Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
November 2017 • Issue 542

Santa Barbara County Bar Association

www.sblaw.org

2017 Officers and Directors

MICHAEL DENVER
President
Hollister & Brace
PO Box 630
Santa Barbara, CA 93102
T: (805)963-6711
mpdenver@hbsb.com

JEFF CHAMBLISS
President-Elect
Criminal Defense Attorney
133 E. De La Guerra Street #188
Santa Barbara CA 93101
T: (805) 895-6782
jeff@chamblisslegal.com

AMBER HOLDERNESS
Secretary
Ofc of County Counsel
105 E. Anapamu Street, #201
Santa Barbara, CA 93101
T: 568-2969
aholderness@co.santa-barbara.ca.us

ELIZABETH DIAZ
Chief Financial Officer
Legal Aid Foundation
301 E. Canon Perdido Street
Santa Barbara, CA 93101
T: 963-6754
ediaz@lafsbc.com

JAMES GRIFFITH
Past President
Law Offices of James P. Griffith
25 E. Anapamu Street, #2
Santa Barbara, CA 93101
T: (805) 962-5821
jim@jamesgriffithlaw.com

LETICIA ANGUIANO
Associate Counsel
Mechanics Bank
1111 Civic Dr., Ste. 390
Walnut Creek, CA 94596
leticia_anguiano@mechanicsbank.com
T: (925) 256-3067

ERIC BERG
Berg Law Group
3905 State St Ste. 7-104
Santa Barbara, CA 93105
T: (805) 708-0748
eric@berglawgroup.com

JOSEPH BILLINGS
Allen & Kimbell, LLP
317 E. Carrillo Street
Santa Barbara, CA 93101
T: (805) 963-8611
jbillings@aklaw.net

DEBORAH K. BOSWELL
Mullen & Henzell L.L.P.
112 E. Victoria Street
Santa Barbara, CA 93101
T: (805) 966-1501
dboswell@mullenlaw.com

MICHAEL BRELJE
Grokenberger & Smith
152 E. Carrillo Street
Santa Barbara CA 93101
T: (805) 965-7746
gmb@grokenberger.com

LARRY CONLAN
Cappello & Noël LLP
831 State St
Santa Barbara, CA 93101
T: (805) 564-2444
lconlan@cappellonoel.com

BRIAN COTA
Ofc of District Attorney
1112 Santa Barbara St
Santa Barbara, CA 93101
T: (805) 568-2424
bcota@co.santa-barbara.ca.us

STEPHEN DUNKLE
Sanger, Swysen & Dunkle
125 E. De La Guerra, Ste 102
Santa Barbara, CA 93101
T: 962-4887
sdunkle@sangerswysen.com

JENNIFER DUFFY
Fell, Marking, Abkin, Montgomery, Granet & Raney LLP
222 E Carrillo St #400
Santa Barbara, CA 93101
T: (805) 963-0755
jduffy@fmam.com

ELVIA GARCIA
Law Offices of Gregory I. McMurray PC
1035 Santa Barbara St Ste 7
Santa Barbara, CA 93101
T: (805) 965-3703
elvia@mcmurraylaw.us

JEFF SODERBORG
Barnes & Barnes
1900 State St Ste M
Santa Barbara, CA 93105
T: (805) 687-6660
jsoderborg@barneslawsb.com

LIDA SIDERIS
Executive Director
15 W. Carrillo Street, Ste 106
Santa Barbara, CA 93101
569-5511; Fax: 569-2888
sblawdirector@gmail.com

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.

Santa Barbara Lawyer

A Publication of the Santa Barbara County Bar Association

CONTRIBUTING WRITERS
Penny Clemmons
Jennifer Goddard Combs
Susan H. McCollum
Wendy Nwosu
David C. Peterson
Robert Sanger
Amy Steinfeld

EDITOR
Eric Berg

ASSISTANT EDITOR
Lida Sideris

MOTIONS EDITOR
Michael Pasternak

VERDICTS & DECISIONS EDITOR
Allegra Geller-Kudrow

PROFILE EDITOR
James P. Griffith

PHOTO EDITOR
Mike Lyons

Submit all **EDITORIAL** matter to sblawyermagazine@gmail.com with "SUBMISSION" in the email subject line.

Submit all **MOTIONS** matter to Michael Pasternak at pasterna@gmail.com.

Submit all **ADVERTISING** to **SBCBA**, 15 W. Carrillo Street, Suite 106, Santa Barbara, CA 93101 phone 569-5511, fax 569-2888 Classifieds can be emailed to: sblawdirector@gmail.com

Santa Barbara Lawyer
Official Publication of the Santa Barbara County Bar Association
November 2017 • Issue 542

Articles

Sections

On the Cover

Bar Association Tees it up at Sandpiper. Photo by Mike Lyons.

Proposed Slate of Officers, Directors & Delegates SBCBA 2018

OFFICERS:
President: Jeff Chambliss
President-elect: Amber Holderness
Secretary: Elizabeth Diaz
Chief Financial Officer: Eric Berg
Past President: Mike Denver

DIRECTORS:

Leticia Anguiano
Joe Billings
Deborah Boswell
Larry Conlan
Iulia Davies
Jennifer Duffy
Stephen Dunkle
Elvia Garcia
Lauren Joyce
Jeff Soderborg
Rosaleen Wynne

SLATE OF DELEGATES TO THE CONFERENCE OF CA BAR ASSOCIATIONS:
Tim Metzinger, Sue McCollum, Donna Lewis, Tom Hinshaw, Jim Griffith

Thanks to Our Fee Arbitration Panel!

The SBCBA would like to thank the following Mandatory Fee Arbitration attorney arbitrators for their service in 2017. The program, which operates under the auspices of the State Bar of California, provides services to resolve fee disputes between clients and attorneys.

Stephen Anderson
Marilyn Anticouni
Marcus Bird
Alan Blakeboro
Penny Clemmons
David Fainer
Michael Hall Gray
Lynn Goebel
Diana Jackson
Matthew Long
Sayre Macneil
Janet McGinnis
Patrick O'Hara
Mac Sanborn
John Thyne
Victor Zilinskas

A big thank you also to the Chair and committee members of the fee arbitration program, Eric Berg, Naomi Dewey and Mike Brelje.

David Charles Peterson - November 21, 1948 - October 2, 2017

Footprints in the Sand

One night I dreamed I was walking along the beach with the Lord. Many scenes from my life flashed across the sky. In each scene I noticed footprints in the sand. Sometimes there were two sets of footprints, other times there was one only. This bothered me because I noticed that during the low periods of my life, when I was suffering from anguish, sorrow or defeat, I could only see one set of foot prints, so I said to the Lord, "You promised me Lord, that if I followed you, you would walk with me always. But I have noticed that during the most trying periods of my life there has only been one set of footprints in sand. Why, when I needed you most, have you not been there for me?"

The Lord replied, "the years when you have only seen one set of footprints, my child, is when I carried you."

Emotional Intelligence and Managing Emotions

The Key to Greater Success and Satisfaction

By David C. Peterson

Editor's Note: All of us at *Santa Barbara Lawyer* are deeply saddened by the news that David Peterson passed away on October 2, 2017. So many of us relied on David's skills to resolve our clients' most intractable problems. More importantly, we remember his kindness and his ability to emotionally connect on such a profound level with all who came in contact with him. David submitted the attached article to the Magazine shortly before his passing. The subject matter could not be more appropriate. –eb-

Dramatic social shifts occur periodically. One is taking place now. The Harvard Business School refers to it as "**(o)ne of the most influential business ideas of the decade**." The following quote appeared in the July, 2005, *American Bar Association Journal:* "Research over the last decade has conclusively demonstrated that **emotional intelligence predicts success more than any other single factor** …."

Success in our context is to thrive as a lawyer, doing that which is rewarding and satisfies purposes higher than monetary gain and ego satisfaction. After all, these alone are shallow bins from which to get complete satisfaction from our work.

Some of the important qualities of EQ are: 1) The ability to Empathize; 2) Self Awareness; 3) Social Awareness; 4) Positive Thinking and Hope; 5) "Emotional Self Regulation."

Thankfully, it has been discovered through research that these qualities can be learned and mastered (unless you're psychopathic). As it becomes more ingrained in society, the results are impressive. Companies embracing it have excelled. Where government leaders practice it, success unfolds.

