

Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
August 2019 • Issue 563





Gary Goldberg

Real Estate Broker

Former Practicing Attorney

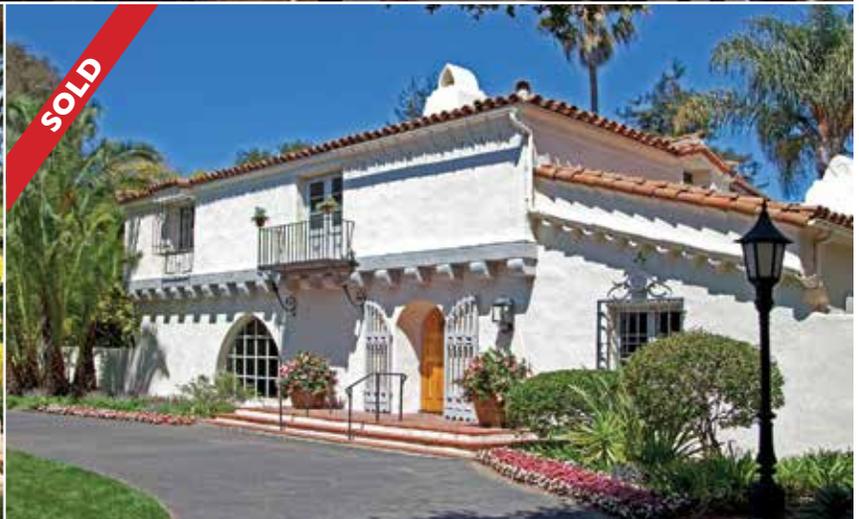
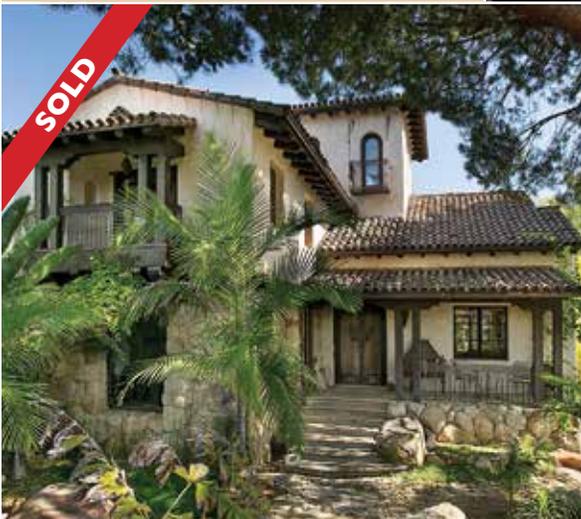
UC Hastings College of Law • Order of the Coif
CalBRE License # 01172139

- Intensive Marketing Plan for each listing
- Member, Santa Barbara, Ventura, and Santa Ynez Real Estate Boards
- Expert witness in Real Estate and Divorce Matters, and Estate Planning
- Non-Practicing Licensed Attorney, Instructor Real Estate Law and Practice Courses at SBCC

For your Real Estate needs, choose carefully and choose experience!

Over \$700,000,000 Sold Since 2000

Among the top 10 agents in Santa Barbara (MLS statistics for 2000-2017)



1086 Coast Village Road, Santa Barbara, California 93108 • Office 805 969-1258 • Cell 805 455-8910
To view my listings visit www.garygoldberg.net • Email gary@coastalrealty.com

Get the Best Coverage at the Best Price

Selecting the right insurance broker is the first step in protecting your assets, clients, reputation and practice. You need a policy that serves your best interests at an affordable premium, and we offer you that choice.

Walter R. Anderson Insurance has specialized in lawyer malpractice insurance since 1981. We negotiate terms with 19 insurers throughout California, so we can offer you the best coverage options at the best prices.

Get the Best Choice of Coverage and Price

If fifty percent of your practice is devoted to one category, and you've had no claims in the last five years, you should be eligible for a large discount in your insurance premiums.

**Call for an estimate:
805.682.8885**

Or visit us online and complete
the law firm information form:

Lawyers-Insurance.com

Click on Get Started Now

**WALTER R. ANDERSON
Insurance Services, Inc.**

3757 State Street, Suite 2B

Santa Barbara CA 93105

TEL: 805.682.8885

FAX: 805.563.1160

info@lawyers-insurance.com

CA License: 0711805

Santa Barbara County Bar Association

www.sblaw.org

2019 Officers and Directors

Officers

AMBER HOLDERNESS

President
Office of County Counsel
105 E. Anapamu Street, #201
Santa Barbara, CA 93101
T: (805) 568-2969
aholderness@co.santa-barbara.ca.us

ELIZABETH DIAZ

President-Elect
Legal Aid Foundation
301 E. Canon Perdido Street
Santa Barbara, CA 93101
T: (805) 963-6754
ediaz@lafsb.com

ERIC BERG

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

JENNIFER GILLON DUFFY

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

J. JEFF CHAMBLISS

Past President
The Law Offices of J. Jeff Chambliss
140 E. Figueroa Street
Santa Barbara, CA 93101
T: (805) 895-6782
jeff@chamblisslegal.com

Directors

JOSEPH BILLINGS

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

DEBORAH BOSWELL

Mullen & Henzell LLP
112 Victoria Street
Santa Barbara, CA 93101
T: (805) 966-1501
dboswell@mullenlaw.com

ARIEL CALONNE

City Attorney's Office
740 State Street, Ste 201
Santa Barbara, CA 93101
T: (805) 564-5326
acalonne@santabarbaraca.gov

LARRY CONLAN

Cappello & Noel LLP
831 State Street
Santa Barbara, CA 93101
T: (805) 564-2444
lconlan@cappellonoel.com

IULIA DAVIES

800 Anacapa Street, Suite A
Santa Barbara, CA 93101
T: (805) 260-9096
iuliadavies@gmail.com

STEPHEN DUNKLE

Sanger, Swysen, & Dunkle
125 E. De La Guerra, Suite 102
Santa Barbara, CA 93101
T: (805) 962-4887
sdunkle@sangerswysen.com

TARA MESSING

Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101
T: (805) 963-1622
tmessing@environmentaldef-
fensecenter.org

CHAD PRENTICE

Maho & Prentice
629 State Street Ste. 217
Santa Barbara, CA 93101
T: (805) 962-1930
cprentice@sbcslaw.com

MICHELLE ROBERSON

President
Sierra Property Group, Inc.
5290 Overpass Road, Bldg. C
Santa Barbara, CA 93111
T: (805) 692-1520 *102
michelle@sierrapropsb.com

JEFF SODERBORG

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

ROSALEEN WYNNE

Law Offices of James F. Cote
222 E. Carrillo St. Ste 207
Santa Barbara, CA 93101
T: (805) 966-1204
rosaleen@jfcotelaw.com

LIDA SIDERIS

Executive Director
15 W. Carrillo Street, Ste 106
Santa Barbara, CA 93101
T: (805) 569-5511
Fax: 569-2888
sblawdirector@gmail.com

Santa Barbara Lawyer

A Publication of the Santa Barbara
County Bar Association

©2019 Santa Barbara County Bar Association

CONTRIBUTING WRITERS

Penny Clemmons
Christopher Hamilton
Gregory W. Herring
Julianna M. Malis
Robert Sanger

EDITOR

Stephen Dunkle

ASSISTANT EDITOR

Joe Billings
Lida Sideris

MOTIONS EDITOR

Michael Pasternak

VERDICTS & DECISIONS

EDITOR

Allegra Geller-Kudrow

PHOTO EDITOR

Mike Lyons

DESIGN

Baushe Graphic Arts

PRINTING

Printing Impressions

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

Submit all **VERDICTS AND
DECISIONS** matter to:
Allegra Geller-Kudrow at
ageller-kudrow@mullenlaw.com

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

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

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

Official Publication of the Santa Barbara County Bar Association
August 2019 • Issue 563

Articles

- 6 Understanding Veterans Affairs, Pension Benefits and How They Can Pay for Elder Care Today, *By Julianna M. Malis, LL.M*
- 7 The Forensic Evidence Toolbox and Its Application, *By Robert Sanger*
- 12 Whose Pet Is It Anyway?, *By Penny Clemmons*
- 14 The *Forum Non Conveniens* Defense in Family Law Litigation, *By Gregory W. Herring, CFLS*
- 15 Clandestine Forensic Accounting, *By Christopher Hamilton*

Sections

- 20 Verdicts & Decisions
- 21 Motions
- 23 Section Notices
- 26 Classifieds

On the Cover

Santa Barbara Courthouse during Old Spanish Days 2018
by Victoria Lindenauer

Bench and Bar Meetings

As Presiding Judge, the Honorable Michael Carrozzo has set the schedule for the Bench and Bar Meetings that will take place in 2019 as follows:

August 21, 2019 – 12:15 pm to 1:15 pm
November 20, 2019 – 12:15 pm to 1:15 pm

Each meeting will be held at the Santa Barbara Court Video Conference Room in the Figueroa Division of the Santa Barbara Courthouse.

