

# RIVERSIDE LAWYER

January 2020 • Volume 70 Number 1

MAGAZINE

## CHANGES COMING IN 2020

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California is Changing College Amateurism Rules



The Official Publication of the Riverside County Bar Association



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DAREN LIPINSKY, FELLOW

**SOME  
RECENT  
RESULTS\*\***

**\$7,500,000**

Wrongful Death - Riverside

**\$2,773,693**

Wrongful Death - Riverside

**\$1,375,000**

Head-On Collision - San Diego

**\$600,000**

Golf Cart Rollover - Riverside

**\$2,996,684**

Motorcycle Accident - San Bernardino

**\$1,900,000**

Auto vs. Pedestrian - Riverside

**\$850,000**

Wrongful Death - San Bernardino

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Auto vs. Truck - Riverside

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# RIVERSIDE LAWYER

MAGAZINE

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# MISSION STATEMENT

## Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

## RCBA Mission Statement

The mission of the Riverside County Bar Association is:  
To serve our members, our communities, and our legal system.

## Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities, Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

*The Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6<sup>th</sup> day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are \$25.00 and single copies are \$3.50.*

*Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in the Riverside Lawyer.*

*The material printed in the Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

# CALENDAR

## January

- 6 Civil Litigation Roundtable**  
Noon – 1:15 p.m.  
RCBA Boardroom (1st Floor)  
Speaker: Judge Craig Riemer  
MCLE – .75 hour General
- 14 Civil Litigation Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Judge Raquel Marquez  
Topic: “Update on Civil Court Procedures”  
MCLE – 1 hour General
- 15 Estate Planning, Probate & Elder Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: R. Sam Price  
Topic: “Probating Insolvent & Bankrupt Estates”  
MCLE – 1 hour General
- 16 Solo/Small Firm Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Doug Bradley  
Topic: “Blogging for Solo & Small Firms: Benefits & Challenges”  
MCLE – 1 hour General
- 17 MCLE Marathon**  
9:30 a.m. – 2:45 p.m.  
9:30 Check-in/Registration  
RCBA Gabbert Gallery  
9:50 – 10:50 a.m. – Competence Issues (1 hour)  
Speaker: James Heiting & Michael Razo  
Topic: “Chemical Dependency: Careers, Families and Lives”  
11:00 – 12 p.m. – Recognition and Elimination of Bias (1 hour)  
Speaker: L. Song Richardson  
Topic: “Understanding – and Attempting to Address – Implicit Bias in the Workplace”  
12:30 – 2:45 – Legal Ethics (2 hours)  
Speaker: Robert Hawley  
Topic: “Tips and Trends in Professional Responsibilities in 2020”
- 21 Family Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Dennis Sandoval  
Topic:  
MCLE – 1 hour General
- 22 Appellate Law Section**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speakers: Dan Huckabay & Arturo Ayala  
Topic: “Everything an Appellate Lawyer Needs to Know about Surety Bonds & Undertakings”  
MCLE – 1 hour General
- 24 General Membership Meeting**  
Noon – 1:15 p.m.  
RCBA Gabbert Gallery  
Speaker: Presiding Judge John Vineyard, Riverside Superior Court  
Topic: “State of the Court”  
MCLE - .75 hour General

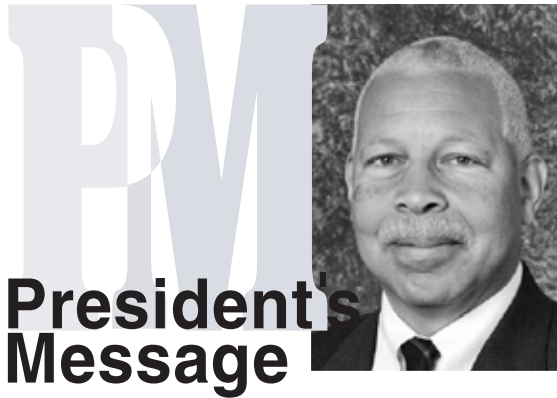
## February

- 7 Bridging the Gap**  
8:00 a.m. – 4:00 p.m.  
RCBA Gabbert Gallery

### EVENTS SUBJECT TO CHANGE.

For the latest calendar information please visit the RCBA's website at [riversidecountybar.com](http://riversidecountybar.com).





# President's Message

by Jack Clarke, Jr.

## A New Year and New Opportunities

As we begin the fresh, new 2020, I would like to be guided by the following quote:

"It is far better to act than to talk..."

William L. Ransom, "The Bar's Duty to the Public"

11 *Indiana Law Journal* 151, 152 (1935)

So this column will be brief. I want to try more action and less writing/talking. But I do want to inform you of two things. First, this year's RCBA Board of Directors is working hard to move forward on a mild renovation of the RCBA building. Over the last few months, we have been in communication with two designers/contractors who have submitted recommendations to improve the form and function of the building. As the board approaches the task, we are cognizant of several interests we must balance. For example, our budget is limited. We have approximately, three-hundred thousand dollars (less if we keep a construction contingency fund) available to us from a line of credit, which was previously taken out for the purpose of a building renovation. Thus, we will need to be careful of attempting large structural changes. The more likely changes you will see will be in items such as ceiling tiles, paint, carpeting, lighting, outward façade, and some fixture improvements. Also, the board wants to freshen the building to make it more attractive for staff, tenants, and prospective tenants. At the same time, we want to respect the building's current early to mid-twentieth century feel. We are also cognizant of the fact that whatever design plan we finally decide upon, some of you will like it and some of you will just, maybe not hate it but, not like it. We are an association of over twelve hundred lawyers and judges after all.

In terms of timeline to begin the work, the board would like to begin to start as early as this coming March. Therefore, if any of you would like to give input on design ideas, renovation priorities, or any other thoughts, please reach out to me or any other member of the board with your ideas. Of course, you can also reach out to Executive Director Charlene Nelson, but I would like to avoid inundating her with calls. So please use your discretion.

The board had a special meeting last month to take an initial look at some design concepts. We had a good turnout for that meeting. I want to thank the board for meeting the week before the Christmas holiday.

Our next meeting will be January 21. The board will be hearing from the two companies who are being considered and we will be doing another brief walk through of the building. We hope to make a final decision by our February board meeting and, if all things come together well, we will begin making improvements in March. Again, I invite you to give your input on what we should or should not focus on.

Second, please follow the progress of the Task Force on Access through Innovation of Legal Services (ATILS). The Task Force had its last meeting on December 12 and appears to be moving toward a conclusion of the work with a current March 31, 2020 date for move final recommendations. You can look up the last Agenda at <http://board.calbar.ca.gov/Agenda.aspx?id=15417&t=0&s=false>

I look forward to making progress in all domains this year. Happy New Year to you all.

*Jack Clarke, Jr. is a partner with the law firm of Best, Best & Krieger LLP.*



### STAFF ATTORNEY, RIVERSIDE LEGAL AID

Riverside Legal Aid is offering a position as a full time staff attorney. The position would entail attorney representation of clients in the areas of landlord/tenant, family law, bankruptcy, guardianship, conservatorship and probate. Courtroom representation is anticipated. Some experience in these areas is desirable but not mandatory.

#### Job Requirements:

1. Attorney, licensed to practice by California State Bar.
2. Vehicle and driver's license or other means of transportation to go to courtroom, clinic or other designated work location within Riverside County.
3. Conversational Spanish desired but not mandatory.
4. General familiarity with computer based programs.

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Phone (951) 682-4423, Email [ritasmith@riversidelegalaid.org](mailto:ritasmith@riversidelegalaid.org)

# BARRISTERS PRESIDENT'S MESSAGE

by Paul Leonidas Lin



## Ugly Christmas Suits: Ultra Christmas Chic or Fashion Faux Pas?

Verdict: it's totally fetch.<sup>1</sup>  
Now onward to 2020! A new year means new beginnings. A fresh start that is full of things that have never been. And all that other jazz. Here at the Barristers it's a new year, same

us. We will continue to provide our time honored traditions of monthly happy hours, yearly bowling nights, and I swear we will do that hike with the Furristers up Mt. Rubidoux if it's the last thing I do!

A big thank you to all who have come out to the barristers events this past year. It certainly was a banner year with each event being bigger than the last. Especially those who came out on a work night to help with the RCBA Elves Wrapping, as it is always important to give back to the community that provides so much for us.

Now it's time to look ahead to 2020 and make this the biggest Barristers year yet. They say big results require big ambitions, and I can tell you that this board certainly fits that bill.

Below are some of the events that we have already planned for 2020, but please follow us to stay up to date with more events. We have talks of a Disneyland meet up, winery tour with MCLE, beer yoga, golf lessons, and probably a regular MCLE in there somewhere.

If you're interested in being part of the board and help plan these events, don't be shy. Reach out to us. No idea is too strange or out there. Not while I'm the captain of this ship.

Cheers to a new year.

## Upcoming Events:

- **Friday, January 24** – Happy Hour at Mezcal starting at 5:00 p.m.
- **Thursday, January 30** – Barristers' Annual "Motion to Strike" Bowling Night at Bowlero starting at 5:00 p.m.
- **Friday, February 21** – Happy Hour at Brickwood starting at 5:00 p.m.



Barristers at Elves wrapping night



Paul Lin, Patricia Mejia, David Rivera, Goushia Farook, Mike Ortiz

- **Friday, March 13** – Happy Hour at Heroes starting at 5:00 p.m.
- **Thursday, March 26** – Trivia Night at Raincross Pub + Kitchen at 5:00 p.m.
- **TBA** – Escape Room.

<sup>1</sup> If you don't get that reference, you can't sit with us.

## Follow Us!

Stay up to date with our upcoming events!

