

Santa Barbara Lawyer

Official Publication of the Santa Barbara County Bar Association
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SBCBA Past Presidents' Luncheon Welcomes New Admittees to the Bar

*Inside: 2022 SBCBA Award Recipients / 2022 Past Presidents'
Luncheon—Back in Person! / Selling a Business Without a Lender /
Lawyer Advertising and Solicitation in the Criminal Arena*



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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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Articles

- 7 Letter from the Editor, *Michelle E. Roberson*
- 8 2022 SBCBA Award Recipients, *Michelle E. Roberson*
- 10 2022 Past Presidents' Luncheon—Back in Person!
Eric Berg, 2022 SBCBA President
- 16 Selling a Business Without a Lender, *Robert W. Olson Jr.*
- 18 Lawyer Advertising and Solicitation in the Criminal
Arena, *Robert M. Sanger*

Sections

- 24 Section Notice
- 28 Verdicts & Decisions
- 31 Motions
- 32 Classifieds
- 34 Calendar

On the Cover

Past Presidents' Luncheon new admittees to the Bar. Photo by Mike Lyons.

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Letter from the Editor

By MICHELLE E. ROBERSON

A year ago, I did not think I would be able to take on the monumental task of putting together this publication monthly. As the CEO of two corporations, I am fortunate to have employees that keep the businesses operational, but sometimes it is a daunting feeling knowing they rely on my leadership as much as I rely on their expertise.

Yet, I find it my duty to also give back to my community by volunteering my time. But between the lecture circuit, the various boards I sit on, committee commitments, kids... it did not seem possible.

Yet here we are, 11 issues in: it has been both a rewarding experience and a great honor to be the Editor of this magazine.

I must share with you, however, that this magazine is truly not possible without the help of our Graphic Designer Kathleen Baushke, our graphic artist with Baushke Graphic Arts. She has been with the magazine since before there was real software to put it together. Imagine, sheets of paper, scissors, and glue with Kathleen working away decades ago.

She is so plugged into our magazine that she probably

has earned her own *juris doctorate*. And, I don't say this only because of her eternal patience with me the last two months. She goes above and beyond for our magazine, adding titles that were missed during the editing process, text that should have been brought forth before submission, and gentle reminders that if we want to add a page, we have to have a multiplier.

As the theme this year has been thanking those in our community that volunteer their time, I have to also put to the forefront those that may also go unnoticed.

This year, we are also thrilled to be able to have an in-person Annual Dinner. We will celebrate more people that have given back to our community and get to see each other's smiles again. I so look forward to this as we welcome our incoming president, Jenn Duffy, and thank Eric Berg for his many years of service and leadership at the Santa Barbara County Bar Association. We appreciate your dedication and hard work, especially the last two years that have been fraught with change and uncertainty.

As my year as editor comes to a close, I look back with gratitude of being fortunate to be surrounded by such wonderful people in this beautiful town. Thank you, all. ■



Michelle E. Roberson

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2022 SBCBA Award Winners

BY MICHELLE E. ROBERSON

Each year, the SBCBA seeks out nominations to recognize individuals in our community. There are some years that awards are not issued as we hold very high standards when reviewing the nominations and seeking out. One year we had several as the nominations that came in were prolific!

This year, with Ian Elsenheimer taking lead on collecting the nominations, our Board selected our 2022 winners being honored at our Annual Dinner, the first held in-person since 2019.

Superior Court Judge Von Nguyen Deroian, 2022 John T. Rickard Judicial Service Award

This award honors one of our judges for excellence on the Bench and outstanding contributions to the judiciary and/or the local court system.

The Honorable Deroian has earned respect of the family bar first as a Family Court Commissioner. More, she is described as “a beacon of light that embodies the pursuit of excellence.” The contributions to the judiciary include, but are not limited to being the Criminal Supervising Judge and participation on the Executive Committee, the Appellate Division, the Domestic Violence Court Core Committee and the Court Construction Committee. Serving as a Trustee of the Colleges of Law, the Governor’s Central Cost Judicial Selection Advisory Committee, as well as the California Judge’s Association Diversity and Inclusivity Committee.



