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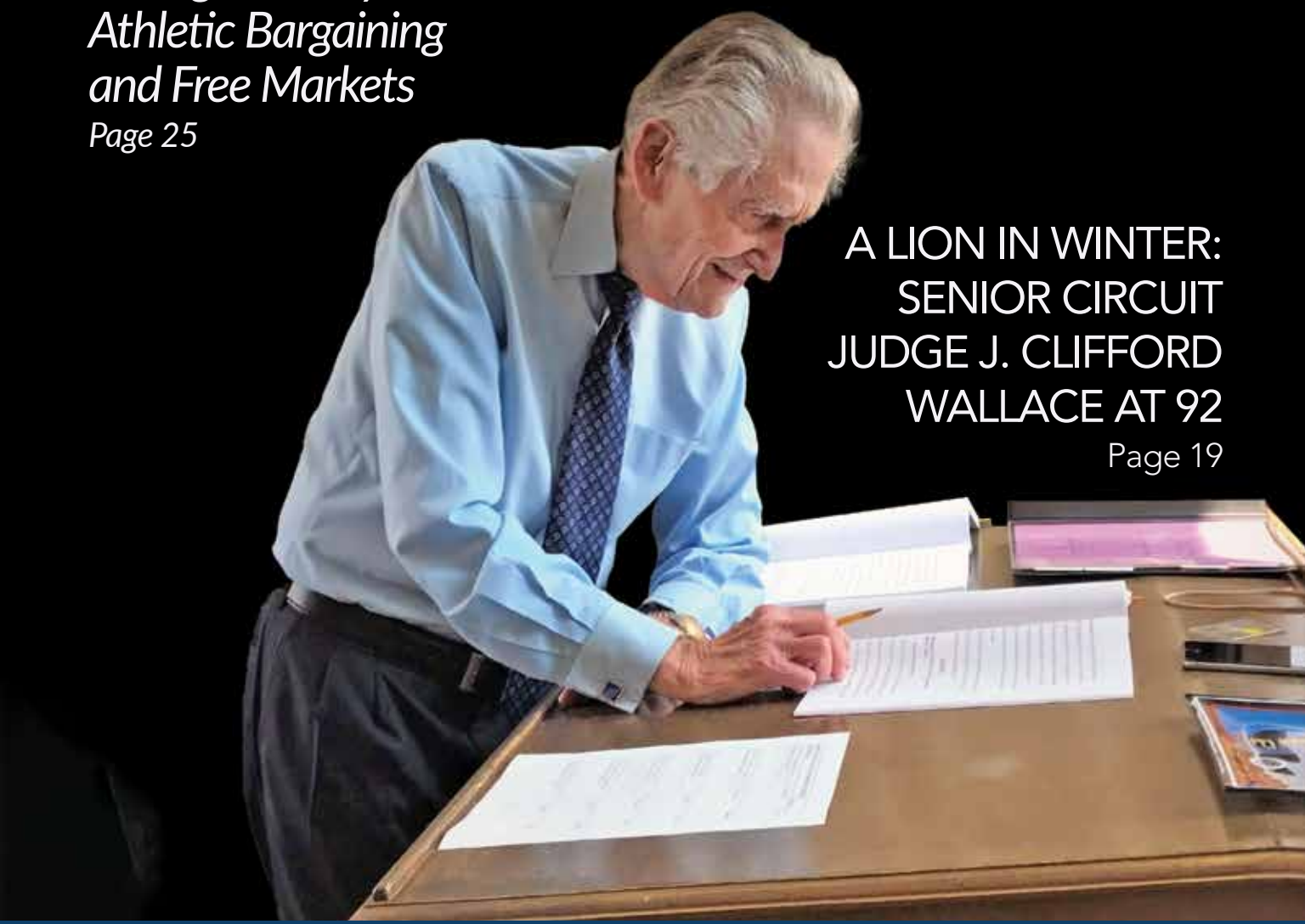

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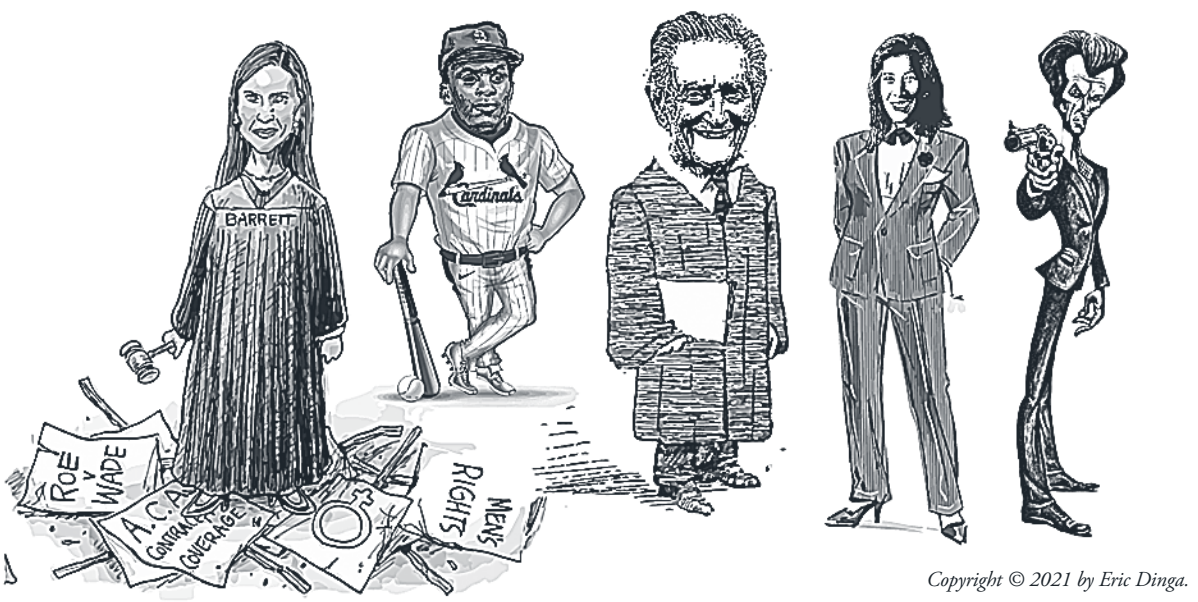


FROM THE SECTION CHAIR

By Jessica Barclay-Strobel

Jessica Barclay-Strobel

As we look to the coming year, the Litigation Section anticipates resuming in-person gatherings for some of our signature programs in Spring of 2022 while continuing to offer a wide range of online options. Like so many of you, we pivoted to entirely online programming last year. Despite those constraints, we significantly expanded the amount and types of programs we offer, including through the Racial Justice Committee launched in 2020 (https://calawyers.org/Racial-Justice-Committee-Resources/). While we have adapted to an online world, it was nonetheless a wonderful treat to recently hold our first in-person event in over a year: the 2021 award ceremony inducting Arturo González and Dennis A. Schoville into the Trial Lawyer Hall of Fame (https://calawyers.org/litigation/trial-lawyer-hall-of-fame-winners/) and Wendy Cole Lascher into the Appellate Lawyer Hall of Fame (https://calawyers.org/litigation/appellate-lawyer-hall-of-fame-winners/).

Our programming expansion this past year was made possible by the excellent leadership of so many Litigation Section members—including our amazing outgoing chair Terrance Evans and our wonderful outgoing Executive Committee members Karli Eisenberg and Michelle Galloway, who made our virtual Litigation and Appellate Summits such a success. We thank our outgoing members, who now pass the torch to new Executive Committee members Nadim Hegazi and Nathaniel Dunn, as well as Jeff Daar (our Alternative Dispute Resolution Committee chair) and Seth Kugler (our former California Young Lawyers Association liaison). I look forward to working with our members in my new role as Litigation Section chair, along with my fellow officers Mary McKelvey (vice-chair), Erik Silber (treasurer,) and Adrieannette Ciccone (secretary).

Our Executive Committee will continue to provide you with outstanding publications, webinars, and other programs. Be sure to mark your calendar for these exciting upcoming activities:

- **A Week in Legal London**, which will be held on March 20-26, 2022, and will also offer our first add-on program in Edinburgh from March 27-31, 2022 (http://AWeekInLegalLondon.com/).
- **Core Skills: Anatomy of a Trial**, which will be held on April 23, 2022.
- **Litigation and Appellate Summits**, which will be available online on May 12-13, 2022.

EDITOR'S FOREWORD

No Longer on Demand

By Benjamin G. Shatz

Benjamin G. Shatz, Editor-in-Chief of this journal, is a certified Specialist in Appellate Law and Co-chairs the Appellate Practice Group of Manatt, Phelps & Phillips, LLP, in Los Angeles. BShatz@Manatt.com

In August, I received an email from Kimberly McDermott Stefanowicz. The McDermott name should ring a bell, since Tom McDermott was a founder of this journal and its longest-serving editorial board member. Sadly, the email was a notification from Tom's daughter that he had passed away. Tom's dedication to the Litigation Section and this journal were unparalleled. He chaired the section in 1993-94 and wrote extensively for this publication, including his regular column called *McDermott on Demand*. To honor Tom, here is the obituary from his daughter:

Thomas John McDermott, Jr. (1931-2021)

Thomas J. McDermott, Jr., who was born and raised in Santa Monica during the Great Depression before becoming a successful litigator, died June 30, 2021. He was 90 and still practiced law full time. He graduated with a B.A. in English Literature from UCLA. He then served in the United States Army in Ft. Lee and Korea before receiving his J.D. from UCLA School of Law, where he was Articles Editor of Law Review and Order of the Coif.

Tom practiced law for 62 years, mainly in Los Angeles before opening his own firm in Palm Desert. He represented major corporations (e.g., United Airlines, Pan Am, Packard Bell, Baskin Robbins, IBM, Ford, Pfizer, Warner Bros.), government entities, and well-known entertainers.

He helped found and was president of the Association of Business Trial Lawyers (serving as the first editor of the ABTL Bulletin), president of the UCLA Law Alumni Association, chair of the State Bar's Litigation Section, chair of the Lawyer Representatives Coordinating Committee of the Ninth Circuit Judicial Conference, chair of the Ninth Circuit Judicial Conference, and chair of the Ninth Circuit Advisory Board. He was a Fellow of the American College of Trial Lawyers. He was a founder of the Los Angeles Opera Company and represented it for several years, and served on the board of the Los Angeles Music Center Performing Arts Council.

Throughout his career he earned many awards. In 2009 he received the John Frank Award, given annually by the Ninth Circuit

to a lawyer for outstanding service to the federal courts. In 2013 he was inducted into the Litigation Section's Trial Lawyer Hall of Fame.

Tom enjoyed listening to music and performing magic. He was a member of the Magic Castle in Hollywood before moving to the desert. He loved attending operas, musicals, and comedies. He was an avid reader, with a fondness for James Joyce, Charles Dickens, and F. Scott Fitzgerald. He also collected books and donated his personal collection to the University Library "Rare Book Room" at California State University Northridge.

He and his former wife helped coordinate the adoption of numerous orphans in Thailand in the mid-1970's. He was a proud member and former President of the La Quinta Rotary Club. Palm Desert proclaimed September 12, 2013 as Thomas J. McDermott Day. He met his wife, Yolanda, during the 1989 coup d'état in the Philippines where they were both taken hostage at their hotel in Manila.

Tom is survived by his wife Yolanda, children Kimberly and Kish, and grandchildren Trystan and Skylar.

* * *

Tom may not longer be "on demand," but he'd undoubtedly want to the show to go on. In this issue we have our annual Cal Supreme Court recap by Kirk Jenkins. We then shift to the U.S. Supreme Court for Jimmy Azadian's take on our newest high court justice, Amy Coney Barrett. Sticking with the federal theme, Eddy Board member Dan Lawton interviews the unstoppable nonagenarian Ninth Circuit Judge Cliff Wallace.

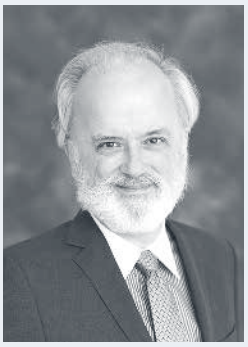
We next take a historical look at two important cultural touchstones that have reached their half-century mark: First, an analysis of *Flood v. Kuhn*, which changed baseball, and then a modern take on Inspector Harry Callahan, in *Dirty Harry Turns 50*. On the retrospective theme, ADR guru (and inaugural ADR Hall of Famer) Richard Chernick looks back at his groundbreaking career. But before that, we've also tucked in a quartet of practical articles, addressing special masters, 998 offers, recent employment law developments, and the evolving saga of lawyer Steven Donziger. (Is Donziger a legal hero or villain? Send in your views!)

Surely something in this issue will catch your interest. If so, let us know. And if not, let us know what you'd like to be reading about. This is your Section and your journal, and we can serve you best when you share what's on your mind. My in-box is always open for you.

The California Supreme Court, 2020-2021:

Tracking the Impact of the Pandemic

By Kirk C. Jenkins



Kirk C. Jenkins is Senior Counsel at Arnold & Porter Kaye Scholer LLP in San Francisco, and is the President of the California Academy of Appellate Lawyers.

Although there was comparatively little time in Judicial Year 2019-2020 for the coronavirus pandemic to impact the Court's workload given that a national emergency was not declared until March 2020, the story of the California Supreme Court for JY2021 was the same as the dominant story for nearly everyone around the world: coping with the pandemic.

The pandemic's impact was clear in the JY2021 data. The Court's production of opinions was down sharply: only 56 decisions — 37 criminal and only 19 civil. This compares to 77 decisions in JY2020 (43 criminal, 34 civil), 75 in JY2019 (43 criminal, 32 civil), 85 in JY2018 (49 criminal, 36 civil) and 90 in JY2017 (44 criminal, 46 civil). Thus, the Court's workload was down 28% in a single year. The explanation isn't difficult to fathom. Criminal defendants have the right to a speedy trial, which at least somewhat limits a trial judge's ability to postpone trial dates. Civil parties have no correlative right. Accordingly, the Court's criminal production was down only about 14%, while civil cases dropped 42% from the two preceding years.

There was no similar drop-off in the Court's death penalty caseload. For JY2021, the Supreme Court reviewed 15 death penalty decisions. The Court affirmed 10 of those decisions in all respects. Three decisions were reversed in part but the penalty affirmed. One decision was reversed in part and the penalty reversed, and one case was reversed outright. We'll get to lag time data shortly, but there's no real indication in the data that Proposition 66 has caused the Court's death penalty production to increase much; the Court published 19 death cases in JY2018, 20 in JY2019 and 17 in JY2020 before the slight drop this year. Since JY2012, the Court has reviewed 190 death penalty cases. The Court affirmed in all respects in 132, i.e., 69.47% of the total. The Court reversed in part while affirming the penalty in an additional 31 cases (16.32%). In 20 cases, the Court reversed in part while reversing the penalty, accounting for 10.53% of the total. Finally, the Court has reversed completely in

only seven cases (3.68%). The shift to a more Democratic Court has not significantly impacted the penalty reversal rate. For JY2021, 13.33% of the death penalty cases were either reversed in part with the penalty reversed or reversed outright. For JY2017, penalty reversals accounted for 14.29% of the docket. In the years between, the number was all over the place: down to 5.26% in JY2018, up to 20% for JY2019 and back down to 11.76% in JY2020.

As always, Los Angeles County was the largest single source of both civil and criminal cases making the Court's docket. Los Angeles accounted for six civil cases. Certified questions from the United States District Court for the Northern District of California produced three. San Bernardino and San Diego Counties accounted for two each. Six counties produced one case each: Alameda, Orange, Riverside, San Joaquin, San Mateo and Santa Clara.

On the criminal side, Los Angeles produced a dozen cases. Five counties were tied for second place with three cases: Alameda, Orange, Riverside, San Francisco and Ventura. Kern and San Bernardino Counties accounted for two cases apiece. Five counties produced one case each: Contra Costa, Sacramento, San Diego, Sonoma and Stanislaus.

