractice issues.

Any of you inundated with proposals for marketing your practice through social media? I am swamped with such proposals. I must say in the past we have signed up for programs which purportedly get high value cases to our firm "And only to our firm." But I must say we have never seen a benefit by way of real cases. I recently attended a seminar for marketing our practice areas. Sounds like the same pitch I hear from everyone. I would like to know, does anyone have a story to tell in which they have had great success getting case referrals from a social media marketing source? Let me know. And I am not asking for that source. Just want to know if it really works.

That's enough for now. Please keep those cards and letters coming. Actually email or text please.

# Inns of Court

Wednesday, February 01, 2017



The Robert G. McGrath Chapter of the American Inns of the Court met at the Lafayette Park Hotel on Thursday, November 10th, 2016. Attendees were treated to a presentation pulled from two aspects of a similar scenario. The first is from the hit TV series, “Better Call Saul,” a prequel to the massive hit, “Breaking Bad.” The second was pulled closer to home from a local Contra Costa attorney who went off the rails a number of years ago, moving from one practice to another, challenging opposing counsel to fisticuffs, descending into significant mental health challenges.

The presentation was broken into three vignettes – each presenting a viewpoint of a downward spiraling attorney, and the ramifications on those surrounding our fictional Saul.

Ariel Lee, Nataly Cortasso, and Kenneth Strongman portrayed the first vignette.

Ariel and Nataly acted as two Cal undergraduates, who were dealing with Saul as a troublesome, vexatious neighbor. Kenneth plays the attorney they approach to determine what their options are, as Saul has threatened them, their parrot, and their general well being. Kenneth offers mediation, emergency protective orders, and non-clats/No HAM orders, and then discusses a Civil Harassment Restraining Order as possible solutions.

At the end of each vignette, the Honorable Ed Weil stepped in with the law, and introduced the following: Family Code § 6200 Domestic Violence Restraining Order, Emergency Protective Order-Family Code § 6250, Penal Code § 13710(b), and Civil Procedure § 527.6.

The next vignette addressed the impact on Saul’s parents, played by Rita Holder and Greg Howard. C. Joseph Doherty was the attorney they approached, looking for solutions to the chaos their wayward son was creating in their life. The issue of safety was introduced, and again, the topic centered on Domestic Violence Restraining Order. Judge Weil went over the requirements for a Restraining Order. “Laura’s Law” WIC § 5345 was discussed, with the mental health aspects being developed, and what the process looks like, potentially leading up to a 5150. Additionally, Probate Code Conservatorship, Probate Code § 5350 was discussed.

The final vignette included Saul’s law partners, played by David Pearson, Janine Ogando and Bonnie Johnson. Emphasized here were the challenges a law practice would face when one of the partners goes off the rails. The focus was on the duties owed to a client (or client list) where one’s mental or physical ability is lacking. The partners discussed the Rule of Professional Conduct, Rule 3-110. That rule states that “‘competence’ in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Further discussion focused on Rule 3-700, which requires mandatory withdrawal from a case if “the member’s mental or physical condition renders it unreasonably difficult to carry out the employment effectively.”



The group opened the floor up for questions, and lively debate flowed. The questions about partner liability, and appropriate screening was balanced with humor, and a focus on setting up an LLC with the right structure. For many attorneys, it is a sobering thought that when a client hires an attorney at a law firm, the client contracts for the services of all members of the firm.

***Greg Howard*** is a former Army officer, married to Dr Clair Howard, and father of two. He is a second-year law student at JFK, and manages a sales team at AT&T.

# Board of Directors - Did You Know?

Wednesday, February 01, 2017

## Looking for lost MCLE Attendance certificates?

Not sure how many MCLE you did during your reporting period (or how many you have left before you have to report)? Never fear, the CCCBA is here!

Did you know that you can print out MCLE certificates for most of the programs that are sponsored by the CCCBA and its sections? So if you are panicking and can't find your certificates..

- Go to [www.cccbba.org/attorney](http://www.cccbba.org/attorney)
- Click on 'Login' in the upper right corner
- Once you have logged in click on 'My Events' to see a list of CCCBA events that you have attended
- Simply click on the relevant certificate and print it out

Need help logging in or have questions about MCLE? Contact Anne Wolf at [awolf@cccba.org](mailto:awolf@cccba.org) or (925) 370-2540.











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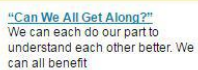


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## News & Updates



The Robert G. McGrath Chapter of the American Inns of the Court met at the



Holiday Party Photos  
It was a dark and stormy night (really!) but that did not deter the jovial

## Year End Financial Report

Annual Officer Installation Luncheon, January 27, 2017