For those who are not familiar, these Bench and Bar Meetings provide a forum for local members of the Bar to engage in an informal dialogue with the Presiding Judge as a means of raising issues and concerns that may not otherwise be addressed. All attorneys and paralegals are welcome to attend.

For any practitioners wishing to submit agenda items for consideration before any of the scheduled meetings, please email those items to the Santa Barbara County Bar Association Bench & Bar relations chair, Jeffrey Soderborg at jsoderborg@barneslawsb.com.

We look forward to seeing you at the upcoming meetings!

Understanding Veterans Affairs, Pension Benefits and How They Can Pay for Elder Care Today

BY JULIANNA M. MALIS, LL.M.
ANACAPA ESTATE PLANNING & ELDER LAW

Many veterans believe that government benefits are only available if they were wounded in combat or suffer from a disability related to their service. This is simply not true. One of the most valuable benefits available to veterans is also one of the least understood and most underutilized—the Veterans Pension Program.

Veterans and their spouses may be eligible for a valuable program known as Veterans Pension. For many veterans who are just getting by on social security and withdrawing as little as possible from their retirement money, this significant monthly stipend from the Department of Veterans Affairs (VA) can make a major difference in their quality of life.

An increased pension is available if the veteran requires the aid and attendance of another, or is housebound. While every family situation is unique, an eligible veteran can receive over \$26,000 a year tax-free for assistance with medical expenses and long-term care. An eligible veteran's widowed spouse can potentially receive over \$14,500 per year tax-free. Another important aspect of the Aid and Attendance benefit is that it can allow an eligible veteran or widowed spouse to pay anyone, including his or her child, for home care. It can also be used to pay for professional care in the home, assisted living, nursing home care, insurance premiums, prescription drugs, and co-pays.

The Aid and Attendance benefits can help an eligible veteran or widowed spouse live at home for as long as possible

while still receiving the care he or she needs and protecting hard-earned assets. In addition, depending on the person's specific circumstances, planning ahead can help the veteran double or triple the time they can afford to live in an assisted living facility, while at the same time preserving Medi-Cal eligibility if a future nursing home stay is needed.

The challenge of obtaining veteran pension benefits from the government can be confusing for many people, and recent rule changes can also make it harder for beneficiaries to know what benefits they can collect – and how to collect them. The latest major change in veteran pension benefits took effect October 18, 2018, when the VA

implemented comprehensive new rules regarding the eligibility of applicants applying for a pension.

Potential beneficiaries need to be aware of the 2018 changes to this program. A VA-accredited elder law attorney can help veterans and their spouses by discussing the new requirements to obtain a VA pension as well as veterans' healthcare options and the tax consequences of those options. A VA-accredited elder law attorney can also help veterans and their families protect assets using wills, trusts and other estate planning strategies, as well as implement a plan for each individual's situation.

Veterans may qualify for tax-free income from the VA if they meet certain criteria, including: they are 65 or older or 100 percent disabled; they served at least 90 days on active duty with one day of active duty during eligible wartime period; they need help with activities of daily living such as dressing, bathing, toileting; they are currently paying for, or need, nursing home care, assisted living care, or in-home care. The veteran's discharge from the military has to be other than dishonorable.



Julianna M. Malis

Veterans who serve our country honorably deserve all the benefits they are eligible to receive so they can live their best life possible in retirement.”

Continued on page 17

The Forensic Evidence Toolbox and Its Application

BY ROBERT SANGER

The Honorable Thomas P. Anderle was so kind as to invite me to make a presentation on Forensic Evidence to invited judges and lawyers.¹ After a career of studying, teaching, litigating, and writing about forensics, it struck me as a real challenge to distill into one presentation what might be helpful to judicial and legal practitioners. Having given it some thought, I would like to share what amounts to a synthesis of the basic rules and resources that would be helpful to judges and lawyers actually using forensic evidence in cases.

Justice Stephen Breyer introduced the Third Edition of the federal *Reference Manual on Scientific Evidence* by saying:

“In this age of science, science should expect to find a warm welcome, perhaps a permanent home, in our courtrooms. The reason is a simple one. The legal disputes before us increasingly involve the principles and tools of science. Proper resolution of those disputes matters not just to the litigants, but also to the general public—those who live in our technologically complex society and whom the law must serve. Our decisions should reflect a proper scientific and technical understanding so that the law can respond to the needs of the public.”²

Judges and lawyers are usually not scientists, and their day job is not to be a scientist—in relation to forensic evidence; their job is to address the legal issues pertaining to foundation and admissibility. To do this, they need to understand and apply the legal rules which, as codified and interpreted, are unnecessarily complicated. To assist in making the legal process of dealing with forensic evidence workable, this article will suggest a “Forensic Evidence Toolbox” that puts the basic materials and resources in one convenient location. After the Toolbox is created, the article will reorganize the existing rules on forensic evidence, specifically dividing the rule relating to foundation and admissibility, into five simple steps. Once the complicated rules are thus reorganized, they are demystified and fairly easy to use.

Of course, while I hope that this article will provide a

good working framework for the foundation and admissibility of forensic evidence, there is much more to forensic science that cannot be covered in this abbreviated format. Dean Jackie Gardina at the Santa Barbara College of Law,³ has agreed to sponsor a week-long Forensics Institute presently scheduled for early to mid-March, 2020. It is expected to be accessible to lawyers (for MCLE credit) as well as judges, law students and allied professionals. Forensic science is both complex and changing and can be the subject of a lifetime of more nuanced learning. The modest hope, in these pages, is to start with a workable system for dealing with the foundation and admissibility of forensic evidence to help judges and lawyers do their jobs.



Robert Sanger

The Forensic Evidence Toolbox

The basic materials needed to understand issues of foundation and admissibility of forensic evidence are not that voluminous. However, short as they are, they are not organized in a rational manner and are just downright confusing. Nevertheless, to get started, this article suggests assembly of the canonical texts into a “Forensic Evidence Toolbox.”⁴

The materials in the “Toolbox” will include a few of the Federal Rules of Evidence (FRE) and a few sections of the California Evidence Code (CEC) along with four cases and three reference books. The basic “Forensic Evidence Toolbox” materials are spelled out below. Two caveats: 1) The rules, statutes and leading cases were enacted or decided in a less than logical fashion over time and are hard to follow. Add them to the Toolbox for reference and they will be addressed in a more logical fashion below in the section on “*The Simplified Forensic Evidence Rules;*” 2) For any individual forensic evidence issue, the relevant standards or best practices guides,⁵ and statutory law or regulations that pertain to the particular area of science or expertise, should be added.

With those observations, the basic “Forensic Evidence Toolbox” should contain:

- FRE 103 and 104 / CEC 402 and 403—Hearing out of the presence of the Jury
- FRE 403 / CEC 352—Exclude evidence if probative

value is substantially outweighed

- FRE 702 / CEC 720 and 801(b)—Expert qualified by knowledge, skill, training, and education
- FRE 703 / CEC 801(b) and 803—Basis of Opinion
- *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (“*Daubert*”)
- *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (“*Kumho Tire*”)
- *Sargon v. Univ. Southern Cal.*, 55 Cal.4th 747 (2012) (“*Sargon*”)
- *People v. Kelly*, 17 Cal.3d 24 (1976) (“*Kelly*”)
- National Academy of Science, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, National Academies Press (2019) (“*NAS Report*”)
- Nat’l Research Council, Committee on Science, Technology, and Law Policy and Global Affairs, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE THIRD EDITION, National Academies Press, (3rd Ed. 2011) (“*Reference Manual*”)
- President’s Council of Advisors on Science and

Technology, FORENSIC SCIENCE IN THE CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS, (2016) (“*PCAST Report*”)

The Simplified Forensic Evidence Rules

Rule #1: All evidence, including forensic evidence, must be trustworthy. Forensic evidence has to be shown by the proponent to be trustworthy. If it is not basically trustworthy, one or more of the rules below will make it inadmissible. But, to start with, think big picture: Is it trustworthy? (The *NAS Report*, *Reference Manual*, and *PCAST Report*.)⁶

Rule #2: The Judge is the Gatekeeper. We all know this, however, bad forensics are admitted into evidence all the time. *Daubert* says the judge is the gatekeeper and *Sargon* says *Daubert* applies in California. The judge is not a doorstop holding the door open, she is a gatekeeper actively using critical thinking to make admissibility rulings.⁷

Rule #3: The proponent must establish and the court must evaluate the foundational facts to establish admissibility based on five steps.⁸ The proponent must present sufficient evidence to support a finding that foundational facts exist. (FRE 103 and 104 and CEC 402 and 403.) Those foundational facts are set forth in the five steps below. The duties of the judge as gatekeeper apply to the admissibility of expert opinions regarding science (*Daubert*) and other areas of forensic expertise. (*Kumho Tire* and *Sargon*).⁹

Step #1: Is it a Science? Whether a science or an area of forensic expertise qualifies under *Daubert* and *Kumho Tire* requires the court to ask:

- whether the theory or technique in question can be (and has been) tested, (falsifiability);
- whether it has been subjected to peer review and publication;
- its known or potential error rate;
- the existence and maintenance of standards controlling its operation; and
- whether it has attracted widespread acceptance within a relevant scientific community.