To be effective we must master ourselves and have the ability to empathize with those with whom we deal. This includes clients, opposing attorneys, witnesses, judicial officers, our staff, the judge or jury, and so on. This does not mean agreement or sympathy; it means the ability to see things the way the other person does; to place oneself in the shoes of another and see things from their perspective. You can love or despise a person and still empathize with them. If you do, you can deal with them meaningfully and effectively. If you don't, you'll likely fail to achieve all your objectives.

David C. Peterson

The modern view of integrity includes the qualities of EQ. In his book, *Integrity*, Dr. Henry Cloud observes that:

> There is no shortage of talented, brainy people who are very, very good at what they do and are able to work the system and schmooze other people to get things done. There are zillions of them, and we all see them every day. (p.6)

There is no integrity in this. Nor is impeccable honesty sufficient. There are "many honest, ethical people of 'integrity' who were not making it in some way. * * * (T)he reality is that their 'person-hood' was still preventing their talents and brains from accomplishing all that was in their potential." (p.9)

For those seeking to improve their integrity, they find it comes from:

- Empathy, "…the ability to enter into another person's experience and connect with it in such a way that you actually *experience* to some degree what the other person is experiencing … at least for a moment …." (pp 9 & 58)
- Gaining complete trust of others by connecting authentically with them;
- Seeing all of the realities right in front of them, and being in touch with these realities;
- Effectively dealing with problem people, negative situations, obstacles, failures, setbacks, and losses; realizing that "life is largely about solving problems" (p.172);
- Transcending their own interests and giving themselves to larger purposes, thus becoming part of a larger mission;
- Resolving conflicts by seeing and working with the truth from the other side and integrating it into one's own truth, finding a solution that transcends either polarity, (p.133) "going hard on the issue and soft on the person." (p.192)

- Actually producing the outcomes that their abilities would allow them to accomplish.

Attorneys respected for their work and ideals appear to share the following EQ qualities:

- They empathize with their clients and those around them. Again, this is not always sympathy or agreement. It is simply the ability to recognize what factors are driving the thoughts and actions of the client and others they deal with.
- They are genuine and connect in a meaningful way with others with whom they deal or seek to influence. They don't seek to dominate by aggression. They are dignified but not aloof.
- They are honest and show integrity. By doing so others respect them, even their opponents in most cases.
- Rather than automatically imposing their own agenda on everyone, they patiently and carefully survey the situation and study the individuals they are engaged with.
- They are not impulsive or rude. Instead, they respond appropriately and with purpose, showing respect to those around them, even in the face of attack.
- As a result, the attorney possessing emotional intelligence is in control of their own emotions and actions. They are realistic and accept those things they cannot control but carefully take action where their control or influence can make a difference. Time and emotion are not wasted with tantrums, outbursts or other negative behavior.
- Their mental and other resources are devoted to positive thoughts and action. Their minds are not cluttered with negativity and unproductive thoughts. Where things go wrong, these attorneys see it more as an opportunity to face and get through the circumstance with dignity and grace. They don't make excuses or seek to pass out blame.
- They realistically assess the circumstance and calmly take appropriate action. They follow the course described in Ben Stein's book, *How Successful People Win*. He calls it "bunkhouse logic." When a cowboy finds that a well on his trail has run dry, he doesn't sulk, go into a rage or seek to assess blame. He sees the circumstance as just a good argument to move on to another water source.

Attorneys and others with EQ usually stand out in their circles. They are comfortable to be around. Their clients trust them as do their opponents and judicial officers. This is because this attorney takes into account the situation and feelings of everyone around him or her. They react and communicate in a manner dictated by the results of their ability to accurately assess the perspectives, feelings and perceptions of others within their sphere of influence.

Jerry Spence (*How to Argue and Win Every Time*) describes and explains the aspects of emotional intelligence for lawyers better than anyone. He recounts his mistakes early in his practice where he failed to employ this quality. After a trial where he had taken a witness apart in blistering cross-examination, a juror asked Spence, "Why did you make us hate you so much?" He had forgotten to take into account the potential reaction of the jury to the manner in which he presented himself. He had not empathized with the jury.

In another example where he used EQ, Spence describes his approach when filing a brief. He pictures the judge and what it must be like to be that judge. He thinks of how the judge must want to throw most briefs at the wall because they have to read so many lengthy, boring, predictable, bombastic, and unenlightening briefs. On this topic, Justice Wickson Woolpert once told me as I was preparing an appellate brief: "Dave, make it interesting and short."

Abraham Lincoln displayed this quality in his statement that, when he would be facing a man to influence him, he spent two-thirds of his time thinking about what the other would say and one-third of the time thinking of what he would say.

Complete and accurate listening is crucial. In the book *Making Smart Decisions* (Harvard Business School Press), the authors point out the "filters" of our mind that compel us to tune out negative information or information disagreeable to us. When we do that we will ultimately fail. Leadership experts point to this as the single worst trait of leaders who end up getting their company or the country in trouble. The company, Compaq, suffered a huge downturn due to its leaders' failure to listen to warnings regarding the inroads being made by Gateway and Dell.

It takes patience to listen accurately, and an honest effort. Having a right frame of mind is necessary. Failure to do it leads to mediocrity or worse.

Every author discussing the subject of EQ or effectiveness emphasizes the need to be genuine, not phony. Even the ultimate salesman, Zig Zigler (*Secrets of Closing the Sale*), said you can't have success without being genuine. Those who are unable to be genuine have little hope of grasping, developing and using the concepts of emotional intelligence.

Spence devotes another section of his book on this topic: "The Incredible Power of Credibility." He says, "The first trick of the winning argument is the trick of abandoning

trickery." Those who engage in "trickery" are eventually exposed for who they are. Being "straight up" and genuine gets us further in the long run.

Emotional intelligence also requires that we avoid acting upon our primitive instincts. Our first instincts are usually contraindicated when it comes to getting the results we and our clients desire. If we are attacked, our first reaction, if not checked, is to counter-attack. This is most unproductive. They say that a part of our brain's frontal lobe acts as a "damper on our instincts to go ballistic." Some of us need to go into the shop to get ours fixed. An emotional reaction or outburst usually escalates an already bad situation and produces no favorable result. Anger (or intoxication for that matter) has led to some of the poorest decisions humans have made. We usually do it out of fear or self-protection, motives that cause us to wander from our true objective, which we're unlikely to reach by way of knee jerking emotional reactions.

Another trait contrary to emotional intelligence was exposed by George Carlin who observed as follows: "Did you ever notice that when you're on the freeway those who are going slower than you are idiots and those going faster are maniacs? " The thought that we are the center of the universe, are all knowing and have all the right answers or keys to life, persists in most of us. When our minds are closed to others and their ideas, our vision is stifled. We become myopic, less effective and unproductive. We lose the ability to be creative in finding solutions for our clients. It's a flaw in integrity as Dr. Cloud sees it:

> (It) is the worst sickness of all: the preservation of the 'good self.' It is the character component of narcissism, the search for the 'ideal self,' or the wish to see oneself as 'all good' or flawless or perfect. It is one of the sickest traits we can have.

One way to test ourselves on these qualities is to look at the wake we are leaving behind. Like a boat, we move though the waters of our experience. Two trails are formed, one to the right and another to the left. One wake represents the tasks we performed, the other our people relationships. Are these trails mostly positive or negative? As Dr. Henry Cloud puts it: "(w)e can tell a lot about (a) person from the nature of (their) wake."

The more all of us strive to employ the components of emotional intelligence and integrity, the more we will excel and be satisfied with what we do. It appears to be a life-long process from which we never graduate. As we improve, however, others around us are lifted and we lift the image of our profession as well. We also find greater success and satisfaction with our lives. ■

COME ON INN

By Susan H. McCollum

If you like a good bed and breakfast, you are going to love an Inn with dinner and MCLE credits!

One of the great things about practicing law in Santa Barbara is the willingness of the judges of the Santa Barbara Superior Court to participate in activities with the legal community. If you want to know the wonderful people in our legal community, both on the bench and in the bar (pun intended), come to the Inn.

Since 1995, The William L. Gordon Inn of Court has been a Santa Barbara Chapter of the American Inns of Court. 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. One of our experienced judges has opined that all young attorneys should be members of the Inn. It is educational and promotes civility among our legal colleagues. If you are a young attorney or are willing to help them learn the practicalities of practicing law in Santa Barbara, while gathering the MCLE credits you need, become a member of the William L. Gordon Inn of Court.

