

# *Santa Barbara* Lawyer

Official Publication of the Santa Barbara County Bar Association  
October 2018 • Issue 553







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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.*

# Santa Barbara Lawyer

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## Articles

- 6** Insurance Considerations for Transitioning Attorneys,  
*By Michael Crist*
- 8** Gifting in Residential Loan Transactions, *By Austin Lampson*
- 10** The Latest Happenings at Legal Aid Foundation of Santa Barbara County, *By Jennifer Smith*
- 13** Philanthropy Corner, *By Jennifer Gillon Duffy*
- 16** Anonymity and the Criminal Law, *By Robert Sanger*
- 25** Photos from Judge Von Deroian's enrobing ceremony and recent MCLE program on the new California rules of Professional Conduct

## Sections

- 20** Verdicts and Decisions
- 28** Motions
- 32** Section Notices
- 34** Classifieds

## On the Cover

"Shadows Before Noon, Courthouse," oil on canvas, 16 x 12, by local artist **Chris Potter**, created specifically for this publication. [www.ChrisPotterArt.com](http://www.ChrisPotterArt.com).



Santa Barbara  
County Bar  
Association

## 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:

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# Insurance Considerations for Transitioning Attorneys

BY MICHAEL CRIST

**A**s a professional in today's complex legal environment, there is tremendous value in having a sound professional liability insurance solution. Unfortunately, as of today, there is not just a single, universally viable product for law firms. Law firms, in particular, are susceptible to being sued for millions over alleged errors. With a continued rise in defense costs that can easily surpass six figures, professional liability claims have the potential to be crippling to a business. Additionally, although a lawyer's act or omission may occur in work performed today, a claim stemming from that wrongful act may not be realized or made against the lawyer for a significant period of time, perhaps even years down the road.

An underlying premise of an Errors & Omissions ("E&O") policy is that the insurance company shall pay a covered claim, including defense costs, on behalf of an insured, up to the limit of liability purchased. To many, this is not immediately clear as there are many different coverage provisions that need to be reviewed prior to determining a covered claim. For a member in transition, the innate intricacies of an E&O policy may lead to more questions than answers.

An E&O "loss" references the amount an insurer is legally obligated to pay as a result of a claim, typically including defense costs. If appropriate professional liability limits are not selected, defense costs alone may quickly mount, thereby reducing the limits available for other claims, and can eventually exhaust the limit of liability. Whether it be for a breach of fiduciary duty or malpractice, it is not uncommon for defense costs to far exceed a case's settlement value.

An "insured", which includes the designated firm, typically extends to the firm's current partners, principals, directors, officers, shareholders or other members of the firm while performing in their respective capacities. For coverage to continue to be afforded to such individuals that have left a firm, it is imperative that a firm's E&O policy form be broad enough to maintain them as insureds. While a departed firm member may sleep better believing they remain covered, the scope of coverage for past individuals is limited to

claims arising from their services rendered while with the insured firm. Coverage does not follow an individual to a new role or employment outside of the insured firm.

A fundamental feature of most professional liability policies is its "claims-made" reporting provision. Claims, which are most frequently received in the format of a written demand for monetary damages, largely stem from an alleged error by a firm while performing its professional services; however, if a claim is not reported to the carrier per the terms of the contract, it is unlikely that coverage will be available.

Unlike an "occurrence based" policy, the policy that is triggered and responds to a claim on a claims-made policy, is the policy that is in effect when a claim is first made against an insured and reported to the responsible insurance carrier. This method prevents multiple policies from responding to a series of related wrongful acts that occurred over multiple policy periods. To avoid forfeiture of coverage, an insured may be required to notify its carrier of an E&O claim during the same policy period it was received or within a brief grace period, such as thirty (30) to sixty (60) days, post policy expiration. If reported to the carrier during the post expiration period, the claim would most often need to be received by the insured during the policy term. Ultimately, if the claim reporting provisions are not met by the insured, the lawyer or firm will forfeit coverage under that policy.

In the event an insured elects to terminate or no longer renew its E&O coverage, it is wise to purchase an extended reporting period, commonly known as a "tail", from the incumbent insurer. The realization of a professional liability error is far different from that of your typical automobile accident or home fire. Since an attorney's exposure for claims likely stretches well past a policy's expiration date, a tail policy creates an additional extended time period to report claims. Tails are typically offered for terms of one (1) to five (5) years, although under certain circumstances, they are offered for an unlimited period of time, and are made effective as of the date of termination or non-renewal of the policy. It is important to recognize that the tail coverage only applies to professional services rendered, or wrongful



Michael Crist



acts committed, prior to the effective date of the policy's termination.

Tail coverage is offered by many of the standard and non-standard E&O carriers. Should the need for such coverage arise, there is often a fairly significant variance between the number of years of coverage that a carrier is willing to provide and the subsequent cost of such coverage. If a firm's current carrier does not offer the desired extended reporting terms, there are certain stand-alone carriers who are able to bridge the gap. Insurers typically require the purchase of an extended reporting period to occur within a specific number of days from the expiration date or the ability to procure the tail will be lost. To avoid a lapse in coverage, possibly due to acquisition or financial burdens, securing favorable tail coverage is essential. Even if the tail cost is high, the payments are due in full at the time of purchase and are considered fully earned and non-cancellable.

Transition within the law industry is inevitable, but not without potential pitfalls from an insurance perspective. If an attorney is moving from one firm to another, the new firm's E&O carrier will most often only respond to claims arising from work performed on behalf of the new firm. Certain policies will extend coverage to the attorney's previous work, but this is not the assumed standard. To avoid relying on the prior firm's ongoing E&O coverage, or possibly lack thereof, in some circumstances an attorney may have the option to purchase an individual tail policy from the prior firm's carrier upon departure.

