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LOOK WHO'S NEW IN DEPARTMENT 33
JUDGE DANA K. CAUDILL

By Rachel Coleman

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PRESIDENT'S MESSAGE

by Joshua S. Hopstone

Last month the Ventura County Bar Association announced a change to its member services—cessation of the VCBA Mandatory Fee Arbitration (MFA) Program. The Bar has received a variety of feedback to the announcement, and it is my pleasure and responsibility to clarify the reasons for the change.

By way of background, California law mandates the State Bar of California to maintain and administer a system and procedure for arbitration of disputes concerning fees charged by licensed California attorneys. (Bus. & Prof. Code, § 6200, subd. (a).) The law was enacted in 1979 to provide clients and lawyers with an affordable alternative to the judicial system for expeditiously resolving fee disputes, and to alleviate the disparity in bargaining power in attorney-client fee disputes, which are a leading cause of legal malpractice claims. Arbitration of fee disputes is voluntary to the client (absent an enforceable arbitration provision in the fee agreement), and mandatory to the attorney if elected by the client. (*Id.,* subd. (c).)

Although the overarching MFA system is administered by the State Bar, a large majority of arbitrations have historically been handled through local bar association programs. VCBA's *Rules of Procedure for Hearing of Fee Arbitrations* was initially enacted with an effective date of January 1, 1979. After its enactment, VCBA's MFA Program was initially very popular, and many hundreds of fee disputes were arbitrated in the years that followed under VCBA's administration.

More recently however, interest in our local MFA Program has waned. In the last 21 years (2003 to 2024), the number of cases submitted to VCBA for arbitration averaged around 20 per year, with a high of 48 (in 2004) and a low of three (in 2021). Over the last five years (2020 to 2024), the average has fallen to just nine cases per year.

Concurrently, the list of attorney volunteers has shrunk from many dozens in the 1990s and 2000s, to just eight in 2024, with many of the same volunteers graciously repeating service year after year. The time demand upon these volunteers to accept a fee arbitration case has also increased over time, to an average of approximately 20 hours per case, (and sometimes much more), according to informal survey results. From an administration perspective, the MFA Program has continued to be a time-consuming burden on VCBA staff, with very little observable benefit to the bar or its members in return.

VCBA is not alone in its decision to wind down its MFA Program. In fact, just 21 of the 58 California counties currently offer an MFA program, while 37 counties do not. Many of the counties that continue to offer an MFA program have hired a dedicated staff person charged solely with responsibility for administration and management of the program. Implementing a similar strategy would require VCBA to raise membership dues—something the board was not prepared to abide in order to maintain a dwindling program with interest of less than a dozen cases per year.

Fortunately for our members, the recent statewide centralization of MFA means that the State Bar of California's MFA program is stronger than ever. The State Bar has a wealth of information and resources regarding MFA on its website, including forms,instructions, a sample fee agreement, and arbitration advisories. Regardless of whether a fee dispute is arbitrated by a local Ventura attorney, all the same benefits of the program will continue to be available to attorneys and clients who request them. Moving forward, VCBA and its staff will continue to remain at the service of our attorney members to assist in connecting attorneys and clients with the State Bar program as needed.

Above all else, VCBA wishes to extend its heartfelt gratitude to the many attorneys who have volunteered their time and experience in service as arbitrators of the MFA Program over the years. A Certificate of Appreciation has been bestowed upon all attorneys presently serving on the 2024 panel, who deserve the recognition and praise of our community: **Andy Viets**, **Brent Rosenbaum**, **Jeff Rishwain**, **Larry Hines**, **Michael Christiano**, **Richard Hoefflin**, **Samuel Huestis**, and **Zoya Shenker**. These attorneys and their predecessors have the appreciation of the VCBA Board of Directors and staff, and the entire legal community, for your years of volunteerism, dedication and service.

Joshua S. Hopstone *is a partner at Ferguson Case Orr Paterson LLP. His practice focuses on business and real estate litigation, trust/probate litigation, and appeals.*

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LOOK WHO'S NEW IN DEPARTMENT 33 JUDGE DANA K. CAUDILL

By Rachel Coleman

Gov. Gavin Newsom appointed **Dana K. Caudill** to the bench on January 29, 2024, to fill the vacancy created by **Judge Manuel J. Covarrubias** who retired in 2023. Judge Caudill received the wonderful news from Gov. Newsom's secretary, who asked her "if she was sitting down." She recalled the phone call came "out of the blue" as she applied to be a candidate for judge in October 2022. Her husband of 27 years, as well as her two children who are in college and grad school, were elated when they heard the news.