Six civil cases arose from the Second District—two each from Divisions Seven and Eight and one apiece from Two and Three. Another six cases came from the Fourth District—three from Division Two, two from Division One and one from Division Three. Only two cases arose from the First District, one each from Divisions Four and Five. The Court decided three certified question appeals and one case each from the Third and Sixth Districts.

The Second District led the criminal docket with eight cases—three from Division Two, two each from One and Five and one from Division Six. The First District was next, producing six criminal cases—two each from Divisions One and Two and one each from Three and Four. The Fourth District accounted for five cases—three from Division Two, two from Division Three. The Fifth District produced two criminal cases, the Third District produced one and as mentioned, 15 death penalty appeals arrived directly from the trial courts.

The reversal rate in civil cases from the Second District was 50%—one reversal each from Divisions Three, Seven and Eight. The Fourth District had a rough year at the Court, with five of its six cases being reversed (an 83.33% rate). The First District fared even worse—two civil cases, two reversals. The Sixth District's one civil case was reversed, and the Third's one case was affirmed.

Five of the eight criminal cases from the Second District were reversed, or 62.5%: two from Division Two and one each from One, Five and Six. The First District was reversed in five of six criminal cases: two from Division One and one each from Two, Three and Four. The Fourth District had an 80% reversal rate on the criminal side, with four of five cases being reversed. The one Third District case was reversed but both Fifth District decisions were affirmed.

Eleven of the Court's civil cases arose from a final trial court judgment. Three arose on certified question appeals. Two were from petitions for writ of mandate (one administrative, one not). There was one injunction order, one order on an anti-SLAPP motion, and one order on a motion to set aside a default.

On the criminal side, in addition to the 15 death penalty appeals, seven cases arose from final judgments. Six were non-death habeas pe-

titions. Two arose from final orders in parental rights termination proceedings. Seven other categories contributed one case each to the criminal (quasi-criminal, juvenile and mental health) docket.

Very few of the Court's cases on either the civil or criminal side involved dissents at the Court of Appeal in JY2021: only 2 of 19 civil cases and 1 of 37 criminal cases. This tracked the Court's record for recent years. In JY2020, only 2 of 34 civil cases had dissents below. In JY2019, only 5 of 32 cases were divided decisions, and the previous year, only 5 of 36 were. For the criminal docket, of course we eliminate the death penalty cases which bypass the Court of Appeal. In JY2020, 6 of the remaining 26 criminal cases had dissents below. In JY2019, only 2 of 23 cases did, and in JY2018, it was 5 of 30.

For JY2021, 14 of 19 civil cases were published at the Court of Appeal. Fifteen of 22 non-death criminal cases were published. Once again, these numbers track the Court's recent record. In JY2020, 70.6% of civil cases were published at the Court of Appeal. A year earlier, 84.38% were, and in JY2018, 77.78% of civil cases were published. On the criminal side, 73.08% of cases in JY2020 were published. In JY2019, 60.87% were published. In JY2018, two-thirds of criminal cases had been published.

It's far from clear that the processing of death penalty appeals has sped up since the approval of Proposition 66 in 2016. For JY2021, the decisional period — the average days from the end of briefing to oral argument — was 906.33 days in death penalty cases. In JY2020, the average was 1,117.29 days, meaning that these cases were moving more slowly before the pandemic took hold. The average was down to 809.1 in JY2019 but was 1,091.63 days in JY2018. The decisional period in non-death criminal cases averaged 173.91 days in JY2021. The average wait from the grant of review to oral argument was 457.06 days.

Although the pandemic decreased the Court's caseload, it doesn't seem to have slowed down the processing of civil cases much. The average wait between the end of briefing and oral argument in civil cases in JY2021 was 244.74 days. The average lag time from the grant of review to oral argument was 600.58 days. The average decisional period was higher in JY2020 — 342.64 days. But it was lower in JY2019 (239.79 days) and in JY2018, the wait was 233.48 days.

Nearly 90% of the Court's civil cases (17 of 19, to be precise) were decided unanimously. The unanimity rate was down slightly in JY2020 at 82.35%. The year before, the unanimity rate was 90.63%. In JY2018, the unanimity rate for civil cases was 81.4%. Unanimity on the criminal side has been rising in recent years. For JY2021, 91.89% of the Court's criminal cases were unanimous decisions. The percentage was 88.37% in JY2020, 81.4% in JY2019, and 73.47% in JY2018.

The reversal rate has steadily risen over the past four years. For JY2021, 80.77% of the Court's civil cases were reversals. In JY2020, it was 61.76%. For JY2019, only 43.75% of the Court's civil cases were reversals. In JY2018, it was only 27.91%. Reversal has steadily increased on the criminal side as well, but not nearly as sharply. In JY2021, 47.62% of the Court's criminal cases were reversals. In JY2020, the reversal rate was one-third. In JY2019, 27.91% of the Court's criminal cases were reversals. The previous year, the rate was almost identical: 28.57%.

The issues the Court ruled on in JY2021 shifted a bit from recent years. Although government and administrative law has been the

most common issue on the docket for many years, it accounted for only one civil case this year. Civil procedure was the most common area last year, but this year, the Court decided eight cases dealing with employment law. Civil procedure was second with five cases. The Court decided three tort cases and two insurance law cases.

On the criminal law side, the most common issue after the death penalty appeals was criminal procedure (six cases). The Court decided four juvenile justice cases and three apiece in habeas corpus and sentencing law. The Court decided two criminal cases involving constitutional law, two involving the elements of violent crimes and one each relating to drug offenses and mental health proceedings.

Justice Kruger was the most prolific writer on the civil side this year, writing five majority opinions. The Chief Justice was next, producing four. Justices Corrigan and Liu wrote three apiece, Justice Cuellar wrote two majorities and Justices Groban and Jenkins wrote one each. The criminal side was a three-way tie, with Chief Justice Cantil-Sakauye and Justices Chin and Liu writing seven majority opinions apiece. Justice Corrigan wrote six majority opinions. Justices Corrigan and Kruger wrote four apiece and Justice Jenkins added one.

The Justices filed only nine concurring opinions in JY2021. On the civil side, Justices Kruger, Cuellar, Groban and Jenkins filed one apiece. This represents a sharp drop from two of the past three judicial years. In JY2020, 29.41% of the Court's civil cases drew concurrences and in JY2018, 30.56% of the civil cases did. Five concurrences on the criminal side (13.51% of the docket) was in line with recent years: 16.28% in JY2020, 13.95% in JY2019 and 10.2% in JY2018.

In civil cases, Justice Cuellar wrote two dissents and Justice Liu filed one — but given the low caseload, this represented an increase to 10.53% of civil cases, compared to 8.82% in JY2020, 9.38% in JY2019 and 8.33% in JY2018. On the criminal side, Justices Kruger, Liu and Corrigan filed one each. This continued the recent sharp drop in criminal dissents. In JY2018, 26.53% of the Court's criminal cases drew at least one dissent. The following year, the share was down to 18.6%. In JY2020, only 11.63% of the criminal docket had a dissent. This year, it was down to 8.11%.

As a result of the sharp decrease in civil cases, amicus briefs were more numerous on the criminal side than on the civil docket in JY2021. A total of 35 amici supported civil appellants and 33 supported respondents. In the criminal docket (largely as the result of *In re Humphrey* and *In re Palmer*, two cases the Court took on its own motion), there were 52 briefs for appellants and 17 for respondents. Four briefs in each docket supported neither party. But this amounts to a higher average number of briefs in civil cases: 1.84 for appellants, 1.74 for respondents, compared to 1.41 and 0.46 in criminal cases.

With so many more amicus briefs being filed in the Supreme Court compared to other state supreme courts around the country, the question is often asked whether amicus support increases a party's chances of winning. One of several ways to approach that question is to divide the briefs by those for winning and losing appellants and respondents. Indeed, winning parties averaged more support. In civil affirmances, respondents averaged 1.14 amicus briefs to 0.57 for appellants. In reversals, appellants averaged 2.67 briefs in support to 1.44 for respondents.

Researchers have established two propositions from oral argument analytics studies:

First, the court will typically average more questions to the party who will lose, and many individual justices typically will more heavily question the party they're voting against. The second proposition comes from our article last year: the Supreme Court asked fewer questions in remote arguments than in live ones. So what about JY2021, an entire year of remote arguments?

For JY2021, the Court asked 155 questions of civil appellants and 172 to respondents: an average of 9.69 and 10.75 per case, respectively. In criminal cases, the Court asked 353 questions of appellants (9.81 per case) and 296 of respondents (8.22 per case). The losing party does average more questions on both the civil and criminal side, although the difference was not substantial this year. In civil affirmances, appellants averaged 10.43 questions to 10.14 for respondents. In civil reversals, it was 11.22 for respondents to 9.11 for appellants. In criminal affirmances, appellants averaged 9 questions to 5.56 for respondents. In reversals, respondents averaged 11.44 to 10.81 for appellants. In contrast, in the most recent entirely-live-arguments of JY2019, the Court averaged 50 questions per case in civil cases and 42 in criminal cases.

On the civil side, Justice Cuellar was the heaviest questioner, averaging 8.4 per case. Next were Justices Kruger (6.87), Jenkins (6.46), Groban (6.06) and Liu (4.97) and the Chief (4.78). The least active questioner this year in civil cases was Justice Corrigan, averaging only 0.87. Less than half the Court averaged more questions to the party that Justice was voting against – Justices Corrigan and Jenkins and the Chief Justice (affirmances only). Justices Kruger and Cuellar averaged more questions to appellants in all civil cases, while Justices Groban and Liu more heavily questioned respondents.

Justice Cuellar was also the most active questioner on the criminal side, averaging 7.26 per case. Justice Corrigan was next, averaging 6.09, and Justice Liu was close behind at 5.28. Behind Justice Liu were Justices Groban (4.46), Jenkins (4.0) and Kruger (3.89). The least active questioner in criminal cases was the Chief (3.25). Four Justices — the Chief and Justices Groban, Cuellar and Liu – averaged more questions to the party they were voting against. Justices Corrigan, Kruger and Jenkins averaged more questions to the appellant regardless of their vote.

We conclude this year with a new topic – the Court's petition conferences. Once again, we divide the data into pure civil cases on the one side and criminal, quasi-criminal (habeas), juvenile justice and mental health cases on the other. During JY2021, the Court disposed of more than three-and-a-half times as many petitions for review in criminal cases (2,959) than in civil cases (817). Of the 817 civil cases, 17 were granted outright, 8 were granted-and-held, 12 were granted-and-transferred, and 780 were denied. Because the Court conferences year-round, there is nothing akin to the "Long Conference" at the U.S. Supreme Court where the Court deals with far more petitions than at any other time. The heaviest civil docket was on December 9, when the Court disposed of 33 civil cases. On September 16, 13.33% of the civil cases were granted outright, the highest rate of the year. In 24 conferences, no civil cases were granted. For the entire state, the grant rate was 2.08%, and the "not denied rate" – grants + grant-and-holds + grant-and-transfers – was 4.53%. The "best" District to bring a civil case to the Court from was the Second, where the outright grant rate was 4.01%. It was followed by the Fifth (1.96%), Division Two of the Fourth (1.89%) and the First (1.4%). Fourteen civil disposition orders drew dissents – most often cases from the Second District (5). Justice

Liu was the most frequent dissenter with seven, and one disposition drew three dissenters (Liu, Cuellar and Kruger).

Of the 2,959 criminal cases disposed of this year, 19 were granted, a rate of 0.64%. Another 558 were granted-and-held, 30 were granted-and-transferred and 2,352 were denied. The grant-and-hold rate was 18.86%; the "not denied" rate was 20.51%. The busiest conference was January 13, when 131 cases were disposed of, and the highest grant rate was February 17, when 3.03% of criminal cases received grants. The only two Districts whose criminal grant rates were over 1% were the two courts which accounted for the fewest cases — the Sixth (1.39%) and the Fifth (1.19%). Next were the Second District (0.85%) and the Third (0.49%). Twenty-nine disposition orders drew dissents, most frequently in cases from the Second (7) and First Districts (5) and Division Two of the Fourth (5). The most frequent dissenter was Justice Liu (15), followed by Justices Cuellar (12) and Groban (6). Justices Liu and Cuellar dissented alone in 7 cases.

JY2021 was a uniquely difficult year for people and institutions throughout California and around the world. The pandemic appears to have been responsible for a sharp fall in the Court's civil caseload and a minor dip in the criminal docket, and the Court is clearly far less active in remote oral arguments than it has traditionally been live. But all things considered, the Supreme Court has weathered the pandemic remarkably well, continuing to process petitions, hear arguments and write and issue opinions. Hopefully when we review JY2022, we can look back on this year as a unique challenge in the Court's long history.

She's No Rookie:

Associate Justice Amy Coney Barrett Emerges as a Key Influencer in Her First Term

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By James Azadian

Amy Coney Barrett is the fifth woman to join the Supreme Court, the second female justice nominated by a Republican president, and the first woman to fill a vacancy created by another woman on the Court, with the passing of Associate Justice Ruth Bader Ginsburg. She is also the first justice who is the mother of school-aged children (seven, to be exact) and, as noted by then-Senate Judiciary Chairman Lindsey Graham, "this is the first time in American history that we've nominated a woman who's unashamedly pro-life and embraces her faith without apology." Of the current justices, Justice Barrett is the only one who did not receive her law degree from Harvard or Yale, and the only justice in the Court's history to graduate from Notre Dame Law School.

Before Justice Barrett was nominated to the Supreme Court, she served as a law clerk to the late Justice Antonin Scalia, as a law professor at her alma mater, and as a federal court of appeals judge. During her circuit judge confirmation hearing in 2017, her name made headlines when certain senators pressed about her faith and how it may impact her forthcoming jurisprudence. "The dogma lives loudly within you," California Democratic Senator Dianne Feinstein sternly told Barrett during the hearing. Those comments were widely criticized as showing religious bigotry in the Senate's consideration of Barrett for the circuit post. Undeterred, Barrett responded: "I would never impose my own personal convictions upon the law."

Three years later, Barrett was again poised to appear before the Senate, but this time for her Supreme Court confirmation hearing. As she accepted the President's nomination, her first words were to praise Justice Ginsburg: "Should I be confirmed, I will be mindful of who came before me.... The flag of the United States is still flying at half-staff in memory of Justice Ruth Bader Ginsburg to mark the end of a great American life. Justice Ginsburg began her career at a time when women were not welcome in the legal profession, but she not only broke glass ceilings, she smashed them." At the time of her Supreme Court confirmation hearing, Barrett's critics were no longer focused on her faith. They were primarily concerned that she would provide the critical vote needed to eviscerate the Affordable Care Act (also known

as Obamacare), with the passing of Justice Ginsburg leaving the Court seemingly divided 4-4 on the subject. Once again, Barrett's name was vaulted in headlines, this time as the one who would take a flamethrower to Obamacare, with her critics insisting that she would strike down the Act if she was confirmed. Senate Democratic Leader Chuck Schumer boldly declared that "a vote by any Senator for Judge Amy Coney Barrett is a vote to strike down the Affordable Care Act and eliminate protections for millions of Americans with pre-existing conditions."

Nevertheless, the Senate confirmed Barrett in a 52-48 vote (almost strictly along party lines, with all the Democrats and one Republican voting against her). She became the 103rd associate justice of the Supreme Court on October 27, 2020, nearly a month after the Court's 2020 Term was already underway. It was an unprecedented and unceremonious introduction to the Court, which remained closed due to the pandemic, causing all oral arguments to occur by teleconference. The newest justice did not physically take the bench with her fellow justices during the entire term. These pandemic circumstances did not afford the hospitality, warm welcome, and mentorship a new justice receives upon joining the Court. In many ways, Justice Barrett had to navigate her inaugural voyage alone.