In conclusion, a comprehensive review of your E&O insurance solution is strongly recommended to ensure appropriate and adequate coverage is in place. In the present climate, with law firms performing a myriad of professional services, it is vital to a firm's longevity and financial health to have a tailored E&O program that properly accounts for all of the varied exposures. It is imperative that both the firm and its respective attorneys take into consideration their prior acts, as well as the prior acts of attorneys who are no longer with the firm. ■

*Michael Crist is a Partner with CF&P Insurance Brokers in Walnut Creek, California. He can be reached at [mike@cfpinsurance.com](mailto:mike@cfpinsurance.com) or (925) 956-7700.*

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## Articles for this Magazine Requested

The *Santa Barbara Lawyer* magazine welcomes you to submit an article for consideration to be published in a future issue.

This magazine is the official publication of the Santa Barbara County Bar Association and is widely read throughout the local legal community and beyond. Content should relate to legal issues or practical or academic subject matters. We invite submissions of legal-related book reviews as well.

Please direct questions and article submissions to: [sblawyermagazine@gmail.com](mailto:sblawyermagazine@gmail.com) and include "submission" in the email subject line.

If you have taken a high-resolution photograph of the Santa Barbara Courthouse, that is welcomed as well, as part of the 2018 Courthouse cover series.

## *Santa Barbara Lawyer*

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# Gifts in Residential Loan Transactions

By AUSTIN LAMPSON

We are blessed to live in such a philanthropic community. The spirit of giving is strong in Santa Barbara, and this applies to both immediate and long-range planning and execution. Within the world of residential lending, instances of gifting are frequent—especially with down payments. However, as with much in “loan land,” nuances abound that can complicate what may seem like a simple idea. This article serves to highlight a few such nuances, and certainly does not imply any tax or structure advice.

As always, each lender has their own guidelines, and your client’s specific options may vary from these generalities.

Let us first outline three basics of gifting in a standard, residential loan transaction.

**The Players:** A donor is defined as someone who is gifting funds to the borrower. This must be an individual, not an entity. This individual must also have a direct relation to the borrower—mother, father, brother, sister, fiancée, or otherwise. Foster parents are certainly acceptable donors, however friends are typically not allowed in conventional financing, and never with a non-conforming loan. That said, if there is more than one borrower on a transaction, the donor must be related to at least one of them and donate to the relative alone, or to both borrowers, as well. For example, mom can gift to the daughter; or to daughter and son-in-law, but not just to son-in law. We will cover the process later of how this can be done.

**The Purpose:** Gift funds may be used towards the down payment, closing costs, or pay-off of debt as may be needed to qualify. They can never be used for reserves. In some transactions, the borrowers must supply a certain amount of

the down payment from their own funds, and no gifts are allowed when the property is to be used for investment purposes. It should also be noted that debt that is forgiven by another party is typically not considered a gift, but instead, a default. These are just a few reasons why it is important to go over these details when reviewing loan options.



Austin Lampson

## The Method: Gifts

may be given prior to the application, during the loan process, or at closing. In all instances, three steps will need to be documented: 1) the donor’s ability; 2) the executed

Gift Letter; and 3) verification of receipt of funds. The donor’s ability is typically done with a bank statement covering a one-month period—it must be complete, identify the ownership, institution, and accounting information, and nothing may be “blacked out” or otherwise altered on the statement itself. Each lending institution has its own proprietary Gift Letter, but all state that the funds given are indeed a gift, with no repayment expected, as well as identify the loan number, subject property address, amount of the donation, along with the donor, and borrower—with signatures of both. Lastly, the verification of receipt of funds can vary depending on the method of transfer. I typically recommend that funds are sent directly from the donor’s account to the settlement company, as it is the simplest to document.

While most gifts are of liquid assets, there is another form of gifting that can be especially useful in estate planning, which is the gift of equity. Typically limited to conforming transactions, a gift of equity is when the donor owns the property (with or without encumbrance) and is gifting it to the borrower. In this instance, the title report serves as evidence of the donor’s ability, and the transfer is done at

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While most gifts are of liquid assets, there is another form of gifting that can be especially useful in estate planning, which is the gift of equity. Typically limited to conforming transactions, a gift of equity is when the donor owns the property (with or without encumbrance) and is gifting it to the borrower.

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Continued on page 22



# *Save the Date*

*Santa Barbara County Bar Association Presents  
Ice Cream Social & Live Scan Fingerprinting*



*Hosted by the SBCBA!*

**When:** Thursday, October 11<sup>th</sup> from 4:30 pm – 7:00 pm

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**Ice cream provided by the SBCBA. \$49 charge from the FBI & DOJ plus a \$20 fingerprinting fee to Law Copy. A total of \$69 to be paid in advance to the SBCBA. Log into your State Bar profile, print out your form, and pre-fill because you MUST bring it with you. No printers on-site. Pay/RSVP by Oct 5th to**

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Per CA Rule of Court Rule 9.9.5, most attorneys licensed in CA must be re-fingerprinted, and those fingerprints must be submitted to the State Bar of CA by April 30, 2019.

# The Latest Happenings at Legal Aid Foundation of Santa Barbara County

BY JENNIFER SMITH

**A**s the new Executive Director of Legal Aid Foundation of Santa Barbara County, I look forward to building on the good work Molara Vadnais has done for Legal Aid and am excited to bring my vision and leadership skills to the organization. Our dedicated staff and volunteers are committed to providing high quality legal services to underserved residents of our community.

## ***What We Do - About Legal Aid Foundation of Santa Barbara County***

Legal Aid Foundation of Santa Barbara County is a non-profit law firm that provides free legal services to Santa Barbara County residents who are in danger of home-

lessness, violence, or financial exploitation. The organization's work ensures meaningful access to the civil legal system for those with barriers to justice, including people with low incomes, limited English proficiency, or disabilities.

Since 1959, Legal Aid has provided legal services to those most in need. Its offices are located in Santa Barbara, Lompoc, and Santa Maria. Last year, Legal Aid attorneys assisted over 2,700 individuals in 973 cases and assisted 6,525 County residents at the Legal Resource Centers.

