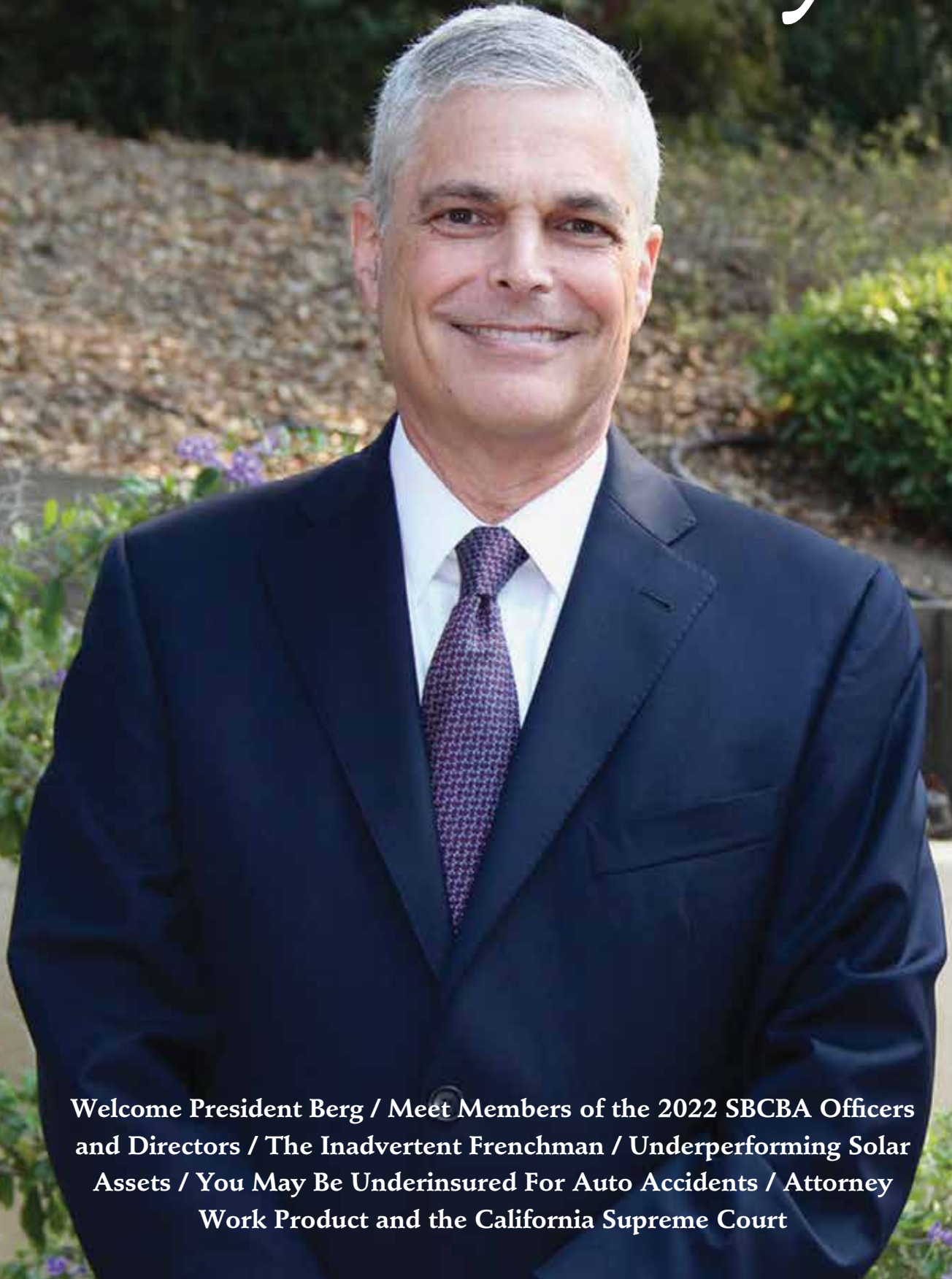


# *Santa Barbara* Lawyer

Official Publication of the Santa Barbara County Bar Association  
January 2022 • Issue 592



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*Mission Statement*

*Santa Barbara County Bar Association*

*The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.*

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SBCBA President Eric Berg, photo by Stacy Halperin

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# Santa Barbara County Bar Association's President's Message

BY ERIC BERG

**L**ike so many Los Angeles natives, my wife Shaunah and I spent as many weekends as we could in Santa Barbara. After one memorable visit, Shaunah said, "We should move here." It sounded like a dream. There was, however, the not-so-small matter of how I was going to become gainfully employed. As fate would have it, Hatch & Parent happened to be looking for someone to head up their Litigation Department—I was managing a litigation firm in Los Angeles—and the fit was perfect. Shortly thereafter, in April 2003, our family moved here. Within a few weeks, I felt completely integrated and welcomed into this legal community. Much of that was due to the open and welcoming nature of this town. Serving as your 2022 Bar President is truly an honor because it affords me the opportunity to remind you of the many ways the Bar can welcome you and support your practice, just as the community reached out to this newcomer nearly twenty years ago.

As daily life begins to open up, I want to share with you just a few of the resources we offer to help in our return to a new normal.

I want to start with a program that informs so much of what we do. During her tenure, our Past President Elizabeth Diaz founded and spearheaded the Bar's Diversity and Inclusion Task Force. Elizabeth put in motion what we know intuitively—that diversity in the legal profession improves the fair delivery of justice, regardless of the background of the client. I am proud to report that what began as a task force is being integrated into a permanent part of the Bar's focus and programming. Our community should expect nothing less from its legal professionals. With Elizabeth continuing to lead this effort, the Bar will strive to be a model of inclusivity and fair justice for the greater legal community.

Our community outreach extends in many directions. For example, this Magazine reaches all corners of the County. The effort required to publish a print edition is not easy. Erin Parks raised the bar as our 2021 Magazine Editor, giving voice to the increasingly diverse needs of our legal community. Michelle Roberson takes the reigns as this year's

Editor, and if this month's issue is any indication, she will enjoy a similar level of success. By submitting an article to the Magazine you introduce yourself and your practice to our community. By advertising in the Magazine you increase your exposure at a modest cost. With so many of us motivated early in the year to execute on our "to do" lists, now is the perfect time to contact Michelle to learn more.



Eric Berg

Erin and Michelle are just two of our sixteen Board members. You can read more about each of them in this month's issue. We are what is known as a "working" Board, and I am so grateful for the significant time commitment these busy professionals take from their practices to serve our community.

As someone who has benefitted tremendously from the increased ease and efficiency that technology brings to my litigation practice, I want the Bar to be at the forefront of continuing to extend these benefits to you. Our resources are distinguished by the multiple ways they can benefit your practice. Our electronic newsletter enabled us direct and real-time access to the Court during this challenging time. Our Bench and Bar Relations program lets us get to know our Bench officers, and they us, at a level few communities can match. Our Lawyer Referral Service is committed to growing your client base. Our Section Heads—you can find them in the back of this issue—provide continuing education unique to your practice. Or if you just need some last minute MCLE credits—even the most well-intentioned of us push this off until the last minute—we have a great remote program later this month that makes participation particularly convenient.

Please stay tuned for an announcement of our next in person social event, which will be happening as soon as the time is right.

I am humbled and grateful for this honor.

—Eric

# We Have Big Shoes to Fill

BY MICHELLE E. ROBERSON

As I read a 2021 edition of the *Santa Barbara Lawyer*, I encountered a very well researched and thought-out article written by Erin Parks. It was more pages than I had ever submitted for the magazine in what I thought was fairly scholarly and filled with jurisprudence—yet they did not compare. I then lined up the magazines I had collected the last several months and saw the detail in each cover, the organization, and considered that perhaps I was not cut out for this.

These are certainly big shoes to fill.

Outgoing Editor, Erin Parks, and Assistant Editor, Tara Messing, were an amazing team and created a fantastic publication. This was at a time when it could not be filled with fun pictures of events as we were basically relegated to our homes the entirety of 2021. Zoom screenshots don't have the same zeal. They expanded on the prior year's publications and did what they promised: enriched legal discourse in various areas.

I realized that I, too, would need a strong assistant editor that would help edit and maybe have the same eye for the artistic detail Tara gave each cover. This is usually reserved for an existing board member, but having served on our board for four years and seeing how many of us have added on to our volunteer hours the Diversity and Inclusion Task Force that our immediate past president Elizabeth Diaz launched, I did not think many would have the capacity.

Fortunately, I have met a recent UCSB English graduate, Jenna Gatto. She has been my right hand when it comes to editing and writing during her time at our office. She loves to write and edit, excited to dig deep into our legal culture and provide her skills for our magazine along the way. She is amazingly talented and though she will be in law school this fall (hint for anybody wanting some editing skills, I would enjoy your help!), I know that together with Lida Sideris's help we can continue to provide a quality product.