Caudill's 94-year-old father was very emotional when she announced her appointment to the bench. Her father is a retired attorney who came from very humble beginnings. Her grandfather worked as a butcher in a meat market during the depression. Her father grew up in tough times but eventually, through hard work and perseverance, graduated from college and then law school. The first thing he said to her upon hearing the news was "from a butcher all the way to a Judge!"

When attending University of California, Santa Barbara (UCSB), Caudill studied communications. An internship at the Santa Barbara County District Attorney's Office working in the investigative unit handling the fraudulent check writing program piqued her interest in the study of law. After that internship she directed her focus to a career in law. She took some law related courses at UCSB that made her feel that "law was her calling." She earned her bachelor's degree and graduated from UCSB in 1989.

During her studies at UCSB, for her final three units, Caudill participated in an internship program in Washington, D.C. with the Senate Judiciary Committee (SJC). Of note, the SJC at the time was led by Senator, now President, Joe Biden. Even though it sounds grand, Caudill recalled only briefly meeting him twice during her internship, which gave her insight to the innerworkings of government that she would have never otherwise experienced.

Caudill attended law school at University of the Pacific, McGeorge School of Law (McGeorge). She published an article in the Pacific Law Journal on asbestos litigation and strict liability, and during her third year at McGeorge she worked as an editor for the Pacific Law Review. She also worked part time as a law clerk at the insurance defense firm, Matheny, Poidmore & Sears. After graduating from McGeorge with her Juris Doctor degree in 1993, Matheny, Poidmore & Sears hired her as an attorney. After only a year at the firm, she was let go due to a downturn in the economy. Caudill reflected that she would not be a judge today, had she not lost her first job as an attorney.

From 1994 to 1996, she worked as an attorney at Porter, Scott, Weiberg & Delehant, where she practiced insurance defense. After a chance meeting with another attorney who also worked in her building, she was presented with an unexpected employment opportunity. This attorney recommended and referred Caudill to a job opening with Farmers Insurance Company.

Farmers made Caudill an offer, which she accepted. On her first day, she walked into an office with 60 files on her desk, all of which needed attention, and a voicemail full of messages that needed to be returned. In her new position, Caudill quickly learned how to put together a case from start to finish that she could present to a jury. She learned the importance of discovery and how it could go terribly sour if not done correctly. Caudill said, "This new position at Farmers was a great fit for me, and my law career flourished." During her career at Farmers, she conducted 35 trials before a jury to verdict. In addition, she handled hundreds of mediations and arbitrations and conducted too many depositions to count. Caudill worked for Farmers from 1996 until her appointment to the bench. Prior to her appointment, she was the Managing Attorney for Farmers' office in Los Angeles. Prior to that she worked as a Supervising Attorney and Trial Attorney.

In her spare time, she was actively involved in the local legal community as well as the community at large. From 2001 to 2008, she was a member of the Jerome H. Berenson American Inns of Court. She reported this was a fabulous group for meeting other attorneys who practiced different areas of law as well as meeting the judges in a more personal setting.

In 2004, after conducting 20 jury trials, Caudill was admitted to the California Coast Chapter of the American Board of Trial Advocates (ABOTA). During her time with ABOTA, she sat on the board of directors as a chairperson, treasurer, vice-president and president (2015). While acting as president, she hosted three MCLE programs on civility and ethics in the legal profession. As a huge proponent of civility in the legal profession, the purpose of these MCLE presentations was to improve and promote civility

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amongst attorneys. Caudill says, "Being civil and professional helps resolve cases and improves your health and wellbeing in your profession."

From 2007 to 2011, Caudill served as a Judge Pro Tem with the Ventura County Superior Court. While sitting Pro Tem, she presided over all types of cases in small claims matters. She highly recommends that any attorney who is eligible should volunteer. In her opinion, making important and sometimes life-changing decisions for people changes your point of view of the practice of law. Serving as a Pro Tem helps attorneys become better by experiencing the different perspective of sitting behind the bench, instead of standing in front of it.

Caudill regularly volunteered as a scorer for the Mock Trial program. "The confidence and poise of the students in the courtroom is just amazing. Time is precious, but I highly recommend that more attorneys get involved in the program." She also volunteered as a guest speaker at an internship program for local high school students who were interested in a career in law. She wants to encourage as many young people as she can to pursue a career in law.

As Judge Caudill is just settling into courtroom 33, she encourages all attorneys to be as specific as possible when presenting motions, briefs and requests for orders to the court. She asks that attorneys be clear about what they are asking the court to do for their client as well as provide the appropriate points and authorities, including citations to the legal authority that supports their client's position.

Caudill expects all trial briefs, witness and exhibit lists to be filed and exchanged at least 10 days prior to the trial. As to the exhibits for trial, Caudill requests that all counsel bring 5 copies of their exhibit binders to the courtroom on the day of trial for maximum efficiency. If you have not met Judge Caudill, you can look for her in courtroom 33 or hiking and skiing in the mountains, at the beach, or camping with her family.

