

Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
November 2021 • Issue 590



ENVISION YOURSELF

ON THE BENCH

Battle Over Bias / Dogs & Insurance / Legal Capacity / Modest Means
Spotlight / Santa Barbara Trees / Well-Being & Lawyer Competence

Over
800
Million Sold

Top 5 in Total Number of Closed Escrows since 2000*
Top 10 in Total Dollar Volume Sold since 2000*

Former Practicing Attorney
UC Hastings College of Law • Order of the Coif

- 360° Marketing Plan for each Listing
3D Tours, Video Tour, and more, tailored
to client's needs.
- Member, Santa Barbara, Ventura,
and Santa Ynez Real Estate Boards
- Former Instructor Real Estate Law
and Practice Courses at SBCC (21 Years)

Real Estate Experience You Can Count On

Gary Goldberg

GARY GOLDBERG
805.455.8910
gary@coastalrealty.com
www.garygoldberg.net

COASTAL  PROPERTIES

*Rankings based on market penetration by individual statistics from the SBOR MLS through 11/20

DRE #01172139

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

2021 Officers and Directors

Officers

ELIZABETH DIAZ

President

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

ERIC BERG

President-Elect

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

JENNIFER GILLON DUFFY

Secretary

Rimon Law
200 E. Carrillo St, Ste 201
Santa Barbara, CA 93101
T: (805) 618-2606
jennifer.duffy@rimonlaw.com

STEPHEN DUNKLE

Chief Financial Officer

Sanger, Swysen, & Dunkle
222 E. Carrillo St, #300
Santa Barbara, CA 93101
T: (805) 962-4887
sdunkle@sangerswysen.com

AMBER HOLDERNESS

Past President

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

Directors

BRADFORD BROWN

Law Offices of Brad Brown, APC
735 State St, Ste 418
Santa Barbara, CA 93101
T: (805) 963-5607
brad@bradfordbrownlaw.com

IAN ELSENHEIMER

Ferguson Case Orr Paterson LLP
1050 S Kimball Rd
Ventura, CA 93004
W: www.fcoplaw.com
T: (805) 659-6800, ext. 203
F: (805) 659-6818
ielsenheimer@fcoplaw.com

TAYLOR FULLER

Herring Law Group
559 San Ysidro Rd
Ste G
Santa Barbara, CA 93108
tfuller@theherringlawgroup.com

RICHARD LLOYD

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

TERESA MARTINEZ

Office of County Counsel
105 E. Anapamu St, # 201
Santa Barbara, CA 93101
T: (805) 568-2950
teresamartinez@co.santa-barbara.ca.us

TARA MESSING

Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Ste 1000
South San Francisco, CA 93408
T: (650) 589-1660
tmessing@adamsbroadwell.com

ERIN PARKS

Attorney at Law
625 E. Victoria St
Santa Barbara, CA 93103
T: (805) 899-7717
law@erinparks.com

JESSICA PHILLIPS

Maho & Prentice LLP
629 State St, Ste 217
Santa Barbara, CA 93101
T: (805) 962-1930
jphillips@sbcacalaw.com

MICHELLE ROBERSON

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

RUSSELL TERRY

Reicker, Pfau Pyle & McRoy LLP
1421 State St, Ste B
Santa Barbara, CA 93101
T: (805) 966-2440
rterry@rppmh.com

Staff

LIDA SIDERIS

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

CONTRIBUTING WRITERS

Judge Arthur A Garcia
Scott Jaske
Robin Oaks
Jessica Phillips &
Samantha Baldwin
Robert M. Sanger
Mareike Schmidt

EDITOR

Erin Parks

ASSISTANT EDITORS

Tara Messing
Lida Sideris

MOTIONS EDITOR

Michael Pasternak

PHOTO EDITOR

Mike Lyons

GRAPHIC DESIGN

Baushke Graphic Arts

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

Submit all **MOTIONS**
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
November 2021 • Issue 590

Articles

- 7 Does My Client Have Legal Capacity?, *Erin Parks*
- 9 Envision Yourself on The Bench, *Judge Arthur A. Garcia*
- 11 Considerations When Removing or Pruning Trees in Santa Barbara, *Scott Jaske*
- 16 Spotlight On Modest Means Attorney Mareike Schmidt, *Mareike Schmidt*
- 18 Well-Being and Lawyer Competence—Shifting the Paradigm, One Law Student at a Time, *Robin Oaks*
- 22 Pathologists, Context, and a Battle over Bias, *Robert Sanger*
- 26 Why Insurance Matters to Your Dog, *Jessica Phillips & Samantha Baldwin*

Sections

- 31 Section Notices
- 33 November Calendar
- 34 Classifieds

On the Cover

Santa Barbara Superior Court Bench Department SMJ1

Life happens. And you want to be ready when it does.

Let us help you take care of what matters most

Getting to know you and what you care most about—planning for college, taking care of an elder family member, passing a legacy to future generations, buying a second home—is so important. Once we understand your priorities, together, we can help you pursue the goals you've set for yourself and your family. Call to learn more today.



Merrill Lynch Wealth Management

The Gamberdella-Spruill Group
1424 State Street
Santa Barbara, California 93101
805.963.6310
marc_gamberdella@ml.com
www.fa.ml.com/gamberdella_spruill



Merrill Lynch, Pierce, Fenner & Smith Incorporated (also referred to as "MLPF&S" or "Merrill") makes available certain investment products sponsored, managed, distributed or provided by companies that are affiliates of Bank of America Corporation ("BoFA Corp."). MLPF&S is a registered broker-dealer, Member SIPC and a wholly owned subsidiary of BoFA Corp. Banking products are provided by Bank of America, N.A., Member FDIC and a wholly owned subsidiary of BoFA Corp.

Investment products: **Are Not FDIC Insured** | **Are Not Bank Guaranteed** | **May Lose Value**

© 2019 Bank of America Corporation. All rights reserved.

ARXNBK9X Vault-BA14M7 | MLWM-320-AD | 471089PM-0819 | 08/2019

**“Wow, that
was easy.”**



E-Filing & E-Recording

Ready to save time, trees, and money by using e-filing and e-recording services? The CPS e-filing portal is user friendly, cost efficient, and accepted at California mandated e-filing courts. Plus, we're family-owned and our local team of experts are here to help you every step of the way. Now *that's* easy.



COMMERCIAL
PROCESS SERVING, INC.

Process Serving | E-Recording | E-Filing | Court Filing | Skip Tracing
On-Site/Off-Site Scanning | Subpoena Preparation | Depo Officer | Messenger Services

comproserve.net | 805.650.9291 | Your Complete Legal Service Solution Since 1993

Does My Client Have Legal Capacity?

BY ERIN PARKS

How do you know if a client truly understands what you are proposing or what they are asking you to do? I recently attended a Zoom program organized by the Santa Barbara Estate Planning Council entitled "Protecting Clients: Capacity and Ethics." The speaker, David Godfrey, J.D., Senior Attorney on the American Bar Association's (ABA) Commission on Law and Aging, explored capacity from legal and ethical perspectives, offered screening tools for capacity, and financial exploitation of clients.¹ For those of you who were unable to attend Mr. Godfrey's presentation, the following Article contains the highlights with my annotations from California law.

What is Capacity?

At its essence, capacity is the ability to make an informed decision or choice. Capacity is a spectrum. It is both situational and transient. It can be impacted by illness, pain, lack of sleep, medication, stress, mental health, and substance use/abuse.

California Law Presumes Mental Capacity

The starting point is the rebuttable presumption, codified in California Probate Code section 810, that all persons have capacity "to make decisions and to be responsible for their acts or decisions."

Testamentary Capacity in California is an "Extremely Low" Standard

Probate Code section 6100.5 provides the following insight into testamentary capacity:

"(a) An individual is not mentally competent to make a will if, at the time of making the will, either of the following is true:

(1) The individual does not have sufficient mental capacity to be able to do any of the following:

(A) Understand the nature of the testamentary act.

(B) Understand and recollect the nature and situation of the individual's property.

(C) Remember and understand the individual's

relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(2) The individual suffers from a mental health disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way that, except for the existence of the delusions or hallucinations, the individual would not have done...."



Erin Parks

Contractual Capacity to Sign a Power of Attorney & Convey Real Property

When does a California resident lack sufficient mental capacity to sign a contract or power of attorney? Probate Code section 4120 states that a "natural person having the capacity to contract may execute a power of attorney." If the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend the nature and effect.

California Civil Code section 39 provides that contracts and conveyances are subject to rescission (cancellation) if a party was of "unsound mind," which is presumed if a party was "substantially unable to manage financial resources or resist fraud or undue influence." However, "isolated acts of negligence or improvidence" are, without more, insufficient to show the party was of "unsound mind."

A capacity contestant may show under California Probate Code section 812 that the subject was unable to communicate regarding the decision. Alternatively, the contestant may show that the subject was unable to understand and appreciate: (1) the rights, duties and responsibilities created or affected by the decision, (2) the probable consequences for affected persons, or (3) the risks, benefits, and alternatives. In sum, could a client consider the pros/cons of entering the contract?

How Do Lawyers Assess Capacity?

Communicating interactively involves a natural capacity assessment. There is no simple test. The totality of the circumstances controls. The client must have the ability to

communicate and give informed consent. When in doubt, seek guidance before proceeding.

Capacity Determinations. Lawyers must have a “conceptually sound” and “consistent process” for answering the following questions:

1. Does the client have the capacity to contract for my services?
2. Does the client have the capacity to complete the legal transaction?

One of the resources Mr. Godfrey shared during his presentation is a publication created by the ABA's Commission on Law and Aging entitled: “*Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers*” (Handbook).² The Handbook contains helpful Attorney Assessment Worksheets which allow recordation of: observational signs (cognitive functioning); financial management abilities; emotional and behavioral functioning; other observations; mitigating/qualifying factors affecting observations (and ways to address/accommodate); and other important information.

Hypothetical & Capacity Red Flags. Edna and Bill have been married for 62 years. They arrive for your meeting and Edna does the talking, saying that they want to leave everything to each other, then when the second one dies, in equal shares to their three children. Edna wants to be named as the agent in a power of attorney and as health care agent for Bill. Edna wants her oldest son to be her attorney-in-fact and health care agent. When Bill is asked what he wants, he responds: “whatever Edna wants is fine.” When Bill is asked to recite the names of his children, he responds: “ask Edna.” Finally, when asked what bank they use for their life savings account, Bill turns to Edna and says, “you know that don't you?”

Which of the following are the red flags in the scenario above?

1. Edna speaks for both herself and Bill.
2. Edna does not choose Bill to be her agents.
3. Bill defers to Edna.
4. Bill cannot answer basic questions.
5. All the above.³

Uncomfortable Facts Regarding Decline in Financial Capacity

Research shows that financial judgment peaks at age 52. Credit scores, on average, start to decline seven years before a person is diagnosed with Alzheimer's. Unpaid bills are the most obvious sign of decline. Unusual spending is less common.

Undue Influence

Undue influence means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.⁴ The California Undue Influence Screening Tool (CUIST) is another valuable resource shared by Mr. Godfrey during his presentation.⁵ CUIST was developed to help Adult Protective Service personnel screen for suspected undue influence using elements contained in California Probate Code section 86 and Welfare and Institutions Code section 15610.70: (1) Client Vulnerability, (2) Influencer's Authority/Power, (3) Actions/Tactics, and (4) Unfair/Improper Outcomes.⁶

Informed Consent Defined

“Informed consent” means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct. “Informed written consent” means that the disclosures and the consent must be in writing.⁷

Bottom line, clients have capacity if lawyers can communicate in a way that the client can understand, to the degree necessary for the client to give informed consent regarding the goals of the representation. If not, the client lacks capacity to give informed consent.

