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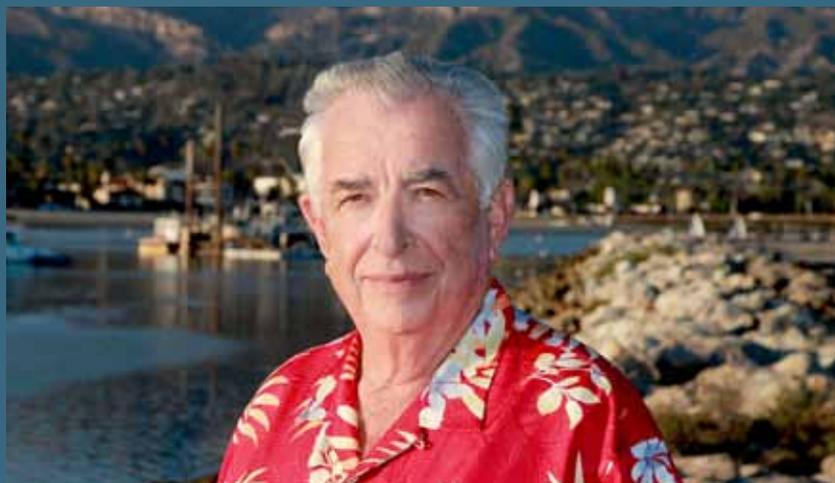


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Mission Statement

Santa Barbara County Bar Association

The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.



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Glen Annie Golf Course, the venue for the 2016 SBCBA Golf and Tennis Tournament

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Richard Abbe Humanitarian Award 2016

Judge George C. Eskin, Ret.

The Santa Barbara County Bar Association has the honor of presenting the 2016 Richard Abbe Humanitarian Award to Judge George C. Eskin. This award is given only in those years in which a local judge or attorney has been nominated who has shown exceptional qualifications reflecting the highest humanitarian principles, as exemplified by the late Justice Richard Abbe. Judge Eskin is just such a nominee.

Judge Eskin spent ten years on the Santa Barbara bench, from 2003 to 2013. During that time, he was an advocate for substance abuse and mental health treatment, whenever appropriate, in lieu of incarceration. He frequently voiced his opinions in open court, favoring placement for rehabilitation over prison time whenever he felt a case merited that option.

He was instrumental in starting the Veterans Treatment Court in Santa Barbara in 2012. The goal was to assist veterans struggling with addiction or mental illness to be better served by treatment rather than incarceration, steering them from the criminal justice system into programs that would help them adjust to civilian life. It focused mainly, but not exclusively, on first-time, non-violent offenders. After 12 to 18 months in a treatment program, pending charges could be reduced or dismissed entirely. Veterans Treatment Court is still held twice a month and is currently overseen by the Hon. Michael Carrozza.

Judge Eskin has also been active in working to improve the California legal community, having served on the California Commission on Personal Privacy, the California Judicial Nominees Evaluation Committee and the Santa Barbara County Human Services Commission. He is currently a member of the State Executive Board of California Judges.

In April of 2016, Judge Eskin was appointed to the Executive Steering Committee regarding Proposition 47, a five-member panel that will direct the expenditure of



money saved by releasing inmates convicted of nonviolent, nonserious crimes from state prisons, in accordance with Proposition 47. The panel is charged with drafting the criteria by which grant applications for those funds, estimated to be in the millions, will be judged.

He has also voluntarily served on numerous local Boards of Directors over the years, including the California Judges Association, Girls, Inc., Shelter Services for Women, and the Anti-Defamation League of Santa Barbara.

Judge Eskin is involved and active in his local community, having been the public address announcer for UCSB Women's Basketball for over ten years and the public address announcer for the Foresters Baseball. He has acted as Teen Court Judge and Coordinator, has been a volunteer reader for the Recording for the Blind, and has hosted a Public Affairs radio show and a weekly jazz and classical music radio show.

As explained by his wife of 35 years, Senator Hannah-Beth Jackson,

"George has given of his time and expertise generously and with little or no expectation or desire for fanfare or recognition.

He has always conducted himself with integrity, warmth and respect, and always in the pursuit of fairness and justice for each and every one." ■

Don't miss the SBCBA Annual Dinner. See page 32 for more information.

Frank Crandall Community Service Award 2016 Hollister & Brace



The Frank Crandall Community Service Award for 2016 is being presented to the firm of Hollister & Brace. The award was named in honor of the late Frank Crandall, a highly regarded Santa Barbara attorney, well-known for his civic activities and generous contributions to worthy causes.

This award honors a local law firm's efforts in carrying on the spirit of Frank Crandall's efforts by its involvement in civic activities and by providing pro bono services to community non-profit organizations. Factors considered in bestowing this award include the existence of a firm policy or attitude encouraging pro bono services, the percentage of firm attorneys performing pro bono work, the nature and quality of pro bono work, the firm's and the member attorneys' display of leadership in community projects and the services provided for the benefit of low-income persons. Hollister & Brace has excelled in all of these areas and has displayed an ongoing, long-term commitment to pro bono work for the benefit of the Santa Barbara community.

The firm of Hollister & Brace was established in 1966 by William A. Brace and the late J.J. Hollister, based on a practice centered on the California Central Coast that offered a comprehensive range of legal services. Today the firm consists of thirteen attorneys with a practice that extends to state and federal courts throughout the United States. The firm's practice areas are diverse, and its attorneys are committed to serving its clients, the legal profession and our community. In doing so, Hollister & Brace exemplifies the high standards of the Frank Crandall award.

This tradition of civic involvement and community service was initiated by its founders. J.J. Hollister's family owned the 782 acre Arroyo Hondo Ranch on the Gaviota Coast. Through the family's generosity, the Land Trust for Santa Barbara was able to purchase the property in 2002. It is now operated and maintained by the Land Trust for use by the people of Santa Barbara County. It was the Hollister family that made the preservation of the ranch a reality.

William A. Brace began his support for and involvement with the Santa Barbara Zoo many years ago, and has served

there in many capacities, including as president of the Zoo. He has been so active in his support that the Zoo now prominently displays a plaque at its entry arch recognizing him for his years of contributions.

With the examples established by the firm's founders, the firm of Hollister & Brace consistently demonstrates a depth and breadth of service, both to the legal profession and the Santa Barbara community in general. The firm and its members have long supported the less fortunate in our community. The firm's support has taken many forms: leadership roles in and substantial firm contributions to agencies focusing on those in need (e.g., the United Boys and Girls Club and the United Way) and legal services for the underserved (via Legal Aid and the Lawyer Referral Service).