Another way to ask this is whether the science or area of forensic expertise possesses “foundational validity.” (*PCAST Report*.) Yet another is to ask if it will produce “scientific, technical or specialized knowledge” that is the result of “reliable principles and methods” (FRE 702) that are “sufficiently beyond common experience?” (CEC 801(a).)

Step #2: Is the Witness a Scientist Qualified in this Science? Whether an expert qualifies is based on

BONGIOVI MEDIATION

Mediating Solutions since 1998

Mediator • Arbitrator • Discovery Referee

“There is no better ambassador for the value of mediation than Henry Bongiovi.”



HENRY J. BONGIOVI

AV Preeminent Rating
(5 out of 5)

AVO Rated ‘Superb’
(10 out of 10)

Conducting Mediations
throughout California

805.564.2115

www.henrybongiovi.com

the expert's "knowledge, skill, training, education" in the science or area of expertise. (FRE 702; CEC 720; CEC 801(b).) Under *Daubert* the expert's qualifications should be evaluated based, in part, on whether she has been subject to peer review and has published in the area, and whether she has been subject to proficiency testing or error rates. "[W]hether a person qualifies as an expert in a particular case depends upon the facts of that case and the witness' qualifications." (*Kelly*, second prong.)

In other words, the expert must be an expert, not just someone who has made interesting observations.¹⁰ The expert cannot testify beyond the area in which she has expertise.¹¹

Step #3: Is the Data Reliable? Whether data is reliable is based on whether it empirically supports the subject matter of the expert's opinion. (*Sargon*.) In other words, absent relevant empirical data, an expert opinion should not be allowed. Furthermore, the data must have integrity. It cannot be tainted.¹² It cannot be based on inadmissible hearsay.¹³

To the extent it applies in a given case, the foundation for the admissibility of an opinion must include evidence that the source was reliable, proper scientific methods were employed in collection, control samples were taken, the chain of custody was maintained, and protocols were employed to avoid contamination.¹⁴

Step #4: Was the Data Properly Analyzed? Whether the data was properly analyzed is based on whether the expert followed the proper protocols, avoided contamination, used equipment that was properly maintained and calibrated.¹⁵ This can be evaluated in terms of whether the criteria to establish "validity as applied" in this area of science or expertise have been followed in practice. (*PCAST Report*). "[T]he proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." (*Kelly*, third prong.)

Step #5: Based on the Science, What Can a Qualified Scientist Report Based on the Reliable Data Properly Analyzed? This is the ultimate question that is often ignored in practice. Part of the gatekeeping function is not to just say "yay" or "nay" on the

admissibility of the "expert" but to carefully regulate what the expert is allowed to say. In *Kumho Tire* the United States Supreme Court said:

"The objective of [*Daubert's* gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

In *Sargon* the California Supreme Court said, "... the trial court has the duty to act as a gatekeeper to exclude speculative expert testimony."

In other words, scientific or expert opinion must be stated in scientific or expert terms. Those terms would invoke the scientific method and would include explaining or demonstrating the empirical data and

then explaining how that data is consistent with or not consistent with a hypothesis and whether or not there are alternative hypotheses that are also not ruled out by the data.¹⁶ Experts cannot comment on credibility¹⁷ nor can they simply take sides in the litigation.¹⁸ And, as the Department of Justice has instructed, an expert also should "not use the expressions 'reasonable degree of scientific certainty,' 'reasonable scientific certainty,' or similar assertions of reasonable certainty in either reports or testimony unless required to do so by a judge or applicable law."¹⁹

Rule #1: All evidence, including forensic evidence, must be trustworthy. Forensic evidence has to be shown by the proponent to be trustworthy. If it is not basically trustworthy, one or more of the [other] rules will make it inadmissible. But, to start with, think big picture: Is it trustworthy?

Rule #4: If the foundational facts are established, the court must determine if the probative value is substantially outweighed by the prejudicial effect. FRE 403 and CEC 352 provide slightly different standards but mean that the judge shall or may exclude relevant evidence if the probative value is substantially outweighed by the prejudicial effect. FRE 403: "by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." CEC 352: "by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The court should consider excluding scientific or expert testimony because it

may be given undue weight by a jury. It must meet all the criteria and have considerable integrity and weight.

Conclusion

In summary, judges and lawyers should assemble their “Forensic Evidence Toolbox” containing:

Evidence rules: FRE’s (103, 104, 403, 702, and 703) and CEC’s (402, 403, 352, 720, 801 and 803);

Four key cases: (*Daubert*, *Kumho Tire*, *Sargon* and *Kelly*); and

Three basic treatises: (*NAS Report*, *Reference Manual* and *PCAST Report*.)

Augmented with: The standards and best practices of the particular science or area of expertise and any cases or regulations specific to the discipline.

Using that “Toolbox,” the proponent of evidence should lay a foundation and the judge should rule on admissibility using the “Simplified Forensic Evidence Rules.”

Rule #1: All evidence, including forensic evidence, must be trustworthy.

Rule #2: The Judge is the Gatekeeper.

Rule #3: The proponent must establish and the court must evaluate the foundational facts based on five steps:

Step #1: Is it a science?

Step #2: Is the witness a scientist qualified in this science?

Step #3: Is the data reliable?

Step #4: Was the data properly analyzed?

Step #5: Based on the science, what can a qualified scientist report based on the reliable data properly analyzed?

Rule #4: If the foundational facts are established, the court must determine if the probative value is substantially outweighed by the prejudicial effect.

These four rules—and the five steps of rule # three—are all based on existing law. They simply untangle the unduly complicated and disorganized law presently found in the FRE’s, the CEC and case law. Lawyers need to check all the boxes contained in these rules to establish a foundation for forensic evidence, and judges need to consider them to rule on admissibility. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 45 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 a Fellow of the American Academy of Forensic Sciences (AAFS) and Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers’ organization. He is a Director

of Death Penalty Focus and an Associate Member of the Council of Forensic Science Educators (COFSE). The opinions expressed here are his own and do not necessarily reflect those of the organizations with which he is associated. ©Robert M. Sanger.

ENDNOTES

- 1 The presentation is scheduled for July 17, 2019, which will occur while this article is in press.
- 2 Nat’l Research Council, Committee on Science, Technology, and Law Policy and Global Affairs, *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* THIRD EDITION, National Academies Press, 2 (2011).
- 3 The Santa Barbara Colleges of Law is a non-profit school, accredited by the California State Bar and by the Western Association of Schools & Colleges Senior College and University Commission (WSCUC).
- 4 It can be a metaphorical toolbox, a computer or DropBox® site or a paper file.—
- 5 Many areas were the subject of “Scientific Working Groups” (SWG’s) created by the FBI and, thereafter, “Scientific Area Committees” (organized as OSAC’s) created by NIST.—There are also standards, best practices and other documents issued by the “guild” organizations for each area and Academy Standards Board consensus groups created by the American Academy of Forensic Sciences as well as Department of Justice “Uniform Language for Testimony and Reports.”—Those items can be located by speaking with an expert or by doing scholarly research and, once found, can be added to the toolbox for each particular case.
- 6 The *NAS Report*, *Reference Manual*, and *PCAST Report* all address this issue.—The *NAS Report* is broadly critical of existing forensic evidence.—The *Reference Manual* takes on specific areas of evidence as does the *PCAST Report* and the latter focuses on an analysis of “foundational validity” and “validity as applied.”—All three are a starting point for understanding the potential conflict between the kind of testimony that has been admitted in the past and the kind of “trustworthiness” that should be required for the foundation and admissibility of forensic evidence following some semblance of the scientific method.
- 7 While some judges and lawyers are very well versed in foundation and admissibility rules, empirical evidence suggests that not all are.—*See, e.g.,* Sophia Gatowski, Shirley Dobbin, James Richardson, Gerald Ginsburg, Mara Merlino, and Veronica Dahir, *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 *LAW & HUMAN BEHAVIOR* 433, (2001) (The authors conducted a two-part survey of 400 state court judges – with a 71% and 81% response rate respectively -- in which only four percent of respondents could operationalize Daubert’s falsifiability and error rate factors).
- 8 These steps were originally set forth as four stages but, upon further reflection, five stages (redesignated as steps) seem to make the rule easier to apply.—*See, Robert Sanger, The New Rules for Admissibility of Expert Testimony: Part I and Part II*, Santa Barbara Lawyer Magazine Issue 493 and 494 (2013), Selected Works at: http://works.bepress.com/robert_sanger/22/ and http://works.bepress.com/robert_sanger/21/.—*See also, Robert Sanger, “A Scientific Approach to Scientific Evidence:—A Four-Stage Rule for Admissibility and Scope,”* (Thompson Reuters, 2013) 2013 WL 5757941.—
- 9 The Court in *Kumho Tire* held that *Daubert* requirements for forensic science would be applied flexibly to non-scientific expertise.—In light of that, this article will refer to “science” to include “science and expertise.”