Rachel Coleman *is an attorney with Seige Law, PC. and a member of the CITATIONS Editorial Board. Rachel can be reached at rachel@seigelaw.com.*

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LINDKE V FREED: PUBLIC OFFICIALS CAN BE HELD LIABLE FOR BLOCKING CRITICS ON SOCIAL MEDIA

By Mari K. Rockenstein

Does the First Amendment prohibit government officials from deleting comments or blocking members of the public from their social media?

The short answer: *It depends.*

There are millions of state and local government employees across the country who use social media for personal communication, official communication or both. In *Lindke* v. *Freed*, the United States Supreme Court (SCOTUS) provided us with a test for when a public official's social media activity constitutes "state action" for the purposes of the First Amendment (*Lindke v Freed*, 601 U.S. 187 (2024).

Individuals who have been blocked or had their comments deleted from a government official's account argue that government officials are attempting to shut down or silence their opposing viewpoints in conflict with free speech rights. This, they say, amounts to the government engaging in viewpoint discrimination in a public forum, which is prohibited under the First Amendment.

The *Lindke* decision resolved a lower court split regarding the same issue. In *O'Connor-Ratcliff v. Garnier*, 41 F.4th 1158 (2022)), the U.S. Court of Appeals for the Ninth Circuit ruled that two school board members violated the First Amendment when they blocked two parents from their personal Facebook and Twitter accounts, which they used to provide information about the board and its work. The Court of Appeals held that state action applied to the board members' social media accounts based on the "appearance and content" of the pages. In *Lindke v Freed*, the U.S Court of Appeals for the Sixth Circuit affirmed the lower court's decision that Lindke's claim failed because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under 42 U.S.C. § 1983. *Lindke v Freed*, 37 F.4th 1199 (2022).

Lindke required SCOTUS to analyze whether a state official engaged in state action or functioned as a private citizen. The Court admitted the question is difficult, especially in a case involving a state or local official who routinely interacts with the public. (*Lindke*, 601 U.S. 187, 196.) Some officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. The Court emphasized that while public officials can act on behalf of the State, they are also private citizens with their own constitutional rights, including rights to speak about their employment, that they do not relinquish simply by becoming public officials. (*Id*.)

James Freed created a private Facebook profile sometime before 2008. (*Id*. at 198). He eventually converted his profile to a public "page," meaning that anyone could see and comment on his posts. In 2014, Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Freed continued to operate his Facebook page himself and continued to post primarily about his personal life. Freed also posted information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of concern. Freed often responded to comments on his posts, including those left by city residents with inquiries about community matters and deleted comments he considered "derogatory" or "stupid." (*Lindke*, 601 U.S. at 187.)

After the COVID–19 pandemic began, Freed posted about it. Some posts were personal, and some contained information related to his job. Facebook user Kevin Lindke commented on some of Freed's posts, unequivocally expressing his displeasure with the city's approach to the pandemic. Initially, Freed deleted Lindke's comments; ultimately, he blocked him from commenting at all. Lindke sued Freed under 42 U.S.C. § 1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page because it was a public forum. (*Id*. at 197).

In a unanimous decision by SCOTUS, Justice Amy Coney Barrett explained that a government official's social media posts can be attributed to the government only if: (1) the official had the authority to speak on behalf of the government; and (2) was exercising that power when the official created the social media post at the center of the dispute. (*Id*). In a case like Freed's, Barrett continued, involving a social media page with both personal and official posts, making such a determination will require "a fact-specific undertaking in which the post's content and function are the most important considerations."

After sending the case back for a further look, the Court stated that the burden is on the plaintiff to show the official is "purporting to exercise state authority in specific posts." Additional factors, such as the use of governmental staff and resources, may help demonstrate the use of that authority.

The Court also provided guidance and hypotheticals on the implications of this ruling. A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president

However, if a mayor or county supervisor posts something expressly invoking the authority of the city or county, the action takes immediate legal effect and is not otherwise available elsewhere; that post would likely be state action. On the other hand, if the official is merely sharing information that is otherwise publicly available, it is far less likely to be state action.

Public officials may use labels and disclaimers on their social media pages, such as "this is the personal page" of the individual or "the views expressed are strictly my own,"

which, according to the Court, would entitle the official to "a heavy (though not irrebuttable) presumption that all of the posts on his page were personal." However, the Court noted such a disclaimer does not provide cover to conduct government business on a personal page such as live streaming a council meeting only on that "personal" page.