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

1. Ten excellent dinners currently 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 extra credit for being a presenter);
3. The opportunity to work as a team with local judges and other judicial officers and attorneys at all levels of experience to give one MCLE presentation during the year;
4. Social hour prior to dinner meetings to meet and become acquainted with the other members of the Inn; and,
5. Membership in the American Inns of Court.

If you are interested in becoming a member of our Inn of Court, please contact Cheryl Johnson at cherjohnson@me.com or Marietta Jablonka at marietta@thynelaw.com. ■

What's All the Ruckus About ADUs?

By Amy Steinfeld and Wendy Nwosu

Amy Steinfeld

Wendy Nwosu

Many Californians are wondering whether their neighbor's new tiny home will house grandma or become a new rental. Advocates of accessory dwelling units ("ADU") claim they'll provide millennials and seniors with alternative housing options and homeowners with a new source of income. Opponents fret ADUs will alter neighborhoods and strain resources.

Senate Bill 1069 (Wieckowski, D-Fremont) and Assembly Bill 2299 (Bloom) were signed into law on Sept. 27, 2016, and went into effect on Jan. 1, 2017, (collectively, "ADU law"). The law aims to reduce regulatory barriers for homeowners seeking to convert space or add backyard structures for use as an ADU. ADUs, otherwise known as "in-law units, "back houses" or "granny flats" are secondary dwelling units with independent living facilities that can be either attached ("Interior ADU") (by repurposing an existing space) or detached ("Exterior ADU") from an existing home, and must be less than 1,200 square feet.[1] Regardless of an ADU's shape or size, it remains part of the same property as the main home and cannot be sold separately.

Enactment of the ADU law has sparked a robust public conversation. Supporters believe the ADU law will create more affordable housing (especially in high-rent areas like Santa Barbara), flexibility for the state's aging and growing population, and more jobs for architects, planners and contractors. Homeowners in favor of the law believe it gives them more freedom to develop their properties. Adversaries argue the ADU law will strip power from local agencies to regulate ADUs, could negatively affect neighborhood character, and will strain limited off-street parking and water supplies. Further, they believe local agencies are more adept than states in considering ADU permit applications based on local information and context. For example, housing needs in Santa Barbara are significantly different from those in Indio. There is also nothing in the law that precludes ADUs from being used as short-term vacation rentals rather than to house locals.

	2015	2016
California Rental Vacancy Rate	4.1%	3.6%
California Homeowner Vacancy Rate	1.2%	1.1%
Santa Barbara Rental Vacancy Rate	0.5%[8]	0.5%

Shift of Regulatory Power

The ADU law removes obstacles imposed by local agencies that block or make it costly for homeowners to build ADUs. Two important changes pertain to water/sewer connections and parking. Water and sewer agencies are precluded from charging hookup fees for Interior ADUs.[2] Any fees imposed on Exterior ADUs must be proportionate to the added burden the ADU places on the local agency's sewer system.[3] Further, local agencies are not permitted to require new parking spots for certain ADUs, including those units that are part of an existing primary residence and units located within a half-mile from public transportation.[4] Homeowners can now build a backyard cottage without carving out a space for additional cars.

Historically, the state has allowed local agencies to regulate zoning within their respective jurisdictional limits. So why is the state suddenly limiting local regulatory power? Likely reasons include:

1. Increase Vacancy Rates

In 2016, rental and homeowner vacancies were shockingly low throughout California. The rental vacancy rate declined from 4.1 percent in 2015 to 3.6 percent in 2016 while the homeowner vacancy rate declined slightly from 1.2 percent in 2015 to 1.1 percent in 2016.[5] Santa Barbara is the least affordable county in California; only 14 percent of residents are able to afford a median-priced home of $930,000. In order to offset the decline in vacant rental units and address increasing rents, cities must allow more new construction, which has already occurred in major

cities like Los Angeles and San Francisco. In Santa Barbara, the vacancy rate is at a historic low of less than 1 percent, forcing rent prices—already some of the highest in the country—to spike another 20 percent from 2015 to 2016.[6] Santa Barbara's current vacancy rate is now approximately 1.3 percent. Economists assert that a 5 percent vacancy rate represents a healthy market equilibrium.[7]

2. Ease Burden of Building ADUs

Discretionary permits are commonly required for the approval of housing development. Discretionary permits require analysis under the California Environmental Quality Act ("CEQA"). The new permit process should (in theory) be an easy ministerial process that is exempt from CEQA. The ADU law requires that a permit be issued within three months if the applicant meets all requirements.[9]

3. Adopt Uniform System

The state believes they can streamline ADU construction and provide uniform permitting procedures across the state.

4. Take Credit for "Doing Something" About Housing

With the end of redevelopment in California, local agencies have lost the ability to use tax increment financing to build affordable housing. CEQA compliance and litigation are daunting obstacles to the approval of housing projects subject to discretionary permitting. Although there are ongoing discussions in Sacramento regarding a possible provision of funding to local agencies for housing, such funding has not been provided in the past. Some think the California Legislature believes that streamlining ADU approvals will allow them to take credit for helping to solve the state's housing crisis.

What Are Local Agencies Doing?

Until a local agency adopts its own ADU ordinance, it is required to ministerially approve ADUs if the unit complies with the ADU law. Many cities and counties are now proposing to adopt local development rules that will regulate, pursuant to the state law, certain aspects of ADUs.

• *County of Santa Barbara*. Santa Barbara County's draft ordinance was presented to its board on Sept. 12. The draft ordinance is currently more stringent than state law. For example, the draft language provides that the main property shall be owner-occupied and the ADU may not be rented for less than 30 days.[10] At the meeting, most of the public opposed the restrictive nature of the ordinance, claiming that it fails to comply with the ADU law. The draft ordinance was rejected 4 to 1. The board instructed the planning department to revisit various issues, such as the design review process and water/sewer connections, especially in light of new ADU laws that await the governor's signature.[11]

• *City of Santa Barbara.* Since the ADU law's enactment, Santa Barbara has received over 170 ADU applications.[12] For comparison, Santa Barbara only approved 16 ADUs between 1993 and 2016. Most of the new applicants reside in the Lower Riviera, Upper Eastside and San Roque neighborhoods.[13] The city is currently considering an ADU ordinance that will address applicability within high fire hazard areas, zoning designations, minimum lot size and maximum unit size. A draft was presented to the Planning Commission on Sept. 7.[14] At the meeting, numerous opponents of the draft ordinance claimed that its restrictions on ADUs in certain zones and its 600-square-feet maximum size restriction violate the ADU law. The Planning Commission instructed staff to research the rationale of the proposed ordinance and determine whether it complies with the ADU law. The city continues to actively seek public input and scheduled another public hearing for late October.

• *Goleta*. The City of Goleta is currently working on a draft ordinance that will address junior units, owner-occupancy requirements, and amnesty for unpermitted ADUs. Goleta estimates that over 5,000 of its homes could support an ADU. The draft will go before council soon, but the exact timing is unclear. Once the council weighs in on the draft ADU ordinance, staff will continue the drafting process. As of September, the city had received many inquiries but no complete ADU applications.

We will continue to track this issue as it unfolds in each jurisdiction. ■

ENDNOTES

1 California Department of Housing and Community Development, *Accessory Dwelling Unit Memorandum*, (December 2016) http://www.hcd.ca.gov/policy-research/docs/17Jan30-ADU-TA-Memo.pdf
2 Gov. Code, § 65852.2(f)(2)(A).
3 Gov. Code, § 65852.2(f)(2)(B).
4 Gov. Code, § 65852.2(d).
5 http://journal.firsttuesday.us/nobodys-home-california-residential-vacancy-rates/7094/
6 http://www.independent.com/news/2016/nov/08/rents-jump-20-percent/
7 http://www.independent.com/news/2017/aug/01/great-vacancy-rate-debate/
8 https://www.noozhawk.com/article/short_term_vacation_rentals_santa_barbara_housing_market_20150510

Continued on page 29

Marketing Tips for Attorneys

By Jennifer Goddard Combs

Lawyers, like virtually all business professionals, must market their services to the public at large and to their peers. Keeping your name and work out there are vital to maintaining relevance and procuring new clients.

Here are six things attorneys can do to promote themselves:

1. Write and issue press releases regularly. Press releases can announce awards you receive; new hires joining the firm; promotions; seminars at which you're speaking or presenting; big court wins and interesting cases; and appointments of lawyers to boards or event chairs, to name just a few things. There's always something to promote.