- 10 *People v. Hogan*, 31 Cal.3d 815, 852-853 (1982), (trial court erroneously permitted a criminalist to offer blood spatter testimony where the criminalist had merely observed many bloodstains without any inquiry, analysis, or experiment.)
- 11 *People v. Pearson*, 56 Cal.4th 393, 445-446 (2013), (a radiologist, otherwise qualified as a radiologist, was not shown to be an expert regarding the effect of fossae abnormalities on human behavior and his testimony on that issue should not have been permitted); *People v. Vieira*, 35 Cal.4th 264, 292 (2005), (cult expert not qualified to render opinions on defendant's mental illness or mental states for murder.)
- 12 *People v. Parnell*, 16 Cal.App.4th 862, 868 (1993), (trial court properly excluded opinion of a psychotherapist as to defendant's mental state at the time of the crimes where the opinion was based in significant part on statements defendant made while under hypnosis.)
- 13 *Whitfield v. Roth*, 10 Cal.3d 874, 894 (1974), (neurosurgeon testified that he saw no abnormality in certain x-ray films and that he presented the films at "grand rounds at Stanford" to about 50 students, residents and faculty doctors and not one of them could see an abnormality or detect any pathology; held, the opinion of the other doctors who were not present in court was hearsay).
- 14 *See, e.g., Henry Lee, Timothy Palmbach and Marilyn Miller, HENRY LEE'S CRIME SCENE HANDBOOK*, Elsevier Academic Press (2001) 49-56.
- 15 *Kennemur v. State of California*, 133 Cal. App.3d 907, 923 (1982), (falsity of an expert's opinion can be shown by "error in the data upon which the first expert based his opinion.")
- 16 For an overview of the scientific methods (there are variations on the theme) see, James Ladyman, *UNDERSTANDING THE PHILOSOPHY OF SCIENCE*, Routledge (2002).
- 17 *People v. Sergill*, 138 Cal.App.3d 34, 39-40 (1982), (reversible error for officer to testify that child victim was telling the truth); *U.S. v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985), (it is an invasion of the jury's responsibility to determine the facts and witness credibility); *People v. Smith*, 30 Cal.4th 581, 626-628 (2003), (expert excluded who would have testified that the defendant was sincere in his remorse).
- 18 *Cooper v. Sowders*, 837 F.2d 284, 287 (6th Cir. Ky. 1988), (denial of Due Process for officer to opine that all the evidence



It is with great pride we announce
that Snyder Law, LLP is now
Snyder Burnett Egerer, LLP.

Sean R. Burnett and Ashley Dorris Egerer have been with the firm for over 15 years and both bring their loyalty, dedication and hard work to the forefront as the firm continues to offer highly specialized litigation services throughout the Central Coast and greater Los Angeles areas. Founding partner, Barry Clifford Snyder, continues to remain an active and integral part of the firm and its future. Barry spends the majority of his time litigating high profile transportation cases throughout California. He has secured 3 defense verdicts in the past 15 months, most recently in the Central District of California in a case that alleged over \$11 million in damages.

Barry, Sean and Ashley are joined by their other partners, Christopher Cotter, Jeffrey Choi, Jessica Farley, and Jerry Howard in leading the firm to continued successes. Each partner offers their own unique experiences in areas that includes real estate and construction, employment law, insurance coverage and disputes, product and professional liability, transportation and estate planning.

SNYDER BURNETT EGERER, LLP

5383 Hollister Avenue, Suite 240
Santa Barbara, CA 93111
Office 805.692.2800
Facsimile 805.692.2801
www.sbelaw.com



points to the defendant and excludes everyone else).

- 19 *Department of Justice Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline – Pattern Match Examination*, effective January 24, 2019.

Whose Pet Is It Anyway?

BY PENNY CLEMMONS

Thirty-three years ago, when my husband and I were married, we created a prenuptial agreement for two reasons: Bentley and Guinevere, our Old English Sheepdogs. My worst fear, if our marriage dissolved, was how would I prevail to gain custody of those two? They could not be separated since they had been raised together from puppyhood, and Guinevere was a special needs dog. She was born deaf. Predictably, the pre-nup gave me sole legal and sole physical custody with reasonable visitation to their father and right of first refusal. It did not provide for dog support. Fortunately, for all of us, I never needed to exercise the provisions of the pre-nup. However, for years, I've wondered if the pre-nup would protect my rights to the successor dogs.

On a serious note, not surprisingly, animal custody fights can become as cruel and contentious as child custody battles. Sometimes, even more so. A most hideous situation involved a litigant who had the family pet euthanized in retaliation for the husband filing for divorce. It's unknown if the District Attorney, Tom Sneddon at that time, brought criminal charges for animal cruelty.

Determining custody is one of the most difficult decisions a Family Law Judge has to make. If the case has made it to the courtroom, there is serious dysfunction between one or more of the parties, or one or more of the attorneys, or some combination. It is not unlike the client who wants his/her attorney to serve a Petition for Dissolution on Valentine's Day or the spouse's birthday. Family law attorneys like to pride themselves on client control. For instance, a typical response might be, "no, we will not serve your spouse at her



Penny Clemmons



mother's funeral," but it is not always possible despite best efforts. In high conflict child custody cases, judges often rely on expert witnesses and custody evaluators to assist them in making a decision that is in the best interests of the child.

Judges have had a difficult time exercising jurisdiction over animals, except for therapy animals, but Family Code Section 2605, enacted in 2019, has empowered judges to determine custody. It states in part:

The court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may enter an order, prior to the final determination of ownership of a pet animal, to require a party to care for the pet animal...

(b) ...the court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal.

Now that we have a statute that extends the courts' jurisdiction to animals, what resources will judges have to rely upon for their opinions? Considerations could include which parent would provide ease of access to the other. How would medical decisions and costs be allocated and would the parents need to provide pet insurance? Where would access exchanges take place? Would seat restraints be required in vehicles?

Would the judges interview the pet in chambers if it was of a certain age and maturity, and how would the court reporter take down the interaction in chamber's proceedings? Would the parties be required to attend Family Custody Services Mediation prior to filing a motion? How would Dog Support be calculated? Would the Dissomaster be replaced by a Dogomaster? Would the animal attend obedience school and, if so, which one? Would it go to day care or have a nanny?

With all these variables, this law gives rise to a new industry: Animal Custody Evaluations. The standard would be the best interests of the animal. Evaluators

would need to interview the parents, the animal(s), the vet, day care providers, conduct home visits and determine whether psychological testing of the parents was necessary to determine fitness. Obedience school records would need to be perused. Custody schedules would need to be

Continued on page 25



PERSONAL SERVICE FROM LOCAL ATTORNEYS CONSIDER MAHO I PRENTICE FOR YOUR PERSONAL INJURY REFERRALS

MAHO I PRENTICE LLP is a longstanding Santa Barbara firm which focuses its practice on handling plaintiff personal injury cases. We welcome your referrals on matters of personal injury and wrongful death and pay referral fees per State Bar rules. Personal, trustworthy, and accessible, we pride ourselves in exceptional client service, while obtaining maximum results. We will speak with all potential clients free of charge and will handle cases anywhere in the State of California. Please consider establishing a rewarding relationship with us.



MAHO I PRENTICE, LLP
ATTORNEYS AT LAW

Fifthian Building
629 State St., Suite 217, Santa Barbara, CA 93101

www.maho-prentice.com
(805) 962-1930

The *Forum Non Conveniens* Defense in Family Law Litigation

BY GREGORY W. HERRING, CFLS

California’s family law policies and remedies can be attractive to out-of-state parties. For instance, spousal support remains generally robust here, whereas it is limited, sometimes draconically so—in other jurisdictions. Domestic monthly child support awards can reach tens of thousands of dollars—especially in “extraordinary high earner” cases—while firm caps are imposed elsewhere. Our community property principles might prove more generous in certain cases than under the “equitable distribution” laws in 41 other states.

As a result, “foreign” litigants, not uncommonly seek California courts. Assuming the existence of personal and subject matter jurisdiction, do California’s under-funded and over-burdened family courts *always* have to handle the litigation when a party travels here?

Forum shopping for opportunities toward more lucrative litigation awards has long been rejected at the national level. The United States Supreme Court case, *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501, 510, upheld the dismissal of a New York lawsuit that had been mounted on arguments that New York awards were likely better than those of another competing state’s.

In California, Code of Civil Procedure section 410.30 subdivision (a) codifies the common law doctrine of *forum non conveniens* (“FNC”): “When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.” (Code Civ. Proc. § 410.30, subd. (a).) A “defendant,” by the last day of her time to plead, may file and serve a motion to stay or dismiss an action on the ground of FNC. (*Id.*, § 418.10, subd. (a)(2).) Failing to timely do so waives the defense. (*Id.*, § 418.10, subd. (e)(3).) An order granting a motion to stay or dismiss on the ground of FNC is immediately appealable.