Website: [RiversideBarristers.org](http://RiversideBarristers.org)

Facebook: [Facebook.com/RCBABarristers/](https://www.facebook.com/RCBABarristers/)

Instagram: [@RCBABarristers](https://www.instagram.com/RCBABarristers)

*Paul Leonidas Lin is an attorney at The Lin Law Office Inc. located in Downtown Riverside where he practices exclusively in the area of criminal defense. He is the immediate past president of the Asian Pacific American Lawyers of the Inland Empire (APALIE).*



*Finished!*



*Barristers Wrapping Elves at Happy Hour!*

# SO YOU WANT A NEW JOB...

*by Steven Harmon*

For what it's worth, I want to share my list of who I look for when seeking to hire a new lawyer (or anyone for that matter):

1. A person of good character. Someone who is honest and truthful.
2. A person who is self-aware. Someone who understands their strengths and weaknesses.
3. A person who is hardworking. Someone who will never give up.
4. A person who is kind and patient. Someone who understands human frailty.
5. A person who is a team player. Someone who is happy to see their colleagues grow and succeed.
6. A person who is not a complainer. Someone who is a get-it-doner.
7. A person who cares for others. Someone who will care for their clients.
8. A person who can show grace under fire. Someone who can withstand pressure and keep going.
9. A person who will accept responsibility for their own actions. Someone who will not blame others.
10. A person who has passion in their soul. Someone who will have passion to do the work I am offering them.
11. A person who has ambition. Someone who does not just want to be average.
12. A person who is not just looking for a job. Someone who wants a career.
13. A person who is basically a happy person. Someone who has a bright light in their eyes.
14. A person who does not just want to be the best, but someone who wants to do the best.
15. A person who does not always need to be right, but someone who will always strive to do right.
16. A person who is emphatic to others. Someone who will listen and respect others.
17. A person who is humble. Someone who can control their ego.
18. A person who loves their family even more than the job I am offering them.

You show me all of these and you've got a job. You show me all of these and you've got a successful career ahead of you.

*Steven Harmon is the Riverside County Public Defender and a past president of the RCBA.*



# 2020 NEW EMPLOYMENT RELATED LAWS

by Boyd F. Jensen II

There were 2,625 bills introduced in the California Legislature during 2019. 1,042 bills progressed through the Legislature to reach Governor Gavin Newsom's desk. Of those he signed 870 and vetoed 172. California employers will be affected by many of those new laws. This article touches on a few important employer related legislative changes for 2020.

## Independent Contractors – Assembly Bill 5

In a landmark unanimous ruling on April 30, 2018, the California Supreme Court made it harder to designate a worker as an independent contractor (*Dynamex Operations West, Inc. v Superior Court* (2018) 4 Cal5th 903.) Under *Dynamex*, a worker is considered an independent contractor only if the hiring entity meets each part of the "ABC Test":

- (A) The worker is free from the type and degree of control and direction the hiring entity typically exercises over its employees;
- (B) The worker performs work outside the scope of the hiring entity's business, and whose work therefore would not ordinarily be viewed by others as working in the hiring entity's business; and
- (C) The worker is customarily engaged in an independently established trade, occupation, or business, taking such steps as incorporating his business, getting a business or trade license or advertising.

The Supreme Court limited its holding to claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission and for purposes of unemployment insurance, acknowledging that different standards may apply to the same worker under different employment laws, such as workers compensation and taxation. Later in 2018, in *Perkins v Knox* (2018) Cal. Wrk. Comp. P.D. LEXIS 490, the California Workers' Compensation Appeals Board declined to apply the ABC Test to workers' compensation claims. The Appeals Board said *Dynamex* limited the application of the ABC test to wage orders.

*Dynamex* did not overturn *S.G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal 3d 342, the correct standard for determining an employee's status in a workers' compensation case. The principal stricture in the *Borello* factors is whether the "person to whom service is rendered has the right to control the manner and means

of accomplishing the result desired." The test also includes 9 additional factors, but not every factor must be met:

- (1) Right to discharge at will, without cause;
- (2) Whether the one performing the services is engaged in a distinct occupation or business;
- (3) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- (4) The skill required in the particular occupation;
- (5) Whether the principal or worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) The length of time for which the services are to be performed;
- (7) The method of payment, whether by the time or by the job;
- (8) Whether or not the work is part of the regular business of the principal; and
- (9) Whether or not the parties believe they are creating a relationship of employer-employee. (See also CACI 3704. "Existence of "Employee" Status Disputed," which essentially mirrors the ABC and *Borello* rules above.)

## Harassment and Discrimination – AB 9 and SB 188

The one year statute of limitations for discrimination or harassment was extended to three years under AB 9. Harassment prevention training requirements were increased, including increasing the number of employers who must provide training and establishing a training deadline of January 1, 2020. Under the FEHA, it's unlawful to discriminate on the basis of race, and SB 188 expands the law to prohibit discrimination against employees and students based on their natural hairstyles.

## Arbitration and Settlement Agreements AB 51, SB 707 and AB 749

AB 51 essentially bans mandatory arbitration agreements between employers and employees. The bill prohibits an employer from requiring an applicant or employee to waive any rights regarding employer violations of the FEHA and the Labor Code. The Legislature was clear this was intended to target arbitration agreements, in which



employers and employees generally agree to resolve employment disputes outside of court. There is concern that it may violate the Federal Arbitration Act, under which the U.S. Supreme Court has struck down state laws that unduly restrict arbitration. It would not apply to arbitration agreements entered into prior to January 1, 2020.

Another bill targeting arbitration, SB 707, provides consumers or employees remedies if the drafting party (the business or employer) breaches an arbitration agreement. If the employer doesn't pay the costs associated with beginning or continuing arbitration within 30 days after they are due, then the employer is in material breach of agreement, in default of arbitration and waives its right to compel arbitration. The employer may be required to pay reasonable attorney's fees, costs, and even sanctions.

## Miscellaneous Legislation

AB 1748 expands access to the California Family Rights Act (CFRA) for airline employees, and AB 1223 requires employers to provide an additional unpaid leave of absence, up to 30 days per year, to an employee donating an organ. SB 30 changed how California defines a "domestic partnership," allowing any two adults over the age of 18 to enter into a domestic partnership. SB 83 extended from six to eight weeks, benefits under the Paid Family Leave Act. AB 1805 changes the definitions of "serious injury or illness" and "serious exposure" to align with the federal Occupational Safety and Health Administration (OSHA) standards, by removing the 24-hour minimum hospitalization requirement. This means employers will have to report all inpatient hospitalizations, regardless of the length of stay. The bill also updates the definition of "serious

exposure" to mean exposure to a hazardous substance that has a "realistic possibility" of death or serious physical harm. Lastly, SB 688 expands the Labor Commissioner's authority regarding citations for wage violations.

*Boyd F. Jensen II, a member of the Bar Publications Committee, is with the firm of Jensen & Garrett in Riverside.*



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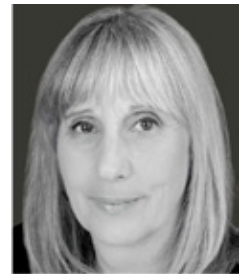
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# PRIMARY CARETAKER DIVERSION AND WHY IT MATTERS

by Juanita E. Mantz and Brittany Young

On October 8, 2019, Governor Newsom signed Senate Bill 394 into law. The bill was sponsored by Senator Skinner and allows the creation of a diversionary program for primary caretakers, as defined under the law very specifically, for misdemeanors and low-level felonies. (See California Senate Bill 394.)

The California Public Defender's Association stated the following in their letter of support for SB 394:

Convicting these primary caretakers of a criminal offense, and thereby permanently harming their ability to seek employment or find housing not only damages these individuals, but also threatens the safety and security of those for whom they care.

The new law appears to have been drafted very carefully and lays out the elements for creation of the diversion program by county agencies and specifies qualifying criteria for the program and the nature of the programming itself, as well as explicitly excluding serious and violent offenses.

But the process is not what this article is about. This article is about why primary caretaker diversion law matters.

As a deputy public defender for over a decade, one currently assigned to incompetency proceedings under Penal Code Section 1368 in Mental Health Court, I know why it so desperately matters because I have seen it firsthand. This essay is my way of bearing witness.

Over the years, I have seen many families in court when I have a female client in custody. By seeing them, I mean—I note their presence, acknowledge them, sometimes hug them, and often highlight their presence to the court. I talk to them outside and try to reassure them. What I see most often are grandmothers in the audience looking at their loved one holding the hands of their grandchildren and sisters who are aunts, with tears running down their faces while holding the hands of their niece and nephew in court. What affects me the most is a baby carriage outside or a pregnant client. To say it is heartbreaking is an understatement. It is a tragedy.

Stories and anecdotes are important of course, but the nationwide studies show the alarming reality of what we are dealing with:

As of 2007, half of those incarcerated in the United States (US) have children and there are more than 1.7 million children of incarcerated parents under 18 years of age.<sup>1</sup>

As of 2016, 5 million children in the US have at least one parent who is incarcerated and 4.5 million children enter foster care before 18 years of age. These children are typically from disadvantaged backgrounds.<sup>2</sup>

Even more troubling, in the US, only 37 percent of children whose mother (i.e., primary caregiver) is incarcerated are then cared for by their biological father.<sup>3</sup>

Children with incarcerated parents face problematic outcomes that can arise for children, including mental health problems, delinquency, crime, and substance abuse.<sup>4</sup>

With regard to the mothers, it has been shown that incarcerated mothers experience attachment disturbances with their children while in custody which often results in health and developmental problems for their children.<sup>5</sup>

Ultimately, what the statistics show are what we already know. The reality is that we are incarcerating mothers at an alarming rate and their children are suffering. Society is also suffering. Our institutions such as the judicial system, schools, social services, and foster care are suffering.

We all know that we are perpetuating a vicious cycle of poverty and incarceration by incarcerating mothers. But no one knows how to stop it. Retributive policies demand that society punish, but what people fail to recognize is that we are punishing children who committed no crime.

And that is why this new law matters.