The Court also cautioned that the "nature of the technology matters" in this analysis. Although deleting comments allows an official to target only personal posts, blocking someone from a "mixed use" social media page that contains both personal and official posts is a "different story." If blocking is the only option, the public official is risking liability for also preventing comments on official posts. "A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability," it warned. (*Id*. at 204).

Ultimately Lindke must show that Freed had: (1) actual authority to speak on behalf of the State on a particular matter; and (2) Freed purported to exercise that authority in the relevant posts for Lindke's First Amendment rights to be violated. (*Id*.)

The Aftermath:

In a brief unsigned opinion that followed Justice Barrett's decision in Freed's case, the justices sent *O'Connor-Ratcliff v. Garnier* back to the Ninth Circuit for it to take another look using the new test. This ruling is the first of several expected this term involving the relationship between government and social media.

The views presented are those of the author and do not necessarily represent the views of the DON, DoD or its components.

Mari K. Rockenstein *is Counsel for the Department of the Navy, Office of General Counsel and Director of Environmental Law Training - in addition to adjunct professor for Cal Lutheran University and CSUCI.*

VOIR DIRE IN KAREN READ MURDER TRIAL DIFFERENT PROCEDURES? DIFFERENT RESULTS?

By Craig Bates

Defense team pictured Left to Right: Alan Jackson, Craig Bates, Karen Read (Defendant) and David Yanetti.

The Karen Read murder trial in Massachusetts has been a closely watched crime drama capturing national interest. Read, 45, pleaded not guilty to charges of second-degree murder, vehicular manslaughter while intoxicated, and leaving the scene of a collision resulting in death. The decedent, John O'Keefe, a Boston Police officer, was Read's boyfriend. His body was found with signs of physical trauma in the snow, on January 29, 2022, outside the home of a fellow Boston Police officer in Canton. Prosecutors believe Read ran him over with her car after an argument after which O'Keefe got out of the car. Read is alleged to have been intoxicated, striking O'Keefe while driving in reverse, then fleeing the scene, leaving O'Keefe to die. The defense countered that Read was a victim of an extensive police cover-up and was framed. The trial which began in April lasted 11 weeks and ended in a mistrial.

Throughout the United States, the process of selecting a jury can vary significantly from state to state. During the high-profile prosecution against Karen Read, I was brought in to provide visual litigation support and experienced first-hand how the differences in jury selection in Massachusetts, as opposed to California, could potentially influence the outcome of this case.

The jury selection process, well known as *voir dire*, allows the judge and the attorneys from both sides to question potential jurors to ensure they can be fair and impartial. Attorneys are given a limited number of peremptory challenges, which allow them to dismiss a juror without cause or providing a reason. However, these challenges cannot be used to discriminate based on race, gender, or other protected groups.

In California, a pool of 12 to 18 prospective jurors are brought into a courtroom and seated in the jury box for open questioning from the attorneys representing each side. During this exchange jurors are screened to better understand their life experience and to determine if they can be fair and impartial.

In both California and Massachusetts, once jurors are brought into the courtroom, they are asked by the judge a series of questions which relate to financial hardships, strong biases or opinions, and any familiarity with any parties or witnesses involved in the case; this questioning of the jurors is conducted in open court.

Massachusetts, however, has a different approach to the jury selection process. In the *Read* case, the jurors were asked the initial questions by the judge in open court. Following that, each juror, randomly selected by juror number, was asked to come to judge's sidebar with the attorneys present. The judge then proceeded to further ask a series of questions about that person's qualifications to sit as a juror. Next, the attorneys were given the opportunity to question the potential juror, at sidebar, until a final decision was made to either excuse the juror for cause, excuse the juror with a peremptory challenge from the defense or prosecutor or seat the juror.

This process, although very time-consuming, gives prospective jurors a more private environment to be open and candid about their answers to the questions presented by the judge and attorneys.

Another notable difference occurs at the conclusion of the presentation of the evidence and after both sides rest. In Massachusetts, a process then occurs of drawing two random numbers out of a barrel, those jurors whose numbers are drawn become the alternates. The remaining 12 jurors become the final jurors, then the judge selects the jury foreperson and deliberations begin.

This is in stark contrast to California, whereby, upon completion of the evidence, the 12 selected jurors decide amongst themselves who will be the foreperson and the alternates are released from deliberating until and if called to replace any of the original 12 jurors.

These differences in jury selection between California and Massachusetts could have a significant impact on the outcome of a case. While both states' goal is to select an impartial jury, the procedures they employ to achieve this goal have obvious differences in how potential jurors are required to disclose sensitive personal details, potentially leading to different outcomes in similar cases. What do you think? Does this process necessarily lead to the selection (*or non-selection*) of jurors who otherwise would have been excused or empaneled?