Legal Aid currently provides legal services in the following areas: domestic violence and elder abuse restraining orders and related family law matters; legal assistance to victims of sexual assault and human trafficking; immigration remedies for victims of crimes; and legal assistance to victims of financial exploitation, victims of housing discrimination, and people facing homelessness as a result of an eviction or uninhabitable dwelling. An attorney is also available to assist individuals impacted by the Thomas Fire and debris flows, regardless of income. The organization also provides representation in guardianship and conservatorship matters in North County through a pilot program funded by the Sargent Shriver Civil Counsel Act. Legal Aid works closely with the courts on the Shriver program and also employs the attorneys at the courthouse Legal Resource Centers. In addition, a group of dedicated volunteer attorneys provide "advice only" outreach services throughout the community and staff the Bankruptcy clinic on Friday mornings. Additional volunteers include university students and law students.

Legal Aid's only fundraiser, **Santa Barbara Chowder Fest**, will be held on **October 21, 2018** at the Santa Barbara Maritime Museum from 1:00pm-4:00pm. A record number of law firms and businesses have sponsored the event this year, demonstrating the legal community's commitment to Legal Aid. The **Santa Barbara County Bar Association** and the law firm of **Fell, Marking, Abkin, Montgomery,**



*Jennifer Smith*



*Continued on page 27*



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Welcome to the

# PHILANTHROPY CORNER

By JENN DUFFY, EDITOR

Featuring Philanthropy Organizations

This month's featured philanthropy organizations focus on domestic violence prevention in honor of Domestic Violence Prevention Month.

They are:



## What is Love?

and



## Legal Aid Foundation's Family Violence Prevention Program

### *What is Love?*

What is LOVE was founded by Christy Stillwell, MA Psy., a high school dropout and teen runaway. She understands firsthand how growing up around domestic violence can shape a life and how the dating landscape for teens in our community has become exceedingly dangerous in the age of digital access. ONE in THREE teenagers ages 14 to 20 experience physical, emotional, digital, or sexual abuse daily from someone they date.

With over two decades of direct service experience, curriculum development, and independent evaluation, What is LOVE works with schools, educators, students, and parents to teach them how to help teens build loving, abuse-free relationships. What is LOVE'S researched programming provides dating violence prevention to every high school in Santa Barbara County to:

- Strengthen students' healthy relationship skills
- Develop educator capacity to engage students and families in identifying abuse
- Increase students' ability to ask for help
- Connect students to resources

Since 2009, What is LOVE has reached 43,320 teens! We've seen a 300% increase in SUPPORT LINE calls and 96% increased ability for a teen to recognize abusive dating behaviors, which allows our educators to connect them to much needed resources.



*Christy Stillwell*

### *Legal Aid Foundation's Family Violence Prevention Program*

Legal Aid Foundation of Santa Barbara County is a non-profit law firm that provides free legal assistance to Santa Barbara County residents. Its mission is to provide high-quality legal services to those who are in danger of homelessness, violence, or financial exploitation. Legal Aid also assists "in pro per" residents with navigating the civil legal system. The organization's work ensures meaningful access to the civil justice system for those with barriers to justice.

Since 1959, Legal Aid has provided legal services to those most in need. Services are offered countywide through offices in Santa Barbara, Lompoc, and Santa Maria. Legal Aid's Family Violence Prevention Program empowers and protects survivors of abuse and violence by providing the following legal services: domestic violence and elder abuse restraining orders and related family law services; assistance to victims of sexual assault and human trafficking; and immigration remedies for victims of crimes.

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*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).*



## FAMILY VIOLENCE PREVENTION

A victim's access to an attorney is the single most effective way to  
*permanently* end domestic violence. \*



The Legal Aid Foundation of Santa Barbara County is the only organization in the county that provides free civil legal services to victims of domestic violence, elder abuse, sexual assault, and human trafficking. In the last year, Legal Aid attorneys represented 223 victims of abuse and their 314 children. We helped these clients to obtain restraining orders, child custody, divorces, and support. Although our doors are open to all Santa Barbara County victims of violence who need our help regardless of income, 14% of our clients are homeless and many have incomes below the federal poverty line.

We ask that you join us in ensuring that victims of violence who have the courage to break free will also have all the help that they need to succeed. Become a volunteer.

**PLEASE DONATE TO THE LEGAL AID FOUNDATION OF SANTA BARBARA COUNTY**

Visit our website: [www.lafsbc.org/donate](http://www.lafsbc.org/donate) or call (805) 963-6754 ext. 110 to donate

\* A. Farmer & J. Tiefenthaler (2003). Explaining the Recent Decline in Domestic Violence. Contemporary Economic Policy, Vol. 21, Iss. 2.





# 17 AGAIN!

## How dating has changed for today's teen

The dating landscape for teens in our community has become exceedingly dangerous with the age of digital access with **ONE in THREE teens** experiencing dating abuse daily. Girls suffer disproportionately from severe physical and sexual violence. Teachers and counselors report epidemic numbers of students suffering from physical, emotional, digital and sexual dating abuse leading to anxiety, depression and suicidal thoughts.

The Centers for Disease Control and Prevention points out that youth who experience dating violence are more likely to do poorly in school, binge drink, engage in physical fights, get pregnant and attempt suicide. Teens who experience dating violence are 5 times more likely to commit suicide.

### WHY ARE OUR TEENS IN CRISIS?

Unhealthy relationship dynamics in this media-driven dating landscape, the cycle of generational violence, a profound lack of awareness, and little to no funding for prevention are major barriers to ending this violence.

Dating should be a wonderful experience. Relationships built on trust, mutual respect, and healthy communication. But our teens' dating experiences are shaped by texting, "hooking up" and the social media street corner, powerful dangerous tools for teens to connect with a romantic partner.

75% of seventh grade students report having a boyfriend or girlfriend and up to 87% of this abuse occurs on school grounds.

