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What I Did On My Summer Vacation

Successful Business Partnerships / Beyond Compliance: Creating a Lawful and Inclusive Privacy Program / The Federalist Society and Honest Services Fraud / Divorce Coaching—Bridging the Emotional and Legal Realities of Divorce

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

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

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

ERIN PARKS
Chief Financial Officer
Attorney at Law
625 E. Victoria St, Garden Ste
Santa Barbara CA 93101
T: (805) 819-7717
law@erinparks.com

ELIZABETH DIAZ
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Legal Aid Foundation
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T: (805) 963-6754
ediaz@lafsbc.org

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

RAYMOND CHANDLER
Law Office of Raymond Chandler
15 W. Carrillo St #220
Santa Barbara CA 93101
T: (805) 965-1999
Rdc@rdclawoffice.com

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Ferguson, Case, Orr, Paterson, LLP
1050 S. Kimball Rd
Ventura, CA 93004
T: (805)659-6800, x203
IElsenheimer@fcoplaw.com

TAYLOR FULLER
Herring Law Group
559 San Ysidro Road 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

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

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

DAVID TAPPEINER
DT Law Partners, LLP
125 E. Victoria St. Ste I
Santa Barbara, CA 93101
T: (805) 456-8324
David@DTlawpartners.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

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

CHRISTY BARKEY
Legal Assistant

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CONTRIBUTING WRITERS
Diane Y. Byun
Robert W. Olson Jr.
Erin Parks
Robert M. Santer
Erin Schaden

EDITOR
Michelle E. Roberson

ASSISTANT EDITORS
Jenna Gatto
Marietta Jablonka

MOTIONS EDITOR
Michael Pasternak

PHOTO EDITOR
Mike Lyons

GRAPHIC DESIGN
Baushke Graphic Arts

* * *

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Articles

Sections

On the Cover

Erin Parks and her companion enjoy being dwarfed by the Alps.

What I Did On My Summer Vacation

Fondue in France

We are all starved for a vacation, and after living with the impacts of the pandemic for over two years—including multiple travel restrictions—we certainly need one!

Whether acting on delayed plans to see old friends or family members, or knocking off another item on our personal bucket list, 2022 saw more of us answering the call of camaraderie and adventure.

If you haven't been quite ready to venture forth, here are a few vacation memories to tempt and entice you. It is never too late to start making plans.

Erin Parks

In June 2022, my guy and I spent a glorious week in the Austrian Alps. We started out at a delightful boutique hotel in Salzburg with a perch on the roof where we were enchanted by surrounding spires and the tolling of their bells. The culmination of our Austrian road trip was the spectacular drive up the Grossglockner High Alpine Road. We then set off for Zurich where we picked up the son and his girlfriend for a belated post-Covid college graduation tour of Switzerland. We spent two weeks touring the Swiss Alps, hiking from Murren to Grindewald, and dipping into the French countryside for fondue. The adventure was magical.

Craig Smith

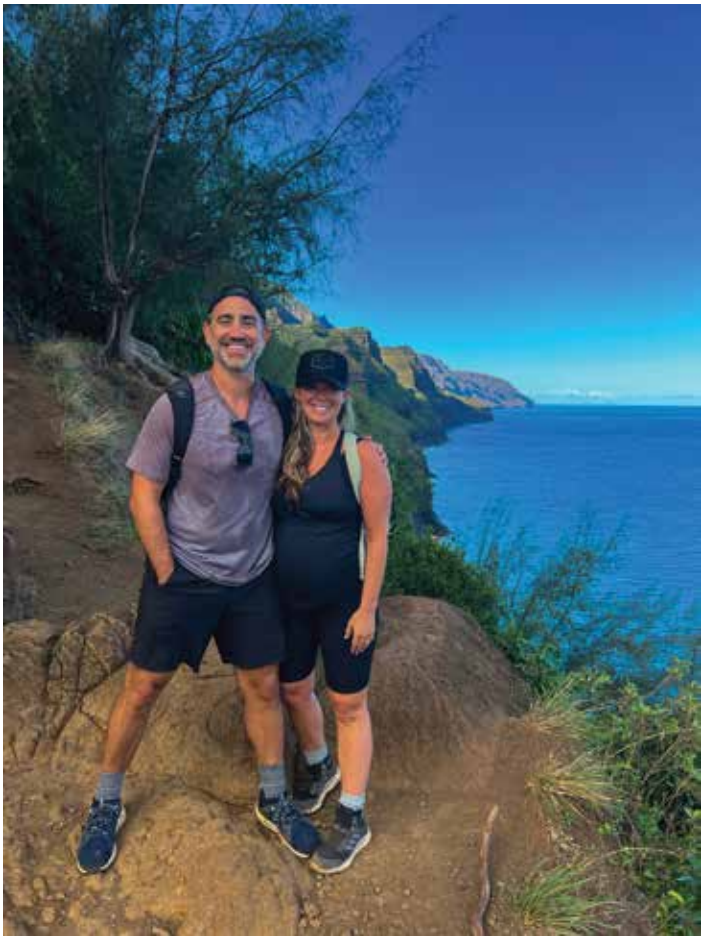
Everyone has their own idea of what constitutes a "relaxing vacation." As I write this, I have completed two days of an 8-day bike ride across the state of New York, going from Buffalo to Albany following the route of the Erie Canal. By the time you read this I will be done. Hopefully, not "done" as in stick a fork in me, but done, as in finished. This 360 mile trek is an opportunity for me to get out of my comfort zone, something I'm not often comfortable in doing. So far, the trip has been great. If you want to know how relaxing it turned out to be, ask me after the ride is over. (If you'd like to see the route I took, here is the map: https://www.ptny.org/bike-canal/map

Ian Elsenheimer

Spent time with family white water rafting down the Royal Gorge (Arkansas River) in Canon City, Colorado.

Marietta Jablonka

Spent time on a short pickleball vacation in Pismo Beach that I took with my friends Lisa Street, Chrissie Mancuso and Nicole Bates. We found a pickleball court in Shell Beach that had an ocean view. It's safe to say that we ae obsessed with the game, we played twice a day. It was heaven.



Jessica Phillips

My husband Alex and I travelled to Kauai and here is a picture of us hiking the Kalalau Trail on the Na Pali Coast.

Michelle E. Roberson

Grew some tomatoes and spent a few weeks at her property in Texas with her family.

Successful Business Partnerships

By Robert W. Olson Jr.

The concept of a business partnership is an attractive one. This is certainly true given recent technological advances: think about how the now-ancient synergy of telephones and cars and late-night munchies created the business behemoth of Domino's Pizza.

Success in business partnerships requires the right business plan, and partners with the ability, capital, time and drive to execute that business plan. However, even the right business plan, financial backing, and partners with the right skill sets, are nowhere near enough to give you a good shot at a financially successful partnership. Certainly, the shifting sands of the free market, technology and consumer demand will always be a risk factor in any business endeavor. However, beyond these typically understood dynamics, it is also crucial to understand that partner personalities and their interpersonal dynamics are an even greater risk factor.

Beyond their finances and skill sets, partners have their own unique (and frequently conflicting) desires, outside responsibilities, interpersonal skills, temperament, blind spots, and myriad other human traits. People are human, and so will bring to a partnership all the benefits and burdens that go with that. Therefore, when a client is ready to jump into a business partnership, my 30+ years of legal practice prompt this advice: *"To protect the partners and their families, your partnership needs to be set forth in a written agreement that is fair, comprehensive, and reduces potential disagreement among the partners."*

Without that written agreement, the partnership has little chance to succeed in the long run. If the agreement doesn't clearly address what happens in a disputed situation, it becomes nearly impossible for the partners (and their families) to agree to what is "fair" once that situation arises. At this stage, lawyers may have to get involved, and resolving the situation becomes a slow, expensive and psychologically damaging process.

What is Included in a "Fair" Agreement?

So, what constitutes the "fair" terms in a partnership agreement? One that includes the following elements:

Robert W. Olson, Jr.