2. Speak publicly. Take the time to speak on interesting topics to service clubs such as Rotary and Kiwanis and on local news radio programs. Speaking engagement topics can cover any subject that is interesting or that the attorney is passionate about, such as a current event, a fascinating topic from history, or a personal hobby.

3. Attend your local county Bar Association and other industry-related events. Lawyers tend to refer cases to people they know and trust. Be seen and be social among your peers. If they don't see you or hear from you, they won't think of you when it comes time to referring business.

4. Establish yourself to the media as an expert on legal topics. This way, when a newsworthy U.S. Supreme Court ruling comes down and the local paper is seeking an "expert" attorney in the community for analysis, for instance, you are the go-to source. Do this by contacting news editors in advance and forming relationships with them. Similarly, opinion pieces can be written for the *Los Angeles Daily Journal* or other media; once published, they can be reprinted as a marketing tool and linked on your social media sites to further expand your reach.

Jennifer Goddard Combs

5. Blog. Write a regular blog for your firm's website that also can be used on social media. This helps keep your website fresh and interesting, and helps keep you relatable. And, if you don't have a website, create one, and add a blog section as soon as possible. Then keep material on this link current. For blog material, look to your own expertise and to news and legal trade magazines for topics you can write about that are timely.

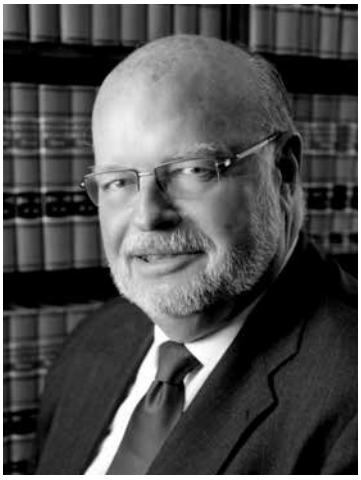
6. Create and send an email newsletter or quarterly e-blast. Keep your name and your firm's news top of mind, with a regular digital newsletter. No need to reinvent the wheel for this; use material from your recent press releases and blog if still timely. If you're keeping up on those, there should be plenty of content to repurpose into an email newsletter. Create a newsletter emailing list that may include current clients, past clients, peers, Bar Association leaders, local elected officials, city managers, local media and others in the legal community whom you wish to reach. And keep expanding the list over time.

Finally, if you're stumped on how to do any of these things and lack media know-how, hire a local professional to help you. Save your expertise for the courtroom. Publicity is the gift that keeps on giving as long as you keep on sharing it! ■

Jennifer Goddard Combs is the owner of The Goddard Company Public Relations located in Carpinteria, California. Any questions, email jennifer@thegoddardcompany.com. Website: www.thegoddardcompany.com.

The Yates Memo and the New Sessions Legacy

By Robert Sanger[1]



Robert Sanger

Every Attorney General of the United States puts her or his stamp on their administration by authoring memos that change policy in the Department of Justice (DOJ) and the United States Attorneys' Offices (USAOs) throughout the country. Sometimes they are stand-alone memos and other times they are amendments to the United States Attorneys' Manual. Some of the memos become famous or infamous and are known by the name of the Attorney General who authored them.

In this month's *Criminal Justice* column, we will look at the Yates memo authored by Sally Yates, Deputy Attorney General of the United States under President Obama entitled, "Individual Accountability for Corporate Wrongdoing." This Yates memo was oriented toward a more proactive prosecution approach to high level people in the business world who had ignored the federal laws thereby creating economic chaos and losses for millions of Americans. Starting in April of this year, Attorney General Jeff Sessions indicated that he will be rethinking that policy. More recently, in September 2017, Deputy Attorney General Rod Rosenstein told a conservative group that the Yates memo was under review. Is it possible that while pursuing a theme of getting tougher on ordinary people charged with federal crimes that there might be a relaxing of enforcement of criminal laws on the business elite? It is too early to tell but we will examine the issues.

Attorney General Memos in Recent History Pertaining to Criminal Law

Memos issued by the Attorney General of the United States are a means by which to set policy for the administration of justice in the federal system. Memos often stand the test of time and remain in effect long after the particular Attorney General issuing the memo has left office. The memos provide direction to the subordinates of the Attorney General in "Main Justice," the DOJ operations centered in Washington, D.C, as well as the federal agencies under the DOJ, including the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Bureau of alcohol, Tobacco, Firearms and Explosives (ATFE), the Office of Justice Planning (OJP), the Bureau of Prisons (BOP), and the United States Marshal's Service, to name a few. In addition, the Attorney General is in charge of the United States Attorneys (USAs) who serve as the principal prosecutors for the federal government.[2] Although separate districts are somewhat autonomous and each USA is the chief law enforcement officer in his or her jurisdiction, the USAs serve under the direction of the Attorney General of the United States. To achieve some consistency from one district to another, the DOJ publishes the United States Attorney Manual, Title 9 of which pertains to Criminal Law.

There have been many memos issued over the years that pertain to criminal law and policies. One that raised concerns about the asserted power of prosecutors was issued by Attorney General Richard Thornburgh on June 8, 1989. It stated that Assistant United States Attorneys were not bound by the Codes of Professional Responsibility of the state to which they were assigned or, for that matter to the ABA Model Rules or any state ethics code. Therefore, he claimed they were allowed to contact people who they knew were represented by counsel. The idea being that it was easier to "turn" people facing serious charges if the AUSA did not have to talk to their lawyers. These otherwise represented individuals could then be persuaded to identify additional targets and to testify for the government against their co-defendants.

After a great deal of public and academic discussion and after a change of administrations, Attorney General Janet Reno on September 26, 1994 watered down, but did not rescind, the Thornburgh memo. Eventually, on October 21, 1998, a federal statute was enacted stating that, "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[3] That was the formal demise of the Thornburgh memo.

Another notable Attorney General memo was that of Eric

Continued on page 19

SBCBA Golf and Tennis Tournaments

A big thank you to all who participated in the Golf & Tennis tournaments and to those that joined us for dinner at the magnificent Sandpiper Golf Club!

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 sharing her outstanding skills in organizing the golf tournament. And a big thank you to our tireless events team, **Joe Billings**, **Stephen Dunkle**, **Jeff Soderborg and Deborah Boswell.** Many thanks also to our ace photographer, **Michael Lyons**.

Thank you to this year's Golf Tournament tee sponsors:

Allen & Kimbell
Sanger, Swysen & Dunkle

And the prizes went to:

GOLF

1st Place: Mike Brelje, Shereef Moharram, Connor Cote, Clark Lammers
2nd Place: Trevor Broesemle, Ed DeCaro, Ronnie Ybarra, Jeff Chambliss
Longest Drive: Clark Lammers
Closest to Pin: Connor Cote

TENNIS

1st place - Jason Ebin
2nd place – Kevin Yacoub
3rd place – Danielle DeSmeth

Sanger, *continued from page 14*

J. Holder of May 10, 2010 in which he announced that the DOJ would be pursuing a "reasoned policy of prosecutorial discretion."[4] That Holder memo was followed by another on August 12, 2013, in which he encouraged federal prosecutors to seek the harshest punishment only for "serious, high-level, or violent drug traffickers" instead of lower-level offenders. The second memo was accompanied by a speech to the ABA that same day where the Attorney General referred to being "smart on crime" as an alternative to the politically popular but inherently unworkable idea of being "tough on crime." The latter translated into the aggressive enforcement of innumerable new laws and of enhancements to old ones that committed people to prison for inordinate amounts of time. Although it promoted the careers of politicians in the minds of the armchair voters, it actually made matters much worse, resulting in per capita levels of incarceration in this country that far exceeded the levels in any other Western country. The damage to communities around the country will take generations to repair, if repair ever gets started.

Is it possible that there might be a relaxing of enforcement of criminal laws on the business elite?

Whatever small progress was made has been negated by Attorney General Sessions' memo issued on May 12, 2017, "repealing" the Holder memo. Sessions' actions were met with harsh criticism.[5] The Holder memo hardly opened the floodgates. It simply allowed and encouraged the Assistant United States Attorneys (AUSAs) to exercise discretion in selection of charges and sentencing to allow for more community based sentencing. Attorney General Session rescinded the Holder memo and reverted to the politically popular, unworkable and mindless "tough on crime" approach. Sessions' memo directed AUSAs to "charge and pursue the most serious, readily provable offense" in all cases. There is no provision for how it will affect doing justice in individual cases, reaching settlements or providing for more space in the already overcrowded prison system.[6]

There seems to be a pattern here. The Republican Attorneys General want to increase the power of the U.S. Attorneys' Offices and encourage them to prosecute crime to the fullest. The Democratic Attorneys General want to temper the power of the U.S. Attorneys' Offices and encourage them to exercise prosecutorial discretion. But, this pattern may not hold. Attorney General Jeff Sessions, while insisting on maximum prosecution and sentencing for ordinary people, may be taking a different approach when it comes to individuals involved in corporate crimes. Time will tell, but here is what is at stake.

