

# *Santa Barbara* Lawyer

Official Publication of the Santa Barbara County Bar Association  
July 2018 • Issue 550





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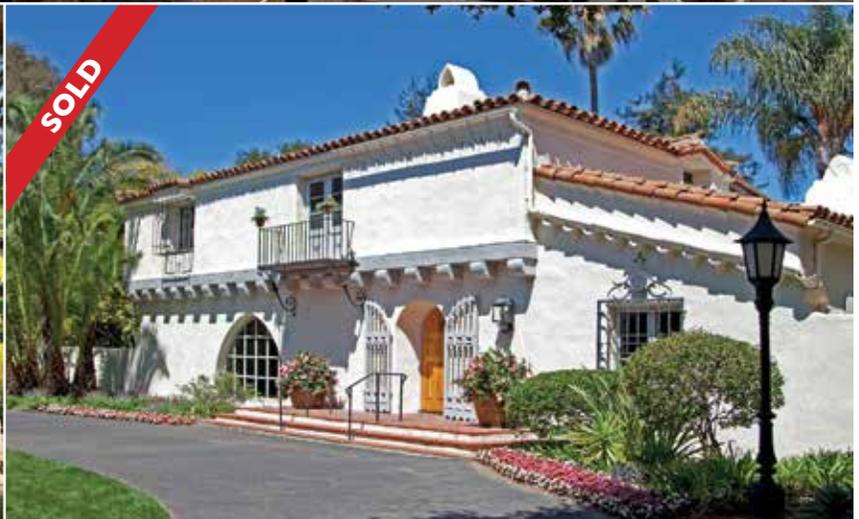
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# Santa Barbara Lawyer

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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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Photo by Mike Lyons



*Enjoying the Past Presidents' Luncheon are: Marilyn Anticouni, Lynn Goebel, Judge Monica Marlow (ret.), Judge Pauline Maxwell, Judge Donna Geck, and Jessica Anticouni*

# Judge Rogelio Flores Retires After 31 Years on the Bench

BY JEFF CHAMBLISS

**A**fter 31 years on the bench, longtime North County Superior Court Judge Rogelio Flores hung up his robe for good on Friday, May 18, 2018, as he and a Mariachi Band serenaded the over 400 people who attended his retirement party at the Abel Maldonado Youth Center in Santa Maria.

During those 31 years, Judge Flores presided over nine different courtrooms, 29 years in Santa Maria and two years in Lompoc, where he handled many assignments, including drug offenses, mental health issues, domestic violence, and felony trials.

“It’s been an amazing ride, the last 31 years. I don’t regret anything,” he said. “But I’ll be 65 in June, and I just thought last year that maybe it’s finally time to say goodbye.”

Judge Flores was born in south Texas in June 1953. The family moved to the Central Coast in 1961 when Judge Flores was eight-years-old. His father was a carpenter by trade, and his mother, a homemaker. Both of his parents were educated only to the elementary school level in Mexico before they immigrated to the United States, but worked hard and raised six children together, all of whom established successful careers and obtained postgraduate degrees.

“My family history is the definition of the American dream,” Judge Flores said. “My younger brother is a doctor, my sister is a schoolteacher, my older brother is a librarian, and I, myself, am a judge.” Judge Flores also has two stepbrothers, both of whom are Vietnam veterans who now live in San Antonio, Texas.

Judge Flores grew up in the Nipomo Mesa area. He first became interested in the law when he was in high school, at the same time his father became involved with the Cesar Chavez United Farm Workers’ movement. “I met Latino attorneys who spoke Spanish and worked for the California Rural Legal Assistance, and at that time, I never knew that lawyers could look like me,” Flores said. “They showed me that I, too, could do this.”

Judge Flores graduated from Arroyo Grande High School in 1971 and went to college at UCLA, where he majored

in political science. He met his wife Arleen in 1972, and they married on August 7, 1976. He earned his law degree at UCLA in 1979. He was admitted to the bar later that year at age 26 before starting his career as a legal aid attorney in Los Angeles.

When his oldest son, Rogelio Jr., was born in 1980, Judge Flores brought his family back to the Central Coast, where he ran his private practice as a criminal defense attorney for eight years before joining the Office of the Santa Barbara County Public Defender. In 1987, at just 33-years-old, Judge Flores began his long term on the Bench, when he was appointed as the first Court Commissioner for the North Santa Barbara County Municipal Court. He spent half of his time presiding over traffic violations and small claims, and the other half as a research attorney.

In 1997, Judge Flores was appointed as a Judge on the Municipal Court Bench, then one year later, he took the Bench for the Santa Barbara County Superior Court.

His stepbrothers’ military experiences inspired Judge Flores to help organize the first Veterans’ Treatment Court in Santa Barbara County. He started it in Santa Maria in 2011 before starting another in Lompoc in 2016. He also presided over the Substance Abuse Treatment Court for 12 years before shifting to Department 7. A huge champion for collaborative courts, Judge Flores also served on the Collaborative Justice Courts Advisory Committees for the Judicial Council of California. He has traveled to different countries over the last decade such as Spain, Argentina, Chile, and Ecuador to give lectures about drug courts.

“I knew I wanted to help people with their struggles,” Judge Flores said. “As lawyers or judges, you have that power to affect change in a positive way.” He continued, “As a criminal defense attorney, I really wanted people to have a fair shot, to have their voice heard. I always kept that mantra, even more so after I became a judge ... it never left me.”

Judge Flores describes himself as a “fair but firm judge,” and at the same time, everyone’s caring, fun uncle while wielding the gavel. “I can be nice, and I believe in second chances, but don’t mess with me,” he noted. “I’m not to be lied to.” He doles out advice, not just to defendants who



Jeff Chambliss

are on the calendar, but also to young lawyers after trial on the best way to go about their practice. "I care about everyone in my courtroom and want them to succeed," he said. "These lawyers may very well one day become judges as well."

Judge Flores said he doesn't see his courtroom as a colorless, soulless environment in which to punish people, but rather a place to heal people and give them a chance to turn their lives around. Everyone has a life story behind their case, and Judge Flores has heard thousands during his time as judge -- from drug addicts, the mentally ill, alcoholics, and post-traumatic stress-disorder-afflicted veterans. Keeping their stories in mind, Judge Flores actively pursued a positive change in the justice system to emphasize rehabilitation over incarceration. "That's what the justice system should be like," he said. "We should proactively be improving lives. When you witness people change over time after getting clean, it just makes you want to go back to work the next day and call that next case because you can't wait to heal another person again."