*Juanita E. Mantz is a deputy public defender at the Law Offices of the Riverside County Public Defender and a writer and member of the Macondo Writers Workshop. The views in this article are her personal views only.*

*Brittany Young is an intern at the Law Offices of the Riverside County Public Defender and is currently pursuing a Master's in Forensic Psychology at California Baptist University. The views in this article are her personal views only.*

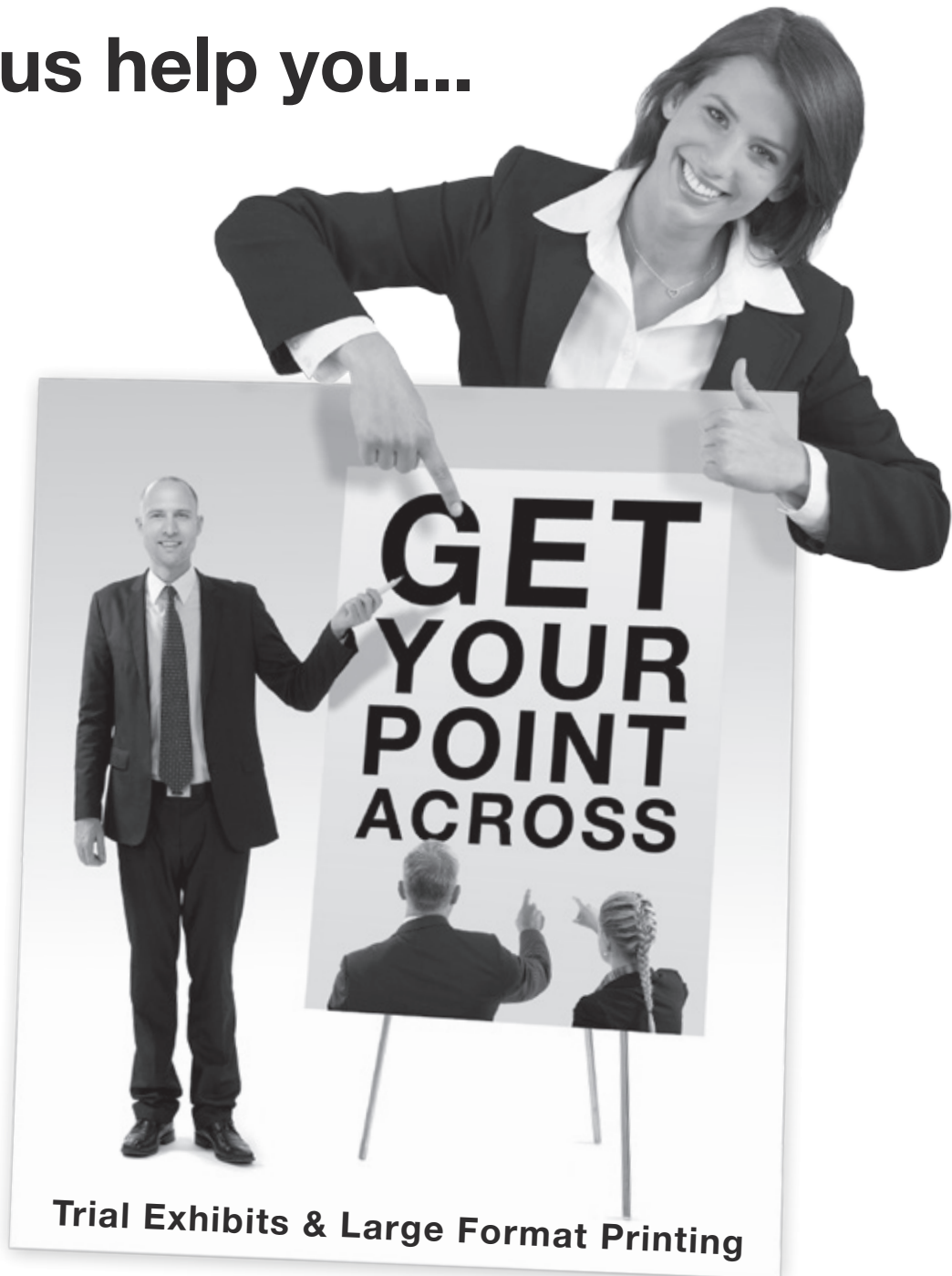


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# THE SPIRIT AND VALUE OF VOLUNTEERISM

by Darrell Moore

Imagine a beautiful park designed with youth sports in mind located in a city with plenty of active children engaged in healthy activities with the participation of parents and coaches, supporters, and spectators. Now imagine a time before there was a park, a time when there was a vacant lot. A lot not being put to any good use and collecting its fair share of debris and trash. What is the difference between the two? In a speech near and dear to the citizens of Temecula, President Ronald Reagan championed the creation of the park because it was built by community volunteers on donated land. That park is now known as the Ronald Reagan Sports Park and I personally have coached many enjoyable seasons of soccer at this park with my children.

The ideal of self-sufficient citizens able to resolve their community needs through volunteerism is laudable. These volunteers derive satisfaction and fulfillment from their own productive good deeds and the community is immeasurably benefited. Our own community constantly faces an array of challenges and they can be daunting. Need for a sports park is one kind of challenge. Need for legal assistance is another type of challenge. Inland Counties Legal Services (ICLS) is 1 of 133 federally funded “legal aid” programs located throughout the country. ICLS is responsible for providing civil legal services to the impoverished residents of San Bernardino and Riverside counties and within this area, there are 868,594 individuals eligible for services. With 37 attorneys and 28 paralegals each ICLS advocate would be required to help over 13,000 people annually. It may be obvious, but simply stated, 65 advocates cannot each individually help 13,000 people a year. In 2018, ICLS closed 9,556 cases assisting 26,376 people. Needy people in our service area go without legal assistance due to a lack of resources. It was this type of community need that prompted President Richard Nixon to sign the Legal Services Act into law in 1974.

When President Reagan came to office, he sought to improve on the good intentions of President Nixon by requiring legal service organizations to develop and encourage volunteer opportunities for attorneys. In the spirit of the sports park, he believed that the attorneys of each community could be called upon to provide the necessary assistance to meet this community’s needs. Our leadership here in California, through the Board of Governors of the State of California, passed a pro bono resolution. It urges all attorneys to contribute at least 50 hours of pro bono service each year. In his book *God’s Politics*, author

Jim Wallis describes the importance that the Bible places on providing assistance to the poor in our communities.

ICLS is fortunate, the Inland Empire has a rich tradition of attorney volunteerism. ICLS recently had the opportunity to bestow its first ever “Founders Award” upon Arthur L. Littleworth in recognition of his achievements that fundamentally changed our legal community. In the 1950’s, Mr. Littleworth was a founding board member of what has become ICLS. He was among a select group of lawyers that saw an unmet need—low-income citizens were being kept out of the justice system because of their inability to pay for legal services. Florentino Garza is another celebrated attorney in our service area with a substantial record of community service, and for whom ICLS bestowed its Lifetime Achievement Award. He was a key leader in efforts that led to expanded legal services to San Bernardino County in 1979. As a board member of ICLS, he engaged the LSC leadership and the leaders in our community to help create a vision for a local legal services program designed to serve the low-income individuals of both counties. Both of these individuals are outstanding examples of the type of attorney we could all aspire to be.

Whether you are guided by the expectations of our presidential leadership or you want to be thought of as an attorney in good standing within your legal community by donating 50 hours, or you feel enlightened by Judeo-Christian philosophy, or you are inspired by the examples of our own community’s legal stars, know this: Volunteerism Needs You.

The smiling healthy children actually engaged in wholesome activities on a sports field is a good thing. Volunteers made that sports park a reality. The impoverished litigants navigating our justice system free of confusion and uncertainty about the process would be a good thing. Volunteer attorneys could make that a reality.

ICLS can provide volunteer attorneys an opportunity to work on an array of individual cases such as evictions, domestic violence restraining orders, elder abuse, and consumer defense, among others. ICLS is developing a number of volunteer legal clinics for 2020 and offers co-counseling arrangements for more complex litigation.

For more information about volunteering with ICLS, contact Tori Praul-Hedrick, 951-774-4402, [tpraul@icls.org](mailto:tpraul@icls.org).

*Darrell Moore is the executive director of Inland Counties Legal Services.*





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# IELLA FUNDRAISER

by Honorable Helios Hernandez



*Alfonso Smith, Rosa Marquez, Laura Robles, Estella Acuna, Steve Anderson, Alicia Orejel, John Vega, Russell Jauregui, Rene Pimentel, and Jonathan Mendoza*

On December 5, 2019 at the Riverside County Law Library, the Inland Empire Latino Lawyers Association (IELLA) held their annual fundraiser for their legal aid clinics. Numerous people attended the event including, Judges Eric Keen and Helios Hernandez from Riverside County Superior Court, and Judges Art Harrison, Lynn Poncin, Stan Reichert, and John Pacheco from San Bernardino County Superior. Also present was Ron Loveridge, former mayor of Riverside. Laura Robles, a deputy district attorney with the San Bernardino County, is the president of the board and Sylvia Quistorf is the executive director.

Awards were presented to the most dedicated volunteer attorneys. Attorney Elena Sahagun won the award for Volunteer Attorney of the Year.

Since 1984, IELLA has sponsored weekly legal aid clinics in Riverside and San Bernardino counties. There are currently seven separate clinic locations. These are staffed by volunteer attorneys. Many dozens of attorneys volunteer, but there is always a need for more. To volunteer and help the community, contact executive director at [SQuistorf@iellaaid.org](mailto:SQuistorf@iellaaid.org) or 951-369-3009.



*Judges Eric Keen and Helios Hernandez from Riverside and Judges Art Harrison, Lynn Poncin, Stan Reichert, and John Pacheco from San Bernardino*



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# “I MEANT WHAT I SAID AND I SAID WHAT I MEANT” LEGISLATURE VS. THE COURTS<sup>1</sup>

by Chandra L. Moss

The last legislative season was a slow one for family law, but among the changes to law cleaning up grammar, rendering statutes gender neutral and simplifying language is a major revision to California Family Code section 1615. This statute governs the enforceability of premarital agreements. The revisions to this statute exemplify the principle that the legislature has the authority to change case law, especially when it deems the Court misinterpreted its intent.

California Family Code section 1615 originally provided:

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

(2) The party against whom enforcement is sought had not less than seven calendar days between the time

that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.

The Court of Appeal rendered an interpretation of this statute in *In re Marriage of Cadwell-Faso and Faso* (2011) 191 Cal. App.4th 945. In that matter, both parties wanted a premarital agreement and both parties retained counsel. The proposed agreement was unacceptable to wife, who had her counsel draft an addendum, which was revised four times at husband's request.