The firm became the first major law firm contributor, in 2008, to Computers for Families. Computers for Families was a \$4 million fund-raising effort whose goal was to make Santa Barbara the first community in the country to provide a working computer and internet connection to every needy fourth grade student in the city. That goal was reached, with Hollister & Brace being key to achieving it. To date, over 10,000 computers have been donated locally. The Computers for Families Program is still going strong today, with 600 to 700 computers being donated annually by local law firms and businesses. It is Hollister & Brace's ongoing policy that when it replaces or upgrades its computers, the older computers are revamped and donated to low income students and their families.

Hollister & Brace attorneys have established a tradition of service to the local legal community. Shareholder Michael Denver, specializing in complex business litigation at Hollister & Brace since 2004, will be the next President of the Santa Barbara County Bar Association. Four other members of the firm (Bill Brace, Steve Kirby, Brad Ginder and Sue McCollum) have also been extremely active in the legal community, each serving as Santa Barbara County Bar

Continued on page 27



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A Tribute To G. Michael McGrath

BY JEFF CHAMBLISS

On August 29, 2016, in the wee hours of the morning and with his daughters Nicole Kathleen McGrath and Madaline Eileen Makler by his side, my good friend and beloved colleague, G. Michael McGrath passed away. Michael dedicated his whole life to helping the poor and underprivileged, serving 27 years as a Santa Barbara County Public Defender. His heart, his selfless dedication to clients, friends and family, his stubbornness, his strong Catholic Faith, his allegiance to the Santa Barbara Mission, all were characteristics of this wonderful man.

When I started in 1990 as a Deputy Public Defender, I knew nothing about criminal law. I only knew that the title Deputy Public Defender sounded cool. Michael and Sy Weisberg befriended me and taught me how to be a criminal defense lawyer: how to interact with Judges, Prosecutors, Clients, Colleagues and Management. Over the years our friendship deepened and included trips to Ireland and many deep theological discussions. Needless to say we did not agree on everything but Michael never took offense, never judged and always loved and supported. At a gathering at the home of Bob and Lynn Carman, I remember Michael asking Father Virgil to say a prayer for my ailing mother. Michael, like Father Virgil, found room for all of God's children under the umbrella of his love and faith. He had a huge heart.

Michael was born in Sioux City, Iowa and was the oldest of seven brothers and sisters. His upbringing in Los Angeles was so humble, that he and his brothers struggled for the single blanket in the bed they shared. He graduated with a Bachelor's Degree from California State University at Northridge and obtained a Juris Doctorate Degree from Whittier College of Law in 1972. During and after law school, Michael worked as a social worker for Los Angeles County from 1966 to 1973, then as an attorney for Legal Aid in the City of Pasadena from 1974 to 1975, in private practice in Pasadena from 1975 to 1980, and finally in 1980 he came to the Santa Barbara County Public Defender's Office.

Michael worked in all three offices of the Santa Barbara County Public Defender: Lompoc, Santa Maria and Santa



G. Michael McGrath

Barbara. He rose to the position of Senior Deputy Public Defender and retired in June 2007. Among the thousands of clients he steadfastly served, Michael represented Barry McNamara in a death penalty trial in 1986 and saved his life. He also represented John Bishop in a murder trial in 1989 and obtained an acquittal on the murder charges. He loved to tell the story of Judge Ronald Stevens telling then District Attorney Thomas Sneddon during the Bishop trial, probably incorrectly, at side bar, "Mr. Sneddon, the die is cast, step back," when the jury hung on the second degree murder charge but convicted of manslaughter. Michael also served on the Board of Catholic Charities from 1982 to 2002 and was President of the Board several times.

Michael's proudest accomplishment was raising two daughters, Nicole Kathleen McGrath and Madaline Eileen Makler, who have successful careers in law and teaching. He is a proud grandfather to my good buddy Benjamin ("Benny") Makler, age three.

Without fail, day in and day out, for 41 years of public service and all his life, Michael touched everyone he met with his love and faith. He was a good friend, a humble dedicated public servant, a loving father and grandfather and he never wavered in his belief that all his fellow human beings were worthy of his and God's Grace. I miss him very much. ■

Digressions

The purpose of this inaugural column will be to meander down the lane of Santa Barbara's legal history, to remind the reader of our past with stories about local lawyers and anecdotes and personalities which prove that there can be humor in what we do.

I will begin by using my nom de plume so I can avoid risking libel suits. So, if you don't appreciate the contents herein you can sue this guy and not me, because I'm really not him but somebody else.

Here goes,

I came to Santa Barbara and joined the DA'S office in 1973. At that time David Manier was the DA. Barry Cappello and Steve Balash had just left for private practice. Pat McKinley was a young Deputy DA with a criminal record, having been arrested wrongfully during the IV riots – thus beginning the rich tradition of arrests for whatever in Isla Vista. My first memory of the DA's office was walking to

ADA Bob Schaffer's office when I passed by another small office (the DA's office at that time was on the first floor of the Municipal Court building) and was introduced to Zel Canter. He was reading the once-quality *Santa Barbara News Press* with his size 14 Florsheim wingtips propped lazily upon his desk. Schaffer assigned me my first jury trial in Santa Barbara County. It was a speeding ticket before the Honorable Joseph Lodge (yes, in 1972 speeding tickets were misdemeanors punishable by fines and substantial jail time).

I move forward to 1974. Charlie Ramsbarger was the calendar deputy DA before the Honorable Floyd Dodson. Al Clark was the reporter that day in Dept. 1 as Superior Court arraignments began. The first matter of business was sentencing of a local miscreant. When Dodson asked the defendant if he had anything to say before judgment, the defendant responded by turning around and mooning the Honorable One and said, "eat the fudge judge". Oh well.

Contributions to this column from members of the Bar regarding Santa Barbara's legal history and humor will be well received. Of course, that depends on whether future installments will be allowed by the editors of *Santa Barbara Lawyer*.

Thought for the month: "remember, it's easier to get over pneumonia than it is to get over mental disease."