***Craig Bates** is the Principal at Telegenics, Inc., providing legal video and visual litigation support for attorneys in Southern California, and elsewhere, for 40 years. www.telegenicsinc.com*

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LEGAL VEXILLOGRAPHY FLAG LITIGATION IN THE NEWS: READ BEFORE YOU LET YOUR FREAK FLAG FLY

By Panda Kroll

As a student of First Amendment litigation, and in keeping with this month's national holiday I am following three recent legal cases involving flags.

Two are pending cases, *Little v. L.A. County Fire Department* and *Feldman v. Denver Public Schools*, and both fall into the category of "my protected class trumps your protected class" cases, i.e., disputes involving Christians' rights versus rights of the LGBTQIA+ community. In the first of these cases, in 2023, the L.A. County Board of Supervisors ordered Progress Pride flags flown throughout all County facilities during the month of June, which the Board designated as Pride Month. The L.A. County Fire Department allegedly threatened a 22-year employee, Christian lifeguard Captain Jeffrey Little, with dismissal after he took down the rainbow-colored flags hanging near his station in Will Rogers Beach in the Pacific Palisades. Previously, he had allegedly sought and been denied a religious accommodation. Since 1997, the Thomas More Society, a conservative Roman Catholic public-interest law firm, has brought culture war suits throughout the U.S. on behalf of religious plaintiffs (individuals and groups) in addition to filing numerous amicus briefs. In May 2024, the Society filed suit on behalf of Little against his employer in the U.S. District Court, Central District of California. Little alleges employment discrimination and retaliation under state and federal law on the basis of his deeply-held religious beliefs. He seeks damages for severe emotional distress and a "standing exemption" from working near a Pride flag. Interestingly, he asks the court to order his managers to complete workplace diversity classes sponsored by the EEOC including, *inter alia*, "Creating an Inclusive Workplace," and "Harassment and Diversity: Respecting Differences."

In the second case, in November 2023, Nathan Feldman sued the Denver Public Schools on behalf of himself and his twin children in the U.S. District Court, District of Colorado after he was allegedly denied permission to raise a "straight pride" flag at the siblings' K-8 school. He sought the right to display this flag because he was dissatisfied with the Schools' alleged practice of "teaching second grade students about the topic of sex including sexual orientation and gender identity," and of allowing teachers to display rainbow flags, which the principal allegedly advised were consistent with the district's policy supporting "the right of its employees to put rainbow flags or other signs of support for LGBTQIA+ students and staff." The complaint alleges that the schools violated Feldman and his twins' constitutional rights under the First and Fourteenth Amendments. In addition, the complaint alleges the schools violated Title IX of the Federal Civil Rights Act, citing by analogy the landmark 2020 U.S. Supreme Court (SCOTUS) ruling in *Bostock v Clayton County,* which was an employment case. In *Bostock*, the Court ruled that "[d]iscrimination on the basis of 'sex' extends to gender identity and sexual orientation," broadening the interpretation of rules under Title VII of the federal Civil Rights Act to include protections for LGBTQ employees, which previously were afforded to such employees according to laws enacted in only about half the states. The Feldmans' theory is that the school discriminated against them on the basis of their membership in a protected class, i.e., straight /cisgender. The complaint seeks $3 million in damages.

A second category of recent flag litigation invokes the old chestnut, *Lemon v. Kurtzman*, which we studied in second-semester Con Law. This 1971 case set forth the three-part *Lemon* test that has been applied in disputes involving the Establishment Clause prohibition against government establishing an official religion. The test, however, has fallen increasingly out of favor. In the 2022 case of *Shurtleff v City of Boston,* for example, SCOTUS rejected a defendant municipality's argument that the Establishment Clause justified its policy allowing some groups, but not religious groups, to have their flags temporarily flown outside of Boston City Hall through an informal permit process. After losing in both the District Court and the First Circuit, Hal Schurtleff, the director of a Christian group, Camp Constitution, obtained certiorari. In a rare unanimous decision, the Court ruled that the City violated the group's First Amendment rights when it denied the group's request to raise their flag. The Christian legal firm that represented Shurtleff was awarded $2.1 million as reimbursement for its attorney fees and costs incurred in the five years of litigation.

Enter another actor who is no stranger to Establishment Clause challenges. The Satanic Temple, founded in Salem Massachusetts and recognized by the IRS as an official House of Worship since 2019, has brought numerous cases across the country advocating for the separation of church and state. Shortly after *Schurtleff* was published, Boston City Hall acquiesced and allowed Camp Constitution to fly its Christian flag. Predictably, the Satanic Temple applied to have one of its flags raised in the same location. The City, however, amended its rules, thus avoiding a skirmish with the Satanic Temple or any other applicant. Its rules, as amended August 2022, now state that, rather than through an application procedure, a City Council resolution or mayoral proclamation is required for a flag to be raised, consistent with the Supreme Court's implication that the City needed to clarify that the process of raising flags at City Hall is unambiguously government – and not private – speech.