Capital Contributions Equal to Ownership. Fairness is far easier to see when each partner contributes amounts of money proportional to their ownership rights. However, many business partnerships rely on one partner providing start-up cash for their share of ownership while the other partner promises to contribute work for their share of ownership – frequently called "sweat equity." Unfortunately, this approach has many pitfalls. It is an unreliable method of equalizing capital contributions, since the working and non-working partners almost always have different perspectives on how hard the working partner is actually working. It also gives the non-working partner equal control and ownership before that equal position has been earned, which reduces the working partner's incentive to do the actual work. Finally, this approach has unexpected and severely negative tax consequences for each partner.[1] Therefore, when a new partner can't afford to buy their full equal share up front, there needs to be specific timetables and pricing for the new partner to become an equal partner over time, including (if applicable) the timing and process of awarding sweat equity.

Equal Control. Ownership and control generally go hand in hand, but even if ownership is not equal, control must be equal. Many prospective partners fear that their partnership will not be able to act if one partner (the one who raises the issue) doesn't have a final say in disagreements. While this is literally true, it is important that the partners be forced to discuss and compromise on matters of disagreement. Leaving one partner in complete charge makes discussion meaningless and compromise unnecessary, leaving the other partner as a permanent subordinate who is subject to all the business liabilities but lacking any control over the business. This situation is a guaranteed recipe for disputes, and almost always leads to an acrimonious breakup.

No Passive Investors. Another, but even more important, reason to keep equal management rights is to stay on the right side of federal and state securities law. Ownership

Continued on page 12

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Olson, *continued from page 10*

in a business with no control over operations turns that ownership right into a "security."[2,3] When someone sells a security, the seller is required to disclose all the relevant risks of the buyer's investment.[4] Failure to disclose those risks can have devastating effects on the seller and the business. Not only can a "failure to disclose" finding force full repayment of the buyer's investment, that finding can also result in criminal charges![5] DON'T go there.

Compensation in Two Parts. Each partner needs to be paid for the work they actually do, as if they were an employee rather than an owner. Then, after all other business expenses are paid, the balance is paid to the partners in proportion to their ownership.

- **Equal Work Rights.** A corollary of two-part compensation is the requirement of equal work rights. When a partner's main source of partnership income is their workload, each partner needs to have workdays and hours in the same proportion as their ownership rights. The bulk of the business' value usually is in cashflow, and a junior partner will be unwilling to pay for cashflow that the senior partner keeps for itself. There are some exceptions to this requirement (such as work that requires specialized skills, specific insurance coverage, or regulatory compliance) that may require that work be allocated to the partner meeting those requirements. The partnership may also allow for reduced hours (and reduced compensation) requested by a senior partner without negatively impacting the "equal work" requirement.
- **Equal Time Commitment.** On the other hand, when a partner's main source of partnership income is based on their ownership rather than workload, partners need to have time commitments to the partnership commensurate with their ownership. This approach can be difficult to enforce when the partners have very different roles in the partnership.

Reducing Disagreements: Succession Planning

There are structural ways to reduce sources of disagreement among partners that are not addressed in this article.[6] Other than structural solutions, the most likely source of conflict in any partnership agreement is upon the buyout of a partner who leaves the partnership, whether willingly or involuntarily. Even if the partners are extremely patient, accommodating, and fair with each other, I can guarantee you that their spouses and children will not be, given that everybody will then know which partner is departing and the reasons for that departure.

My overall goal in partnership succession planning is to protect both the remaining partners and their continued ability to operate the business profitably, as well as the family of a departing partner who no longer brings in their expected income. The question then becomes "what details do we need to cover in that succession plan?"

- **Buyout Price.** If not set by agreement or formula, the price may be set by a lender or business broker as of the triggering event (e.g., death, disability, loss of license or other wrongdoing, insolvency, retirement). Generally based on fair market value, that value is discounted if the departing partner is "at fault" for the departure.
- **Manner of Payment.** If no loan or insurance proceeds are available to fully fund the buyout, a detailed payment plan needs to be included, with a specified term, interest rate, monthly payment, and security for payment.
- **Buyout Timing.** Loss of a professional license or death requires specified buyout time limits under state law. Disability or retirement buyouts may not have legal urgency, but for the family of a disabled partner, like that of a deceased partner, that loss of income can be a severe blow. All partners need to be mindful that it could be their families that are put in this precarious position when negotiating buyout timing.
- **Post-Buyout Behavior.** Except when the departing partner is deceased, the buyout price assumes certain behavior by both sides after the buyout. A purchase agreement covers all these things, but the two sides are unlikely to be reasonable once they know their position. Therefore, all those behavioral matters should be specified within the partnership agreement. These behavioral matters include non-competes, accounts receivables collection, uncompleted repair work, use of the departing partner's name, and many other matters.
- **Other Issues.** There are so many other issues that should be discussed as part of succession planning in the partnership agreement. Included in those issues are timing and payment for intermediate purchases, treatment of liens and personal guarantees, whether the purchase optional or mandatory, what assets are included in the purchase, and tax allocations.

Practitioners need to be very careful, thorough, and

thoughtful when preparing and finalizing partnership agreements. They need to use precise and consistent language throughout that partnership agreement, since each and every ambiguity gives plaintiff's attorneys something to dispute when disagreements arise. They also need to ask their clients, and think through in great detail, **(1)** what is important to each partner under current circumstances, **(2)** what will be important to each partner under possible changes in future circumstances, **(3)** what would be important to a departing partner, the remaining partners, and their respective families, when the inevitable buyout situation occurs, and **(4)** what would each partner and their family members consider the "fair" procedure for that inevitable buyout.

For each of these considerations, the parties' positions should be considered as if under the veil of ignorance: of not knowing what their respective positions will be. Each could be a senior or junior partner, the departing or remaining partner, or a family member of a senior, junior, deceased or disabled partner.[7] Fairness is not a mere abstraction when working with partnerships, and as attorneys we cannot treat it as such if we want our partnership clients to survive and thrive. Professionalism demands nothing less. ■

Mr. Olson is an attorney in Santa Barbara, focusing on small business mergers & acquisitions, corporate law, commercial real estate, estate planning, and related tax issues.

Endnotes

1 These tax ramifications are addressed in my January 2021 article in Santa Barbara Lawyer "Tax Ramifications of Sweat Equity in Professional Partnerships."

2 15 U.S.C. §78c(a)(10) defines a security (in part) as: "any note, stock, … certificate of interest or participation in any profit-sharing agreement or in any … investment contract … for a security …."

3 *SEC v. Howey Co.*, 328 US 293 (1946), defined an investment contract as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of a promoter or a third party."

4 15 U.S.C. §78j(b) and 17 C.F.R. §240.10b-5.

5 *Janus Capital Group, Inc. v. First Derivative Traders*, 131 U.S. 2296 (2011), and *Prousalis v. Moore*, 751 F.3d 272 (4th Cir. 2014).

6 Structural techniques for reducing partner conflict is addressed in my November 2013 article in Santa Barbara Lawyer "Professional Group Practice Options."

7 Also known as the "original position" in John Rawls' 1971 book "A Theory of Justice." See also Immanuel Kant's "categorical imperative" in his 1785 work "Groundwork on the Metaphysics of Morals."

Beyond Compliance: Creating a Lawful and Inclusive Privacy Program

By Diane Y. Byun

Diane Y. Byun

Effective January 1, 2023, the California Privacy Rights Act ("CPRA") expands and amends the California Consumer Privacy Act ("CCPA"), making it the first comprehensive U.S. data privacy law to afford protections upon human resources data. Such data includes personally identifiable information ("personal information") of applicants, employees, independent contractors, dependents, and other employment-related information of California residents (collectively, "Employees").

Among other things, the CPRA restricts the processing of sensitive categories of personal information for limited purposes, otherwise they must notify Employees of the additional purposes and provide Employees the opportunity to opt-out of such processing. At the same time, understanding the role of sensitive data points is a critical aspect of initiatives relating to diversity, equity, inclusion, and accessibility ("DEIA"). How does an employer reconcile this apparent clash?