As our world is slowly opening up, we yearn to hear from our colleagues. I encourage you to write and share with us your thoughts on the law, navigating the court system, services you are finding useful, reintegrating after



Michelle E. Roberson



Jenna Gatto

working from home, and even transitioning into new fields or stages in your life, as this seems to be common during the pandemic. These perspectives along with navigating new laws are sure to have our magazine be something we all look forward to reading each month.

**Editor:** Michelle E. Roberson is a first-generation Californian that was not quite on the right path in grade school, graduating high school with an abysmal 1.8 gpa. Notwithstanding, she was awarded the Alyce Marita Whitted Memorial Award at UCSB in recognition of endurance, persistence, and courage in the face of extraordinary challenges while in pursuit of an academic degree where she majored in Law and Society with an emphasis in Criminal Justice as well as Business Economics. She subsequently went to Rutgers Law where she earned her Juris Doctorate and practiced law in New Jersey and Pennsylvania before returning to California, practicing law locally, including providing low-bono services for the SBCBA Lawyer Referral Service Modest Means program. She now is the President/CEO of Sierra Property Group d/b/a Sierra Property Management.

**Assistant Editor:** Jenna Gatto is a 2020 UCSB Graduate, navigating the (sometimes daunting) world of post-grad. Graduating college with a BA in English and a minor in History of Art and Architecture on the precipice of the pandemic was not the most encouraging time to pursue her dream of going to law school—at least not just yet. After getting a receptionist job at Sierra Property Management to fill the gap between undergrad and law school, she is currently applying to law schools and looking forward to the next chapter, with dreams of becoming an expert Divorce Attorney. ■



# Meet Members of the 2022 Santa Barbara County Bar Association Officers and Directors



**Eric Berg**  
President

**Eric Berg** is the Founding Partner of Berg Law Group, a boutique trial firm representing emerging and established companies and individuals in high-stakes disputes throughout California. Prior to founding the firm, Eric served as the Chair of the Litigation Department of Hatch and Parent and as a Litigation Shareholder with Hatch and Parent’s successor, Brownstein Hyatt Farber Schreck.

Eric is a member of the American Board of Trial Advocates, an invitation-only national trial lawyer organization, where he holds the rank of Associate. He is an Arbitrator for the American Arbitration Association’s National Roster of Arbitrators as well as its Panel of Construction Arbitrators. Eric also serves as Chairperson of the Bar’s Fee Arbitration Committee.

Eric is the Past Board Chair of the Tri Counties Region of the Anti-Defamation League (ADL), as well as the former Chair of the ADL’s Civil Rights Committee. In 2012 Eric was presented with the ADL’s Harter-Myerson Award in recognition of his service as an outstanding community leader. He also currently serves on the Board of the Santa Barbara Jewish Federation.

Eric obtained his BA in Political Science from the University of California San Diego in 1984, where he was selected as Student Commencement Speaker. He obtained his law degree from the University of Southern California Gould School of Law in 1987.



**Jennifer Duffy**  
Vice President

**Jennifer Gillon Duffy** grew up in Santa Barbara and specializes in employment and family law matters (Certified Family Law Specialist). Jenn attended UCLA and then the University of San Francisco, where she was Editor-in-Chief of the Law Review and a Judicial Extern to the California Supreme Court for the Honorable Joyce Luther Kennard. Jenn is a passionate community volunteer, paying it forward in appreciation for the people who have helped her on her own journey. She is a member of the Santa Barbara Chapter of the National Charity League with her three daughters, on the Board of Storyteller Children’s Center, and was Dream Foundation’s Volunteer of the Year in 2018. She has been named in the “Top 50 Women in Business” and “Who’s Who in Professional Services” for multiple years by the Pacific Coast Business Times. Jenn is Group Leader of one of the Santa Barbara groups of ProVisors and a member of The W Source (both national networking organizations). Jenn is a partner in the international firm Rimôn Law.



**Stephen K. Dunkle**  
Secretary

**Stephen K. Dunkle** is an attorney at the law firm of Sanger Swysen & Dunkle. He is a graduate of Pomona College and received his law degree from the University

of Southern California Law School. His practice includes representing defendants in trials and appeals in state and federal court. He is an Appellate Law Specialist, certified by the State Bar of California Board of Legal Specialization. He is the chair of the California Attorneys for Criminal Justice Amicus Committee. He is a member of the National Association of Criminal Defense Lawyers and California Appellate Defense Counsel. Mr. Dunkle's career highlights include being part of the team of attorneys who successfully defended Michael Jackson and being one of the leaders of a group of criminal defense attorneys who volunteered their time to defeat a proposed gang injunction in Santa Barbara.



**Erin R. Parks** is a transactional attorney and a civil litigator based in Santa Barbara. She serves as a personal attorney; a family attorney; and general counsel for small business owners in a myriad of transactional and civil litigation arenas: California Employment Law, Estate Planning, Immigration, Probate, Trust Administration & Litigation, Real Estate, and Small Business Formations.

Erin started her Santa Barbara legal career in 1988. Her solo practice has succeeded because of her fierce tenacity, compassion for clients, attention to detail, superior writing acumen, and knowing that being a peacemaker, and an ethical officer of the court, take precedence.

She is an active member of the Santa Barbara County Bar Association (SBCBA) and the State Bar of California. Erin returned to serve on SBCBA's Board of Directors in 2020. In 2021, she led the editorial team of SBCBA's *Santa Barbara Lawyer*. Erin has been a member of the State Bar's Labor & Employment Law Section and served on the State Bar's Committee on Women in the Law. Erin's fight for the progression of women's rights is borne out by her longstanding membership in Santa Barbara Women Lawyers (SBWL), service as a past SBWL board member, and continuing SBWL mentoring committee membership.

Erin is a California native of the San Francisco Peninsula where she attended Santa Clara University Law School, reveled in Law Review editorship, and studied International

Dispute Resolution and Comparative Law abroad. Erin continues to practice global citizenship as an avid traveler and volunteer for sustainable humanity. She is immensely proud of her daughter who is an amazing person, artist, and aspiring architect at the University of California, Berkeley.



**Daniel Bauerlein** joined NordstrandBlack PC as an attorney in 2020. Before that, he worked for the firm for three years while putting himself through the Santa Barbara College of Law, where he graduated third in his class. Before coming to the firm and beginning law school, Daniel earned a B.S. in Environmental Science, Technology, and Policy from California State University, Monterey Bay. He then went on to enlist in the United States Coast Guard, where he served as an operations specialist on a national security cutter. While serving in the Coast Guard, he decided to further his education by getting an M.S. in Environmental Policy and Management from American Military University, where he graduated with honors.



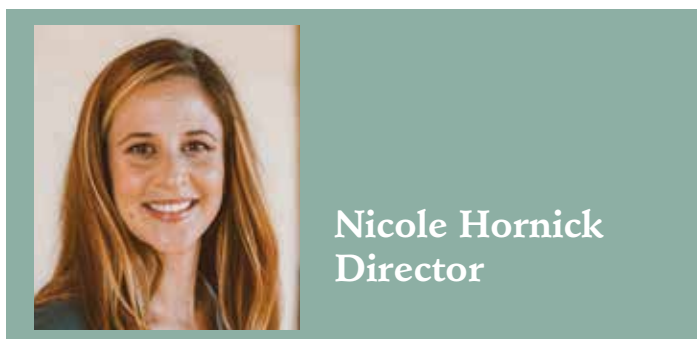
**Taylor Fuller** was born and raised in Santa Barbara County, Taylor is a graduate of Cabrillo High School in Lompoc. At San Diego State University, she earned her Bachelor of Arts degree in Political Science with a minor in Sociology. Taylor spent her undergraduate summers interning for the Office of the San Luis Obispo County District Attorney. She then returned to Santa Barbara County for law school.



Taylor attended law school at the Santa Barbara College of Law. She earned the Witkin Awards for outstanding academic achievements in Community Property and Criminal Law courses. While in law school, Taylor held positions interning for the Office of the San Luis Obispo County District Attorney. She also worked at a local firm offering law services in family, criminal defense and estate planning.

Taylor was barred in June 2018, and represents clients in divorce, legal separation, support, parentage and custody proceedings with Herring Law Group. She has represented family law clients across Santa Barbara County and also the broader Central Coast.

Taylor currently serves as a Director on the Board of Directors for Santa Barbara Women Lawyers, Santa Barbara Barristers, and Santa Barbara County Bar Association. During her spare time, Taylor enjoys being outdoors, visiting Jalama Beach or Lake Nacimiento, with friends and family.



**Nicole Hornick** is an associate attorney at Trusted Legal PLC, and focuses on civil litigation, business law and estate planning. Some of her most current litigation includes employment discrimination, breach of employment contracts, misappropriation of trade secrets and defending construction entities. Nicole also performs transactional work for her business clients as well as estate planning and asset protection for individuals and families. Before working for Trusted Legal, Nicole worked for a civil litigation firm where she pursued personal injury claims and defended local school districts. As well as serving on the Board for SBCBA, Nicole serves as the Treasurer for the board of the Santa Barbara Women Lawyers. When not busy practicing law, Nicole loves to run, garden, and hang out her three favorite boys: her husband, son, and French bulldog.