Panda L. Kroll *is the founder of Panda Kroll, Esq. & Associates and the Timeshare Law Library, Inc.*

APPEAL TO HEAVEN FLAG

By Alex Tron

In the summer of 2023, a flag with deep historical and contemporary significance was flown outside the New Jersey vacation home of Justice Samuel A. Alito Jr. This flag, known as the "Appeal to Heaven" flag, has roots in the Revolutionary War but has recently been adopted by factions supporting former President Donald J. Trump and the "Stop the Steal" campaign. The presence of this flag, coupled with its political connotations, raises critical questions about judicial impartiality, especially as the Supreme Court faces pivotal cases related to the events of January 6, 2021.

The "Appeal to Heaven" flag, also known as the Pine Tree flag, originally symbolized resistance against British rule during the American Revolution. The phrase "appeal to heaven" derives from the writings of 17th-century philosopher John Locke, who argued for the right to rebel against unjust governance. This historical relic saw a resurgence in modern times, particularly within right-wing movements and supporters of Donald Trump. Photographic evidence and eyewitness accounts confirm that the "Appeal to Heaven" flag was displayed at Justice Alito's Long Beach Island home in July and September 2023. While it is unclear how long the flag was flown, its presence coincided with significant legal deliberations at the Supreme Court regarding the January 6th Capitol riots. This timing has fueled concerns about potential biases and ethical breaches within the judiciary.

The display of politically charged symbols by a sitting Supreme Court justice can undermine public confidence in judicial impartiality. The "Appeal to Heaven" flag presents a troubling image when perceived to be flown by a Supreme Court justice. The revelation of the flag at Justice Alito's home has drawn significant attention from both sides of the political spectrum. Legal scholars and Democratic lawmakers have called for Justice Alito to recuse himself from cases related to January 6th, arguing that his impartiality is compromised. Conservative figures have also expressed concern, although their critiques focus more on the judgment of displaying such symbols rather than on ethical violations.

This incident is not the first time Justice Alito's home has been associated with controversial symbols. In 2021, an upside-down American flag, another emblem used by January 6th rioters, was seen at his Virginia residence. Justice Alito attributed this to a dispute involving his wife, Martha-Ann Alito and a neighbor, but the incident nonetheless sparked calls for his recusal from related cases and highlighted the ongoing scrutiny of his actions outside the courtroom.

More recently, reporting has revealed Martha-Ann Alito's strong feelings about the Pride flag, which represents the LGBTQIA+ community. According to audio captured by Lauren Windsor, Martha-Ann Alito expressed opposition to the flying of pride flags in support of the LGBTQIA+ community, suggesting her desire to fly other flags in counter-protest. She said: "You know what I want. . . I want a Sacred Heart of Jesus flag because I have to look across the lagoon at the Pride flag for the next month." Continuing, Ms. Alito said: "I'm putting it up and I'm going to send them a message every day, maybe every week. I'll be changing the flags."

Justice Alito's perceived association with such symbols, whether intentional or not, raises profound questions about the intersection of personal beliefs and judicial responsibilities. The timing of the "Appeal to Heaven" flag's display is particularly consequential as the Supreme Court prepares to rule on critical cases involving the January 6th insurrection and former President Trump's potential immunity from prosecution. These decisions will have far-reaching implications for American democracy and the rule of law. Any hint of bias or partisanship within the Court could undermine the perceived legitimacy of its rulings and erode public trust in the judicial system.

The presence of the "Appeal to Heaven" flag at Justice Alito's residence is more than a mere anecdote; it is a symbolically loaded event that underscores the need for stringent ethical standards in the judiciary. As the Supreme Court faces pivotal decisions on the accountability of political leaders and the sanctity of democratic processes, the impartiality of its justices remains paramount. Legal professionals and scholars must continue to advocate for transparency and adherence to ethical norms to preserve the integrity of the judicial system.

Alex Tron *has been a resident of Ventura County for over 20 years and is the Reentry Attorney at The Social Impact Center. Alex can be reached at alex@thesocialimpactcenter.org and by phone at (213) 534-6229.*

U.S. FLAG CODE

By Carol Mack

Did you know that there are federal laws governing the handling and displaying of the American Flag? There are. They are found in 4 USC Ch. 1 and are known as the U.S. Flag Code. These rules cover the display of the flag, alone and with other flags, as well as respect for the flag.