Contact us today at [info@whatisLOVEteens.org](mailto:info@whatisLOVEteens.org)  
805-705-0011 - [www.whatisLOVEteens.org](http://www.whatisLOVEteens.org)

### HOW CAN WE HELP?

It is critical to invest in school-based programming that builds healthy abuse-free relationship skills early and consistently. A teen's early dating experience forms the foundation for a lifetime of either healthy or unhealthy relationships.

**OUR PROMISE - Promote healthy loving relationship skills and prevent dating abuse in our schools.**

What is LOVE offers researched programming to ensure effective prevention to every school in Santa Barbara County. Our educators help:

- Strengthen students' healthy relationship skills
- Develop educator capacity to engage students and families in identifying abuse
- Increase students' ability to ask for help
- Connect students to much needed resources

### HOW CAN I VOLUNTEER?

We provide crisis support, classroom presentations, awareness campaigns, parent outreach, and professional development for teachers and counselors in Santa Barbara County High Schools.

### GET ENGAGED IN OUR #teachLOVE MOVEMENT!

- join our board
- train to be an educator, or
- support awareness campaigns

### SUPPORT US

Please consider making a contribution today. 100% of our work is funded by individual donations and foundation grants.



**INSPIRING HEALTHY RELATIONSHIPS**

# Anonymity and the Criminal Law

BY ROBERT SANGER

At the time this *Criminal Justice* column is written, the commotion over the anonymous *New York Times* Opinion Editorial<sup>1</sup> (“Op-Ed”) is still centering on the issue of “who” rather than “what.” This commotion transcends party or political philosophy. It is not the point of this column to become embroiled in either part of that analysis. As to the “who,” by the time of publication, the name of the author may well be known. As to the “what,” the definitive history of the current administration will be written by future generations.

This *Criminal Justice* column will look at a different aspect of the controversy—a criminal law aspect—which actually has an interesting legal and historical background that, again to the date of this writing, has not been explored. The anonymous author of the Op-Ed piece, and by extension the *New York Times*, has received considerable criticism and, at times, condemnation, for expressing and publishing views anonymously. The anonymous author was characterized as a “coward” across the political spectrum, and the *New York Times* was characterized as “unethical” for publishing the anonymous account.

There have been comments about the paper being held liable, on some undisclosed theory, for publication of the Op-Ed and, in this column, we will talk specifically about the constitutionality of criminal sanctions (or probably any other government sanctions) for publishing anonymous political tracts. Remarkably, best as can be determined from a search of the current news, commentary, and scholarly coverage, there has been no analysis of how “anonymous” political tracts have been a part of our political heritage in this country. Moreover, there has been no analysis of the constitutionality of criminal or other government sanctions for publishing anonymous political tracts.

## History of Anonymous Political Tracts

One would expect that the Heritage Foundation and the Federalist Society, on one side, and the American Civil Liberties Union and, say, the National Association of Criminal Defense Lawyers, on the other, would recognize the historical significance of anonymous political tracts in the history of the United States. *The Federalist Papers*, themselves, were

published anonymously under the pseudonym of “Publius.”<sup>2</sup> Between October 1787 and May 1788, all but eight of these papers were published as a series of anonymous essays in three major New York newspapers. Then the series was published as a book, again, by “Publius,” in the spring of 1788. It was not until later that the authors were determined to be Alexander Hamilton, John Jay, and James Madison.



Robert Sanger

However, anonymous political tracts were quite common at the time. In 1776, on the eve of the American Revolution, Thomas Paine’s famous “Common Sense” was originally published anonymously. There was simply no name on the title page, and the Introduction was signed “The Author.” And after independence, not only were *The Federalist Papers* published anonymously by Publius, but tracts were published in newspapers under the by-lines of Cato, Caesar, Brutus, Constant Reader, Centinel, The Federal Farmer, and other pseudonyms. Benjamin Franklin was known to use numerous *noms de plume*.<sup>3</sup> Such anonymous authorship has been used more recently to engender public debate on important political issues. Famously, George Kennan, a senior State Department official in the Truman Administration,<sup>4</sup> authored an article published in the distinguished journal *Foreign Affairs*, entitled “The Sources of Soviet Conduct.” The journal listed the author as “Mr. X.” For better or worse, the anonymous article became the basis for the policy of “containment.”

## Attempts to Criminalize Anonymous Political Tracts

Despite the prominent use of this anonymous article to help foment the Cold War and the anti-communist position of the government establishment, the 1950s saw a rebuke to the use of anonymous tracts in American politics, especially when directed against the establishment. Some of the ordinances or state laws actually predated the Second World War, including the ordinance in Los Angeles, adopted in 1932.<sup>5</sup> In Los Angeles and many of the states, the ordinances and statutes were used in the 1950s and 60s to suppress speech of people concerned about oppressive government or of people who stood up for civil rights.

In Los Angeles in particular, the Municipal Code was used to arrest and criminally prosecute people who distributed handbills that urged consumers to boycott particular merchants and businesspeople who denied equal employment to Americans of African, Mexican, or Asian descent. A particular litigant, Manuel Talley, was convicted in the late 1950s in the Los Angeles Municipal Court of distributing these anonymous civil rights handbills. Talley was fined \$10, and his conviction was upheld by the Appellate Department of the Superior Court. The United States Supreme court granted *certiorari*.

Justice Black wrote the relatively brief opinion for the majority of the Court in *Talley v. California* 362 U.S. 60, at 64 (1960). He said in part,

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”

The Court held that such a criminal restraint on anonymous publication is a violation of the First Amendment, saying,

“There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. ‘Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.’” [Citation omitted.] *Id.* at 64.

The issue of anonymous publication of political tracts came up again before the United States Supreme Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). There, the Ohio authorities claimed that the Ohio election laws could be invoked to fine a mother who posted some unsigned handbills opposing a school tax that was the subject of a vote. Ms. McIntyre was fined \$100, this time not in a strict criminal conviction but in an administrative proceeding before the Ohio Elections Commission. Eventually, the Ohio Supreme Court affirmed the \$100 sanction and upheld the constitutionality of the statute.<sup>6</sup>

Justice John Paul Stevens, writing the opinion for the United States Supreme Court in *McIntyre*, expanded on the discussion in *Talley*:

“Despite readers’ curiosity and the public’s interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or

her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.” [Footnote omitted.] *Id.* at 341-42.