Now-retired Judge Flores plans to stay busy -- carpentering, going backpacking/hiking, playing music, and writing a book. His book will focus on the cases over which he has presided during his legal career, including his experiences with collaborative courts, in hopes of bringing about more positive change for rehabilitation in the justice system.

This is not the end of the road for Judge Flores in the courthouse, however. Sometimes, he said, he will dust off his robe and put it back on to fill in for other judges when they are on vacation. "I'll still be busy, but I'll be here whenever I'm needed," Flores said. "I've always wanted to be a lawyer and a judge, and I can't imagine doing anything else. I'm convinced being a public servant involves a real service to the community -- I've always loved helping people and I hope I did that as a judge," he added.

"I want to thank everyone I met during my career in Santa Maria and Lompoc for giving me the opportunity to serve alongside them." ■

*Jeff Chambliss is the current President of the Santa Barbara County Bar Association. He is in private practice in Santa Barbara, San Luis Obispo, and Ventura Counties focusing on criminal defense after having left the Santa Barbara County Public Defender's Office in 2017 as a Chief Trial Deputy. The author had the pleasure of working in the Courtroom of Judge Flores, then known as "The Commish," in 1991 in Santa Maria and has appeared before him numerous times since then.*



Santa Barbara  
County Bar  
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## GRANT REQUESTS

The Santa Barbara County Bar Association provides grants to projects that further its Mission Statement (please see page 4). Priority is given to requests where the funds will be used for the benefit of SBCBA members or for the benefit of individuals within Santa Barbara County.

Requests for grants shall be made in writing addressed to the SBCBA (15 W. Carrillo Street, #106, Santa Barbara CA, 93101) and include the following information:

Name of Requestor  
Total Amount of Request  
Reason for Request

Description of exactly how the requested funds will be used and whether said request is time-sensitive.

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# Local Lawyer Lore

BY L. LAWYER

Ready for the “reveal” from last month’s reprise of the Local Lawyer Lore guessing game about our local legal community? As promised, on the facing page you will see: the original headshots from the 1976-1977 Attorney Directory for nine local lawyers; the addition of the employment and personal information for each as it appeared in the 1976-1977 directory; and finally, a headshot of each from the 2017-2018 Attorney Directory.

The winning guess, selected from all those submitted, not surprisingly was from another local attorney featured in both directories. Given the precision of his winning answer, coupled with his “style points supplement” (e.g., a reference to Judge Adams’ gig as a singer with the Wayfarers), we’re taking the unprecedented step of including a “then” and “now” photo of our winner, John Rydell.

Please note that two of our “Then and Now” featured attorneys, Judge Tom Anderle and Susan Petrovich, have argued before the California Supreme Court, and thus should have been featured in this column in the September 2015 issue of *Santa Barbara Lawyer* presenting local attorneys who have appeared before the California Supreme Court.

Stay tuned for future columns and feel free to submit column ideas to [LocalLawyerLore@gmail.com](mailto:LocalLawyerLore@gmail.com). Repeated below is a P.S. from an earlier column soliciting information for a possible “Epic Practical Jokes . . . Performed by and on Local Attorneys” column. Finally, please note that amounts received by the winner of the Local Lawyer Lore competition are taxable in accordance with Internal Revenue Code Section 74.

P.S. A potential topic for a future column is “Epic Practical Jokes . . . Performed by and on Local Attorneys.” If you were the perpetrator or the “victim” of a local lawyer practical joke you consider worthy of consideration for a future column, please send an email with your name and a brief description of the joke, the attorney perpetrator, and the attorney “victim” to [LocalLawyerLore@gmail.com](mailto:LocalLawyerLore@gmail.com). ■

## THE WINNER



**John R. Rydell II**  
*Griffith & Thornburgh*

## THEN (1976–1977) and NOW (2017–2018)



**THOMAS R. ADAMS, Jr.**  
*Haws, Wells & Adams*



**Hon. Thomas R. Adams Jr.**  
*Superior Court Judge*



**THOMAS P. ANDERLE**  
*Goux, Romasanta & Anderle*



**Hon. Thomas Anderle**  
*Superior Court Judge*

THEN (1976–1977)  
and  
NOW (2017–2018)



**L. DONALD BODEN**  
Griffith & Thornburgh



**L. Donald Boden**  
*Griffith & Thornburgh, LLP*



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**Michael Hall Gray**  
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*Please submit jokes for my future  
column, "Epic Practical Jokes . . .  
Performed by and on Local Attorneys,"  
to [LocalLawyerLore@gmail.com](mailto:LocalLawyerLore@gmail.com)*

# From a Judge's Secretary's Perspective

BY MARILYN METZNER

1. Many *ex partes* are sought, and then taken off calendar at the last minute, because counsel has not received a response from opposing counsel to a request for a continuance (or other request). Usually the request for an *ex parte* comes days after the call was made to resolve the issue. We always ask if counsel has tried to resolve it before setting the *ex parte* – as our rules (local and State) require that *ex partes* are “for dire emergencies” and set only after efforts to resolve have been made. Lacking a response, setting counsel has no alternative but to seek *ex parte* relief.

2. Counsel should know by now that Judges do not hear *ex partes* on their “Calendar day.”

3. Sometimes counsel relies on the fact that no *ex parte* documents were filed to conclude that, therefore, the *ex parte* will not be going forward. This does not allow for that reserved time to be made available to someone else, as we do not find out in time that there will be no *ex parte* in the scheduled case. Please take your reservation of *ex parte* time OFF CALENDAR when the issues are resolved.

4. The Judicial Council form “Case Management Statement” shows a place for counsel’s email address at the top and again on Page 2, Paragraph 8. It is almost never filled in, and we must call counsel to get it. All counsel should fill in that space.

5. We have quite a number of cases, especially family law cases, in which counsel has not filed a Substitution of Attorney form. Although counsel may have filed documents/motions/etc. in the case, that counsel does not appear as attorney of record in the Court’s Odyssey program without a filed Substitution form. Whether coming in for previous counsel, or for a party *in pro per*, a Substitution is necessary to be put in Court records as attorney of record.