Judge Von Nguyen Deroian

Lol Sorenson, 2022 Jamie Forrest Raney Mentorship Award Recipient

This award honors an attorney who has made a significant difference in the careers of other attorneys through ongoing mentorship regarding professional growth, principals of professionalism, ethics, and law practice management, as did the late Jamie Forrest Raney.

Mr. Sorenson worked as a supervising attorney at Mullen & Henzell L.L.P., however, his reputation in the community is what distinguished him in the nomination process. Described by his peers as an excellent mentor, dedicated mediator, but above all, for having a keen ability of making sure you are not taking yourself too seriously.



Lol Sorenson

Special note: Robin Unander, 2021 Richard Abbe Humanitarian Award

Ms. Unander, previously featured in a former issue of the magazine, will also be recognized at this year’s 2022 Annual Dinner. This special award is given to an outstanding attorney or judge whose life, leadership and conduct exemplifies humanitarian principles. The award is named after an Associate Justice of the California Court of Appeal, Richard Abbe, who was widely recognized for his contributions to the State, family, environmental law, and for his commitment to humanitarian causes.



Robin Unander

We hope you will join us in honoring our award recipients at El Paseo on December 1, 2022. For more information about the Annual Dinner, see page 27 of this publication. ■



Santa Barbara
County Bar
Association

Santa Barbara County Bar Association 2022 Annual Dinner Sponsorship

The Santa Barbara County Bar Association will hold the Annual Dinner on December 1, 2022 at the El Paseo Restaurant. If you would like to be a sponsor for this awesome event please contact Marietta Jablonka at sblaw-director@gmail.com or 805-569-5511 to arrange payment and submit logo.

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Silver - \$ 750 2 tickets and recognition in the Santa Barbara Lawyer Magazine and eNewsletter

We are expecting this event to be well attended and hope you will consider being a sponsor!

2022 Past Presidents' Luncheon— Back in Person!

BY ERIC BERG, 2022 SBCBA PRESIDENT

In September 22, 2022, I had the honor of hosting the Bar Association's Annual Past Presidents' Luncheon at the University Club. This is the first time in the past three years that the Bar has been able to put on this annual event, and being able to be with one another in person was an overdue treat.

The Luncheon serves to introduce us to those newly-admitted attorneys who recently passed the Bar and are beginning their local practice. This is an especially meaningful event because it pairs each new admittee with a Past Bar President who introduces him or her to the legal community. Ten active and retired bench officers were also able to join us.

This year's event set an unofficial record by introducing fourteen new members of the Bar. Please join me in welcoming:

- Angela Greenspan
- Adam Carreljo
- Richard Lloyd
- Scott Jaske
- Joanne Nava
- Heather Minter
- Delaney Moore
- Ali Quudus
- Katie Mohun
- Maria Elosu
- Jack Ucciferri
- Fantasy Windsong
- Michael McNally
- Kacey Cook

For those of you who are ready to be "in person" again, the Bar will be hosting one final event this year when we have our Annual Dinner on December 1st at El Paseo Restaurant. We expect both a very meaningful and a very enjoyable event. Please join us. ■



Teresa Martinez; Marietta Jablonka, SBCBA Executive Director; Eric Berg, SBCBA President



Delaney Moore, Heather Minter, Hon. Thomas Anderle

See more photos beginning on page 12



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Scott Jaske, Joanne Nava, and SBCBA Past President Gerald Parent



Hon. Thomas Anderle, Delaney Moore, and Heather Minter





Naomi Dewey, Jack Uccferri



Jack Uccferri, Scott Jeske, Joanne Nava



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Selling a Business Without a Lender

BY ROBERT W. OLSON JR.

Given recent events, institutional lenders have tightened their underwriting requirements and increased interest rates for prospective buyers of small businesses. That situation isn't going away soon, and that puts prospective sellers in a difficult position. This is particularly true if the seller needs to sell quickly and the buyer doesn't have sufficient cash to buy the purchase price. If the buyer doesn't have sufficient cash or institutional lending sources to complete the purchase, the seller may have to consider one or a combination of the following alternatives.

Non-Institutional Buyer Financing. The buyer may have home equity to borrow against, or family members that can lend toward the purchase. The seller should always ask if either of these sources is available for the purchase price, before suggesting any of the below payment options.