Justice Barrett is still at the dawn of her lifetime appointment to the Supreme Court and, with only one partial (pandemic) term under her belt, she has already become an influencer, shaping the Court's jurisprudence, tipping the dynamics of her colleagues, and proving her critics wrong. Like any new justice, she is developing her own voice and synergy with her colleagues. Toward that end, she appears to be separating herself from her brethren on the right with her low-key, attention-deflecting manner. While Justice Barrett has adopted the legal method of her mentor, the late Justice Scalia, she has avoided the sharp rhetoric that defined him. During oral argument, her approach has been polite yet exacting, asking thoughtful and probing questions of both sides, demonstrating her impeccable command of the record and the law. She avoids the limelight, declining interview requests and making no public appearances. Her record so far suggests that she has joined the center of the Court rather than its right flank.

She served to solidify the Court's rightward tilt, as demonstrated in controversial cases seemingly decided along ideological lines, including three 6-3 rulings in which the conservative majority (1) gave states more room to enact voting restrictions, (2) further eroded campaign finance disclosure laws by striking down California's charitable donor disclosure requirement, and (3) dealt another setback for organized labor by limiting the ability of union organizers to enter agricultural businesses in California. It may be more accurate, however, to describe the Court now in terms of a 3-3-3 split between the liberal bloc (Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan), the swing bloc composed of conservative-leaning members willing to compromise (Chief Justice John Roberts Jr. and Justices Brett Kavanaugh and Barrett), and the more hardline conservative members (Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch). Voting statistics from the past term support that description with Kavanaugh in the lead followed by a tie between Roberts and Barrett as the three justices most often in the majority this past term.

But Justice Barrett's greatest influence may be seen in how she has altered the role and effect of the chief justice. In the last few terms, Chief Justice Roberts emerged as the swing or anchor

vote in deciding close, hot-button cases — a role previously occupied by now-retired Justice Anthony Kennedy. For example, in the 2019 Term, the Chief was in the majority in 97% of the cases and provided the key fifth vote in the closely divided decisions, often siding with the Court's "liberal bloc" to form a majority. That contrasts with the most recent past term, where the Chief was in the majority in 91% of the cases and Justice Kavanaugh supplanted Chief Justice Roberts as the court's new ideological median, finding himself in the majority in 97% of the cases. It should be noted, however, that with Barrett recused in a dozen cases, a reliable picture cannot emerge as to which justices were in the majority the most this past term.

What is clear is that the addition of Justice Barrett and departure of Justice Ginsburg created a 6-3 majority of conservative-leaning justices for the first time during Roberts' tenure, thus severely limiting (if not altogether eliminating) the Chief's ability to provide the deciding vote in close and highly fraught cases. The Chief's vote no longer can help the liberal bloc (Justices Breyer, Sotomayor, and Kagan) to form a majority. And no longer is the Chief's vote essential to the conservative bloc (Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett). In other words, the Chief's ability to shape decisions and how they are written now depends on his joining the majority, which gives him the authority to assign authorship of the majority's lead decision, even to himself.

And with Barrett aboard, it is going to be considerably more difficult for the three justices forming the Court's liberal bloc to achieve a majority in hot-button, divided cases. When Justice Ginsburg was on the Court, the liberal bloc needed only one more vote to form a majority. Now it needs at least two more votes.

Justice Barrett authored four rulings in cases argued during the term and three dissents. Her first opinion was in *United States Fish and Wildlife Service v. Sierra Club*, holding that the federal government does not need to fully disclose draft environmental documents under the Freedom of Information Act, even if those drafts reflect an agency's final view about a policy proposal that it later abandons. It is a Court tradition that the maiden opinion delivered by a new justice be a unanimous decision that is an easy write. But Justice Barrett, like her predecessor Justice Ginsburg, wrote her first opinion for a divided Court. And for Justice Barrett's second opinion, which was a unanimous ruling, the Chief assigned her the long-running original jurisdiction dispute between Florida and Georgia over the proper apportionment of interstate waters. Again, not exactly the easy write or the warm welcome that Justice Barrett may have expected.

While Justice Barrett's first couple of opinions may not have garnered much attention, her third opinion made up for it. *Van Buren v. United States* was the Court's first serious look at the Computer Fraud and Abuse Act of 1986, which makes it a crime to "exceed authorized access" on a computer and was meant to target hacking and related computer crimes. The government argued that users "exceed unauthorized access" (and thus face federal criminal liability) whenever they use information from a computer for an impermissible reason. A police officer named Van Buren lawfully accessed computerized license-plate records, but his use of the information for a private purpose resulted in his federal criminal prosecution. Justice Barrett led a 6-3 majority to overturn the officer's conviction and held that the relevant provision of the Act "covers those who obtain information from particular areas in the computer — such as files, folders, or databases — to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for

obtaining information that is otherwise available to them." Justice Barrett reasoned that an overly broad view of the law would penalize commonplace computer activity, such as an employee sending a personal email or checking sports scores on a work device. If the law "criminalizes every violation of a computer-use policy, then millions of otherwise law-abiding citizens are criminals," Barrett wrote.

But what was most significant about *Van Buren* was that the six-justice majority consisted of all three members of the Court's liberal bloc, while Justice Thomas dissented, joined by the Chief and Justice Alito. The dissent adhered to a different interpretation of the law's text, reasoning that Van Buren's actions violated the law because he was not entitled to the information he was otherwise authorized to access. "Using a police database to obtain information in circumstances where that use is expressly forbidden is a crime," Thomas wrote. This clash in statutory interpretation between the Court's junior-most and senior-most conservative not only resulted in the ideologically diverse scramble that composed the majority, but it also had the effect of discrediting the critics who persistently compared Justice Barrett to Justice Thomas during her confirmation battle, providing the important reminder that justices don't fit neatly into doctrinal boxes. Thus, early into her tenure, Justice Barrett has made it clear that she is not a follower of other justices. She is her own, independent justice, with the prowess to lead Court majorities, including those justices in the liberal bloc. And she has the respect of her colleagues, even from those who do not share her ideology. Notably, Justice Breyer, the senior justice in the *Van Buren* majority, chose Justice Barrett to write *Van Buren* for the Court even though he could have assigned it to Sotomayor, Kagan, or himself.

Further upending her critics and their predictions about her jurisprudence, Justice Barrett joined the Court's 7-2 majority decision penned by Justice Breyer to uphold the Affordable Care Act in *California v. Texas* and *Texas v. California* — the most controversial cases of the term, concerning the constitutionality of the Act's individual mandate and the fate of the entire Act itself. The majority held that the individual plaintiffs and the state plaintiffs lacked standing to challenge the Act's individual mandate, which requires most individuals to either maintain healthcare insurance or pay a monetary penalty. Oral argument in these cases occurred in November 2020 and presented the first hearing in which Justice Barrett participated, causing all ears to attentively listen to her questions, especially because it was widely believed that she would provide the decisive vote. Barrett surprised her critics during oral argument by asking questions that made her seem skeptical about a total dismantling of the Act. These cases underscore the futility in forecasting how a particular justice will decide an issue or vote in a case, and the importance assigned to one justice's vote in any particular case.

Justice Barrett's addition to the Court has yielded a tangible effect in religion cases, and most prominently with the First Amendment cases challenging Covid-19 restrictions on worship gatherings. In *South Bay United Pentecostal Church v. Newsom*, a 5-4 majority composed of Roberts, Ginsburg, Breyer, Sotomayor, and Kagan denied an injunction seeking to ban enforcement of the worship restrictions. About a month after Justice Barrett joined the Court, however, the 5-4 majority flipped in the case of *Roman Catholic Diocese of Brooklyn v. Cuomo*, with Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett ruling in favor of the worshippers. That new 5-4 majority then returned to grant a similar injunction in *Tandon*

v. Newsom. Additionally, in a death penalty case reaching the Court on an emergency application (*Dunn v. Smith*), Justice Barrett blazed her own path, disagreeing with her colleagues on the right and signing an opinion written by Justice Kagan that prevented a state from executing a condemned man without his pastor present.

With the controversy surrounding the replacement of the late Justice Ginsburg, the question is how often did Justice Barrett cast a decisive vote in her first term. The answer: rarely. According to SCOTUSblog, if Justice Ginsburg or a Biden nominee had been on the Court in place of Barrett it is likely that the ten 6-3 ideologically polarized cases decided this past term would have reached the same result, with a 5-4 vote alignment. In only four other cases, however, Barrett's presence may have changed the outcome from what would have been expected if a Democratic appointee sat in Barrett's seat and voted with the liberal bloc. The Court decided all four of those *non*-blockbuster cases 5-4, with Barrett in the majority and one conservative-leaning justice joining the liberal bloc in dissent. One of those cases involved the constitutionality of appointed administrative patent judges (*United States v. Arthrex, Inc.*), another tightened the requirements for consumers to file class actions (*Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*), and two are the Covid-19 cases discussed above, where the Court granted religious groups exemptions from social-distancing restrictions (*Roman Catholic Diocese* and *Tandon*). And in *Goldman Sachs*, it is worth noting that Justice Barrett again wrote the Court's opinion for an ideologically mixed majority, splitting with three of her conservative-leaning peers plus Justice Sotomayor, and once again demonstrating early into her tenure the valuable ability to build greater consensus among the justices and across the Court's ideological lanes.

Overall, based on her rookie term alone, Justice Barrett may be described as less conservative than some hoped and others feared. But that statement may be premature because the real test is expected to come in her first full term, commencing the First Monday in October 2021. She may be a crucial (and even a deciding) vote in the abortion and gun-rights cases, which are shaping up to be the blockbuster cases of the coming 2021 Term. How she rules on those culture-war issues will better illustrate her jurisprudence and become an important part of her legacy. Former-President Trump, who nominated Barrett to the Court, was recently asked about his views on the Court, and said: "I am very disappointed. I fought very hard for [Kavanaugh and Barrett], but I was very disappointed with a number of their rulings." Suffice it to say that the former president has joined the bandwagon of anti-Barrett critics, which just goes to show that a new justice may be able to please some of her critics some of the time, but she may never be able to please all of her critics. Then again, pleasing critics should never be part of the decisionmaking calculus for a judge. And it is clear that Justice Barrett understands this, as she foretold during her Supreme Court confirmation hearing: "I'm committed to the rule of law and the role of the Supreme Court in dispensing equal justice for all," and "judges can't just wake up one day and say, 'I have an agenda, I like guns, I hate guns, I like abortion, I hate abortion,' and walk in like a royal queen and impose their will on the world."

A Lion in Winter:

Senior Circuit Judge J. Clifford Wallace at 92

By Dan Lawton

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On a sunny August morning in 2021, I arrive at the chambers of Senior Ninth Circuit Judge J. Clifford Wallace in downtown San Diego. Wallace's domain sits on the fourth floor of the federal courthouse on west Broadway. There is a warren of offices — separate quarters for three law clerks, a server room, and storage areas lined with shelves laden with briefs and excerpts of appellate records. The walls are clad in handsome wood paneling. The ceilings are 16 feet high. Two young male law clerks, speaking in hushed tones, greet me. They are dressed in suits and ties. In the carpeted aerie above Broadway, a librarial silence prevails.

The Judge greets me with an elbow bump and ushers me into his chambers. They are massive. The Judge reports, with a gleam in his eye that looks like pride, that they are larger than the Oval Office of the White House, by a margin of 100 square feet. The polished wood of the desktop is immaculate. The single object that rests atop it is a letter opener. No letters are visible.

Cliff Wallace has been a federal judge since 1970, when President Richard Nixon appointed him to a spot on the U.S. District Court bench. Two years later, Nixon elevated Wallace to the Ninth Circuit, where he has sat ever since. Today he is 92 years old. He is elegantly dressed in a dark blue suit, light blue dress shirt with French cuffs, and a blue tie. Wallace has a nice head of salt-and-pepper hair, combed back in a quiff style. Lean and angular, he looks easily 25 years younger than his age. He works out daily with a physical trainer somewhere in the courthouse.

Cliff Wallace was practicing law when most of California's lawyers today were not yet born. He's also been on the Ninth Circuit longer than most of them have been alive. When he arrived at the Ninth Circuit in 1972, the court had 11 judges. Today it has 47. On his watch, eight presidents have entered and left office, 32 of his own colleagues have died, and California has grown from a state of 20 million inhabitants to nearly double that.

Today, Wallace, as he does every day, keeps to a rigorous schedule. I am told he prefers all doors in his chambers be closed at all times, except when one is using it to enter or exit a room. Before I am ushered in to see the Judge, each law clerk compulsively shuts an untended open door, battening down every last hatch.

The Judge welcomes me graciously. I tell him I am tired of the sameness of print interviews of federal judges. *What should attorneys strive for in oral argument? How could brief-writ-*

ing be improved? Do you read footnotes or not? Blah, blah, blah.

Today I want to ask some different questions, I tell him.

Wallace regards me with a smile and a gimlet eye. "Fire away," he says.

Q. What have you learned about judging?

A. "As a lawyer at Gray Cary, I did heavy-duty civil litigation for 15 years. Going to the trial bench didn't change the theater I was in. I was used to being in court. I was more comfortable in court than I was elsewhere, I think.

"The only thing that gave me great concern was dealing with criminal justice. I had not tried criminal cases, only done civil litigation. I had a great deal of sympathy for people that get into these messes. There are some mean people around. But there's a lot of people that get into these things just by making foolish decisions. I was sympathetic with them because as I would review the presentence report, I would see they came from poor areas. They grew up in an area where they did not have role models; their parents were not making sure that their schoolwork was being done. I grew up in a poor area with parents who did not care whether I did anything in school. I had an alcoholic father. He didn't care what I did as long as I did not get in trouble with the police. He never asked once if I did my homework.

"I was not prepared when I finished high school to accomplish much. I was fortunate to go into the Navy. I learned everything about discipline and self-control during the three years I spent in the Navy. l learned I had a mind and that I'm interested in things outside of what's going on around me. By the time I came back, I was ready to go. No one wanted me in their university because of my miserable grades. I was a D+/C- student in high school. UCLA rejected me and so did everybody else. But San Diego State had a program for veterans. If you had a high school diploma, you could have a make-or-break semester at public expense. I enrolled and made straight A's, and I kept it up all through college. I learned to discipline myself. I had a mind and it could be used and I could use it for benefit.

"We do a pretty good job finding the bad guys. We get them in, we have sentencing guidelines and probation. But I wonder as a country whether we shouldn't be pushing a little further back and pay more attention to young people who are really at risk….

"I was very careful about sentencing people. I spent a lot of time on it. Our criminal caseload was very heavy at the time. I would sentence as many as 30 people in a day. We had so many coming across the border. I worked the weekends studying these PSRs. I had the authors in and then listened carefully to the people. We didn't have the sentencing guidelines in those times.

"I didn't find much change, other than taking the oath of poverty. I didn't find it disruptive to my life. I was just dealing with justice in a different fashion."

Q. Do you think the process of nominating and confirming Supreme Court Justices has become too politicized?

A. "If the court decides cases that political party A thinks are inconsistent with their attitude, that party of course wants to expand the court and add more justices that are to their liking. And we get into the liberal/conservative divide. The judiciary is a third, independent branch of the government. Sometimes the Supreme Court acts like a legislature. Some of

those rulings, you're happy they made, because they're necessary."

Q. Example?

A. "When they found that Blacks were being discriminated against in the South. Most of us knew that.

"When I was in the Navy, I was down there for a year. When I grew up, it wasn't skin color, it was who had your back. But down there it wasn't that way at all. I was appalled by what I saw — Blacks in the balcony in a movie theatre, separate drinking fountains, restaurants, restrooms. It was so different than the way I grew up….

"No one knows their judicial philosophy until they've been a justice for five years. Before you go on the court, you're up in the stands and you know what the quarterback should have done. Then, when you get down to being the quarterback, there's a different feeling.

"The media likes to write about everything in political terms — this or that justice comes from this or that political camp. But how do you reconcile that with Earl Warren, a very conservative governor who became a very liberal Supreme Court Justice? How do you define Justice White, who was thought to be a big liberal and then got on the court and became very conservative? It shows we're missing the point when it comes to the liberal/conservative dichotomy."