6. The Court’s mailing system is pretty automatic. If you are not shown as attorney of record, you will not receive



Ben Feld, Marilyn Metzner, Rhonda Henderson

necessary notices. If you do not update your mailing address if changed, the Court system will also automatically mail to your previous address, however long ago it was your address. The fact that you show a different address at the head of your pleading does not initiate a change in the system. You must file a change of address with the Court.

7. We do not know two weeks prior to a Trial Confirmation date what the prognosis is for starting your trial. The Judge could be already in trial, or could have a Trial set for a date certain, or cases on calendar that may settle at the Mandatory Settlement Conference later. The soonest we might know is a couple of days prior to your Trial Confirmation date. ■

*Marilyn Metzner has been a legal secretary for 62 years. She has been with Judge Thomas Anderle, both before and since he became a Judge, for 45 years, and with the Santa Barbara Superior Court for 20. She is currently the Judicial Secretary for Judges Anderle and Colleen Sterne.*

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# Exploring Bridge Loans to Irrevocable Trusts

BY CRYSTAL E. REM

**H**ave you ever had a client who was in a situation where a living trust had become irrevocable due to the death of the grantor, and one of the beneficiaries wanted to keep the family house? This would require buying out the other siblings, but what if there is not enough cash to make this work? What are the options in this situation?

Attorneys and their clients do have an avenue to resolve this type of dilemma so family members can meet their financial goals. This is where a bridge loan comes in. A bridge loan is short-term financing used in both commercial and residential real estate for 12 months or less, and bridge loans can be made to irrevocable trusts. In many cases, the parents' house is in the trust, and the children would like to get money out of the property. The bridge loan allows for the trust to distribute the assets of property and cash. A bank or a mortgage lender can make a bridge loan to the trust so the families can get the house out of the trust's name and into their names. Then, the family can obtain a conventional mortgage.

The lender underwrites to the remaining sibling's ability to qualify for a permanent mortgage after the distribution is made, and the real estate is re-vested from the trust to the remaining sibling. These bridge loans are typically outstanding for only a few months or a maximum of one year while the distribution is made, re-vesting occurs, and the remaining sibling obtains approval for the conventional mortgage.

A reputable bank with a mortgage department can handle the transition from the bridge loan to the permanent mortgage. However, before getting started, be sure to ask upfront if your bank or lender will make this type of loan, as many will not. You'll want to find the right bank to handle your bridge loan from the start. ■

*Crystal E. Rem is a Vice President and Residential Lending Officer for American Riviera Bank, a full-service community bank with branches in Santa Barbara, Goleta, Montecito, and Paso Robles. American Riviera Bank offers a free consultation to those seeking help with residential lending, and this includes attorneys and their clients. Call the Bank at 805-335-8150 and ask to speak to a Residential Lending Officer or visit the residential lending office at 18 E. Figueroa Street. [www.americanrivierabank.com](http://www.americanrivierabank.com).*



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Welcome to the

# PHILANTHROPY CORNER

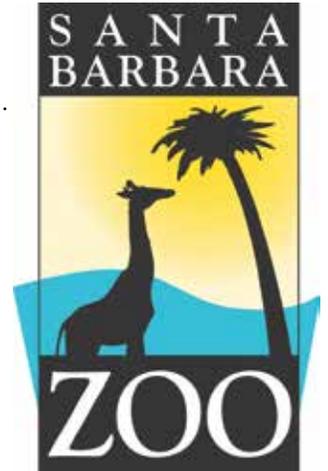
By JENN DUFFY, EDITOR

Featuring Philanthropy Organizations

This month's featured philanthropy organizations focus on ANIMALS.  
They are



## The Santa Barbara Zoo and the Carpinteria Sealwatch.



### ***The Santa Barbara Zoo***

Are you genuinely interested in animals, people, nature, and conservation? Do you enjoy learning and teaching others? Would you like to make new friends and professional contacts? Do you want to have fun? Attend a New Volunteer Orientation to learn about the many volunteer options available at the Beautiful Santa Barbara Zoo and get involved in conservation at your local zoo **\*and\*** in the field. Complete a short online application today at [www.sbzoo.org](http://www.sbzoo.org) to sign up for a New Volunteer Orientation!

In August 1963, the Santa Barbara Zoological Gardens opened its doors to the public and has continued to serve and fulfill this mission: preservation, conservation, and enhancement of the natural world and its living treasures through education, research, and recreation. The Santa Barbara Zoo is now a Certified Autism Center. Visitors will soon have access to quiet zones and can rent "sensory backpacks" filled with noise-cancelling headphones, squeeze toys, a fidget cube, and a scavenger hunt list. The Zoo will soon have an updated accessibility webpage with a map of its quiet zones.

### ***Carpinteria Sealwatch***

Carpinteria Sealwatch formed 30 years ago to protect the Carpinteria Harbor Seal Rookery and provide education to the public about the harbor seals. Many visitors come to watch the seals in their natural habitat from the bluffs above. Carpinteria provides the only publicly-accessible place between La Jolla and Cambria where harbor seals may be observed giving birth and nurturing their pups. Over 30,000 visitors from all over the world are recorded at the overlook during the pupping season. Volunteers enjoy teaching visitors about the seals and the beautiful bluff environment. Sealwatchers typically dedicate two hours a week and are always appreciated. Contact 805-684-2247 and check out our Facebook Page, <https://www.facebook.com/Carpinteria-Seal-Watch-495151410860721/>.

---

*If you have volunteer opportunities you would like to have listed in  
the Philanthropy Corner, please contact Jenn Duffy  
at (805) 963-0755 or [JDuffy@fmam.com](mailto:JDuffy@fmam.com).*

# Carpinteria Sealwatch



Carpinteria Sealwatch began 30 years ago when locals saw the need to protect the Harbor Seal population that was being disturbed during their pupping season. The CARPINTERIA SEAL ROOKERY is located in the City of Carpinteria. Areas where Harbor Seals come ashore are known as “haul outs.” Specific haul outs that seals use for pupping are called “rookeries.” Sealwatch volunteers have observed over 365 seals hauled out on the beach and rocks at one time, and volunteers have counted over 100 births in a single season. Pupping season generally occurs between January 1<sup>st</sup> and May 31<sup>st</sup>.