Furthermore, Justice Stevens made it clear that the protection was particularly important when “a law burdens core political speech.” Justice Stevens quoted cases cited by the Court in a *per curiam* opinion in *Buckley v. Valeo*, 424 U. S. 1, 14-15 (1976):

“Although First Amendment protections are not confined to ‘the exposition of ideas,’ *Winters v. New York*, 333 U. S. 507, 510 (1948), ‘there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . .’ *Mills v. Alabama*, 384 U. S. 214, 218 (1966). This no more than reflects our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,’ *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964).”

As a result of the importance of upholding anonymous speech in the political context, the court held, “When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre* at 347.

In the end, the Court found that the Ohio statute failed to meet the constitutional standard, concluding, “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.” *Id.* at 357.

## Conclusion

From a constitutional criminal law standpoint – and from a legal standpoint whether criminal or not—if legal action by the government seeks to burden core political speech, it is subject to the highest form of scrutiny. And, specifically, any government action against an individual or a newspaper

Continued on page 19





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Sanger, continued from page 17

relating to anonymous publication of political views is likely to not survive such scrutiny. Someday, we will know the “who” and, maybe sometime later, the “what” of the *New York Times* Op-Ed piece but, meanwhile, it is pretty clear that both the authorship and the publication are protected by the First Amendment. ■

*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 opinions expressed here are his own and do not necessarily reflect those of the organizations with which he is associated.*  
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#### ENDNOTES

- 1 Anonymous, “I Am Part of the Resistance Inside the Trump Administration,” *New York Times* Editorial Opinion page (September 5, 2018).
- 2 The Federalist Papers, of course, have been the subject of innumerable books and articles. A coherent and useful summary of the history and significance of the papers is included as an Introduction to the Modern Library publication of the book, Anonymous, (Hamilton, Jay and Madison), *THE FEDERALIST, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES*, Random House, (1937). The Introduction was authored by Edward Mead Earl, Professor of History, Institute of Advanced Study, Princeton, New Jersey.
- 3 There are many instances of anonymous authorship throughout history that are documented but beyond the scope of this article. But see, George Sand (Aman-tine Lucile Aurore Dupin), Mark Twain (Samuel Clemmons), George Orwell (Eric Arthur Blair), Lemony Snicket (Daniel Handler), Robert Galbraith (J.K. Rowling) and, a dispute for the ages, Shakespeare (the Earl of Oxford, Sir Francis Bacon,

Queen Elizabeth, Sir Walter Raleigh or all of them as a part of a Baconian literary society?).

- 4 Kennan was the United States *charge d'affaires* in Moscow.
- 5 Municipal Code of the City of Los Angeles § 28.06.

- 6 The United States Supreme Court granted certiorari despite the small amount at issue and despite the fact that Ms. McIntyre had died, stating, “Our grant of certiorari, [citation] reflects our agreement with his appraisal of the importance of the question presented.” McIntyre, at 340-341.

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# Verdicts and Decisions

## *Patricia Dzukola v. City of Santa Barbara*

SANTA BARBARA SUPERIOR COURT, DEPARTMENT 6

CASE NUMBER:	15CV04278
TYPE OF CASE:	Unlimited Civil Case, Personal Injury, Trip & Fall
TYPE OF PROCEEDING:	Jury
JUDGE:	Hon. Pauline Maxwell
LENGTH OF TRIAL:	5 days
LENGTH OF DELIBERATIONS:	2 and ½ days
DATE OF VERDICT OR DECISION:	July 25, 2018
PLAINTIFF:	Patricia Dzukola
PLAINTIFF'S COUNSEL:	John B. Richards
DEFENDANT:	City of Santa Barbara
DEFENDANT'S COUNSEL:	Tom R. Shapiro
INSURANCE CARRIER:	N/A
EXPERTS:	Brad Avrit, P.E. (Liability Expert); Michael Behrman, M.D.; Frederick Fulmer (Former Head of City of S.B. Sidewalk Repair & Maintenance Dept.)

OVERVIEW OF CASE: On April 10, 2015, Patricia Dzukola ("Plaintiff") was injured while walking on Mason Street in Santa Barbara, when she tripped and fell on an uneven surface of the city sidewalk. Plaintiff contended that the sidewalk where she fell was a dangerous condition of public property and that she was injured in the accident. The City of Santa Barbara ("Defendant") denied that the condition was dangerous and denied liability for Ms. Dzukola's injuries and damages, contending instead that Plaintiff was comparatively negligent for her trip and fall injuries/damages.

### FACTS AND CONTENTIONS:

#### *Per Plaintiff:*

In 2003, the City of Santa Barbara paid the civil engineering firm of Harris & Company ("Harris") approximately \$80,000 to conduct and document a city-wide survey of the condition of the sidewalks in the city of Santa Barbara (the "Harris Report"). In so doing, Harris graded/evaluated every uplift and/or height differential in the sidewalks as follows: "'A' = 0-3/4"; "'B' = ¾" to 2"; and "'C' was greater than 2." Sidewalk surveys such as the Harris Report are commonly used by cities/municipalities to pro-actively identify those areas of their sidewalks that are most dangerous and most in need of repair in order to reduce the nature and extent of sidewalk-related injuries and claims.