Ethical Obligations of a Lawyer for a Client with Diminished Capacity

According to the State Bar of California Standing Committee on Professional Responsibility and Conduct:

“A lawyer for a client with diminished capacity should attempt, insofar as reasonably possible, to preserve a normal attorney-client relationship with the client, that is, a relationship in which the client makes those decisions normally reserved to the client. The lawyer's ethical obligations to such a client do not change, but the client's diminished capacity may require the lawyer to change how the lawyer goes about fulfilling them. In particular, the duties of competence, communication, loyalty, and nondiscrimination may require additional measures to ensure that the client's decision-making authority is preserved and respected. In representing such a client, a lawyer must sometimes make difficult judgments relating to the client's capacity. Provided that such judgments are informed and disinterested, they should not lead to professional discipline. In some

Continued on page 15

Envision Yourself on The Bench

BY JUDGE ARTHUR A. GARCIA

Kudos *Santa Barbara Lawyer* for indulging my request for an empty Bench chair cover photo. This request is not out of false modesty or camera shyness but for a couple of reasons. First, I hope people seeing this consider picturing themselves in a judicial career. Second, it is a reminder that judges are only temporary stewards of the public's courtrooms.

Born and raised in Santa Maria, I never ever imagined growing up that I would be serving the public as a judge. In fact, I had no idea I would be an attorney, as I was aiming for a career in math.

I have had the privilege of being both a Commissioner and Judge for over twenty-five years. It seems like only yesterday that Judge Jennings administered the commissioner oath. I never considered a judicial career until a judge approached and encouraged me to apply for a commissioner position. Though quite happy as a commissioner, judicial colleagues encouraged me to apply to become a judge. I have been blessed to work alongside some wonderful judicial officers and amazing staff.

Laws and procedures are constantly changing. This requires that judges and lawyers keep up with constant change. People also come and go. Judicial assignments change. Judges may be assigned to civil, criminal, probate, therapeutic, juvenile, arraignment, small claims, or traffic calendars. Each assignment has challenges and rewards; every assignment serves the public.

An observation I have is that attorneys and the public have lost respect for the majesty and work of the court. This causes the entire legal profession to be taken down a notch. Mention the word "lawyer" and people don't automatically think of Atticus Finch or Clarence Darrow but _____ (you can fill in the blank with your favorite shady character.)

Some of this negative perception is self-inflicted by outlier judges with bad behavior and/or poor decisions. Some, because we as a legal profession have failed to respond to clearly unwarranted criticism or failed to react and change because of appropriate criticism.¹



Judge Arthur A. Garcia

This loss of confidence affects everyone in the legal profession. We are all held to a higher standard. Our profession is a calling, not just a job; a calling to serve.

If you are a lawyer, seriously consider applying to be on the Bench. By your words and action defend our profession. Hold everyone to the highest standards, including yourself. The public deserves effective, hard-working judges. The sitting judges will all move on in time, so picture yourself sitting in the chair in Department SMJ1 (front cover) or any other department. Presiding Judge Lavayen has asked Judge Sterne and myself to sit on a judicial recruitment committee. Look on the court website for details.²

With that said, and in the interest of you getting to know me better, the following are my responses to the *Santa Barbara Lawyer's* judicial questionnaire:

How long you have been on the Bench?

Short answer, over 25 years. Long Answer, I was sworn-in as Juvenile Commissioner on July 1, 1996, and served for seven plus years. I was sworn-in as judge on August 23, 2003, and have been on the Bench over 18 years so far.

Tell us about your education:

I attended Fairlawn Elementary, El Camino Jr. High, and St. Joseph High School, in Santa Maria. I then went to Loyola Marymount University Los Angeles and in 1975 graduated with a Bachelor of Arts degree in Political Science. After that, I received my Juris Doctor degree from Loyola Law School in 1978 and was admitted to the California Bar in November 1978.

What advice would you offer to a new attorney?

No one knows it all, no matter how great your grades were or where you interned. The best sources of help are the clerks, court reporters, and bailiffs who are in the courtroom every day. Treat everyone with respect and they will help guide you. Experienced attorneys will go out of their way to help a rookie if you just ask. Be humble, ask for help.

Who were/are your mentors?

Go down the list of the Santa Barbara County Judges, past and present and each has helped shape me in some way. I am a work-in-progress, learning every day. Our judges are good people who always try to make the right decision, sometimes at peril of being criticized and judged themselves.

As an attorney, Judge Melville was always well prepared and consequently, as an opposing attorney, I was forced to work extra hard. A good life lesson: “Iron sharpens iron, so one man sharpens another.”³ Rod Melville later became an inspirational judicial leader who led by example and challenged us all to do better.

Judge Rogelio Flores, best known for his work in the therapeutic courts, had a firm but compassionate Bench demeanor which I try to follow. (But do not tell him since he is my brother-in-law. We are constantly misidentified: F comes before G, plus, Rogelio is shorter than I am.)

What do you love about your job?

The people I work with and those that come before the court. I have enjoyed every assignment. I have particularly enjoyed my time in juvenile court—especially the children and parents. I have watched many grow and mature. Juvenile court can be gut-wrenching—terminating parental rights or sending a child to the former Youth Authority. However, there are parents who reunify, kids who finally get it, grow up and do well. There are adoptions where a child goes to a new forever family. There is so much good that happens; it is unfortunate that the public cannot observe these confidential cases. Good conquers the darkness.

There are also dedicated social workers, probation officers, volunteer Court-Appointed Special Advocate, counselors, therapists, and educators who want their clients to succeed. Each are held to a high standard—everyone who comes before the court deserves to be treated with respect.

Do you have advice for attorneys trying a case before your Bench?

Cliché but true—be prepared. I expect attorneys to be prepared, know the rules, and not waste time. I read the file, you should too.

What do you believe is the biggest difference between practicing law and presiding as a judge?

The loss of freedom once you are on the Bench. The court calendar and needs of the court will dictate your day. An attorney can easily clear an afternoon and enjoy the day. As a judge, things happen that need to be addressed and you take care of them, despite your plans.

Attorneys anticipate opposing arguments and are ready to respond. On the Bench you hear good arguments, poor arguments, great attorneys, not-so-great attorneys, but regardless, you try and make the right call ignoring attorney personalities, and sometimes your own view of what the law should be. The law can be a harsh task-master. Trial judges must make tough decisions. We may be criticized and reviewed on appeal, but that first call must be made.

What is your motto?

¡Siempre Adelante!⁴ ■

Judge Arthur Garcia was appointed Judge of the Superior Court in Santa Barbara by Governor Gray Davis in 2003. He is currently the Presiding Judge of the Juvenile Court. Judge Garcia's previous assignments include Assistant Presiding Judge for 2007, 2008, 2011 and 2012, Presiding Judge for 2009, 2010, 2013 and 2014, Presiding Judge of the Juvenile Court, adult criminal trials (felony and misdemeanor), family support cases, criminal arraignments, family law contested hearings, and the domestic violence calendars. He was also the back-up judicial officer for the Proposition 36 court, the adult drug court and the Mental Health Treatment Court and helped to establish the first juvenile drug courts in Lompoc and Santa Maria. Judge Garcia has also been a member of the National Council of Juvenile and Family Court Judges, California Juvenile Judges Association, California Judges Association and California Association of Drug Court Professionals. Judge Garcia was also active with the Northern Santa Barbara County Bar Association and served as a director, newsletter editor and member of its Judicial Evaluation Committee. He lives in Santa Maria with his wife Carmen, who teaches theology at St. Joseph High School.

ENDNOTES:

- 1 Many citizens do not understand that the judiciary is a separate branch of government; they think of the judiciary like a state department.
- 2 See <<https://www.sbcourts.org/gi/JudicialMentor/>>.
- 3 Old Testament, Proverbs 27:17.
- 4 Quote from Saint Junipero Serra. The quote is translated from Spanish as: “Ever [or Always] Onward!”

Considerations When Removing or Pruning Trees in Santa Barbara

BY SCOTT JASKE

Is it my tree? Is it my neighbor's tree? What kind of legal risks might one face for pruning, altering, or removing a tree? What about monetary penalties or criminal charges for removing a tree without the municipality's blessing (permission)? What about trees on my own property? This article will discuss considerations for Santa Barbara homeowners faced with decisions about removing trees on their own property, removing trees on a property line, and pruning limbs and roots of neighboring trees that encroach onto their property.

Determining Who Owns the Tree

The first step is to determine who owns the tree. According to Civil Code section 833, "[a] tree whose trunk stands wholly upon the land of one owner belongs exclusively to them, although the roots may grow into the land of another." Civil Code section 834 states: "trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common." These rules seem straightforward when the tree and its trunk are located entirely on one's own property. In that case, the tree belongs to that owner exclusively. However, if the tree's trunk is located on the boundary line between adjacent properties, then it belongs to *both* neighboring owners (a.k.a. "coterminous ownership"). Ideally, the individual who wishes to alter, prune, or remove a tree would know in advance precisely where the property boundary line is located. However, artificial boundary markers such as fences and privacy hedges may not be denoting the actual boundary line. If there is uncertainty as to the correct boundary line, a surveyor should be retained to determine the true boundary lines.

If a neighbor's tree branches overhang the property line, the non-owner can remove the overhanging portions, regardless of whether they cause damage. However, you cannot cut the branches back *beyond* the property line.¹ On the other hand, a tree owner can potentially be liable for damage caused in the event those branches fall. Generally,

courts have held that an owner can cut back a neighbor's encroaching tree roots to the property line (not beyond), particularly when they cause damage.

Coterminous or "boundary" trees should not be removed without mutual consent of the neighbor or a court order. Civil Code section 841, subsection (a), states that adjoining landowners shall share equally in the responsibility for maintaining the boundaries and monuments between them. This means coterminous owners will be responsible for removing leaves or branches that fall from a boundary tree from their respective yards. However, one may not remove the boundary tree itself without the other owner's consent.²

When removing branches and roots, it is wise to remember that owners have a duty to act reasonably toward adjoining landowners, and refrain from causing foreseeable injury to a neighbor's property.³ In *Booska v. Patel* (1994) 24 Cal.App.4th 1786, the court "tempered" the right to self-help by imposing a "duty to act reasonably," when removing tree limbs or roots that encroach from a neighbor's tree.⁴ The duty of reasonableness has been found to include giving a neighbor notice before trimming an overhanging tree branch or removing the neighbor's tree roots. An alternative to self-help would be to sue for damages or injunctive relief caused by the overhanging or encroaching tree roots or branches.⁵ Prior notice would hopefully be sufficient to avoid a neighbor's nuisance lawsuit.

Measure of Damages for Harm to Another's Tree

Civil Code section 3346 and Code of Civil Procedure section 733 determine the measure of damages to be three times the amount that would compensate for actual detriment. When the damage is "casual or involuntary" the actual damages may be doubled. The treble damages remedy is discretionary, but doubling the damages is generally mandatory, unless the damage resulted from, e.g., innocent reliance on an incorrect boundary line survey. Additional damages could include "the amount which will compensate for all the detriment proximately caused thereby, whether it



Scott Jaske

could have been anticipated or not.”⁶ Cases have analyzed potential damages, e.g., transportation costs for the new tree, removal of the damaged or dead tree, disposal of the damaged or dead tree, and diminution in value of the home sans the tree, all of which could be assessed against the party who wrongfully removed or damaged a tree.