Harbor Seals are among the “true seals.” True seals lack external ear lobes and move in an undulating fashion on land. All Harbor Seals are spotted with great variations in color. Males weigh as much as 350 lbs., and females are slightly smaller. These seals mature between 4 - 7 years of age and live 30 - 40 years. Harbor Seals can stay submerged 40 minutes and eat small schooling fish, crustaceans, and squid.



Harbor Seals are disturbed or startled very easily, especially during the pupping season. A disturbance is anything that alters the seals’ natural behavior and can vary from a turned head to all the seals flushing to the water. The timing after birth is critical for mother and pup to bond, and a disturbance, may cause abandonment. The beach is closed 750’ E and W of the Casitas Pier and 1000’ out into the water by City Ordinance.

In recent years between January 1<sup>st</sup> and May 31<sup>st</sup>, Sealwatch volunteers have counted over 30,000 visitors from all over the world. The bluff top lookout is a place where you can observe seals, whales, dolphins, birds, and nature at its best. Volunteers are needed to educate the public about the seals and inform them about the laws that protect them. Volunteers also collect data about seal behavior and seal disturbances. Come join us on our beautiful coast.

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# 10 Mistakes Clients Make During Transitional Events

BY HANNAH BUSCHBOM, CFP®, CDEA™

**B**arely anyone is fully prepared for a major financial transitional event. These can include retirement, the sale of real estate or a business, the loss of a loved one, or a change in marital status, and any of them can be completely overwhelming. Without an established financial roadmap that takes into consideration your needs, wants, and “what-if” contingencies, the famous quote by Benjamin Franklin becomes sharply penetrating: “Failing to plan is planning to fail.” Below are some of the most common mistakes that well-intending folks in these situations often make. Avoid these mistakes by engaging a team of professionals to help you navigate these pivotal events.

## ***Mistake #1: Listening to well-intentioned advice from acquaintances, friends, or family***

Those feeling the pressure caused by transitional events will often turn to any port in a storm: “My coworker/ best friend’s sister/a lady I met at the grocery store said....” This well-intended advice often fails to take into consideration that no two situations are alike, and mostly these personal anecdotes do not apply to the specific circumstances at hand. Unless speaking with a trusted professional (attorney, CPA, financial advisor, risk management specialist), the best course is usually to thank them for their input, and then simply go along your way. Furthermore, during times of transition, people may unintentionally broadcast that they are vulnerable, making them susceptible to scams or fraud. Don’t take one-size-fits-all advice, and be sure to obtain references for people and professional service teams you’re considering hiring.

## ***Mistake #2: Quickly making major decisions without taking the time to think them through fully***

We often dream about what would happen if we received a sudden windfall of money – perhaps a new home or car purchase, a donation to charity, or paying off debt. Yet, often when a windfall arrives, we are caught unprepared. A financial planner can help by categorizing the transitional process into short-, medium-, and long-term decisions, and then organizing it with a customized action plan. Seek

professional advice to determine which decisions can’t be postponed, and in general, take the time to visualize your preferred outcomes before making snap judgments.

## ***Mistake #3: Not anticipating short-term cash needs***

During this period, it may be unwise to tie-up assets in long-term investments such as real estate. Keeping easily-accessible bank accounts or money market funds allows for the ability to implement personalized action items in the future when there is more clarity about new income and expenses. If managing bills or caring for family becomes overwhelming, it can be helpful to have the extra resources to hire trusted professionals to help get through this phase with the assistance one may need.

A good rule of thumb is usually to maintain three-to-six months of living expenses in highly-liquid accounts. But during a transitional period, consider keeping extra funds in an interest-bearing savings account or available credit on an asset-backed or home equity credit line.

## ***Mistake #4: Treating all assets equally***

During a divorce or when receiving an inheritance, a specific distribution plan may appear to be fair and equitable at the onset, but when x-raying the result, it becomes clear that an uneven division of assets has taken place. To prevent this, engage with a financial planner to determine the most equitable, tax-efficient, and optimal division of assets that align with your goals. Many financial planners will perform this analysis for a project-based fee, to help answer client questions such as:

“What do I receive after-tax?”

“How risky is this account if I keep the investments?”

“Can I take a withdrawal from this account without taxes or penalties?”

“Should I take a one-time/lump-sum payment, or spread it out over my lifetime?”

The following story helps illustrate this concept:

Sally came to me three years after her divorce. She had received ~\$1,000,000 in assets from her divorce in a stock brokerage account. Her husband Frank also received ~\$1,000,000; but in cash. Sally didn’t have enough cash to



Hannah Buschbom



pay her monthly bills, so she was forced to sell her stock, which had appreciated in value. When she sold the stock, the sale resulted in capital gains taxes of ~\$150,000. Because her husband could withdraw funds from a bank account without paying capital gains taxes, his funds could be accessed without a tax consequence – thus making them more valuable than hers.

Often, the optimal situation can only be determined before making any final decisions, such as finalization of the divorce settlement or distribution of all the trust assets to the beneficiaries. A financial advisory firm should collaborate with CPAs, attorneys, and other professionals to help their clients make the most informed decisions.

***Mistake #5: Lacking clarity about all YOUR assets and how they fit together***

Previous generations led much simpler financial lives. Their entire asset pool may have been comprised of cash savings, a home or two, a company pension, and Social Security. Now, with 401(k) plans and the like, many people have multiple banks with multiple accounts, retirement plans remaining at an old employer, and investment accounts with various companies. Understanding their entire financial picture is much more complicated today than it ever was in the past. We suggest utilizing the latest technology to help aggregate all accounts with one password and see everything you own, all in one place. A professional financial team can also help digitize all important documents for storage and access in one safe place.

***Mistake #6: Focusing on factors that cannot be controlled***

During the seminal moments in our lives, we often associate emotions with concerns about money. One of the questions I am most frequently asked by clients is, “Will I have enough money to last throughout my retirement?” This is clearly an important question, and a good financial advisor will help you track your progress as well as provide areas for improvement. It is important to remember that no one can control the markets, the economy, nor what other people or family members do – but quality decisions begin with having a quality plan in place.