(*Id.*, § 904.1 subd. (a)(3).)

In *Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, the California Supreme Court explained that FNC “... is an equitable doctrine invoking the discretionary power of a court to decline the exercise of jurisdiction (to stay or dismiss) it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere.” (*Stangvik v. Shiley, Inc.*, supra., at 751.)



Gregory W. Herring

“There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned. ... [T]he injustices and burdens on local courts and taxpayers ... which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state ... require that our courts, acting on equitable principles ..., exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere.”

“[I]n the hands of people, money becomes a traceable indicator of moral, ethical and even legal implications.”

(*Ibid.*, (citing the first published California case to apply FNC, *Price v. Atchison, T. & S. F. Ry. Co.* (1954) 42 Cal.2d 577).)

“In determining whether to grant a motion based on FNC, a court must first determine whether the alternate forum is a ‘suitable’ place for trial.” (*Ibid.*) “A forum is suitable if there is jurisdiction and no statute of limitations bar to the action. It is sufficient that the action can be brought, although not necessarily won, in the suitable alternative forum.” (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464.)

A defendant bears the burden of proof of establishing an FNC defense. This means that she must provide the trial court with sufficient evidence to enable it to carry out its weighing and balancing analysis. (*NFL v. Fireman’s Fund Ins. Co.* (2013) 216 CA4th 902, 926-927, 933, FTN. No. 15.)

The *Stangvik* Court outlined an approach including an

Continued on page 16

Clandestine Forensic Accounting

BY CHRISTOPHER HAMILTON

Forensic accounting is the investigation and analysis of people and money. Money by itself has no moral or ethical properties.

However, in the hands of people money becomes a traceable indicator of moral, ethical, and even legal implications. “Follow the money” is, therefore, a commonly understood and accepted truism. A coroner practices the most readily obvious form of forensic science as they are tasked with identifying the condition of the body immediately before death, thus providing a cause of death.

In similar ways, a forensic accountant plays the same role in several financial contexts. The most obvious may be establishing the financial condition and value of a business that has been destroyed or harmed, and quantifying the damages related to a catastrophic event.

The most common understanding of forensic accounting is in the arena of fraud, embezzlement, and the intentional destruction of tangible and/or intangible assets. Examinations in such cases require focus, caution, and the ability to process testimony and evidence through a multi-faceted lens. The money must be followed with a keen eye on the interaction of that money with people.

When a fraud examiner arrives, the fraud has usually ended and the victim has retained accountants to identify means and motive, and quantify the financial loss. Sometimes, the malfeasance is in-process and ongoing, and is only a suspicion. That dynamic adds intrigue and stress to the process since the goals are the same, but the environment of the investigation is cloaked in secrecy and a measure of urgency.

Cloak and Dagger

The following is a description of a case that was sensitive and urgent, and resulted in successful prosecutions. It was also unusual. The “field work” in this case began with a clandestine meeting behind a restaurant after midnight with an inside informant and several investigators.

In anticipation of the meeting several investigators covertly followed the informant to the meeting to assure they

were not being followed or otherwise observed. It was a fitting start to a most unusual “site visit” and case.

The most effective and common detection method for identifying occupational fraud in a business is a confidential tip by an employee or others. Determining what to do with such information can be difficult. In this case, the informant was an entry-level accounting clerk with first-hand observations and knowledge of what appeared to be a complex operation involving the cooperation of several members of division management to defraud the company of millions of dollars. The information was sent directly to a member of the company’s Board of Directors.

Because of the complexity and number of employees involved in the alleged conspiracy, the Board of Directors concluded that extraordinary measures must be taken to conduct the investigation. They hired a recently retired Federal law enforcement agent to lead the investigation with instructions to maintain strict secrecy regarding the investigation, its details and its progress. Not sure of how extensive the conspiracy was, there was to be no communication with any member of the company’s management team or the outside auditors.

All reporting on the progress and conclusions of the investigation were to be reported to the Chairman of the Board either in-person or via his personal secure phone line. The home office of the company was in a country other than that where the division was located.

Assembling the Investigative Team

The secrecy of the investigation presented several unique dilemmas. The most significant difficulty was how to develop evidence to prove embezzlement without obtaining any information from management and without the knowledge of management.

The fraud examination team was assembled by the lead investigator to complete the work with two primary approaches.

First, a team was assembled to acquire evidence of the personal finances and spending habits of the members of management in question. The goal in this approach was to assemble evidence independent of the forensic accounting work that would corroborate the accountants’ conclusions. Second, an accounting firm was retained to provide the fraud examination and forensic accounting work. In short, one team investigated the people involved, while the second team concurrently dug into the company’s books and followed the money trail.

The first assignment for the accountants was to solve

Continued on page 22

Herring, *continued from page 14*

analysis of “private” and “public” interest factors after which a California court might determine that another state could provide a proper alternative forum. (*Stangvik v. Shiley Inc.*, *supra*, at 751.)

Private interest factors relate to where the trial and enforcement of any judgment will be the most expeditious and least expensive. They include:

Accessing sources of proof (residence of parties, witnesses, location of physical evidence).

Travel costs for witnesses.

The availability of compulsory process concerning unwilling witnesses.

(*Ibid.*; *Morris v. AGFA Corp.*, *supra.*, at 1463-1464.)

Public interest factors include:

Avoiding overburdening local courts with congested calendars.

Protecting the interests of potential finders of fact so that they are not called upon to decide cases in which the local community has little concern.

Balancing the competing interests of California and the alternate jurisdiction.

(*Stangvik v. Shiley Inc.*, *supra*, at 751.)

The foregoing laws and principles are incorporated into family law practice through Family Code section 210: “[T]he rules of practice and procedure applicable to civil actions generally, ... apply to, and constitute the rules of practice and procedure in, proceedings under [the Family Code].” (Fam. Code § 210.)

Henderson v. Superior Court (1978) 77 Cal.App.3d 583 concerned a *Marvin* action (breach of a non-marital cohabitation contract) brought by a plaintiff who traveled to California before filing against her Florida resident partner. The defendant asserted *FNC*. The Court of Appeal upheld its application, rejecting the practice of forum shopping against nonresidents:

“California has a distinct public interest in not attracting to its borders and drawing into its court system controversies arising out of ... affairs carried on and concluded by nonresidents outside the state. ... If a newly-arrived claimant in California could initiate [a *Marvin*] action against a nonresident ... based on prior nonmarital cohabitation outside California, then California’s courts would be thrown wide open to the grossest form of forum shopping, for which the only equipment needed would be a tenuous claim to some California connection, a serviceable carpetbag, and a one-way ticket from New York, London, Paris, or Cannes.” (*Id.*, at 593-595.)

California’s version of the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), as codified in Family Code sections 3400 *et seq.*, expressly includes *FNC* considerations. Family Code section 3427 provides that a California family court may decline to exercise its jurisdiction at any time if it finds that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. (Fam. Code § 3427.)

Our state’s version of the Uniform Interstate Family Support Act (“UIFSA”), as codified in Family Code sections 5700.101 *et seq.*, reflects *FNC* concerns. It asserts strict requirements before California courts can modify out-of-state support obligations. UIFSA, as adopted in California, was in pertinent part meant to ensure that “only one valid support order may be effective at any one time.” (*In re Marriage of Amezquita* (2002) 101 Cal.App.4th 1415, 1420 (citations omitted)).

On the other hand, the California Supreme Court, in *Wheaton v. Wheaton* (1967) 67 Cal. 2d 656, held that California courts may freely entertain an annulment action against a non-domiciliary spouse based on the mutual consent of the parties. It stated, “the interests of the ... state of domicile of either party do not preclude a court that has personal jurisdiction over both parties from entertaining an annulment action.” (*Wheaton v. Wheaton*, *supra.*, at p. 664.) That case, though, concerned a relatively narrow fact pattern (the “wife” lived in Maryland, but accepted California jurisdiction) and is an outlier compared to the general rule.¹ *FNC* defenses are thus available when a party travels to California and litigates family law disputes. With today’s increasingly mobile population, initial consideration of *FNC* is more important than ever, and should fall under a family law attorney’s duty of care. ■

This article is in part based on legal research by Herring Law Group attorneys, Ruston Imming, CFLS and Morgan Nix. Greg Herring is also a CFLS and is the principal of HLG, a family law firm serving the 805 with offices in Santa Barbara and in Ventura County. He is a Fellow of the Southern California Chapter of the American Academy of Matrimonial Lawyers, and of the International Academy of Family Lawyers. His prior articles and blog entries are at www.theherringlawgroup.com.

ENDNOTES

- 1 See also *Millar v. Millar* (1917) 175 Cal. 797, 809, holding that statutory residence requirements for divorce do not apply to annulment.