Who Must Comply

Employers should first determine whether they are covered by the landmark California privacy law. At present, the CCPA applies to for-profit entities that do business in California and meet any of the following thresholds:

- Have a gross annual revenue of over $25 million;
- Buy, receive, or sell the personal information of 50,000 or more California residents, households, or devices; or
- Derive 50% or more of their annual revenue from selling California residents' personal information.

As of January 1, 2023, the "original" version of the CCPA dissipates. Employers will be covered by the surviving CPRA to the extent they are a for-profit entity that does business in California, collects personal information from California residents, and satisfies at least one of the following thresholds:

- As of January 1 of the calendar year, has annual gross revenues in excess of $25 million in the preceding calendar year;
- Alone or in combination, annually buys or sells, or shares the personal information of 100,000 or more consumers or households; or
- Derives 50% or more of its annual revenues from selling or sharing consumers' personal information.

Employers that do not meet these criteria could still be subject to the CPRA if they:

- Own or control a business defined by the CRPA; or
- Share common branding with a business and with whom the business shares (or receives) Consumers' personal information.

Notably, to qualify under the CPRA's common branding category, the information from the covered business must be for cross-context behavioral advertising purposes.

Overview of Notice Requirements

Prior to January 1, 2023, covered employers must ensure execution of proper notice at collection. Although human resource data is exempt under the CCPA, covered employers must issue privacy notices to their Employees with an initial disclosure, at or before the point of collection. This initial disclosure must identify the categories of personal information collected and the purposes for which the categories of personal information shall be used, likely triggering notice requirements for the collection of diversity-related personal information. If the employer sells the human resource data, then the notice at collection must include a Do Not Sell link. The disclosure must also contain a link to the employer's CCPA-compliant privacy policy.

Once effective, the CPRA signals the end of the temporary carve-out for human resources data, affording Employees the same rights that have applied to general consumers since 2020. In relation to notice requirements, the CPRA mandates that a covered employer that controls the collection of an Employee's personal information must also

disclose the following at or before the point of collection:

1. the purpose for which categories of both sensitive personal information and personal information are collected or used;
2. whether this personal information is sold or shared; and
3. the employer's retention policy.

This notice requirement may be fulfilled by way of a privacy policy detailing how human resource data is processed, including a description of the various privacy rights available to Employees under the CPRA, including:

- **Right to Access:** The CPRA allows an Employee to make a request to know the specific pieces of personal information an employer holds about them that were generated on or after January 1, 2022.
- **Right to Correct:** Employees may request that their employer correct any inaccurate personal information that has been collected.
- **Right to Delete**: Employees may request that their personal information be deleted.
- **Right to Restrict:** Employees have the right to restrict the use of their sensitive personal information to specific business purposes or limited disclosures.
- **Right to Opt-Out of Sale or Sharing:** Employees can opt out of the sale or sharing (as defined by the CPRA) of their personal information by their employer to a third party.
- **Right to Know:** Employees may request from their employers the personal information that has been collected about them during the preceding 12 months.

In addition to the above, employers covered by the CPRA will be required to:

- Comply with the new privacy right obligations regarding human resources data;
- Safeguard human resources data against unauthorized disclosures; and
- Include specific CPRA provisions in contracts with third parties that process human resources data.

What is Sensitive Personal Information?

The CPRA's definition of "sensitive personal information" includes the following types of data, all of which employers often collect:

- Social Security number;
- Driver's license number;
- Racial or ethnic origin;
- Religious or philosophical beliefs;
- Union membership;
- Personal mail, email, and text messages;
- Precise geolocation;
- Biometric information for the purpose of unique identification; and
- Personal information collected and analyzed concerning an individual's health.

The Right to Limit the Use and Disclosure of Sensitive Personal Information

On May 27, 2022, the California Privacy Protection Agency released its draft CPRA regulations, operationalizing the new right to limit the use of sensitive personal information under the CPRA. The draft regulations add Section 7027, concerning consumer requests to limit the use and disclosure of sensitive personal information. The primary focus of Section 7027 is to provide consumers, including Employees, the ability to limit use and disclosure "to that which is necessary to perform the services or provide the goods reasonably expected." Employers that process sensitive personal information for certain purposes must provide a notice of such processing at or before the point of collection. Covered employers using or disclosing sensitive personal information would be required to provide two or more designated methods for submitting requests to limit, and at least one of the methods must reflect the manner in which the business primarily interacts with the consumer (e.g. by restricting processing to only permissible purposes through a "Limit the Use of My Sensitive Personal Information" link).

Regardless of the implementation of Section 7027, covered entities are permitted to use or disclose sensitive personal information without being required to offer consumers a right to limit when the information is necessary to perform the services reasonably expected by an average consumer who requests those goods or services; to detect security incidents to resist malicious or illegal attacks on the business; ensure the physical safety of natural persons; for short-term, transient use; perform services on behalf of the business; or verify or maintain the quality or safety of the business. How the foregoing will specifically apply to Employees' sensitive personal information is yet to be seen as the proposed regulations of the CPRA continue to be reviewed by the California Privacy Protection Agency.

The right to restrict sensitive personal information, however, only applies to sensitive personal information that the covered Employer uses with the purpose of "inferring characteristics" about the Employee. If the information is not collected and used by the employer for the purpose of drawing inferences about Employees, such data can be listed as personal information in the required disclosure within the

other categories of personal information collected by the employer. This may seem like a benign distinction, but identifying the data delta will be crucial for employers to avoid unnecessary notice requirements. If a covered employer discloses the collection of sensitive personal information, this will likely lead to, at a minimum, an increase in inquiries from Employees regarding such processing practices. The incorporation of these categories of information within a list of general categories of personal information collected may enable covered employers to avoid an increase of human resources issues as they would only have to disclose those categories of information that are generally designated as "sensitive," such as social security numbers.

What is an Inference?

On March 10, 2022, the Office of the Attorney General of California ("OAG") explained that inferences could include "a characteristic deduced about a consumer (such as 'married,' 'homeowner,' 'online shopper,' or 'likely voter') that is based on other information a business has collected (such as online transactions, social network posts, or public records)," and established a two-prong test for determining when "inferences" are "personal information" that must be disclosed to consumers under the CCPA.

First, the inference must be derived from an analysis of personal information subject to the CCPA (as well as the CPRA, once effective). This prong is satisfied given the inherent nature of human resources data. Covered entities are deemed to "collect" such inferences even if they are derived internally from other information that has been collected.

Second, the inference must be used to create a profile on the consumer or "predict a salient consumer characteristic." The OAG limited the scope of inferences that must be disclosed to those used to predict, target, or otherwise affect consumer behavior. In other words, inferences used solely for internal purposes, such as to complete the address on file for a consumer, are not covered. Should the inferences be utilized to determine a consumer's propensities, they become part of the consumer's profile and must be disclosed.

At present, the scope and definition of such inferences and characteristics as applied to Employees' sensitive personal information is yet unknown as the opinion was issued in relation to the CCPA. This may change as the California Privacy Protection Agency finalizes its regulations in the coming months.

Bridging the Gap

Despite the new CPRA obligations, covered employers may be able to execute their DEIA initiatives by (1) incorporating algorithmic bias training in the training programs required by the CCPA; and (2) relying upon existing legal requirements to collect certain sensitive human resource data.

Covered employers must ensure that all individuals responsible for privacy compliance or handling responses to data inquiries are informed of all requirements of the CCPA/CPRA, as applicable. This includes training on providing clear instructions on how to exercise data privacy rights. Covered employers are also required to establish, document, and comply with a training policy if they know, or reasonably should know, that they buy, receive for commercial purposes, sell, or share for commercial purposes the personal information of 10 million or more consumers (including Employees, post-2022) in a calendar year.