Ultimately, Defendant decided not to use the Harris Report and its pro-active approach to safe sidewalk maintenance. Instead, Defendant chose to continue with its prior approach to sidewalk maintenance that relied on members of the public to contact them about problems with the sidewalk before they would go out and repair sidewalk problems. Plaintiff's expert Brad Avrit, P.E., testified at his deposition that the Harris Report identified the subject Trip Area as a grade "B" hazard (i.e., between ¾" and 2") in 2003. As a result, Plaintiff contended that Defendant had actual knowledge that the Trip Area was a dangerous condition and that the Trip Area was present in the sidewalk at the time the survey was



conducted some 12 years prior to the date of injury. Defendant made no inspection of any of the sidewalks on the one block of Mason Street between Nopal and Milpas Streets at any time in the twelve years between 2003 (when the Harris Report/Survey was completed) and the date of injury, despite the fact that the Harris Report identified 22 problem areas on the sidewalks for the one block on Mason Street between Nopal and Milpas Streets. Plaintiff's expert also obtained Google Street View photos from both 2007 and 2012 which depict/prove the Trip Area was in a dangerous condition eight years and three years prior to the date of injury. Defendant made no subsequent inspections of the area focused on finding or remediating dangerous sidewalk conditions, including but not limited to using Google Street View to identify dangerous sidewalk conditions.

Plaintiff alleged that on or about April 10, 2015, she tripped and fell on a one-and-3/8-inch uplift on a sidewalk on the northern side of Mason Street between Nopal and Milpas Streets in Santa Barbara, California, near the Wells Fargo Bank parking lot. Plaintiff fell forward and onto her hands/wrists/forearms, suffering injuries to both the right and left hands/wrists/forearms. Since the injury, Plaintiff has undergone two wrist surgeries (one on each wrist) and two rehabilitation/physical therapy/recovery phases, as well. During this time, Plaintiff has lost approximately two years of income, or a total of \$60,000. Plaintiff also still owed \$64,720.70 at the time of trial. Defendant admitted that it owned/controlled the sidewalk in/near/about and including the area of Plaintiff's trip. Plaintiff contended that the Trip Area was a dangerous condition that created a reasonably-foreseeable risk of harm and that the dangerous condition did, in fact, cause her injury.

*Per City:*

The defect that Plaintiff tripped on was trivial and not a dangerous condition of public property. The City did not dispute that the plaintiff suffered injuries and damages as a result of this accident.

SUMMARY OF CLAIMED DAMAGES:

Medical Billing (either paid by insurance or due/owing)	\$ 64,720.70
Lost Income	\$ 60,000.00
Pain, Suffering, Loss of Enjoyment Of Life, Worry, Anxiety	<u>\$ 200,000.00</u>
Plaintiff's Total Damage Claim	\$ 353,852.31

SUMMARY OF SETTLEMENT DISCUSSIONS: Plaintiff served Defendant with a C.C.P. § 998 offer in the amount of \$95,000 in July 2017. Defendant offered \$45,000 just prior to the start of trial.

RESULT: Dangerous Condition (9-3 for Plaintiff), 0% comparative negligence against Plaintiff. The jury awarded Plaintiff \$105,444.39 in special damages. After the verdict, the parties agreed to pay Plaintiff a total of \$170,000, inclusive of all C.C.P. § 998 costs and prevailing party costs. Though not yet approved by Santa Barbara City Council at the time of submission, the City Attorney's Office is recommending that the City Council approve settlement in this amount. Settlement was scheduled for determination on September 11, 2018.

## 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.

Lampson, *continued from page 8*

closing. A Gift Letter will still need to be executed. Remember that gifts can only be for primary or secondary residences, though the borrower does not need to be occupying the property

at the time of application.

It should be noted that an inheritance is not a gift, and inherited assets have different guidelines and allowances for use in a residential loan transaction. Another point to keep in mind is that each gift will need to be

separately documented. For instance, if dad gives the initial deposit to escrow for a new purchase transaction, and then also will be contributing to the final down payment, these are considered two separate gifts from a guideline perspective. Thus, a Gift Letter would need to be executed for each one, outlining the separate dates and amounts of occurrence. In this same instance, dad could give the two gifts as one to each borrower, or just both to one borrower—whether or not the borrowers are married.

Gifts in any form are generous acts. They are a demonstration of love and appreciation between two parties. While the regulation of a residential loan transaction may seem to stiffen these actions, there should be no less joy or appreciation of same. We are blessed to live in a community rich with the caring of others, and that, in itself, is a gift.

*Austin Lampson runs the Santa Barbara Office of OnQ Financial. A local residential mortgage lender with over a dozen years in the mortgage industry, Austin is an ally to her clients and partners in the mortgage process.*

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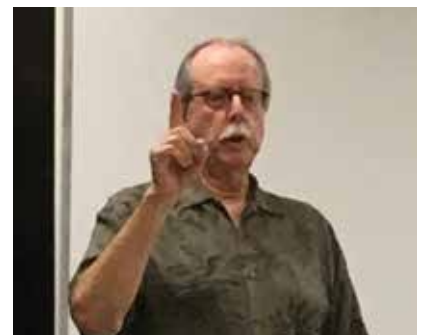
## Judge Von Deroian: Swearing-In Ceremony

On Friday, August 31st, newly appointed Santa Barbara Superior Court Judge Von Deroian was officially sworn-in by Presiding Superior Court Judge Patricia Kelly in a ceremony at the Veterans' Memorial Hall in Solvang.



## MCLE Program Looks at New Rules

The "New CA Rules of Professional Conduct" were discussed in an MCLE presentation by Professor Richard C. Solomon at the Santa Barbara College of Law. The program was presented by the In-House & Corporate Law Section together with the Intellectual Property/Technology Business Section of the Santa Barbara County Bar Association.







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Elizabeth Diaz



Angelica Carol



Stacy Robinson

Smith, *continued from page 10*

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### ***Family Violence Prevention Program***

October is Domestic Violence Awareness Month, and Legal Aid plays a critical role in providing legal services to domestic violence survivors in our community. Legal Aid's Family Violence Prevention (FVP) Program works to provide a holistic approach to clients seeking civil legal assistance regarding domestic violence, sexual assault, human trafficking, and elder abuse. The attorneys believe that access to legal services is a fundamental human right that should not be denied on the basis of income, and as such, they strive to empower their clients to move from a state of vulnerable victimization to one of dignity and safety. Over the years, Legal Aid expanded its FVP program to meet the rising and various needs of the community and to offer bilingual services to meet the needs of Spanish-speaking clients.