The Yates Memo on "Individual Accountability for Corporate Wrongdoing"

On September 9, 2015, Deputy Attorney General Sally Quillian Yates, issued a memo to the heads of the Divisions within Main Justice and to "All United States Attorneys" entitled "Individual Accountability for Corporate Wrongdoing." It begins by saying:

> "Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes--as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.
>
> "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."

Yates in her memo goes on to order that six steps be taken and that Title 9 of the USAM (§§ 28.000 *et seq*.) be amended. In summary, these six steps are:

> "(1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals

as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay."

This is a mixed bag. In this *Criminal Justice* column we have criticized the idea of requiring people in corporate positions or otherwise to denounce other people in their organization in order to avoid draconian repercussions to themselves or their business. It is not only a part of the Yates memo under "Step 1" but it's part of the standards for sentencing of organizations under the United States Sentencing Guidelines and legislation such as The Sarbanes-Oxley Act of 2002.[7] These provisions raise questions about the soundness of requiring people to not only incriminate themselves but to rush forward with incriminating information about co-workers and, in closely held corporations, friends and family.

However, the bulk of the Yates memo is dedicated to establishing civil and criminal responsibility for individuals rather than to allow the corporate "fiction" to absorb liability using money or deferred prosecutions to shield the actual human beings who committed the fraud. That part of it seems an appropriate goal of government, especially in light of the incredible amount of individual fraud perpetrated through corporations leading up the 2009 recession. Except in the cynical world of Washington, D.C., -- particularly as it has been transformed recently – it would seem that an Attorney General who directed AUSAs to "charge and pursue the most serious, readily provable offense" in all cases would be hard pressed as a matter of principle to rescind a memo that says, "the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation."

Earlier this year, Sessions responded to concerns that he might be backing off white-collar in light of his extensive public comments on violent crime and immigration. He said the DOJ would continue "to emphasize the importance" of holding individuals, rather than just companies, accountable for misconduct. But he also said doing so was "not always possible" and that lawyers would take into account companies' cooperation and self-disclosure when making charging decisions.[8] Recently, other trial balloons have been floated at places like the conservative Heritage Foundation where Deputy Attorney General Rod Rosenstein stated that the DOJ was reviewing the Yates memo of September 2015. He said that, "It is under review, and I anticipate that there may be some changes to the policy on corporate prosecutions."[9]

Conclusion

This is not to predict that Attorney General Sessions will rescind this Yates memo of September 2015 in its entirety. That seems unlikely and would require changes in law over which the Attorney General does not have direct control. For instance, to make much change in Step 1, the practice of requiring individuals to incriminate their co-workers, the U.S. Sentencing Guidelines, Sarbanes-Oxley, the USAM and other substantive provisions would also have to be changed. He could modify the DOJ reaction to that by modifying Step 1 of the Yates memo but it might be more symbolic than practical. However, another, softer on corporate criminals, memo would undoubtedly have an effect on the culture of prosecutions of individuals in business contexts by the USAOs throughout the country. This is something to watch in light of the defense of aggressive police tactics, such as "stop-question-and-frisk," and the emphasis on prosecuting "street" crime and immigration. ■

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 and Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law. Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization, and a Director of Death Penalty Focus. Mr. Sanger is also an elected Member of the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS).

ENDNOTES

1 ©Robert M. Sanger.
2 There are 93 United States Attorneys (USAs) who preside over offices staffed by Deputy and Assistant United States Attorneys in the 94 federal districts in the United States (Guam and the Mariana Islands are separate federal districts but share one USA).
3 "Ethical standards for attorneys for the Government," 28 U.S. Code § 530B.
4 The Holder memo, in turn, superseded previous Department guidance on charging and sentencing including the September 22, 2003 memorandum issued by Attorney General John Ashcroft, the July 2, 2004 and January 28, 2005 memoranda issued by Deputy Attorney General James Comey.
5 See, e.g., Kelly Cohen, "*Former Attorney General Eric Holder blasts Sessions' memo as 'dumb on crime,'*" Washington Examiner, May 12, 2017.
6 Sessions rescinded another memo of Deputy Attorney General Yates, one directing that the Bureau of Prisons not renew contracts for private prisons. This seems to be a tacit acknowledgment that he plans on imprisoning more people than the BOP can handle in their own facilities. See, e.g., Ellen Powell, "*Sessions memo: Reversal on private prisons could portend shift on justice, observers say*," Christian Science Monitor (February 24, 2017)
7 Pub.L. 107–204, 116 Stat. 745, (July 30, 2002).
8 Matt Zapotosky, The Washington Post (April 24, 2017).
9 Sarah N. Lynch, "*Justice Department mulls changing corporate prosecution policy*," Reuters, (September 14, 2017).

Review of ABA Research on Mediator Techniques

By Penny Clemmons, Ph.D., Esq.

In April of this year the Report of the ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques was released. It is lengthy but I thought our readers would find a synopsis of their findings useful in practice. The Committee reviewed 47 studies on mediation and use of third party neutrals. The purpose was to review empirical data that would inform both mediators which actions were helpful and which were detrimental to their clients and the outcome. It is important to note that most of the studies involved court-related mediation with a single mediator.

The Task Force identified six categories of mediator actions:

- Pressing or Directive Actions
- Offering Recommendations, Suggestions, Evaluations, or Opinions.
- Eliciting Disputants' Suggestions or Solutions.
- Addressing Disputants' Emotions, Relationships, or Hostility.
- Using Pre-Mediation Caucuses
- Using Caucuses During Mediation

Psychology research on the success of psychotherapy can be extrapolated and applied to mediator success. Studies show that regardless of a therapist's chosen theoretical orientation, treatment outcome is more significantly linked to the relationship between the client and the therapist rather than the therapist's theoretical orientation.[1] It is the relationship which is fundamental to the outcome. The results of the Task Force will show this is also true in mediation.

Let's examine each of these actions and how we apply them as mediators and also, how we as attorneys feel about them. When the mediator knows the attorneys, it is easier to assess the best application of some of these techniques to specific individuals. There are attorneys who will bristle at some of these actions and others who will embrace them depending on their own practice style. It is more difficult to know what will work better with the unknown disputants.

Pressing or Directive Actions

Penny Clemmons

"Pressing or directive actions generally either increased settlement or had no effect, but in some studies these actions were associated with reduced settlement, lower joint goal achievement**, and more post-mediation adversarial motions being filed (**emphasis added)."[2]

While sometimes these actions have no impact on the process, the take away from this finding is that as mediators we obviously do not want our actions to foster litigation and need to examine how our behavior may have adverse effects which leads us to the other actions.

Offering Recommendations, Suggestions, Evaluations, or Opinions

"Recommending a particular settlement, suggesting settlement options, or offering evaluations or opinions had mixed effects on disputants' relationships and perceptions of mediation – positive, negative, and no effect. With regard to attorneys' perceptions of mediation, these actions generally either had no effect or were associated with more favorable views, with the latter seen especially in Early Neutral Evaluation."[3]

When I read this finding, I was immediately reminded of the wording on our CMADRESS description:

> "The facilitator will conduct a frank discussion about the nature of the case and the range of appropriate dispute resolution alternatives, and the costs attendant to those alternatives in contrast to the cost of continued litigation."[4] The creators of the program were prescient in their belief of the potential positive impact on early intervention and the outcome has been proven here in Santa Barbara.

Eliciting Disputants' Suggestions or Solutions

"Eliciting disputants' suggestions or solutions generally increased settlement."

"Thus, eliciting disputants' suggestions or solutions has the potential to increase settlement and to enhance disputants' perceptions and relationships, with no reported negative effects."[5]

Disputants need to be part of the solution and not the problem. If they feel they are stakeholders in the process, they will be more amicable to settlement and more reasonable. In the past year, I had disputants who had been very good friends, neighbors or relatives. In three instances, they asked if they could meet alone without their counsel or me present. To their attorneys' credit, they agreed. All three cases settled after the disputant meetings. In one case they went out to dinner afterwards to catch up on what had been happening in their lives. While this is unusual, particularly in family disputes, business disputes, and family law, it does speak to focus on the disputants' needs. Sometimes, they are looking for a way to save face and resolve the issue without looking weak or too passive.