Buyer Earn-In (Sweat Equity). If the seller is willing to stay on a while as a co-owner, the buyer can earn their way into full ownership by taking less pay than they would as an owner, with seller banking the excess for annual (or more frequent) payments, until the full purchase price is paid. From a tax perspective, it's crucial that the seller pay the buyer that banked excess as compensation, with the buyer paying most of that money back to the seller as a partial purchase price, with that back-and-forth transaction documented in writing. If not completed in this manner, and the parties just transfer a portion of the business without this formality, both parties will end up owing about twice as much in taxes than had they followed the recommended procedure.¹

Buyer Earn-Out (Share of Post-Sale Receipts). If the seller is unwilling to stay as a co-owner, or the buyer is unwilling to pay a fixed price due to concerns about post-sale business income, the seller can accept a certain percentage of the business' post-sale (gross) receipts as payment. For example, if the purchase price would have been 75% of the business' annual receipts, a typical arrangement would

be for the buyer to pay the seller 25% of the business' receipts monthly over the first 3 years post-sale.

This approach works well when the seller stays on as a co-owner, the business caters primarily to other businesses, or almost all customer payments are by credit card and electronic fund transfers that are reported to the IRS. Otherwise, this approach has significant downside risks. The seller who is no longer a co-owner leaves the buyer the ability to hide some of the business' cash flow. Also, businesses that cater to non-business customers risk significant underpayment, since those customers are not required to report their purchases of \$600 or more to the IRS, and cash or check payments may never hit the buyer's bank account.

A partial solution is for the seller to retain audit rights, to confirm the buyer's financial, sale and tax records over the applicable payment period. Also, the seller should never accept a percentage of "net" income or similar metric, since it is too easy for the buyer to reduce its net income with other forms of creative accounting.

Seller Financing. Institutional lenders have long-term experience, large underwriting and legal departments, and substantial loan portfolios, that reduce the lenders' overall risk of loss. The seller doesn't have the same ability to protect itself as does the institutional lender. Therefore, I view seller financing as an undesirable option. It only becomes acceptable when (a) the buyer can't get an institutional, family or home equity loan to pay the entire purchase price, and (b) the seller has to sell within a very short time period.

Precautions. A full cash buyout is almost always preferable to any form of financing. While there are tax advantages to using an "installment sale" to take payments over time, that approach tends to add an unacceptable level of risk that the purchase price won't be paid at all, especially if the seller is no longer actively involved in the business.² Therefore, if the seller needs to sell quickly, there may be no choice but to accept a Buyer Earn-Out or Seller Financing. In those cases, I strongly suggest that proper precautions are taken before finalizing that sale. These precautions include the following:



Robert W. Olson, Jr.

Investigate the Buyer. The seller needs to investigate out the buyer's financial status, business experience, and general reputation. A financial statement signed under penalty of perjury, state and county lien checks, confirmation of corporate and licensing status (as applicable), and a review of social media, on the buyer are required to help assure that the buyer is an acceptable credit risk.

Get a Substantial Down Payment. It's much harder for the buyer to walk away from a business if doing so sacrifices their own initial investment in the business. 20% or more is preferred, but even the greater of 5% or \$10,000 of the purchase price will help motivate the buyer to keep working the business, and keep making payments on its seller financing.

Get it in Writing. This should be obvious, but some people need to be reminded that, in a dispute, they can't prove the content of their agreement without a comprehensive written contract.

Record a 1st Position Lien. A security agreement, and a lien recorded with the Secretary of State and the County Recorder, creates a public record of that security interest and that a lien exists on the business assets. A pre-closing investigation of the buyer should show no pre-existing liens that would attach to the purchased business, since those liens would be superior to the seller's lien. If the seller has a 1st position lien, the buyer cannot sell the business or obtain other loans without paying off the seller's 1st position lien. If the buyer fails to pay the seller as required, the seller then can take back the business and retain all payments previously made on its loan.