Sincerely,
Dogless Wagmore Haynes

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A Long Day in the Saddle

BY JOHN PARKE

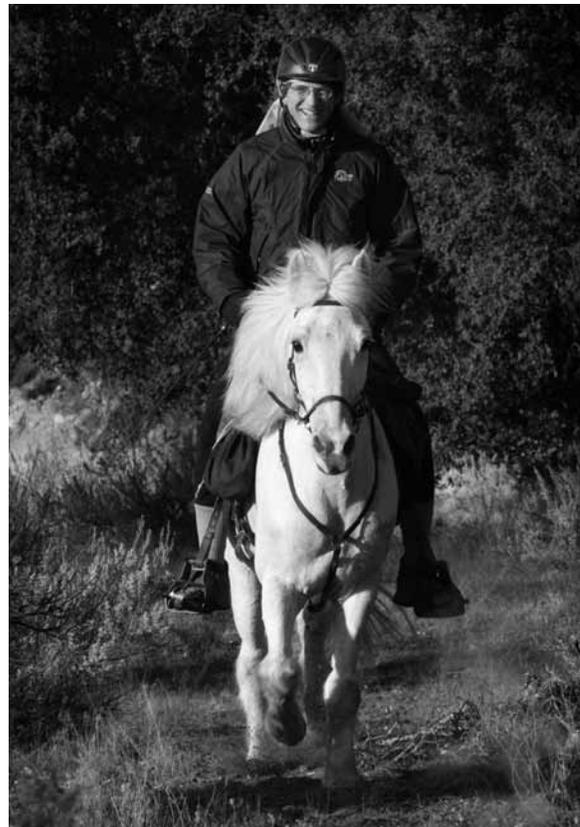
John Parke is a Santa Barbara native who heads up the litigation department at Allen & Kimbell. He submitted this article at the urging of Judge Colleen Sterne who wrote: "Our community of lawyers is full of people who do amazing and unexpected things, and it is always a pleasure to hear about them. We are all so much more than our legal careers."

This is a story about my ride with my pony Remington last summer to sweep behind the ultra-marathoners running the Santa Barbara 100 Mile Endurance Run in the local mountains. We have done this annually since the Run started up five years ago. This year the event took place on the second weekend of July.

Remington and I have been competing in my off hours in the sport of endurance riding for more than two decades. The American Endurance Riding Conference, the national governing body for the sport, defines an endurance ride as 50 miles in 12 hours or 100 miles in 24 hours. These are timed events, with placings. Remington has accumulated nearly 12,000 miles of competition in his career and has been inducted into the AERC Hall of Fame. He is the only Icelandic horse, pony-sized horse, or gaited horse (with extra gaits beyond the usual walk, trot and canter) in the Hall of Fame. No horse and rider team in the world in the sport has ever exceeded the 21 consecutive years that Remington and I have completed at least one endurance ride each year.

We support events for human ultra-runners as a way of giving back to the community. Remington's endurance career makes him uniquely qualified for search and rescue work. He knows all of the backcountry trails from his years of conditioning sessions with me. He can travel at speed for hour after hour over the roughest terrain in the dark of the night. He is absolutely fearless.

We usually sweep the last 30 or 40 miles of the trail through the night to make sure all of the runners make it into the finish safe and sound by their Sunday morning cut-off time. We generally try to sweep the single track trail parts of the course inaccessible to motor vehicles. When we find runners in trouble, they have already run nearly



Search and Rescue Team – Remington with John Parke (photo by Lynne Glazer)

100 miles and are utterly exhausted. The ones who need us during the day are dehydrated and overheated. The ones we find at night are hypothermic and getting colder fast.

The summer before we performed two different rescues during the night. The second runner was in especially bad shape. We encountered him on a particularly nasty stretch of trail at three in the morning lying in the fetal position on the ground where he had been for 3-4 hours. The runner was as cold as a fish and shivering uncontrollably. He was hallucinating and did not know where he was or even what direction to go in. He was miles from any road and couldn't walk. The slope was too steep for a helicopter to land.

So I had to hoist the runner up in the saddle so that Remington could carry him in. I tented a space blanket around him and over Remington's back so that the horse's heat could warm him up as we moved. We tramped up and down over the rocks for five miles to get the runner to a place at daybreak where he could be evacuated out for medical treatment. The news stories that followed in the *Independent*, *The Chronicle of the Horse*, *Horse and Hound* in the UK, and other national and international media were much more interested in the photogenic little pony than in the worn-out old lawyer who stumbled through the dark to lead them in.

Anyway, after Remington and I rescued the two runners in the night last year, I discussed with race management how we could improve our safety efforts as the number of entrants continued to grow. We decided I should find someone to ride with me, hopefully someone with first aid training. We also decided I should get my amateur radio license so that I could communicate real-time with the ham radio operators supporting the run. I did all of these things and, my, did it sure come in handy that weekend.

The key was asking my best friend's daughter Morgan Benedict to ride with me. Morgan is 20 and full of energy and the spirit of adventure. She is also a professional EMT employed at our local hospital. I have known her since I first saw her the morning she was born. Her parents have a framed picture of her sitting on Remington's back when she was a baby. Starting in May, Morgan spent several long rides with me conditioning herself and my wife's horse Mocha for the run. Mocha is an Icelandic, like Remington, and has lived with us since he was six months old. Morgan even gave up a Friday evening for a four hour training ride in the dark because we knew we would be riding through the night behind the runners. With my new call sign (KM-6CUQ), a strong Mocha, and a saddle fit Morgan, we were ready for the race. Remington, of course, is always ready for anything.

The race started when the 100 mile runners took off Friday at six pm. The 100 kilometer runners started Saturday morning at seven am. The idea was for us to join the 100 mile course at the Montecito aid station on Romero Canyon Road and ride up the trail to the Cold Spring Saddle aid station at the top of the Santa Ynez mountain range on Saturday afternoon. The Cold Spring aid station was on the way back for the 100 milers and was also the turn around point for the 100 kilometer runners. We would follow them all the last 30 miles from there into the finish. So we started around noon and climbed 3,000 feet to the top. It was tiring for us and the horses in the heat, so it must have been tough on the runners.

Once we reached the top, we watered the horses at the Cold Springs aid station and waited. The aid station was busy with volunteers, runners and pacers. Pacers are crew for the runners who even run with them part way. At around four pm, the race director informed us that there were reports from other runners of an exhausted 100K runner stopped without water below Forbush Flat down the trail on the other side of the mountain. Someone told us it was 104 degrees down there. The stranded runner wasn't able to make the 2,000 foot plus climb up to the aid station. So we took off running down the trail leading the horses. The trail was so steep that it was faster to jog on foot with

the horses downhill than to ride them.