After some handwriting and communication between the parties via telephone, wife's attorney prepared a fifth draft addendum. The draft was faxed to husband on May 22. The parties and counsel met on May 25, where there was a slight revision to the draft. The parties executed the agreement and the addendum and were married two days later. This premarital agreement recited the parties' intention to waive California community property laws. The rights each were giving up were up were substantial.<sup>2</sup>

During the dissolution litigation, husband moved to set aside the addendum, claiming that he did not have seven days between the time of presentation and execution as

<sup>1</sup> Apologies to Dr. Seuss.

<sup>2</sup> *In re Marriage of Cadwell-Faso and Faso*, supra, 191 Cal. App.4th at 950-951.



required by the then existing Family Code section 1615(c) (2). The trial court found that husband's counsel advised him that the addendum was unenforceable since it had not been presented within seven days of the date of signing. Husband signed believing the agreement was unenforceable. Wife signed because she believed that she and husband had reached an agreement.<sup>3</sup>

The trial court held that the seven-day rule was mandatory and the statute as drafted did not limit the rule to unrepresented parties. Thus, because the presentation of the addendum ran afoul of the seven-day rule, husband's execution of the agreement was deemed involuntary and the Addendum was unenforceable.<sup>4</sup>

The Court of Appeal reversed. Citing its interpretation of legislative intent, the appellate court opined that scrutinizing the existing statute as a whole, it was "mindful that both section 1615(c)(1) and (c)(3) make distinctions between represented and/or unrepresented parties, thus demonstrating that the drafters knew how to place limitations on the party against whom enforcement was sought."<sup>5</sup> Further, the court believed the legislative history revealed that the Legislature was concerned with protecting unrepresented parties. In the present matter, both parties were represented.<sup>6</sup>

Bottom line, the Court of Appeal ruled that if the parties were represented by counsel, the seven-day rule did not apply.

The Legislature disagreed with the appellate court's opinion as to legislative intent and made the following substantive changes (in blue/red) to Family Code section 1615(c), effective January 1, 2020:

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel. The advisement to seek independent legal counsel shall be made at least seven calendar days before the final agreement is signed.

(2) One of the following:

(2) (A) The For an agreement executed between January 1, 2002, and January 1, 2020, the party against whom enforcement is sought had not less than

seven calendar days between the time that party was first presented with the final agreement and advised to seek independent legal counsel and the time the agreement was signed. This requirement does not apply to nonsubstantive amendments that do not change the terms of the agreement.

(B) For an agreement executed on or after January 1, 2020, the party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the final agreement and the time the agreement was signed, regardless of whether the party is represented by legal counsel. This requirement does not apply to nonsubstantive amendments that do not change the terms of the agreement.

Of note, in crafting these revisions, the Legislature specifically found that:

(a) The amendments to paragraph (1), and subparagraph (A) of paragraph (2), of subdivision (c) of Section 1615 of the Family Code made by this act are declaratory of existing law and do not constitute a change in law.

(b) The addition of subparagraph (B) of paragraph (2) of subdivision (c) of Section 1615 of the Family Code made by this act is intended to supersede, on a prospective basis, the holding *in re Marriage of Cadwell-Faso & Faso* (2011) 191 Cal.App.4th 945.

AB-1380 Premarital agreements: enforcement. (2019-2020) (emphasis added)

The Legislature has now made it clear that the seven day rule applies whether or not a party is represented by counsel effective January 1, 2020, and clarified the operation of retroactivity for agreements signed prior to January 1, 2020 and after January 1, 2002.

One other statutory change of note is the addition of section (b) to Family Code section 3011. Family Code section 3011 is the list of factors to be considered when determining the best interests of the child. Section (b) adds:

(b) Notwithstanding subdivision (a), the court shall not consider the sex, gender identity, gender expression, or sexual orientation of a parent, legal guardian, or relative in determining the best interests of the child.

Family law practitioners who are interested in serving on the Inland Empire Standing Committee to review and comment on legislation for FLEXCOM may contact Chandra L. Moss, CFLS via email: [cmoss@hbplaw.com](mailto:cmoss@hbplaw.com).

*Chandra L. Moss is a Certified Family Law Specialist with Holstrom, Block & Parke, APLC, and the current Inland Empire Legislative Liaison to FLEXCOM.*



<sup>3</sup> *In re Marriage of Cadwell-Faso and Faso*, supra, 191 Cal. App.4th at 952.

<sup>4</sup> *In re Marriage of Cadwell-Faso and Faso*, supra, 191 Cal. App.4th at 953.

<sup>5</sup> *In re Marriage of Cadwell-Faso and Faso*, supra, 191 Cal. App.4th at 959.

<sup>6</sup> *In re Marriage of Cadwell-Faso and Faso*, supra, 191 Cal. App.4th at 959-961.

# MENTAL HEALTH DIVERSION

*by Honorable Emma Smith*

Whenever someone mentions the new mental health diversion law, it is inevitably accompanied with an enormous sigh. Everyone is talking about it. Everyone has their own ideas about what it means; what it should or should not do; who it should help; and even, does it help at all? Everyone is trying to figure out how all of us here in Riverside County can make it work for those who need it most.

My job as the judge assigned to the Mental Health Court in our downtown criminal courts is to make it all work. I can tell you that in the last calendar year I have sat in far too many conference rooms, libraries, legislative offices, and what seems like every building in Riverside County, as well as more than a handful of coffee shops and restaurants, listening to good ideas, bad ideas, complaints, frustrations, and sometimes even anger expressed about this new law.

The mental health diversion law is actually a new concept about what to do and how to handle a certain segment of those suffering from mental illness who are involved in the criminal justice system. As with many new concepts, some people are for it, some people are against it, and most people are unfamiliar with it. In any event, it is now the law and it is important for all of us to do our best to make it work.

This new law authorizes the court to grant pretrial diversion to a defendant, facing either a misdemeanor or felony charge, when the defendant is suffering from a mental disorder in order to allow the person to receive mental health treatment. (See California Penal Code section 1001.36.)

For those interested in the details, to be deemed eligible for mental health diversion, the court must find as follows:

1. That the defendant suffers from a qualifying mental health disorder, as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (certain diagnoses are excluded).
2. That the defendant's mental disorder was a significant factor in the commission of the charged offense.
3. The court must conclude that, in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment.
4. The defendant consents to diversion and waives his or her right to a speedy trial (specific exceptions are

codified for instances involving IST diversion or the diverting of an incompetent person's underlying criminal matter).

5. The defendant agrees to comply with treatment as a condition of diversion (this requires a treatment plan, specific to the defendant and his/her case).
6. The defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. The court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate.

Mental health diversion is not available for anyone charged with murder, voluntary manslaughter, or any crime requiring registration as a sex offender (with only a limited exception), and crimes involving weapons of mass destruction.

The new law invests in the judge the discretion to grant diversion to a defendant if all the required elements are present. The defendant is then provided with a mental health treatment plan which he/she will be expected to follow as they are closely monitored. The interesting part of the law (and to some people, the thing they dislike most about it) is that upon successful completion of all treatment, and provided that all other conditions set by the judge have been met, the criminal charges will be dismissed. This is an extraordinary result, which makes this an extraordinary law.

There are many, many complicated issues which makes the implementation of this new law a difficult task. But, since I'm the judge, I'm the one who must ensure that justice is done for everyone along the way. I can certainly tell you that all of these things keep me up at night. I find I can manage it all only because of the incredible collaborative efforts that we have working within our county. Every day I'm so thankful to the many dedicated attorneys with the offices of the District Attorney and the Public Defender, probation officers, behavioral health experts, as well as my wonderful court staff, to guide me. I simply could not do this alone.

As challenging as this new law has been for all of us, there is something truly beautiful happening in our courts because of the law, and I feel very privileged to be a part of it. Lives are being changed and improved every day. People

who once had no hope – or very little hope – of ever receiving help for their mental health issues are, sometimes for the first time, receiving treatment for often life-long conditions which have made their lives very difficult. With care and treatment comes hope. I feel blessed to be a part of this change and blessed to know so many people are dedicated to helping achieve this goal.

While this new law is certainly not perfect, and it is certainly not without controversy, and certainly not the answer for all of our society's mental health problems, I believe it is a good place for us to start.

*Judge Emma Smith is currently assigned to preside over Department 42 in the Hall of Justice. She handles Mental Health Court, Mental Health Diversion Court, ROC Court, Competency Court and Civil Commitment matters. Judge Smith was appointed by Governor Brown in December of 2017. Before that she was an assistant public defender for the Law Offices of the Public Defender in Riverside County.*



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# STATE ACTIONS FACILITATE GROUNDWATER RECHARGE PROJECTS FOR SGMA COMPLIANCE

*by Miles Krieger*

## **New California Law and Permitting Processes May Facilitate Sustainable Groundwater Management**

On January 1, 2015, California's Sustainable Groundwater Management Act (SGMA) took effect. The fundamental aim of SGMA is to achieve sustainability in California's many overdrafted groundwater basins. SGMA emphasizes local actions to ensure that groundwater basins are managed sustainably. Accordingly, local agencies are required to form groundwater sustainability agencies (GSAs) to develop groundwater sustainability plans (GSPs) by certain dates depending on the degree to which a groundwater basin has been overdrafted. SGMA contemplates four categories of overdrafted basins: critically-overdrafted, high-priority, medium priority, and low priority basins. GSAs in high-priority and medium-priority groundwater basins are required to develop GSPs by January 31, 2020, or January 31, 2022, depending on basin conditions. The GSPs must be designed to achieve sustainable management of groundwater within a 20-year period.

In October, Governor Newsom signed Assembly Bill 658 into law. The stated purpose of AB 658 is to encourage groundwater recharge projects during times of high-flow events, primarily during the winter months, which could assist GSAs achieve groundwater sustainability requirements under SGMA. Accordingly, AB 658 creates new temporary diversion permits for excess surface water capture, and also authorizes temporary changes to existing permits to facilitate diversion of excess surface waters into underground storage. In November, the State Water Resources Control Board (State Water Board) streamlined processing of temporary permits and changes to assist GSAs in addressing SGMA requirements and impacts from overpumping.