Recalculate "No Interest" Loans. Many installment sales attempt to set the buyer's post-sale loan payments at a fixed amount per month at 0% interest. With certain exceptions, this approach is considered a "below market loan" with an "original issue discount" under state and federal tax law.^{3,4} As such, the seller is required to declare a minimum portion of their payments as interest income, and the buyer is entitled to deduct that same amount of interest income, based on the "applicable Federal rate" of interest ("AFR").⁵ It's easy to reverse engineer the loan principal, using the minimum AFR with a financial calculator, to fix this tax issue.

Get a Personal Guaranty. Corporations and LLCs can declare bankruptcy and leave the seller with no recourse at all. A personal guaranty is almost always a non-negotiable seller requirement.

Include a Reverse Non-Compete Agreement. Most business sale contracts require the seller to not compete with the buyer within the business' geographic area for a number of years. If the buyer fails to pay the loan and the seller takes the business back, the business isn't worth anything if the buyer just opens up the same type of business in the same area, and then siphons off all the customers that gave the original business its value. Therefore, the contract should include a "reverse" non-compete agreement on the buyer, if the buyer breaches its payment or other obligations under the contract, and the business needs to be taken back or sold to another buyer. ■

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

ENDNOTES

- 1 For details, please see my January 2021 article in Santa Barbara Lawyer, "Tax Ramifications of Sweat Equity in Professional Partnerships."
- 2 26 United States Code §453 and IRS Form 6252.
- 3 26 United States Code §7872.
- 4 18 California Code of Regulations §24271(e)(3); applies to California corporate sellers only.
- 5 26 United States Code §7872(e)(1)(A). The AFR is set monthly for short term, mid-term and long-term loans and can be found at <https://www.irs.gov/applicable-federal-rates>.



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Lawyer Advertising and Solicitation in the Criminal Arena

BY ROBERT M. SANGER

Some of us who are still around started practicing at a time when lawyer advertising was prohibited, before *Bates v. State Bar of Arizona* (1977) 433 U.S. 350. At that time, all lawyers and their firms, no matter how powerful or prestigious had the same type face in the Yellow Pages of the phone book where there were no box ads or ads of any sort for lawyers. There were, for lawyers, no newspaper or magazine ads or television commercials or infomercials. Lawyers were strictly prohibited from soliciting business directly by contacting potential clients or from having anyone do so on their behalf. Only one sign was allowed on the office door.

Many lawyers would long for those “good old days” and for many good reasons. The lawyers who, these days, advertise most aggressively are often good at marketing but often do not excel at practicing law. Frequently, the advertisements are misleading and the qualifications of the lawyers overstated. Even when the advertisements are accurate and the lawyers are competent, there may be unintended consequences of their solicitation efforts. There is something attractive about the nostalgia of quiet professionalism where new clients were referred by other lawyers or by prior clients based on demonstrated competence.

On the other hand, as in so many other regards, the “good old days” were not all that good. They were particularly bad for those aspiring within the profession who were otherwise marginalized. Notoriously, the profession failed to serve many people in need of lawyers whose cases were not attractive to the entrenched bar. And, that bar was almost exclusively a guild of white males. Prior to *Bates*, there is no question that there was a need for a paradigm shift to promote opportunity and diversity in the bar and to make more legal services accessible to more people.

But what a mess has ensued since *Bates*—and it is a mess that is getting more and more out of control. Direct solicitation and television and internet commercials abound to rake in potential clients for the purpose of suing businesses or, sometimes, to find claimants to obtain portions of existing settlements. Personal injury cases with their contingent fees provide a feeding ground for ambitious

lawyers. There are some benefits, and those lawyers would say that they are providing a service by making recoveries accessible to the underserved. There are lawyers who employ marketing techniques and maintain the highest ethical standards in representing each client. But, overall, it is a mess.

In the criminal arena, there has been a steady effort to gain clients by mass marketing involving easy targets like drunk driving arrestees or truck drivers with moving violations. Aside from puffing (or sometimes outright fraud) on web pages and using “jail mail” direct marketing solicitations, it has been more difficult to mass market major felony defense. However, in this *Criminal Justice* column we will look at some emerging predatory practices in the criminal arena that are targeting people in prison and the families of those people in an effort to get hired in those major felony cases.