**Ian Elsenheimer** is a transactional attorney in Ferguson Case Orr Paterson LLP's business transactions and real estate and land use groups.

Ian enjoys assisting his clients in all facets of their real estate matters, including financing, leasing, purchases and sales, title evaluations, tax deferred exchanges and co-ownership arrangements. Ian also has experience in land use planning as well as the formation and operation of homeowners' associations. Ian is equally effective for his business clients, assisting with various matters including the selection, formation, operation and dissolution of both for-profit and non-profit business entities.

Ian obtained his law degree from the University of Southern California Gould School of Law where his focus on corporate law and related matters earned him graduate certificates in both business law and technology and entrepreneurship law.

Prior to joining Ferguson Case Orr Paterson, Ian was an associate attorney in a boutique law firm in Santa Barbara.



**Elizabeth Diaz** is Managing Attorney for the Family Violence Prevention and Immigration Program at the Legal Aid Foundation of Santa Barbara County, in Santa Barbara, focusing her practice primarily on restraining orders and other related family law and civil matters for victims of domestic violence, elder abuse, sexual abuse and Human Trafficking. Elizabeth was born and raised in Santa Barbara; Spanish was her first language. Elizabeth earned her BA in Law and Society at the University of California, Santa

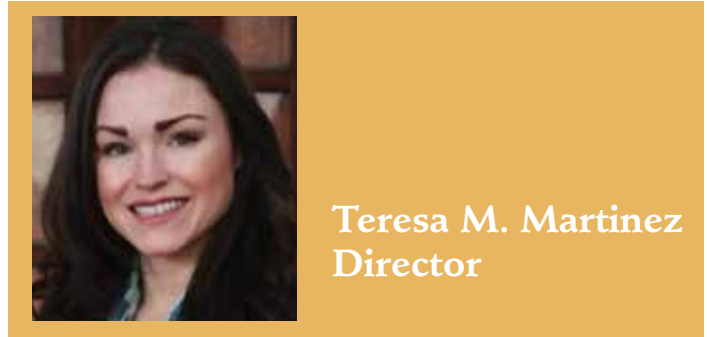
Barbara, and her JD from Santa Barbara College of Law. In 2017, Elizabeth received the Deborah Talmage Attorney of the Year Award, and was the first Hispanic attorney to be Santa Barbara County Bar Association President. Elizabeth was also the first president to serve for two years instead of the traditional one year term.



**Jessica Phillips** is an attorney with the law offices of Maho & Prentice, LLP. She practices civil litigation with an emphasis on representing plaintiffs in personal injury, product liability, wrongful death, toxic tort, and sudden and catastrophic injuries.

Prior to joining Maho & Prentice, LLP, Jessica was a trial attorney at a boutique law firm in Baltimore, Maryland that focused its practice on complex civil litigation, representing plaintiffs in personal injury and insurance matters. As part of the trial team, she successfully tried multiple cases and obtained multimillion-dollar verdicts on behalf of her clients. Jessica also worked as trial counsel at a law firm in Venice, California representing clients in the art, fashion, music, entertainment, and photography industries, with a focus on copyright and contract litigation. Notably, she worked on behalf of songwriter and recording artist Jaime Ciero in litigation against The Walt Disney Company in copyright dispute regarding the hit song Let It Go from the Frozen soundtrack. Ciero v. The Walt Disney Company, et al. U.S.D.C. Case No. 17-cv-08544 GW (MRWx).

Jessica has been selected by Super Lawyers as a Rising Star in 2016, 2017, 2018, 2019, 2020, and 2021. This honor recognizes the top 2.5% of all attorneys under 40 years of age. She is also an Associate Fellow of the Litigation Counsel of America, an invitation-only trial lawyer honorary society composed of less than one-half of one percent of American lawyers. She has also been a speaker at a national litigation conference on the topic of insurance coverage and the implications in litigation.



**Teresa M. Martinez** is a Senior Deputy Counsel with the County of Santa Barbara Office of County Counsel. In this role, Ms. Martinez advises various County departments and handles civil litigation. Prior to joining the County, Ms. Martinez was an associate attorney at Buynak Fauver Archbald & Spray where she advised businesses and entrepreneurs on all aspects of starting and running a business, and did estate planning, and civil litigation. Ms. Martinez started her legal career with the Legal Services Corporation, California Rural Legal Assistance, where she was the Directing Attorney of the Santa Barbara office and provided advice on housing, employment, education, and civil rights.

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University of Cincinnati College of Law (J.D.)  
University of California at Los Angeles (B.A.)



**Richard Lloyd** is an associate attorney with Cappello & Noël LLP. He attended the Santa Barbara Colleges of Law while working as a paralegal and became an associate upon passing the California State Bar exam in 2020. Since being admitted, he has worked on a variety of matters, ranging from a high-profile dispute between a homeowner and the Montecito Club, to representing dozens of oil workers and businesses seeking compensation arising out of the 2015 Plains oil spill. Prior to moving to the USA, Richard spent several years in the City of London





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Officers and Directors, *continued from page 12*

advising clients, negotiating legal fees and conducting detailed assessments on a variety of costs matters, including multi-jurisdictional commercial litigation, high profile defamation cases and complex clinical negligence claims. In addition to serving on the Board, Richard also volunteers as a fee arbitrator for the County Bar Association.



**Michelle E. Roberson**  
Director

**Michelle E. Roberson** is a litigator that handled matters in various states in federal and state courts. She now limits her legal practice to providing consulting and expert services to lawyers and real estate professionals. She focuses most of her time in her business ventures, including being CEO/President of Sierra Property Group, Inc. that does business in Santa Barbara as Sierra Property Management, employing over thirty people locally.

Prior to limiting her legal practice, she was designated a Rising Star by Super Lawyer Magazine for several years in both New Jersey and California. The Pacific Coast Business Times has named her one of the “Top 50 Women in Business” and she is consistently listed in “Who’s Who in Commercial Real Estate and Construction.” She is appointed by the City of Santa Barbara to the Rental Housing Mediation Board where she volunteers her time mediating landlord/tenant disputes in English and Spanish. She has two little girls with her husband of over sixteen years residing in the Good Land where she tends to her bees and chickens.

**Raymond Chandler**  
Director

**Raymond Chandler** was born in New York City in 1946. He attended SUNY Stony Brook where he earned a B.A. in 1968 and a B.S. in 1975. After moving to Santa Barbara, California in 1976, he worked as a medical/surgical R.N. before working in the construction field for twenty years. He earned his J.D. from Santa Barbara College of Law and was admitted to the bar in 2001.



**Russell Terry**  
Director

**Russell Terry** is a Partner in Reicker, Pfau, Pyle & McRoy LLP’s corporate group. His practice focuses on emerging companies, mergers and acquisitions, debt and equity financing and business ventures. Russell also represents managers of private equity and venture capital funds, and has extensive experience representing institutional investors in private fund investments.

Russell has represented dozens of emerging companies in Seed, Series A and later financing rounds, and dozens more in successful exits to financial and strategic buyers. Russell brings a practical and efficient approach focused on achieving a client’s business goals.

Russell is a native of Santa Barbara County. He enjoys living in, working in and contributing to a community that he knows and loves.



**Bradford D. Brown**  
Director

**Bradford D. Brown** performed his undergraduate work at Lewis & Clark College. He earned his law degree from Southwestern University School of Law in Los Angeles in 1992, and soon thereafter established his practice in Santa Barbara which is limited to representing plaintiffs in personal injury actions. In September 2014, Mr. Brown’s client was awarded the largest jury verdict in Santa Barbara County that year in *Reese v. Mingramm*. Mr. Brown is also a Director on the Board of the Santa Barbara County Bar Association. Bradford enjoys spending time with his family and is an avid cyclist, skier, boater, golfer, and tennis player. ■



# Resolving the Case of the Underperforming Solar Asset

BY JOSHUA WEINER

Commercial-scale solar power plants have lucrative upside potential but all the usual risks associated with real estate construction. Unlike in real estate, however, many solar projects, especially those at commercial and industrial facilities, lack the benefit of independent technical and financial expertise.

What happens when deliverables don't meet owner's expectations? First, a subject-matter expert needs to identify the cause of failure, whether it was related to construction; production, which is dictated by the weather; financial modeling, anchored by utility company tariffs and regulations; or some other factor. Industry expertise also helps show who's at fault, what are the standard practices in the industry for addressing performance issues, and how a comprehensive evaluation of an underperforming system can point the way to an appropriate resolution.

A dispute over an underperforming solar project at an RV park in Southern California showcases many of the issues that come up during the project lifecycle.

An expert's analysis of the system showed that a rate change by the utility, Southern California Edison, contributed to a significant loss of revenue. Knowing this, the system owner was able to request and obtain a more advantageous utility rate, preventing further revenue losses for the remainder of the system's lifetime spanning 25 years or more.