A GSA may apply for temporary permits for diversion to underground storage regardless of whether it is an existing water rights holder. Typically, obtaining a surface water right is an expensive and time-consuming process. AB 658 abbreviates the otherwise long wait for a water rights permit—if even available due to water supply constraints—and provides GSAs without surface water rights the ability to capture excess flows. To be

eligible for streamlined permitting by the State Water Board, a GSA's proposed diversion must occur between December 1 and March 31, i.e. the winter months in California, and must be in accordance with flood control operations. This means that the streamflow at the proposed point of diversion is above the 90th percentile, as calculated on a daily basis; the proposed diversion will be less than 20 percent of the total streamflow; and the flows near the point of diversion exceed thresholds that trigger flood control actions necessary to mitigate threats to human health or safety. In effect, a GSA may be eligible for a streamlined temporary permit to divert to underground storage if the proposed diversion occurs during times of flood, as determined at or near the proposed point of diversion. For proposed diversions that are not based on flood-related events, a GSA may still apply for a temporary permit, but processing times may be longer.

If a GSA is eligible for a temporary permit, the State Water Board must make five general findings before issuing the permit:

- The diversion is to underground storage for the beneficial use of achieving a groundwater sustainability agency's goal under SGMA;
- The diversion will not interfere with other lawful water users' rights, including a user's ability to meet water quality objectives;
- The diversion does not unreasonably affect fish, wildlife or other instream beneficial uses;
- The diversion is in the public interest; and
- The diversion will comply with any existing groundwater sustainability plan, interim plan or alternative plan that may apply to the groundwater basin where the diverted water will be stored.

To ensure that a proposed diversion of high flows will not injure downstream users, the proposed diversion may only occur when the flow exceeds the claims of users downstream from the proposed point of diversion. The proposed diversion may not occur if unregulated flow downstream of the diversion will not meet instream flow requirements and water quality objec-

tives. Additionally, extraction of groundwater stored under the permit must be accounted for and reported pursuant to an existing groundwater sustainability plan, interim plan, alternative plan or conditions imposed by the State Water Board under the permit.

In applying for a permit, a GSA must satisfy several criteria, including:

- Completing environmental review required by the California Environmental Quality Act, unless an exemption applies;
- Consulting with the Department of Fish and Wildlife at least 30 days before submitting the application;
- Performing a water availability analysis, for which the State Board has provided two methodologies for streamlined permitting purposes: applying a conservative cap on the amount of water that could be captured without injury to senior rights holders or the environment, or relying on the presence or imminent threat of flood conditions by proposing diversions only after flood control actions have been triggered by high flow events; and
- Providing an accounting method for storage and extraction under the permit, which may already be identified in an applicable GSP, interim plan, or alternative plan.

Despite affording GSAs with an opportunity to advance SGMA's objective of sustainable groundwater management by capturing water during high flow events, the new temporary diversion permits do not actually create a vested right in the GSA. Instead, the permit is at all times subject to modification or revocation by the State Water Board, provided the State Water Board provides notice and an opportunity to be heard regarding the proposed modification or revocation. Moreover, authorization to divert under the permit automatically expires after five years. These limitations suggest that, while GSAs may avail themselves of temporary permits to capture potentially large volumes of water for underground storage, the permits themselves do not provide significant reliability to GSAs in terms of water supply availability.

Similar to the requirements for obtaining a temporary diversion permit, an existing surface water permit or license holder may apply to the State Water Board for a temporary change for diversion to underground storage. Typically, the right to use surface water in California is granted by the State Water Board in the form of permits or licenses. These authorizations usually condition the right to appropriate water on a

type and place of use, the amount of water that may be appropriated, and the place or places from which water may be diverted. Temporary change authorizations under AB 658 are carefully crafted to ensure that a GSA's existing water right will not be expanded with respect to the amounts of water that may be used under the existing right or the time of year when water may be diverted under that right. Additionally, temporary changes for diversion to underground storage may not authorize diversions from a new source of water or otherwise initiate a new water right.

AB 658 reflects a concerted effort by the California Legislature to facilitate local action that accomplishes the important sustainability objectives set forth in SGMA. In particular, AB 658 and the State Water Board's streamlined permitting process provides GSAs with added flexibility in groundwater sustainability planning.

[http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB658](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB658)

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/applications/groundwater\\_recharge/streamlined\\_permits.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/groundwater_recharge/streamlined_permits.html)

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The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective January 30, 2020.

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# THE INS AND OUTS OF AB 1482— THE TENANT PROTECTION ACT OF 2019

by Pablo Ramirez

As we prepare for the new year, it is important to understand our legal rights as tenants. In order to understand the new protections, we must first understand the current protections.

## Current Law

According to the National Housing Law Project, as of 2017, only 17 California Jurisdictions<sup>1</sup> have just cause protections. If a tenant does not have a fixed-term lease in place or lives in an area which does not have just cause protections, a landlord may terminate the tenancy without stating a reason for termination, as long as they adhere to certain legal requirements. The landlord must provide a 30-day notice for tenants who have resided at the property for a period of less than a year, and a 60-day notice for tenants who have resided at the property for a period greater than a year.<sup>2</sup>

A landlord who wishes to increase the rent is able to freely do so, as long as they provide the required notice. California law does not provide a maximum limit for rent increase. A landlord may increase the rent, as long as they provide 30-day notice for the rent increase, which is 10 percent or less of the rent charged within the last 12 months. A landlord can also increase the rent more than 10 percent, if they provide a 60-day notice to tenant.<sup>3</sup>

## So, what changed?

On September 11, 2019, the Tenant Protection Act of 2019 was passed by the legislature (Assembly Bill 1482). On October 8, 2019, Governor Newsom signed the bill into law. The Tenant Protection Act (“TPA”) is meant to provide greater protections to tenants by prohibiting landlords from terminating tenancies without just cause. The Act also prevents landlords from gouging tenants by capping rent increases, which are subject to specified limitations.

1 National Housing Law Project, *California Jurisdictions with Local Ordinances Protecting Tenants in Foreclosed Properties*, WWW.NHL.ORG, <https://www.nhlp.org/wp-content/uploads/2018/01/2-2017.09.05-California-Local-Protections-for-Tenants-in-Foreclosed-Properties.pdf> (last updated Sept. 2017).

2 Civ. Code §1946.1.

3 Civ. Code §827(b)(3).

## What kinds of rental units are covered by AB1482?

AB 1482 applies to most rental units in California, **EXCEPT** the following:<sup>4</sup>

- Single-family owner-occupied residences, including a residence in which the owner-occupant rents or leases no more than two units or bedrooms, and is not controlled by a corporation;
- A duplex in which the owner occupied one of the units as the owner’s principal place of residence at the beginning of the tenancy, so long as the owner continues to live at the property;
- Housing that has been issued a certificate of occupancy within the previous 15 years;
- Rental units which are covered by a local rent control ordinance that is lower than the cap;
- Affordable housing subject to a deed restriction, regulatory agreement, or other agreement with a governmental agency; and
- Dorms.

A landlord must give written notice to the tenants of their just cause rights and the notice is subject Civ. Code § 1632.<sup>5</sup> The tenant must also be provided written notice if the property is exempt.<sup>6</sup>

## How does AB1482 affect rent increases?<sup>7</sup>

This bill will prohibit a landlord from increasing the gross rental rate more than 5% plus the percentage change in the cost of living, (Consumer Price Index),<sup>8</sup> over the course of any 12-month period, or 10% whichever is lower. The bill would also prohibit landlords from increasing the gross rental rate in more than two increments over the course of a 12-month period during the same tenant’s occupancy. The calculation must be from the lowest gross rental rate charged for the unit at any time during the 12 months prior to the effective date of

4 Tenant Protection Act of 2019: Tenancy: Rent Caps, A.B. 1482, Reg. Sess. (CA. 2019); Civ. Code § 1946.2.

5 Civ. Code §1946.2(f).

6 Civ. Code §1946.2(e)(8).

7 Civ. Code §1947.12.

8 Department of Industrial Relations, *California Consumer Price Index* (2018-2019), WWW.DIR.CA.GOV, <https://www.dir.ca.gov/OPRL/CAPriceIndex.htm> (last visited Dec. 3, 2019).

increase,<sup>9</sup> which should exclude any discounts, incentives, and credits.<sup>10</sup> Upon a complete turnover of possession by former tenants, the landlord can raise rent without limit when renting to new tenants.

## AB 1482 “Just Cause” Protections<sup>11</sup>

Landlords cannot proceed with evictions without “just cause.” The law requires that the landlord provide a reason for eviction in the notice to quit, and the reason must fall within the acceptable reasons set out by the law. There are two categories of just cause: at-fault eviction and no-fault eviction.

### At-Fault Just Cause Eviction<sup>12</sup>

At-fault evictions are based on actions or activities of the tenant, which may include nonpayment of rent, breach of material term in the lease, nuisance, waste, subletting in violation of the lease, using the premises for purposes outside of the lease or unlawful purposes, or other reasons as outlined in Code of Civil Procedure section 1161.

At-fault evictions also apply to criminal activity on the premises, or criminal activity off the premises directed at the owner or agent, refusal to allow lawful entry, and refusal to execute a new lease on similar terms.

### No-Fault Just Cause Eviction<sup>13</sup>

No-fault evictions are based on the actions or activities of the landlord, which can include situations in which the landlord withdraws the property from the rental market, moves into the unit, conducts a substantial rehab to the unit, or the landlord intends to demolish the unit.

No fault evictions can also include situations in which the landlord is required to comply with an order issued by a government agency or court relating to habitability or a vacate order that necessitates vacating the property; or a local ordinance that necessitates vacating the property; or other reasons as laid out by AB 1482.

### When will these protections take effect?<sup>14</sup>

The new law takes effect on January 1, 2020. However, the just-cause protections do not take effect until the tenant has lived in the rental unit for at least 12 months. If the tenant satisfies this requirement when the new law takes effect, the law will cover them.