Addressing Disputants' Emotions, Relationships, or Hostility

"Giving more attention to disputants' emotions, relationships, or sources of conflict generally either increased or had no effect on settlement, and either reduced or did not affect post-mediation court actions."[6]

During my first month of law school, I was shocked that no one asked me how I felt. As a clinical psychologist, I had spent years "getting in touch with my feelings" through coursework, clinical supervision, and psychotherapy. It was a preeminent goal of training. It slowly dawned on me that analysis and logic trumped emotions in the discipline of law and I had to do some significant regrouping. But in mediation, that training has been invaluable, in particular in dealing with disputants. In a personal injury case that was headed to trial on the fast track, it was obvious to the psychologist in me that the disputant's emotions were key to settlement. There was a breakthrough when I asked her if I could see the scars on her leg from the auto accident and resulting surgery. She rolled up her pant leg and showed me a long scar complete with keloids and she began to cry. I asked her why she was crying and she said no one in the process had ever asked her to see her leg and she had felt she was an object and not a person. Later that day, we were able to settle the case because she felt she had been seen and no longer needed to have her day in court in order to be heard and seen.

Working to Build Rapport and Trust, Expressing Empathy, Structuring the Agenda, or Other "Process" Actions

"Working to build rapport and trust with and between the disputants, expressing empathy, praising the disputants, or structuring the issues and agenda generally either increased settlement or had no effect on settlement."[7] This action builds on the previous but I want to emphasize the concept of structuring the agenda. Borrowing another concept from psychology, structure binds anxiety. When the litigator organizes his trial strategy, anxiety diminishes because of the structure. It's the same with the To Do Lists we all use. Once we commit to paper all the things we need to do, we can organize and prioritize and thus feel relief. By setting out a clear agenda with all the participants at the beginning of the mediation, some of the negative energy is dissipated.

Using Pre-Mediation Caucuses

"The effects of pre-mediation caucuses depended on their purpose. When used to establish trust and build a relationship with the parties, pre-mediation caucuses increased settlement and reduced disputants' post-mediation conflict."[8]

A pre-caucus is a meeting between the mediator and one side of the mediation prior to the joint meeting. The critique of this technique is the potential perception that the mediator will favor one of the parties. This is especially true in family law where it is imperative to preserve a perception of neutrality. I think the question the mediator needs to ask is whether or not in a particular mediation this technique would be of value or can the goals be accomplished at the beginning of the mediation?

Using Caucuses During Mediation

"Using caucuses during mediation generally increased settlement in labor-management disputes, but had no effect on settlement in other types of disputes, regardless of whether the goal was to establish trust or discuss settlement proposals."[9] In other words, this will not affect most of us.

Conclusion

The mediator's actions that have more potential for positive outcome focus on the disputant's suggestions, giving more attention to the disputants' psychological needs, reducing anxiety, establishing trust and rapport, and structure. Recognizing the humanity of everyone who is involved in the mediation process is the foundation of positive outcomes. ■

References:

1. Lambert, M. J., & Barley, D. E. (2001). Research summary on the therapeutic relationship and psychotherapy outcome. *Psychotherapy: Theory, Research, Practice, Training, 38*(4), 357-361.
2. ABA Section of Dispute Resolution report of the task force on research on mediator techniques (2017) p. 2 https://www.americanbar.org/content/dam/aba/.../med_techniques_tf_report.pdf

Continued on page 29

Verdicts & Decisions

Greg Young Publishing, Inc. v Zazzle, Inc.

US DISTRICT COURT, CENTRAL DISTRICT OF CA, WESTERN DIVISION

CASE NUMBER:	2:16-cv-04587 (SVW)
TYPE OF CASE:	Copyright Infringement
TYPE OF PROCEEDING:	Jury Trial
PRESIDING JUDGE:	Hon. Stephen V. Wilson
LENGTH OF TRIAL:	Two Days
LENGTH OF DELIBERATIONS:	Two Hours
DATE OF VERDICT/DECISION:	August 9, 2017
PLAINTIFF:	Greg Young Publishing, Inc.
PLAINTIFF'S COUNSEL:	Jeffrey Young, Jacob Ainciart, Darren Quinn, and Jason Aquilino
DEFENDANT:	Zazzle Inc.
DEFENDANT'S COUNSEL:	Timothy J. Halloran and Keith G. Adams of Murphy Pearson Bradley & Feeney
EXPERTS:	N/A

OVERVIEW OF CASE: At issue was defendant Zazzle Inc.'s ("Defendant's") alleged copyright infringement of thirty-five (35) registered copyrighted works owned by plaintiff Greg Young Publishing, Inc. ("Plaintiff"), following an earlier assignment of rights to Plaintiff by artist Kerne Erickson.

FACTS AND CONTENTIONS: Plaintiff is a California based art publisher representing several artists. Plaintiff commissioned artist Kerne Erickson to create a series of retro travel themed posters. Mr. Erickson transferred the copyrights to the artwork to Plaintiff, whose business includes licensing the artwork for printing onto merchandise. Plaintiff also represented Scott Westmoreland.

Defendant is a print-on-demand e-commerce company, based in Redwood City, California, which offers consumers the ability to purchase products with nearly any design the customer chooses from Defendant's website. Third-parties, such as artists, designers, etc. upload images (e.g., artwork, photographs, drawings, etc.) to virtual stores maintained on Defendant's website where they offer the images for sale on their choice of merchandise (e.g., clothing, calendars, mouse pads, stamps, posters, stationery, coffee mugs, postcards, tote bags, etc.), to be printed once a customer orders it.

At trial, Plaintiff presented evidence of its copyrights, its notices to Defendant advising of the infringements, and of Defendant's manufacture and sale of over 2,200 products infringing Plaintiff's copyright, since 2013.

Enacted in 1996, the Digital Millennium Copyright Act (DMCA)—through its safe harbor provisions—has long provided a protection for companies allowing users to upload infringing materials, which the company then prints or manufactures for sale to customers. The safe harbor defense of the DMCA states, among other provisions, that "[a] service provider shall not be liable for…infringement of copyright," for information uploaded by users and stored on the service provider's system. (17 U.S.C. 512(c)(1).)

These protections were available to Defendant with respect to infringing images that appeared on its website. However, on motion for summary judgment prior to trial, the Court found that the DMCA's safe harbor defense—under 17 U.S.C.

512(c)—was inapplicable to Defendant's manufacture and sale of physical products bearing copyright protected designs. The Court found that because Defendant had control over the infringement—as it was manufacturing the infringing products, and because it financially benefitted from its infringing manufacture and sale—the DMCA safe harbor did not apply. The Court concluded that "Zazzle had the right and ability to control the types of products it produced," and thus was ineligible for protection under 17 U.S.C. 512(c), as to such products. (*Greg Young Publishing, Inc. v. Zazzle, Inc.*, 2017 U.S. Dist. LEXIS 100268 (C.D. Cal. May 1, 2017).) However, the Court expressly noted in its ruling that this finding "does not preclude Zazzle from invoking § 512(c) with respect to images that were displayed on its website but never printed onto physical products." (Id.) There were four such products, and Plaintiff elected not to pursue at jury trial the claims of copyright infringement for those four "display-only" images. In addition, the Court ruled that the Plaintiff did not have standing to pursue claims on behalf of Mr. Westmoreland.

SUMMARY OF CLAIMED DAMAGES: Plaintiff sought statutory damages under 17 U.S.C. 504, in lieu of Defendant's profits and Plaintiff's actual damages.

RESULT: The eight person jury unanimously found in favor of Plaintiff.

The jury awarded statutory damages for each of the thirty-five (35) individual infringements ranging between $200 and $66,800 per infringement, awarding a total of $460,800.00 in damages.

Plaintiff intends to file a motion for attorney's fees and costs under 17 U.S.C. 505, which has the potential to increase the judgment by an additional $400,000.00.

Plaintiff has filed a motion for permanent injunctive relief and impoundment of infringing images to address Defendant's continuing violations of Plaintiff's copyrights, under 17 U.S.C. 502 and 503. Plaintiff's motion raises issues about Defendant using reverse image searching in the future to identify and stop infringement before it happens. Reverse image search technology creates a digital fingerprint.