Focus on factors within your control by:

- Working with a financial advisor to develop a prudent investment strategy that fits your new lifestyle
- Making informed decisions
- Reviewing spending and saving habits
- Employing tax-reduction strategies when applicable
- Defining goals for the next phase(s) of life

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**Mistake #7: Defaulting to the standard option for alimony, pension, and Social Security income**

Many people don't know that there are ways to maximize during a transitional event. Factors such as life expectancy, the complexion of other assets, and the age to claim Social Security income play an important role in determining the best strategy to take. Before claiming, a financial planner can help you run various "what-if" scenarios to maximize payments from alimony, pensions, and Social Security. For some, it may make sense to withdraw and deplete other assets in favor of allowing Social Security or pension benefits to grow!

**Mistake #8: Forgetting to update tax withholdings from alimony or account distributions**

There are often many moving parts during the first year of a major life change. It can be difficult for non-professionals to project the tax implications as funds are moved around or disbursed. Meeting with a tax preparer and a financial advisor can help you understand what the total taxable income will be from all sources, and adjust withholdings from account distributions accordingly. Review these mul-

iple times during your first year, while the dust is settling. Many accounts allow for a specific percentage of federal and state tax withholding to help you avoid surprises, such as a large amount due in the next tax year.

**Mistake #9: Not having a plan in place before it is too late**

If you do not create a plan that reflects the choices, preferences, and lifestyle that you would like, someone else will likely end up choosing for you. The government may decide for you in the form of additional taxes or penalties, or your family members may choose for you if you lack capacity later in life. Transitioning to your next phase of life should include periodic updates to your financial plan to mitigate this risk.

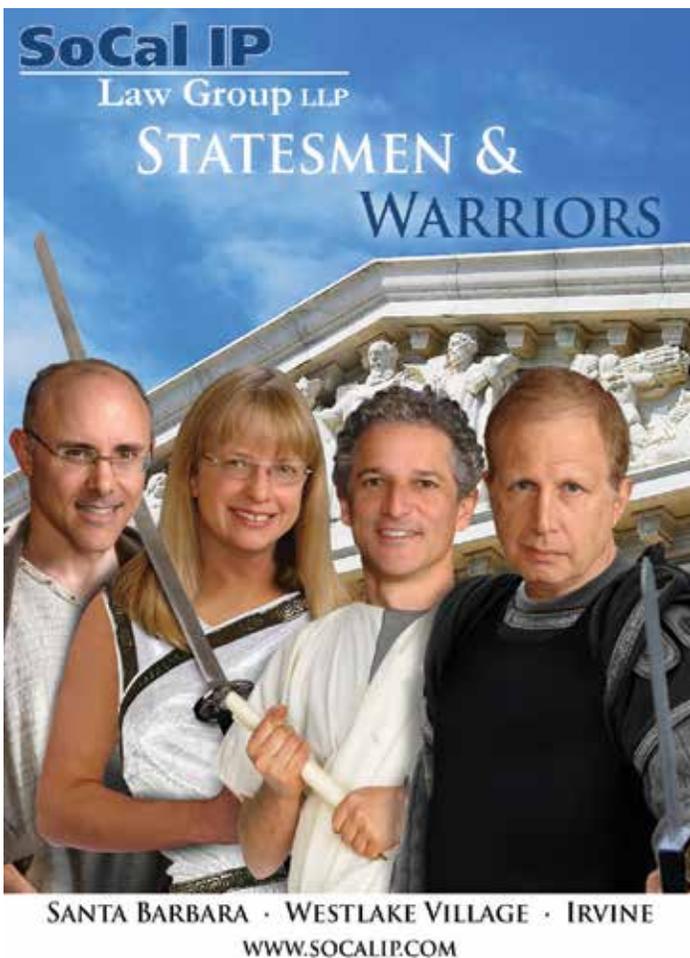
Solutions include:

- Engaging a holistic risk management professional to review your life and long-term insurance needs and change any applicable beneficiaries
- Reviewing the coverage provided by your home, auto, and umbrella policies to make sure they are updated with the latest values
- Changing retirement account beneficiaries to reflect your wishes
- Updating any estate planning documents and designate who you would like to make your health and financial decisions if you are unable to do so in the future.

**Mistake #10: Not allowing yourself to visualize your new goals, wants, and wishes**

Last, but not least, it can be easy to get caught in the "high weeds" of the decisions you will face during this process. Allow yourself some space to think about your vision for what your life will look like one year from now. Use those thoughts to guide you and your professional advisors. Major life transitions are rarely easy, but with the proper guidance and appropriate advice, you'll set yourself up for success from the beginning. ■

*Hannah Buschbom, CFP®, CDFATM is a Partner with AmeriFlex® Financial Services, a team of 14 professionals who serve the Santa Barbara community. AmeriFlex's Wealth Management Team specializes in providing financial planning and consulting services to individuals and families with assets in one or more of the following life transitions - retirement, job/career transition, sale of real estate, business liquidation/sale, inheritance, and change in marital status. For more information, please visit [www.PrefOut.com](http://www.PrefOut.com) or call (805) 898-0893.*



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**Speaker: Richard C. Solomon**

As Professor of Law at Southwestern University Law School in Los Angeles for 25 years, Richard Solomon taught courses in legal ethics, employment law, and civil procedure. He is currently a member of the California State Bar Committee for Professional Responsibility and Conduct and a consultant on legal ethics issues. He is also an arbitrator, primarily for labor relations and employment disputes, a long-time Commissioner with the Santa Barbara County Civil Service Commission, and founding director and chair of the newly formed Santa Barbara County Immigrant Legal Defense Center. Richard earned his law degree at UCLA.

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# *In re Robert Lewis, Jr.* – A Strike Against “Ethnic Adjustments” to IQ Test Results

BY ROBERT SANGER

This month’s *Criminal Justice* column of the Santa Barbara Lawyer Magazine is a bit personal to me and a valiant team of lawyers and professionals. In this column, we have discussed “ethnic adjustments” over the years, and it was the subject of a law review article I wrote, entitled “IQ, Intelligence Testing, ‘Ethnic Adjustments’ and Atkins,” 65 *American University Law Review* 87 (2015). It turns out that a few weeks ago on May 24, 2018, the California Supreme Court came down with an opinion in *In re Robert Lewis, Jr.*<sup>1</sup> that denied the prosecution’s use of “ethnic adjustments” to qualify the defendant for execution.