Malis, continued from page 6

VA benefits are available to surviving spouses of wartime veterans who are disabled and/or have additional medical needs. There are also financial limitations to qualify.

Here's a summary: In addition to the minimum active duty, wartime service, and age or disability requirements, the VA will decide if an applicant is "in need," based on an applicant's net worth, currently set at \$123,600. This number will increase annually with the increase in Social Security benefits. The current maximum net worth amount is set at \$127,061. To determine net worth, assets are combined with gross annual income. Out-of-pocket medical expenses can be factored in to reduce income. The applicant's home is generally excluded but there is a two-acre limit for the homestead.

If the veteran's net worth is too high to qualify, there are legal strategies such as making qualified purchases and accounting for certain medical expenses that can help get an applicant's net worth amount down to the level needed to get the veteran qualified for benefits. The veteran can "spend-down" (reduce) assets by buying goods or services for fair market value as one strategy. Transfers to a non-grantor irrevocable trust may also be used for VA pension purposes, but only where the grantor has no access to income or principal. However, applicants cannot simply transfer money or assets to relatives to reduce their net worth. Due to the new rules implemented last year, there is now a "look-back" period of 36 months when applying for a needs-based pension.

There are a few exceptions to this new transfer penalty rule. For instance, there's no penalty if the transfer was made to a trust established for a child who was not able to support himself or herself before turning 18. There's also no transfer penalty if the applicant's net worth would have been below the net worth limit already.

Veterans who serve our country honorably deserve all the benefits they are eligible to receive so they can live their best life possible in retirement. It's the least our nation can do to thank these brave Americans. ■

Julianna M. Malis is the founder of Anacapa Estate Planning & Elder Law in Santa Barbara (www.anacapalaw.com). Accredited by the Department of Veterans Affairs, Julianna is an estate planning and elder law attorney who has been practicing law for over 20 years and is a member of ElderCounsel, WealthCounsel and the National Academy of Elder Law Attorneys. She also is a military spouse with a passion for veterans' issues. Her husband, an Army officer, is a veteran of the war in Iraq and has served in the U.S. Armed Forces for almost 30 years.

Hebda Property & Title Solutions

John Hebda
President



- ✓ Attorneys
- ✓ Title Companies
- ✓ Commercial, Industrial and Agricultural Real Estate Professionals
- ✓ Residential Real Estate Professionals
- ✓ Utility companies and contractors
- ✓ Government agencies
- ✓ Surveyors
- ✓ Developers

Hebda Property & Title Solutions is committed to sharing over 30 years of title insurance and real property problem solving expertise with Professionals seeking quality research and common sense solutions regarding a host of complex real property issues.

john@hebda.com
805.636.2537
www.hebdasolutions.com

**Experienced.
Trusted.
Proven.**

Mediator and arbitrator
for the resolution of
cases including:

- Business/Commercial
- Contracts, Employment
- Environmental and Real Estate
- Construction
- Wills and Trusts
- Family Law
- Personal Injury

Retired Judge, Elinor Reiner



Judge Elinor Reiner
MEDIATOR AND ARBITRATOR

To schedule a consultation, please call 805-879-7517
211 E. Anapamu Street • Santa Barbara, CA 93101
elinor@elinorreiner.com • WWW.ELINORREINER.COM



YOUR GOOD PRACTICE IS REFLECTED IN OUR NEW LOWER RATES.

As we celebrate our 40-year anniversary, **we are pleased to announce that we were able to lower our rates by an average of 17.5%** effective January 1, 2019.

As the leading provider of professional liability insurance, continued legal education and member benefits to California lawyers, we are committed to the next 40 years and will continue to build with the future and our members' best interest in mind.

We invite you to visit our new website at www.lawyersmutual.com, call us at **818.565.5512** or email us at lmic@lawyersmutual.com to make sure you have the right professional liability cover at the right price for your practice.

We're here so you can practice with peace of mind.



**LAWYERS'
MUTUAL**
INSURANCE COMPANY

Our strength is your insurance

www.lawyersmutual.com

THE SANTA BARBARA COUNTY BAR ASSOCIATION INVITES
MEMBERS AND GUESTS TO OUR
2019 GOLF & TENNIS TOURNAMENT
FRIDAY, SEPTEMBER 27, 2019



DINNER / RECEPTION

So as to provide opportunity for the victors to boast of their athletic conquests, a post golf and tennis reception will begin at 5:30 at the Mulligan's Café & Bar, to be followed by dinner starting at 6:00 pm.
Dinner is \$50 per SBCBA Member/\$60 per non-SBCBA Member (*\$60/\$70 after September 10th*)

GOLF

Meet at the Santa Barbara Municipal Golf Course at 12:30 pm. Shotgun starts at 1:00 pm. Team prizes for 1st & 2nd places. Individual prizes for Longest Drive and Closest to Pin! Players must give some estimate of his/her handicap. You will be contacted regarding team assignments. We strongly encourage to register by September 10th, after that date we cannot guarantee participation.

\$105 to Play for SBCBA Members/\$115 for Non- Members – Includes green fees & cart.
(\$115/\$125 after September 10th)

\$150 for BOTH Golf & Dinner for SBCBA Members/ \$160 for Non- Members
(\$160/\$170 after September 10th)

TENNIS

Meet at the tennis courts at the Santa Barbara Tennis Club at 1:00 pm for warm-up with round robin play starting at 1:30 pm. A committee will form teams, reserving the right to make equitable adjustments in all levels. Men and women will participate in the tournament in all levels.

Prizes to tournament winners!

\$30 to Play per SBCBA Members/\$40 for Non- Members – Includes court fees & balls.
(\$40/\$50 after September 10th)

\$75 for BOTH Tennis & Dinner for SBCBA Members/\$85 for Non-Members
(\$85/\$95 after September 10th)

To register, please fill out bottom portion of this flyer and mail, with check, to:

SBCBA 15 West Carrillo Street, Ste. 106, Santa Barbara, CA 93101

Please clearly specify GOLF HANDICAP or TENNIS RATING.

Questions? Call the SBCBA at (805) 569-5511

Limited Number of Tee Sponsorships: Tee sign on course with your company name (\$100)

Name & Phone Number	Handicap/ Rating	Tourney Fees	Dinner	Vegetarian?	Total

Amount Enclosed: \$ _____ (all fees are non-refundable)

Verdicts & Decisions

David Crockett v. The Regents of the University of California

Santa Barbara Superior Court, Anacapa Division

CASE NUMBER:	1440438
TYPE OF CASE:	Employment (Age Discrimination)
TYPE OF PROCEEDING:	Jury Trial
JUDGE:	Hon. Donna D. Geck
LENGTH OF TRIAL:	8 Days
LENGTH OF DELIBERATIONS:	1 hour and 15 minutes
DATE OF VERDICT/DECISION:	June 20, 2019
PLAINTIFF:	David Oren Crockett Jr.
PLAINTIFF'S COUNSEL:	David S. Secrest of Law Offices of David S. Secrest, APC
DEFENDANT:	The Regents of the University of California
DEFENDANT'S COUNSEL:	Melissa J. Fassett of Price Postel & Parma LLP

OVERVIEW OF CASE: Plaintiff David Crockett and a colleague were laid off from their employment with Defendant Regents of the University of California when the management of their department was restructured. Plaintiff thereafter sought, but was not selected for, a higher-level management position. Plaintiff contended that he was laid off and not selected for the higher position because of his age.

This trial follows a motion for summary judgment by Defendant in 2015, by which the Court dismissed all claims, including claims for retaliation and disability discrimination and dismissed the individually named defendants. The Court reinstated Plaintiff's claims for age discrimination and failure to prevent discrimination following a motion for new trial. The orders granting summary adjudication and new trial were affirmed by the Court of Appeal.

FACTS AND CONTENTIONS: Plaintiff, a retired police officer, was hired by the University as a Parking Enforcement Supervisor in June 2009, at the age of 62. A coworker worked nights and weekends in the same position as Plaintiff. Approximately three years later, the University eliminated both positions as part of its restructuring of the management of the parking enforcement department. Plaintiff and his coworker were given 60 days' notice of their layoff, and they were both given the option of continuing to work or taking the 60 days off with pay to look for other work. Plaintiff chose to take the time off with pay to seek other employment, while his coworker chose to continue working.

Following the layoff, both Plaintiff and his coworker were invited to apply for vacant positions at the University, including a higher-level management position which was open in their department. Both of them applied for the management position, as did a number of other applicants. As part of the process of hiring for the management position, two panels of eight separate interviewers were chosen to interview the top four applicants, and Plaintiff and his coworker were among those interviewed. At the end of the process, six of the eight interviewers chose Plaintiff's coworker—rather than Plaintiff—as the best candidate. None of the interviewers chose Plaintiff as the best applicant. The management position was thereafter offered to the coworker who was found to be the most qualified applicant for the position.