## *An underperforming asset*

The owner of a 434.7 kW solar project at the RV park expected an annual solar savings of \$88,130 in the first year of operations. Energy savings is especially important at the facility. Guests receive free electricity for the duration of their stay, in addition to odorless mineral hot springs, pickleball, water aerobics, bingo, line dancing, and more.

In October 2019, after the first full year of operation, savings from the project was approximately \$51,327. Though the project was producing about 93 percent of the expected energy yield, the financial yield was way off the mark.

The underperformance gave rise to several questions.

Are contractors responsible for performance if they make representations about system output but sign a contract to design a solar system, procure the equipment, then install, commission, and maintain the solar system? What if the performance estimate is based on modeling from a third-party proposal generation tool?

What if the underperformance was caused by unforeseen circumstances that were out of the contractor's control? And lastly, what's an appropriate remedy when the system produces less energy than expected?

## *The main culprit: a utility rate change*

A review of project documents showed that the original sales proposal's model outputs for the project were based on Southern California Edison's TOU-GS-3-R rate. The utility interconnection agreement showed a different rate, TOU-GS-3-B, the rate schedule used at the RV park before solar. Then, just before the start of operations in September 2018, SCE switched the facility to an altogether different rate, TOU-8-D.

SCE also switched the RV park from a net energy metering (NEM) tariff offering one-to-one bill credits for solar output to a newer NEM tariff, NEM 2.0, that increases energy costs for utility customers who produce solar energy with the addition of nonbypassable charges.

A review of SCE rates showed that TOU-8-E would have been a more profitable rate schedule for the RV park. If the contractor or the system owner had asked SCE to switch the facility to TOU-8-E, it would have vastly reduced demand charges and marginally increased energy charges. The net savings in Year 1 would have been \$29,200, offsetting almost 80 percent of the cost of underperformance. A rate change after Year 1 assured that the RV park would see better system performance going forward.

## *Lessons for attorneys and contractors*

The solar project highlights several important lessons for lawyers and contractors who work with asset owners.

Make sure your customers are on the correct rate schedule to collect cash flows spelled out in performance projections. Contractors generally understand how utilities work better than business owners, yet many contracts put the accountability on the owner to manage their own utility tariff rate with the utility company. Whether required by the contract or not, it's good practice to check if the customer is on the best utility rate tariff before and after interconnection.

Pay attention to current and projected energy consumption at the facility. Real estate development at the RV park

*Continued on page 28*

# The Inadvertent Frenchman

BY CINDY BRITTAIN

**A** United States (“U.S.”) trust may become subject to the European Union’s (“EU”) trust registration regime and failure to comply can trigger an expensive, unintended penalty.

Triggering an E.U. country’s specific trust registration regime may occur simply because the U.S. trust has a current or *potential* beneficiary who becomes resident in the E.U., even for a brief amount of time.

By way of example, this discussion will focus on the trust registration regime in France, but similar rules apply within other E.U. country regimes.

A U.S. citizen can become a French resident for any calendar year in which he or she spends 183 days in France, even if the U.S. person does not have a permanent residence there.

A U.S. citizen will certainly be a French resident when his or her main home is in France.

Under either of the above circumstances, a U.S. trust can acquire a French connection simply because the U.S. person (the potential beneficiary, as defined under France’s trust registration regime, in this hypothetical) is spending time in France.

Generally, under French law, trusts do not exist as a legal entity. However, in 2011, French legislation passed that recognizes foreign trusts (i.e., a U.S. trust vis-à-vis France). Such legislation no doubt was put in place to generate revenue, as discussed below.

If a U.S. trust is determined to have a French connection, then the U.S. trust must comply with French laws.

Although French law now recognizes the validity of trusts set up abroad, and the effect they may have abroad, French inheritance laws may overrule the U.S. trust’s dispositional provisions granting no exemption from French forced heirship inheritance rules.

Only if a U.S. trust used in tandem with a U.S. Will that complies with the requirements of the European Succession Regulations (commonly referred to as “Brussels IV”), can an individual adopt the right to use the inheritance laws of either (i) their country of nationality or (ii) the jurisdiction of their habitual place of abode, to circumvent French heirship rules. (Brussels IV is not discussed further herein; however,

is an important succession device relevant for assets in E.U. countries.)

Below are certain cases that outline how the French registration regime work, and how those rules apply to U.S. trusts with a French resident beneficiary. The definition of “trust” for France and E.U. purposes is broadly defined and will likely encompass California joint revocable trusts and California Wills.



Cindy Brittain

## Case 1

Ashleigh Mathieux (a U.S. resident living in California) established the Mathieux Gift Trust in 1999. It is a discretionary trust, which allows the trustees to make certain decisions about how to use the trust income and principal. The potential beneficiaries of the discretionary trust are Ashleigh’s children and her brother. While the declared purpose of the trust is that Ashleigh’s children will benefit primarily, Ashleigh named her brother who lives in North Carolina as a potential beneficiary, in case her children were to predecease.

In 2019, Ashleigh’s brother spent nine months traveling in France, playing his saxophone with local bands. Although Ashleigh’s brother is unlikely to ever benefit from the trust, he is a potential beneficiary and is likely to be regarded as a French resident for 2019. Therefore, the trust may well be subject to the French regulations in 2019.

## Case 2

Joseph, a U.S. resident, made a U.S. Will leaving his worldwide assets to a flexible U.S. Will trust. The potential beneficiaries of the Will trust are his wife and children, who are all U.S. residents. However, Joseph has a French flat near Montpellier, France.

When Joseph dies, the U.S. trust will be subject to French regulations because it includes a French asset. (This may have been the case even if he had left the French holiday home to his wife and children outright, because U.S. Wills are often drafted in a way that fall within the very wide definition of a trust under the French rules.) However, Joseph could have sidestepped the issue completely if he’d made a separate French Will dealing with the French holiday home. Further, in such case where Joseph used a French Will, he could likely have saved French inheritance tax on

the disposition to his wife and children.

### ***Application of the French Trust Regime***

Foreign trusts that trigger registration must make an annual declaration to the French authorities. Additional declarations must be made if the trust has been “modified,” for example, by the mere act of distributing income.

Severe penalties apply if the declarations are not made. There is a fine of the higher of 20,000 euros or 12.5% of the total trust assets for non-declaration and the authorities can go back to 10 years in assessing such penalties. In cases of deliberate failure to file, criminal sanctions of up to five years in prison and a 500,000 euro fine can also apply.

The trust may also have to pay an annual French wealth tax charge. This is charged at a rate of 1.5% of the worldwide trust assets if either the settlor or any of the beneficiaries are French residents. If this isn’t the case, then the annual charge is 1.5% of any French assets held within the trust will likely apply. The wealth tax can be avoided in certain cases where the assets have been correctly declared, but the rules governing this are extremely complicated.

### ***Application of Possible French Inheritance and Income Tax***

Assets comprised in a U.S. trust may trigger French inheritance tax when the U.S. settlor passes away. The rate of tax can be as high as 60% of the worldwide trust assets.

Plus, any income distributed to a French resident beneficiary will be subject to French income tax. There could also be French stamp duty and capital gains tax.

The U.S. has an income tax treaty and an estate tax treaty with France, which can provide relief from double taxation.

### ***Careful Planning***

It will be important to seek counsel knowledgeable of French inheritance rules in both the preparation of U.S. estate planning documents and at death. However, it is critical that U.S. succession documents avoid conflicting with French succession documents.

If there are French assets (or E.U. assets), often creating a separate Will in the corresponding jurisdiction may assist in avoiding the onerous registration and tax burdens relevant to U.S. trusts. ■

#### ENDNOTE

1. Note: The United Kingdom and Switzerland, while not E.U. countries, also have trust registration regimes. France is highlighted for purposes of this discussion. The requirements for trust registration and penalties vary per specific country.

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# You May Be Undersinsured for Auto Accidents

BY TYRONE MAHO

If you have car insurance, you may think you'll be taken care of in case of an accident, but the reality is the specifics of your coverage may mean that your medical bills, lost wages, physical and emotional pain, won't be covered—or you'll have to fight an insurance company to get what you paid for. That's why people who get the most from insurance companies tend to be the ones who hire lawyers to deal with insurance.

Our law firm, Maho Prentice, LLP, represents people who are injured, often seriously or catastrophically, as a result of auto accidents. For rectification, we try to maximize compensation for their injuries and their suffering. That maximum compensation may come from looking at multiple insurance policies when you've been injured by someone else.

Considering this, we first take into account the following when we are representing a client: the person responsible for the accident, the car they were driving, and their insurance policy. Then, as a backup, we look at our client's own policy, and see if they're adequately insured in case the responsible driver doesn't have enough insurance. We also investigate whether the accident was work-related, as business auto policies can often be a major source of compensation for our clients.

Despite all of these safeguards to secure maximum compensation, the unfortunate reality is often that the person at

fault in an accident is either uninsured or underinsured, resulting in the victim not receiving full compensation from an insurance company. Fortunately, you can plan ahead to be covered in case of an accident.