Q. Do you have a judicial philosophy? Did it take you five years to develop it?

A. "I spent some time developing my judicial philosophy. I wrote a law review article for the George Washington University Law Review, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*. Judicial restraint in my view is judicial respect. Let me tell you what that means. The three branches have to respect each other. Each of them has a role to play. That doesn't mean one gets to tell the other that they're wrong. It means the branches are independent. If there's not independence, then the founders' idea is going to be not achieved. Judicial restraint didn't occur in bussing cases; the courts made it their business to order schoolchildren to be bussed to and fro. But it's the legislative bodies that are better set up to make decisions like that. They can hold hearings, appoint committees, take testimony, and so forth. The courts aren't set up to do that.

"People come to our court when they really should be following the process set up under the Constitution."

Q. Are you an originalist?

A. "I am an originalist. I believe the Constitution is what we need to follow. Whether you can write a better one or not, this is the one we have to follow."

Q. Did you and Justice Scalia agree on things?

A. "We didn't always come out the same way. But we did in the great majority of his cases. We were good friends. We did argue about some cases in which I thought he was wrong. He didn't mind. He was very set in his ways.

"I was very fond of Nino. I first met him when he was a professor and we were on a committee at the American Enterprise Institute for 10 years, working on a project devoted to studying how democratic the Constitution is. Robert Bork was in the same group. We had meetings and conferences and we put out a book every year for 10 years. It was the greatest education I ever had, not only on the Constitution and what it is, but how to live with it.

"I find the originalist view appropriate. People disagree with me, because it is a restraint. But I view it as a respect. We respect article 1

and article 2. Article 3 helps us keep articles 1 and 2 in check without setting a social agenda."

Q. Let's talk about collegiality on your court, the Ninth Circuit. What's the state of that today?

A. "It goes up and down. I don't think there's an item we discuss more than collegiality. [Late Chief Judge] Jim Browning gave us a great start on this. If someone came in to him to complain about one of the judges, his first question was, have you gone to talk to him or her? The more we interact, the more collegial we are, was his view.

"Once a year, we go off for the better part of a week and discuss issues we could never get into in court meetings. Anyone can speak. We've had one every year since I've been on the court, except for last year because of the lockdowns. You get to know people on a different level than the confrontation level.

"I found it was very important when I was Chief Judge. We spent a lot of time in that area. When you have a court as large as ours, you can get disjointed. Of course some of the smallest courts have had some of the worst problems, so it's not all size. But it's perhaps true for every court where you're living apart and you don't see each other every day.

"When I was a District Judge, all five of us every Monday went down to a Chinese restaurant on Market Street. We talked through the issues, whatever they were that week. Today, we don't have that opportunity. We're spread out too far, and collegiality can be lost very quickly. How do you interact with people you disagree with? Unless you get to know them it's more difficult to work with them. If you have good collegiality, you change from thinking that what they're doing is wrong to what they're doing is mistaken. It doesn't change that you're going to have disagreements on paper. But it's *how* you disagree and how you feel that's important.

"In spite of our being the largest court in the history of the U.S. we get along very well. I don't agree with my colleagues all the time. But I find them very interesting people. We've succeeded pretty well in disagreeing without being disagreeable. I don't know one of these people I wouldn't go to bat for. Every one of them is my friend.

"One of my closest friends on the court was [the late Stephen] Reinhardt. No one disagreed more than we did. Our approaches were different. But we laughed about our disagreements. If something came up that showed we disagreed, we would always send a note to each other."

Q. Has the surge in new Ninth Circuit Judges during the Trump years changed anything about collegiality?

A. "We get a few upsets now and then. When we have a lot of new judges, it's hard. And this pandemic has set us back some, because the idea of the lockdown is to stay apart. But I don't think it's hurt the court. We have conditionally set a symposium for this coming year, so we'll be going back to it."

Q. What's the hardest part of your job?

A. "I've never thought about that. I like being a judge. I don't mind traveling. I kind of like being with my colleagues together. I enjoy listening to them and learning from them. You have to be able to take the losses with the wins. Sometimes the court does something that you dissent on that you feel strongly about. That's not hard, that's just exposing the issue. I don't find a hard part of the work.

"The job offered me an opportunity that I really became interested in when I came on the Ninth Circuit. When I was practicing law,

I could care less how they were running the law firm as long as I was taken care of properly. But as a judge, I really became interested in learning how the machine works. I spent a month's vacation time at the Woodrow Wilson Center in Washington, D.C., learning how the court functions. How do you make the machine work better? How do you make it more effective? How do you get the product out quicker? A lot of it has to do with the machinery.

"Judges decide cases on precedent. That slips over into, 'We've always done it this way.' Judges don't like to look at new ways of doing things, and they feel too busy to change.

"To me judicial administration has nothing to do with the outcome. It has to do with the process. When I was Chief Judge, I had the greatest job in the world. We made a lot of changes. In one court meeting Reinhardt said, 'Can't you have one meeting when you don't have something new to talk about?' (laughs).

"We made a lot of changes. It has nothing to do with how I write my opinions. We are far more efficient than any other court of appeals. The Second Circuit has picked up on it now. We developed case management and mediation in the appellate courts. No one thought about settling the cases once there was a judgment. I hired a mediator. We started doing 'win-win mediations.' The idea was developed by Fisher and Ury at the Harvard Business School. Once we mediated 1,400 cases in a year. We had a way to get people to talk. Our data shows there's no distinction at all as to what type of case will settle — it's the lawyers and the parties that are the key variables. We started the program about 15 years ago. It's been a great help.

"Weighting the cases on a scale of 1 to 10 also helped us to equalize our workloads among the chambers."

Q. You've spent a lot of time overseas helping courts in other countries improve their systems. How do you grade that project?

A. "The work I do overseas is all process and not law. I started doing it about 40 years ago. I've now worked in 72 countries directly with their judiciaries and developed judicial conferences where they're meeting every one or two years. The most successful one is the conference of chief justices of the Asian and Pacific countries. Thirty-four chief justices sit around a table. They represent two-thirds of the world's population. Think of that.

"We talk about process and how to change. They want to find out more about how we can change the appellate case management process. I'm waiting for the pandemic to end so I can get into China. China's got two very important projects I'm working on to strengthen their judiciary.

"When I stepped down as Chief Judge, I decided to devote half time to my work at the court and the other half to my work overseas. It is very rewarding. I helped the Chinese with their last five-year plan. I was in on the discussions. They're very friendly once they know that you're there as a friend and not as a spy, that you really are sincere about helping them build a stronger judiciary."

Q. If you could travel back in time to 1954, what would you tell your 25-year-old self?

A. "There's more things in life than you can possibly have time to do. So you have to set priorities.

"My greatest interests are in three areas: my family, my religion, and my professional work. You have to be able to set blocks of time so you can take care of the things that mean the most

to you and eliminate other things. When you get into law, you have more things to do than you can possibly do, and you can kill yourself trying to do them. So figure out the three most important things to you and your life. Then set up a schedule so as adequately as you can, you can take care of those things. At the end of your life, you can have satisfaction and know that you've done your best, and you won't have gone crazy wondering what might have been or what you should have done.

"That was something that I learned. I was 28 when I learned it, still practicing law. I still follow it today."

Before we part, the Judge steers me around his chambers, stopping to identify this or that piece of memorabilia. Hidden behind a wall adjoining a large bookcase is a small working office. There he keeps a stand-up desk, a traditional sit-down desk, and a credenza lined with personal mementoes. Sunlight pours in from the 16-foot-high windows. One entire bookshelf holds bound volumes of writings of and about Abraham Lincoln, whom Wallace admires. A framed photo of the Lincoln Memorial hangs on the wall alongside. The Judge pauses to point it out.

"I visited D.C. a lot when I was Chief Judge," Wallace says. "I always made time to get over to the Memorial, to re-read the Gettysburg Address and Second Inaugural Address. Then I'd feel like my sails were trimmed and I was ready to go again."

Flood v. Kuhn:

Paving the Way for Athletic Bargaining and Free Markets

By Phillip E. Stephan

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This month marks the 50-year anniversary of the U.S. Supreme Court's grant of certiorari in *Flood v. Kuhn* (1972) 407 U.S. 258 *(Flood)*. Plenty has been written about the case. It was the beginning of the end of Major League Baseball's notorious "reserve clause." Today, whether you're a baseball fan or not, the case, and its courageous plaintiff, Curt Flood, merit attention from lawyers, judges, and anyone who cares about justice.

For decades, baseball club owners wrote the reserve clause into the contract of every player they employed. The clause bound players to the clubs with which they first signed, for the rest of their playing days. Players could not escape from their clubs except by retiring or sitting out without pay. Nor could they veto trades. The reserve clause amounted to an almost-medieval perpetual contract. Club owners justified the reserve clause by arguing it prevented bidding wars from wrecking baseball financially and heightened fan interest. No player dared argue, for fear of losing his career and livelihood.

Enter Curt Flood. In October 1969, Flood was a 31-year-old, African-American, veteran center fielder for the St. Louis Cardinals. He had just finished his 12th full season in the major leagues. Flood was a defensive standout, who had just won his seventh consecutive Gold Glove at his position. He received a letter from his general manager, Bing Devine, containing three lines of the curt, prim prose favored by executives giving bad news: "Enclosed herewith is ... assignment of your contract to the Philadelphia Club of the National League. Best of luck." Flood had been traded, from a good team and his major league home of 12 years (the Cardinals) to a bad team (the Phillies).

Flood was not happy. He refused to report to his new club. Among other reasons, he felt Philadelphia fans were belligerent and racist. Flood wanted something that all of us take for granted today — free agency, the right to offer his services on an open market and contract with whom he wished.

In December 1969, Flood wrote to the commissioner of baseball, Bowie Kuhn: "After twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States….

"It is my desire to play baseball in 1970, and I am capable of playing. I have received a contract offer from the Philadelphia club, but I believe I

have the right to consider offers from other clubs before making any decision. I, therefore, request that you make known to all Major League clubs my feelings in this matter, and advise them of my availability for the 1970 season."

Flood copied Marvin Miller, the leader of the players' union, on his letter. Years later, ESPN's SportsCentury Series recounted Miller's reaction: "I said to Curt — unless some miracle takes place and the Supreme Court reverses itself — you're not going to win. And Curt, to his everlasting credit, said, 'But would it benefit all the other players and future players?' And I said, 'Yes.' And he said, 'That's good enough for me.'"

Marvin Miller later called Flood a "union-leader's dream."

Flood sued Kuhn in U.S. District Court, alleging violation of the federal antitrust laws. Flood argued the reserve clause was a form of involuntary servitude. It bound players to perpetual service to penurious club owners who controlled their careers and incomes. It denied players the true market value of their services. It was not only illegal. It was *unjust*.

In denying Flood an injunction, Judge Irving Cooper refused to strike down the reserve clause. (*Flood v. Kuhn* (S.D.N.Y. 1970) 309 F.Supp. 793, 797.)

Denied an injunction and hobbled by the reserve clause, Flood sat out the 1970 season. A failed appeal to the Second Circuit set the stage for a showdown in the Supreme Court. Flood hired Arthur Goldberg, himself a former Justice of the Supreme Court, to argue his case to the Justices.

As Miller predicted, Flood lost in the end. In ruling against Flood, the court did not uphold or reject the reserve clause. Instead, in an opinion authored by Justice Harry Blackmun, a passionate baseball fan, the court held the long-standing exemption of professional baseball's reserve system from federal antitrust laws was an established "aberration" in which Congress had acquiesced. *Stare decisis*, Blackmun wrote, required adherence to the exemption. Fifty years earlier, the court, in an opinion authored by Justice Oliver Wendell Holmes, had ruled that baseball was not a part of interstate commerce. Instead, Holmes had held, baseball was something else — and, so, beyond the reach of the antitrust laws. (*Federal Baseball Club v. Nat. League* (1922) 259 U.S. 200.) Now, wrote Blackmun, it was for Congress, and not the court, to remedy any inconsistency or illogic inherent in the late Justice Holmes' decision.

In its fidelity to precedent, *Flood* is unremarkable. What makes the case remarkable is the candor and common sense of its dissent and the modern reality it discerned. Justice William O. Douglas, joined by his colleague William Brennan, penned it. He observed baseball had evolved significantly as a business since 1922: "An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues … would be hard put today to say with the Court in the *Federal Baseball Club* case that baseball was only a local exhibition, not trade or commerce.

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the *Federal Baseball Club* decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs.

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word 'victims' in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade." (*Flood*, *supra,* 407 U.S. at p. 287.)

Chief Justice Warren Burger concurred, while noting his "grave reservations" about the correctness of the precedent which bound the court. "The error," he wrote, "if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled." (*Flood*, *supra,* 407 U.S. at p. 286.)

Today, the *Flood* decision still influences the courts' jurisprudence in cases involving sports. An example is the Supreme Court's recent decision which upheld an order enjoining college athletics' governing body, the NCAA, from limiting certain education-related benefits that member conferences or schools could provide. (*Nat. Collegiate Athletic Assn. v. Alston* (2021) __ U.S. __ [141 S.Ct. 2141, 2160] (Alston), citing Flood.) In *Alston*, the court noted that, unless Congress says otherwise, the only law it had been asked to enforce was the Sherman Act. That law, wrote the court, rested on one assumption alone — "competition is the best method of allocating resources" in the nation's economy.

In his opinion for a unanimous court, Justice Neil Gorsuch noted the same economic realities as Justice Douglas had noted in his dissent in *Flood* 49 years earlier: "At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) 'made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year.' All these amounts have 'increased consistently over the years.'

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per year."(*Alston*, *supra*, 141 S.Ct. at pp. 2150-2151, citations omitted.)

In juxtaposing *Flood* and *Alston*, the bargaining positions of the parties and the operations of each business are easy to see. In *Alston*, the court expressed a fundamental view that NCAA rules unduly restricted the economy. The court in *Alston*, however, was willing to go only so far. The court's decision did not provide college athletes with unfettered access to the market, writing that the NCAA remained free to forbid such things as in-kind benefits unrelated to a student's actual education. "Nothing," wrote Justice Gorsuch, stops the NCAA from "enforcing a 'no Lamborghini' rule." (*Alston*, *supra*, 141 S.Ct. at p. 2165.)

The sole separate opinion in *Alston* was Justice Brett Kavanaugh's concurrence, in which he questioned the notion of amateurism as espoused by the plaintiffs' overseers in the NCAA. Kavanaugh's calling out of the NCAA on its pious public embrace of amateurism seemed to echo Justice Douglas's dissent in *Flood* 49 years earlier: "The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a 'love of the law.' Hospitals cannot agree to cap nurses' income in order to create a 'purer' form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a 'tradition' of public-minded journalism. Movie

studios cannot collude to slash benefits to camera crews to kindle a 'spirit of amateurism' in Hollywood.

Price-fixing labor is price-fixing labor." (*Alston*, *supra*, 141 S.Ct. at p. 2167.)

While not specifically invoking Flood, Justice Kavanaugh's words call to mind its theme — that those who control the business model, when trying to restrict compensation within the business, cannot honestly rely on notions of morality and the "spirit" of their business.

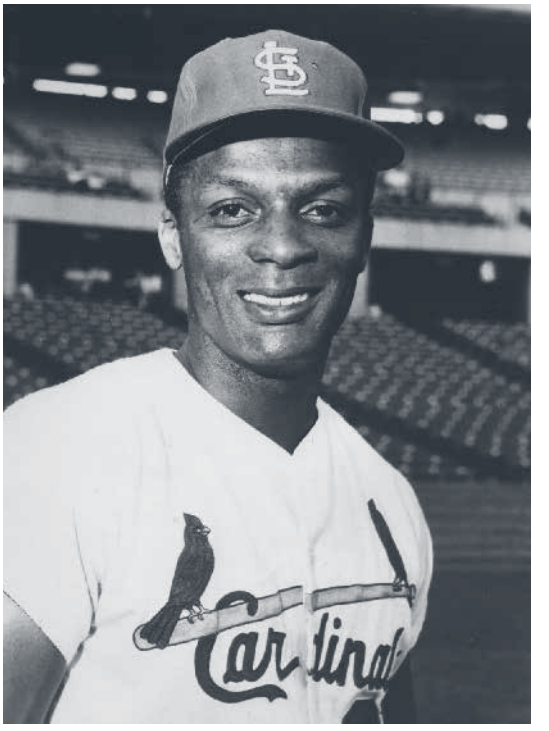
The rest of Flood's story is mostly sad. In 1971, he returned to baseball, playing for the hapless Washington Senators. But by that time his skills had eroded, and the litigation had taken a heavy toll on him. He played in 13 games, mustering a batting average of only .200. After 1971, he was out of baseball for good. Financial and emotional troubles dogged him for years afterward. He filed for bankruptcy. He spent time in a psychiatric hospital in Barcelona, Spain. He died at UCLA Medical Center in Los Angeles in 1997 after a harrowing bout with lung cancer, including a surgery that left him unable to speak.