Bates Review

The foundation of the constitutional right of lawyers to advertise is based on the concept of commercial free speech under the First Amendment. Of course, it was not clear that the First Amendment really was intended to cover commercial speech. Certainly, the emphasis on free speech at the time of the Bill of Rights in the 1790s was to prohibit the federal government from interfering with political speech and religious speech. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or these rights was part of the same amendment that prohibited Congress abridging religious freedom and the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Nowhere did the First Amendment provide that the people shall have the right to mass market their goods and services without restraint.

However, bar associations have traditionally been guilds which promoted established lawyers (traditionally white male) and their friends (same). At the time of *Bates*, and as still the largely the case, the “good old boy” system tended to make legal services inaccessible to a large portion of the public and to the entire public with regard to some



Robert M. Sanger

particular services. Something had to be done. Whether a Supreme Court decision, broadly based on the idea of commercial free speech, was the thing to do may be a question, particularly in hindsight.

Of course, what was done opened the floodgates for all sorts of shenanigans. *Went for It* case was a good example. (*Fla. Bar v. Went for It, Inc.* (1995) 515 U.S. 618.) Telling was the fact a new plaintiff had to be substituted in place of the original lawyer who was the named plaintiff because that plaintiff/lawyer was disbarred. More telling was the reason this defender of free speech under the First Amendment was disbarred. The allegations, sustained by the Florida Supreme Court included some disgusting sexual predator activities by that attorney in his office with his own clients or potential clients. Notwithstanding that, substituted plaintiff, a lawyer doing business as “Went for It,” did not seem to display the commitment to professionalism one would have expected before the age of advertising.

So, in the civil realm, what used to be capping and running became a business plan. The first target was, and may still be, personal injury. Billboards, commercials and even direct solicitation is designed to bring in volume but also the occasional “big” recovery. Now the targets include

products liability and purported toxic torts where the goal is not just signing up plaintiffs but specifically focusing on a business or industry where the groundwork has already been laid for recovery. One has to wonder if there might have been—or someday might still be—a better way to encourage diversity in the bar and provide remedies for clients otherwise marginalized while still providing a high level of representation and not emitting the foul odor of mass marketing.

Advertising and Criminal Law

The desire to mass market and, perhaps, offset quality services with volume came to criminal law as well. It was a bit more difficult but, where there is a will fed by avarice, lawyers will try get their market share. Advertising regarding the highly fungible defense of drunk driving was one volume approach. Then there was “jail mail” where private companies would harvest last night’s arrest records, including the arrestee’s home address, and sell the mailing list to lawyers who would send an impressive looking letter on their letterhead. Some of the letters involved a great deal of puffing but it was—and continues to be for some people—a great source of income.

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The downside was that, just as on the civil side, the marketing skills often outstripped the legal skills. Lawyers often showed up in arraignment court with an armload of files and pre-signed Tahl waivers. Emphasis tended to be on signing up large numbers and processing them as quickly as possible. Of course, there were some people involved in these marketing schemes who were competent criminal defense lawyers and met their ethical burden to accord each client vigorous representation. These people seemed to be in the minority.

Most people would be reluctant to hire a lawyer for a serious felony based on an unsolicited letter, especially since they often received multiple letters from a collection of “jail mail” entrepreneurs. However, when these lawyers did receive a bigger case that required actual defense, many of these lawyers lacked the skill or experience to handle them. In addition, since the “jail mail” resulted in multiple letters, purportedly from lawyers, being sent to the home addresses of everyone arrested every night, pain was widely inflicted on people who were arrested and did not want their parents or spouse or landlord to know about it.

Then came the 1-800 lawyers or worse yet, the lawyers with local prefix telephone numbers that were actually answered at a call center elsewhere. The administrators advertised—and still do—on the internet and elsewhere. When the call center receives a call, many of these operations would send a sales representative (who they call a case manager) to the home, often of the parents, to pick up the check and get a signature on a duplicate fine print retainer agreement. Once that was done, the administrators, often not lawyers themselves, would call a sub-contracting lawyer off of a list who had agreed to take cases on a flat fee at a fraction of the fee collected. Some, but, of course, not all of those lawyers were not trained as criminal defense lawyers and were not qualified or competent to handle criminal cases.