You can't control who hits you or causes you injury while driving, or if they have enough insurance, but you can control your own insurance coverage—most importantly, uninsured motorist/underinsured motorist coverage.

It may sound incredible, but 12.6% of drivers in the country—about one in eight—do not have insurance, according to the Insurance Research Council. That number is even higher in California, where 16.6% of drivers have no car insurance. On top of that, many California drivers only have the minimum state required insurance coverage of \$15,000 for a single injury or death. This minimum, established in 1974, hasn't increased in 47 years. To no surprise, it is often not enough to pay for all hospital bills, ongoing treatment, and damages resulting from an accident today.

We're finding that auto insurance companies often do not explain what uninsured and underinsured motorist protection is, and how inexpensive it is to maximize one's coverage. A common misguided assumption amongst insured drivers is that they have "full coverage," when they in fact, do not. Unfortunately, once a car accident has happened with an uninsured or underinsured driver, it's too late to increase your coverage for that accident. The results could be financially catastrophic; you could end up paying out of pocket, even when the accident was not your fault.

Most people don't know that uninsured or underinsured motorist coverage protects you in the event that the other driver who causes you injury doesn't have enough insurance, effectively supplementing what insurance the other party has. If you aren't sure what your policy includes, you can look at your insurance coverage summary page to see how much uninsured and underinsured motorist coverage you have.

We advise maximizing your uninsured motorist and underinsured motorist coverage before the event of an accident that could cause undue financial and emotional stress. It's of the utmost importance to maximize coverage before you need it, before it is too late. ■



Tyrone Maho

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# Attorney Work Product and the California Supreme Court

BY ROBERT M. SANGER<sup>1</sup>

It is a well settled rule of law that core work product is not discoverable—or, with very limited exceptions—until the decision of the California Supreme Court last month. In the context of the particular facts of the case leading to that decision, an exception to the rule seemed appropriate. Disclosure: The present author cosigned an *amicus* brief on behalf of Private Practice Capital Habeas Corpus Attorneys in support of making an exception to this well settled rule.<sup>2</sup>

In this month's *Criminal Justice* column, we will look at the rule protecting core work product from discovery. Then we will look at the new Supreme Court decision and the implications of its exception to the rule. There are intended and unintended consequences of the exception. We will address some of those consequences for practitioners in both civil and criminal cases.

## The Rule

California Code of Civil Procedure section 2018.030 says, in its entirety:

(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

The rule is clear. Under subsection (a), "a writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" is not discoverable, period. This is often referred to as "core work product." Core work product is "not discoverable under any circumstances." This is an "absolute privilege" as opposed to subsection (b) which is a "qualified privilege." (See *Coito v. Superior Court* (2012) 54 Cal.4th 480, 494.)

Written notes by a trial lawyer regarding the lawyer's "impressions, conclusions or . . . theories" relating to individual prospective jurors during *voir dire* would seem to come within the absolute privilege of section 2018.030(a). If opposing counsel sought to obtain those notes, it would seem to be a non-starter whether in civil and criminal litigation.

In criminal cases, there is another specific statutory provision that pertains to postconviction discovery. California Penal Code section 1054.9 was enacted to authorize postconviction discovery in serious or violent felony cases resulting in a sentence of 15 years or more. It is argued that this section is the exclusive remedy for discovery in such cases. By its terms it is limited to "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." (Pen. Code, § 1054.9(c).) However, if the written notes pertain to impressions of counsel relating to prospective jurors during *voir dire*, even though there is a statute authorizing postconviction discovery, it would still seem to be core work product under section 2018.030(a) and those notes would be absolutely privileged from discovery both at the time of trial or during postconviction proceedings.

Or, one would think. Enter the Supreme Court in *People v. Superior Court of San Diego County (Jones)* (December 2, 2021, S255826) \_\_ Cal 5th \_\_, [2021 WL 5707638] (*Jones*).

## *People v. Superior Court (Jones)*

The *Jones* case involved a discovery request under Penal Code section 1054.9 for the prosecutor's notes pertaining to his impressions of prospective jurors in a capital case where the jury returned a verdict of death in 1994. Long after his death sentence was upheld on appeal, Mr. Jones filed a petition for writ of habeas corpus alleging that the prosecutor at trial had exercised peremptory challenges in a discriminatory fashion in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

The use of peremptory challenges to exclude Blacks from the jury was objected to by Mr. Jones' trial lawyer in 1994



Robert M. Sanger



under *Batson* and *Wheeler*. The trial judge heard from the prosecutor who justified his exclusions based on a rating system he and his colleagues had used in evaluating the prospective jurors' questionnaires. He gave some examples of some specific answers by those prospective jurors to questions in the questionnaires. These were proffered as "race neutral" justifications. Nevertheless, they were contested by the defense as pretexts to exclude prospective jurors based on race.<sup>3</sup>

Mr. Jones claimed in the petition for writ of habeas corpus that these proffered justifications were not adequate and that his trial counsel did not adequately investigate them nor request the prosecutor's notes at the time. After the petition was filed, Mr. Jones filed his motion under Penal Code section 1054.9 for postconviction discovery specifically requesting the prosecutor's notes. This gave rise to the Supreme Court's final opinion.

The Court discussed the nature of the *Batson/Wheeler* three step inquiry which ultimately requires a trial judge (or postconviction court after the fact) to access the thought process of the prosecutor. The Court reflected on numerous cases where *Batson/Wheeler* issues relating to race neutral vs. pretextual grounds were determined by reference to prosecution notes where, at times, the prosecution tendered the notes in its own defense. The Court held that the prosecutor's jury selection notes were discoverable under the facts of the case. The Court found that they were discoverable because, in the case, there had been an implied a waiver of the absolute protection otherwise provided under Code of Civil Procedure section 2018.030(a).

In *Jones*, the prosecutor made specific reference to his notes and the numerical rating system that he and his colleagues used in ranking jurors to support his contention that the challenges of Black prospective jurors was based on race neutral grounds. As a result of this reference, the Court found that there was a waiver on the part of the prosecutor who could have "relied solely on a straightforward listing of juror characteristics, the prosecutor's reasons could have been questioned by the defense and judged against the trial court's own observations." The Court also discussed the significance of implied waivers and commented on the fact that the assertion of "race neutral" reasons for excluding jurors goes to the integrity of the court process. In the end, the Court ordered the disclosure and placed the burden on the prosecution if it felt the discovery request was overbroad to make a foundational showing that three were matters unrelated to jury selection. The Court left open the possibility of an *in camera* inspection by the trial court on a case-by-case basis which might result in redactions of materials that are not relevant to the *Batson/Wheeler* challenge.

### **Consequences to Civil and Criminal Practitioners**

First, racial discrimination in the court process is clearly a present concern of the Legislature and the courts. While recent legislative enactments are tailored to criminal cases, the case law and philosophy underlying the new statutes are applicable to civil cases as well. *Batson*, itself, held that discrimination against prospective jurors is a constitutional violation of the *juror's* rights and undermines the confidence in the judicial system. Therefore, *Batson/Wheeler* challenges are available to both prosecutors and defense lawyers in criminal cases and all sides in civil cases. (See *Unzueta v. Akopyan* (2019) 42 Cal.App.5th 199, 212 (*Unzueta*)).

Jury selection training and ad hoc advice of jury consultants has, in the past, often relied on stereotypes that would violate *Batson/Wheeler*. In recent years, training has shifted away from relying on impermissible criteria. Yet, there is little doubt that the practice continues. For instance, in *Unzueta*, the defendant doctor excluded Latine jurors in a lawsuit by a Latina plaintiff. Proxy reasons are also not to be given as much credit as they were, like the pretext to exclude Black jurors in criminal cases by relying on an answer that the prospective jurors had a bad experience with a police officer.

Therefore, one consequence of *Jones* is likely to be an increase in discovery requests in civil and criminal cases for notes pertaining to the justification for the exercise of peremptories. This would not be limited to the particular notes relating to the excluded prospective juror but could involve all jurors, since a claim can be made that the same answer to the same question may not have disqualified a preferred juror. In addition, use of a jury consultant prior to selection or during selection could lead to the discovery of the profiles and reasoning of the expert which were shared with counsel.

Second, the *Jones* opinion settled the issue as to whether generally there can be an implied waiver of the "absolute privilege" as to core attorney work product under Code of Civil Procedure section 2018.030(a). The Court cited implied waiver cases prior to the enactment of the statute and reconciled the United States Supreme Court opinion in *United States v. Nobles* (1975) 422 U.S. 225 with a California Court of Appeal opinion in *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110. In *Jones*, the California Supreme Court narrowly held that where the prosecutor invoked the undisclosed rating system to justify his use of peremptory challenges, the prosecutor's notes are subject to discovery based on implied waiver. However, more broadly, the Court settled the general rule that there is an implied waiver exception to the absolute privilege

where a lawyer relies on notes in making a representation to the court.