He was 59 years old.

Flood lived long enough, though, to see others take on the reserve clause. His example emboldened other players to mount legal challenges to the reserve clause — not in the courts, but in arbitration, under the auspices of the National Labor Relations Board. Four years after Flood's bruising defeat, pitchers Dave McNally and Andy Messersmith challenged the reserve clause in arbitration. They argued that, once a player's contract expired, he became a free agent. The arbitrator, Peter Seitz, agreed. Furious, the owners challenged his ruling in court. This time the players won. The reserve clause was dead at last. In the end, justice came not from a court, but from an arbitrator.

Today, we still see the results. Players earn millions. Free agency lets them move between clubs, rarely staying with their original teams. Fans pay more now to see them play than in 1972. The game has thrived financially despite the death of the reserve clause. What many today don't understand is that it took years of litigation, and the ruining of Flood's life, to help make these things reality.

Some have argued Flood deserves enshrinement in baseball's Hall of Fame. There is a small movement afoot in that direction right here in California. Flood will be a Hall of Famer one day. If the Hall is mindful about his place, Flood will be enshrined alongside the Hall's most recent honoree, Marvin Miller, who wore a business suit rather than a uniform and fought his battles in the courtroom instead of the diamond. Flood courageously fought a battle he knew he likely could not win, knowing that he might have a way for others in the future. Even in his wildest dreams, Flood probably did not imagine the production of his sacrifice fly.



Dirty Harry Turns 50:

What If Harry Had Worn a Body Cam?

By Colin C. Alexander

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A renegade cop holds back the torrent of crime in San Francisco, plugging the dam with the barrel of his .44 Magnum.

Controversial when released in 1971, *Dirty Harry* was banned in Finland for over a year but was also used as a training film for police in the Philippines. Fifty years after the film was released, we watched it again to see how it holds up today, with a focus on the film's depiction of race, constitutional law, and police procedure.

Dirty Harry's script was originally set in New York and titled *Dead Right*, with Frank Sinatra set to play the lead. After Frank bowed out, Paul Newman also passed because of the film's conservative themes, suggesting Clint Eastwood as a better fit for the film's hero, Harry Callahan.

The film is a type of morality tale, tailored for a market of older men feeling unmoored in a lawless world. Callahan's world can't be tamed by political hacks, bumbling bureaucrats, and do-gooders, requiring instead the stern hand of a violent father figure. Think Chuck Norris, Charles Bronson, and Sylvester Stallone, replaced today by Liam Neeson, Bruce Willis, and Denzel Washington. Men of similar ages ice their backs, avoid spicy food, and go to bed early, but *these* men cannot be underestimated, because when violence erupts (often in the form of a kidnapped daughter or brutalized wife), these leather-hard men unlock their gun cabinets and get to work.

There is a guilty pleasure in the stark morality of these films. Rather than having to contemplate society's role in shaping criminality (through poverty, education, race, addiction, and mental health), we are presented with evil villains devoid of humanity — in a word, monsters. While some films play lip-service to exploring options in society's tool box, the genre provides one tool to combat crime: violence, meted out personally. In the end, we know the good will heroically triumph, and the bad will die terrible, well-deserved deaths, sometimes accompanied by terse one-liners.

Everyone remembers Harry's line, near the film's beginning, to a wounded bank robber, inches away from getting his hands on a fallen shotgun: "*I know what you're thinking. 'Did he fire six shots or only five?' Well to tell you the truth in all this excitement I kinda lost track myself. But being this is a .44 Magnum, the most powerful handgun in the world and would blow your head clean off, you've gotta ask yourself one question: 'Do I feel lucky?' Well, do ya, punk?*"

Confronted with the barrel of Harry's .44 Magnum, the robber assumes Harry's confidence

indicates a loaded gun. The robber's hand retreats from his weapon. But he isn't satisfied with the unanswered question. The bank robber, played by Albert Popwell, says to Harry, *"I gots to know."*

Harry obliges the robber. Instead of telling him, or showing him the empty barrel of the revolver, Harry again points the gun at the robber. Harry revels at Popwell's response, eyes wide with fear, as Harry pulls the trigger, dry firing the gun in the robber's face. The speech was a bluff. The confidence wasn't in a loaded gun, but something inherent in Harry.

Harry's shoot-out with his .44 Magnum on a crowded San Francisco street is frighteningly reckless. It is difficult to accurately aim a pistol at a distance. And there's the issue of over-penetration. If not loaded with an expanding bullet, the round of the .44 Magnum could penetrate its target, and the wall behind the target, and the unknown and unsuspecting citizen beyond. The .44 Magnum Smith & Wesson signaled Harry as a maverick detective. Later, the Scorpio Killer, played by Andrew Robinson, perhaps gets to the heart of things with his improvised line upon the reveal of Harry's weapon, *"My, that's a big one."*

Today, smart phones and body-worn cameras, which have captured fraught scenes of brutality targeting minorities, would present a challenge to Harry and the script writers. The injured bank robber is Black, and Harry is White. Gun owners are trained to never point a weapon at anything they are unwilling to destroy, even if the gun is believed to be unloaded. Video images of a sadistic cop dry firing on someone would end that officer's employment, and may even result in prosecution.

Even in 1971, the filmmakers attempted to preempt criticism of that scene with the next one. Injured during the gun battle, Harry is operated on by a Black doctor. What's more, Harry knows the doctor by name — they even come from the same neighborhood. The message is that Harry *can't* be *racist* — he has a Black friend. (And in the station house, Harry directs his prejudices to all races and ethnicities.) The doctor inoculates and gives tacit approval for Harry's future actions when, after Harry attempts to direct the physician's hand, the doctor responds, *"Do I come down to the station and tell you how to beat a confession out of a prisoner?"*

Dirty Harry was a cash cow milked for four sequels. Curiously, the actor Albert Popwell, a Black man, is also cast in three of the four sequels to *Dirty Harry* (*Magnum Force, The Enforcer*, and *Sudden Impact*) as *different characters* from the bank robber he plays in the original. Either the casting director was exceedingly loyal, or there was an implicit understanding that the audience wouldn't care or *wouldn't notice* the repetition.

But back to the original *Dirty Harry*. Tipped off by a doctor, and knowing the Scorpio Killer has threatened to asphyxiate a hostage who will suffocate in hours if not immediately found, Harry races to Kezar Stadium, where Scorpio, who has been allowed to stay by a groundskeeper, lives like an underworld demon beneath the grandstands.

Accompanied by his sidekick Frank "Fatso" De Georgio, Harry appears thwarted by a high chain-linked fence, blocking access to the stadium. Seeing the fence, De Georgio remarks, *"Illegal entry. No warrant."* Put on notice, Harry responds by scaling the fence to access Scorpio's living quarters. De Georgio bows out (*"Uh-uh, too much linguine"*). Because of his heft, or his scruples, De Georgio searches for another way to enter. But Harry finds the living quarters and kicks the door open. Inside, he finds a rifle that, presumably, could be matched to bullets fired by Scorpio at victims, but only if the evidence is admissible.

Harry has acted without a warrant. The District Attorney will later interrogate Harry, describing his conduct as a "*very unusual piece of police work,*" adding, "*I mean you must have heard of the Fourth Amendment!*"

The DA informs a flabbergasted Harry that no charges will be filed against the Scorpio Killer. Why? Because, according to the DA, all the evidence obtained (including the rifle used to kill Scorpio's victims) is fruit of the poisonous tree. The DA informs Harry that he violated Scorpio's rights, and that all the evidence collected would be suppressed at trial. Indeed, the DA makes it clear that Harry is lucky he will not be prosecuted for his lawless actions.

The DA's analysis is too facile. While Harry's scaling of the fence might be considered trespass, the fence and the area surrounding it belong to Kezar Stadium. They are not the "curtilage" to Scorpio's residence, and he has no reasonable right to privacy in that area. Thus, it is unlikely Scorpio would have standing to argue a violation of his rights just because Harry hopped the fence, either under Justice Scalia's property theory based on invasion of the curtilage in *Florida v. Jardines* (2013) 569 U.S. 1, or Justice Kagan's privacy theory in her concurring opinion.

Harry did not have a search warrant to enter Scorpio's living quarters under the stadium. But Harry's knowledge that the Scorpio Killer is armed and dangerous, and that his latest victim has only enough "oxygen till 3:00 a.m. tomorrow," would plausibly provide exigent circumstances. Under *People v. Ramey* (1976) 16 Cal.3d 263 and other California cases, this might get around the warrant requirement, if it were found that the information from the citizen informant (the doctor who treated Scorpio) provided enough information to indicate Scorpio had committed a crime and merited urgent investigation. Arguably, the doctor's descriptions of the patient's unique wounds and his physical description, the timing of events, and his having left without giving a name would be enough to present the police with probable cause to believe the man was the Scorpio Killer.

Penal Code sections 836 and 844 codify when arrests can be made without a warrant, and the requirements for making an arrest when breaking a door or a window to effectuate that arrest. Under section 836, a police officer can arrest a person without a warrant in circumstances where (1) the officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence; and (2) the person arrested has committed a felony, although not in the officer's presence. Under section 844, officers may break a door or window to effectuate a felony arrest if they have reasonable grounds to believe that the person to be arrested is inside, and if they knock and announce themselves. While Harry did not knock or announce himself before kicking the door in, precedent allows exceptions to the "knock and notice" requirement in cases of exigent circumstances, such as peril to the officer or to someone else.

The contents of the room Harry entered (most notably, the gun Scorpio used to kill his victims) could conceivably be used as evidence at trial, because Harry's no-knock entry was made with the reasonable belief that Scorpio was dangerous, that he'd committed numerous felonies, that a victim would soon die if Scorpio could not be found, that Scorpio possessed firearms, that he could be found beneath Kezar Stadium, and that he was a violent psychopath. The gun could be matched to the bullets and casings found, and potentially provide the basis for a murder prosecution.

But our analysis doesn't end here, because Harry has committed several crimes of moral turpitude (commonly called "*Brady*" violations) in obtaining the evidence, most notably shooting and torturing the unarmed Scorpio Killer. To

lay a foundation for admitting the gun at trial, Harry would have to take the stand and testify about how and where it was found. Evidence of his *Brady* violations would have to be turned over to the Scorpio Killer's defense attorney, and any defense attorney worth their salt would cross-examine the hell out of Harry.

The question left to the jury in closing would look something like this: "Inspector Callahan shot and tortured an unarmed man. And now he wants you to believe he just 'found' the gun used in these killings in my client's room?"

If a man is willing to cross the line between policing and criminality — shooting and torturing an unarmed suspect — a jury could readily conclude the same man is capable of planting evidence. So perhaps the DA, playing the game a few moves ahead, could see that even if the evidence came in, it would be tainted because it had been handled by Dirty Harry.

Harry is an unconventional Inspector who does not observe rules. He doesn't view evidence gained from his warrantless entry as fruit of the poisonous tree. Harry would perhaps accept the personal consequences, even if it meant prosecution for a tort, as long as the evidence was admitted and the vicious criminal convicted. One can debate whether Harry, knowing a victim would die in hours, was acting in hot pursuit, and was acting reasonably even if his entry into Scorpio's living quarters was warrantless. But Harry is about action, not reflection. The standard for a Fourth Amendment analysis is a reasonable officer with the knowledge of the actual officer involved; Harry is, of course, anything but a "reasonable officer."

He is willing to get his hands dirty; and his superiors, whatever they really believe, are relieved to have Harry do the dirty work. Interestingly, whatever the legality of Harry's actions, in the movie, they have no legal consequences for him.

In the film, the Mayor and Police Chief continue to place Harry at the forefront of investigations, despite his checkered history and reputation. While the warrantless entry may have been a stretch of hot pursuit and subject to debate, Harry's later actions are not.

In a harrowing pursuit of the killer through the stadium, Harry chases Scorpio onto the darkened field. Just then, De Georgio flicks on the stadium lights. As Harry raises his .44 Magnum and takes aim from the bleachers, Harry yells out "*Stop!*" Scorpio is revealed, unarmed, with his hands raised across the lit field. Despite Scorpio's compliance, Harry fires his gun, hitting Scorpio across the field, in the leg. Only in the movies is a pistol shot with pinpoint accuracy at such a distance. Harry tells De Georgio, "*Go on out and get some air, Fatso!*" This is a certain sign Harry knows his actions are beyond the pale and he does not want to implicate De Georgio in what he has done and is about to do, or create another witness to his actions.

Knowing Scorpio has kidnapped a teenager who will suffocate in a hole if not found immediately, Harry points his gun at Scorpio, whose bloody leg has left him immobilized and on the ground. Harry demands to know where the girl is. Scorpio pleads for his life, asks for a doctor, demands to see a lawyer, and insists he has rights. The script writers are throwing the Warren Court's rulings in *Escobedo v. Illinois* (1964) 378 U.S. 478 and *Miranda v. Arizona* (1966) 384 U.S. 436 in the audience's face. Harry stays on message, demanding to know where the girl is while grinding the killer's wounded leg with his shoe. The stadium fills with Scorpio's resonant scream.

This is torture: inflicting extreme mental or physical pain. This isn't policing, it's attempted

murder and mayhem with the use of a firearm. While all the violence in this film is still shocking 50 years on, it's this scene that horrifies most, leaving the audience grateful for the camera cutting away. Yet, Harry's extreme methods yield results: The teenager's body is shown being pulled out of a hole. Those who would justify Harry's actions might rely on the infamous "ticking time bomb" thought experiment, in which the police know a time bomb is about to explode in a crowded railway station, and only the use of torture may disclose its location, allowing the bomb to be defused.

But Harry's use of torture is not successful by any measure: Evidence obtained is jeopardized, and no life is saved. The girl is found too late; she has suffocated. In the utilitarian calculus of the ticking time bomb experiment, the many lives at stake justify the use of torture. In *Dirty Harry*, only one life is at stake, and the torture does not save that life. Did San Francisco in 1971 really want a police force populated with officers ready to inflict pain and permanent injury to obtain results? No. And that is why Harry is unique among the Potrero Hill force. Indeed, he is called "Dirty Harry" because he is called upon to do the dirty work others do not wish to do, and his superiors do not want to be associated with it. Harry's use of extreme interrogation methods will cause another problem in the movie, leading to questions about whether evidence obtained will be "fruit of the poisonous tree." Outside of the film, one can't help but wonder if the association with *Dirty Harry* led the Potrero Hill force to be renamed Bayview Station in 1997.

In 1971, body cams didn't exist, and Harry knew it would be difficult to hold him accountable for shooting the villain or standing on his wounded leg in an empty stadium. Yet, all the basic facts are apparently contained within Harry's report, leading the fictional DA to sardonically congratulate Harry that he is not going to be prosecuted despite a report that would have read like a confession.

It would be difficult to remake *Dirty Harry* today without retooling the lead or the message. A modern version might be more like *Falling Down* (1993), with Michael Douglas's William "D-Fens" Foster believing himself to be in the right as he returns slights and discourtesy with violence, while being seen by all who come in contact with him (and the audience itself) as a psychotic with a gun. Taken as is, Harry Callahan in 2021 is a dark figure. What once was considered heroic vigilantism has been deeply compromised by time. Today, Harry isn't a vigilante but a villain, and an audience wouldn't be satisfied with him emerging unscathed.