**Elizabeth Diaz**, recently named *Attorney of the Year* by Santa Barbara Women Lawyers, serves as the supervisor of the Family Violence Prevention Program and manager of the Santa Barbara Legal Aid office. She was first drawn to those suffering from domestic violence in high school and continued on this path through her time at UCSB, her internship with Legal Aid, and throughout law school. Her role centers on helping victims of abuse and assault get protection and assistance with their family law matters. She greatly enjoys being able to make a difference in people's

lives with the team she works with while seeing her clients transform as they overcome abuse.

Two other attorneys support Ms. Diaz in the program. **Angelica Caro** chose to become an attorney for Legal Aid because of its mission to provide "access and justice for low-income people" through a process of self-empowerment. She grew up in Lompoc before attending the Santa Barbara and Ventura Colleges of Law, and started working with Legal Aid in January of 2018. She continues to break down the barriers built by poverty and injustice by representing FVP program clients in North County.

**Stacy Robinson** is both personally and professionally fulfilled by her work with Legal Aid. She is proud to be counted among the many Legal Aid attorneys working on the front lines of litigation and advocacy, and to play a small part in Legal Aid's mission for equal access to justice for our underserved and vulnerable communities. Ms. Robinson serves South County clients in the Santa Barbara office. ■

*Jennifer Smith is the Executive Director of Legal Aid Foundation of Santa Barbara County. She may be reached at [jsmith@lafsb.org](mailto:jsmith@lafsb.org), (805) 963-6754 x.103. For more information about Legal Aid, or to donate, visit: [www.lafsb.org](http://www.lafsb.org). For more information about Santa Barbara Chowder Fest, visit <http://www.santabarachowderfest.com/>.*

# Motions

Santa Barbara Attorney **John W. Ambrecht**, an expert in estate planning, estate tax law, and business succession planning, will address guests at the upcoming 3rd Annual Institute for Family Governance conference in January 2019 in New York City. The conference is titled, "Family Governance: Empowering Beneficiaries Through Inter-Generational Planning: From Strategy to Execution,"



and it takes place on January 24, 2019, at the Union League Club in New York City. Ambrecht will be among a panel of distinguished speakers at the day-long conference and will discuss the topic, "Governance Structures that Actually Fit a Psychological Model of Human Behavior."

Ambrecht is the founder of **Ambrecht & McDermott LLP**, 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 estate and gift tax controversies.

Ambrecht is a certified Specialist in Estate Planning, Trust and Probate Law, California State Bar Board of Legal Specialization. He also is the chair of the Business Families Special Interest Group (SIG) for the USA for STEP World Wide ([www.STEP.org](http://www.STEP.org)), an international organization based in London with over 20,000 professionals who incorporate an international tax and family perspective. SIG helps to raise the profile, understanding, and impact of family dy-

namics in family business succession.

Ambrecht is also a Fellow of the American College of Trust and Estate Counsel, an exclusive non-profit organization for the United States' top probate and estate planning attorneys ([www.actec.org](http://www.actec.org)), and a member of the Advisory Board for the Institute for Family Governance which is hosting the conference in New York. Learn more about the institute at [www.IFGworldwide.org](http://www.IFGworldwide.org).



Founding partner of the firm **Bamieh & Erickson, PLC**, **Ron Bamieh**, is pleased to announce the firm's managing attorney **Danielle De Smeth** will soon be managing shareholder. Bamieh and De Smeth have known each other for more than 20 years, since Bamieh was a top felony prosecutor in the Ventura District Attorney's office coaching Danielle's high school mock trial team. Bamieh says about De Smeth, "She is an excellent attorney and even better person who I am thrilled to soon call my business partner."

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Your member dues include a subscription to *Santa Barbara Lawyer* and the e-Newsletter.

### SCHEDULE OF DUES FOR 2019

Active Members	\$130
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Non-Profit	\$65
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Total amount enclosed	\$_____.

### AREAS OF INTEREST OR PRACTICE (check box as applicable)

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| <input type="checkbox"/> ADR              | <input type="checkbox"/> Estate Planning/Probate              |
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| <input type="checkbox"/> Elder Law        | <input type="checkbox"/> Real Property/Land Use               |
| <input type="checkbox"/> Employment Law   | <input type="checkbox"/> Taxation                             |

Mail completed form along with check to:

Santa Barbara County Bar Association, 15 West Carrillo Street, Suite 106, Santa Barbara, Ca 93101 Tel: (805)569-5511



**SAVE THE DATE!**  
*Santa Barbara County Bar  
Association  
Annual Bench & Bar Conference*

**LEGAL HAZE:**  
*Cannabis in California*



**Featuring:**

- Das Williams (Keynote Speaker)  
First District Supervisor
- Tava Ostrenger, Esq.  
City Attorney's Office
- Bill Makler, Esq.  
Competence / Substance Abuse
- Jennifer Duffy, Esq. and David Secrest, Esq.  
Employment Law Perspective
- Hilary Bricken, Esq.  
Business Perspective
- Amy Steinfeld, Esq.  
Land Use Perspective
- Brian Marblestone  
Insurance Perspective
- Renee Fairbanks, Esq.  
Family Law Perspective
- Distinguished Panel of SB Judges

**6 hours of MCLE credit, including mandatory subjects  
Saturday, January 26, 2019, at the Santa Barbara Club**

Is CIVILITY a sign of weakness?

*The California Coast Chapter of the  
American Board of Trial Advocates  
(ABOTA) presents:*

## CIVILITY MATTERS!

Please join us for a fascinating video presentation and panel discussion with Judge Colleen Sterne and Judge Thomas Anderle and members of the plaintiff and defense bar, on the topic: "Why Civility, and Why Now?" We all strive for professionalism, but it can be difficult to maintain high standards in adversarial situations – opponents' toxic letters, 'hide the ball' discovery disputes, and clients with legal perceptions shaped by television. This program is designed to "raise the bar" for all members of the legal profession.