The federal Flag Code includes the following rules for respecting the U.S. Flag:

- Never place another flag or pennant above the flag of the United States of America
- Never fly the flag with the union down, except as a signal of dire distress in instances of extreme danger to life or property
- Never allow the flag to touch anything beneath it
- Never use the flag as wearing apparel, bedding, or drapery
- Never dip the flag for any person or thing, even though state flags may be dipped as a mark of honor
- Never place anything on the flag, including letters, insignia, or designs of any kind
- Never use the flag for advertising purposes in any manner whatsoever
- When a flag is worn out or otherwise no longer a fitting emblem for display, destroy it in a dignified manner, preferably by burning

It turns out that the U.S. Flag Code is not enforceable under federal law, but states may have their own flag codes and impose penalties for their violation. California, for example, requires that the State and National flags be displayed at schools, public buildings, and sporting events. It also prohibits any person, private entity, or governmental agency from preventing anyone from exercising their legal right to fly the American Flag. The superior court of the county involved is tasked with the enforcement of the law upon the complaint of a citizen.

Though she is retired from practicing law, ***Carol Mack*** *continues participating as a member of the CITATIONS Editorial Board. She is a retired health science professor at CSUCI.*

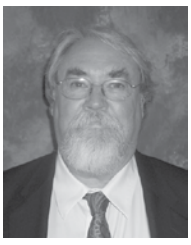
HOA RULES RE: FLAGS

By Michael McQueen

For reasons that escape me, many people chose to live in HOAs. I sort of get it. HOAs have a consistent design and standards, with a governing Board designed to keep everyone in line and compliant. It also seems that every HOA has a self-appointed "lawn Nazi" patrolling the neighborhood looking for infractions. If you are found non-compliant you can get fined – repeatedly. In dire circumstances you can lose your home, which kind of solves your HOA problem.

Another important issue to keep in mind is that the HOA rules adopted under the Davis-Sterling Act can really stack the deck against the independent minded HOA member. The general case law backs the board applying the slippery "reasonableness" standard. People also make the mistake of believing that their constitutional rights are protected in an HOA. Think again, as living in an HOA governed community is a matter of contract and you have given up those normal democratic protections once you contractually agree to live according to the HOA.

So, let's say that you have a fractious spouse who decides to put up flags of protest. For many years, flying any sort of flag could cause neighborhood strife – you would hear the indignant howls that it is their right to do so. Not really. They gave up those "rights" when they made the decision to join the HOA. It is amazing to me that the people who are so strident about their freedoms actually chose to live under an HOA and voluntarily give up those freedoms, in exchange for conformity. Ironic. But it got so bad that the legislature had to step in and pass Civil Code section 4705 which specifically overrules any HOA rule that impairs the right to display the American Flag. But it does not address the rainbow flag, the Don't Tread on Me Flag, the Appeal to Heaven flags, etc. Your "right" to make a free speech display of any flag of your choice does not get past the gates of your HOA gated community.



Michael McQueen *practices law in Camarillo and is a member of the CITATIONS Editorial Board.*

CONSERVATORSHIPS AND RECENT CHANGES TO CALIFORNIA'S CONSERVATORSHIP LAWS

By Carol Mack

As a volunteer attorney with Grey Law of Ventura County, I sometimes had occasion to recommend a conservatorship to my older adult clients. It generally went something like this: A couple would come in, and the wife would say that her husband wanted to assign power of attorney to her. I would say sure, turn to the husband, and ask, "Do you want to sign a power of attorney giving control over your finances to your wife?" He would then look at me for the first time and say something like. "I know you! You're my first-grade teacher, Miss Holly." After further questioning, I would then explain to the wife that her husband seemed not to have the capacity to execute a power of attorney. I would tell her that if she needed control over his finances and did not have access, she would probably need to seek a conservatorship in the Probate court.

Probate conservatorships are established under the California Probate Code and provide for the care of adults who are unable to manage their personal or financial needs due to lack of capacity, perhaps from dementia. This type of conservatorship may also cover those with mental health issues. In addition, there is a separate limited conservatorship for people who are developmentally disabled.

There are two parts to a conservatorship. There is the person charged with managing the conservatee's finances, the conservator of the *estate*. Then, there is the person responsible for the conservatee's care and support, who is called the conservator of the *person*. These two aspects of care could be assigned to separate conservators, or the court may appoint one conservator to handle both.

Conservatorships are set up to support and protect those with cognitive difficulties. Unfortunately, conservators do not always act in the conservatee's best interests. The recent case involving Britney Spears was widely publicized when Spears sought her release from a conservatorship where her father was the initial conservator of her estate, and a licensed personal fiduciary was the conservator of her person. She claimed abuse, mistreatment, coercion, and conflict of interest, saying she just wanted her life back. After months of hearings, the court did terminate the conservatorship.