At trial, Plaintiff contended that his age was a substantial motivating factor in the University's decisions to lay him off and not select him for the higher-level management position. The University argued that Plaintiff was laid off for financial

reasons and was not selected for the management position because the interviewers determined that his coworker was better qualified.

Summary of Claimed Damages: Plaintiff asked the jury to award damages in the total amount of \$732,000, consisting of \$366,000 for economic damages and \$366,000 for non-economic damages.

Result: Verdict for defendant (10-2). The jury determined by special verdict that Plaintiff's age was not a substantial motivating reason for the University's discharge of Plaintiff, or for any other adverse employment action against him.

Motions

Jacob P. Ainciart, Esq., MBA is pleased to announce the opening of his new law firm, **Law Office of Jacob P. Ainciart, A Professional Corporation.**

Jake's practice is focused on the alcohol beverage industry, specifically in legal matters that arise in the production and distribution of wine, beer, and spirits.

Jake is a Santa Barbara native who, after litigating for several years, left the practice to make wine as a harvest intern at one of Santa Barbara County's top wineries. During his time as a harvest intern, Jake began developing his practice as a wine law transactional attorney. Jake advises clients on matters ranging from corporate governance and formation, intellectual property, regulatory compliance, contract negotiation and drafting, mergers and acquisitions, and more.

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. If you submit an accompanying photograph, please ensure that the JPEG or TIFF file has a minimum resolution of 300 dpi. Please note that the Santa Barbara Lawyer editorial board retains discretion to publish or not publish any submission as well as to edit submissions for content, length, and/or clarity.

MSM

Moon, Schwartz & Madden

COURT QUALIFIED EXPERT WITNESS

Actuarial Valuation of Retirement Plan Benefits Including Survivor Benefits



Matthew H. Schwartz
PARTNER



John C. Madden
PARTNER

- Moon, Schwartz & Madden is the leading provider of actuarial community property valuations for defined benefit plans (including survivor benefits), and defined contribution plan tracings in Northern CA.
- We are qualified as experts in the valuation and division of public, private, federal, military, qualified and non-qualified retirement plans.
- Additional services include income stream estimates, review of opposing expert reports, review of plan calculations, QDRO review and more!
- Need to trade off other marital assets or debts against the pension? Need to know the actuarial present day value of lost survivor benefits? No problem, just call MSM!

17901 Von Karman Avenue ■ Suite 600 ■ Irvine CA 92614
(714) 430-8984 ■ www.msmaqdro.com

WE ARE PLEASED TO ANNOUNCE THE OPENING OF OUR NEW OFFICE IN IRVINE!

Lawyer Referral
Service
805.569.9400

Santa Barbara County's ONLY State
Bar Certified Lawyer Referral Service
A Public Service of the Santa Barbara
County Bar Association

Hamilton, *continued from page 15*

the primary dilemma—how to get the evidence needed to either make the case or prove that there was no case. In today's world flash drives would be used, but when this case occurred, manual accounting records were still in extensive use.

In this case, after taking into account both limitations and circumstances, the investigators approached the company's Board to propose entering its offices after-hours and removing the needed accounting records while none of the accounting staff was present. The accounting records would then be transported some 500-plus miles to the offices of the forensic accounting firm, where the investigative work would be conducted until conclusions could be reached.

The plan was approved, written authorizations issued, and a date set for this most unusual 'dark op' site visit. The date was important as the operation needed to be after the heavy workload of month-end closing, when missing accounting records might not be noticed. Once the date was chosen, arrangements were finalized to have a trucking company on hand, while the informant was made available, and the team of investigators was assembled to facilitate the break-in.

On the appointed date, the investigators and forensic accountant flew to the nearest airport, rented a car, and met the informant. An inside informant is typically invaluable because of their knowledge of accounting policies, the actual physical location of records, and other details critical to a successful data-grab. The assistance of the informant in this case was limited because they had no knowledge of the passwords that would allow the operations team to view or copy the electronic accounting records. Consequently, investigators would only have access to hard copy accounting records.

Complications Overcome

To complicate the operation, the business location included a multi-story office facility attached to a manufacturing plant that operated 24 hours a day. The mission was to get into the offices, obtain the records, load the trucks, and leave without being seen by anyone in the plant. The role of the forensic accountant was to lead the group through the offices and point out all records that could be removed and might be relevant. The goal of the mission was simple: to make off with the records that would be useful to the fraud examination, but would not be immediately missed by accounting personnel. As soon as someone in the accounting department found that a notebook or binder was missing, the whole operation would be blown. So, the

pressure was on the forensic accountant to get what was needed without removing anything that was too relevant to the day-to-day operations of the company. By 4:00 a.m., the truck was loaded with the documents and on its way to the offices of the forensic accountants.

It was now a race to complete the investigation before the local division management figured out there was an ongoing investigation or noticed that documents were missing. The Board and all the investigators knew it was just a matter of time. To counteract that inevitability, a procedure was established so that the inside informant could notify the forensic accountant of any compromise to the investigation. Specifically, when someone in the accounting department requested information that had been removed, the informant would leave the premises immediately. Once off the premises (the safety of the informant is always an important planning detail), the informant was to call the forensic accounting firm to notify them that the investigation had been compromised and should be terminated.

A Fraud, Vast and Deep

The staff of the accounting firm worked around the clock until the moment the informant called. Since it was many days before any records were missed, the accounting firm was able to put a strong case together establishing the existence and methodology of a complicated, multi-layer inventory fraud scheme.

Accounting records and documents were analyzed closely and preserved, and corroborated the claims of the inside informant and documented significant financial gain to certain members of middle-and senior-management. While the accounting firm did its work, the investigative team concurrently established evidence of individual lifestyles and assets that far exceeded what could be explained by known sources of income.

Within a day of the informant's call, and the existence of the investigation being exposed, the investigators and forensic accountants convened with local law enforcement and began the process of interviews.

At the end of that process, every member of the senior management team of the largest division in this international firm was implicated in a vast and deep scheme to embezzle millions of dollars from the company's coffers. Enough evidence was accumulated to render the interviews almost unnecessary.

Interestingly, though, the interrogations resulted in several confessions, considerably adding to the weight of evidence against other participants in the crime.

Continued on page 27



Wine Law Overview: Land Use, Operations, and Branding

About:

From planning a vineyard or winery to selling that first bottle of intriguingly labeled wine, there are countless business considerations and legal hurdles to address. Join us for a discussion of important land use, regulatory, branding, and contractual issues and strategies in an industry that is vital to our local economy.

Panelists:

Susan F. Petrovich, Brownstein Hyatt Farber Schreck

Susan Petrovich counsels public and private sector clients in land use, environmental law, and real estate. Agricultural law is a key area of her practice, including vineyards and wineries, cannabis, the agricultural preserve program, conservation and rangeland easements, and agricultural leasing and land purchases.

Derek G. Thiele, Thiele, McElligott & Zeni LLP's

Derek Thiele's practice emphasizes business law and litigation. His work with wine industry clients includes advising vineyard and winery acquisitions and sales, vineyard leases, construction agreements, state and federal licensing, grape purchase contracts, and distribution and export agreements.

Christine L. Kopitzke, SoCal IP Law Group

Chris Kopitzke focuses on trademark and copyright counseling and dispute resolution. She advises clients in a wide array of industries, including vineyards and wineries, on the adoption and use of trademarks and on the protection, enforcement, licensing, and transfer of trademarks, copyrights, domain names, and related rights in the U.S. and abroad.

Date and Time:

Thursday, September 26
Noon – 1:15 p.m.

Location:

Santa Barbara College of Law, 20 East Victoria Street, Santa Barbara

Reservations:

Reserve via email to Chris Kopitzke,
Chair of Intellectual Property/Technology Business Section, [by Monday, September 23, ckopitzke@socalip.com](mailto:ckopitzke@socalip.com)

Cost and Payment:

\$25.00 – includes lunch
Checks payable to Santa Barbara County Bar Association
Mail by Monday, September 23, to SBCBA
15 W. Carrillo St., Suite 106, Santa Barbara, CA 93101

MCLE:

One hour credit applied for



Trade Secrets: Why They Matter and How to Protect Them

About:

Trade secrets encompass confidential business information and data with competitive value, ranging from customer lists to strategic plans, research, and secret proprietary formulas. How can businesses protect these important assets? This program will explore the practical issues involved in counseling clients to manage their data assets in order to avoid loss and contamination in our high-velocity global digital environment.

Speaker:

James Pooley

James Pooley is an internationally recognized expert in trade secret law. He is the author of the treatise *Trade Secret Law* and of *Secrets: Managing Information Assets in the Age of Cyberespionage*. The U.S. Senate Judiciary Committee relied on Mr. Pooley for expert testimony and advice during consideration of the landmark 2016 Defend Trade Secrets Act. In 2014 he completed a five-year term as Deputy Director General at the World Intellectual Property Organization in Geneva. He is a past president of the American Intellectual Property Law Association and currently serves as co-chair of the Trade Secret Task Force of the International Chamber of Commerce. Mr. Pooley has an active law practice in Silicon Valley representing clients in trade secret, patent, and technology-related commercial disputes, and provides advice on IP strategy and data security management. He also serves as a special master, expert, and arbitrator, and teaches trade secret law at the UC Berkeley School of Law.

