HON. DANIEL M. KOLKEY*

The Critical Role and Benefits of the California Supreme Court Historical Society

History plays a critical role in the maintenance of a stable, functioning legal system.

More specifically, any society's legal system, if it is to remain stable and yet be responsive to contemporary society, must be founded on the wisdom of its ancestors, as modified and improved by the living, for the benefit of those yet to be born.

In a similar vein, Edmund Burke described society as "a partnership … between those who are living, those who are dead, and those who are to be born."[1]

And in his group of lectures in 1921 that were compiled in his influential book, *The Nature of the Judicial Process*, Benjamin Cardozo acknowledged history's important role in the judicial process thusly: "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."[2]

---

* Daniel M. Kolkey, a retired partner with Gibson Dunn & Crutcher and a former associate justice of the California Court of Appeal, Third Appellate District, is completing his final term as President of the California Supreme Court Historical Society. He instituted a number of the initiatives described in this article. Published by permission of the California Lawyers Association. The Association previously published the article in its magazine, *California Litigation*, in November, 2024.

[1] Edmund Burke, Reflections on the Revolution in France, in The Works of the Right Honorable Edmund Burke (1899) vol. 3, p. 359.

[2] Benjamin Cardozo, The Nature of the Judicial Process (Yale University Press 1921) p. 112.

That is why organizations like the California Supreme Court Historical Society, which is dedicated to recovering and preserving California's legal and judicial history—with a particular emphasis on California's highest court—play an important role in a functioning legal system.

And that is also why membership in the California Supreme Court Historical Society not only supports the preservation of California's legal history, but with its recently adopted initiatives, now offers immediate benefits to its members.

First, let's look at some of the new benefits of membership. Starting in 2022, the Society began to offer *multiple* educational programs each year that offer *MCLE credit free to members*. Just this year, the Society offered MCLE programs addressing free speech and the internet; the California Supreme Court's decision making; the legal evolution of restrictive covenants in California's history; and the evolution of the admission of evidence in rape trials.

In short, in consideration for the Society's dues checkoff of $25 at the time you pay your State Bar dues, you can view the Society's MCLE webinars for free. For those who want to further support the Society with a tax-deductible contribution *and* receive hard copies of its semiannual magazine, the *Review*, and its annual journal, *California Legal History*, the Society offers higher levels of membership that provide those additional benefits.

Second, by 2025, videos of those prior webinars that offer MCLE credit will be available on the Society's website at www.cschs.org. Members will be able to view these past webinars and receive MCLE credit for free, while non-members can go to the Society's website and pay a fee to receive the MCLE credit.

Third, the Society publishes an annual journal, *California Legal History*, and a semiannual magazine, *Review*, which publish articles analyzing legal developments in California history, like a description of the arguments and judicial decision-making in *Perez v. Sharp,*[3] in which the California Supreme Court overturned the century-old ban on interracial marriage—nearly two decades before the U.S. Supreme Court did so in *Loving v. Virginia*[4] in 1967.

But the journal and the *Review* also address contemporary events. In 2023, the *Review* published pro and con articles regarding the propriety of

---

[3] (1948) 32 Cal.2d 711.

[4] (1967) 388 U.S. 1.

renaming the Hastings College of the Law as the UC College of the Law, San Francisco. And the 2023 issue of *California Legal History* published an article on the evolution of California's criminal justice system since *Brown v. Plata*,[5] which opinion in 2011 found that the level of overcrowding in California's prisons violated the Eighth Amendment's prohibition against cruel and unusual punishments. That same issue also published an article which provided a first-hand, historical account from one of the key participants (Justice George Nicholson) regarding how the advocates of crime victims' rights were able to enact the Victims' Bill of Rights in the California Constitution.[6] The article is a virtual "how-to" guide.

Fourth, to develop an interest in California legal history, the Society oversees an annual student writing competition for law and graduate students, offering prizes for the first-, second-, and third-place winners, whose papers can be published in our journal, and who can attend a virtual awards ceremony, which is traditionally presided over by the current Chief Justice of California.

Fifth, another one of the Society's principal functions is to fund the oral histories of California Supreme Court justices once they retire. In that connection, the Society's publications often include abridged versions of these oral histories. And from these oral histories, attorneys can learn quite a bit of insightful information regarding the inner workings of the courts, the jurisprudence of the justices, and the times that shaped our foremost jurists.

For instance, former Associate Justice Edward Panelli, who passed away on July 20, 2024 at the age of 92, recommended to attorneys to never waive oral argument, regardless of any solicitation seeking a waiver.[7] He also spoke of the importance of keeping your sentences short in your briefs since no busy jurist is going to take the time to figure out what the attorney is trying to say. He gave an example of receiving a brief with a sentence that ran a page and a half, observing that "[m]any times … if I don't know [what] they're saying, they didn't raise the issue properly, and then it's waived and we're going to deny it."[8]

---

5 (2011) 563 U.S. 493.