Defendant has filed a motion for judgment as a matter of law under Federal Rules of Civil Procedure, Rules 50 and 59, challenging the jury's award of damages exceeding $30,000 for five different works of art, which demonstrates the jury's belief that Defendant's infringement of those five works was willful under 17 U.S.C. 503. ■

Motions

Tara Messing Joins Environmental Defense Center

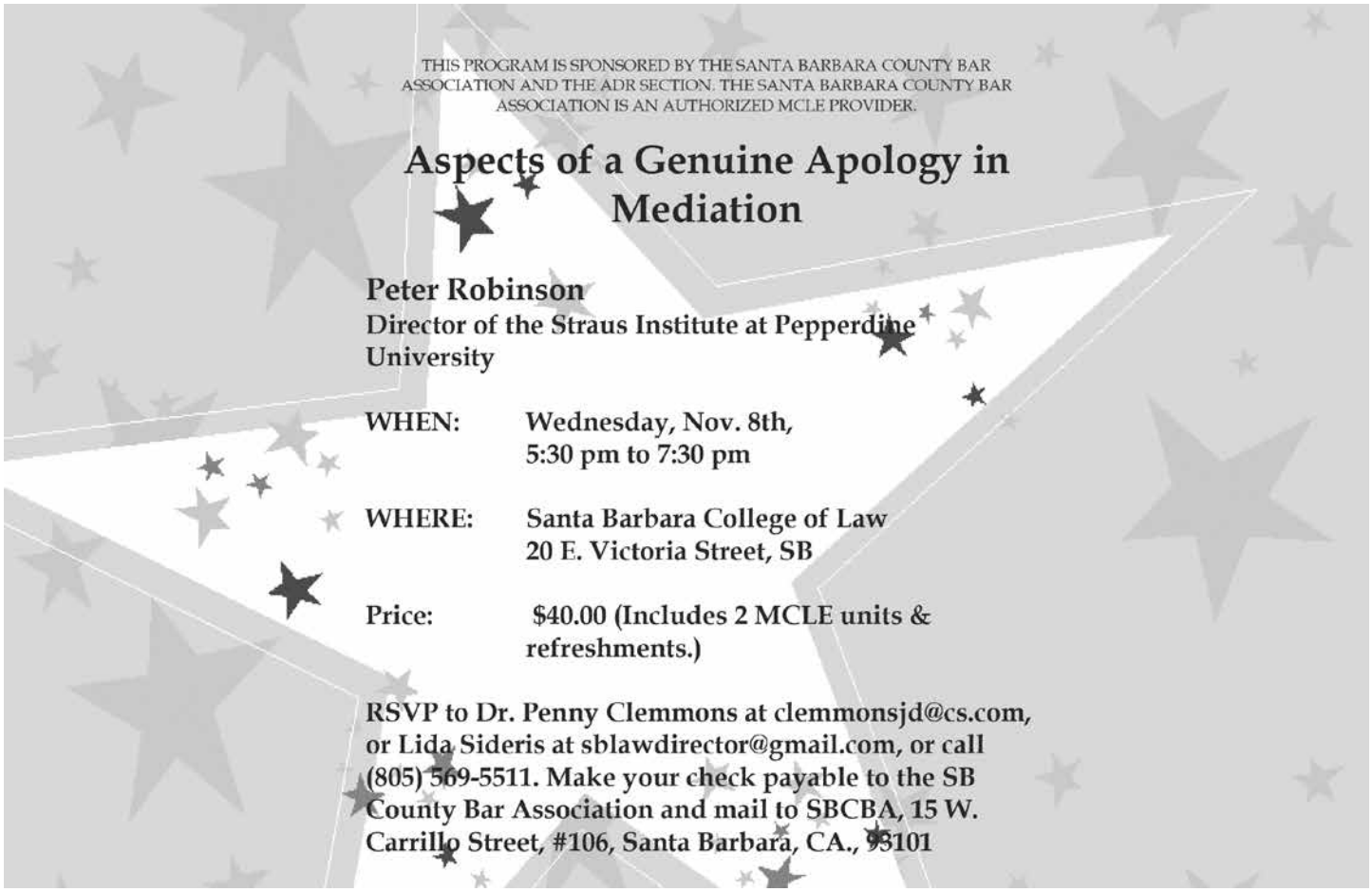
The Environmental Defense Center ("EDC") is pleased to announce that Tara Messing has joined our team as a Staff Attorney. Prior to working for EDC, Ms. Messing served as an Associate Attorney at McCarthy & Kroes, working on business litigation, contract law, products liability, and personal injury law, and before that at Paladin Law Group, working on environmental remediation cases.

Ms. Messing graduated from the University of Maryland Francis King Carey School of Law, where she participated on the Stetson International Environmental Moot Court Team, Maryland State Bar Association Environmental Law Section, Maryland Environmental Law Society, and Maryland Carey Service Corps. In addition to serving as a law clerk at EDC, Ms. Messing clerked with the U.S. Department of Justice Environment and Natural Resources Division and the U.S. EPA Office of Enforcement and Compliance Assurance.

Ms. Messing previously worked for EDC as a law clerk in 2014, and moved back to Santa Barbara after passing the California bar in 2015. She immediately immersed herself in the local legal community, serving as a Board member for Santa Barbara Women Lawyers Foundation and Get Oil Out!, chairing the Santa Barbara Women Lawyers' Food From The Bar Committee, and participating in the William L. Gordon Inn of Court program.

"Tara Messing brings a strong commitment to environmental law, and a passion for the issues facing our community," said Linda Krop, Chief Counsel of EDC. Ms. Krop noted that Ms.

Messing's background and knowledge will help EDC serve our community in a variety of cases, ranging from protecting air and water quality, conserving open spaces and wildlife, and combatting climate change. Most immediately, Ms. Messing will be working to protect threatened and endangered species from the risks and impacts posed by enhanced onshore oil and gas development projects, especially those utilizing cyclic steam injection. ■



The SBCBA Criminal Law Section Presents:

Marijuana Zeitgeist: Fear and Loathing at the DOJ

When

December 13, 2017, at noon

Where

Santa Barbara College of Law – 20 E. Victoria Street

MCLE

One Hour of General MCLE credit (pending)

Speakers

Jay Leiderman, Criminal Law Specialist

About the Event

Jay Leiderman is the owner of the Law Offices of Jay Leiderman, PC a Ventura, California based law firm. Mr. Leiderman advises medical marijuana collectives, teaching them the law, writing up their contracts and articles of association, and helping them to comply with local and state laws. He co-authored a book on the legal defense of California medical marijuana crimes, which was published by NORML, the National Organization for the Reform of Marijuana Laws. Mr. Leiderman has been a Certified Criminal Law Specialist (California Bar Board of Legal Specialization) since 2006. Lawyer Monthly Magazine named him the 2016 Criminal Defense Attorney of the Year for the United States. The *Atlantic* magazine called Mr. Leiderman the "Hacktivist's Advocate" for his work defending hacker-activists accused of computer crimes, or so-called ("Hacktivism") especially people associated with Anonymous. He defended journalist Matthew Keys from accusations that he had conspired with hackers to attack the *Los Angeles Times* and was the defense counsel in many other noteworthy cases.

Price

$10.00. Free for public defenders, government attorneys and legal aid staff. Please make checks payable to:
Santa Barbara County Bar Association
15 West Carrillo Street, Suite 106
Santa Barbara, CA 93101

Lunch

Brown bag lunch

RSVP Deadline

December 6, 2017

Contact Information/R.S.V.P.

Jeff Chambliss, jeff@chamblisslegal.com

Santa Barbara County Bar Association

You are invited to the 2017 Annual Dinner

Friday, November 17th starting at 5:30 pm, dinner at 6:30
At the Kimpton Canary Hotel

Featuring:

- **CA State Bar President James P. Fox**

Awards:

- **John T. Rickard Judicial Service Award to Judge Clifford R. Anderson III**
- **Pro Bono Award to Allan S. Morton**
- **Frank Crandall Community Service Award to Mullen & Henzell LLP**

Ticket Type	Cost
Members	$105
Non-members	$115
Table of 10 (Members)	$850
Table of 10 (Non-members)	$950
New Attorneys /Law Students (0-3 years)	$45

Call SBCBA at (805)569-5511 for more information.
Seating is limited

Sponsorship opportunities available! Please call the SBCBA at (805)569-5511 for more information.