In part as a result of that case and its publicity, conservatorship laws in California have changed. Governor Gavin Newsom actually signed new legislation into law the same day that a court agreed to suspend Ms. Spears' father as her conservator. The changes aimed to provide more protection for existing and proposed conservatees.

One provision of the Probate Code amendments is the requirement that less restrictive alternatives to conservatorship be explored before moving to a conservatorship. These alternatives include supportive decision-making, where a trusted person assists the impaired individual with decision making; powers of attorney; advanced healthcare directives; and a representative payee for Social Security or Supplemental Security Income payments. When appropriate, these arrangements can help preserve the potential conservatee's decision-making power and provide support without involving the court.

The amendments also include a provision that the court must honor the conservatee or proposed conservatee's preference for an attorney to represent them, even if that attorney has not met the certification requirements for a probate court appointment. It is important, of course, that an individual be represented by counsel and, ideally, by counsel of their choosing. However, this provision does raise some concerns. For example, the requirement that the conservatee be able to choose their own attorney would be problematic for someone like my client, who couldn't recognize an attorney when she was sitting right in front of him. To be fair, having the capacity to retain an attorney is quite a low bar, and many persons considered for a conservatorship could meet it.

A bigger concern is the potential for undue influence – difficult to prove. Ironically, undue influence is cited in the Probate Code as one of the reasons for appointing a conservator of the estate in the first place. And yet, recent changes could increase the risk of undue influecne. If a conservatee lacks judgment due to cognitive issues, they are more prone to undue influence by another person. More freedom to make decisions about their representation and other matters – without oversight – could increase that risk.

Undue influence is found where one person uses excessive persuasion to overcome another's free will, causing them to act against their own self-interest. Undue influence is commonly claimed in will contests. *Proving* undue influence is difficult.

Another change in the Probate Code allows any interested person (not just the conservator or trustee) to file a petition with the court to investigate an allegation of abuse, and requires that the court investigate. There are also increased penalties for those conservators found guilty of abuse, with greater penalties if the conservator is a professional fiduciary.

Another change in conservatorship law involves increased oversight of professional fiduciaries, including the requirement that their fees be posted or provided to a prospective client. It also now requires, rather than allows, the Professional Fiduciaries Bureau to impose sanctions for breach of fiduciary duty or abuse.

While all of these changes provide additional protection to a potential conservatee, it remains important to consider alternatives to conservatorship first, before the intended conservatee loses capacity. Alternatives include powers of attorney and advanced healthcare directives, both of which can be executed at any time. Which brings us back to my opening scenario. Had the husband been able to complete these documents, conservatorship might not have become an issue.

A final word. The law always assumes capacity, and so I assume that you have the capacity to execute both a power of attorney and an advance directive. Please do so now while you do still have capacity.

Though she is retired from practicing law, ***Carol Mack*** *continues participating as a member of the CITATIONS editorial board. She is a retired health science professor at CSUCI.*

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HAVE YOU HEARD?

The Ventura Superior Court has opened the recruitment process for Court Commissioner. The Court expects to fill at least one position in the near term, and possibly two or more. Qualified attorneys are encouraged to apply.

At the Ventura County Family Justice Center's July 20 Voices of Hope Gala, retired **Judge Brian Back** will be honored for his contributions to the Center's success. The dinner will also honor the Ventura County Community Foundation, as well as Dr. Thomas Duncan, the husband of Myers Widders partner **Jacquelyn Ruffin**. The event will raise money to improve the lives of people impacted by family violence and trauma. Please see attached flier.

Christopher Young, a State Bar-certified specialist in estate planning, trust and probate law and formerly attorney with The Alvarez Firm, has just been appointed as a probate attorney for the Los Angeles County Superior Court.

OXNARD'S TRIBUTE TO CARMEN RAMIREZ

A 12-foot by 18-foot cut glass mosaic recently installed on Oxnard's newly constructed Central Terrace Apartments honors the late County Supervisor and VCBA Past President **Carmen Ramírez**. She was a driving force behind the apartments which, when they open, will be for low-income residents. The idea came from Roy Prince, Ramírez's husband; it was funded by community organizations and the City of Oxnard.

Three VCBA members take special pride in the mosaic. Artist Larissa Strauss is the daughter of former VCBA President **Anthony Strauss**, sister of **Michael Strauss**, and sister-in-law of **Jenna Strauss**.

BARRISTER TRIVIA NIGHT

Congratulations to The Colleges of Law students on being the Barristers 2024 Champions from Trivia Night. Fun evening was had. From left to right: Jessica Ball, Makenzie Woo, Bella Tomasetta, Ellie Gomez, and Josh Tice.

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