In connection with the requisite data privacy training, covered employers may educate trainees about the risks of algorithmic bias to promote DEIA and decrease discrimination risks within the organizational culture. Employers can remain compliant while actively promoting DEIA by training key privacy personnel about how artificial intelligence tools have resulted in discrimination in recruitment and other employment decisions. Suggested topics include the EEOC's recent initiatives highlighting the impact of algorithmic bias in perpetuating bias or creating discriminatory barriers to jobs; the FTC's ban on the sale or use of racially biased algorithms under the FTC Act; and California's Fair Employment and Housing Council's proposed regulations to limit an employer or covered entity's ability to use qualification standards, employment tests, algorithms, or other criteria that screen out or tend to screen out protected individuals or groups, unless job-related and consistent with business necessity.

Additionally, covered employers may collect diversity data points while remaining compliant by way of reliance on existing laws. For example, Title VII of the Civil Rights Act of 1967 requires employers with at least 100 employees to submit an EEO-1 report to the EEOC. The EEO-1 covers the racial/ethnic and gender composition of the employer's workforce by specific job categories. On the state level, private employers with 100 or more employees in California are required by California Government Code section 12999 to maintain and report employee pay data for specified job categories by gender, race and ethnicity. Covered employers with less than 100 employees should utilize anonymous self-reporting systems to obtain the requisite data points to inform policies and practices relating to DEIA initiatives. This can be implemented by surveying employees periodically, requesting updated profile information, and allowing employees to anonymously self-identify. No matter the method of data point procurement, employers

should conduct regular data mapping and proper algorithm audits. Proper implementation of mapping and audits will require stakeholder engagement, including developers, sales representatives, client managers, users, and policy makers.

The protection of personal information and prevention of discrimination should be a priority for all parties. Accordingly, employers should evaluate their privacy policies and practices to ensure both compliance and DEIA in the workplace. ■

Diane Byun (CIPP/US) is a data privacy and transactional associate with Reicker, Pfau, Pyle & McRoy LLP. Diane counsels companies on compliance issues relating to data privacy laws and regulations with a particular focus on the California Consumer Privacy Act (CCPA). Diane also supports companies on matters involving data mapping, legal analysis of data processing, and drafting privacy policies, and terms of service.

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The Federalist Society and Honest Services Fraud

By Robert M. Sanger

Robert M. Sanger

The October Term of the United States Supreme Court for 2022 will be interesting to say the least. Certainly, as discussed in prior *Criminal Justice* columns, there are subtle and not subtle indications that a good part of the Federalist Society doctrine is being enacted through judicial legislation.[1] It is a fact that the last administration made Federalist Society approval a litmus test for appointment to the federal bench. Although the Bush administration relied on Society affiliation, it was not until Trump that membership in the Society and obtaining the Society's imprimatur replaced the long tradition of merits-based evaluations by the American Bar Association.

Of course, the Supreme Court Justices have said that they will decide cases based on the law and not on political allegiances. The Chief Justice and Justice Barrett have made much of this in public statements.[2] However, by any account, this commitment to neutral principles is belied by the decisions of Court that track the doctrines of the Federalist Society and related organizations.

Unfortunately, in order to predict the Court's upcoming rulings, even in what should be fairly technical legal decisions, it is necessary to recognize the influence of these doctrines. The doctrines do not necessarily track traditional conservative or, for instance, libertarian, ideation but instead often appear to be more pragmatic than philosophical. This *Criminal Justice* column will address a grant of *certiorari* in a case that presents a technical legal issue but the result may be predicted more reliably in light of Federalist Society doctrine than jurisprudence.

The Federalist Society

The Federalist Society—its predecessor, the John Birch Society, and its collegial entities, the CATO Institute and the Heritage Foundation, as well as allied entities like the Chamber of Commerce and the National Rifle Association, and the donor class, such as the billionaire Koch brothers[3]—have an outsized influence on the direction of the federal bench and the Supreme Court. This influence far exceeds the legislative machinations of the prior administrations and that of the conservative leaders of the Senate. Following the Bush administrations, the Senate, both during the Obama Administration and during the presidency of Trump, stacked the federal judiciary by refusing to confirm qualified federal judicial nominees and by confirming an overwhelming number of nominees who had gained approval from the Federalist Society. Six of the current nine Supreme Court Justices are affiliated with the Federalist Society.

This is concerning since affiliation does not simply relate to a judicial philosophy. It is true that the Society had its origins at Yale and the University of Chicago in the 1980's where it promoted a judicial philosophy of originalism.[4] It was a convenient philosophy that could be used to push back on what were considered liberal protections for individual rights by the federal courts. In this same vein the Society was also opposed to "judicial activism." However, as the spokes-group for an amalgamation of right leaning ideas, the Society's current advocacy and the contorted use of originalism has taken the Court to one of the most judicially active terms in its history. The search for a coherent philosophy can obscure the amalgamated agenda that is at work.

Of course, behind the Federalist Society are some of the most dogmatic interests of the financial elites. The Koch family, with its roots in the John Birch Society, and other members of the donor class have exerted a hard right but pragmatic influence on legislation long before the takeover of the Supreme Court. The interests of the financial elites, as endorsed by the Federalist Society, are a priority among the Society's appointees to the Court. Voting rights cases, depriving individuals of the full power of their votes, is not a traditional conservative American value, but fits in with the Society's catering to the financial elites. The case of *New York State Rifle and Pistol Association v. Bruen*, decided June 23, 2022,[5] was a putative example of libertarianism and originalism but it was conjoined with longtime advocacy for unfettered gun rights by the financially and politically powerful NRA.

The most prominent and predictable outcome of this allegiance to the Federal Society by Supreme Court ap-

pointees was the *Dobbs* decision overturning *Roe v. Wade*.[6] *Dobbs* was an example of judicial activism and, contrary to traditional libertarian values, supported government intervention into individual rights. This outcome is more predictable understanding that the Federalist Society has made part of their hard right doctrine regressive Christian religious doctrine and has disproportionately supported conservative Catholic nominees.[7] While a Justice's religious views should not influence decisions, in the case of *Dobbs*, they unabashedly did.

In criminal law, with the exception of gun possession,[8] the Court has been extremely hard on criminal defendants. This includes excluding consideration of actual innocence in death penalty cases such as *Martinez Ramirez*[9] not only through opinions but through denials of *certiorari*. In criminal law and procedure the government generally wins over the interests of the individual. Whatever libertarian values might otherwise dictate government restraint, when it comes to the government protecting well being and property of the entitled from marginalized individuals, the government prevails.[10]

In other cases involving the government vs. the individual, the individual loses, such as removal of Equal Protection arguments on behalf of non-citizens and the reversal of Due Process protections relating to privacy and interpersonal relations (except, perhaps, interracial marriage).[11] Despite the purported libertarian philosophy of restricting government interference with personal life, these cases tend to favor government power, albeit power that is less likely to affect the financial elite. On the other hand, where government power seeks to regulate business and political practices, the libertarian arguments tend to dominate and the individual—generally the individual of privilege—has a chance to prevail against the government.

In light of this, a prediction that an individual convicted of crime may have a chance for reversal by the Court seems to be contrary to the trend. However, there may be a doctrinal explanation based on Federalist Society inclinations regarding one case where certiorari has been granted.

Defrauding Honest Services

The fact is that the Court has been willing to allow individuals (admittedly individuals among the financial elite) to prevail over the government in criminal prosecutions under the wire-fraud and mail-fraud statutes.[12] It turns out that the Federalist Society, CATO institute and Chamber of Commerce have disdain for the use of these statutes to prosecute business men and women in big business or political schemes. This is not something new. The over-criminalization of federal law has long been a focus of the Society's and the CATO Institute's law reform advocacy which has in some cases gained the support of the more liberal criminal defense organizations. These business practices or political influence prosecutions, often under the mail-fraud/wire-fraud codes sections in the United States Code, have long been the bane of the financial elite.

In particular, the "honest services" theory of mail or wire fraud has been criticized as intruding on business or political practices that may be fraudulent but do not otherwise come within federal law. Such prosecutions have been cut back by the Supreme Court in earlier terms including cases involving the Enron fraud cases.[13] Other than these sorts of cases, the Supreme Court has not seemed particularly concerned about the rights of criminal defendants

With that in mind, the grant of certiorari in an otherwise obscure case, *Percoco v. United States* (granted June 20, 2022; decision below 13 F.4th 180) may be a case in which the Court rules for the individual defendant while giving the Court the opportunity to push further back on honest services fraud prosecutions. The question presented in *Percoco* is:

Does a private citizen who holds no elected office or government employment, but has informal political or other influence over governmental decisionmaking, owe a fiduciary duty to the general public such that he can be convicted of honest-services fraud?