It also turns out that I was the lawyer appointed by the California Supreme Court on that case to represent Mr. Lewis in 1994. I generally tell the press that I will not comment on pending cases, and I do not. This case is now no longer pending. I also generally do not comment on my own cases in this *Criminal Justice* column but rather on matters of broader concern. This may be both. So, with the readers’ indulgence I will make exceptions and recount a bit of the history and significance of the decision.<sup>2</sup>

## *The Case of Robert Lewis, Jr.*

I was forty-five years old when I accepted the appointment by the California Supreme Court to represent Robert Lewis, Jr., a prisoner condemned to death and residing at San Quentin. I will be seventy in a few months. As a result of the Supreme Court’s opinion, Mr. Lewis will live.

Mr. Lewis had been on Death Row for ten years before I was appointed. He had been convicted in 1984 of a murder in Long Beach that occurred in 1983 during a robbery. He had been represented by an infamous lawyer, Ron Slick, who at one time had more people on death row than any other lawyer, including prosecutors. Mr. Slick specialized in handling as many appointed cases as he could and was known for his very quick trials. Mr. Lewis’ capital trial — all of it, including jury selection, openings, evidence, ar-

guments, and jury instructions — took four days. The penalty phase (the choice between life and death) — including openings, evidence, arguments, and jury instructions — took one hour and 36 minutes. The jury convicted, found for death, and Mr. Lewis was sentenced to San Quentin to be executed.

Mr. Lewis’ case was subject to an automatic appeal, required in all death cases, directly to the Supreme Court of California. Mr. Lewis was appointed an excellent lawyer, Don Spector, founder of the non-profit Prison Law Office. Mr. Spector raised many issues on appeal and more in a petition for writ of habeas corpus. One issue could not escape the Court’s attention. The trial judge was responsible under the law to conduct a modification hearing, based on the evidence the jury heard, to determine if the jury properly reached a death verdict.<sup>3</sup> The trial judge ruled that the jury did properly reach the verdict, however, the judge relied on information that had been provided in a probation report prepared after the trial.

The Supreme Court reversed the death penalty judgment but did not reverse the conviction.<sup>4</sup> The case was remanded to the Superior Court in Los Angeles for the sole purpose of conducting another modification hearing for the trial judge to consider whether the death verdict was supported by the evidence without regard to the probation report. The opinion said, “Any subsequent appeal shall be limited to issues related solely to the modification application.”<sup>5</sup> On remand, the trial judge had retired and a different judge presided over the 190.4(e) hearing, who affirmed the verdict and entered a judgment of death.

After a few years, in 1994, the California Supreme Court appointed me to handle the new direct appeal for Mr. Lewis. I read the record and, of course, the Court’s prior opinion in the case limited the issue to whether there were any issues “related solely to the modification application.” Given the work of Mr. Spector raising some issues on remand, there was something to argue in our new Opening Brief, even if it pushed the envelope.

In the meantime, we had assembled a team to reinvestigate the case and the work — or lack thereof — of Mr. Slick. We also tried to learn everything we could about Mr. Lewis and his family. Law partner Catherine Swysen was on the



Robert Sanger

case from the beginning. Other team members included lawyers Steve Dunkle, Aaron Heisler, Tara Haaland-Ford, Mark Saatjian, Jeff Sanger, and Julie Lawrence; investigators included, Bobette Tryon, Tom Parker, Reggie Stewart, and Rebekah Dillon; mitigation specialists included Carin Connell and Jesus Castillo; paralegals included, Jessica Dzamba and Jake Swanson; and the team included our other colleagues at SS&D over the years.

Without disclosing any confidences, I will say that in my visits to see Mr. Lewis over the years, I got to know him. He also calls our office often, and many of my colleagues and staff had a good relationship with him by phone. Mr. Lewis is intellectually disabled and functionally illiterate. However, he has always been considerate and funny – a person who says off the wall things resulting in doubling himself up with laughter. Whoever is in the room has the same reaction.

Without saying any more about his case, suffice it to say that I do not think that Mr. Lewis committed the homicide. Whether or not he was there, it is not unusual for a person who is intellectually disabled to be left holding the bag. Claims related to his innocence or to lesser culpability were resolved against Mr. Lewis in earlier proceedings and, although we tried to raise them again, our direct appeal was limited to procedural matters (even though we tried to get these issues before the court anyway).

After we fully briefed our direct appeal and were waiting for the court to schedule oral argument, we filed a petition for writ of habeas corpus in July 2003, seeking to raise issues outside of the record and outside of the limitations of the direct appeal. The petition was hundreds of pages long. Among other things, we raised claims of ineffective assistance of counsel on the part of Mr. Slick, including his lack of investigation and his four-day trial with a one-hour-and-36-minute penalty phase. We also raised mental health issues. In the course of our investigation, we obtained Mr. Lewis' school and institutional records. We found that he appeared to have IQ test scores in the range of intellectual disability<sup>6</sup> so we asked a psychologist, Dr. Natasha Khanov, on the faculty of the University of California at San Francisco, to do an evaluation of Mr. Lewis at San Quentin. She agreed and she did. So, we added a claim under the then-new United States Supreme Court case of *Atkins v. Virginia*,<sup>7</sup> in which it was held to be unconstitutional to execute a person who was intellectually disabled.

The Attorney General opposed our habeas petition, and we continued to wait for the Court to act on both the direct appeal and the habeas petition. In 2004, the Court scheduled oral argument on the direct appeal, which was supposed to be on one procedural issue but which raised a few other

procedural issues and also claimed that the death penalty was unconstitutional. There was no word on the habeas.

By the time of the oral argument, all of the technical issues that we raised on appeal -- such as whether a new trial judge could replace a retired judge to handle the modification hearing – had been decided adversely in other reported Supreme Court opinions. So, I took the opportunity at oral argument to claim that the death penalty is wrong and that it was time for the Court to say so. This evoked strong responses from Justices Kennard, Werdeger and Brown questioning whether I had read the limited remand and restriction on any subsequent appeal. My response was that the constitutionality of the death penalty is jurisdictional and can be raised at any time in the proceedings. I further argued that, in this case, the Attorney General is arguing that a one-hour-and-36-minute penalty phase was systemically sufficient to invoke the death penalty, in that any death judgment based on that sort of procedure is a symptom that the death penalty itself is wrong.