6 Cal. Const., art. I, § 28.

7 McCreery, *Oral History of Edward A. Panelli, Associate Justice, California Supreme Court, 1985–1995* (2022) 17 Cal. Legal History 1, 503, which was abridged from *From the Bottom to the Top: An Immigrant Son's Rise to the California Supreme Court, Capping Twenty-Two Years of Judicial Service on California's Superior and Appeals Courts, 1972–1994*, an oral history conducted in 2005–2006 by Laura McCreery, Institute of Governmental Studies, University of California, Berkeley (2009), © The Regents of the University of California, The Bancroft Library, University of California, Berkeley.

8 *Ibid.*

And consider some of the observations of former California Supreme Court Justice John Arguelles—the second Latino to be appointed to our state high court. He acknowledged his consternation as a trial judge when the Bird Court reversed many death penalty convictions based on prejudicial error, explaining that "as a trial judge we had coped with the same arguments during posttrial motions and had concluded otherwise. . . . Reading a cold transcript many years later, four hundred miles away, is different than having been at the actual trial scene. … maybe I was wrong in one particular case, maybe, I don't think so, but perhaps I was. But were all of the other judges wrong too? All of us?"[9]

Attention, attorneys: Could Justice Arguelles's point be raised effectively in an appellate brief involving an issue regarding whether an error at trial should be considered prejudicial when the trial judge considered otherwise?

And consider these tidbits from the oral history of retired Associate Justice Ming Chin. He observed, "You can tell a lot just by reading the first paragraph of most anything. [U.S. Supreme Court] Justice [Anthony] Kennedy talked me into that. He puts a lot of time into the first paragraph of every one of his opinions, and you can tell when you pick it up whether you're interested in reading the rest of it."[10]

Justice Chin also told a story during his oral history about how future U.S. Supreme Court Chief Justice John Roberts prepared for his Supreme Court oral arguments while he was still a practicing lawyer: "Rumor is that he used to write every question, every possible question, on three-by-five cards. Then he would shuffle them, and then would answer them in whatever order they came up, because that's the way you're going to get questions at oral argument. I thought, well, attorneys ought to know this, that this is a good way to prepare for an argument because you're not going to get questions in the order you think they're going to come."[11]

Additionally, one can also learn about how review is granted in the California Supreme Court from these oral histories. Justice Chin explains that in considering whether to grant review, a justice must consider how

---

[9] Carter and McCreery, *Remembering the Legacy of Justice John Arguelles: An Introduction and Oral History* (2023) 18 Cal. Legal History 1, 332, which was abridged from *Stepping up to the California Supreme Court: twenty-six years of judicial service at every level of the California court system, 1963–1989/John A. Arguelles*; with an introduction by Manuel A. Ramirez; interviews conducted by Laura McCreery in 2006, BANC MSS 2014/182, © The Regents of the University of California, The Bancroft Library, University of California, Berkeley.

[10] *Motion sustained: a half century of vigorous law practice and judicial innovation, from the Alameda County District Attorney's Office and private civil practice to the Superior Court, the Court of Appeal, and the California Supreme Court/Ming W. Chin*; with an introduction by Justice Carol A. Corrigan. Interviews conducted in 2019 by Laura McCreery, BANC MSS 2021/125, © The Regents of the University of California, The Bancroft Library, University of California, Berkeley, p. 85.

[11] *Id.*, p. 158.

the Court will come out on the issue if the petition is granted, whether the case is a good vehicle for deciding the issue, and whether the drafting of the petition for review affords the type of help the Court is going to need.[12]

But these oral histories literally come to life when the Society interviews the retired justice at a public program. On October 22, 2024, the Society held a public program in San Francisco (which offered MCLE credit), in which our recently retired Chief Justice, Tani Cantil-Sakauye, was interviewed about her career, her jurisprudence, and the Court by retired Associate Justice Kay Werdegar. This program revealed significant insights into how her early career shaped her innovations in the court system and on the Judicial Council, and other tidbits, such as the advice she received from former Chief Justice Ron George upon assuming her position as Chief Justice.

Finally, because there has never been a book on the significant influence of Bernard Witkin on the California courts, the Society is sponsoring a book on Bernard Witkin—the "Justinian" of California law, as the late appellate justice, Norman Epstein described him—based on archival materials, his speeches, interviews, and 17 oral histories about him from people who knew him. This book, to be authored by legal historian, John Wierzbicki, will be a "must read" for appellate lawyers and judges when it is completed in three years.

In conclusion, the California Supreme Court Historical Society not only preserves California's legal history and disseminates it, *and* offers MCLE programs at no cost to its members, but it also issues publications that can make you a better attorney—or even guide you toward a judicial career.

And just as importantly, a true appreciation of California's legal past helps preserve its future. If we lose our rudder, we will lose our way. Or as the late Henry Kissinger so presciently observed, "No society can remain great if it loses faith in itself or if it systematically impugns its self-perception."[13] A deep and balanced appreciation for a society's history can maintain that faith.

★ ★ ★

[12] *Id.*, p. 214.

[13] Henry Kissinger, *Leadership: Six Studies in World Leadership* (Penguin Press, New York 2022) , p. 415.