From a criminal defense standpoint, it should be fundamental that prosecutions only occur for violations of law which are clearly promulgated by statutes which, in turn, clearly proscribe the conduct to be punished. We have argued in federal court that fraud requires an actual deprivation of property and, in bribery cases, a *quid pro quo*. Although remnants of honest services fraud remain, we argue that honest services is too ambiguous to survive a void for vagueness argument. Therefore, from a criminal defense and constitutional standpoint, the fact that the Court has granted *certiorari* in this case seems appropriate. What is fascinating is that the likely reason the Court is affording itself an opportunity to vindicate the rights of the individual over government in the *Percoco* case is that it fits neatly into the Society's agenda to restrain the government from prosecuting financial elites in business and political transactions.

The *Percoco* case involves the conviction of the named petitioner for wire fraud, 18 U.S.C. 1343, under the federal honest-services fraud statute, 18 U.S.C. 1346, in a conspiracy with other defendants. The theory of the prosecution is that Percoco at the time of the transactions was a lobbyist although he had been the former Executive Deputy Secretary in the New York Governor's office. At the time of the transaction he was managing the Governor's campaign for re-election and was considering returning to the Governor's office after the election. However, at the time he was paid $35,000 to intercede in a pending matter regarding a state contract, he was not a government employee.

Therefore, since Percoco was not employed by government at the moment, this was not a traditional act of bribing a public official – a *quid pro quo*. Instead, the final jury instructions asked whether Percoco "dominated and controlled any governmental business" and whether "people working in the government actually relied on him." (Pet. for *cert*. p. 7.) Thus, this went beyond the *McDonnell* requirement that an official act under the federal bribery law must involve a "formal exercise of governmental power."[14]

Percoco should be argued and decided in the October 2022 Term. Based on the doctrinal position of the Federalist Society and CATO Institute, the prediction of this author is that the defendant will receive relief. From a criminal and constitutional law perspective, this would be the right decision since it would prevent abuse of discretion by the government in prosecuting under an unclear law. Yet, the result is more predictable based on Federalist Society and CATO Institute positions and on a concern for the rights of the financial elite than it is based on a philosophy of protecting the rights of all individuals against the exercise of unfettered power of the government.

Politically, the case would be a win for an operative in the circle of then Governor Cuomo. It is hard to miss, however, that it would redound to the benefit of the recent political operatives of the past administration who received sums of money for political influence in between, before or after their official government service.

Conclusion

Technical as this may be, a ruling for Mr. Percoco would have a significant effect on lobbying and business dealings among the business and political financial elite. It nevertheless may be the right ruling jurisprudentially requiring that elements of an offense be clearly promulgated. Due process is a good thing. On the other hand, the Supreme Court is

content to hold that other more marginalized individuals like Mr. Ramirez Martinez, may still face execution for crimes they did not commit. ■

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.

Endnotes

1 As set forth below, the doctrine is that of the Federalist Society which is heavily influenced by the CATO Institute, the Heritage Foundation, the United States Chamber of Commerce, the National Rifle Association and the donor class.

2 For instance, Justice Barrett during said in a speech that she was an originalist but that the Supreme Court was "not comprised of a bunch of partisan hacks." Mary Ramsey, "Justice Amy Coney Barrett argues Supreme Court isn't 'a bunch of partisan hacks,'" USA TODAY (Sept. 21, 2021).

3 For a concise history of the fractured activist right coalescing in the influence of the Federalist Society on the federal judiciary, see, Gareth Fowler, "Divided Conservatism in the United States," MOBILIZATION OF CONSERVATIVE CIVIL SOCIETY, Carnegie Endowment for International Peace (2018).

4 See an earlier history of the Federalist Society and its influence on federal litigation: Nancy Scherer and Banks Miller, The Federalist Society's Influence on the Federal Judiciary, 62 POLITICAL RESEARCH QUARTERLY 366-378 (2009).

5 New York State Rifle and Pistol Association v. Bruen, __U.S.__ (June 23, 2022)

6 Dobbs v. Jackson Women's Health Organization, 597 U.S. __ (2022), overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v Casey, 505 U.S. 833 (1992).

7 Five of the six conservative appointees to the Supreme Court are conservative Catholics and the sixth, Justice Gorsuch, is a conservative Episcopalian.

8 See, District of Columbia v. Heller, 540 U.S. 570 (2008) and Bruen, supra.

9 Shinn v. Martinez Ramirez, __U.S.__(May 25, 2022).

10 United States v. Vaello Madero (595 U.S. __, (April 21, 2022).

11 See the Criminal Justice column in the SANTA BARBARA LAWYER MAGAZINE for June and July 2022.

12 Going back to McNally v. United States, 483 U.S. 350 (1987),

13 Skilling v. United States, 561 U.S. 358 (2010); also see, McDonnell v. United States, 136 S. Ct. 2355 (2016), and Kelly v. United States, 140 S. Ct. 1565 (2020).

14 McDonnell, 136 S. Ct. at 2371-72.

Divorce Coaching—Bridging the Emotional and Legal Realities of Divorce

By Erin Schaden and Erin Parks

Erin Schaden

Erin Parks

Besides sounding like the last thing on earth you would ever want to need, what is a Divorce Coach and why are they essential? Some of you may be wondering: is a Divorce Coach even a thing? You may also be thinking that a Divorce Coach sounds like a new age thing that is ill defined, costs a lot of money, and is not likely to yield any definable results? Or, you might be thinking, a family law attorney is good enough—right? Not right! Divorce coaching done well can save divorcees thousands of dollars (not including the emotional currency that is expended in the best of divorces) and save attorneys the agony of bridging the emotional and legal realities of divorce.

Attorneys, like all professions, have skill sets. They are trained to make good arguments, conduct legal research, draft persuasive pleadings, and appear in court to right injustice. And in most practice areas, that skill set is enough. Generally, an attorney is a tactician that does not need to have a wonderful desk side manner. A client does not have to like his or her attorney; they hire the attorney to get a specific job done.

Family law is completely different. While representing someone in a divorce case, an attorney comes to know the client's intimate secrets: sexual practices; use (or not) of contraception; venereal diseases contracted and/or given; and whether they like expensive call girls or have a penchant for Craigslist hookers. Family law attorneys know where their clients spend their money, how much they spend and where they try to hide it. They learn how their clients parent their children; where they went (or did not go) on vacation; and whether they celebrate Christmas—at all, or on Christmas Eve, or Christmas morning.

Most family law attorneys are not prepared for the depth of emotional entanglement that comes with the practice of family law. Even the best family law practitioners will tell you that the part of their job that they dread the most is dealing with the client's emotional reality in the stark and sometimes unforgiving light of a courtroom. Family law litigators are dealing with the messy disaster where hard feelings, resentments, and anger abound.

Clients bring "emotional facts" to their family law attorney and expect them to magically turn those "emotional facts" into evidence to prove that they are right, and the other side is woefully wrong. Emotional reality drives all their behavior. It influences all decisions. It alters every thought. The emotional reality for each client is different since it is impacted by their use of substances, level of resilience, past traumas, and willingness to see their part in the marital implosion.

Let us look at an example of how emotional facts are exchanged between a client and a family law attorney:

> Client: "My ex is practically living with his girlfriend."
>
> Attorney: "How do you know that?" "Who could verify that information?" "Where did you get that information?" "When was the last time you saw your ex with his girlfriend?" "What did you do to obtain that information?"
>
> Client: "I KNOW it because his car wasn't in his driveway last night and he isn't on a work trip." "I AM VERIFYING THAT INFORMATION FOR YOU RIGHT NOW!" "I got the information from my old next-door neighbor. She hates him." "I have never met the girlfriend but everyone around town sees them together all the time." "I climbed over the fence after he left for work and put a video camera on the window ledge…it is my house too—community property—so I am sure that this is totally legal!"