Santa Barbara County Deciduous Oak Tree Act

It is also worth noting that Santa Barbara County and City have ordinances to protect certain types and species of trees. On April 15, 2003, Santa Barbara County adopted Ordinance Number 4490, also known as the “Deciduous Oak Tree Protection and Regeneration Act” (hereinafter “The Oak Trees Act”). The County Board of Supervisors found that protecting oak trees was important to the people’s well-being, and the ecological integrity of Santa Barbara County. The regulation was created to address deciduous oak tree removal in the inland rural areas of the county and requires a permit for removal of deciduous oak trees under articles II or IV of chapter 35 of the County Code, or Ordinance 661.

The Oak Trees Act defines any removal of protected deciduous oak trees to be unlawful and a public nuisance. The Oak Trees Act allows for injunctive relief, abatement, civil penalties, and remedies. For example, someone who violates The Oak Trees Act can be liable for a civil penalty not to exceed \$25,000 for each violation. There are also possible criminal penalties. The Oak Trees Act penalizes violations with infractions consisting of a fine not exceeding \$100 per protected deciduous oak tree for first violations, fines not exceeding \$200 for a second violation within one year, and a fine not exceeding \$500 for each additional violation within one year. The District Attorney may upgrade the infraction to a misdemeanor at the District Attorney’s discretion, and the punishment is to be a fine not less than \$500 nor more than \$25,000 per violation or imprisonment not to exceed six months or both.

Reportedly, The Oak Trees Act was originally enacted in response to a Santa Ynez vintner who destroyed hundreds of oak trees on his property, causing a public outcry to protect the oaks. In 2012, a Carpinteria property owner was fined almost three thousand dollars for removing an oak tree from her own property in violation of The Oak Trees Act. Why such a harsh penalty for removing oak trees from her own property? Unfortunately, the Carpinteria owner failed to secure a permit in advance for the tree removal.

City of Santa Barbara Tree Preservation Act

The City of Santa Barbara has its own separate requirements for certain trees. In 1969, the Santa Barbara City

Council enacted the Preservation of Trees Act codified as Municipal Code Chapter 15.24. Section 15.24.020. The Trees Preservation Act states: “it is unlawful for any person to remove or significantly alter or to authorize or allow the removal or significant alteration of any of the following trees without a permit: A) a setback tree; B) a parking lot tree; C) a tree on an approved plan; or D) a tree designated as an historic or specimen tree by the City Council.”

Setback Trees. A “Setback Tree” is “located in the front setback of any lot as the term front setback is defined and specified in Title 28 of this Code, the Zoning Ordinance. A tree is a setback tree if more than 50% of the tree trunk, measured at the highest natural grade adjacent the trunk, is within the front setback.” Setback requirements can vary depending on local, county, and state requirements.

Parking Lot Trees. A “parking lot tree” is a tree situated in a planter required pursuant to Section 28.90.050 of the Santa Barbara Municipal Code. The City of Santa Barbara sought to encourage the development of more attractive parking lots in commercial, industrial, and multiple-family use areas and has designated “parking lot trees” as being protected by the Preservation of Trees Act.

Trees on an Approved Plan. A tree shown on an approved plan on record with the City of Santa Barbara for a lot developed with commercial, multiple-family residential, or industrial use, are protected by the Preservation of Trees Act. Both “Parking Lot Trees” and “Trees on an Approved Plan” require the same application and permitting process for alteration, pruning, or removal. The application shall be filed with the Community Development Department on the provided forms and the application must show the location and identify the tree or trees sought to be removed by diagram or plot plan and photograph(s), the name and address of the owner, and other such information as required by the form provided.

Designated Historic/Specimen Trees. A tree is designated as “historic” if it has been found by the Parks and Recreation Commission, the Historic Landmarks Commission, or the City Council to be a tree of notable historic interest and has been designated by resolution of the City Council as such. A “specimen tree” is a tree which has been found by the Parks and Recreation Commission to be of high value because of its type and/or age, and which has been designated by resolution of the City Council as a “specimen tree.” A good example of a “historic tree” would be Santa Barbara’s Moreton Bay Fig Tree, which is believed to be the largest *Ficus macrophylla* in the United States. A seaman visiting Santa Barbara in 1876 presented a seedling of an

Continued on page 14



BUILT WITH YOU IN MIND, INTRODUCING OUR LAWYERS' INSURANCE DEFENSE PROGRAM

Lawyers' Mutual is excited to share our values, services and member benefits with an ever expanding pool of California attorneys.

Built with you in mind, Lawyers' Mutual has redesigned our Lawyers' Insurance Defense Program for firms of six attorneys or more who practice 90% insurance defense work or greater.

Key program features:

- Limits from \$1,000,000 per claim / \$3,000,000 in the aggregate to \$10,000,000 per claim / \$12,000,000 in the aggregate.
- \$50,000 Claims Expense Allowance outside limits included.
- Expert in-house California claims examiners.
- Multi-attorney discount factor.

Our Lawyers' Insurance Defense Program delivers on our commitment to enhance, revolutionize and challenge the status quo of how the traditional insurance industry operates.



www.lawyersmutual.com



Jaske, continued from page 12

Australian Moreton Bay fig tree to a local girl who planted the tree at 201 State Street. The tree was then transplanted to the corner of Montecito and Chapala streets. The tree was designated as an official historic landmark in 1970 and was deeded to the City of Santa Barbara in 1976.

Penalties for Violating the Preservation of Trees Act

On December 8, 2009, the Santa Barbara City Council adopted resolution 09-096, which established a “Fine Schedule” of administrative penalties for tree removal, excessive pruning, and landscape plan maintenance. For example, Resolution 09-096 enables the City of Santa Barbara to impose and collect civil administrative fines in conjunction with the abatement of violations. The alteration of a tree protected by the Preservation of Trees Act can result in civil fines of up to \$500 or \$1000, depending on the diameter of the tree trunk, and outright removal of a tree under the act can result in fines from \$1,000 up to \$5,000. The City of Santa Barbara may also require corrective actions such as implementation of a tree rehabilitation program, or if the tree has been removed and cannot be rehabilitated, the city may require the tree to be replaced. The cost of replacing a mature tree can reach or exceed \$15,000.

Penalties for Damaging Someone Else’s Tree

Consider the following: a Santa Barbara local cut down three (3) Eugenia trees that were located on City of Santa Barbara property in front of their home. However, the

owner did not apply for a permit and with a helping hand removed the trees. The problems for our local homeowner were stemming from his tree removal which grew into a far greater problem than he anticipated. The District Attorney announced a felony complaint was filed against the local homeowner charging them with two felony violations: conspiracy to commit vandalism in violation of Penal Code section 182(a)(1) and vandalism causing damage over \$10,000 in violation of Penal Code section 594(a)(3). Further, the District Attorney went after the homeowner with three misdemeanors in violation of Santa Barbara Municipal Code section 15.20.115 and one misdemeanor violation of Santa Barbara Municipal Code section 15.24.020. Do the misdemeanors look familiar? They should. The local homeowner is charged with violating the Tree Preservation Act.

Exceptions to the Tree Preservation Act and Obtaining Permits

There are several notable exceptions to the Tree Preservation Act, which allow removal of a tree that is dying, or that poses a potential danger to persons or property due to age, disease, storm, fire, or injury, or if the City Fire Department orders the pruning of the tree. If none of these exceptions apply, lawfully removing a tree which is subject to the Act will typically require obtaining a permit from the City of Santa Barbara. Most permit applications are filed with the Parks and Recreation Commission or the Community Development Department. Following submittal, it may take up to sixty (60) days for permit approval. If denied, the application may be appealed to the Santa Barbara City Council. ■

Scott Jaske is a Provisionally Licensed Lawyer pursuant to California Rules of Court section 9.49. In 2017, Scott joined the firm of Mark T. Coffin, P.C.. Hailing from Bakersfield, California, Mr. Jaske decided to pursue a law career after being injured as the pedestrian in a pedestrian versus automobile accident. Mr. Jaske is a graduate of California State University of Bakersfield and obtained his Juris Doctorate from Santa Barbara College of Law in 2020.

ENDNOTES

1. *Bonde v. Bishop* (1952) 112 Cal.App.2d 1.
2. See *Smith-Chavez, et al.*, Cal. Civ. Prac. Real Property Litigation (2020) § 11:40; *Miller & Starr, California Real Estate* (4th ed. 2020) § 17:12; *Anderson v. Weiland* (1936) 12 Cal.App.2d 730.
3. *Grandona v. Lovdal* (1886) 70 Cal. 161, 162.
4. *Id.* at 1791.
5. *Bonde, supra*, at 6.
6. Civ. Code § 3333; *Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 861.

LIFE CARE PLANNER
Injury & Disability Consultant



TBI • SCI • BURNS
PTSD • ORTHO • CRPS
AMPUTATIONS

Karen Luckett
OTR, CLCP, CCM, CDMS

Personal Injury | Work Comp | Med Mal
injuryxpert@gmail.com
805.570.0306

Parks, *continued from page 8*

situations, the client's lack of capacity may require that the lawyer decline to effectuate the client's expressed wishes. When the lawyer reasonably believes that the client's diminished capacity exposes the client to harm, the lawyer may seek the client's informed consent to take protective measures. If the client cannot or does not give informed consent, the lawyer may be unable to protect the client against harm. A lawyer representing a competent client who may later become incapacitated may propose to the client that the client give advanced consent to protective disclosure in the event that such incapacity occurs. If appropriately limited and informed, such a consent is ethically proper."⁸

Conclusion

Adults have the right to make bad choices. Our goal as legal practitioners is to ensure that our adult clients understand their choices. If they do not understand, and the client is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, it is our job to take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian. ■

Erin Parks is the Editor of the Santa Barbara Lawyer. For almost 30 years, she has had a solo practice emphasizing Trust and Estates, Employment, and Immigration Law. Ms. Parks can be seen at www.erinparks.com and contacted at law@erinparks.com.

ENDNOTES

1. David Godfrey, Senior Attorney, American Bar Association Commission on Law and Aging, Protecting Clients: Capacity and Ethics (Zoom Presentation September 28, 2021).
2. American Bar Association Commission on Law and Aging, Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers (2020); <www.americanbar.org/products/inventory/book/411701219> (as of October 4, 2021).
3. The following answer is most correct: "All of the above."
4. See Prob. Code § 86 and Welf. & Inst. Code § 15610.70.
5. The California Elder Justice Coalition, California Undue Influence Screening Tool (CUIST) <https://www.elderjusticecal.org/uploads/1/0/1/7/101741090/final_cuist_5-27-2016_12.4.18.pdf> (as of October 4, 2021).
6. The California Elder Justice Coalition <<https://www.elderjusticecal.org/undue-influence.html>> (as of October 4, 2021).
7. Rules Prof. Conduct, rule 1.0.1 (e) and (e-1).
8. State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 13-0002; Rules of Prof. Conduct 1.0.1(e), 1.1, 1.2, 1.4, 1.6, 1.7, and 8.4.1; Bus. & Prof. Code § 6068(e).

If it's there,
we'll find it.
It's that simple.



White, Zuckerman, Warsavsky, Luna & Hunt, LLP offers much more than accounting expertise. Our creative ideas and new strategies give our clients a competitive edge. In family law, you need professionals who can analyze financial situations and provide unimpeachable analysis and expert testimony. With decades of experience, we are highly qualified in all areas including:

- ▶ Business & Professional Practice Valuations
- ▶ Cash Flow Available for Support
- ▶ High Earner Child Support Situations
- ▶ Lifestyle Expense Analysis
- ▶ Community/Separate Property Balance Sheets
- ▶ Tax Effects of Divorce & Tax Planning
- ▶ Asset Tracing
- ▶ Reimbursement & Misappropriation Analyses

Call us today so you can focus on what's important – your clients.

To attend our Santa Barbara Family Law Study Group, e-mail llasseube@wzwlw.com. There is no charge for the dinner or program and you will receive one hour of MCLE credit.