We found our runner lying on a bench about a mile down from the aid station. He had no shirt and his skin was totally dry, meaning he could no longer sweat because he was so dehydrated. In her calm and friendly tone, Morgan asked the runner several questions to determine his condition and reassured him we were there to help. Morgan told me he was already in shock and needed to get out of there immediately. She thought we were too deep into the steeply walled canyon for a helicopter to take him out even with a hoist. I told the runner he was lucky because he was going to get to ride out on a special horse.

Just as we were loading up the dehydrated runner, another runner staggered in who needed help, too. This runner began cramping up so badly that he cried out in pain and literally could not move his arms and legs. He was dehydrated too and could not continue. Good we had two horses. So we loaded runner #1 (the wobbliest) on Remington and runner #2 on Mocha, with us on foot. I told the runners to just hang onto the horses' manes because the horses would keep re-balancing underneath them so that they wouldn't fall off.

As we started leading the horses up the trail, the crew for still another runner came up looking for help. He said his runner had been vomiting and was struggling up the trail behind him. I told him to stay put and that we would return in half an hour. I used my new call sign for the first time to radio the network operator and the aid station what was going on.

We walked quickly up the trail to the aid station. The horses had no problem carrying the runners, even over the washed out part of the trail where the path narrowed to 3-4 inches wide at most. Once we reached the top, I told each runner to make like a sack of potatoes over my shoulder while I lifted him out of the saddle. Morgan walked them over to cots under a tent and tended to them with towels soaked in ice water. Runner #2's spouse was there to take over for him, and aid station volunteers took over for runner #1. Morgan explained how to take care of them and what to do if they didn't seem to recover. The aid station was accessible by air and by road if the runners needed to go to the hospital.

We gathered up the ponies and ran down the trail again for runner #3. We found him stretched out on the same bench where we had found the other runners. He was in really bad shape. He had been vomiting for the last hour. He was so dehydrated that he could not even hold water down. Morgan said he was definitely in shock and would need intravenous fluids if he got worse. Morgan patiently explained to him what the situation was and what was go-



Morgan Benedict at an aid station.

ing to happen next. He was so weak that we agreed it was best to put him on Remington with all of his experience on rough trail. So we lifted runner #3 up into the saddle and went charging back up the trail.

As we reached the washed out part of the trail, I reassured the runner that he was safer on Remington's back and four feet than he would have been on his own two feet. While looking back at them, I then tripped over a tree root and fell off the trail, slowly slipping down the hillside. I grabbed a bush with my left hand and Remington's lower leg with my right hand and pulled myself back up. Feeling a little stupid, I quipped, "See, doesn't that prove my point ... although I didn't do that just to prove my point." On we went.

When we reached the top, Morgan and I each got under a shoulder and moved runner #3 over to a cot under the tent. The tent was beginning to look like a MASH ward. I tended to the horses while Morgan tended to our growing group of sick runners. While I was eating a snack, a polite but obviously concerned woman approached me and asked if I had seen her husband down the trail. It was getting late and she had expected him hours ago. I asked her what his number was and promised her we would find him.

So off we ran down the trail again. After half a mile or so, I told Morgan that at age 63, my own legs were beginning to feel a little heavy. We then encountered runner #4 sitting in the middle of the trail as it crossed the steep slope. He was indeed the nice lady's missing husband. He appeared to be in the worst shape yet of the runners we had seen. He said he had been out of water for an hour and had vomited up everything he had been able to drink before that. Morgan

said he was in shock too from his severe dehydration.

Up he went on Remington's back. He was so weak that he couldn't sit up in the saddle. He flopped over on Remington's neck and hung on. The horses managed to spin around and head back up the mountain for the third time. They were so calm as they would squeeze by the runners still in the race coming down the narrow trail in the opposite direction. As I looked back to check the runner, I could see Remington moving back and forth to continuously readjust himself under his disabled rider. I wondered to myself how many people have ever actually watched a master at work like this.

The people still at the aid station cheered when we reached the top. Race volunteers located another cot for runner #4 and we lowered him down into it. His wife was so relieved to see him that she started to cry. As things settled down over the next few minutes, she must have asked me three times what the names of the horses were. Morgan tended to all of her charges once again. When she said they were looking good enough for us to leave, I shook hands with the various runners, gave the grateful spouse a hug and pointed the horses down the trail again.

It was now seven pm and we needed to sweep the remaining 30 miles of trail. I told Morgan I was done running. We soon encountered the last runner coming up the mountain, so young Morgan ran back up to the aid station to make sure they didn't close it before he got there. The rest of our ride was relatively uneventful. We had some nice visits at the remaining aid stations (somebody even mixed me a whiskey sour!), re-directed one lost runner in the dark, rode some thrilling trail in the starlight and finished half asleep the next morning.

After I got home, I learned that my wife and I had to drive 150 miles and back on an errand that same day, but that is another story. I realized after we were done that I was exhausted emotionally as well as physically. Maybe the highly charged emotions of the runners we helped and their loved ones triggered some kind of reciprocal emotion in me. I also could not get over how proud I was of seeing a child I first saw as a newborn turn into an invaluable professional helping others right before my eyes. When we were in the middle of all the action at the Cold Spring aid station, I facetiously asked Morgan if she was bored. She grinned and said, "I love it."

And what is left to say about Remington? At 28 years old, the things he does continue to amaze me. I wish I had some witty way to summarize my thoughts about Morgan and the two ponies, but I don't. All I can say is God bless little girls and little horses. They just may grow up to have inner resources that will astound you. ■



Judge Anderle and Joseph Billings



From Left to Right: Elvia Garcia, Molora Vadnais, Elizabeth Diaz, Evelyn Cortez, Alex Entrekin, and Sarah Veeck



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2016 SBCBA Golf and Tennis Tournament

Thank you to all who participated in the Golf & Tennis tournaments and to those that joined us for dinner at Glen Annie! Many, many thanks also to our incredible attorney volunteers: **Clark Stirling** and **John Richards** for energetically organizing and running the tennis portion, and **Catherine Swysen** for her outstanding assistance with the golf tournament. A big thank you to our tireless events team, **Mike Brelje**, **Emily Allen** and **Elizabeth Diaz**, and to our ace photographer, **Michael Lyons**.