To those who love and live with a family law attorney, the above dialogue makes your beloved litigator return home weary, ragged, and irritable at the end of the day. And, not just one client, in one case, on one day—it is most of their clients and cases, day in, day out.

There is a real, deep, and ever shifting gap between a divorcing client's emotional reality and the more fixed and unmovable legal reality. A family law attorney must deal with both if they ever hope to get the case concluded with their sanity intact. So, are people who litigate their divorces just harder than most to deal with? Are they crazier? Are they bigger messes? The answer is sometimes…and all the time.

Family law attorneys are dealing with people whose lives have just imploded. Every part of their life has just been addressed in real time: where they live, how and when they parent, how much and what access they have to their finances, where they worship, their ability to do their job, provide for themselves, their emotional and physical health and that of their children, and where they are going to find the money to pay for lawyers.

Boom! Overnight all that soon-to-be divorcees knew and held dear is now up for grabs, and they take all that personal information into dedicated family law professionals and spew all of it on the conference room table. They divulge so that their attorney can help them pick up the pieces and make sense out of the implosion. They want their attorney to help put their lives back together again.

Alas, most family law attorneys are not therapists. They are attorneys and attorneys tend to be logical people. Attorneys begin to explain the process to the often shell-shocked client. Most attorneys do it succinctly and patiently…the first twelve times. Then even the best attorneys tend to lose compassion, patience, and willingness to have the conversation with the client daily or, sometimes hourly. Clients become critical when asked to pay attorneys to provide them the same advice repeatedly, despite the fact they need the repetition for the new reality to really sink in.

It is here that family law attorneys get stuck in the gap with clients. They find themselves long involved in the divorce process only to learn that their client was not ready for and could not fathom or process the legal reality of their legal advice. It is right before this jumping off place, that a Certified Divorce Coach becomes the best asset for attorney and client alike. The best Certified Divorce Coach will also be an ex-family law litigator who knows the ropes and job of an attorney but can sit at the table wearing a different hat. A Certified Divorce Coach who has an attorney's knowledge of the court system proves invaluable to clients and attorneys alike.

When a client walks into a family law office for a consultation, that client has a legal reality and an emotional reality. The attorney spends the first part of the case learning issues such as community property versus separate property; the respective incomes of the parties; their marital standard of living; and how many children are in play. The attorneys can really do little to move the case along until the basic "facts" of the marriage are known and ascertained. Once the marital facts are known, the legal reality is often quite simple. The scale may move a little this way or that way, but in the end the law is the law and unless we are talking custody…or crazy assets to divide, in short order, the attorneys can begin to divvy up what was once the marriage.

The legal reality should be what drives the divorce case, but it really does not. The emotional reality does. And it always will. Therefore, there must be a coordinated mechanism for working with family law clients to assist them in getting their legal and emotional reality somewhere in the same zip code.

This is where a Divorce Coach meets the client. Right there in the messy thick of it. The Divorce Coach can see the client's divorce story long before the client even knows they have a divorce story. The work of a divorce coach is to help the client begin a process to adjust their emotional realities so that they have some prayer of comporting with the legal reality down the line. Without this strategic and structured plan, family law attorneys and clients end up dissatisfied and often disconnected.

Employing a Divorce Coach partners the client with someone (at a much lower billable hourly rate) to be the person's confidant, support, and partner as they weather the often stormy and foul weather a divorce endures. Divorce Coaches can use a variety of concepts and strategies to help clients become dislodged from riveted thinking. Shifted from their wrong and right binary positions to a forward reality that allows for shades of gray. That is why couples separate in the first place, for a new and better reality. And, if the client is the one being left behind, they really need someone to help them see that their new reality, while not what they would choose, is something that can be used for their benefit.

Divorce coaching is not therapy, advising or even really informing. Divorce Coaches do not go back into a client's distant, or maybe not so distant, emotional past. Divorce coaching is not meant to show the client where they were wrong or right or justified or completely insane. The Divorce coach meets the client where they are - emotionally - wherever that might be. And helps the client begin to sort through the collateral, and not so collateral damage while the lawyers move the case along toward the ultimate

resolution. Divorce coaching gives the client a confidant to walk down the path of divorce. A person who can be a cheerleader, teller of truth, provider of alternative perspective, support, and clear thinking.

Divorce coaches ease clients through the process. They explain in a relaxed manner the things that need to be repeated, repeatedly. Coaches, coach. They help clients ferret out what they want given their new reality. And they do so to help the client achieve a sense of stability, control, and manageability during instability.

Divorce Coaches are the bridge between counsel and client. A place where the client's messy, often illogical emotions can be brought into line with the attorney's factual and legal reality.

The beauty of Divorce Coaching is that it can be tailored to the client. Some clients have weekly appointments to sort through the hurdles; some need daily coaching. For others, it is a periodic thing, on an as needed basis. Regardless of the schedule, it is a stable place for the client to return to even after the worst has come and gone. A Divorce Coach can help the client navigate the choppy and stormy seas of divorce to assist the client as they land on new post-divorce shores. But the Divorce Coach / Client relationship need not stop there. After the divorce is over, the Divorce Coach can continue to coach the client for years to come on all kinds of things: parenting disputes, communication issues, or just life on life's own terms. Divorce Coaches help people by providing a strategic thinking partner. Someone to unpack and repack the attendant baggage whether that baggage be from a divorce or some other life event.

Divorce Coaches are likewise invaluable to the legal team. A Divorce Coach can assist a family law attorney in better seeing the case from the client's perspective and help alleviate some of the emotional heavy lifting that is so taxing. Divorce Coaches pave the way to better attorney-client relations by speaking the language of both client and attorney as it is their job to see the case from all perspectives. ■

Erin Schaden is a former family law attorney, writer/blogger, turned Divorce Coach and mediator at Lotus Coaching & Mediation. She can be contacted at (805)758-8445, www.lotuscoachingandmediation.com or erineschaden@hotmail.com.

Erin Parks is an Officer of the Santa Barbara County Bar Association and a solo practitioner emphasizing Trust and Estates, Employment, and Immigration Law. Ms. Parks can be seen at www.erinparks.com and contacted at law@erinparks.com.

The SBCBA Real Estate and Land Use Section Presents:

Trusts, Estates & Entities: Navigating Income & Assets in Residential Lending

When:
October 4, 2022 at Noon

Where:
Santa Barbara College of Law

MCLE:
1.00 Hour

Speaker:
Austin Lampson - Branch Manager, Licensed Mortgage Professional at Homeowners Financial Group
About the Event:
This course will educate attorneys on how residential underwriting treats income, liabilities and assets from or in trusts, estates and entities, and how best to navigate these considerations during the loan process.

Cost:
$15 Members/$25 Non-Members

Contact Information/RSVP:
Please contact Joe Billings at jbillings@aklaw.net or Marietta Jablonka at sblawdirector@gmail.com

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a statewide 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.

UCSB Mock Trial Executive Board

The Executive Board for the University of California, Santa Barbara Mock Trial Team cordially invites you to help host or judge a round of competitive college Mock Trial.

In its brief history, the UCSB undergraduate trial team has become a nationally ranked program, competing and placing at the National Championship tournament for the last two years. As a completely student-run and self-funded organization, they rely on support from our Santa Barbara community to keep us going.

Judging a round at our tournament means that you can either score or preside, contributing your experience in the legal field to a group of college students interested in pursuing a similar career. This small message serves as a call to all law students, lawyers, judges, and people with past mock trial experience in and around Santa Barbara. From November 5th-6th, UC Santa Barbara Mock Trial will be hosting its seventh annual mock trial tournament, ***Mocktopia VII***.

If you'd like to judge this tournament, or you would like to help them fundraise for their competitive season, please reach out at mocktopiaucsb@gmail.com.