However, if any additional adult tenants are added to the lease before an existing tenant has continuously

<sup>9</sup> CalRHA, AB 1482 (“TENANT PROTECTION ACT OF 2019”), WWW.CAL-RHA.ORG, <https://cal-rha.org/legislative/ab-1482/>.

<sup>10</sup> Tenant Protection Act of 2019: Tenancy: Rent Caps, A.B. 1482, Reg. Sess. (CA. 2019).

<sup>11</sup> Civ. Code §1946.2.

<sup>12</sup> Civ. Code §1946.2(b)(1); CCP §1161.

<sup>13</sup> Civ. Code §1946.2(b)(2).

<sup>14</sup> Civ. Code §1946.2(a).

and lawfully occupied the residential real property for 24 months, then it is only applicable if all tenants have lived there for 12 months, or any one tenant has lived there for 24 months.<sup>15</sup> After at least one tenant has lived in the property for 24 months, the just cause protection is applicable to all tenants.

### Relocation Assistance<sup>16</sup>

A tenant is entitled to relocation assistance in no-fault evictions. The relocation assistance must be equal to one month’s rent, but a waiver of one month’s rent is also acceptable. However, if a local law requires a greater amount of relocation assistance, the amount would comply with the local law instead of the TPA required amount.

### What type of notice am I entitled to?<sup>17</sup>

If the landlord is terminating the tenancy based on a curable breach (e.g. breach of the lease), the landlord must provide the tenant with a notice, which outlines the violation and the period in which the tenant can cure the violation. If the tenant fails to cure the violation within the set period, a 3-day notice to quit without the opportunity to cure may be served to terminate the tenancy. If the tenant fails to vacate the property within the notice to quit period, the landlord can proceed with an unlawful detainer.

This article is meant to provide a brief glance into the highly-publicized rule set to take effect on January 1, 2020. This article is not meant to be all-inclusive and any readers that would like to obtain additional information are invited to conduct further research on Assembly Bill 1482.

*Pablo Ramirez is the director of the Housing Practice Group with Inland Counties Legal Services.*



<sup>15</sup> Civ. Code §1946.2(a)(2).

<sup>16</sup> Civ. Code §1946.2(d).

<sup>17</sup> Civ. Code §1946.2(c).



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# NON-RETROACTIVE CHANGES IN THE LAW FAVORABLE TO CRIMINAL DEFENDANTS: UNDERSTANDING *IN RE ESTRADA* AND CDCR'S RECALL OF SENTENCING PROCEDURE

by Joshua Knight

There have been several modifications to the California Penal Code benefitting criminal defendants over the past legislative sessions. For example, just this past year, Governor Newsom signed Senate Bill 136 ("SB 136") largely curtailing the use of one-year prison priors. Other changes over the past years have curtailed drug sales priors, limited drug transportation to cases involving sales and expanded judicial discretion to strike serious priors and gun enhancements. Through this article, I hope to shed some light on how defendants get the benefits of these changes.

When figuring out whether a beneficial change applies to a defendant, it is important to know if they are currently pending charges, are on appeal, or have exhausted their appeal. Bills signed into law go into effect the first day following the end of the year they are signed, unless designated urgent legislation. For example, because SB 136 was not urgent legislation, it goes into effect January 1, 2020. Changes in the law reducing punishment from when a crime was committed are presumed to apply prospectively only, so defendants in pending cases get the benefit; but changes also apply to offenses committed before the effective date provided a defendant's judgment is not final when the new law becomes effective.<sup>1</sup> As a result, defendants who are pending appeal get the benefit even if they committed the crime and were sentenced prior to a statute's effective date.

For those defendants with final convictions, there is one other way to get the benefit of beneficial changes in the law: a California Department of Corrections and Rehabilitation (CDCR) initiated recall of sentence. For decades, Penal Code section 1170, subdivision (d)(1) authorized the secretary of CDCR or the Board of Parole Hearings to recommend recall of sentences *at any time* "to eliminate disparity of sentences and to promote uniformity of sentencing," but they were rare.

In June of 2018, Assembly Bill 1812 granted funds to CDCR to investigate potential cases to refer for recall and changed section 1170, subdivision (d)(1), to authorize recalls for sentences that resulted from a plea agreements if "in the interests of justice" and to allow courts to consider postconviction factors since the original sentencing, in addition to the authority already provided. The postconviction factors include "the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since

the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice."<sup>2</sup> And at a recall of sentencing, "the resentencing court has jurisdiction to modify *every* aspect of the sentence, and not just the portion subjected to the recall," including whether an enhancement is still valid.<sup>3</sup>

CDCR has since promulgated regulations on how to evaluate whether inmates are worthy for a recall referral. Cases are referred for the following: 1) exceptional conduct; 2) new information which could have influenced the sentence imposed by the court; and 3) changed circumstances to the extent that the inmate's continued incarceration is not in the interest of justice.<sup>4</sup>

Any institution staff or volunteer may refer an inmate to the Classification and Parole Representative (C&PR) for consideration. Upon receipt of a referral, the C&PR reviews the case to see if the person is eligible and, if they are, directs the inmate's caseworker to "prepare an evaluation report, noting the inmate's case factors," and a report including a list of information with attachments is produced.<sup>5</sup> Once that report is completed, it is submitted to the warden for signature and positive recommendations are referred to the Secretary, who has final word on whether an inmate is referred for a recall of sentencing.<sup>6</sup>

CDCR receives referrals directly from the C&PR only. It does not accept self-referrals or referrals from friends, family, or attorneys but encourages an inmate to remain disciplinary-free and continue their rehabilitative journey should their case be referred in the future. The practical effect of this referral process and its extensive review of an inmate's behavior and case factors makes sense. CDCR provides an opportunity for inmates to receive the benefit of non-retroactive changes in the law only to those who show meaningful change and rehabilitation. This process also gives inmates another incentive to rehabilitate. Otherwise, their convictions remain final and undisturbed.

*Joshua Knight has been a deputy public defender for 15 years with Kern and Riverside counties. He is currently assigned to the writs and appeals unit with a specialization in post-conviction proceedings and appellate work.*



<sup>2</sup> § 1170, subd. (d)(1).

<sup>3</sup> *People v. Buysks* (2018) 5 Cal.5th 857, 890, 893 [emphasis in original].

<sup>4</sup> 15 CCR § 3076, subd. (e).

<sup>5</sup> 15 CCR § 3076.2.

<sup>6</sup> *Id.* at, subds. (c) & (e)(1).

<sup>1</sup> See *In re Estrada* (1965) 63 Cal.2d 740, 745.





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# THE FAIR PAY TO PLAY ACT: CALIFORNIA IS CHANGING COLLEGE AMATEURISM RULES

by David P. Rivera

For decades, the National Collegiate Athletic Association (“NCAA”) has successfully opposed efforts to compensate student-athletes. No longer. Legislation recently passed by California stands to usher in commercial opportunities for California’s student-athletes. This article examines that legislation, its shortcomings, arguments for and against it, and provides a brief look at what might come next.

## I. The Fair Pay to Play Act

On September 30, 2019, California passed Senate Bill 206 (“SB 206”), also known as the Fair Pay to Play Act, into law. SB 206 employs very broad legislative strokes to permit student-athletes to earn commercial compensation once the legislation becomes operative on January 1, 2023.<sup>1</sup>

### A. Permitted Compensation

The name of the Fair Pay to Play Act is misleading. SB 206 does not permit California’s student-athletes to earn compensation merely for participating in intercollegiate sports or achieving athletic performance goals. It does not recognize student-athletes as employees of the California schools they play for, or require those schools to pay salaries directly to student-athletes.<sup>2</sup>

Instead, SB 206 permits a student-athlete to earn compensation for use of his or her name, image, or likeness (“NIL compensation”).<sup>3</sup> As a result, sponsorships, endorsements, and licensing contracts that are currently banned under NCAA rules and regulations will soon be permitted under California law.<sup>4</sup>

Compensation opportunities will not be limited to big-time business contracts. Student-athletes will be able to monetize their brand using easily accessible social media and file sharing sites (e.g., Instagram and YouTube), and by signing autographs for money.<sup>5</sup>

### B. Restrictions on Permitted Compensation

Although the SB 206 permits student-athletes to earn NIL compensation, it also places notable restrictions on that ability.<sup>6</sup>

First, schools and the NCAA cannot compensate a student-athlete for use of his or her name, image, or likeness.<sup>7</sup> There are likely several reasons for this, but one important ramification is that those few schools with disproportionate financial resources are prevented from bankrolling a professional team through salaries disguised as sponsorships and endorsement deals. Theoretically, this will promote parity in recruiting and fair competition on the playing field.

Second, student-athletes’ compensation contracts may not conflict with schools’ team contracts.<sup>8</sup> Sports equipment companies—including Nike, Under Armour, and Adidas—enter into multiyear contracts with high-profile schools, whereby they pay those schools up to hundreds of millions of dollars for the right to exclusively outfit those schools’ teams in said companies’ shoes and apparel (free of charge to the schools).<sup>9</sup>

Recognizing that these team contracts can encroach on NIL compensation opportunities, SB 206 provides that team contracts cannot prevent student-athletes from earning NIL compensation unless they are engaged in official team activities.<sup>10</sup> Naturally, this provision is prospective, not retroactive; it only applies to team contracts entered into, modified, or renewed after September 30, 2019.<sup>11</sup> Consequently, existing team contracts might inhibit NIL earnings until those contracts run their term.

### C. Professional Representation

Student-athletes garner an additional benefit under SB 206—they will be able to engage professional representation in the form of California-licensed sport agents

1 Cal. Educ. Code § 67456(h). *But see* §67457 (exempting community colleges, for the time being, from complying with SB 206).

2 *Id.* at § 67456, 67457.

3 *Id.* at § 67456(a)(1).

4 Erwin Chemerinsky, “Colleges Make Lots of Money off of Sports. Why Can’t Student Athletes Do the Same?” ¶ 5 <<https://www.sacbee.com/opinion/california-forum/article234702882.html>> (accessed Dec. 19, 2019).