If Harry had been wearing a body cam, his story today could not have had a second act, let alone a third. The recorded image of a sadist pointing his gun and pulling the trigger at a surrendered criminal would have prevented Harry from holding a badge and representing the people of San Francisco. He wouldn't be referred to as "Inspector Callahan" or "Harry." He'd just be dirty.

"Isn't that Special": The Limited Powers of Special Masters

By Mark T. Drooks & Thomas R. Freeman

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The Church Lady's words may be particularly apt when it comes to the appointment of special masters in California's trial courts. Used appropriately, special masters can be extremely useful to the parties and the court. They can bring expertise to a complex case or issue, parse a large or technical record for the benefit of the trial court, and make recommendations to the court on matters presented by the parties. But the expertise and resources special masters bring to that job — in conjunction with their typically broad investigatory mandates under a trial court's order of appointment — may lead some to inadvertently overstep the bounds of their appropriate authority as judicial agents.

Given the extraordinary powers conferred on special masters — and the accompanying risk that those great powers will be taken too far — it may be surprising to learn that there is little appellate law on the appropriate use (or misuse) of a special master's delegated judicial authority. This dearth of appellate guidance is likely a function of aggrieved parties' prudent fear that an unsuccessful attempt to seek discretionary writ review from the appellate court will make matters far worse. As Ralph Waldo Emerson famously responded to a young Oliver Wendell Holmes' criticism of Plato, "When you strike at the king, you must kill him." Given the low probability of appellate intervention, the risk of challenging a special master often weighs decisively against even seeking appellate relief in this fraught context.

Despite the lack of appellate guidance, there is at least one rule that should be uncontroversial. Special masters, who function as an arm of the court, cannot exceed the appointing court's own judicial authority. From that Archimedean point, we argue that special masters must operate as judicial officers within the adversarial system of justice — and not as judicial inquisitors operating on an *ex parte* basis. We are forced to "argue" this point because (surprisingly) it is not clearly established by judicial opinion.

Special Masters Perform a Judicial Function

Section 639 of the Code of Civil Procedure empowers trial courts to appoint special masters without the parties' consent to perform a variety of functions when (among

other things) (1) "a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action," (2) "it is necessary for the information of the court in a special proceeding," or (3) "the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon."

Special masters perform a subordinate but nevertheless "judicial" function when appointed by a trial court to assist in the fact-finding process or make recommendations. (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 721.) In recognition of that judicial role, Canon 6(A) of the California Code of Judicial Ethics provides that "[a]nyone who is an officer of the state judicial system and who performs judicial functions including ... a special master, is a judge within the meaning of this code."

Courts and Special Masters Are Passive Arbiters of Justice

The judicial role is defined by the adversary system of justice: "What makes a system adversarial rather than inquisitorial is ... the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 357, quoting *McNeil v. Wisconsin* (1991) 501 U.S. 171, 181, fn. 2.)

The "philosophy" underlying the adversary system "insists on keeping the function of the advocate, on the one hand, from that of the judge on the other hand." (Fuller, *The Adversary System*, Talks on American Law (Harold Berman ed. 1961) pp. 34-35.) Judges must therefore follow a fact-finding and decisional process within the parameters of an open, adversarial system, with the judge assuming the judicial function of a "neutral" and "passive" arbiter of justice. (*United States v. Sineneng-Smith* (2020) 140 S.Ct. 1575, 1579.) This system is "premised on the well-tested principle that truth — as well as fairness — is best discovered by powerful statements on both sides of the question." (*Penson v. Ohio* (1988) 488 U.S. 75, 84.)

Special masters, who function as judges and are subject to the same ethical canons as judges, must be held to the same constraints as their appointing judges. The premise that truth is best discovered and fairness is best protected by an open, adversary system in which the judge acts as a passive arbiter of justice is no less applicable when a special master performs the judicial function. The same principles require that the systemic constraints on *judicial* fact-finding and decision-making must apply to special masters performing such judicial functions.

Ex-Prosecutors as Special Masters

Trial courts often appoint former prosecutors as special masters, particularly those who have developed a specialized expertise that may be helpful in a given case. The problem is that former prosecutors may assume that they have been appointed to do what prosecutors do — i.e., conduct *ex parte* investigations. In determining whether to bring criminal charges, prosecutors have vast investigatory powers, allowing them to do things like privately interview witnesses and communicate with those having interests that conflict with their targets' interests. The targets of investigations have no due process right to participate in such investigations.

But special masters are not prosecutors investigating potential crimes or other forms of misconduct by the parties or counsel. They are agents of an appointing court who exercise

delegated *judicial* powers, subject to the same canons of judicial ethics and constitutional norms as judges.

Judicial Canon 3B(7) Bars *Ex Parte* Investigations

Although orders appointing special masters rarely address the issue, it is clear that special masters, like courts, cannot pursue prosecutor-like *ex parte* investigations. Judicial Ethics Canon 3B(7) provides that "[u]nless otherwise authorized by law [or agreed to by the parties], a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed." The Advisory Committee's Commentary makes clear that Canon 3B(7) includes the corollary that "[a] judge shall not initiate, permit, or consider ex parte communications" on any matter of substance "concerning a pending or impending proceeding," absent the parties' express consent.

This rule against *ex parte* proceedings and communications is necessary to protect the integrity of the judicial truth-finding and decisional process because *ex parte* proceedings lead to "a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party's own presentation is often abbreviated because no challenge from the defendant is anticipated at this point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court's initial decision...." (*United Farm Workers of Am. v. Superior Court* (1975) 14 Cal.3d 902, 908.) *Ex parte* proceedings provide "no opportunity" for an absent party "to know precisely what was said, when it was said, by whom, and what effect could be drawn from their offerings." (*In re Kensington* (3d Cir. 2004) 368 F.3d 289, 309-311.) Simply put, "[i]f judges engage in *ex parte* conversations with the parties or outside experts, the adversary process is not allowed to function properly and there is an increased risk of an incorrect result." (*Id.* at p. 310.)

Thus, "[t]he value of a judicial proceeding ... is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." (*Carroll v. Pres. & Comrs. of Princess Anne* (1968) 393 U.S. 175, 183.) That is why courts are "restricted from conducting independent investigations, since such a practice amount[s] to a denial of due process, and certainly would deny to a litigant the fair and impartial trial to which he is entitled." (*Conservatorship of Shaeffer* (2002) 98 Cal.App.4th 159, 164, quotations omitted.)

A Special Master's *Ex Parte*-Tainted Report Cannot Be Cleansed

Special masters, of course, are subject to all the Canons of Judicial Ethics, including 3B(7). But despite that bar on *ex parte* proceedings, some have dismissed concerns about *ex parte* investigations because a special master's findings and recommendations are merely advisory. Aggrieved parties will have an opportunity to rebut the special master's findings before the trial court makes any final decisions. In sum, "no harm, no foul."

That is an argument that only an appointing court (and the aggrieved party's adversary) could love.

The first problem with a special master's report that is tainted with *ex parte* information is obvious. The report itself exposes the judge to second-hand *ex parte* communications. A judge's willful exposure to substantive *ex parte* communications violates Canon 3B(7) and is a long-recognized basis for disqualification,

as a matter of both statute and constitutional due process. (See, e.g., *In re Hancock* (1977) 67 Cal.App.3d 943, 949 [holding that due process requires resentencing due to judge's *ex parte* communications with prosecutor].) The fact that the *ex parte* information is provided to the court by an agent — i.e., a court-appointed special master — makes no difference. As the Seventh Circuit recognized in *Edgar v. K.L.* (7th Cir. 1996) 93 F.3d 256, information given to a judge about the treatment of patients in off-the-record briefings is no less disqualifiable "than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated." (*Id*. at p. 259.)

Even more insidious is the problem of the special master's "selection bias." A special master who conducts an *ex parte* investigation — interviewing witnesses, meeting separately with select parties or interested persons — will be exposed to information relevant to his or her assigned task. "Inevitably, he would have formed impressions about the character of some, perhaps many, of the individuals" involved in the matter being investigated. (*In re Brooks* (D.C. Cir. 2004) 383 F.3d 1036, 1045.) As a result, selection bias infects a special master's report through the choice of what to include and exclude from the report, the manner in which the information is conveyed, and the scope and direction of the underlying investigation.

While an aggrieved party may be able to rebut information included in a special master's report, when the special master is exposed to off-the-record, *ex parte* information, there is no way to know what is not in the report. Rebuttal is not a viable cure because there is no verbatim transcript revealing precisely what was discussed and therefore no way to access the "silent facts" that have not been preserved. (*Kensington*, *supra,* 368 F.3d at p. 309.) As the D.C. Circuit explained in the context of a special master's investigation prior to formal contempt proceedings: "Our concern is not with information that enters the record and may be controverted or tested by the tools of the adversary process, our concern is with the information that leaves no trace in the record — such as [the special master's] contacts with 'moles' and unnamed DOI employees — that may reasonably be expected to color the way in which [the special master] approaches his task, and ultimately his report and recommendations to the district court, and thus to taint the [district court's] contempt proceedings despite the steps taken to insulate those proceedings from the information to which [the special master] was exposed *ex parte*." (*Brooks, supra,* at p. 1046, citations and internal quotations omitted.)

Because the report of a special master exposed to *ex parte* communications is subject to this incurable selection bias, the tainted report cannot properly be reviewed by the appointing court. (See *In re Kempthorne* (D.C. Cir. 2006) 449 F.3d 1265, 1272 [holding that "only suppression" of special master's reports tainted by *ex parte* communications "can ensure neither the plaintiffs nor the district court will rely upon the reports in the future, to the detriment of the 'public's confidence' in the judicial process"].)

It's Not Easy to Stop a Special Master from Violating Due Process

The cold truth is that it is not easy to stop a special master from overstepping the bounds of his or her authority. Appointed by the court, they have the court's confidence and benefit from a certain presumption that their conduct is appropriate. Moreover, any lawyer challenging a special master must do a cost-benefit analysis as to whether it is wise to run the risk of antagonizing someone with the power to

dramatically influence the outcome of the case. And the reality is that appellate remedies are quite limited.

The first step in attempting to control the conduct of a special master is to object early and often when appropriate. Perhaps the most important objection should be aimed at what does *not* appear in the appointment order. The order should (but rarely if ever does) specify that the special master must conduct an open, on-the-record judicial investigation, with no substantive *ex parte* communications and where counsel for the interested parties have a right not only to be present but also to question witnesses and review any documents available to the special master. Your best (and realistically, perhaps only viable) opportunity to protect your client's right to due process is to have that right enshrined in the appointment order.

Next, the appointment order should be carefully reviewed to determine whether any expressly-provided powers are not appropriate for a special master. If the order fails to assure an open process in which counsel has the right to participate, an order that expressly confers on the special master the authority to issue subpoenas, for instance, may be wielded to facilitate an *ex parte* process. Where that occurs, it is important to object.

During the course of the investigation, the special master may engage in conduct that goes beyond the bounds of the appointment order. One would hope that a well-founded objection would cause a special master to reconsider his or her course of conduct. If the objection is overruled or ignored, it may be wise to bring the objection to the court's attention. Where a special master files interim reports, they may present an opportunity to raise an objection to a continuing course of conduct. If those reports are filed *in camera*, an objection is warranted.

In view of the special relationship between a court and the special master whom the court has appointed, it is particularly important to avoid any conduct that may be deemed a waiver of the right to object. An objection to a special master's report may be lodged after substantial resources have been devoted to its preparation; nobody wants to waste those resources due to a defect in the process — especially not the appointing judge, who is likely to give the special master the benefit of any doubt.

Nevertheless, when the special master's conduct implicates due process and the integrity of the fact-finding process, a prior failure to object to merely potential (or less substantial) abuse should not be deemed a waiver. The Supreme Court has made clear that the right to adversary process exists to protect the justice system's truth-finding function. (*Sineneng-Smith*, *supra*, 140 S.Ct. at p. 1579.) Accordingly, for almost 50 years, California courts have "applied the voluntary, knowing and intelligent [waiver] standard" in the context of due process and other constitutional rights in civil cases. Under that stringent standard, consent to a violation of due process rights is never presumed by mere inaction. (*Rockefeller Tech. Invests. (Asia) VII v. Changzhou Sinotype Tech. Co., Ltd*. (2020) 9 Cal.5th 125, 140-141.)

Indeed, federal courts have held that the mere failure to object to a violation of the federal equivalent to Canon 3B(7) cannot be treated as consent: "While we have no record of any objections being registered at that time, we cannot regard the silence that accompanied the [district court's] preemptive statement that 'any objection to such *ex parte* communications is deemed waived' as manifesting consent. To fulfill the principles and objectives of Canon 3 of the Code of Conduct, which proscribes *ex parte* communications except with consent, *affirmative consent* is dictated." (*Kensington*,

supra, 368 F.3d at p. 311 [simplified].) Accordingly, where a party objects to a special master's report on constitutional grounds, having failed to previously object to the order of appointment, waiver standards such as the "doctrine of tantamount stipulation" ought not apply. As the California Supreme Court has explained, the doctrine of tantamount stipulation applies only to "tactical rights," not to rights that "exist solely to protect fair and impartial factfinding." (*In re Horton* (1991) 54 Cal.3d 82, 93, 95-96.) Where counsel's objections have been overruled, an appellate remedy exists, but is limited to a discretionary petition for writ of mandate. As evident from the dearth of published opinions, the probability of success by petition for writ of mandate is low.

Finally, if a writ petition fails and the trial judge is exposed to a special master's *ex parte*-tainted report, counsel should consider filing a motion to disqualify the trial judge. As indicated above, federal courts have held that suppression of a report from an *ex parte*-tainted special master is necessary to shield the trial court from bias-creating *ex parte* information as well as the presentation of information that was influenced by *ex parte* communications (selection bias). By the same rationale, a trial court actually exposed to such a bias-creating report must be disqualified in the interests of justice. Unless the trial judge strikes such a motion as untimely or frivolous on its face, such a motion should be ruled upon by a different trial judge. Once again, however, appellate relief is limited to writ review.

The Cliff Notes Version

The due process risks combined with the probable futility of after-the-fact efforts to cure any violations point to one simple lesson. At the earliest opportunity, submit a proposed paragraph for inclusion in the appointment order specifying that the special master's investigation must be conducted through an open process in which the parties have the same right to participate as they have in any fact-finding proceeding before the trial judge. The paragraph should include an express statement that Canon 3(B)7 applies to the special master to the same extent that it applies to any judicial officer. The paragraph should also contain language specifying that the special master shall not engage in any *ex parte* communications with the parties, witnesses, interested persons, experts, or even the trial judge (except for scheduling or similarly non-substantive matters). If you wait until *after* the special master has commenced an *ex parte* process, irrespective of the controlling legal precedents and the requirements of due process, it may well be too late.

Chevron Corp. v. *Donziger* and Paying the Piper

By David M. Majchrzak

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As a college freshman, I was invited to participate in a then-new program, called thematic option, where general education requirements would be fulfilled. There, we had a class size of 16 students, giving a pretty solid teacher to student ratio in a world class university. Although I took something away from all my classes, I remember those more than the others not just because of the intimate environment, but because of the philosophical discussions. Little did I know that I would revisit much of the moral philosophy we discussed roughly 30 years later when I watched the situation comedy, *The Good Place*. In both settings — my first exposure to a healthy dose of the Socratic method, and passively watching Ted Danson play a demon — the participants discussed what should determine whether particular conduct was moral.

Though, of course, there are many theories, two often dominate the conversation. Consequentialism, often associated with Jeremy Bentham and John Stuart Mill, takes the Monday morning quarterback view of actions. Looking backwards, it considers the result in assessing the morality (i.e., the ends justifying or condemning the means). At the other end of the spectrum is the deontological approach that Immanuel Kant, among others, advocated, where an action is evaluated based on whether it fulfilled a duty. That is, conduct is moral so long as it follows the rules of the way we are supposed to act since results — good or bad — sometimes may occur through fortune or happenstance, rather than as a direct result of the action.