Chief Justice Ronald George interceded and began a colloquy on the constitutional issue – thus saving me from the ire of the other justices. I remember him asking if the legislature allowed boiling in oil, whether that would mean that the “evolving standards of decency” would make such punishment acceptable under the Eighth Amendment. My response included the claim that such would be “devolving” standards, not “evolving,” but the Chief seemed to enjoy the discussion. In any event, every chance I had, I referred to the “one-hour-and-36-minute penalty phase” in the context of a systemic claim that the death penalty could not be constitutional if such procedures were tolerated. Finally, Justice Baxter, who was generally quiet during oral arguments, spoke up and asked if I raised the one-hour-and-36-minute penalty phase issue in a habeas petition. I said I had and he said, “We’ll look into it.” Out of the corner of my eye, I detected scribbling activity in the section reserved for the Justices’ law clerks.

Of course, we lost the direct appeal – the successor trial judge below had not read the probation report; he only read the trial transcripts.<sup>8</sup> In the 2004 opinion by Justice Brown, the Court affirmed the conviction and sentence of death based on the limited issues before it. However, the opinion mentioned the alternative of a habeas petition three times, concluding, “To the extent defendant has valid constitutional claims, he may raise them by petition for writ of habeas corpus.”<sup>9</sup> Well, of course, we already had. Final briefing of the habeas was concluded, and we waited. Finally, in 2009, the Court issued an Order to Show Cause remanding the matter to Judge Robert J. Perry of the Los Angeles Superior Court for a reference hearing on ineffec-

tive assistance of attorney Slick during the penalty phase, and for a determination as to whether or not Mr. Lewis was intellectually disabled within the meaning of *Atkins*.

Multiple procedural hearings and 14 days of actual testimony ensued in Judge Perry's court in Los Angeles over the next three years. Fifteen witnesses testified, including witnesses on Mr. Lewis' intellectual functioning. Dr. Khazanov testified about Mr. Lewis' history of sub average intelligence test results and deficits in tested behavior. Childhood friends and others who knew Mr. Lewis testified to his deficits in adaptive behavior, including lifetime illiteracy. The District Attorney called professional witnesses and their main attack on the intellectual disability claim, through the testimony of a Dr. Hinkin, was that "Black people score lower than Whites on IQ tests," therefore you must add five to 15 points to Mr. Lewis' score because he is Black. We vehemently opposed such an "ethnic adjustment" and Judge Perry declined to adjust the scores. On this and evidence of Mr. Lewis' adaptive behavior, Judge Perry found Mr. Lewis ineligible to be executed under *Atkins*. He filed a 42-page report with the Supreme Court dated March 23, 2012.

The Attorney General took over the case from the Los Angeles District Attorney and filed objections to the Report.<sup>10</sup> Eventually, after full briefing, and supplemental briefing, the matter was set for oral argument before the Supreme Court on March 7, 2018. And, finally, on May 24, 2018, the Court issued *Lewis III*, the opinion affirming Judge Perry's report, finding that Mr. Lewis could not be executed. Thus concluded a very long journey for Mr. Lewis and our team.

The opinion is only the third opinion of the California Supreme Court since the United States Supreme Court decision in *Atkins* in 2002 that addressed the fundamental issues in intellectual disability.<sup>11</sup> It was the first case to address the "modern" view regarding the significance of medical knowledge and clinical judgment, as well as the acknowledgment that intellectual disability is not a rigid legal construct.<sup>12</sup> Importantly, the Court found Dr. Khazanov's testimony to be convincing and rejected Dr. Hinkin's ethnic adjustments when adopting Judge Perry's conclusion that there was no evidence offered to support the claim of adjustments based on race or socio-economic conditions.

## Conclusion

We argued that "ethnic adjustments" were unconstitutional as a violation of equal protection. You cannot ethnically adjust test scores to get a job or to get an education, so how can it be possible to adjust scores so the state can kill you? The Court decided the case, as they should, on non-constitutional grounds and therefore did not reach the constitutional issues. However, the opinion should end "ethnic

adjustments" in California, since the adjustments must be supported by evidence and, in my opinion, that cannot be done.<sup>13</sup> My hope is that the United States Supreme Court will take the matter up in another case and end such adjustments once and for all on Constitutional grounds. All in all, the opinion in *Lewis III*, is an important contribution to state and national death penalty jurisprudence, and our team did a great job.

Most importantly, Robert Lewis, Jr., and, perhaps, others with intellectual disability, will live.

*Post script:* This impending seventy thing is overrated. My next capital jury trial (estimated six months, not four days) is scheduled to begin the day after my 70<sup>th</sup> birthday. The team is ready to go. ■

*Robert Sanger is a litigation partner in Sanger Swysen & Dunkle, and a Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law. He is a Member of the American Academy of Forensic Sciences (AAFS) and an Associate Member of the Council of Forensic Science Educators (COFSE). Mr. Sanger is a Criminal Law Specialist (The St. Bar Bd. Of Legal Specialization), practicing both civil and criminal litigation for over 40 years and serves as a forensic consultant on complex civil and criminal cases. He is also one of the Co-Chairs of the annual four-day Capital Case Defense Seminar sponsored by CACJ and CPDA and a long-time Board member of Death Penalty Focus. (The views expressed herein are those of the author and not necessarily of the organizations with which he is affiliated).*

## ENDNOTES

- 1 \_\_ Cal.5th \_\_ (S117235, filed May 24, 2018) (*Lewis III*).
- 2 This article will not disclose attorney-client-privileged information. Since the *Lewis* opinions are reported decisions of the California Supreme Court, the client's name and the information in the case itself are public record.
- 3 Penal Code Section 190.4(e).
- 4 *People v. Lewis*, 50 Cal.3d 262 (1990) (*Lewis I*).
- 5 *Id.*, at 292.
- 6 Then called "mental retardation."
- 7 *Atkins v. Virginia*, 536 U.S. 304 (2002).
- 8 *People v. Lewis*, 33 Cal.4th 214 (2004) (*Lewis II*).
- 9 *Id.*, at 578.
- 10 We also filed Objections, out of an abundance of caution, since the Report did not thoroughly address the ineffective assistance claims. We, of course, supported Judge Perry's findings and conclusions regarding intellectual disability.
- 11 *In re Hawthorne* 35 Cal.4th 40 (2005) and *People v. Superior Court (Vidal)* 40 Cal.4th 999 (2007) were the others.
- 12 This following the U. S. Supreme Court in *Hall v. Florida*, \_\_ U.S. \_\_, [134 S.Ct. 1986] (2014) and *Moore v. Texas* \_\_ U.S. \_\_ [137 S.Ct. 1039] (2017).
- 13 See the detailed explanation for this in Robert Sanger, "IQ, Intelligence Testing, 'Ethnic Adjustments' and *Atkins*," 65 American University Law Review 87 (2015).