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Golf

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2nd Place Net: Robert Forouzandeh, Tim Trager, Alan Blakeboro, Justin Anderson

Longest Drive (men): Mike Brelje

Longest Drive (women): Lauren Wood

Closest to Pin: Eric Ogan

Tennis

Flight A: Jason Ebin and David Grokenberger (tie)

Flight B: Michael Gray





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A Well-Deserved Honor to Marilyn Metzner

The 2016 Legal Community Appreciation Award was presented to Marilyn Metzner at a September 22, 2016 reception at the Santa Barbara Club. The honoree graciously requested *Santa Barbara Lawyer* to include the following:

Dear All Who Attended the Event Honoring me –

Thank you, thank you, thank you. It was wonderful to be selected for this honor, and a bit overwhelming too. You all said such kind and generous things to me and some to my various children who attended, and I was so moved by it all. It is wonderful to receive such “flowers of appreciation” while still above ground! Such a lovely event, and such an honor for a secretary. This was truly a highlight of my life. Bless you.

- Marilyn Metzner, Secretary to Judges Anderle and Sterne





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The New PCAST Report to the President of the United States on Forensic Science

BY ROBERT SANGER¹

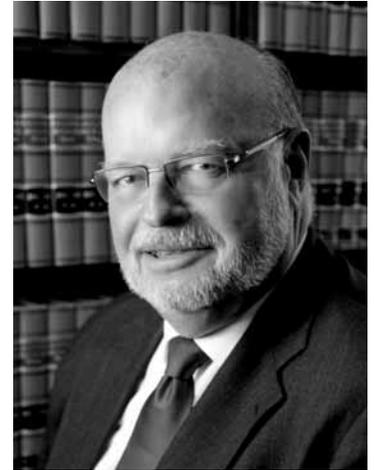
The President of the United States requested an in-depth report from the President's Council of Advisors on Science and Technology (known as PCAST) in 2015 to "consider whether there are additional steps that could usefully be taken on the scientific side to strengthen the forensic science disciplines and ensure the validity of forensic evidence used in the Nation's legal system."² The PCAST Report was issued September 20, 2016, specifically referring to criminal court applications of forensic science. However, as with all of the forensic studies that have come out in recent years, this report has implications for civil litigators as well as criminal. It also has implications for judges, particularly those at the trial level.

In this month's *Criminal Justice* column, we will review the thrust of the PCAST Report, making reference to the six areas of forensic science (seven evaluations) that it features in particular. One of those, Firearms and Toolmarks, is a forensic area that is the subject of independent review by the Academy Standards Board (ASB) of which the author is the Chair. This ASB will not meet in full until mid-November after the publication of this article and, in any event, the opinions and observations in this article are those of the author only. Nevertheless, it can be reported that there has been some considerable reaction to the PCAST Report in the general scientific, forensic and law enforcement communities, including some regarding the individual areas of forensic testimony mentioned in the Report.

The main reason for writing at this time is to give our readers a "heads up" as to the controversies ahead and to remind everyone that, ever since the NAS Report in 2009,³ forensics is a new ballgame. There are emerging new rules, new standards, new bases for pretrial litigation and new grounds for proffers, objections and cross-examination. In all cases, civil or criminal, where there is potential expert testimony, the PCAST Report as well as several other studies should be taken into account in formulating pre-trial and trial strategy. So, here is a preview of the latest.

Why PCAST?

The Department of Justice (DOJ), headed by the Attorney General of the United States, is a part of the Executive Branch and includes, of course, the Federal Bureau of Investigation (FBI), the Bureau of Alcohol Tobacco, Firearms and Explosives (ATF), and numerous other federal agencies with laboratories and agents available to testify as experts. The FBI and the Attorney General



Robert Sanger

were well aware of shortcomings in the forensic sciences and expert testimony which had largely been exposed by DNA results and re-tests in the 1990s. This led to the FBI's extensive re-examination of hair comparison microscopy in 2002, an unfavorable report on the FBI's bullet comparisons based on lead composition in 2004, and an FBI commissioned report critical of latent fingerprint analysis in 2005 as a result of the Brandon Mayfield debacle. Furthermore, in the 2000s, Scientific Working Groups (SWGs) were instituted by the DOJ and the FBI to study all of the areas of forensic testimony. Thus, the Executive Branch has been well aware of the failings of forensic science and expert testimony for some time.

In the midst of all this, President George W. Bush commissioned the now landmark study by the National Academy of Sciences. After extensive hearings, the Academy issued its report in 2009 which represented an assessment of the general lack of scientific standards in expert testimony across the board. They made an exception for testimony regarding single source, non-contaminated, non-degraded DNA which they held out as the "gold standard." So, once again, the Executive Branch – and everyone else involved with expert testimony – obtained a candid assessment which was consistent with the findings that were emerging from the DOJ and FBI studies and from the reforms recommended by the SWGs.

Then, in 2013, the federal government appointed the old Bureau of Standards within the Department of Commerce, renamed the National Institute of Standards and Technology (NIST), to take over the evaluation of forensic sciences in light of the NAS Report. NIST, also an Executive Branch agency but not one under the direction of the Department of Justice, was a compromise choice in light of the fact that the NAS Report recommended that oversight of forensic

standards not be a part of the prosecutor's office or overseen by law enforcement officials. Nevertheless, the DOJ (the federal law prosecutorial and law enforcement agency) established the National Commission on Forensic Science (NCFS, chaired by Deputy Attorney General Sally Q. Yates) "in partnership" with NIST to oversee the work that the NAS Report had recommended not be under prosecutorial or law enforcement supervision. In turn, NCFS and NIST created the Organization of Scientific Area Committees (OSACs) for Forensic Science to study individual areas of forensic expertise. These governmental OSACS started to work in 2014 and are continuing to work on recommendations at this time.

Despite the criticism of prosecutorial oversight, the OSAC boards and staffs have enlisted the talents of some impressive non-governmental, as well as governmental, experts in the various fields. The resulting recommendations should be substantial. Nevertheless, a non-governmental organization, American National Standards Institute (ANSI) designated the American Academy of Forensic Sciences as a Standards Development Organization (SDO) leading to the creation of Academy Standards Boards, such as the one the author chairs, to develop a consensus among the stakeholders in forensic sciences. As reported in this column previously, that work is going on and involves liaisons with the OSACs, governmental agencies and others.