Our two California locations include:

Los Angeles 818-981-4226 Orange County 949-219-9816

E-mail: expert@wzwlh.com www.wzwlh.com

White
Zuckerman
Warsavsky
Luna
Hunt LLP

Certified Public ACCOUNTANTS
Expert Witnesses
Forensic Accountants
Business Appraisers
Marital Dissolution
Lost Earnings & Profits
Wrongful Termination
Fraud Investigation

Spotlight On Modest Means Attorney Mareike Schmidt

BY MAREIKE SCHMIDT

The Santa Barbara County Bar Association (SBCBA) sponsors a Lawyer Referral Service that assists people in Santa Barbara County who have legal problems and seek the advice of qualified attorneys. The Lawyer Referral Service has been serving Santa Barbara County since 1964 and is certified by the State Bar of California. The Lawyer Referral Service offers a Modest Means Program for low income individuals with family law issues. Qualifying applicants may retain an attorney, like myself, for reduced fees.

I agreed to assist with this Spotlight so that the local legal community could learn more about me and the Modest Means Program.

What influenced you to become a lawyer?

I grew up in East Berlin and every-day citizens of East Germany did not have many choices regarding anything, including a choice of career. The career decision was generally made for them by the government. Like any other child, I watched many television shows which provided a constant supply of career ideas such as veterinarian, lawyer, actress, or astronaut.

When I turned 13-years-old, I came face-to-face with my lack of choice in East Germany. At the time, I was required to go on job interviews to secure employment for when I finished high school at 16-years-old. I remember being given two career choices: administrative assistant or bank teller. I did not like either choice, and requested to go to the university to further my education. I was told my family did not have the requisite political background to make such a request and thus my request was denied. I remember feeling a tremendous amount of injustice at the time.

In the following years, I became more aware of the regime I was forced to live under and the lack of fundamental rights. It was the late 1980s, and many citizens, including some of my classmates, were getting arrested for anti-government speech. Some were being shipped off to prisons without the benefit of trial or adequate representation. Some were never heard from again. I decided, one way or another, I was going to pursue a career in law. Looking back, I did

not know how I was going to do it, but with the fall of the Berlin Wall in 1989, my dream became possible.

What drew you to practice in Santa Barbara?

Santa Barbara has been my home since 1993. I cannot imagine practicing anywhere else.

How/why did you get involved with the SBCBA Lawyer Referral Service Modest Means program?

Initially, a colleague and friend of mine mentioned the program when I first began practicing law in 2010. It is an important program, and I am proud to be part of it.

What is the most gratifying about being a Modest Means Attorney?

I like helping people who have a legitimate claim and who are prevented from accessing legal representation because of their financial setting. I think back to my own dilemma 20 years ago, when I needed help adjusting my immigration status. At the time I could not afford the services of an attorney and I knew I would not be able to navigate the immigration system myself. I ended up being referred to a local immigration document preparer, who went above and beyond to help me at a reduced rate. It took several years but she was able to successfully walk me through the process. I am certain I would not have been able to do it on my own and I am grateful for her help to this day.

What do you do when not practicing law? How do you balance work life?

I admit it, I do not have a lot of balance right now. I used to be an avid, daily runner and I used to hike several miles every weekend. However, during the last year, I have become the 24/7 caregiver to my special needs pet, which does not leave me with much of a social life. I realize animals are not everyone's priority – but my pet is mine.

What would someone be surprised to learn about you?

When I first moved to Santa Barbara in 1993, I could not speak, much less understand, the English language. There was a lot of smiling and head-nodding going on back then.



Mareike Schmidt

Any advice you would have given yourself when first starting out your law career?

Do not take any of it personal; not your client's actions; not your client's case; and not opposing counsel's conduct.

Do you have any animal friends you'd like to tell us about?

Anyone who knows me, knows I come with my pug attached to my hip. Finley and I are inseparable. He is my Velcro-pug.

Who is your legal heroine?

RBG (Ruth Bader Ginsberg).

What do you own that you should really throw out?

I have been doing a lot of "spring-cleaning" since the pandemic began. I must have been successful because I cannot think of anything that is left and that I am avoiding throwing out.

What was your favorite journey?

Aside from my journey to the United States? As a child, my family and I traveled to Mongolia. We spent several weeks visiting temples, living in yurts, sleeping on wood benches, and eating strange goat cheese puffs and meat dumplings called Buuz. It was such a unique experience. I will never forget it.

iPad or Chromebook?

I am the owner of several Apple watches, iPhones, and iPads, but I cannot get used to working with Mac computers!

Have you ever asked someone for his or her autograph?

I am taking the Fifth on the identity of the person. When I was 12-years-old, I received it despite it having to make its way all the way from the United States to East Berlin without getting confiscated at the border. It was quite the accomplishment at the time.

What is your greatest fear?

Having lived in Germany, a country without any of the fundamental rights most Americans take for granted, to this day my greatest fear is that history could repeat itself. It is an indescribable and terrifying experience to not have freedom of speech; to not have democratic elections; to not have a right to privacy; to not have due process; and to be trapped behind a wall with no way to leave. I lived with it for over fifteen years. I had to accept that nothing I owned

was mine; that my family's mail was opened and read all the time; that packages addressed to us were confiscated; that my parents' phone line was tapped; that secret police could (and did) show up at our doorstep to threaten and silence us; and so on and so forth. I believe there are many lessons in history which need to be taught in schools today in greater detail to prevent them from happening again.

Bitcoin or Benjamins?

I am old school. I prefer Benjamins.

What app do you use most?

iMessages and Outlook.

What do you perceive as the greatest obstacles to justice, if any?

Speaking in terms of my law practice, it is lack of access to financial resources. As much as people want to believe financial inequalities do not lead to inequalities in justice, they do. Without the Modest Means Program, my clients would run into the issue of mounting legal fees, being outspent by the other side, and thus being forced to settle or withdraw their case simply because they can no longer afford to seek justice. ■

Mareike Schmidt attended the Colleges of Law in Santa Barbara. She was admitted to the State Bar of California in 2010. In January 2011, Mareike hung out her shingle and has been practicing Family Law solo in downtown Santa Barbara ever since. She is also now proficient in English and German, and is a member of the Delta Theta Phi Law Fraternity. Ms. Schmidt can be reached at 805-770-7762 or attorney@mschmidtlaw.com.

ENDNOTES

- 1 See <<https://sblaw.org/lawyer-referral-service/>>.
- 2 See <<https://sblaw.org/local-family-law-resources/>>.



Mareike and her Velcro-pug, Finley

Well-Being and Lawyer Competence—Shifting the Paradigm, One Law Student at a Time

BY ROBIN OAKS

As we all are, local Santa Barbara and Ventura Colleges of Law (COL) students are facing the challenges brought about by the pandemic and the recent surge of the delta variant.¹ This summer I launched a COL two credit course entitled “*Wellness and Lawyering Competence*” to make a change and a difference. The course was designed to help law students develop lawyering skillsets that foster well-being, and to meet the challenges of working in a stress-filled and changing profession—and world. As legal professionals, we need to optimize, preserve, and protect the functioning of the tools of our trade—our minds and bodies.

From day one, I explained to the students that this course would be like no other they had experienced in law school. The students’ weekly assignments and coursework were rigorous, but the most challenging task was to explore their own inner landscape of thinking, feeling, and habits of behavior. They were expected to hone their critical thinking skills, pay attention to, and reflect upon what was going on in their mind, body, and emotions. They became their own case study, discovering from a holistic perspective what fosters sustainability, success, and well-being.

Students explored research and read articles from the fields of medicine, psychology, neuroscience, and law. Their weekly assignments included many evidence-based mind-body practices I have studied and used with professionals as a “well-being” life coach providing support for optimizing energy, rebalancing, resilience, and cognitive and emotional fitness. I invited eleven distinguished professionals to share their insights and help the students realize by “science and stories” that well-being is integral to lawyering.

After the ten-week course finished, one student wrote: “For the last year or so, I’ve had no motivation to get my

schoolwork done and had forgotten my purpose for being in law school. Dropping out of law school has never been an option for me, no matter how miserable it can be at times, but during the spring 2021 semester, I was ultimately ‘over’ law school. Taking your course has helped me rediscover my purpose for law school and the law. I am once again motivated and excited for the new semester to start in a week! I’ve learned that my connection to myself is worth the time it takes—and has improved my personal, occupational, and academic life.”



Robin Oaks

Professor Lawrence Krieger, a lawyer, law professor, and researcher, spoke about his seminal research studying thousands of lawyers and law students to determine what factors most contribute to lawyer well-being, motivation, and life satisfaction.² His research confirms that intrinsic factors (competence, autonomy, supportive leadership, relationships, authenticity, integrity, meaning, purpose) matter far more than extrinsic factors (money, prestige, grades, making partner, law school rank). Krieger’s research is based on self-determination theory, which identifies the major organizational influences on human motivation and productivity. “Self-determination theory represents a broad framework for the study of human motivation and personality... Conditions and experiences supporting the human needs of *autonomy, competence, and relatedness* foster the most high-quality forms of motivation, including enhanced performance, perseverance, and creativity. The degree to which any of these three psychological needs is unsupported or thwarted within a social or institutional context will have a detrimental impact on wellness in that setting.”³

Research by Martin Seligman, the psychologist who launched Positive Psychology,⁴ confirmed that happiness and well-being involve five building blocks for human flourishing: Positive Emotion, Engagement, Relationship, Meaning, and Accomplishment (PERMA). The goal of becoming an attorney does not mean that one’s humanness can be neglected. Therefore supporting “psychological capital,” an individual’s psychological state of development, comprised of hope, optimism, resilience, and self-efficacy, is inextricably linked to success, business profitability, and employee productivity. COL students explored practices

each week that supported all PERMA elements, building skillsets for resilience and engagement.

COL students used words like “game changer” and “eye-opener” when describing how the course positively impacted their mood, performance, and energy. One mentioned, “The wellness practices we’ve learned are valuable and practical. Learning some of these techniques, like meditation, can change one’s entire law school experience. And students who are familiar with the wellness practices Professor Oaks teaches will certainly have an opportunity to avoid some of the pitfalls that law school stress causes.”

The response of COL students presents an opportunity to work with researchers to empirically study the effects of well-being strategies on law students’ well-being and achievement. A recent study suggests positive effects on bar exam pass rates from providing law students just a few hours of instruction about how cognitive reframing, mindset, and neuroplasticity of the brain, affect thinking and attention.⁵

Many COL students felt it was invaluable to have legal professionals validate their emotional and mental experiences, and to have classmates share candidly the challenges they experienced. This normalized what they were feeling, countered the stigma against help-seeking, created psychological safety, and supported learning and growth. One commented, “What other opportunities are available at law schools that offer such a potential for professors to glimpse and understand the mindsets of future attorneys? Would a student have been able to share his or her vision or ambition if it were not for this class? It was only through this class that such an honest reflection and discussion on professional identity occurred.”

Jackie Gardina, the COL Dean, and nearly every speaker, including myself, candidly spoke of personal and professional challenges coping with stress and toxic work environments, and suggested effective strategies for rebalancing from emotional and cognitive overwhelm. One student commented, “The fundamental challenge for lawyers in becoming well is sometimes the barriers of stigma, retribution, and confidentiality issues specific to the legal community. The existence alone of a well-being and lawyer competence course in law school breaks these barriers by normalizing the discussions surrounding mental and emotional health.”

Working with the mind—becoming aware of thoughts and building cognitive fitness—was strongly emphasized

throughout the course. Dr. Spencer Sherman, a local clinical psychologist, professor, and life coach, spoke with the class about cognitive restructuring, which is the essence of cognitive-behavioral therapy. Students learned that examining and reframing limiting beliefs and energy-draining, anxiety producing thoughts can dramatically improve performance.