# Motions

Attorney **John W. Ambrecht**, an expert in estate planning and estate tax law, has been selected as a “Super Lawyer” for 2018 in a newly published listing of top attorneys throughout Southern California. This is the 12th time Ambrecht has been selected as a “Super Lawyer,” an honor he has received every year since 2007.



*John W. Ambrecht*

Ambrecht is the founder of **Ambrecht & McDermott**, a boutique law firm in Montecito. He focuses his practice on integrating sophisticated estate and tax planning with family business succession planning, including developing appropriate transitional structures with an emphasis on conflict resolution among generations. His practice also includes sophisticated multi-state domestic trusts and estate planning, national and international asset protection, and tax controversies.

**Danielle De Smeth**, Managing Attorney at the **Law Offices of Bamieh & Erickson, PLC**, is pleased to announce that **Monique L. Fierro** has joined the firm as a civil litigation associate. After graduating Stanford Law School, Ms. Fierro worked at California Rural Legal Assistance under a Public Interest Fellowship and as a staff attorney. At Bamieh & Erickson, Ms. Fierro will continue fighting for plaintiffs



*Monique L. Fierro*

in the employment, education, and civil rights arenas. Ms. Fierro has studied Human Rights at Oxford University and worked at the Special Tribunal for Lebanon in The Hague.

Ms. Fierro loves living in Santa Barbara with her husband Josh. High school sweethearts, the pair stayed together while he attended UCSB and she earned her Bachelor’s degree in English Literature with a minor in Middle Eastern Studies from Stanford University. Fierro, a zealous advocate for social justice, has volunteered for Standing Together to End Sexual Assault (formerly the SB Rape Crisis Center) and the Legal Aid Foundation of Santa Barbara County.

**Hager & Dowling** is pleased to announce that **Christine A. Renshaw** and **Natalie N. Mutz** have joined the firm as associate attorneys.



*Christine A. Renshaw*

Ms. Renshaw has extensive experience in all aspects of litigation in state, federal, and appellate courts. Her practice focuses on representing clients in the defense of a wide range of matters, including personal injury, employment, public entity, professional liability, products and premises liability, insurance bad faith, construction, and transportation. Before joining Hager & Dowling, Ms. Renshaw was the founding member of a local law firm where she focused primarily on representing clients in personal injury, legal malpractice, medical malpractice, business, environmental, employment, and bankruptcy matters. She also worked for several years with a firm representing governmental entities and school districts. During law school, Ms. Renshaw served as an Intern at Warner Bros. Studio in the Television Legal Department.

Ms. Renshaw earned her Juris Doctor degree from Duquesne University School of Law and her LL.M in tax law from Loyola Law School. Ms. Renshaw has been an active member in the Ventura County Bar Association, Santa Barbara County Bar Association, Association of Southern California Defense Counsel, and the Jerome H. Berenson American Inn of Court. She has served as an adjunct Professor of Law at the Ventura College of Law. Prior to beginning her legal career, Ms. Renshaw was a high fashion model with IMG Models in New York City.

Natalie N. Mutz represents a diverse range of clients in business and entertainment litigation, intellectual property,

real property, insurance bad faith, and employment matters. Ms. Mutz has extensive experience in litigation and resolving intellectual property issues. She has advised startup companies throughout their growth phases.



Natalie N. Mutz

During law school, Ms. Mutz wrote for Southwestern Law School's Journal of International Law and Commentator Legal News Magazine, served as a Director in the Student Bar Association and as President of the International Law Society. She also volunteered with legal aid organizations, including the FAME Free Legal Clinic and One-Justice's Justice Bus Project. Prior to beginning her legal career, she spent over four years living, working, and studying abroad in Europe, Asia, and South America. She is proficient in Spanish and basic Japanese. She is an active member of the Bar Association of Santa Barbara and Los Angeles Counties.

Before joining Hager & Dowling, Ms. Mutz was an associate in the law firm of Kulik, Gottesman Siegel & Ware.

If you have news to report - e.g. a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc. the Santa Barbara Lawyer editorial board invites you to "Make a Motion!". Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at [pasterna@gmail.com](mailto:pasterna@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.



**Fell, Marking, Abkin, Montgomery, Granet & Raney LLP** is pleased to announce that partner **Jennifer Gillon Duffy** has been named one of the **Top 50 Women in Business** in the tri-counties for the second year in a row by the **Pacific Coast Business Times** and the **Volunteer of the Year for 2018** by the **Dream Foundation** for her work



Jennifer Duffy

with the organization's Flower Empower program. Ms. Duffy has volunteered her time virtually every Saturday morning for the past six years making (and teaching others to make) bouquets from donated flowers for people in hospice, retirement homes, or who otherwise need some cheer. She has made over 2,000 bouquets during this time. The Dream Foundation is the only national non-profit organization that grants final dreams to terminally ill adults. Ms. Duffy is also the Editor of the *Santa Barbara Lawyer* magazine for 2018.

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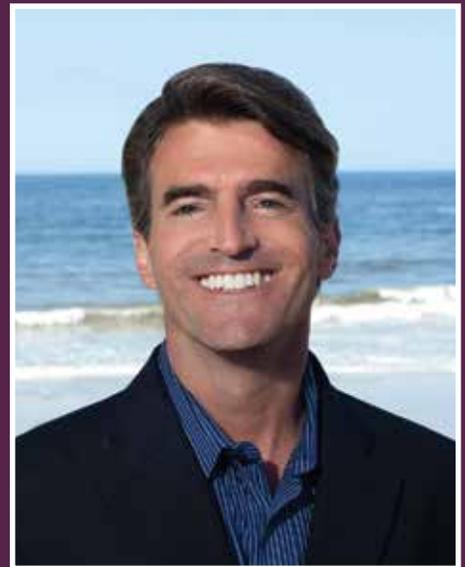
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