Thus, for lawyers in civil cases as well as prosecutors and defense lawyers in criminal cases, writings that reflect “an attorney’s impressions, conclusions, opinions, or legal research or theories” are only subject to a qualified privilege despite the “absolute” language of section 2018.030(a). This seems to extend the implied waiver to a lawyer who refreshes “recollection with [the lawyer’s] notes” and makes those notes discoverable. This means that the implied waiver under section 2018.030(a) would go far beyond the exercise of peremptory challenges.

### Conclusion

The *Jones* opinion could be read narrowly. After all, the Court put the ruling in the national context of dealing with historic racial discrimination in jury selection. However, even there, civil and criminal lawyers on all sides could be challenged under *Batson/Wheeler* and, in justifying their use of a challenge, make their jury selection notes and the notes of their team subject to discovery. So, the best practice

would be to not refer to the notes to justify the challenges but to rely on answers to questions on the record. Alternatively, counsel should keep the notes as factual as possible knowing that they may be disclosed.

On the other hand, *Jones* could be read more broadly to imply that lawyers who even refresh their recollection before making a representation to the court, using otherwise absolutely protected writings, may subject those writings to discovery. Lawyers routinely make representations on a variety of topics based on notes they have taken, notes from their team members or even notes from their clients. This broadest reading could have the consequence of proliferating discovery demands in any case where a lawyer makes a representation.

The best practice, it would seem, would be for counsel to keep specific notes as compartmentalized as practical so that the notes that pertain to any specific representation to the court do not also include other “impressions, conclusions, opinions, or legal research or theories” that are not relevant to the representation. There is good reason to try to limit *Jones* to the exercise of peremptory challenges after

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a *Batson/Wheeler* challenge; however, if there is a demand and notes are taken cautiously, any subsequent litigation on discovery can be more focused. ■

## ENDNOTES

1 Robert Sanger is a Certified Criminal Law Specialist (Ca. State Bar Bd. Of Legal Specialization) and has been practicing as a litigation partner at Sanger Swysen & Dunkle in Santa Barbara for 48 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.

- 2 *People v. Superior Court (Jones)*, Supreme Court number S255826, at: <https://1.next.westlaw.com/Link/Document/Blob/16f-878dc00fb311ec935d0c4d0a1b251.pdf?originationContext=filings&transitionType=FilingsItem&contextData=%28sc.Search%29&AcceptCharges=true>
- 3 It should be noted that the amendments to Section 231.7 of the Code of Civil Procedure, enacted in 2020 and effective January 1, 2022, significantly restrict the kinds of questions that can be asked in *voir dire* and rejects reasons for peremptory challenges, which are pretextual and proxies for discrimination based on "the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups." Also enacted in 2020, Penal Code section 745 was added, effective January 1, 2021, and prohibits the obtaining of a criminal conviction or sentence "on the basis of race, ethnicity, or national origin."



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# Motions

**Cossart-Daly Law, A.P.C.’s** Founder and Principal Attorney **Elise Cossart-Daly** is pleased to announce the launch of CDL’s updated website, [www.cossart-dalylaw.com](http://www.cossart-dalylaw.com), and new location at 1117 State Street in Santa Barbara.



*Elise Cossart-Daly*

Cossart-Daly Law, A.P.C. is a unique, mission-driven practice focused on social justice and environmental advocacy. They fight discrimination and advocate for civil rights in almost every situation or location – including at work; in schools, camps, and daycares; in housing; in medical care; and in public places. Cossart-Daly Law, A.P.C.’s team works to protect open space and wildlife, oppose irresponsible development and land-use decisions, and fights for environmental justice. They provide legal advice and support to historically excluded clients who face employment, disability rights, discrimination, civil rights, and environmental legal issue and offer counsel for advocates, grassroots organizations, non-profits, and select businesses that strive to build a better world.

\* \* \*

**Judge Von Deroian, Dr. Julius Sokenu,** and Attorney **Lori Trofemuk**, are the newest members of The Santa Barbara & Ventura Colleges of Law (COL) Board of Trustees. All three were elected unanimously this fall to serve as fiduciaries for the region’s oldest and largest independent law school.

Judge Von Deroian (JD ’06) joins a distinguished pedigree of officers of the court elected to the Board, including Judges Colleen Toy White (JD ’77), Michele Castillo, Manuel Covarrubias, Frank Ochoa, Rebecca Riley (JD ’84), and David Long (JD ’83). She is currently the criminal supervising judge and Executive Committee member with the Santa Barbara

Superior Court. Prior to joining the Bench, Judge Deroian spent 11 years as a deputy district attorney with the Santa Barbara Co. District Attorney’s Office.

Dr. Julius Sokenu, president of Moorpark College, brings to the COL Board 27 years of extensive and progressive leadership experience in community college education and 14 years of managerial oversight of instruction, student services, career technical education, noncredit programs, and community relations.

Lori Trofemuk, JD, brings her expertise as a San Diego attorney specializing in employment law, with extensive experience in arbitration and hearing management, policy development, stakeholder relations, regulatory compliance, contract negotiations, and labor relations. Her professional journey included 12 years of service as a labor relations advocate at UC San Diego.

“What was already a strong board just got stronger thanks to the reputation and experience of these outstanding new fiduciaries and servants of our mission,” said COL Board Chair Jana Johnston (JD ’03). “We look forward to benefitting from their wisdom and community connections.”

COL President Matthew Nehmer agreed, adding, “Judge Deroian, Dr. Sokenu, and Ms. Trofemuk bring a distinct diversity of background, experience, and expertise to our governance work. Their election fills out a Board of 15



*Judge Von Deroian*



*Dr. Julius Sokenu*



*Lori Trofemuk*

individuals, including numerous luminaires in higher education and the legal field, both locally and beyond. Speaking on behalf of all of us at COL, we welcome them to our academic community.”

\* \* \*

The **Environmental Defense Center** is pleased to announce the addition of **Alicia Roessler** as a Senior Attorney. Alicia will be a critical part of the legal team working to protect ocean and coastal resources, open space and agriculture, water quality, and fighting oil and gas development impacting under-represented communities across Ventura, Santa Barbara, and San Luis Obispo Counties.



*Alicia Roessler*

Alicia is a familiar face at EDC, having first joined the organization as a law clerk in 2000 while she was completing her J.D. at Northwestern School of Law of Lewis & Clark College. Upon graduating, Alicia worked as an Associate Attorney at Cappello & Noel, LLP, during which time she served on EDC’s Board of Directors. During a previous period as a staff attorney with EDC, Alicia played a critical role helping our client defeat BHP Billiton’s proposal to build a massive floating Liquefied Natural Gas storage and regasification terminal off the Oxnard-Malibu coast.

She was also EDC’s lead attorney representing the Sierra Club and SBCAN in convincing the Santa Barbara County Board of Supervisors to deny Pacific Coast Energy Company’s dangerous proposal for 144 new cyclic steam injection oil wells in Orcutt, and she helped defeat Phillips 66’s proposal to import heavy tar sands crude by train to its refinery near Nipomo in southern San Luis Obispo County. Alicia also worked to protect important agricultural lands from subdivision in the Santa Ynez Valley. Most recently, she led the organization’s legal fight to block NRG’s proposed gas-powered Puente Power Plant in Oxnard.

“Alicia brings substantial legal expertise as well as a strong familiarity with local environmental issues,” said Linda Krop, Chief Counsel of EDC. “Our clients and community will benefit from Alicia’s experience in environmental litigation and advocacy.”

**Maho Prentice, LLP** is very proud to announce that **Jessica Phillips** and **Samantha Baldwin** have become partners of the firm.



*Jessica Phillips*

Ms. Phillips’ practice continues to be in civil litigation, with an emphasis on representing plaintiffs in personal injury, including all type of vehicular accidents, including truck, motorcycle and bicycle accidents, premises liability, product liability, dog bites/attacks, assault, wrongful death, and cases of negligence and recklessness involving sudden and catastrophic injuries.

Prior to coming to California, Ms. Phillips had many years of experience as a trial attorney in Baltimore, Maryland, successfully trying multiple cases, and obtained multimillion-dollar verdicts on behalf of her clients. She has been selected by Super Lawyers as a Rising Star, each year since 2016. Ms. Phillips earned her B.A. from High Point University and her J.D. from the University of Baltimore School of Law.

Ms. Baldwin’s practice continues to be in civil litigation, with an emphasis on representing plaintiffs in personal injury, including all type of vehicular accidents, including truck, motorcycle and bicycle accidents, premises liability, product liability, dog bites/attacks, assault, wrongful death, and cases of negligence and recklessness involving sudden and catastrophic injuries. Ms. Baldwin represents clients across California.