5 Mike Pudlow, IndianaHQ, Fair Pay to Play Act: What’s Inside California’s Bill That Targets the NCAA? ¶ 1 <<https://indianahq.com/fair-pay-to-play-act-whats-inside-californias-bill-that-targets-the-ncaa/>> (Nov. 22, 2019).

6 Cal. Educ. Code §§ 67456(b), (e)(1), (f).

7 Cal. Educ. Code §§ 67456(b). See § 67456(d) (defining “compensation” so as to exclude scholarships that cover the cost of attendance).

8 *Id.* at (e)(1).

9 Sara Germano, *The Wall Street J.*, “Mega Contracts With Colleges Start to Pinch Under Armour” <<https://www.wsj.com/articles/mega-contracts-with-colleges-start-to-pinch-under-armour-1477490200>> (Oct. 26, 2019).

10 Cal. Educ. Code § 67456(f).

11 *Id.*

and attorneys without forfeiting their college sports eligibility.<sup>12</sup>

#### D. Protecting Legislative Intent

SB 206 provides certain safeguards to protect compensation and representation rights.<sup>13</sup> Schools are prohibited from terminating scholarships on the basis that a student-athlete has earned NIL compensation or has obtained professional representation.<sup>14</sup> In a similar vein, the NCAA may not bar schools from participating in NCAA competition merely because student-athletes have earned NIL compensation.<sup>15</sup>

#### E. Amendments

SB 206 requires California's Legislature to monitor and consider findings and recommendations made by the NCAA on the issue of NIL compensation, and to continue to develop policies in furtherance of SB 206.<sup>16</sup>

## II. Shortcomings

SB 206 has several shortcomings, including: (1) The absence of an enforcement mechanism and a sanctions provision, (2) Vagueness as to "conflicts" between NIL compensation contracts and team contracts, and (3) A loophole that might encourage paid-for competitive advantages on the playing field.<sup>17</sup>

### A. Missing Enforcement Mechanism and Sanctions Provision

Glaringly absent from SB 206 are an enforcement mechanism and a sanctions provision. SB 206 does not resolve to whom violations shall be reported. It neither creates an independent oversight body to enforce SB 206, nor charges schools with comprehensive self-regulation by assigning compliance responsibility to school officials, departments, or committees. It makes no provision for mediation of disputes. It also fails to identify penalties for violations, whether in the form of civil sanctions or criminal jeopardy.<sup>18</sup>

### B. Vague Definition of "Conflict"

SB 206 is vague as to what constitutes a "conflict" between a student-athlete's NIL compensation agreement and a school's team contract.<sup>19</sup> Such conflicts might be limited to situations where an NIL compensation agreement directly contravenes a school's ability to perform its duties under a team contract. Alternatively, a recognizable conflict might exist in situations where an NIL compensation agreement merely creates a conflict of interest for

either a school or the sports apparel company with which the school is contracted.

The latter interpretation would prevent student-athletes from signing endorsement deals with competitors of the companies that have team contracts with the student-athlete's school. For example, a UCLA football player would be unable to sign an endorsement deal with Adidas, because UCLA has a team contract with Under Armour.<sup>20</sup>

### C. Loophole: Paying for On-Field Competitive Advantage

SB 206 tolerates the payment of veritable signing bonuses to recruits for accepting scholarships from sponsor-favored schools as long as those payments are veiled as sponsorship, endorsement, or similar deals.<sup>21</sup> This loophole allows supporters of a school's athletic interests to amass paid talent at schools they prefer, thereby paving the way for the sale of NCAA championships. This argument is explored further from a different perspective in Section IV.B.

While SB 206's shortcomings present genuine concerns, the Legislature has ample time to address them before the January 1, 2023 operative date.<sup>22</sup>

## III. Arguments for SB 206

There are many supporting arguments for SB 206. The stronger ones include: (1) Alleviating inequity between NCAA earnings and student-athlete compensation, (2) Easing student-athletes' financial distress, (3) Enhancing compensation opportunities for female student-athletes, and (4) Encouraging student-athletes to remain in school and earn a degree.

### A. Alleviating Inequity

The NCAA generates tremendous revenue. In the 2016–2017 academic year, it brought in more than \$1 billion, largely due to the marketable activity of student-athletes. Although the NCAA shares revenue with its member schools—perhaps subsidizing large compensation packages for high-profile coaches and athletics directors—none of it trickles down directly to student-athletes.<sup>23</sup>

Proponents of SB 206 find this compensation imbalance irreconcilable. They note that intercollegiate sports would not exist without student-athletes. They assert that permitting NIL compensation will address the imbalance in a welcome, albeit meager, manner. Though NIL com-

12 *Id.* at (c).

13 *Id.* at (a).

14 *Id.* at (a)(1).

15 *Id.* at (a)(3).

16 Collegiate Athletics: Student Athlete Compensation and Representation, S. 206, 2019 Leg., Sess. (Cal. 2019).

17 Cal. Educ. Code §§ 67456, 67457.

18 *Id.*

19 *Id.* at § 67456(e)(1).

20 Bank, Steven A., "The Olympic-Sized Loophole in California's Fair Pay to Play Act," Colum. L. Rev. Forum (2020, Forthcoming); UCLA School of Law, Pub. L. Research Paper No. 19-39. Available at SSRN: <<https://ssrn.com/abstract=3470409>>.

21 Cal. Educ. Code § 67456(a)(1), (2).

22 *Id.* at (h).

23 Elliott C. McLaughlin, *CNN*, "Calif. Wants Its College Athletes to Get Paid, but the NCAA Is Likely to Put Up Hurdles" ¶ 11 <<https://www.cnn.com/2019/10/01/us/california-sb206-ncaa-fair-pay-to-play-act/index.html>> (last updated Oct. 2, 2019).

pensation does not tackle a lack of revenue sharing with student-athletes, it will help alleviate the inequity.<sup>24</sup>

## B. Easing Student-Athletes' Financial Distress

Forty percent of college student-athletes will not receive an athletic scholarship.<sup>25</sup> The 60 percent who do earn a scholarship will receive an average annual value of less than \$12,700.<sup>26</sup> Although other aid is available, many student-athletes live at or near the federal poverty level.<sup>27</sup> Some experience such financial distress that they struggle to pay for basic necessities.<sup>28</sup> Proponents of SB 206 argue that NIL compensation will ease financial distress.

## C. Enhancing Opportunities for Women

In the 2017–2018 academic year, 216,378 women participated in college sports across all NCAA divisions, representing 44 percent of the student-athlete population. Meanwhile, 278,614 men participated in NCAA sports, representing 56 percent of that population. Whereas men outnumbered their female counterparts, women's teams accounted for 54 percent of NCAA teams, compared to men's 46 percent.<sup>29</sup>

Notwithstanding women's robust involvement in the NCAA sports machine, they enjoy fewer opportunities than men to pursue professional sports careers. Even when those few opportunities are realized, women fall victim to a disquieting gender pay gap. For example, the minimum salary for an NBA player is \$580,000, while the maximum salary for a WNBA player is \$117,500.<sup>30</sup>

SB 206 offers some course correction. It provides women a fleeting opportunity to capitalize on the commercial worth of their athletic achievements while in college. California State Sen. Nancy Skinner, who introduced SB 206 together with Sen. Steve Bradford, framed the argument nicely: "College is the primary time when the

spotlight is on [them]. For women, this might be the only time they could make any money."<sup>31</sup>

In addition, SB 206 would arguably increase publicity for women's sports and bolster opportunities for female athletes.<sup>32</sup>

## D. Promoting Degree Completion

Fewer than 2 percent of NCAA student-athletes will play sports professionally.<sup>33</sup> Despite these daunting odds, some student-athletes will leave school early, enticed by lucrative sports contracts. The 2019 NFL draft illustrates this problem. One hundred forty-four underclassmen declared for the draft; only 49 of them, or 34 percent, were selected.<sup>34</sup> This small success rate is representative of prior years and shows no signs of slowing down.<sup>35</sup>

SB 206 does not address this problem head-on, but it does alleviate it. The ability to earn NIL compensation will ease financial pressure on underclassmen to pursue uncertain professional sports careers before they earn their degrees.<sup>36</sup> They will no longer be forced to choose between all or nothing options.

## IV. Arguments Against SB 206

There are three core, intertwining, arguments opposing SB 206: (1) Preserving amateurism, (2) Preventing unfair competition among schools, and (3) Maintaining uniformity across states for compensation requirements. Each of these has been advanced by several institutions, most notably the NCAA, the Pac-12 Conference, Stanford University, and UC Berkeley.<sup>37</sup>

### A. Preserving Amateurism

The NCAA embraces a traditional idea of amateurism that emphasizes education over sports.<sup>38</sup>

31 *Id.* at ¶ 13.

32 Chemerinsky, *supra* n. 4, at ¶ 13.

33 NCAA Recruiting Facts, *supra* n. 25.

34 Kendall Baker, "Football's Underclassmen Problem" ¶ 1 <<https://www.axios.com/nfl-draft-undrafted-underclassmen-college-football-4d0f729e-7324-49ee-8f22-ba13883a5a2c.html>> (Apr. 29, 2019).

35 *Id.* at ¶ 6.

36 State of California, Senator Nancy Skinner, "Calif. State Senate Greenlights SB 206, The Fair Pay to Play Act" ¶ 8 <<https://sd09.senate.ca.gov/news/20190522-calif-state-senate-greenlights-sb-206-fair-pay-play-act>> (May 22, 2019).

37 Felicia Mello, "Will CA's New NCAA Law Be a Game Changer? Here Are 5 Things to Know Next" ¶ 6 <<https://calmatters.org/education/higher-education/2019/09/ncaa-california-athletes-endorsements-college-fair-play-act/>> (Sept. 30, 2019); NCAA, News, NCAA Responds to Calif. Sen. Bill 206 ¶¶ 2–5 <<http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206>> (Sept. 11, 2019); Stanford Univ., Stanford News, Stanford Univ. State. on Sen. Bill 206 ¶ 1–3 <https://news.stanford.edu/2019/09/30/stanford-university-statement-senate-bill-206/> (Sept. 30, 2019); Pac-12 Conference, Pac-12 News, State. from the Pac-12 on the Signing of Calif. SB 206 ¶¶ 1, 2 <<https://pac-12.com/article/2019/09/30/statement-pac-12-signing-california-sb-206>> (Sept. 30, 2019).