Reservation Form

Name:_____ Ticket Type:_____ Total:_____
Name:_____ Ticket Type:_____ Total:_____

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

The SBCBA Employment Law Section Presents:

Solving the Misclassification Puzzle: Are Your Workers Contractors, Employees, Exempt or Non-Exempt? Be Sure You're Doing It Right!

When

November 9, 2017, 12:00-1:00 p.m.

Where

Santa Barbara College of Law

MCLE

1 Hour (General)

Speaker(s)

Alex W. Craigie, The Law Offices of Alex W. Craigie
Alex is an AV-Preeminent rated trial attorney recognized for bringing an innovative and cost-effective approach to helping small and mid-sized California companies prevent, address and resolve employment disputes. He counsels employers and routinely defends claims of harassment, discrimination and retaliation, as well as misclassification, wage-hour, rest and meal period claims.

About the Event

No topic in employment law creates more confusion than worker classification. On the one hand, there is the question whether a worker can be legitimately treated as an "independent contractor," thus avoiding payroll laws and taxes. Equally vexing to many employers is the question whether an employee is "exempt" or "non-exempt." In both instances, mistakes in classification can be costly, as illustrated by the frequent seven, eight and even nine figure settlements and verdicts covered in the media.
This one hour MCLE presentation will demystify the topic of classification. Attendees will be given the tools necessary to understand when a worker can properly be classified as an independent contractor, and whether an employee is exempt or nonexempt.
Who should attend? Anyone who faces, or whose clients face, these questions.

Price

$20 SBCA Members/$25 Nonmembers

Contact Information/R.S.V.P.

Please RSVP by November 2nd to alex@craigielawfirm.com or (805) 845-1752. Please send checks to:
Alex Craigie
The Law Offices of Alex W. Craigie
791 Via Manana
Santa Barbara, CA 93108

The SBCBA Estate Planning/Probate Section Presents:

Built-in Gain Tax Liability, the IRS, and What You Need to Know

When

Wednesday, November 8th, 12:15 PM

Where

Santa Barbara College of Law, Room 2
20 East Victoria Street
Santa Barbara, CA 93101

MCLE

1 hour general credit

Speaker

James Lisi, Santa Barbara Valuations

About the Event

Mr. Lisi will discuss the two value issues surrounding minority interests in the asset holding company- BIG tax and Discount for Lack of Marketability (DLOM). He will work a simple example showing that 60% reduction is often available between the BIGL and DLOM, then dive into the exit at valuation date versus future exit issues that have been litigated by the Commissioner. The missing elements of the Tax Court's current analysis will then be presented, and proper future exit analysis parameters explained. This first public presentation of future exit analysis methodology under the Fair Market Value standard will reveal how to defend against the IRS tactics that demand a value reduction in BIGL.

Lunch

Lunch will be provided from South Coast Deli

Price

$25 for SBCBA Members, $30 for non-members

Contact Information/R.S.V.P.

Connor@jfcotelaw.com

Steinfeld and Nwosu, *continued from page 12*

9 Gov. Code, § 65852.2(a)(3).
10 http://sbcountyplanning.org/PDF/boards/MPC/05-17-2017/16ORD-00000-00015/Staff%20Presentation.pdf
11 The proposed laws are Senate Bill 229 (Wieckowski) and Assembly Bill 494 (Bloom). These laws aim to clarify ADU parking requirements, connection fees, and maximum unit size. https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB229; https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml? bill_id=201720180AB494.
12 Noozhawk, "Santa Barbara Inundated With Granny Unit Applications as City Develops Local Regulations" https://www.noozhawk.com/article/santa_barbara_inundated_granny_unit_applications
13 Noozhawk, "Santa Barbara Inundated With Granny Unit Applications as City Develops Local Regulations"
14 Noozhawk, "Santa Barbara Inundated With Granny Unit Applications as City Develops Local Regulations"

Amy Steinfeld is a Shareholder and Wendy Nwosu is an Associate at the law firm of Brownstein Hyatt Farber Schreck. They can be reached at www.bhfs.com .

Clemmons, *continued from page 22*

3 ibid., p. 3
4 cmadress program overview - Santa Barbara CADRe www.sbcadre.org/cadre/docs/cmadress.pdf
5 ABA, p.3
6 ibid., p.3
7 ibid., p.3
8 ibid., p.3
9 ibid., p.3

Penny is the Head of the County Bar Section on Alternative Dispute Resolution, a licensed clinical psychologist, CMADRESS mediator, volunteer for the Mandatory Settlement and Unlawful Detainer Calendars, mediator in private practice, trial consultant and is Certified as a Specialist in Family Law by the State Bar of California. She can be reached at clemmonsjd@cs.com.

Santa Barbara County Bar Association

SAVE THE DATE

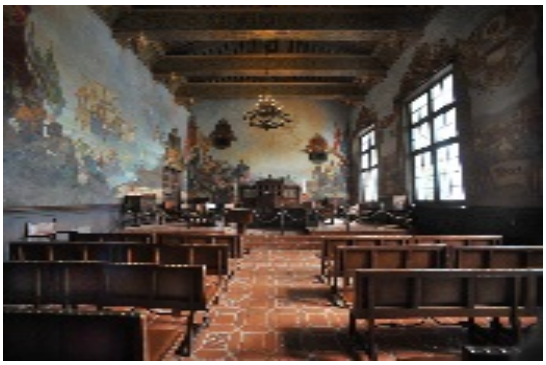
Saturday, January 20, 2018

Santa Barbara County Bar Association
Annual Bench and Bar Conference

Climate Change, Sea Level Rise and the Law: How Will We Preserve the California Coast?

Speakers and panelists

- **Hon. Serge Dedina**
  Conservationist and Mayor of
  Imperial Beach, CA
- **Michael McCormick, AICP**
  Planner and Advisor
  Climate and Land Use Policy
  Governor's Office of Planning and Research
- **Aeron Arlin Genet**
  Director
  SB County Air Pollution Control District



at the Santa Barbara Courthouse
Mural Room

Breakfast and lunch by Jill's Place!
Come on down!

MCLE Credits Available!

Presentations by:

Hon. Frank J. Ochoa (Ret.)
Andrew Dieden, lawyer, author, speaker
Francine Tone, lawyer, author
Distinguished panel of SB County Judges

2017 SBCBA SECTION HEADS

Alternative Dispute Resolution
Dr. Penny Clemmons 687-9901
penny clemmonsjd@cs.com

Bench & Bar Relations:
Stephen Dunkle 962-4887
sdunkle@sangerswysen.com

Civil Litigation
Mark Coffin 248-7118
mtc@markcoffinlaw.com

Criminal
Catherine Swysen 962-4887
cswysen@sangerswysen.com

Debtor/Creditor
Carissa Horowitz 708-6653
cnhorowitz@yahoo.com

Employment Law
Alex Craigie 845-1752
alex@craigielawfirm.com

Estate Planning/Probate
Connor Cote 966-1204
connor@jfcotelaw.com

Family Law
Matthew Long 254-4878
matthewjlong@santabarbaradivorcelaw.com

In House Counsel/Corporate Law
Betty L. Jeppesen 963-9958
jeppesenlaw@gmail.com

Intellectual Property
Christine Kopitzke 845-3434
ckopitzke@socalip.com

Mandatory Fee Arbitration
Eric Berg 708-0748
eric@berglawgroup.com
Michael Brelje 965-7746
gmb@grokenberger.com
Naomi Dewey 966-7422
ndewey@BFASlaw.com

Real Property/Land Use
Josh Rabinowitz 963-0755
jrabinowitz@fmam.com
Bret Stone 898-9700
bstone@paladinlaw.com

Taxation
Peter Muzinich 966-2440
pmuzinich@gmail.com
Cindy Brittain 695-7315
Cdb11@ntrs.com

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

Classifieds

Estate Planning Lawyer Sought

Top Santa Barbara law firm seeks an estate planning lawyer with at least seven years of experience to add to its established practice. A candidate should be at or near the partner or of counsel level with a significant client base of his or her own. Goal is synergy with existing practice with increased compensation for the candidate. Qualified applicants should submit resumes via e-mail to sblawdirector@gmail.com.

THE OTHER BAR NOTICE

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.

Santa Barbara Lawyer
The Santa Barbara County Bar Association
15 W. Carrillo St., Suite 106
Santa Barbara, CA 93101

Change Service Requested

PRSRT STD
U.S. Postage Paid
Santa Barbara, CA
Permit #734