*Samantha Baldwin*

Ms. Baldwin is currently an active member of Santa Barbara Women Lawyers, having served as President of the Foundation in 2020 and as President of Santa Barbara Women Lawyers Association in 2021. Ms. Baldwin is an active supporter of youth sports, specifically Santa Barbara 805 Water Polo Club and Bishop Diego Boys and Girls Water Polo. ■

# Verdicts, Decisions & Settlements

*William Mora. v. Albertsons, LLC, A&J Refrigeration et al.*

KERN COUNTY SUPERIOR COURT, TRUXTON DIVISION

**CASE NUMBER:** 19CV03676  
**TYPE OF CASE:** Slip and Fall, Mild Traumatic Brain Injury  
**TYPE OF PROCEEDING:** Jury Trial  
**JUDGE:** Thomas Clark  
**LENGTH OF TRIAL:** 5 weeks  
**LENGTH OF DELIBERATIONS:** 5 hours  
**DATE OF VERDICT OR DECISION:** November 17, 2021  
**PLAINTIFF:** William M. Mora  
**PLAINTIFF'S COUNSEL:** Steven R. Andrade  
**DEFENDANTS:** Albertsons, LLC and AM Wighton, DBA A&J Refrigeration  
**DEFENDANT'S COUNSEL:** For Albertsons, LLC, Paul Caleo and Robert Bodzin, Dustin Cameron of Gordon Rees Scully Mansukhani, LLP, San Francisco. Law Office of Seana B. Thomas, APC, Santa Barbara, CA.  
**INSURANCE CARRIER:** Sedgwick Claims  
**DEFENDANT:** AM Wighton, DBA A&J Refrigeration  
**DEFENDANT'S COUNSEL:** For AM Wighton, DBA A&J Refrigeration, Chris Mordy, Taylor Anderson, LLP, San Diego, and Ninos Saroukhanioff, Morganstern Law Group, Woodland Hills.  
**INSURANCE CARRIER:** Great American

**PLAINTIFF'S NON-RETAINED EXPERTS/TREATING DOCTORS:**

Richard Chung, M.D., Brain Surgery, Santa Barbara, CA.  
Bernard Chow, M.D., Radiology, Santa Barbara, CA.  
Bernard Weinstock, M.D., ENT Specialist, Lompoc CA.  
Richard Flynn, M.D., Emergency Medicine, Santa Barbara, CA.  
Wayne Jonas, M.D., Emergency Medicine, Lompoc, CA  
Erin Kenny-Hammett, M.D., Rheumatology and Emergency Medicine, Chula Vista, CA

**PLAINTIFF'S RETAINED EXPERTS:**

Sharon Perlman Berry, PSY.D., ABN Neuropsychologist, San Francisco, CA.  
Jonathan Mueller, M.D. Neuropsychiatrist, San Francisco, CA.  
Rajiv Kelkar, Ph.D. – Accident Reconstruction/Biomechanics  
Gavin Whalen, Video Expert, Surveillance Systems, Santa Ynez, CA.  
Alex Balian, M.B.A., Safety and Industry Standards, West Hills, CA



**PLAINTIFF'S REBUTTAL EXPERT:**

Jay Kelly, Digital Watchdog Surveillance Systems

**DEFENSE RETAINED EXPERTS:**

- David Hoenig, M.D., Neurology, Tarzana, CA.
- Talin Babikian, Ph.D. ABPP, Neuropsychology, Los Angeles, CA.
- Michael Winters, PE, Engineering, Anaheim Hills, CA.
- Robert Smith, PE, Engineering, Anaheim Hills, CA.
- Michael Nicholas, WSO, CSSP, CHAS, Safety and Industry Standards, Laverne, CA.
- David Shreve, PE, Engineering, San Diego, CA.
- Douglas Carner, Audio/Video Forensics Analyst, VanNuys, CA.
- Kirsten White, MSPE, Accident Reconstruction, Biomechanics, Hayward, CA.

**OVERVIEW OF CASE:** In April of 2016, Plaintiff William Mora, now age 60, was shopping in the Albertsons, LLC grocery store in Taft, California. He slipped and fell on water that had pooled on the floor near a freezer island floor case. Everyone thought he had only suffered a broken nose.

Between April 2016 and December 2016, Plaintiff complained of a loss of sense of smell and taste, and memory problems. Based on his symptoms, an MRI was ordered in January 2017, eight months after the fall. The MRI revealed a subdural hematoma. Plaintiff contended that the fall caused permanent anosmia (loss of sense of smell and taste) and mild traumatic brain injury, including mild memory loss and mild cognitive issues.

Every issue in the case was hotly contested. Albertsons, LLC disputed liability and the damages. Defense experts contended that Plaintiff could not have suffered brain damage from the fall without having more severe symptoms before his January 2017 MRI study.

Defendant Albertsons, LLC tried to shift blame and liability on to the refrigeration company, and on a janitorial service without success.

The jury found Albertsons, LLC 100% at fault and awarded plaintiff \$4,317,495.08.

**FACTS AND CONTENTIONS:** Plaintiff and the refrigeration company contended that only Albertsons, LLC was responsible because Albertsons, LLC failed to maintain and regularly inspect the functionality of the freezer island floor sinks.

**SUMMARY OF SETTLEMENT DISCUSSIONS:** Plaintiff made a \$3,999,999.99 C.C.P. § 998 demand in February 2020.

**FINAL JURY VERDICT RESULT:** \$4,317,495.08

- \$ 47,495.08 Stipulated Medical Expenses
- \$ 750,000.00 Past Non-Economic Loss including physical pain and mental suffering
- \$ 3,520,000.00 Future Non-Economic Loss, including physical pain and mental suffering

Section 998 interest, expert fees and costs should easily result in an award exceeding \$5M.

***Santa Barbara Lawyer***  
**SEEKS SETTLEMENTS, VERDICTS & DECISIONS**

*SBL* encourages all SBCBA members to share notable non-confidential settlements, verdicts or decisions. The data is valuable to our membership. Please submit information to Victoria Lindenauer ([Lindenauer\\_mediation@cox.net](mailto:Lindenauer_mediation@cox.net)) or R.A. Carrington ([ratc@cox.net](mailto:ratc@cox.net)).

Weiner, *continued from page 15*

led to an increase in electricity demand. This prompted SCE’s decision to impose a rate change. It also affected the value of solar PV at the facility.

Energy storage would have reduced utility costs by further driving down demand charges and solar energy shifting from the daytime, when energy exports are worth about 10¢ per kWh, to the evening when the value increases to 45¢ per kWh. A small energy storage system could have saved the RV park about \$3,100 in Year 1. A large system could have saved the facility about \$31,000 or more, depending on its energy load profile.

### Finding solar expertise

The main cause of solar underperformance at the RV park was unique. But you can apply the same analytical process in many cases that need to resolve discrepancies between expectations and deliverables.

Start with an expert who brings a ton of industry knowledge. Make sure the expert can address issues related to

technical design, construction, and financial modeling and performance. Also check that your expert can easily identify standard practices in the industry. Do EPC contractors generally pay the difference when a financial representation is not met? Do system owners generally notify solar companies when planning a significant change in electricity load? Who is watching the utility tariff rates and utility policies after the solar project is placed into service to ensure the system owner is reaping the solar system’s benefits adequately?

As solar becomes a primary source of energy, we’re seeing an uptick in cases where performance does not meet owner expectations. Independent experts who specialize in project finance, engineering and design, and ways to add value throughout the project lifecycle are best positioned to help with conflict resolution and support the energy transition amid a changing technology and policy landscape. ■

*Joshua Weiner, CEO of SepiSolar, provides expert witness services and case review for construction law and civil litigation firms representing plaintiffs and defense.*

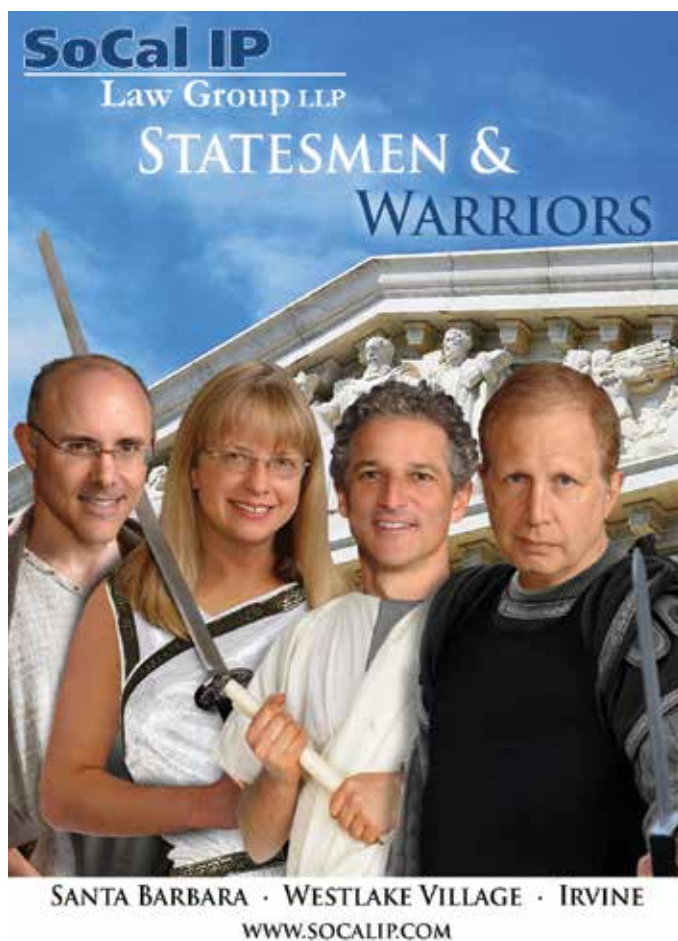


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# Santa Barbara Lawyer – 2022 Submission Guidelines and Key Dates

*Santa Barbara Lawyer* publishes monthly. Just like last year, in 2022 the deadline for content, copy, and photographs is on the first Monday of each month. There is no “soft deadline” without pre-approval from the editor.