38 Savannah Padgett, UMLR News, "Calif. Puts the Ball in the NCAA's Court with the Fair Pay to Play Act" ¶ 7 <<https://lawreview.law>

24 *Id.* at ¶¶ 11, 47.

25 NCAA, "NCAA Recruiting Facts, College Sports Create a Pathway to Opportunity for Student-Athletes" <<https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf>> (last updated Mar. 2018).

26 ScholarshipStats.com, "Information on College Sports & Athletic Scholarships, Average Athletic Scholarship per College Athlete," ¶¶ 1, 2 <<http://www.scholarshipstats.com/average-per-athlete.html>> (2019); NCAA Recruiting Facts, *supra* n. 25.

27 McLaughlin, *supra* n. 23, at ¶ 39.

28 State of California, Office of Gov. Gavin Newsom, Newsroom, Gov. "Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports" ¶ 10 <<https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/>> (Sep. 30, 2019).

29 NCAA, News, "Number of NCAA College Athletes Reaches All-Time High" ¶ 5 <<http://www.ncaa.org/about/resources/media-center/news/number-ncaa-college-athletes-reaches-all-time-high>> (Oct. 10, 2018).

30 CNN, Bus., Perspectives, Paying College Athletes Is a Huge Win for Women" ¶ 10 <<https://www.cnn.com/2019/10/08/perspectives/female-athletes-fair-pay-to-play/index.html>> (last updated Oct. 29, 2019).

The NCAA states its “Fundamental Policy” in Article 1 of its Constitution: Educational institutions design their athletics programs to be vital parts of the education system and, in doing so, recognize that student-athletes are a vital part of the student body. The NCAA, supporting this design, seeks to retain a clear delineation between intercollegiate athletics and professional sports.<sup>39</sup>

The NCAA identifies its guiding “Principle of Amateurism” in Article 2 of its Constitution: “[s]tudent-athletes... should be motivated primarily by education and... protected from exploitation by professional and commercial enterprises.” Thus, compensation beyond scholarships is disallowed.<sup>40</sup>

The NCAA’s Fundamental Policy and Principle of Amateurism present a nice theoretical posture. However, it loses its appeal since the NCAA and its member schools have commercialized intercollegiate athletics. Amateurism for amateurism’s sake is not compelling.<sup>41</sup>

Amateurism—or more specifically the loss of amateurism—becomes more convincing if it significantly affects fair competition. This argument is examined in Section IV.B, below.

## B. Preventing Unfair Competition

Opponents of SB 206 believe that it might foster competitive advantages in recruiting that lead to unfair competition on the playing field.<sup>42</sup>

Recruits with the greatest talent will likely enjoy more opportunities to commercialize their identity. They will gravitate to schools in states that offer the best earnings potential under generous laws. California schools (and schools in other states that adopt laws comparable to SB 206) will reap an unfair recruiting advantage over schools in states that lack similar incentives. The NCAA contends that this would lead to an unfair advantage in NCAA sports contests, compromising the legitimacy of NCAA championships.<sup>43</sup>

Now consider the threat from a different approach. Imagine a hypothetical transaction involving two fictitious parties, Acme Sports, Inc. (“ASI”), the world’s largest supplier of sports apparel and equipment, and Southern California University’s (“SCU”), a private California university. ASI targets SCU’s football program as a team with winning potential and a large fanbase that displays its team pride by wearing SCU merchandise. ASI and SCU

enter into a team contract that includes the licensing, manufacturing, and distribution rights for SCU athletic apparel and other merchandise, which will be sold to fans. ASI knows that successful college teams generate more merchandise sales. With this in mind, ASI adopts a multiyear policy to offer all of SCU’s recruits lucrative endorsement deals for the purpose of enticing them to commit to SCU. As a result, SCU consistently lands the top recruiting classes in the nation, leading to a football dynasty that wins championships year after year. The SCU football team’s success increases the program’s publicity, leading to increased merchandise sales. ASI, pleased with its incredible profits from merchandise sales, invests even more money in its endorsement deals with SCU’s recruiting classes. The cycle repeats and fair competition is destroyed.

Opponents of SB 206 believe that the recruiting advantages it provides are actually a consequence of California acting unilaterally and destroying the uniformity of rules that previously governed all schools’ actions.<sup>44</sup> This argument is examined in Section IV.C, below.

## C. Maintaining Uniformity

Opponents of SB 206 believe that fair competition can only exist when all schools operate under the same set of rules. They believe that student-athlete compensation needs to be examined holistically, through a consensus reached by NCAA-member schools. Legislation at the state level should be avoided because it will lead to a “patchwork of different laws... [that] will make unattainable the goal of providing a fair and level playing field for 1,100 campuses and nearly half a million student-athletes nationwide.”<sup>45</sup>

## V. Looking to the Future

The future of NIL compensation for student-athletes will be influenced by state legislation, amendments to NCAA rules, and possibly even federal legislation.

### A. State Legislation

Although California is the first state to pass legislation on NIL compensation, as many as twenty states are contemplating a similar move.<sup>46</sup> Those states include Colorado, Florida, Illinois, Kentucky, Michigan, Minnesota, Nevada, New York, Pennsylvania, South Carolina, and Washington.<sup>47</sup> If state legislators differ in their approach,

<sup>44</sup> McLaughlin, *supra* n. 23, at ¶ 28.

<sup>45</sup> NCAA, News, “NCAA State. on Gov. Newsom Signing SB 206” ¶ 1–3 < <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gov-newsom-signing-sb-206> > (Sept. 30, 2019).

<sup>46</sup> Jabari Young, “Fla. and N.Y. Push Bills to Compete with California’s NCAA ‘Pay to Play’ Law” ¶ 10 < <https://www.cnbc.com/2019/10/24/florida-and-ny-push-bills-to-compete-with-californias-ncaa-pay-to-play-law.html> > (last updated Oct. 24, 2019).

<sup>47</sup> Dan Wolken, “How the Game Changed in College Sports: ‘It’s Like Lighting a Fuse’ ” ¶¶ 7, 11 < <https://www.usatoday.com/story/sports/>

[miami.edu/california-puts-ball-ncaas-court-fair-pay-play-act/](http://miami.edu/california-puts-ball-ncaas-court-fair-pay-play-act/) (Oct. 31, 2019).

<sup>39</sup> NCAA Publications, *NCAA Manuals*, 2019-2020 Div. I Manual, Const. Art. 1.3.1 < <http://www.ncaapublications.com/productdownloads/D120.pdf> > (effective Aug. 1, 2019).

<sup>40</sup> *Id.*

<sup>41</sup> *NCAA Manuals*, *supra* n. 39, at Const. Art. 2.9.

<sup>42</sup> Padgett, *supra* n. 38, at ¶ 4.

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

it could lead to an increased patchwork of rules. This will only exacerbate the problem created by SB 206.

## B. NCAA Rule Amendment

The NCAA has already taken steps to promote uniform NIL compensation rules, with the hope of preventing the headache that varying state laws will create. Shortly after Governor Newsom signed SB 206 into law, the NCAA's Board of Governors voted unanimously to allow NIL compensation, subject to certain guidelines. In particular, the NCAA will seek to "[p]rotect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution." The NCAA has also directed its working group to collaborate with legislators. The deadline for creating new rules is January 2021, but all divisions have been asked to begin work immediately.<sup>48</sup>

## C. Federal Legislation

Federal legislation on student-athlete compensation is a work-in-progress.

In March 2019, U.S. Rep. Mark Walker (R-N.C.) introduced a House bill on NIL compensation that now sits before the House Ways and Means Committee. The bill would amend the tax code to strip away the NCAA's tax-exempt status if it continues to deny NIL compensation to student-athletes.<sup>49</sup>

In October 2019, U.S. Sen. Corey Booker (D-N.J.) announced a wide-ranging plan that would create a federal commission to oversee amateur sports. Issues of concern include the ability to unionize, improving access to health care, and earning NIL compensation without reprisal. The commission would lean on antitrust laws to curb practices that harm amateur athletes.<sup>50</sup>

Also in October 2019, U.S. Rep. Anthony Gonzalez (R-Ohio) announced that he plans to introduce a bill granting student-athletes NIL compensation rights without NCAA repercussions.<sup>51</sup>

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columnist/dan-wolken/2019/11/12/ncaa-how-name-image-likeness-debate-quickly-shifted/2522382001/> (Nov. 12, 2019); Savannah Padgett, UMLR News, California Puts the Ball in the NCAA's Court with the Fair Pay to Play Act ¶ 3 <<https://lawreview.law.miami.edu/california-puts-ball-ncaas-court-fair-pay-play-act/>> (Oct. 31, 2019).

48 NCAA, News, "Board of Gov. Starts Process to Enhance Name, Image and Likeness Opportunities" ¶¶ 1, 2, 5-7 <<http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities>> (Oct. 29, 2019).

49 Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

50 Cory Booker, "Issues, Justice and Opportunity for Athletes" ¶¶ 4, 7, 8 <<https://corybooker.com/issues/economic-security-and-opportunity/justice-and-opportunity-for-athletes/>> (accessed Dec. 18, 2019).

51 Dan Murphy, "Congressman to Propose Fed. Legis. for Paying College Athletes" ¶¶ 2, 11 <[https://www.espn.com/college-sports/story/\\_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes](https://www.espn.com/college-sports/story/_/id/27751454/congressman-propose-federal-legislation-paying-college-athletes)> (Oct. 2, 2019).

## VI. Summary

California's Fair Pay to Play Act is a commendable step toward allowing student-athletes to capitalize on their name, image, and likeness. However, the legislation is drafted in a such a broad manner that some shortcomings are apparent. The fallout of those shortcomings could lead to unfair recruiting advantages and unfair competition on the playing field. SB 206 is nonetheless a bold move that has other states, the NCAA, and even the United States Congress racing to catch up. At first glance, it looks like a win for student-athletes. But we won't know for sure until the fat lady sings.

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