Stanford psychologist Carol Dweck’s research about growth versus fixed mindset became a center-post for exploration during the course. A growth mindset (“With effort, I can improve”) potentiates greater achievement by reframing setbacks as opportunities to learn, whereas a fixed mindset (“It’s the way it is and can’t be changed”) precludes growth. One student felt empowered when she became aware of being able to shift her fixed mindset when triggered. “I was triggered yesterday when a professor was explaining the curve on our last assignment. A few people did well and scored very high, a few scored very low, and the rest were in the middle. I instantly got a pit in my stomach and thought that I would be very disappointed if my score was not one of the few ‘very high’ scores because I would feel like I didn’t work as hard as the other students. I then took a deep breath and reminded myself that no matter how I scored it will be an opportunity to learn more and grow. If this is the only thing I take away from this class, it will be worth it! It was an instant change that I have been able to

apply to many aspects of my life (...including how I’m parenting my children).”

One of the most popular speakers during the course was Santa Barbara County District Attorney, Joyce Dudley. She shared captivating stories about the realities of working in a trauma-based profession. She stressed that self-care, seeking mental health support when needed, exercise, supportive relationships, and effective leadership that recognizes the importance of well-being, are all vital to surviving and thriving in the legal profession.

Other legal professionals, Amy Slonaker and Christian Felix, spoke about their experiences working in toxic legal work environments, and what strategies they now counsel others, including law partners, about to build emotional intelligence, and leadership communication skills, including effectively giving and receiving feedback. Even the financial advisor who presented about “wealth health,” Spencer Sherman (this is not a typo, two speakers coincidentally had the same name), focused on the importance of developing

“Well-being can no longer be considered something separate from the law school experience, but rather threads within its very fabric.”

emotional awareness, exploring limiting beliefs, and practicing mindfulness for financial success.

Nathalie Martin, a University of New Mexico School of Law professor, and author of the book *Lawyering from the Inside Out: Learning Professional Development Through Mindfulness and Emotional Intelligence* (one of the books assigned to my COL students) shared stories and wellness practices she teaches her students, including meditation and mindfulness pauses. More than a relaxation technique, meditation builds self-awareness, increases focus, and strengthens emotional self-regulation. One student reported, “The empathy and compassion combined with the quiet and open observation of mindfulness practice makes it much easier for me to see the most effective way to regulate my emotions so that I am effective, where before I was self-defeating.”

The importance of engagement and inclusive work environments was emphasized by Paula Brown, a former attorney, and author of *Beating Burnout at Work: Why Teams Hold the Secret to Well-Being and Resilience*. She spoke about her own journey recovering from burnout and then teaching military personnel resilience and Positive Psychology strategies.

Other speakers, including Jenn Sherr, a bodywork specialist, and Dr. Jay Winner, a Sansum family practice physician, led the students through practices demonstrating how the body and mind are interrelated. After I introduced several breathwork techniques that help calm anxiety, and increase focus, one student noted, “It is amazing how a simple 5-count breathing exercise changes your mood, state of mind and brings a significant amount of clarity to your thought process...It can make the difference between a student staying in a program or feeling the loss of self-control and dropping out.”

Last year, the Institute for Well-Being in Law (IWIL),⁶ was formed as a continuation of the ABA National Task Force on Lawyer Well-Being. In 2017, the Task Force launched a movement to foster well-being through its groundbreaking report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*. IWIL’s mission is the betterment of the legal profession by focusing on a holistic approach to well-being and promoting a “culture shift in law to establish health and well-being as core centerpieces of success.” I was recently selected to be a member of IWIL’s programs and resources committee and hope to contribute to the well-being of our local legal community by raising awareness and sharing resources at the individual and organizational level.

The rapid growth of the well-being movement is evidenced by the increase of well-being strategies and coordinators in national law firms, including O’Melveny & Myers,

Ropes & Grey, and Morgan, Lewis & Bockius. Vault.com recently included a Wellness category in its Best Law Firm rankings of large and mid-sized firms.¹ This is a sign that a shift in the legal culture is happening, and employee satisfaction translates into profitability and success.

Brandy Price, COL Associate Dean, an advocate for fostering student wellness and well-being, commented, “The profoundly positive response to the summer well-being course validates what we believe signals a paradigm shift in legal education. Students described the well-being course as positively transformative and Professor Oaks’ knowledge and passion as inspiring, even life changing. In education, we hope to make this type of positive and enduring difference. The reality is that we are at an inflection point and we must seize the moment. Well-being can no longer be considered something separate from the law school experience, but rather threads within its very fabric.”

I designed the *Wellness and Lawyering Competence* COL course as a catalyst for learning, but any transformative impact was the result of each student’s commitment to self-exploration that sparked insights and change. I was inspired by the students’ willingness to participate, practice, and become enthusiastic ambassadors for fostering well-being as an integral part of professional competence and success. They evidenced for me what Gandhi meant when he said, “Be the change you want to see in the world.” ■

Robin Oaks has been an attorney for nearly four decades, and for twenty-five years has provided legal services focused on independent workplace investigations and mediations. She is certified in and has studied a wide range of healing, emotional intelligence, cognitive restructuring, and mind-body practices. She offers group training programs and confidential well-being life coaching sessions for legal professionals to energize, rebalance, and experience wellness and cognitive fitness strategies for thriving during change and stressful life challenges. Ms. Oaks can be reached at: Robin@RobinOaks.com or 805-685-6773.

ENDNOTES

- 1 Delta is the Greek letter that means change or difference.
- 2 Krieger and Sheldon, *What Makes Lawyers Happy: A Data-Driven Prescription to Redesign Professional Success* (2015).
- 3 See <<https://selfdeterminationtheory.org/theory/>>.
- 4 Positive Psychology is the scientific study of what makes life most worth living, focusing on both individual and societal well-being.
- 5 See <<http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Exam-Strategies-and-Stories-Program>>.
- 6 The Institute for Well-Being in Law can be navigated online at: <www.lawyerwellbeing.net>.
- 7 See *Career Advice & Company Reviews by Employees* at <<https://firsthand.co/library/themes/vault-law>>.

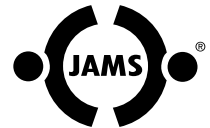


VIRTUAL ADR AT JAMS

Our neutrals don't just mediate and arbitrate — they also navigate.

The mediators and arbitrators at JAMS have decades of experience handling high-stakes, complicated cases and are accomplished at overcoming barriers of all kinds. Assisted by our virtual skills training department and on-demand tech support team, they keep remote proceedings on track and guide parties toward a seamless, successful resolution. Schedule your virtual or hybrid hearing today.

Learn more at jamsadr.com/virtual.



SBCBA Diversity and Inclusion Task Force Survey

The Diversity and Inclusion Task Force would like to thank all those who've taken the time to participate in the survey, thus far. The results have been very helpful and your participation appreciated. And for those who've not yet had a chance to complete the survey, the link appears below.

Diversity in the legal profession is a necessity that helps to improve the overall focus of the profession. A group of culturally, racially, ethnically, and gender-diverse legal practitioners can attract and effectively connect with a broader network of clients than can their non-diverse counterparts. Such diversity strengthens the belief in the fair delivery of justice, regardless of the background of the client.

Please take a few minutes to complete this survey:

https://docs.google.com/forms/d/1IFx17IKRILAw5soDd4_PPckUZeg-9tPadhV3sihsc-0/viewform?ts=607f2d53&edit_requested=true

The link to review the Diversity and Inclusion Resources Guide for legal professionals is <https://sblaw.org/diversity-inclusion-resource-guide/>.

Thank you for your participation.

Pathologists, Context, and a Battle over Bias

BY ROBERT M. SANGER

In the last issue of the *Santa Barbara Lawyer*, the *Criminal Justice* column dealt with a possible causative factor in cognitive bias among forensic scientists, particularly those who are called to testify. Since writing that column, there has been an extended discussion among forensic pathologists regarding possible cognitive bias in their specific profession. The discussion was generated by one of the articles cited in last month's column. Cognitive scientist Dr. Itiel Dror, PhD and pathologist Dr. Judy Melinek, MD along with five other authors published an article in the *Journal of Forensic Sciences* (hereinafter "*Journal*")¹ It was cited last month for the general proposition that cognitive bias can affect decisions made in pathology. On that general point, there is no serious dispute.

The extended and somewhat heated discussion among pathologists about the recent *Journal* article begins with the previous work of some of the authors of that article—principally, work of Dr. Dror—relating to cognitive bias in forensic science in general. That work led to the recent controversial article in the *Journal* focusing on pathology. The article and responses provide a foundation for a discussion in this column of, first, what kinds of bias can affect decisions in a forensic field like pathology and, second, what kinds of things can be done to attempt to limit and control for such biases. Far from a moribund subject, the effect of contextual bias in determining cause of death, mechanism of death, and manner of death are quite lively – so to speak. Such will be the subject of this article.

The Dispute

The Dror article appeared in the prestigious 66-year-old *Journal* and in letters to the editor and responses in the *Journal* itself.² The discussion also spilled over into other publications. For the article to be accepted by the *Journal* for publication, it was peer reviewed by anonymous editors. It was accepted and officially published September 9, 2021.³ But, in response to review of "E-Pub" drafts, 74 pathologists—some serving as medical examiners and others in private practice—issued a demand that the article be

withdrawn by the *Journal*.⁴ Eight other letters were published in the *Journal* in response to the Dror article and Dr. Dror and his colleagues responded to each one.

While these disputing pathologists were offended by the arguments and conclusions of the Dror article, they conceded that there may be bias in forensic pathology and that bias "may" include unconscious race bias.

They argued in the name of their guild organization, the National Association of Medical Examiners (NAME), that forensic pathologists, particularly those working as medical examiners, are adequately regulating themselves.⁵ Both the article and the responses by the disputing pathologists are strident in making their respective cases. This resulted in the polemical confrontation.

Fighting pathologists are fascinating and, if anyone is interested in the overall controversy, they can read the article and correspondence. For this column, and of practical interest to both civil and criminal practitioners who are involved in death cases, this column will address the kinds of non-medical contextual information that can cause implicit bias affecting the decisions that form the basis for reports and testimony by forensic pathologists. The column will also discuss the use of linear sequential unmasking (LSU) and other mechanisms to limit or control the effect of cognitive bias in presenting reports and testimony.

The Opinions of the Forensic Pathologist

Both in civil cases and criminal cases involving death, pathologists are traditionally called upon to form opinions, write reports and give testimony regarding three major areas: cause of death, mechanism of death, and manner of death. The cause of death is generally a determination of the key physiological failure of a human body to function as a living organism. For instance, cardiac arrest may be assigned as the cause of death—that is the heart stopped pumping blood, which, in turn, caused the rest of the body to fail to function as a living organism. The determination of cause of death should be as objective as possible based on scientific testing of tissue and bodily fluids and the examination of the body before and during autopsy.



Robert M. Sanger

The mechanism of death more particularly describes the biological and physiological events that resulted in the cause of death. For instance, cardiac arrest may have been the cause of death, however, the mechanism might have been asphyxia that resulted in the failure of the heart to receive sufficient oxygen to continue to function. The determination of the mechanism leading to the cause of death, again, should be as objective as possible based on scientific testing of tissue and bodily fluids and the examination of the body before and during autopsy.

Finally, the manner of death is a determination based on findings related to cause of death and the mechanism of death, but it may rely more heavily on factors beyond scientific testing of tissue and bodily fluids and the examination of the body before and during autopsy. To determine that the manner of death was a homicide for instance, would probably require more information about the circumstances under which injuries were inflicted. For instance, cardiac arrest could be the cause of death and the mechanism could have been asphyxia, but the manner still is undetermined. The asphyxia could have been due to leaking carbon monoxide into a confined environment, asphyxia due to position of the body, or asphyxia due to suffocation. However, the manner of death, whether it was “natural,” “accident,” “suicide,” or “homicide,” in the case of those examples, might depend on how the carbon monoxide got into the environment, what caused the position of the body, or what caused the suffocation.