Amruta Baradwaj, President
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Executive Board
University of California, Santa Barbara

The Santa Barbara County Bar Association and its membership send their heartfelt congratulations to our newest Judge to serve on the bench. On September 1st, in Courtroom one, Carol Hubner went from Commissioner Hubner to the Honorable Judge Hubner as she was sworn in by the Honorable Judge Gustavo Lavayen.

We wish you the utmost continued success, happiness and good health as you begin a new phase in service to the people of Santa Barbara County.

SAVE THE DATE!

The Santa Barbara County Bar Association is excited to announce that the Annual Dinner is back!

Thursday, December 1, 2022
El Paseo Restaurant

Great food, Photo Booth, Silent Auction and more!

You do not want to miss this amazing event honoring our legal community

Sponsorship opportunities available:
contact Marietta Jablonka at sblawdirector@gmail.com

Stay tuned for more information

Verdicts & Decisions

Jeff Arlington and Sonia Arlington v County of Santa Barbara and Mark Valencia

SANTA BARBARA SUPERIOR COURT, ANACAPA

CASE NUMBER:	20CV03438
TYPE OF CASE:	False arrest, battery by a peace officer, Bane act, negligence, loss of consortium
TYPE OF PROCEEDING:	Jury
JUDGE:	Thomas P. Anderle
LENGTH OF TRIAL:	3 weeks
LENGTH OF DELIBERATIONS:	1 week
DATE OF VERDICT OR DECISION:	August 19, 2022
PLAINTIFF:	Jeff Arlington and Sonia Arlington
PLAINTIFF'S COUNSEL:	Bradley C. Gage, Wayne Smith of Goldberg & Gage (Pre-Trial Law Offices of Christian Bosuel)
DEFENDANT:	County of Santa Barbara and Mark Valencia
DEFENDANT'S COUNSEL:	Barbara Carroll, Christopher Dawood and Julius Abanise, County Counsel
EXPERTS:	Craig Hunter, Police Practices and Williams Stetson, M.D. Orthopedist for Plaintiff. Defendants had Greg Meyer, Police Practices, Matthew Pifer, Orthopedist.

OVERVIEW OF CASE: Civil rights – broken leg

FACTS AND CONTENTIONS: Jeff Arlington was drinking at his home while working on his car. He poured gasoline on the engine and it caught fire. Mr. Arlington used the garden hose to douse the flames while a passer-by called 9-1-1. The Fire Department arrived and finished putting the fire out. The firefighters claimed Mr. Arlington was aggressive and was interfering with their ability to investigate the cause and origin of the fire, and they requested law enforcement support. After the Sheriff's Deputy arrived, Mr. Arlington became agitated with the Fire Captain and moved to confront him. The Sheriff's Deputy ordered Mr. Arlington to turn around. Mr. Arlington ignored the orders and the Sheriff's Deputy took him to the ground. Mr. Arlington's leg was broken. Plaintiffs claimed civil rights violations (Bane Act), unlawful arrest, unreasonable force and negligence; defendants denied the allegations and contend the use of force was reasonable, the arrest was lawful, there was no negligence, that Mr. Arlington was negligent, and that Mr. Arlington's civil rights were not violated.

Mr. Arlington died shortly before trial due to complications from his alcoholism; his non-economic damages abated. In addition to the broken tibia, Mr. Arlington experienced an exacerbation of a pre-existing rotator cuff tear. The testimony from the treating physicians and medical experts was that he had reached optimal healing 3.5 months post-incident.

SUMMARY OF CLAIMED DAMAGES: The parties stipulated that if liability was found, Mr. Arlington's special dam-

ages were $3,400. Plaintiff's argued for $3,000,000-$5,000,000 for Mrs. Arlington loss of consortium claim. Plaintiffs also requested punitive damages.

SUMMARY OF SETTLEMENT DISCUSSIONS: Sonia Arlington offered to settle via CCP 998 for $19,000. Jeff Arlington sent a CCP 998 for $100,000.Defendants offered Jeffrey Arlington $5,000 and Sonia Arlington $5,000, both by CCP 998.

RESULT: The jury found for plaintiff on the battery by a peace officer claim (9-3), unlawful arrest (9-3), negligence (9-3) and loss of consortium (11-1). The jury found for defendants on the Bane Act (0-12), punitive damages (0-12) and the negligence of Jeffrey Arlington (1-11). Jury awarded $300,000 for loss of consortium and Jeff Arlington received the stipulated $3,400 of damages.

Elba Santibanez v. Betty Mae Flesher

SANTA BARBARA SUPERIOR COURT, DEPARTMENT 3

CASE NUMBER:	20CV02091
TYPE OF CASE:	Motor vehicle accident
TYPE OF PROCEEDING:	Jury
JUDGE:	Thomas Anderle
LENGTH OF TRIAL:	6 days
LENGTH OF DELIBERATIONS:	4 ½ hours
DATE OF VERDICT OR DECISION:	September 6, 2022
PLAINTIFF:	Elba Santibanez
PLAINTIFF'S COUNSEL:	Anthony Kastenek & Evan Spano, Harris Personal Injury Lawyers
DEFENDANT:	Betty Mae Flesher
DEFENDANT'S COUNSEL:	Collette Asel, Mark R. Weiner & Associates
INSURANCE CARRIER, IF ANY:	State Farm
PLAINTIFF'S EXPERTS:	Alan Moelleken, MD (Orthopedic Surgeon/Treating Doctor) Christopher Birch, MD (Orthopedic Surgeon/Operating Surgeon)
DEFENSE EXPERTS:	Tony Feuerman, MD (Neurosurgeon) Brian Bashner, MD (Orthopedic Surgeon) Isaak Ikram (Accident Reconstructionist)

OVERVIEW OF CASE: On February 22, 2019 plaintiff was turning her Nissan Pathfinder right onto the US 101 Southbound at Storke Road when defendant's Honda Civic struck the back rear of plaintiff's Pathfinder, causing it to spin 180 degrees.

FACTS AND CONTENTIONS: Plaintiff made claims of injuries to her low back and left hip.

Defendant accepted liability for the crash but disputed the nature and extent of her injuries. Specifically, Defendant contended there was no evidence of acute trauma to her low back and that any low back pain should have resolved within 1-2 months. Regarding the hip, Defendant claimed the injuries were degenerative in nature. Defendant also claimed that prior to the Incident, Plaintiff's primary care doctors were misdiagnosing her degenerative hip as diverticulitis (a gastro-intestinal issue).

SUMMARY OF CLAIMED DAMAGES: Plaintiff received medical treatment from a variety of health care providers, including urgent care, chiropractic, orthopedic, pain management, imaging, surgery, and physical therapy.

For her low back, Plaintiff received a low back PRP injection in July 2019 and another one in September 2020.

For her left hip, Dr. Amit Nathani, M.D. recommended a total hip replacement and administered a hip PRP injection. On April 14, 2021, plaintiff sought a second opinion from Christopher Birch, M.D. at Alta Orthopedics who also recommended hip replacement surgery that he performed on May 24, 2021. Plaintiff then underwent physical therapy at SB Physio. Plaintiff's medical bills totaled $173,760.29.

SUMMARY OF SETTLEMENT DISCUSSIONS: Plaintiff made a $187,817.90 settlement demand before filing her lawsuit. Defendant responded with a $13,670 offer.

On November 19, 2021 plaintiff served a $99,000 section "998" offer. On December 15, Defendant served a $25,000 "998" offer. Defendant tried to serve a subsequent "998" for $50,000.00, but it was untimely served.

RESULT: The jury, by a vote of 11 to 1, awarded plaintiff $125,000 in past medical expenses and $122,000 in future medical expenses. By a vote of 9 to 3, the jury awarded $100,000 in past noneconomic damages and $8,000 in future non-economic damages.

Plaintiff anticipates recovering approximately $80,000.00 in recoverable costs and approximately $30,000.00 in interest after receiving a verdict for more than her $99,000.00 "998" offer.

Santa Barbara Lawyer seeks editorial submissions.

Articles should be 700 to 3,500 words in length.

Articles should be submitted in Word format, including a short biography of the author. A high resolution photo of the author is desired.