## Articles

- Include a title or headline with your article. Include your name/title, and a short biography at the end of your article.
- Articles do not need to be laid out; plain text is easier for us to work with.
- Shorter paragraphs work best for our newsletter format. Aim for 600-1200 words.
- Microsoft Word, .rtf or .txt files are ideal. No PDFs.
- Please proof your material before you send it in! We cannot guarantee that we will catch every spelling, grammar, or punctuation error, and proofreading takes time away from our design and editing process.
- Please use the footnote format for references to authority.
- Please review and submit a signed Author Agreement with your article.

## Photographs and images

- Color photographs are preferable.
- Send the largest file (highest resolution) of the best quality possible. Photographs must be minimum 300 dpi.
- Do not edit or crop your photos. Do not imbed images in Word or any other application.
- Send photographs as separate attachments.
- Captions are best sent with their image – for example:

<u>Image file name</u>	<u>Caption</u>
[ARTICLE NAME] 1.jpg	Jane Smith, John Doe, and Miles Davis
[ARTICLE NAME] 2.jpg	Attendees at the Legal Aid luncheon

## Miscellaneous

- **Coverage:** From time to time, an article idea, feature, profile, event, or photo opportunity may come along that you think should be in the magazine. Please send it to us when you think of it. This allows us to plan ahead and make sure it is covered.
- **Verdicts & Decisions:** *Santa Barbara Lawyer* seeks to objectively report verdicts and decisions from cases involving firms and lawyers based in Santa Barbara County or involving issues of local significance.
- **Profiles:** We welcome suggestions.
- **Work/Life Balance/Exercise/Quality of Life/Stress Relief:** This is an ongoing challenge for all of us. We welcome submissions and suggestions.
- **Space in the magazine:** *Santa Barbara Lawyer* is printed in multiples of four pages (i.e. an edition will be 28/32/36/40 pages long). Thus, when space is a concern, we may shorten or even omit an article. When this is done, we will take into account timing, need to publicize events or other deadlines, and whether the article can run in the following issue.
- **Content:** *Santa Barbara Lawyer* is a publication of the Santa Barbara County Bar Association (SBCBA), written by and for our membership. We reserve the right to reject content that runs counter to SBCBA’s published mission and goals or that is not of interest to our readership.

## Contact Information

Content should be sent to [sblawyer magazine@gmail.com](mailto:sblawyer magazine@gmail.com)

Verdicts & Decisions should be sent to R.A. Carrington: [ratc@cox.net](mailto:ratc@cox.net) / [lindenauer\\_mediations@cox.net](mailto:lindenauer_mediations@cox.net)

Motions (short news items/announcements) should be sent to Mike Pasternak: [pasterna@gmail.com](mailto:pasterna@gmail.com)

## Editorial Board

Michelle Roberson (Editor), Phone: (805) 692-1520 \*102, Email: [Michelle@sierrapropsb.com](mailto:Michelle@sierrapropsb.com)

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Lida Sideris (Assistant Editor and Santa Barbara County Bar Association Executive Director) handles advertising sales and inquiries, Phone: (805) 569-5511, Email: [sblawdirector@gmail.com](mailto:sblawdirector@gmail.com)

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R.A. Carrington (Verdicts & Settlements Editor), Email: [ratc@cox.net](mailto:ratc@cox.net)

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# *Time to Register!*

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## **2022 Virtual Bench & Bar Conference**

### **Friday, January 21, 2022**

8:30am to 4:30pm

*Featuring Keynote Speaker*

**Justin Brooks**

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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*



**Santa Barbara County Bar Association  
2022 Virtual Bench & Bar Conference Schedule**

8:15 AM – 9:00 AM	Sign In
Joint Session 9:00 AM to 10:05 AM 1 hour MCLE	<b>Attorney Competency**</b> Doug Ridley, Ridley Defense **Expected to qualify for competency credit
Joint Session 10:10 AM to 11:15 AM 1 hour MCLE	<b>Constitutional Law</b> The Honorable Brian Hill Santa Barbara Superior Court
Breakout Session 1 11:20 AM to 12:25 PM 1 hour MCLE	<b>Criminal Law Panel</b> La Mer Kyle-Griffiths, Santa Barbara Assistant Public Defender Diana Lytel, Lytel & Lytel LLC
12:25 PM to 1:00 PM	<b>Lunch Break</b>
Joint Session 1:00 PM to 2:05 PM 1 hour MCLE	<b>Keynote Presentation</b> Justin Brooks Director and Co-Founder of the California Innocence Project, Director of Latin American Institute of Law and Justice
Breakout Session 2 2:10 PM to 3:15 PM 1 hour MCLE	<b>Family Law Panel</b> Greg Herring, Herring Law Group
Joint Session 3:20 PM to 4:25 PM 1 hour MCLE Ethics	<b>Judge's Session**</b> The Honorable Colleen K. Sterne The Honorable Thomas P. Anderle **Expected <i>to qualify for an ethics credit</i>
	<b>Mock Jury Trial</b> Chad M. Prentice, Maho & Prentice, LLP Tyrone J. Maho, Maho & Prentice, LLP
	<b>NFT, IP, and Crypto Currency Panel</b> Jeremy S. Goldman, Frankfurt, Kermit, & Selz PC

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## Santa Barbara County Bar Association 2022 Membership Application

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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.

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

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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



# January

## 2022



Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1 New Year's Day
2	3	4	5	6	7	8 War on Poverty Day
9	10 National Clean Your Desk Day	11 National Human Trafficking Awareness Day	12	13	14	15
16	17 Martin Luther King Jr. Day – <b>Court Holiday</b>	18	19	20	21 The SBCBA 2022 Virtual Bench & Bar Conference	22
23	24	25	26	27	28 National Fun at Work Day	29

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

### TWO OFFICES FOR RENT

For rent (available immediately) two professional furnished offices (11'8" x 8'8" for \$1,200.00 and 11'8" x 10'9" for \$1,350.00). Includes two conference rooms, kitchen and workroom with copier. Located in a great Santa Barbara downtown location across from the Courthouse and above the Secret Bao restaurant. Please contact Howard Simon at [hsimon@jhsllaw.com](mailto:hsimon@jhsllaw.com) for further information.

### PRACTICE FOR SALE

40 year Wills, Trusts, Estate Planning and Probate Practice for Sale - San Luis Obispo County contact Attorney John F. Sachs, 805-541-4640.

### 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](mailto:kcallahan@hdlaw.com).

### SEEKING ESTATE PLANNING/TRANSACTIONAL 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](mailto: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](mailto:reception@rogerssheffield.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](mailto:jpetteway@rppmh.com). ■

## Enjoy Trivia Night!

On January 13, 2022 at 5:30 – 6:30 pm, CLA and the California Judges Association (CJA) are co-hosting a free virtual trivia night to test the trivia knowledge of judges and attorneys across the state. Register here: <https://calawyers.org/event/cla-cja-trivia-night>

# HAPPY NEW YEAR

From the Santa Barbara County Bar Association

## 2022 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

Marla Pleyte (805) 770-7080  
marla@marlapleyte.com

### Family Law

Renee Fairbanks (805) 845-1604  
renee@reneefairbanks.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  
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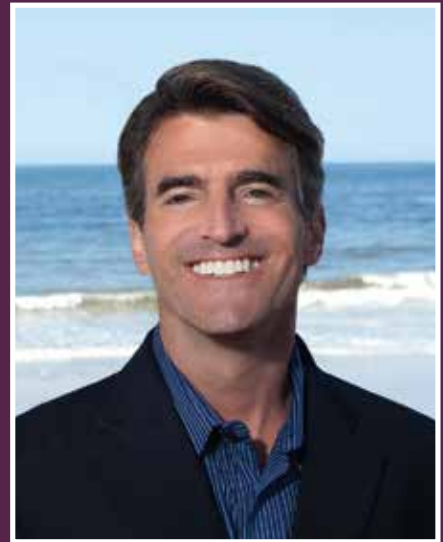
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- #4 Berkshire Hathaway Agent in the Nation
- Wall Street Journal "Top 100" Agents Nationwide (out of over 1.3 million)
- Graduate of UCLA School of Law and former attorney
  - An expert in the luxury home market
  - Alumnus of Cate and UCSB

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  
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