The ultimate question as to “manner of death” for medical examiners is often defined by a small box on the death certificate that must be filled with one of six choices: “natural,” “accident,” “suicide,” “homicide,” “undetermined,” or “pending.” The taxonomy of the medical decision process is vulnerable at this point from the standpoint of medical science. The cause of death may have been cardiac arrest, the mechanism may have been asphyxia, but the hypotheses to be considered by the medical examiner given the evidence may include degenerative pulmonary disease, carbon monoxide poisoning, positional asphyxia, or suffocation. The latter three hypotheses, in turn, require further analysis to determine if the asphyxia leading to cardiac arrest was the result of accident, the decedent’s own conduct or the conduct of others.

Furthermore, the determination of whether to call the manner of death a homicide will turn upon whether the medical examiner determines that the death was caused by another. The pathologist will not necessarily answer the question of whether the conduct of the other causing the death was intentional, negligent, excused, or justified and, thus, whether it would give rise to civil or criminal

liability. However, the pathologist’s opinion on manner of death will have significant impact on those factual and legal issues. For instance, it may be a medical hypothesis that the cause of death was cardiac arrest and that the mechanism of death was cardiac arrhythmia resulting from asphyxia. However, the opinion as to the manner of death requires additional non-medical contextual information to evaluate the competing hypotheses. For instance, if the person who suffered cardiac arrest was obese, had a high blood alcohol level and the medical examiner was advised that there was evidence that the decedent was found face down, the mechanism of death might be positional asphyxia causing cardiac arrhythmia leading to cardiac arrest. But to determine manner of death, the medical examiner would still need more non-medical contextual information from investigators.

If information is provided by investigators that the person was found on his or her own bed, the manner of death might be determined to be “natural” because of physiological derangement based on the same mechanism of death. Even in that case, alternative hypotheses might be considered as to the manner of death including “accident,” “suicide,” or “homicide.” For instance, if the person suffered cardiac arrest after being placed in handcuffs in a hog-tie position face down in the back seat of a patrol car in violation of department policy, a strong hypothesis might support the manner of death as “homicide.” For the same reasons, a cardiac arrest might result from a gunshot wound which would not support a finding of “natural,” but could support a finding of “accident,” “suicide,” or “homicide.” Context matters but can be dangerous in reaching any forensic opinion particularly manner of death opinions by pathologists.

Context Management in Forensic Pathology

Dr. Dror and his colleagues long understood that contextual information in all forensic sciences is “fraught with error.”⁶ Studies show that, for many tasks in forensic science, context is more likely to cause harm than to promote unbiased scientific perceptions and judgments. The science should be based on the physical evidence. Famously, the misidentification of Brandon Mayfield as the “Madrid Bomber” was blamed on fingerprint examiners relying on contextual information rather than simply comparing a lifted print to a known print. The contextual information—that Oregon lawyer Brandon Mayfield was married to a Muslim woman and had converted to Islam and that, in his law practice, he had represented a “Muslim terrorist” in a child custody dispute—were factors that influenced fingerprint examiners to “match” his prints to a print left at the scene. The fact that the senior examiner made a “match”

was made known to the subsequent two FBI examiners, and the fact that all three agreed was made known to the civilian who gave the fourth opinion.

There is much to be said for limiting reporting and testimony in a forensic case to “sub-source” or “source level” evidence or information. The examiner should just look at the prints following double-blind principles. On the other hand, sometimes the validity of an opinion depends on “activity level” evidence or information which considers the bigger context, outside of the microscope, as it were.⁷ ENFSI Guidelines, the European forensic standards discussed in a previous *Santa Barbara Lawyer* column,⁸ recognize that the validity of a forensic opinion may properly depend on some contextual information regarding the evidence under scientific scrutiny.

In the United States, to maintain some degree of scientific “control” over the contextual information, Dr. Dror and his colleagues some years ago proposed Linear Sequential Unmasking (LSU).⁹ The levels of potentially biasing but potentially task-relevant information are (1) trace evidence; (2) reference materials; (3) case information; (4) “base rate” expectations; and (5) organizational and cultural factors. To the extent that any of these levels contain task-relevant information, they should be unmasked sequentially. In other words, the forensic scientist would do the initial analysis only with the trace evidence and, after recording results, is given relevant information from the next level to form another opinion and then onto the next level and the next as appropriate. Using LSU, the contextual information would be regulated to minimize the effect on cognitive bias.

Context Management in Forensic Pathology Decisions

Forensic pathologists, as discussed, require contextual information to render opinions, particularly as to manner of death. The cause of death and the mechanism of death can often (but not always) be determined in the autopsy room and the laboratory. The manner of death almost always requires context. However, it is typical for medical examiners doing forensic pathology to be provided with significant amounts of contextual information that goes beyond the “sub-source level” and the “source level” to the “activity level” in ENFSI terms or from level 1 all the way through level 5 in the earlier Dror taxonomy.

Hence, in September 2021, Dr. Dror and another group of colleagues, turned their attention to contextual bias specifically in forensic pathology. They published their peer reviewed article in the *Journal* advocating the implementation of LSU in pathology. The examples that they used to make their case, involved studies that suggested that pathologists

are biased by the contextual information they are presented with the case. Furthermore, the context may convey racial bias that will not only influence the opinions but may influence the actual scientific procedures implemented in the face of identical physiological evidence. This finding provoked not only discussion but outrage among the 74 disputing pathologists and others who joined in the fray.

The foundation for Dror and his colleagues’ most recent research regarding cognitive bias and pathology was the examination of ten years of death certificates from the State of Nevada and the conducting of an experiment with 133 forensic pathologists. In the September 2021 article, Dror and his colleagues expanded the original five levels to eight levels (on a continuum) relating to the potentially-biasing-but-potentially-task-relevant information that might be considered as context in manner of death determinations. Their thesis remained the same for pathologists, as for other forensic scientists. Context can be task relevant, but it can also create cognitive bias. The authors were careful to say that bias is not necessarily racial bias even if racial effects may emerge from secondary categories of bias, for instance, past statistics that perpetuates a skewed expectation resulting in a “bias cascade.” They tried to be constructive and, after identifying a continuum of contextual information that may be a source of contextual bias, they made six lengthy recommendations: (1) while cause of death opinions should be based solely on medically relevant information and while some contextual information will be relevant to manner of death assessments and determinations, the information should be limited to the relevant information; (2) research and discussion among forensic pathologists, taking into account cognitive science, should be performed to determine where on the continuum context information ceases to provide task relevant information; (3) LNU should be employed to make medical information the primary driver of decisions; (4) non-medical information should be consulted for corroboration but not be the driver of the decisions; (5) non-medical information should be used to trigger further tests and procedures where appropriate; and (6) there should be transparency about the use of non-medical contextual information.

The actual experiment employed by Dror, and his colleagues riled many forensic pathologists who saw the experiment itself as flawed and the results as condemning the entire profession (and each of them) as racist. The vignette presented to the 133 pathologists included medical findings based on an autopsy of a 3.5-year-old child who presented in the emergency room with blunt trauma injuries.

“By random assignment, each pathologist read one of two vignettes, which were identical apart from two

pieces of information: some were told that the child was African-American and that the caretaker was the mother's boyfriend..., whereas the other pathologists were told that that child was White and that the caretaker was the child's grandmother.... To be consistent with typical medical information, the race of the child was stated, but the race of the caretaker was not explicitly stated (the caretakers explicitly differed only in their relations to the child as well as their sex; implicitly they may have differed in their age and race)."

The authors claimed that the death certificate data showed that forensic pathologists were more likely to express the opinion that the manner of death was "homicide" rather than "accident" for deaths of Black children relative to White children. They then claimed that their experiment with the 133 pathologists not only corroborated the statistical data but supported the explanation that cognitive bias affected the opinions based on irrelevant non-medical information about the race of the child and who was the caregiver.

Calling out contextual bias for what it often is—invisible, implicit in past practices, and no longer intentional—creates emotional backlash particularly when the bias is demonstrated to have disparate race effects. No one wants to own it. But of course, failure to own it perpetuates it. Here, the non-medical contextual information included race and the caregiver as controlled variables. The results are the results. Maybe a further regression analysis would have supported another explanation, but the fact is that the experiment corroborated the review of ten years of death certificates. And, when all is said and done, it is a cautionary tale at the very least. Forensic analysis and opinions should be based as much as possible on medical science. Non-medical contextual information should be viewed with caution using the LSU approach or, at least, using informed professional introspection to control its adverse cognitive effects.

Conclusion

As of this writing, there has not been a reconciliation among the various pathologists, researchers, and commentators. Despite the demand for retraction of the article, it has been retained by the *Journal*. For the purposes of lawyers, both civil and criminal, there are valuable lessons in the literature on all sides. Forensic opinions on cause of death, mechanism of death and, especially, manner of death are all subject to possible contextual bias. Whether LSU is implemented, counsel with a possibly contested pathologist report should carefully determine what non-medical context was considered and whether context had anything to do with procedures employed, questions asked, or opinions

formed. Non-medical contextual information might have properly informed the pathologist regarding task-relevant facts or, on the other hand, might have contributed to a cognitive bias that allowed task-irrelevant information to affect purportedly scientific procedures and opinions. ■

Robert Sanger is a Certified Criminal Law Specialist (California State Bar Board of Legal Specialization) and has been practicing as a litigation partner at Sanger Swysen & Dunkle in Santa Barbara for 47 years. Mr. Sanger is a Fellow of the American Academy of Forensic Sciences (AAFS). He is a Professor of Law and Forensic Science at the Santa Barbara College of Law. Mr. Sanger is an Associate Member of the Council of Forensic Science Educators (COFSE). He is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization. The opinions expressed here are those of the author and do not necessarily reflect those of the organizations with which he is associated. ©Robert M. Sanger.

ENDNOTES

- 1 Itiel Dror PhD, Judy Melinek MD, Jonathan L. Arden MD, Jeff Kukucka PhD, Sarah Hawkins JD, Joye Carter MD, PhD, Daniel S. Atherton MD., *Cognitive Bias in Forensic Pathology Decisions* (2021) 66 J. Forensic Sci. 1751-1757.
- 2 Material for the *Journal*, including drafts of articles submitted, is distributed on-line in "E-Pub" version leading to the ultimate acceptance and publication in the official *Journal* which is published by the American Academy of Forensic Sciences (AAFS). The author of this article, Robert Sanger, is a Fellow of AAFS but not involved with the publication of the *Journal*.
- 3 The author of this article received a prepublication copy of the final version of the article in time for inclusion of the reference in the *Criminal Justice* column submitted to the *Santa Barbara Lawyer* on September 7, 2021, for publication in its October 2021 issue.
- 4 Brian Peterson, et al., Letter to the Editor, "Commentary on: Dror IE, Melinek J, Arden JL, Kukucka J, Hawkins S, Carter J, et al., Cognitive Bias in Forensic Pathology Decisions" (2021) 66 J. Forensic Sci. <<https://doi.org/10.1111/1556-4029.14843>>.
- 5 The author of this article, as a forensic consultant, is a member of NAME and has co-presented on forensic pathology at professional conferences with one of the 74 disputing pathologists.
- 6 Saul M. Kassin, Itiel E. Dror, Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions* (2013) 2 Journal of Applied Research in Memory and Cognition, 42-52.
- 7 It is generally conceded that the forensic scientist should never go to the "guilt level" or the level of deciding whose hypothesis regarding the entire case (civil or criminal) is supported by the evidence. The forensic scientist, at most, offers an opinion on the likelihood of the evidence given a hypothesis, not – by transposing the conditional—the likelihood of the hypothesis.
- 8 See, Sanger, *ENFSI – European Guidelines for Evaluative Reporting in Forensic Science* (September 2021) *Santa Barbara Lawyer* 18-20.
- 9 Letter to the Editor of the *Journal of Forensic Sciences* (2015).