### **Speakers**

**Judge Colleen K. Sterne**, Santa Barbara County Superior Court

**Judge Thomas P. Anderle**, Santa Barbara County Superior Court

**Brian K. O'Connor, Esq.**, Santa Barbara County ABOTA Representative

**Jill L. Friedman, Esq.**, President California Coast Chapter of ABOTA

### **Date and Time**

Wednesday, November 14<sup>th</sup>, 12 noon to 1:30 pm

### **Location**

University Club of Santa Barbara, 1332 Santa Barbara Street, Santa Barbara, CA 93101

### **Reservations**

Please RSVP via email to Brian K. O'Connor, Santa Barbara County ABOTA Representative, at [bkoesq@gmail.com](mailto:bkoesq@gmail.com), by Friday Nov. 02, 2018 (PLEASE NOTE: We anticipate full venue capacity)

### **Cost and Payment**

Lunch will be provided for \$35.00 with advance RSVP. Please mail checks by Friday Nov. 1<sup>st</sup>, payable to: ABOTA, c/o Brian K. O'Connor  
LAW OFFICE OF BRIAN K. O'CONNOR, 800 Garden Street, Suite L, Santa Barbara, CA 93101

### **MCLE Credit**

One hour of credit (applied for Ethics)

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The Santa Barbara County Bar Association, North Santa  
Barbara County Bar Association and the Santa Maria Legal  
Professionals Association present:

## “Cellphone Forensics: Applications in Discovery and Investigations”

**When:** November 15, 2018 from 12:00pm – 1:00pm

**Where:** Santa Maria Inn at 801 S Broadway, Santa Maria, CA 93454

**MCLE:** 1 Hour General MCLE Credit

**Speaker(s): Thomas Plunkett**

Thomas Plunkett is the Director of Digital Forensics at Calforensics, San Diego. He is a Certified Information Systems Security Professional (CISSP) and EnCase Certified Forensic Examiner (EnCE) with over 20 years of experience in digital forensics, cybersecurity and counterintelligence. He holds a Master's degree in Information Systems and is an adjunct professor, teaching cybersecurity and digital forensics topics at the University of San Diego. Mr. Plunkett has led investigations involving data breaches, computer hacking, theft of intellectual property, and foreign intelligence operations. His clients have included all levels of government, law firms, casinos, medical device manufacturers, hospitals, technology companies and celebrities.

**About the Event:** Cellphones represent one of the fastest-changing areas of legal practice. Mobile device evidence is more important than ever, thanks to the rapid evolution of the technology and the way this evidence is treated by the courts. Touching on important recent cases, technology developments, and Calforensics' direct experience advising attorneys, this presentation provides up-to-date guidance on the application of cellphone forensics in litigation, investigations, and other legal matters.

**Price:** Bar Association/non-attorney Staff & LPA Members \$25/Non-Members \$35

**Contact Information/RSVP:** Please RSVP with lunch choice [trifid sandwich or veggie wrap] by November 13, 2018, to Northern Santa Barbara County Bar Association at [nsbcba@gmail.com](mailto:nsbcba@gmail.com)





*The Santa Barbara County Bar Association Proudly Presents*

# *A Reception with the Appellate Justices of Division Six*

*1 hour General MCLE*

*Justices' panel to be moderated by Santa Barbara Superior  
Court Presiding Judge Patricia Kelly*

*Please join us on  
Tuesday, October 30th, 2018  
6:00 pm - 8:00 pm  
The Santa Barbara Club - 1105 Chapala Street*

*1 Hour MCLE General Credit*

*SBCBA Members: \$50 (After October 11<sup>th</sup>, \$60)*

*Non-Members: \$60 (After October 11<sup>th</sup>, \$70)*

*Students/Paralegals: \$20*

*Please call 569-5511 to pay via credit card or mail completed  
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15 West Carrillo Street, Santa Barbara, CA 93101*

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J. Jeff Chambliss  
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[jeff@chamblisslegal.com](mailto:jeff@chamblisslegal.com)

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### ESTATE PLANNING ASSOCIATE

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Santa Barbara, CA

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## 2018 SBCBA SECTION HEADS

### Alternative Dispute Resolution

Dr. Penny Clemmons 687-9901  
clemmonsjd@cs.com

### Bench & Bar Relations:

Larry Conlan 564-2444  
lconlan@cappellonoel.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@santabarbaradivorce.com

### In House Counsel/Corporate Law

Betty L. Jeppesen 450-1789  
jeppesenlaw@gmail.com

### Intellectual Property

Christine Kopitzke 845-3434  
ckopitzke@socalip.com

### Mandatory Fee Arbitration

Eric Berg 708-0748  
eric@berglawgroup.com  
Vanessa Kirker Wright 964-5105  
vkw@kirkerwright.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  
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For information on upcoming MCLE events,  
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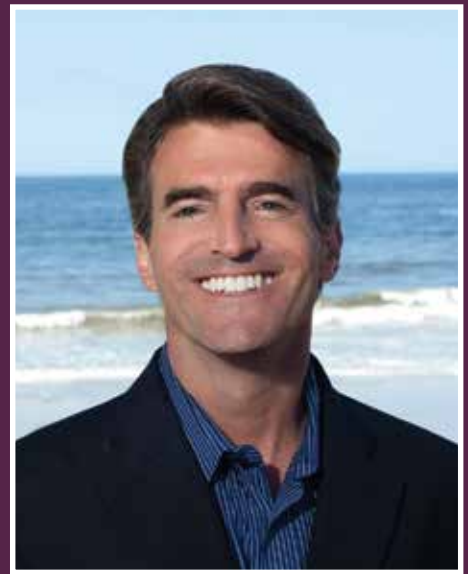
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