Please submit articles by the 8th of the month for publication in the following month's issue. The editorial board of *Santa Barbara Lawyer* reserves the right to edit for accurateness and clarity, or reject any submission if it does not meet magazine guidelines.

Please submit articles to Michelle Roberson at michelle@sierrapropsb.com.

Motions

MULLEN & HENZELL is pleased to announce the following attorneys have joined our Firm since fall of 2021:

Delaney Moore joined the firm in September 2021 as an Associate in Labor & Employment Group. Her practice focuses on representing employers in a variety of employment matters including wrongful termination, discrimination and harassment, and compliance with wage and hour laws. **Celia Rosas** joined the firm in February as an associate in the Litigation Department. Her practice is focused on general litigation matters, including complex commercial litigation, landlord-tenant disputes and discrimination. **Heather Minter** joined the firm in February as an Associate in the Estate Planning Group. Her practice focuses on trust administration, conservatorships, post death administration, estate and trust litigation. **Cameron Stowers** joined the firm in March as an Associate in the Business & Real Estate Group. His practice guides clients through legal requirements of newly formed corporations, counsel for day-to-day operations; also trained in trademark prosecution and related applications. **Joseph Pulverman** joined the firm in March as an Associate in Estate Planning Group. His practice is focuses on estate planning and trust and estate administration. **Andrew Cox** joined the firm in June as an Associate in the Litigation Group. His practice is focused on general litigation matters.

Erin Schaden

Erin Schaden has been a family law attorney for 27 years. She became a certified Divorce Coach in 2019 and worked for local family law attorneys for the last 7 years. In April 2022, Erin launched her own firm, **Lotus Coaching & Mediation**. Based in Ojai, Erin assists divorcees and attorneys alike to take a case from start to finish while bolstering the relationship between attorney and client. Her goal is to help the client's emotional reality to come into line with their legal reality and provide a safety valve for the hard emotions that are attendant to the divorce process.

Erin has found that the use of a Divorce Coach is essential to a family law practice and allows firms to provide a level of care to their clients that is not possible when a Divorce Coach is not in the equation. That is Erin's mission - to ensure that the whole client is represented.

At Lotus Coaching & Mediation, Erin partners with clients in a thought-provoking and creative process that inspires them to maximize their personal potential. Her service as a professional Divorce Coach focuses on an individual client's life as it relates to goal setting, outcome creating, and personal change management while mired in the process of divorce. Her Divorce Coaching practice is aimed at individual-initiated change in pursuit of specific actionable outcomes. These outcomes are linked to personal success as the client moves through the divorce process. Erin coaches clients to move them forward and change perspective from past wrongs to future success. This process coupled with professional legal counsel allows the client to meaningfully participate in the process and begin to heal long before the divorce is final.

* * *

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

SANTA BARBARA CITY ATTORNEY'S OFFICE SEEKS DEPUTY CITY ATTORNEY/ ASSISTANT CITY ATTORNEY I

Entry level position for an attorney with a strong interest and commitment to public law and litigation. For more details please visit: https://www.governmentjobs.com/careers/santabarbara or http://www.santabarbaraca.gov

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.

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Available 9/1/22. Centrally located in the Monterey Building, an historic adobe (fully upgraded in 2014) with a quiet interior courtyard with fountain, beautiful exterior landscaping. central air/heat, hardwood floors, gas fireplace, exterior balcony, and views. Main entry through a well-appointed reception area, with a separate private entrance. Photos and floor plan available upon request – about 300 sq.ft. usable.

Suite is shared with a business/ transactional/ tax attorney, and includes 4 4-ft. lateral files and overhead storage in reception. A short walk to the Courthouse, County Building, numerous banks, and State Street. City Lot 8 parking is located directly behind the building, with other city lots available nearby with monthly parking. Referrals possible depending on your availability, specialties and experience.

$1,500 for rent plus 1/3 share of cable internet, security system, bottled water service and janitorial (currently $125/ month) - $1,625 total. Contact at 805-963-1120 or rwo@transdental.com.

MULLEN & HENZELL HIRING ASSOCIATES

• ESTATE PLANNING ASSOCIATE 3-5 YEARS: Join our estate and wealth planning department. Work on sophisticated estate plans, conservatorships, post death probate and trust administrations.

• LABOR & EMPLOYMENT ASSOCIATE 1-5 YEARS: Join our labor and employment practice. Work on employment contract disputes, wage and hour, wrongful termination, discrimination, harassment and litigation matters.

Hiring for Santa Barbara office. Option to work in Ventura or Solvang office if you reside near those communities. Must be current member CA Bar.

Send resume and cover letter to Jared Green, Recruiting Partner: Recruit@mullenlaw.com (re EP, LIT or L&E). Visit us online for more information: www.mullenlaw.com.

CONTRACT ATTORNEY AVAILABLE

Meghan Dohoney: Contract Attorney Available for Legal Research/Writing. Freelance attorney in Oxnard available to provide legal research and writing services to other attorneys on a project-by-project basis. Former judicial law clerk to federal judge in San Diego for three years. Licensed in California. For more information, please visit www.meghandohoney.com.

ESTATE PLANNING ASSOCIATE SOUGHT

Price, Postel & Parma LLP, a long-standing law firm in Santa Barbara with roots dating back to 1852, is seeking an associate attorney with superior credentials to practice in our trusts and estates department. We are looking for a candidate with 3-7 years of significant experience in the area of trusts and estates. This is a full-time position in our Santa Barbara office. Candidates must be a member of the California State Bar. The ideal candidate will have experience drafting revocable trusts, irrevocable trusts, wills and all other estate planning documents, in addition to experience working on post-death trust administrations, probates, and conservatorships. LL.M in Taxation or other significant tax background is preferred. The law partners in the trust and estates department walk alongside associates and guide them through all levels of estate planning, beginning with straightforward estate plans and working up to highly complex estate planning and trust administration matters. Our trust and estates team includes highly trained paralegals and legal assistants well versed in this area of law. If you are a qualified trusts and estates attorney interested in working in downtown Santa Barbara, please submit your resume to Ian Fisher, at ifisher@ppplaw.com or Kristen Blabey, at kblabey@ppplaw.com.

LITIGATION ASSOCIATE POSITION

Rogers, Sheffield and Campbell, LLP, a Santa Barbara-based law firm, seeks to hire an associate attorney to bolster its busy litigation practice. Ideal candidates will have: (i) 3-5 years of experience, including experience dealing with landlord-tenant disputes and other real estate matters, (ii) excellent academic credentials and interpersonal skills, and (iii) graduated from a top-tier law school. Candidates must be licensed to practice law in California. Interested candidates should send their resume and cover letter to Reception@ rogerssheffield.com.

Professional office building in downtown Santa Barbara with individual offices available for lease on a gross basis ranging from $500 to $1,500 per month. Fully furnished options are available.

This building is located two blocks from the Courthouse and offers shared use of all amenities including a live receptionist, Class A conference room, two additional meeting rooms, kitchenette, elevator, full cost accounting, and a copy room which features a high-speed color copier with fax and scan capabilities. On-site parking is available for an additional fee.

Please contact Jeanette Hudgens
Cell 805.729.2603

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matthew@moorefamlaw.com

Bench & Bar Relations:
Richard Lloyd (805) 564-2444
RLloyd@cappellonoel.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@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

Real Property/Land Use
Joe Billings (805) 963-8611
jbillings@aklaw.net

Taxation
Peter Muzinich (805) 966-2440
pmuzinich@gmail.com
Cindy Brittain (323) 648-4657
cbrittain@karlinpeebles.com

October

2022

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4 SBCBA **MCLE**: Real Estate & Land Use Yom Kippur	5 SBWL **MCLE**: 2022 Online MCLE Series Advocacy & Charging Forward	6	7	8
9	10	11 SBWL Present: 2022 Awards Ceremony	12	13	14	15
16	17	18	19	20	21	22
23 National Paralegal Day	24	25	26	27	28	29
30	31 Halloween					

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.

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Fresno, CA 93711

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