Why Insurance Matters to Your Dog

BY JESSICA PHILLIPS & SAMANTHA BALDWIN

Santa Barbara is a town that is just as beloved by people as it is by its dogs. Santa Barbara has dog friendly restaurants, tasting rooms, and off-leash beaches and hiking trails. It is a dog's dream come true to live here.

As lawyers who each own two dogs, dog bite and injury cases hit close to home. We have seen it all—dogs that no one was surprised bit someone, and dogs that have never had a propensity to bite, attack out of the blue. It is never an easy day for us to sit across from someone who has gone through such experiences and to learn about their injuries, the trauma, and the toll that it has taken on them mentally and physically.

California is one of the only states with strict liability dog-bite laws—holding an owner responsible even if the animal has never previously bitten someone or shown aggressive tendencies. This law does have limitations. California Civil Code Section 3342 outlines the law and holds an owner liable for damages if the individual was bitten while in a public place or lawfully in a private place.

California law does not protect individuals who were trespassing on private property, who provoked the animal, if the animal was protecting its owner or another person in accordance with California's laws on self-defense, or if the animal was military or police and being used appropriately with the agency's written policies.

It is important to note that if someone is injured but not actually bitten, strict liability does not apply and negligence on behalf of the owner must be shown. For example, if your dog jumps onto someone out of happiness and knocks them down resulting in an injury that individual may have a claim against you. In *Wolf v. Weber* (2020) 52 Cal.App.5th 406, Wolf and her husband were walking their dog in an off-leash park. At the same time, Weber was walking on the same trail with an unleashed dog—Luigi. Luigi wandered toward Wolf's party and Weber called for Luigi several times and Luigi began to return to Weber. As Wolf turned around, she was struck in the back of her knees and she fell, dislocating her ankle and breaking two leg bones.

Wolf sued Weber alleging, in part, negligence. Wolf al-



Jessica Phillips



Samantha Baldwin

leged that Weber breached his duty of care by failing to leash or control Luigi. The lower court granted Weber's motion for summary judgment, finding that Wolf assumed the inherent risk of being bumped by a dog by being in the off-leash park. The court of appeal reversed, finding that the primary assumption of the risk doctrine did not apply and that given the duties and expectations that the park's ordinance establishes, being knocked over by an unleashed dog with which a person has sought no interaction is not an inherent risk. The court noted that controlling one's dog is part of the "fundamental nature" of hiking on the park's leash-optional trails.

Victims of dog bites and attacks can be compensated for related medical costs, psychological counseling, property damage, lost wages, lost earning capacity, and the physical and mental pain and suffering. However, for a victim to receive compensation, our job is to determine if there is applicable insurance coverage and/or whether the dog owner has sufficient personal assets to cover the damages. In most cases, homeowner's or renter's policies cover dog bite injuries. However, some companies exclude liability for certain breeds.

Owning a dog comes with obvious responsibilities—keeping the animal safe, feeding it, keeping it healthy and exercised, and additionally keeping insurance protection in place in case of a worst-case scenario. Unfortunately, we see a wide range of damages resulting from a dog whether it be a broken finger or wrist or leg, permanent nerve damage, and/or severe scarring. The gravity of these injuries is almost always significant. Without sufficient homeowners' insurance or renters' coverage, the dog owner is personally liable for the extent of the injuries.

Simply, liability insurance is there to protect you from the worst-case scenario, be it a car accident or another in-

Personal Injury

jury causing event. It is always worth it to have sufficient coverage. So, check your policies, talk to your loved ones, make sure you and your family are protected so you do not “go to the dogs”! ■

Jessica Phillips and Samantha Baldwin are trial attorneys with Maho & Prentice, LLP. They focus their practice on Plaintiff's personal injury law and pride themselves in exceptional client service, while obtaining maximum results. They handle cases anywhere in the State of California. Ms. Phillips and Ms. Baldwin can be reached at: jphillips@sbcacalaw.com or sbaldwin@sbcacalaw.com.

2021 Bench & Bar Meetings

As Assistant Presiding Judge, the Honorable Pauline Maxwell has set the schedule for the last 2021 Bench and Bar Meeting that will take place on:

**Thursday, November 18, 2021
12:15 pm**

The Bench and Bar Meeting will be held via Zoom. These 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 a scheduled meeting, please email those items to Ian Elsenheimer at ielsenheimer@fcoplaw.com.

THE OTHER BAR NOTICE

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

Celebrating 25 years!

VERDICT RESOURCES

Forensic & Litigation Support Services

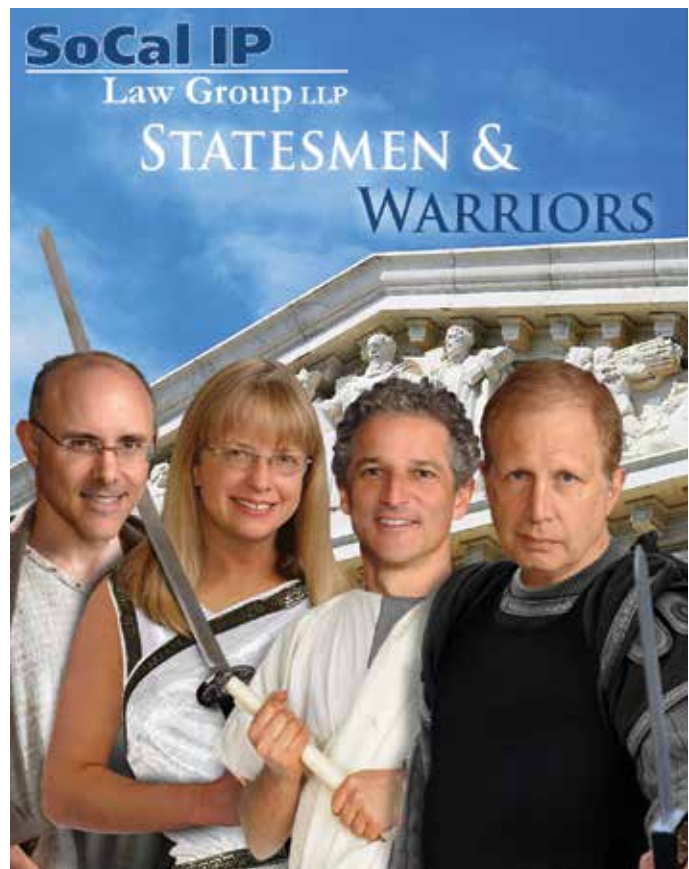


JOHN TROXEL
Investigations and
computer forensics
for law firms

“Verdict Resources has assisted dozens of my clients throughout the years, from surveillance to computer forensics. He is incredibly responsive, has a team of experts available to accomplish all investigative work needed, and he is a fantastic person as well. I will continue to use his services.”

– Jennifer Gillon Duffy, Rimon Law

Call us at (805) 572-7669
or visit www.verdict.net today.



SANTA BARBARA · WESTLAKE VILLAGE · IRVINE
WWW.SOCALIP.COM

NORDSTRANDBLACK PC

A PLAINTIFF'S PERSONAL INJURY LAW FIRM

GENEROUS REFERRAL FEES PAID

NordstrandBlack PC has a dynamic team of highly skilled trial lawyers, undeterred by challenges and committed to every case we take.

Experienced: We have more than 80 years of combined trial experience representing people injured by the negligent, reckless or intentional acts of individuals, companies and public entities.

Passion: At NordstrandBlack we care about our clients and relentlessly pursue their cases with integrity and professionalism so they receive full justice.

Results: When you refer a client to NordstrandBlack for representation you can be sure that our firm will handle their case to maximize the value for them and pay you a generous referral fee.

We are skilled and talented plaintiff's lawyers with the knowledge and resources to provide our clients with access to the best experts and innovative trial techniques so that they can be victorious.



Doug Black Renée Nordstrand-Black Sheldon Rosenfield

RENÉE NORDSTRAND-BLACK
SBWL Attorney of the year • AV Rated Martindale-Hubbell



NORDSTRANDBLACK PC
PERSONAL INJURY LAWYERS

33 West Mission Street, Suite 206

Santa Barbara, CA 93101

Phone: 805.962.2022 • Fax: 805.962.5001

Email: info@nblaw.us

Website: www.nordstrandlaw.com



(805) 845-1752

Alex@craigielawfirm.com

www.craigielawfirm.com

791 Via Mañana
Santa Barbara, CA 93108

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





Santa Barbara County Bar Association 2022 Membership Application

Member Name: _____

Check here if you do not want your name and office address disclosed to any buyer of Bar Assoc. mailing labels.

Check here if membership information is the same as last year. If so, the rest of the form may be left blank.

Check here if you do not want your e-mail address disclosed to SBCBA sponsors.

Check here to opt out of receiving the monthly publication in hard copy. You'll receive a pdf version instead.

Office Address: _____

City: _____ State: _____ Zip: _____

E-Mail Address: _____

Phone Number: _____ Fax Number: _____

Home Address: _____

City: _____ State: _____ Zip: _____

State Bar #: _____ Year Admitted to Bar: _____

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

SCHEDULE OF DUES FOR 2022

Active Members	\$130
Student Members	\$30
New Admittees (First Year Attorneys Only)	\$00
Affiliate Members (non-Attorney members only)	\$65
Non-Profit	\$65
Inactive/Retired	\$65
Total amount enclosed	\$_____.

AREAS OF INTEREST OR PRACTICE (check box as applicable)

- | | |
|---|---|
| <input type="checkbox"/> ADR | <input type="checkbox"/> Estate Planning/Probate |
| <input type="checkbox"/> Civil Litigation | <input type="checkbox"/> Family Law |
| <input type="checkbox"/> Criminal | <input type="checkbox"/> In-House Counsel & Corporate Law |
| <input type="checkbox"/> Debtor/Creditor | <input type="checkbox"/> Intellectual Property/Tech. Business |
| <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



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@hebdasolutions.com
805.636.2537
www.hebdasolutions.com

PETRU
CORPORATION



Title, Natural Resources
& Land Experts

Title Searches/Reports
Oil, Gas, Mineral Land Consulting
Expert Witness & Due Diligence
Right-of-Way/Easements
Water & Geothermal
Asset Identification
Permits/Regulatory Compliance
Subdivisions/Parcel Maps

TIMOTHY B. TRUWE
Registered Professional Landman
Registered Environmental Assessor
250 Hallock Dr., Suite 100
Santa Paula, CA 93060-9218
(805) 933-1389
<http://www.PetruCorporation.com>
Petru@PetruCorporation.com

Featured on Enterprises TV, aired on Fox Business Network
Published in "Black Gold in California"



GRANDfolia
Interior Plantscapes & Service

(805) 898-0835 ■ Fax (805) 898-0613
P.O. Box 3889 ■ Santa Barbara, CA 93130
grandfolia@aol.com



Proposed Slate of Officers, Directors & Delegates SBCBA 2022

OFFICERS:

President: Eric Berg
President-Elect: Jennifer Gillon Duffy
Secretary: Stephen Dunkle
Chief Financial Officer: Erin Parks
Past President: Elizabeth Diaz

DIRECTORS:

Daniel Bauerlein
Brad Brown
Raymond Chandler
Ian Elsenheimer
Taylor Fuller
Nicole Hornick
Richard Lloyd
Teresa Martinez
Jessica Phillips
Michelle Roberson
Russell Terry

SLATE OF DELEGATES TO THE CONFERENCE OF CA BAR ASSOCIATIONS:

Jim Griffith, Teresa Martinez,
Brad Brown

The Santa Barbara County Bar Civil
Litigation Section presents:

How to Find and Use Location Information in Litigation

Description:

Determining the location of an individual at a specific point in time can make or break a case. You can use location data to present an alibi in defense, discredit a witness or party, show how long someone was on the road prior to a crash, establish where a digital contract was signed, and more. This unique webinar will show you how to find and use location data in your case. We will answer your live questions, and walk through real-world location analysis. You will come away knowing where to find data to support your case, as well as how to analyze some of the data yourself.