Date and Time:

Wednesday, October 23

Noon – 1:15 p.m.

Location:

Santa Barbara College of Law, 20 East Victoria Street, Santa Barbara

Reservations:

Reserve via email to Chris Kopitzke,
Chair of Intellectual Property/Technology Business Section,
by Friday, October 18, ckopitzke@socalip.com

Cost and Payment:

\$25.00 – includes lunch

Checks payable to Santa Barbara County Bar Association

Mail by Friday, October 18, to SBCBA

15 W. Carrillo St., Suite 106, Santa Barbara, CA 93101

MCLE:

One hour credit applied for

Clemmons, *continued from page 13*

created and, in some cases, a Special Master or Parenting Co-Coordinator appointed. Does the animal need Minor’s Counsel? Would the same code sections apply for these roles that now are statutory in child custody cases?

While this essay is written somewhat tongue-in-check, the lesson we can learn is the need for parents and their counsel to find ways not to exploit their children or their animals. Psychologists have witnessed many children who do not bear the wounds of divorce because whatever issues the parents had with one another, they managed to find a way to exclude the children from the conflict, and provided the children with two loving homes along with the respect and dignity children deserve. ■

Penny Clemmons, Ph.D. is certified as a Specialist in Family Law by the State Bar of California and is a licensed clinical Psychologist who practices mediation. She is the parent of Asia Minor and Sasha Blu, two seven-year-old labradoodles, who are the current successors of Bentley and Guinevere.

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.



Ventura Mediation Center

Hon. Frederick H. Bysshe

Ventura County Superior Court, Retired



- Unlimited and complex civil trial judge (2001-2012); Chief Settlement Judge (2013-2018); Appellate Division (2015-2016).
- Brings a wealth of experience in all aspects of civil litigation; earned a reputation from both plaintiff and defense bars as an outstanding settlement judge who relentlessly pursues a fair result in every case.

Hon. Frank J. Ochoa

Santa Barbara County Superior Court, Retired



- Private mediator, arbitrator, referee, special master and hearing officer since 2015, handling civil, family and probate cases.
- Three decades of judicial service includes Santa Barbara Superior Court (1997-2015); presided over wide range of complex, high-profile matters; implemented the court’s CADRE program.

840 County Square Drive • 2nd Floor • Ventura, CA 93003 • 805.643.1052 • www.arc4adr.com

BUSINESS/TRANSACTIONAL ASSOCIATE SOUGHT

Price, Postel & Parma, a long-standing law firm in Santa Barbara, is seeking a transactional associate with superior credentials, at least 2 years of significant experience and a current license to practice in the State of California. Compensation is commensurate with skills, education and experience. Please submit a cover letter and resume via email to Ian Fisher at ifisher@ppplaw.com.

EDUCATION LAW/EMPLOYMENT LAW ASSOCIATE SOUGHT

Price, Postel & Parma LLP is seeking an associate attorney for our statewide Education Law practice. We are looking for an Associate with superior credentials and at least four (4) years of experience, with particular emphasis on employment and public agency law for school districts and administrators. Experience defending and advising school districts and/or public agencies, and school district/public agency employees is preferred. Compensation is commensurate with skills, education and experience. A current license to practice in California is required. Please submit a resume and cover letter detailing your experience by email to Linda Ford, Administrator at lford@ppplaw.com.

HAGER & DOWLING, LLP SEEKS ASSOCIATE ATTORNEY & TRIAL ATTORNEY

Highly respected Santa Barbara civil litigation law firm, seeks experienced litigation attorney with knowledge of and experience in insurance law as well as associate attorney. Candidate must have, excellent verbal and writing skills, enjoy litigation and bring a strong team work ethic. Competitive benefits include health and dental insurance, free parking and 401k plan. Respond with resume, cover letter and references to kcallahan@hdlaw.com.

LITIGATION ASSOCIATE

We have a position for a litigation lawyer with 1 to 3 years of experience. Excellent legal research, writing and communication skills along with strong academics and California Bar membership are required.

We are an exciting, busy, AV-rated law firm providing business, transactional and litigation legal services. We offer a competitive salary and excellent benefits package with attractive downtown offices. Check out our website at reickerpfau.com to learn more about our firm. Please e-mail your resume to info@rppmh.com.

ATTORNEY SEEKING WORK

Licensed California attorney will work for \$20/hr to join Santa Barbara firm. Vanderbilt educated. Please email me at sean.r.richardson@outlook.com if interested.

FOOD FROM THE BAR

Each summer, the legal community comes together for one purpose: to **end hunger** for children in Santa Barbara County, where **1 in 5** experience food insecurity.

Donate:
FoodbankSBC.org



Media Sponsors:



2019 SBCBA SECTION HEADS

Alternative Dispute Resolution

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

Bench & Bar Relations:

Jeff Soderborg 687-6660
jsoderborg@barneslawsb.com

Civil Litigation

Mark Coffin 248-7118
mtc@markcoffinlaw.com

Criminal

Jeff Chambliss 895-6782
Jeff@Chamblisslegal.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

Renee Fairbanks 845-1604
renee@reneemfairbanks.com
Marisa Beuoy 965-5131
beuoy@g-tlaw.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
Naomi Dewey 979-5160
naomi@trusted.legal
Vanessa Kirker Wright 964-5105
vkw@kirkerwright.com

Real Property/Land Use

Joe Billings 963-8611
jbillings@aklaw.net

Taxation

Peter Muzinich 966-2440
pmuzinich@gmail.com
Cindy Brittain 695-7315
cindy.brittain@kattenlaw.com

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

JOHN NORDSTRAND

ECONOMIC EXPERT



For 27 years serving the Central Coast as an expert economist for personal injury, wrongful death, wrongful termination, and business litigation matters.

Services

- Valuation of Wage and Fringe Benefit Loss
- Household Services
- Business Valuations
- Loss of Profits Analyses
- Statistical Studies

Experience

Over 175 appearances of courtroom testimony in Superior Courts of Santa Clara, Monterey, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, and Orange Counties, as well as U.S. Federal Court.

 (805) 604-2750
 John.nordstrand747@gmail.com

 www.johnnordstrand.com

Hamilton, *continued from page 22*

While the company was devastated by the tangible and intangible implications of what had transpired, the investigative team was invigorated by the successful implementation of a highly complex engagement leading to irrefutable evidence that gave the company the wherewithal to uncover a criminal operation cultivated by its own trusted management team, and bring the members of that team to justice.

As every forensic accountant knows, there is always a healthy dose of good fortune contributing to a successful inquiry.

A confidential inside source not only recognized the criminal activity, but also had the courage to trigger an investigation that could have put them at great personal risk. At the same time, honest company personnel took the information seriously and pursued the matter to its conclusion. ■

Christopher Hamilton is a CPA, as well as a Certified Fraud Examiner and Certified Valuation Analyst with Arxis Financial in Simi Valley. He can be reached at chamilton@arxisgroup.com.

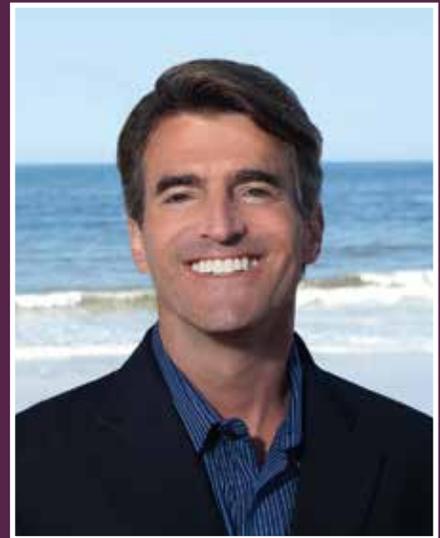
This article is reprinted, with permission, from *Valley Lawyer* magazine, the monthly publication of the San Fernando Valley Bar Association.

Santa Barbara Lawyer

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

Change Service Requested

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



DANIEL ENCELL

"The Real Estate Guy"

Call: (805) 565-4896

Email: danencell@aol.com

Visit: www.DanEncell.com

DRE #00976141

• Montecito • Santa Barbara • Hope Ranch • Beach •

- #4 Berkshire Hathaway Agent in the Nation
- Wall Street Journal "Top 100" Agents Nationwide (out of over 1.3 million)
- Graduate of UCLA School of Law and former attorney
 - An expert in the luxury home market
 - Alumnus of Cate and UCSB

Remember — it costs no more to work with the best
(but it can cost you plenty if you don't!)

Each year, Dan spends over \$250,000 to market and advertise his listings. He has sold over \$1.5 Billion in Local Real Estate.



BERKSHIRE HATHAWAY
HomeServices
California Properties