So, why PCAST? It certainly seems redundant to other Executive Branch efforts. On the other hand, the fact is that forensic science is at a critical stage of transformation. The word is filtering down to trial lawyers and trial judges. There are substantial defects and substantial revisions in the way that judges will regard their jobs as "gatekeepers." There are also substantial policy decisions that will be required by the Executive Branch, headed by the President of the United States, which may involve direction to the Attorney General and other Executive agencies. So, understanding that, the Chief Executive does have a legitimate need for direct expert information in the way he or she does the job. And, that is what the Chief Executive received: a candid report from the experts on forensic science and whether the current state of forensics does or does not promote scientific validity.

The PCAST Methodology

First, the PCAST Report focused on criminal cases concerning six areas of forensic concern: comparing DNA samples, bite marks, latent fingerprints, firearm marks, footwear, and hair. Second, these areas specifically relate to forensic "feature comparison" methods. Nevertheless, to the extent that there are issues regarding foundational

requirements for a proffer, objections to be made or cross-examination to be conducted, the concerns contained in this report would be applicable to all matters, civil and criminal. Either directly or indirectly, all of these concerns relate to *Daubert/Kumho Tire* requirements and to the defensibility, either from a proponent or opponent's perspective, of all forensic and expert opinions.

The Report studied these six areas of forensic concern with regard to "foundational validity" and "validity as applied." This is the same thing we have discussed in this column previously and would correlate to the four-stage rule of admissibility argued for in these pages and summarized in "A Scientific Approach to Scientific Evidence: A Four-Stage Rule for Admissibility and Scope."⁴ In the terms of the four-stage rule: 1) Is it a science; and, if so, 2-4) Is the witness a scientist, who analyzes valid data and comes to a valid opinion?

PCAST basically advised the President that:

"Foundational validity" for a forensic science method requires that it be shown, based on empirical studies, to be repeatable, reproducible, and accurate, at levels that have been measured and are appropriate to the intended application. Foundational validity, then, means that a method can, in principle, be reliable. It is the scientific concept we mean to correspond to the legal requirement, in Rule 702(c), of "reliable principles and methods."

"Validity as applied" means that the method has been reliably applied in practice. It is the scientific concept we mean to correspond to the legal requirement, in Rule 702(d), that an expert "has reliably applied the principles and methods to the facts of the case."

PCAST went on to say that "foundational validity" requires:

(1) That a method has been subjected to empirical testing by multiple groups, under conditions appropriate to its intended use. The studies must (a) demonstrate that the method is repeatable and reproducible and (b) provide valid estimates of the method's accuracy (that is, how often the method reaches an incorrect conclusion) that indicate the method is appropriate to the intended application.

(2) For objective methods, that the method can be established by measuring the accuracy, reproducibility, and consistency of each of its individual steps.

(3) For subjective feature-comparison methods, because the individual steps are not objectively specified, that the method must be evaluated as if it were a "black box" in the examiner's head. Evaluations of validity and reliability must therefore be based on "black-box studies," in which many examiners render decisions about many independent tests (typically, involving "questioned" samples and one or

more “known” samples) and the error rates are determined.

(4) Without appropriate estimates of accuracy, that an examiner’s statement that two samples are similar—or even indistinguishable—is scientifically meaningless: it has no probative value, and considerable potential for prejudicial impact.

“Validity as applied” requires meeting two tests:

(1) That the forensic examiner must have been shown to be capable of reliably applying the method and must actually have done so. Demonstrating that an expert is capable of reliably applying the method is crucial—especially for subjective methods, in which human judgment plays a central role. From a scientific standpoint, the ability to apply a method reliably can be demonstrated only through empirical testing that measures how often the expert reaches the correct answer. Determining whether an examiner has actually reliably applied the method requires that the procedures actually used in the case, the results obtained, and the laboratory notes be made available for scientific review by others.

(2) That the practitioner’s assertions about the probative value of proposed identifications must be scientifically valid. The expert should report the overall false-positive rate and sensitivity for the method established in the studies of foundational validity and should demonstrate that the samples used in the foundational studies are relevant to the facts of the case. Where applicable, the expert should report the probative value of the observed match based on the specific features observed in the case. And the expert should not make claims or implications that go beyond the empirical evidence and the applications of valid statistical principles to that evidence.

PCAST also reported to the President that “an expert’s expression of *confidence* based on personal professional experience or expressions of consensus among practitioners about the accuracy of their field is no substitute for error rate estimated from relevant studies.” This and the preceding criteria put the PCAST Report in accord with the emerging premises of modern forensic evidence. There are nuanced differences that can be explored at another time – perhaps in subsequent *Criminal Justice* columns – and there will probably be significant disputes about how these principles were applied in the particular six forensic areas analyzed by PCAST in the Report.

The PCAST Conclusions

The short version is that PCAST found that DNA analysis of single-source and simple-mixture samples remains the gold standard, although there is a need to improve proficiency testing. However, DNA analysis of complex mixture

samples require substantially more evidence to establish foundational validity. The current state of expertise is subjective and the foundational validity of the methodology has not been established as reliable.

Analysis of bite mark evidence did not fare nearly as well. It was found to be far from meeting the scientific standards for foundational validity, and the prospects for developing bite mark analysis into a scientifically valid method is low; so low, in fact, that they advised against devoting significant resources to the effort.

Fingerprint analysis was still found to be subjective. There was hope held out that the additional data bases and analysis could lead to a more objective basis for comparison. The same was said of firearms and toolmark analysis. However, footwear analysis, other than objectively evaluating class characteristics, was not supported to determine individual characteristics. Finally, hair analysis was not found to meet the requirements of foundational validity or reliability.

Following this, PCAST made recommendations to NIST and to the President’s own Office of Science and Technology Policy (OSTP), to the Attorney General and to the Judiciary. It is beyond the scope here to analyze these recommendations in detail but they are quite cautionary about the use of overblown claims in testimony and recommend that the various agencies do a lot more than PCAST perceived them to be doing. The recommendations are strong in requiring objective empirical support to establish both foundational and as-applied validity. And, as is the trend in forensic science today, PCAST emphasized the need for metrics in the support for and expression of opinions.

The Immediate Reaction

Just as when the 2009 NAS Report came out, the various forensic expert groups have become defensive. We will be seeing formal responses from these groups, and interest groups associated with them in the near future. Experts, just like all people, are averse to being told that they are not doing a good job or that they need to do a better job. Time will tell what specific criticisms will be leveled against PCAST and what will be taken to heart by working forensic experts. Nevertheless, the thrust of the Report is consistent with the direction that the highest level of forensic science has been taking over the last few years. One would hope that this criticism contribute to the efforts already underway to enhance the scientific status of forensics.