To say that one or the other applies to lawyers' professional responsibilities would be a mistake. Ask a lawyer involved in the discipline process with any regularity and they will quickly let you know that, in determining whether there was any violation of the Rules of Professional Conduct or the State Bar Act, there is no consideration for whether any harm was done. Clearly, such an approach is deontological. But the level of harm may come into play when assessing what level of discipline is appropriate, and it is hard to imagine that clients would not assess the propriety of a lawyer's conduct by how it impacted their matter. Consequentialism in action.

The well-publicized matters involving Steven Donziger over the past quarter century highlight these concepts. Before beginning this discussion, I note that an appeal has been filed and that new proceedings may yield different conclusions as to the facts and conclusions of the case. Accordingly, the current findings are used here merely to illustrate, not to excoriate,

accuse, or otherwise claim to be the gospel truth of what happened.

Donziger and others represented thousands of indigenous people in an Ecuadorian action against Chevron. He advocated that Chevron, which had acquired Texaco's stock, should be responsible for Texaco's oil activities that caused extensive environmental damage that had been referred to as the Amazon's Chernobyl in terms of industrial pollution. Donziger aggressively represented his clients both in the Ecuadorian courts and in the courts of public opinion with heavy media and public relations strategies aimed at creating pressure on the court to find favorably for his clients. In 2011, his efforts were rewarded with a $9.5 billion dollar judgment, then believed to be the largest judgment for such a claim in history. But this victory would not be one that Donziger would be able to savor.

Chevron refused to pay the judgment, instead bringing an action in the Southern District of New York, contending that the judgment was procured by fraud. (Someone familiar with the procedural history of the case may see some irony to relief's being sought in New York, given that Texaco had initially fought to move the case from New York to Ecuador.) Among other things, the New York court concluded that the team of lawyers that included Donziger had submitted fraudulent evidence by persuading a judge to use an expert to make a damages assessment and then to "play ball" with the plaintiffs. Donziger purportedly paid a Colorado consulting firm to write a substantial portion of the expert's report, and then falsely presented it as the work of the court-appointed and supposedly impartial expert, and then was less than candid about that and other conduct. Donziger argued at trial that opinions remediation experts had disavowed should be considered because he believed in them and even thought that the costs could be much higher. And when testing for pollutants started yielding results that might point toward another polluter, the Donziger team asked them to stop testing for such contaminants. Perhaps the most offensive conduct was that the lawyers wrote the judgment themselves and promised a half million dollars to the Ecuadorian judge, the sixth assigned to the matter within eight years of litigation, to sign it.

The court concluded that "Donziger began his involvement in [the] controversy with a desire to improve conditions in the area in which his Ecuadorian clients live." But due to the conduct outlined above, the Southern District thought it was important to enjoin the persons responsible for it from benefitting from it. The court's opinion lamented that because the course of justice had been perverted, it may never be determined whether there were valid claims to be made against Chevron. But the question was not whether the Ecuadorian court reached the correct conclusion, it was whether it was the product of corruption. Accordingly, Donziger was precluded from recovering any sum.

As if missing out on what would presumptively have been a life-changing recovery was not enough, Donziger predictably faced more fallout flowing from these proceedings. Following this determination, Donziger was automatically suspended from the practice of law and the matter assigned to a referee for a sanctions hearing. Although the referee concluded that Donziger should be reinstated, the Appellate Division disagreed, concluding that disbarment was appropriate for somebody who had been found guilty of egregious professional misconduct, namely, corruption of a court expert and ghostwriting his report, obstruction of justice, witness tampering, and

judicial coercion and bribery, which Donziger steadfastly refused to acknowledge and for which he showed no remorse. Accordingly, Donziger was disbarred retroactively to 2018.

Adding more to his woes, in 2019, Donziger was placed under house arrest and a private prosecutor was appointed to bring charges for contempt against Donziger for his alleged refusal to obey orders regarding the divestment of profits from the judgment and to turn over his phone and laptop to Chevron; public prosecutors had declined to pursue such charges. This summer, Judge Loretta Preska of the Southern District of New York concluded that Donziger was guilty of criminal contempt of court and sentenced him to six months in jail. This, of course, followed the two years under house arrest that Donziger faced before the sentencing. And it was only one month after the United Nations High Commissioner on Human Rights ruled that Donziger's home detention was illegal under international law and called for his release.

In her decision issued in July 2021, Judge Preska distilled the case to its essence. She wrote: "At stake here is the fundamental principle that a party to a legal action must abide by court orders or risk criminal sanctions, no matter how fervently he believes in the righteousness of his cause or how much he detests his adversary. It's time to pay the piper."

There are a couple of lessons in reality that come out of this. First, is the premise of this article, that lawyers owe obligations beyond their clients to the administration of justice. Without that, there is there very real risk that the public loses faith in the integrity of the justice system in finding the correct answer. Finding the right balance of advocating for a client while honoring responsibilities to other litigation participants can sometimes be a challenge. One need look no further than the story of Lord Henry Brougham's representation of Queen Caroline, which begat the expression of zealous advocacy when he engaged in one of the first well-known examples of graymail. But it also led to the somewhat infamous criticism that Brougham may have been a good lawyer, but was a bad citizen.

Of course, most lawyers would not even consider going to the lengths that Donziger was found to have gone. But there are much smaller steps that are more routinely taken. These could include something as simple as *ad hominen* attacks of opposing counsel or even the court, when things don't go the way a lawyer hopes. They probably do not advance the merits of the legal arguments being made. But they certainly call into question the character of those playing an important rule in how we, as a society, resolve disputes. It is perhaps that such carelessness regarding the nobility of the profession is one reason why the images of Atticus Finch have faded into My Cousin Vinny, or perhaps why those who do not necessarily have a financial impediment to engaging a lawyer still opt to represent themselves in pro per.

A second potential reminder is really one of practicality. Companies who face high stakes litigation usually are willing to devote deep resources to carry on efforts well beyond the initial trial and appeal not only to prevail in the matter, but to discourage future litigation by those who may think there is a payday to be had simply by pursuing somebody with a big checkbook. Indeed, there is a fine line with such tactics and, in this case, Chevron was criticized by Nobel laureates for its tactics against Donziger.

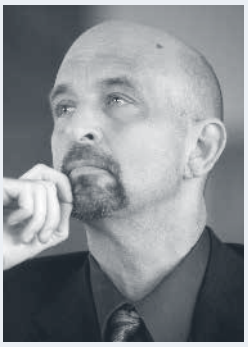
Of course, lawyers should never bring frivolous actions. And, if they later receive information that the claims are not supported by probable cause, they may not continue to

maintain it. But there should also be consideration at the beginning of the case what it will mean to litigate against a large enterprise. Early on, lawyer and client should candidly discuss what that means, how far things are likely to be taken, and their willingness to be in such an environment for the long haul.

There appears to be little question that the Ecuadorians Donziger represented had been victimized by some industrial pollution. That he represented them against a giant and obtained a judgment that had the potential to help restore their environment, however, could never justify the conduct described in the judgment from the Southern District of New York. Indeed, as is often the case, under either model of morality, the conduct would be found wanting. The violation of the rules — even if motivated purely by a desire to help the clients — resulted in a negative consequence for the clients. Their landmark judgment appears to have become a Pyrrhic victory with no foreseeable likelihood of payment. A lesson to be learned is that lawyers need to take care of not just their clients but our institution. It is only in keeping both of these in mind that lawyers best serve those who they represent.

Three Recent Decisions on Section 998 Settlement Offers

By Don Willenburg & Tyler Paetkau



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A Code of Civil Procedure section 998 offer can be a powerful tool. If the other side does not accept and fails to obtain "a more favorable judgment," then the non-accepting party becomes liable for the offeror's costs, which may include expert fees.

Section 998 involves multiple policies. Judicial decisions applying section 998 sometimes emphasize concerns particular to the statute, sometimes the strong policy favoring settlements, and sometimes straightforward contractual interpretation. Three recent cases illustrate these policies.

In your 998 offer, do not require plaintiffs to indemnify defendants against possible future claims of nonparties.

Comparing the value of the judgment to that of the offer can be less straightforward than one might think. In one recent case, *Khosravan v. Chevron* (2d Dist., Div. 7, 2021) 66 Cal.App.5th 288, even a defense judgment was not enough to shift costs, because the defendant's offer contained terms with uncertain and potentially high monetary value.

Chevron won summary judgment, and then sought costs including payment of expert witness fees under section 998. The trial court awarded fees based on Chevron's facially-reasonable argument that plaintiffs failed to obtain a more favorable judgment than the offer. Chevron's offer was for a waiver of costs plus a "release of all future claims based on the allegations in the complaint, including, but not limited to, claims for wrongful death, and indemnity in the event such claims are filed by non-parties to this case." (Khosravan, at p. 292.)

The Court of Appeal reversed. The indemnity had such an indeterminate and potentially large value that the court could not conclude that the judgment — *under which plaintiffs took nothing and were liable for costs* — was less favorable than the offer.

Chevron lost the benefit of section 998 not because of the release, but because of the indemnity provision. "A valid section 998 offer may include terms requiring the release of all claims (by parties or nonparties) arising from the injury at issue in the lawsuit. [Citations omitted.] Thus, the inclusion of terms in the Chevron defendants' settlement offers requiring the Khosravans to release all claims based on the allegations of the complaint does not by itself invalidate the section 998 offers. But the offers' inclusion of a requirement that the Khosravans indemnify the Chevron defendants against claims by nonparties renders the offers difficult to value and potentially costly to the Khosravans." (Khosravan, at p. 296.)

In some ways, this conclusion flowed from the inclusion of the indemnity term in the offer. "The Chevron defendants would not have included the indemnification provisions if they had no value. Further, contrary to the Chevron defendants' contention, even if nonparties were to bring only meritless claims, the Khosravans would still be liable for the costs of the Chevron defendants' defense against these claims," under standard indemnity law. (Khosravan, at p. 297.)

So the indemnity must have some value. But that value is too uncertain to compare the offer to the judgment. To compare the value of the offer to their potential litigation outcomes "would have required the Khosravans to evaluate a series of contingencies to determine the cost of indemnification for possible future claims of unidentified parties. What was the likelihood of the Khosravans' children or heirs filing wrongful death claims against the Chevron defendants had the Khosravans settled? And would the Chevron defendants have demanded the Khosravans defend against those claims? If not, what defense costs would the Khosravans have been required to reimburse? The Chevron defendants provide no valuation for the likely expense of defending against potential claims, meritless or not. For the same reasons, the trial court (and this Court on appeal) would have 'to engage in wild speculation bordering on psychic prediction' to determine the valuation of the costs of defending against potential future claims." (Khoravan, at p. 298, fn. omitted; accord *Toste v. CalPortland Constr.* (2016) 245 Cal.App.4th 362, 373, fn. 6 [indemnity condition made the offer invalid for 998 purposes because too "difficult to accurately value the monetary term of the offer"; the *Toste* defendant remedied with a later, unconditional offer].)

The *Khosravan* court's explanation is thorough and informative, and perhaps somewhat beyond what was necessary to decide this case. Whatever the value of the indemnity, it is more than the zero Chevron offered. Perhaps the real comparison is the value of the indemnity provisions against the costs that would be waived had the offer been accepted.

The same is likely to be true for any indemnity provision. Even an indemnity capped at a certain amount would require an estimate of the likelihood it would be invoked, which is a calculus no litigant likely wants to set forth in a public filing (and a calculus a litigant may not even be able to make or justify).

"We recognize the desire by defendants to reach a settlement that protects them from all liability for the conduct alleged in the complaint, whether as to the plaintiffs or their heirs in a wrongful death action. But if defendants seek that protection through indemnification, they may well need to give

up the benefit of section 998. We reverse." (Khosravan, at p. 291.)

You can make any settlement offer you want. If plaintiffs accept, great. But if they decline, not all "998" settlement offers will trigger section 998 cost-shifting.

Don't send a 998 offer you don't want the other side to accept as written!

In *Arriagarazo v. BMW of North America, LLC* (3d Dist., 2021) 64 Cal.App.5th 742, plaintiffs/appellants accepted an offer to compromise their wrongful death suit, agreeing to sign a general release in exchange for a monetary payment. The trial court initially entered judgment on the accepted offer, but then vacated the judgment on defendants' argument that the offer "purportedly did not contemplate entry of judgment." The Court of Appeal reversed.

The offer provided that "[i]n exchange for $15,000 as 'settlement of all claims and causes of action being litigated in this action against [BMW],' appellants would 'execute a general release of all claims and causes of action against [BMW], with each side to bear their own costs and attorney fees.' The offer did not otherwise specify how the case was to be finally resolved, nor did it include a draft of the proposed general release." (Arriagarazo, at pp. 744-745.) After counsel for plaintiffs signed and returned the acceptance form, counsel for BMW sent a proposed release. "Under its terms, appellants would agree to release BMW from any claim or cause of action, whether known or unknown, arising from the January 2014 car accident. Appellants also would provide a general release pursuant to Civil Code section 1542. The agreement included confidentiality and indemnity clauses." (Id. at p. 745.) Plaintiffs refused to sign, but instead signed a release without those provisions, and provided a proposed stipulated judgment that the trial court initially entered. BMW countered that its offer "provides for a settlement and release, not entry of judgment." (Id. at p. 746.) The superior court agreed and voided the judgment.

The Court of Appeal reversed, agreeing with plaintiffs/appellants "that the offer neither called for a judgment nor a dismissal, and that section 998, subdivision (b) results in a judgment unless otherwise specified in the offer. Given the offer's silence about how the case was to be concluded ... the contract must be interpreted as including the statutory default of judgment.... BMW had the burden of drafting the offer with sufficient precision and cannot later unilaterally add terms and conditions." (Arriagarazo, at p. 747.)

The Court of Appeal applied "well-established contract law principles to section 998 offers and acceptances," chiefly that "[i]n interpreting a contract, the mutual intention of the parties at the time the contract was formed governs." (Arriagarazo, at p. 748.) There was nothing in the terms of BMW's written 998 offer showing that it provided "for a settlement and release, not entry of judgment." (Id. at p. 746.) Although such an offer would have passed muster under section 998, drafter "BMW had the duty to make clear in its section 998 offer any intention to stray from the usual path under section 998 of entry of judgment." (Id. at 749.) Defense counsel's communications after plaintiffs accepted the offer made no difference. "Given that appellants unconditionally accepted the section 998 offer as written, we are not persuaded that BMW's e-mailed 'clarifications' should alter the result." (Id. at 749.)

If you get a "998 offer" that does not contain the required provision regarding acceptance, it will not be enough to get a judgment if the other side backs out.

Mostafavi Law Group, APC v. Larry Rabineau, APC (2d Dist. Div. 4 2021) 61 Cal.App.5th 614, elevates statutory formality over both principles of contract interpretation and what most would consider an equitable result. Be wary.

Defendant served a purported 998 that did not contain the statutorily required "provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." Plaintiff's counsel nevertheless signed the offer, and handwrote on it that it was accepted. Plaintiff filed a notice of acceptance, and the court entered judgment. Defense counsel first said he would send a settlement agreement before paying (something not contained in the offer, and which depending on the terms could itself make the offer invalid). Defense counsel — *the offeror!* — then moved to vacate the judgment, arguing *his own offer* was invalid because it lacked the provision. Two courts agreed. Judgment vacated, and affirmed on appeal.

Plaintiff argued that the 998 was enforceable based on "pure contract principles" and equity. (Mostafavi, at p. 624.) The Court of Appeal disagreed, ruling that parties get the benefits of 998 (in most cases, cost-shifting: here, immediate entry of judgment) only if they draft and accept an offer exactly as section 998 requires. "[C]onsistent application of this rule will ensure parties can efficiently discern" what is a valid 998 offer and what is not. (Ibid.) "[T]his 'bright-line rule will eliminate confusion and uncertainty' and 'encourage settlements[.]'" (Ibid.)