Speaker:

Brian Chase is a Director of Digital Forensics at ArcherHall, an expert witness, and an adjunct professor of law. Before joining ArcherHall, he was a practicing attorney and the owner of Chase Technology Consulting, a legal technology consulting firm providing digital forensics and e-discovery expertise. He has worked with various sized law firms both in an IT and legal capacity. He has consulted with firms on their use of technology within the office, and has provided expert testimony in criminal and civil matters ranging from misdemeanors to murder to medical malpractice.

Date and Time:

Wednesday, November 10, 2021, 12:00 pm

Location:

Virtual Presentation via Zoom

Cost:

\$10/members; \$15/non-members.

MCLE:

1 hour general credit (pending)

Reservations and Payment:

Please mail checks by Wednesday, November 8, 2021 payable to Santa Barbara Bar Association, 15 W. Carrillo Street Suite 106, Santa Barbara, CA 93101. You may also click the link here to pay via Venmo, or go to <https://venmo.com/sbcba>.

Contact Information/RSVP:

Please RSVP by Wednesday, November 8, 2021 to: Mark Coffin at mtc@markcoffinlaw.com, and Lida Sideris at sblawdirector@gmail.com.

The Intellectual Property/Technology
Business Section and In-House Counsel &
Corporate Law Section of the Santa Barbara
County Bar Association present:

Non-Fungible Tokens: A Primer and Legal Guide to NFTs

Description:

Non-Fungible Tokens (NFTs), the latest rage in blockchain technology, have burst into the entertainment and media space, creating new markets and opportunities for artists, musicians, sports stars, brands, technology platforms, investors, and consumers. NFTs raise a profusion of novel legal questions involving intellectual property, advertising, consumer protection, and regulatory matters. This program will explore some of the basic questions and fascinating legal issues raised by NFTs.

Speaker:

Jeremy Goldman is a partner at Frankfurt Kurnit Klein & Selz PC in Los Angeles. He practices in the media, entertainment, and technology industries, with a focus on counseling clients about and litigating copyright, trademark, talent, contract, privacy, and IP-adjacent matters. Jeremy calls on his deep understanding of computers and the internet to advise clients on cutting-edge questions at the intersection of intellectual property and technology. Recognized by legal news website *Above the Law* as an "IP NFT Pioneer," he represents both platforms and creators in this rapidly developing field.

Date and Time:

Wednesday, November 17, 2021
12 pm – 1:15 pm

Location:

Virtual Presentation via Zoom

Reservations:

To receive the meeting link via email, please respond by Friday, November 12, 2021, to Chris Kopitzke at ckopitzke@socalip.com AND to Lida Sideris at sblawdirector@gmail.com

Cost and Payment:

\$10 SBCBA Members/\$15 Non-members
Mail checks by Friday, November 12, 2021
payable to Santa Barbara County Bar Association,
15 W. Carrillo St., Suite 106, Santa Barbara, CA 93101



NEW EVENT DATE!

FOR THE
SANTA BARBARA COUNTY
BAR ASSOCIATION'S

2022 Virtual Bench & Bar Conference

Friday, January 21, 2022

8:30am to 4:30pm

Featuring Keynote Speaker

Justin Brooks

Director and Co-Founder of the
California Innocence Project

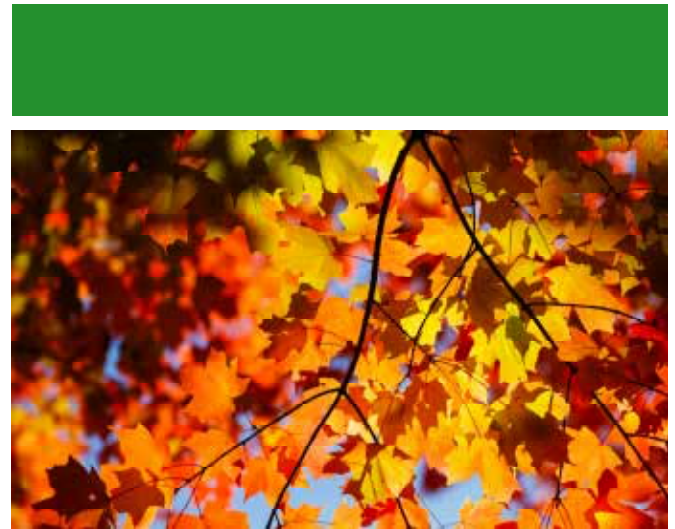
Join us as we explore emerging
legal and social issues from 2021,
including cryptocurrency,
constitutional law, trust and
estates, and family law.

Tickets \$25 for SBCBA Members and \$35 for Non-SBCBA Members

*6 hours of MCLE, including
mandatory subject units*

November

2021



Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2 Día de los Muertos	3	4 Diwali	5	6
7 Daylight Savings Time Ends	8	9 World Freedom Day (commemorating fall of Berlin Wall)	10 The SBCBA Civil Litigation Section Presents: "Location Information"	11 Veterans Day – Court Holiday	12	13
14	15 Revolution Day (Mexico)	16 International Day for Tolerance	17 The SBCBA IP/In-House/Corp. Section Presents: "NFT"	18	19 Partial Lunar Eclipse	20 Universal Children's Day Transgender Day of Remembrance
21	22	23	24	25 Thanksgiving Court Holiday	26 Court Holiday	27
28 Hanukkah Begins at Sunset	29	30				

The Santa Barbara Bar Association is a State Bar of California MCLE approved provider. Please visit www.sblaw.org to view SBCBA event details. Pricing discounted for current SBCBA members.

HAGER & DOWLING, LLP SEEKS ASSOCIATE ATTORNEY

Highly respected Santa Barbara civil litigation firm seeks associate attorney with civil litigation and insurance law background. The applicant must have excellent verbal and writing skills, work well both independently and in a team environment, exceptional legal research and enjoy litigation. Competitive benefits include, health and dental insurance, free parking and 401k plan. Respond with resume, cover letter and references to kcallahan@hdlaw.com.

SEEKING LITIGATION ASSOCIATE

Price, Postel & Parma, a long-standing law firm in Santa Barbara, is seeking a litigation associate with superior credentials, a minimum of 3-5 years of significant litigation 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 Craig Parton at cparton@ppplaw.com.

REICKER PFAU IS PURSUING A TRANSACTIONAL ASSOCIATE ATTORNEY

Reicker, Pfau, Pyle & McRoy LLP, Santa Barbara's premier business law firm, is seeking a mid-level transactional/corporate associate.

Our firm's transactional practice includes mergers and acquisitions, emerging companies, financing, securities, private placements, and general corporate and contract matters. We are looking for a candidate with three to eight years of experience to initially fill a supporting role in transactional matters and progress to assignments with greater responsibility.

Competitive pay and excellent benefits. To apply or inquire, please contact Jan Petteway at jpetteway@rppmh.com.

SEEKING EXPERIENCED LITIGATOR

Ventura County's largest law firm, **Ferguson Case Orr Paterson** LLP, seeks a top caliber litigation associate. The ideal candidate has 1 to 5 years of experience, strong academic credentials, and excellent writing and communication skills. Ties to the Ventura County area are a plus. This is an ideal opportunity to build your career in a great community with an esteemed law firm that pays competitive

salaries and benefits. Please send a resume with a cover letter introducing yourself and describing your experience to sbarron@fcoplw.com. Applicants without litigation experience will not be considered.

SEEKING ESTATE PLANNING/TRANSACTIONS ASSOCIATE

Rogers, Sheffield and Campbell, LLP, a Santa Barbara-based law firm, seeks an associate attorney to bolster its busy transactional practice, to assist with estate planning/trust administration matters, the formation of business entities, as well as business and real estate transactions. Ideal candidates will have: (i) at least two (2) years of relevant experience at another firm, (ii) excellent academic credentials and interpersonal skills, and (iii) graduated from a top-tier law school. All candidates must be licensed to practice law in California. Interested candidates should send their resumes to: reception@rogerssheffield.com.

SEEKING EXPERIENCED LITIGATOR

Rogers, Sheffield and Campbell, LLP, also seeks an experienced litigator to bolster its busy trust and civil litigation practice. Ideal candidates will: (i) have at least five (5) years of relevant experience at another firm, including significant trial experience, (ii) be able to handle a case from beginning to end with little or no supervision, (iii) have excellent academic credentials and interpersonal skills, and (iv) have graduated from a top-tier law school. All candidates must be licensed to practice law in California. Interested candidates should send their resumes to: reception@rogerssheffield.com.

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

2021 SBCBA SECTION HEADS

Alternative Dispute Resolution

Dr. Penny Clemmons (805) 687-9901
clemmonsjd@cs.com

Bench & Bar Relations:

Ian Elsenheimer (805) 659-6800
ielsenheimer@fcoplaw.com

Civil Litigation

Mark Coffin (805) 248-7118
mtc@markcoffinlaw.com

Criminal

Jeff Chambliss (805) 895-6782
Jeff@Chamblisslegal.com

Employment Law

Alex Craigie (805) 845-1752
alex@craigielawfirm.com

Estate Planning/Probate

Connor Cote (805) 966-1204
connor@jfcotelaw.com

Family Law

Renee Fairbanks (805) 845-1604
renee@reneemfairbanks.com
Marisa Beuoy (805) 965-5131
beuoy@g-tlaw.com

In House Counsel/Corporate Law

Betty L. Jeppesen (805) 450-1789
jeppesenlaw@gmail.com

Intellectual Property

Christine Kopitzke (805) 845-3434
ckopitzke@socalip.com

Mandatory Fee Arbitration

Eric Berg (805) 708-0748
eric@berglawgroup.com
Naomi Dewey (805) 979-5160
naomi@trusted.legal
Vanessa Kirker Wright (805) 964-5105
vkw@kirkerwright.com

Real Property/Land Use

Joe Billings (805) 963-8611
jbillings@aklaw.net

Taxation

Peter Muzinich (805) 966-2440
pmuzinich@gmail.com
Cindy Brittain (805) 695-7315
cindybrittain@gmail.com

*SBCBA wishes
all a Happy
and Safe
Thanksgiving!*

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)

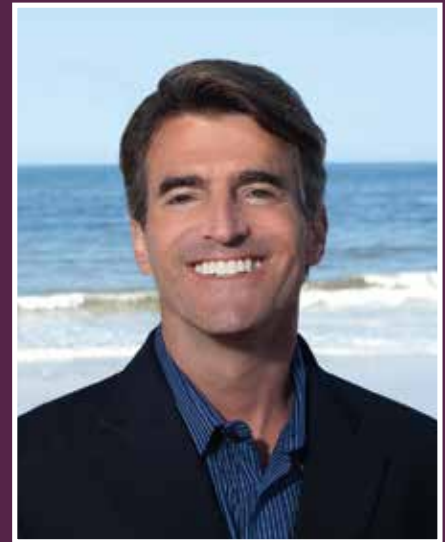
Conducting Mediations
throughout California

805.564.2115
www.henrybongiovi.com

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