Other commentators, such as Judge Kozinski of the Ninth Circuit, applauded the PCAST Report. He wrote an article for the *Wall Street Journal*, “Rejecting Voodoo Science in the Courtroom.”⁵ Another major force within the judiciary, Jed Rakoff, was actually on the Advisory Committee

for PCAST. But, with a swift rejection of the Report, the National Association of District Attorneys, in their own words, “slammed” the PCAST Report in a press release.⁶ And, the Attorney General Loretta Lynch stated that she felt that scientific evidence has a positive effect on juries and on the development of evidence. She said of PCAST that, while “we appreciate their contribution to the field of scientific inquiry, the department will not be adopting the recommendations related to the admissibility of forensic science evidence.”⁷

Conclusion

The President is now advised, and his President’s Council of Advisors on Science and Technology (PCAST) has been so presumptuous as to give advice to the Attorney General as well as NIST and the judiciary. It did not go over well with the prosecution side so far. We have yet to hear from the forensics industry and scientific groups, governmental and otherwise, that have been studying the same things. Much of what is recommended is not out of line with the views of other leaders in the advancement of forensics. However, we can expect that the Report will be dissected, evaluated and re-evaluated over the next few months.

Nevertheless, it would seem shortsighted for any lawyer, civil or criminal, to disregard this Report. It can certainly be the basis for support, opposition or cross-examination of individual experts in individual cases. The contents will have some sway with some judges. In the long run the Report may hold up well or it may be successfully criticized in part but, as a whole and as a resource, it is not something for lawyers and judges to ignore. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 40 years. He is a partner in the firm of Sanger Swysen & Dunkle. Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers’ organization. He is a Director of Death Penalty Focus. Mr. Sanger is a Member of the ABA Criminal Justice Sentencing Committee and the NACDL Death Penalty Committee. He is a Member of the American Association for the Advancement of Science (AAAS). Mr. Sanger is also a member of the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS) and the Chair of the Academy Standards Board Consensus Body for Firearms and Toolmarks. Mr. Sanger is an Adjunct Professor of Law at the Santa Barbara and Ventura Colleges of Law.

ENDNOTES

1 ©Robert Sanger. The opinions expressed herein are those of the author alone and not of the Colleges of Law, the AAFS Standards board or the other organizations with which the author is associ-

ated.

- 2 President’s Council of Advisors on Science and Technology, “*REPORT TO THE PRESIDENT, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*,” Executive Office of the President (September 2016), (hereinafter, “PCAST Report”), at: https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.
- 3 Committee on Identifying the Needs of the Forensic Sciences Community, “*Strengthening Forensic Science in the United States – A Path Forward*,” National Research Council (2009) (hereinafter, “NAS Report”).
- 4 Robert Sanger, “*A Scientific Approach to Scientific Evidence: A Four-Stage Rule for Admissibility and Scope*,” (2013), Westlaw: 2013 WL 5757941 or: SSRN at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2706986.
- 5 Alex Kozinski, “*Rejecting Voodoo Science in the Courtroom*,” Wall Street Journal, (Sept. 19, 2016).
- 6 NDAA Press Release, (September 20, 2016) <http://www.ndaa.org/pdf/NDAA%20Press%20Release%20on%20PCAST%20Report.pdf>.
- 7 Gary Fields, “*White House Advisory Council Report Is Critical of Forensics Used in Criminal Trials*,” Wall Street Journal (September 20, 2016), <http://www.wsj.com/articles/white-house-advisory-council-releases-report-critical-of-forensics-used-in-criminal-trials-1474394743>.

SBCBA

Crandell Award, *continued from page 7*

Association President, with Sue McCollum also serving as President of the Santa Barbara Women Lawyers. When the Courthouse Legacy Foundation (CLF) launched its initiative a few years ago for much needed renovations to the courthouse, firm member Brad Ginder led the effort as President of CLF. Numerous Bar Association sections, initiatives and committees have been chaired by firm members.

Partners and associates in the firm are encouraged to select non-profit activities and organizations in which they have a personal interest and then to demonstrate that interest by committing time and effort to that endeavor. All members of the firm are involved in at least one such activity. Community service is encouraged for all attorneys at the firm and is considered as a part of the firm’s annual review process.

Firm members have served in officer, director and/or trustee positions in many local non-profit organizations, including the Trust for Historic Preservation, Hillside House, the Boys & Girls Club, Angels Foster Care, Garden Court, the YMCA, the Santa Barbara Botanic Garden and Santa Barbara Visiting Nurse & Hospice. At various times, a member of the firm has served as president of the Santa Barbara Zoo, the Santa Barbara Nautical Museum, the Downtown Organization and the United Boys and Girls Club of Santa Barbara County. ■



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8:15 AM – 9:00 AM	Registration and Breakfast. Mural Room, Second Floor
9:00 AM to 9:50 AM 1 hour MCLE Competence Issues	Substance Abuse Dr. Leslie Lundt, Santa Barbara County Department of Behavioral Wellness Mural Room
Breakout Session A 10:00 AM to 10:50 AM 1 hour MCLE	Discovery Including ESI/E-Discovery Strategy in Family Law Gregory W. Herring Herring Law Group Department 1
8:30 AM to 2:00 PM	Legal Services & Technology Exhibits
11:00 AM to 11:50 AM 1 hour MCLE	Keynote Presentation: Individual Privacy vs. Collective Security: The Encryption Wars and Corporate America Steve Zipperstein Chief Legal Officer and General Counsel Blackberry Ltd. Mural Room
11:50 AM to 12:20 PM	Pre-Debate Luncheon Buffet
12:30 PM to 2:00 PM 1.5 hours MCLE Ethics	Luncheon Debate: The Tension between Individual Privacy and Collective Security: Three Perspectives Steve Zipperstein, Chief Legal Officer and General Counsel, Blackberry Ltd. Nate Cordozo, Senior Staff Attorney, Electronic Frontier Foundation Melissa A. Meister, Esq., Larson O'Brien LLP, Former Assistant United States Attorney Mural Room
Breakout Session B 2:10 PM to 3:00 PM 1 hour MCLE	Recent Changes to Internal Revenue Code Regulations and their Impact on Estate Planning Brooke C. McDermott Ambrecht & Associates Department 1
3:10 PM to 4:00 PM 1 hour MCLE Elimination of Bias	Judicial Panel: Bias in the Legal Profession: A View from the Bench Judges of the Santa Barbara County Superior Court Mural Room
	Ownership of Real Property in Business Entities and Related Tax Implications Brad Lundgren Allen & Kimbell, LLP Department 2