The Court of Appeal emphasized this general principle over its application in this case. "Adopting a rule requiring section 998 offers to include an acceptance provision to be valid, whether they are rejected or accepted, adds consistency and predictability to section 998's operation. This may incentivize litigants to utilize this 'straightforward and expedited procedure' to settle disputes before trial." (Mostafavi, at p. 624.) How denying judgment to someone who accepted a 998 offer will "incentivize litigants to utilize" 998s is unclear.

A harsh result, but it resulted from using 998's special entry of judgment procedure. The offeree still theoretically has a breach of contract claim, and potentially could raise ethical issues with defense counsel's reneging on the settlement, but either course would be plainly messier, more expensive, and more difficult.

Can California Protect Employees from Entering into Mandatory Pre-Dispute Arbitration Agreements and Avoid Federal Preemption?

By Paul J. Dubow & Marc D. Alexander

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In California, legislative efforts to prevent employers from requiring employees to sign pre-dispute arbitration clauses, removing the right to a court or jury trial, have traveled a long and rocky road. The biggest rock — really a boulder — has been the doctrine of federal preemption. Does the Federal Arbitration Act (FAA) preempt California's most recent attempt to prevent employers from requiring employees to enter into mandatory pre-dispute arbitration agreements?

We describe California's legislative efforts and the state of the law. And spoiler: because the state of the law is evolving, and may yet change, we offer our best suggestions for what employers and employees can do under current uncertain circumstances in California.

The FAA (1925), like its predecessor the New York Arbitration Act (1920), was a response to judicial hostility to arbitration, and an effort to create an economic and efficient means to resolve disputes among merchants. Earlier judicial hostility to arbitration meant parties could revoke arbitration agreements and courts could refuse to enforce arbitration agreements that ousted courts of jurisdiction. Section 2 of the FAA intends to overcome that historic judicial hostility, for section 2 provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 USCS § 2.) In practice, section 2 means arbitration agreements are to be enforced as written unless there is an established defense in law or equity for revoking the contract, such as lack of consent, unconscionability, or fraud.

California's efforts to preserve the right of aggrieved employees to go to court have played in three acts. In act 1, our Legislature passed Assembly Bill (AB) 465, banning employers from requiring arbitration as a condition of employment, and making the arbitration agreement unenforceable. Governor Jerry Brown vetoed this bill on the ground that cases consistently held a blanket ban of arbitration violated the FAA. In act 2, the Legislature passed AB 3080, prohibiting an employer from requiring an employee to waive a judicial forum as a condition of employment. This too was vetoed by Brown as a violation of federal law.

And so we come to act 3, AB 51, included in Labor Code section 432.6, and Government Code section 12953, declaring it an unlawful employment practice for an employer to violate section 432.6 of the Labor Code. What distinguishes AB 51 is that it aims at pre-agreement conduct and does not invalidate or render unenforceable a signed arbitration agreement.

Labor Code section 432.6 provides that a person shall not, as a condition of employment, continued employment, or receipt of an employment-related benefit, require an applicant for employment to waive any right, forum, or procedure for a violation of any provision of the Fair Employment and Housing Act (FEHA), including the right to file and pursue a civil action. Also, the employer cannot threaten, retaliate, or discriminate against, or terminate an employee applicant for refusing to consent to waiving any right, forum, or procedure for a violation of FEHA, including the right to file a civil action. Note again that the described conduct is pre-agreement conduct.

Can an employee opt out? No, the Legislature took care of such a loophole, by defining an agreement requiring employees to opt out of a waiver to preserve their rights as "a condition of employment."

Section 432.6 does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (which would cover the Financial Industry Regulatory Authority also known as FINRA), post-dispute settlement agreements, or negotiated severance packages.

Section 432.6 applies to contracts for employment entered into, modified, or extended after January 1, 2020.

Notably, section 432.6 does *not* invalidate a written arbitration agreement otherwise enforceable under the FAA. This final point is important, for it means that a signed arbitration agreement remains enforceable, even though California can now smack the employer for conduct leading to the formation of the agreement.

In *Chamber of Commerce v. Bonta* (9th Cir. 2021) 2021 US App LEXIS 27659, the Ninth Circuit reviewed the grant of a preliminary injunction requested by the U.S. Chamber of Commerce and other industry groups to enjoin California from enforcing section 432.6 as to arbitration agreements covered by the FAA. The district court had concluded that section 432.6, subdivisions (a)-(c) was preempted by the FAA. The Ninth Circuit reversed in part, holding that AB 51 was not preempted, except as to certain civil and criminal penalties that did burden arbitration agreements. Judge Carlos F. Lucero of the 10th Circuit, sitting by designation, wrote for the majority, joined by Judge William A. Fletcher, and Judge Sandra S. Ikuta dissented. As Judges Lucero and Fletcher were Clinton appointees, and Judge Ikuta was a Trump appointee, the judges' legal and philosophical division concerning arbitration lined up with their party affiliations.

The majority opinion makes several points. First, an arbitration agreement must be voluntary and consensual, and since the state legislation seeks to promote voluntariness and consent, it is not at

odds with the FAA. Second, the imposition of civil and criminal sanctions for executing an arbitration agreement does conflict with the FAA, and therefore such sanctions are preempted. Third, the California law does not create a contract defense that allows a signed arbitration agreement to be invalidated. Fourth, on its face, the law does not discriminate against arbitration, because where it mentions arbitration, it says arbitration agreements may be enforced. Fifth, unlike cases that, based on federal preemption, refuse to allow state laws to invalidate arbitration agreements, here, AB 51 aims at "conduct that takes place prior to the existence of any such agreement." As we shall see, where the majority focuses on preemption and the invalidity of laws that *invalidate a signed arbitration agreement*, and the majority claims AB 51 is solely directed at pre-agreement conduct, the dissent focuses on the preemption of state laws that impact *formation* of an arbitration agreement.

Judge Ikuta wrote a blistering dissent. She began by stating: "Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act, the state bounces back with even more creative methods to sidestep" it. She termed the bill as a "gimmick" and "a blatant attack on arbitration agreements" that was consistent with the anti-arbitration laws passed by the Legislature in earlier sessions and either vetoed by Governor Brown or struck down by the Court of Appeal. She disagreed with the majority's premise that *Kindred Nursing Centers Limited Partnership v. Clark* (2017) 137 S. Ct. 1421 and similar cases cited by plaintiffs, were distinguishable because they applied to executed contracts rather than contract formation.

She observed that in *Kindred,* the parties opposing arbitration advanced an argument based on the distinction between contract formation and contract enforcement and the Supreme Court rejected this distinction.

Indeed, when Governor Brown vetoed AB 3080, a bill that was very similar to AB 51, he cited Justice Kagan's statement in *Kindred* that "a rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce these agreements once properly made."

Given that the Ninth Circuit dissolved the injunction issued by the district court, employers who previously required employees to enter into arbitration agreements as a condition of employment now have to consider whether they should comply with the statute when they enter into arbitration agreements with new employees.

Employers might choose to ignore the statute, though they do so at their own risk. First, the plaintiffs have filed a petition for a rehearing en banc and so employers may decide that the Ninth Circuit's ruling is likely to be overturned by the en banc panel or by the Supreme Court. Second, and more interestingly, the statute may be ineffectual.

Judge Ikuta raised the issue of the statute's ineffectiveness in her dissent when she criticized the majority's reasoning for holding that the statute's criminal penalties were preempted. In so holding, the majority stated: "An arbitration agreement cannot simultaneously be 'valid' under federal law and grounds for a criminal conviction under state law." The "valid" contract to which the majority referred had to be a contract imposed as a condition of employment because that was the only type of contract that gave rise to the criminal penalties. In other words, an employer violates the statute by requiring execution of an arbitration agreement to be a condition of employment, but the ensuing executed agreement is nevertheless valid and enforceable. Judge Ikuta likened this situation to a statute where a drug dealer is criminally liable for offering to sell drugs but the sale itself is lawful.

But the majority should not be criticized for this bizarre result. It was hamstrung by the FAA.

If an employee files suit in court and opposes the employer's motion to compel arbitration because the arbitration agreement was in violation of AB 51, the employee's argument would be that the agreement was signed involuntarily because it was a condition of employment. The employee could not raise that defense in the case of, say, a dispute involving a covenant not to compete or a confidentiality agreement. The FAA requires that arbitration contracts be on equal footing with other contracts and a state law that provides a defense against arbitration agreements but not other contracts is preempted by the FAA. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 10; *DirecTV v. Imburgia* (2015) 577 U.S. 47, 58-59.) Thus, the majority's only choice was to concede that an arbitration agreement offered as a condition of employment, once signed, is valid.

An employer who chooses to ignore the statute should be careful, however. If the FAA does not apply, the preemption argument will not be available and an executed contract presented as a condition of employment will not be valid. Contracts not covered by the FAA not only include contracts in intrastate commerce, but also include contracts which specifically state that the California Arbitration Act will apply as well as contracts with transportation workers because section 1 of the FAA exempts transportation workers from its coverage. (See *Garrido v. Air Liquide Industrial US LP* (2015) 241 Cal. App. 4th 836, 839-841; *Rittman v. Amazon.com, Inc.* (9th Cir. 2020) 971 F.3d 904, 916-919.) In addition, criminal liability is only avoided if the employee signs the agreement. If an employer demands that an employee sign the agreement as a condition of employment and the employee refuses to sign, then the employer remains criminally liable.

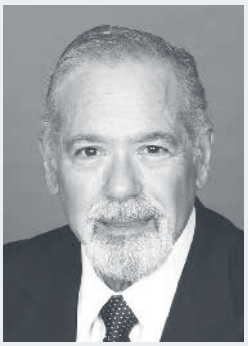
On the other hand, there may be good reason to comply with the statute, notwithstanding a belief that it does not affect contracts covered by the FAA. An employee who signs a contract that is a condition of employment and later has a dispute with the employer is likely to file suit in federal or state court and the employer will have to expend legal fees filing a motion to compel arbitration and defending against the employee's challenge to it. If the contract is not a condition of employment, most employees will probably still sign it and, if a dispute arises, will be more likely to initiate resolution of the dispute in an arbitral forum. Of course, this may not be a "one size fits all" solution for employers. For example, some employers may so fear the risk of class actions that they will always want to compel arbitration and pay the cost of doing so, putting them in a position to "divide and conquer" with individual arbitrations.

In a bit of irony, it can be argued that the statute is helpful to the arbitration process. Many legislators, academics, attorneys, and members of the media have a negative view of arbitration. This largely stems from the fact that most employment and consumer arbitration agreements are imposed as a condition of employment or purchase of a product. If the general practice changes and entrance into an arbitration agreement becomes optional for the employee or consumer, many objections to arbitration, often manifested in legislation and unflattering articles, might disappear.

Finally, what can an employee do to assert his or her rights under the statute? If the FAA applies, there probably is little that can be done if the employer makes execution of the contract a condition of employment, but the employee has nothing to lose by at least raising the existence of the statute. If the employer persists then the employee will need to sign the contract unless the employee is willing to look elsewhere for a position. True, if the statute is valid the employer may be subject to penalties for conduct before the agreement is signed. Yet even if the statute is valid, so too will be the signed arbitration agreement, assuming the agreement doesn't have other problems for the employer and employee to fight over.

"Present at the Creation"

By Richard Chernick



Richard Chernick practiced at Gibson, Dunn & Crutcher for 25 years as a commercial trial lawyer before he became a full-time arbitrator and mediator in 1994. He was at AAA for seven years and since 2001 has been the Vice-President and Managing Director of the JAMS Arbitration Practice. He has served as President of the Los Angeles County Bar Association, President of the Legal Aid Foundation of Los Angeles, Chair of the Dispute Resolution Section of the ABA, and Founding President of the College of Commercial Arbitrators. He has taught ADR and Arbitration at USC Gould School of Law, UCLA Law School, and Pepperdine Law School.

The phrase was originated by Dean Acheson in his memoir, *Present at the Creation: My Years in the State Department.*

It is more than an honor to be the first ADR Hall of Fame member, all the more so because of my respect and admiration for the Litigation Section of the California Lawyers Association. I have been asked to address briefly the history of the development of ADR and arbitration in California on the occasion of the inauguration of this special recognition for ADR pioneers.

As a very young lawyer (1970's), I happened into a few cases that were arbitrated rather than litigated, mostly at the AAA. Because I enjoyed that quite different experience, I began to seek out such cases and quickly became our firm's resident expert on commercial arbitration practice, a very small subspecialty of our litigation practice.

When the Iranian hostage crisis resolved in the Algiers Accords in 1981, many U.S. firms were authorized to bring claims against the Iranian government at the Iran-U.S. Claims Tribunal in The Hague. Because of my knowledge of arbitration, I became lead counsel at my firm in eight such cases and was quickly exposed to international arbitration principles and practices. The Claims Tribunal experience of many U.S. lawyers awakened broad interest in international arbitration among corporations and law firms.

At about the same time, two circumstances overlapped to jump-start private judging in California. Our trial courts became severely backlogged, and a number of highly respected and recently retired superior court judges were sought out to become private judges, mainly to try cases under the California reference statutes (Code Civ. Proc., §§ 638, 639) and article VI, section 21 of the California Constitution (temporary judge proceedings). Seth Hufstedler and Hillel Chodos were counsel in perhaps the first case that used reference proceedings in this period, and they gained significant public exposure for the innovative nature of that trial.

The case backlog also motivated courts to develop innovative techniques to help resolve cases, and mandatory mediation and judicial arbitration were two techniques that were advanced and promoted.

All of this exposed many litigators to nontraditional forms of dispute resolution and began the inexorable process of embedding ADR into the litigation toolbox of many of them.

None of this would be of much interest today if these efforts were not successful in providing fair and effective alternative resolution methods that clients and lawyers appreciated and valued, and numerous retired judges and former lawyers enthusiastically entered the field and became highly experienced in hearing and deciding cases using these new processes.

Provider organizations — AAA, JAMS, ADR Services, Inc., Alternative Resolution Centers, LLC, and Judicate West — provided stables of neutrals who were highly experienced, well-trained, and respected for their skills in leading these processes. Pepperdine's Straus Institute and later USC Gould School of Law provided training for law students and practitioners, further advancing the sophistication of the field. One should not overlook the role of the Center for Public Resources which, in the 1980's under Jim Henry's leadership obtained pledges from major corporations and law firms to consider use of ADR in every case, and which trained law firm and business leaders how to employ ADR effectively.

Today, ADR is so widely accepted that it has become an integral part of the litigation landscape. No commercial contract is negotiated without at least considering the inclusion of a dispute resolution clause, and some of the biggest and most complex commercial disputes routinely find their way into mediation and arbitration processes. I dare say that an active commercial trial lawyer today is equally likely to have arbitrated his/her last case to award as having litigated it to verdict. (See Chernick et al., Private Judging: Privatizing Civil Justice (Nat. Legal Center for the Public Interest, 1997).)

Some aspects of this renaissance have garnered more mixed reviews. Imposed arbitration of consumer and employment cases (and the inevitable class action waiver feature of such agreements) have supporters and detractors; but for the unwavering support of arbitration under the FAA by our Supreme Court (the one in Washington, D.C., not the one in San Francisco, CA), there would likely be serious legislative limitations on such processes in this state.

The Future of Dispute Resolution

There can be no doubt that the broad use of dispute resolution techniques in the recent past has transformed the thinking of trial lawyers in many ways. First, they are more open to fitting the process to the dispute at hand utilizing ADR techniques that were either unknown or largely unused until late last century. Second, they understand that many disputes are amenable to friendly resolution and that they have a responsibility to consider consensual resolution and a key role to play in that process. Finally, they have learned to be effective advocates in mediation and arbitration — skills that they have developed only recently.

ADR has become an essential part of most law school curricula, and recent JDs are often better prepared to utilize these newer forms of dispute resolution better than their colleagues who lacked the benefit of such instruction when they attended law school.

Finally, courts have become more open to allowing litigants to chart their own course to resolution and are often instigators of the diversion of pending litigation into other fora.

All this portends a variable litigation landscape that will be more efficient and effective and that will guarantee participants greater satisfaction in the processing and outcome of their disputes.

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