Bench & Bar Conference



**Saturday, January 21, 2017
at the Historic Courthouse**

Featuring

- Keynote Presentation and Panel Discussion featuring the Chief Legal Officer and General Counsel of BlackBerry Ltd. on Individual Privacy vs. Collective Security: The Encryption Wars and Corporate America.
- Judges' Panel led by Presiding Judge James Herman addressing bias in the legal profession from the Judicial perspective.
- Courses include Ethics, Elimination of Bias, Substance Abuse, Developments in Family Law, Land Use Law, Corporate Law and Trusts and Estates Law.

6.5 Hours of MCLE Credit

Registration Form	Registration	Payments received →	On or before 1-6-2017	After 1-6-2017
	SBCBA Members			\$110.00
Non-SBCBA Members			\$130.00	\$150.00
New Admittee/Public Interest Attorneys			\$90.00	\$90.00
Three or More Attendees from Same Firm or Organization			\$90.00	\$90.00

Name	Email	Firm	Membership status
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Payment: ___ SBCBA members at \$110 \$130 _____ .00
 ___ non-SBCBA members at \$130 \$150 _____ .00
 ___ new admittee/public interest at \$90 _____ .00
 ___ 3+ from same firm/org. at \$90 _____ .00 → **Total: \$ _____**

To register and pay by credit card, call SBCBA at 569-5511. Otherwise, mail completed registration form with payment to SBCBA, 15 West Carrillo, Ste. 106, Santa Barbara, CA 93101. Attach additional sheets for additional registrants.

**REAL PROPERTY SECTION OF THE
SANTA BARBARA COUNTY BAR ASSOCIATION
LUNCHEON PROGRAM**

LAW OF WINERIES: AN OVERVIEW OF LAND USE ISSUES

Date: November 16, 2016

Time: 12:00 p.m. – 1:30 p.m.

Topic: *Law of Wineries: An Overview of Land Use Issues.* This presentation will address Santa Barbara County's draft winery ordinance, enforcement issues, water supply, and due diligence issues concerning owning and operating wineries.

Speaker: **DYLAN K. JOHNSON.** Dylan is an attorney at Brownstein Hyatt Farber Schreck, LLP. Dylan counsels public and private clients on a broad range of land use and environmental issues, enforcement actions and litigation, with an emphasis on the California Environmental Quality Act (CEQA), water rights, and clean water regulations.

Place: **Wells Fargo Private Bank**
118 East Carrillo Street
Second Floor Conference Room

MCLE: One hour of credit, approval pending

Menu: Lunch will be provided

Price: **\$30.00** (net proceeds going to the County Bar)

Reservations: Must be received by November 11, 2016.
In ADVANCE please send your payment payable to:

Fell, Marking, Abkin, Montgomery, et al. LLP:
Attn: Carys Morgan
222 E. Carrillo Street, 4th Floor
Santa Barbara, California 93101

Questions: Josh Rabinowitz, 963-0755



*PLEASE NOTE DATE CHANGE: **WEDNESDAY,**
NOVEMBER 16TH*

The Santa Barbara County Bar Association Proudly Presents:

*A Reception with the Appellate
Justices of Division Six*

*Q & A with the Justices**

*Please join us on
Wednesday, November 16th, 2016
6:00 pm - 8:00pm
The Santa Barbara Club - 1105 Chapala Street*

1 MCLE Credit

SBCBA Members: \$60

Non-Members: \$70

Students/Paralegals: \$20

*Please call 569-5511 to pay via credit card or mail completed
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Association*

*Santa Barbara County Bar Association
15 West Carrillo Street, Santa Barbara, CA 93101*

Name(s) _____

Phone Number _____

Amount Enclosed _____

** Questions may be submitted in advance to
sblawdirector@gmail.com*

You are invited to the 2016 Annual Dinner

Thursday November 3, 2016 starting at 5:30pm, dinner at 6:30pm



Keynote Speaker: Senator Hannah-Beth Jackson
Frank Crandall Community Service Award: Hollister & Brace
Richard Abbe Humanitarian Award: Judge George Eskin



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PAYMENTS RECEIVED	ON OR BEFORE 10-14-2016	AFTER 10-14-2016
MEMBERS	\$95	\$105
NONMEMBERS	\$105	\$115



RESERVATION FORM

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_____ Member Non-member \$ _____

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To reserve & pay via USPS, please complete this form and send with your check payable to SBCBA: 15 W. Carrillo St., #106, Santa Barbara, CA 93101. To reserve and pay by credit card, or if you have questions, call SBCBA at (805) 569-5511. Fees paid are nonrefundable.

2017 Memberships with the William L. Gordon Inn of Court

The William L. Gordon Inns of Court is accepting applications for 2017. Our new year starts November 3, 2016.

Since 1995, The William L. Gordon Inn of Court has been a Santa Barbara Chapter of the American Inns of Court Foundation. Its mission is to foster civility, professionalism and excellence in the legal profession.

The monthly meetings are generally entertaining, educational and a great way for the more experienced professionals to mentor the less experienced attorneys and students.

Benefits of membership in the Inn include all of the following:

1. Ten excellent dinners at the University Club (one each month November through October - excepting December and January);
2. At least nine hours of participatory MCLE credit (based on attendance - plus credit for being a presenter);

3. The opportunity to work as a team with local attorneys, judges, and other judicial officers at all levels of experience to give one MCLE presentation during the year; and,

4. Social hour prior to dinner meetings to meet and become acquainted with the other members of the Inn and their guests.

If you are interested in becoming a member of our Inn of Court, please contact Cheryl Johnson at 963-6711 or at cjohnson@hbsb.com.



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2016 SBCBA SECTION HEADS

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**For information on upcoming MCLE events,
visit SBCBA at <http://www.sblaw.org/>**

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Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a state-wide network of recovering lawyers and judges dedicated to assisting others within the profession who have problems with alcohol or substance abuse. We protect anonymity. To contact a local member go to <http://www.otherbar.org> and choose Santa Barbara in “Meetings” menu.

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