In addition, those sub-contract lawyers were often not local to the case and would call appearance lawyers to do the arraignment and subsequent hearings until, in felonies, an actual preliminary hearing was set. An investigator was often not included in the fee and the client’s family may be told to hire their own. Frequently, after a perfunctory preliminary hearing with no preparation or expense, the lawyer would then tell the family or the client that the agreement was for representation through the prelim only (a term of which they were never advised but was buried in the fine print of the agreement) and that they needed to pay an additional retainer if they were going to continue. These sub-contract lawyers often were happy not to have to take a case any further since doing a quick prelim was

easy money compared to actually preparing for a trial and for serious plea negotiations. The result frequently was that a public defender would take over the case where there was no preparation and where opportunities were missed at stages before and during the prelim.

Now, a new scam is in the works. Lawyers (and some freelance experts) have been contacting people incarcerated on Death Row and in the state and federal prisons. They have sometimes contacted their families and loved ones. Although this has occurred on a limited basis in the past, it seems to be increasing in frequency in recent years. Many of the people contacted have been languishing in prison for years and have given up hope. Others are actually represented by counsel but still receive the outwardly promising letters that make optimistic claims on impressive letterhead.

Although there has been a flurry of solicitations related to early release based on compassionate release or other COVID related relief, the major efforts have been related to recent changes in California law. The changes do make it possible for inmates to seek relief even if they have exhausted their direct appeals and even habeas. The first wave was the law that allowed for resentencing under Proposition 57, for non-violent offenders might be eligible for earlier parole if they had completed the base term and were serving additional time on enhancement. Another law established a potential for resentencing of youthful offenders who were sentenced to life without the possibility of parole. There was yet another law that provided a chance for a person convicted as an accomplice to murder to have their conviction reviewed.

Some of the solicitations to inmates resulted in the people in custody, or more probably their loved ones, scraping together their life savings to avail themselves of what was marketed as a promising chance by lawyers who had sung their own praises. Frequently, after getting the retainer, these lawyers, or their case managers, would gather some transcripts and files only to conclude that there is no basis for relief under these statutes—either because, the cases or the clients do not qualify or because there was never a diligent search of the record to find a basis. They may attempt to then justify their large retainer by simply writing a letter to the prosecutor asking the prosecutor to reinvestigate the case. While the prosecutor’s discretion has been increased by other new legislation, unless such a letter is well researched and significant issues are presented, it is not likely to have much effect.

Meanwhile, some of the people they solicit have lawyers who are actually pursuing these remedies. Public defenders and competent private defense lawyers generally rescreen their cases to see if there is a basis to invoke any of the new

Criminal Justice

laws. The courts and defense counsel have implemented programs to identify appropriate cases for relief. In addition, especially in capital cases where there are so many avenues for relief that must be carefully explored and the record of seeking relief preserved, these soliciting lawyers can interfere with the attorney client relationship and sometimes damage work in progress.

It also appears that there are people holding themselves out to be forensic experts who, for a significant fee, will “review” the person’s case and advise them of what might be done to resubmit a habeas petition based on a deficient scientific basis. That sometimes results in no more than a cursory review with a request for more funds to crack the case all of which is meaningless unless the person can then hire a lawyer to prosecute the writ.

The counterargument would be that these lawyers and experts are providing a service and that the harm they cause with their mass-marketing tactics is offset by making services available to the underserved population of desperate people and their families. Anecdotally, it has been hard to see a substantial benefit outweighing the harm, but it may exist.

Conclusion

The problem with soliciting or advertising to vulnerable people, whether in civil cases where they are injured or criminal where they are incarcerated, is that it is easy for a person sporting the mantle of lawyer to take advantage of that vulnerability. The concept of commercial free speech may have helped disrupt the “good old boy” system and may have made services available to some people who might not otherwise have access. That is good. But the abuse of commercial free speech to use the mantle of “lawyer” to obtain volume rather than provide professional services is causing harm that should be avoided.

It would seem that the courts, and the Supreme Court itself, need to allow sufficient regulation of the practice of law so that state bars can fashion meaningful regulations to ensure the integrity of what should be the profession. Other avenues that currently exist are underused. For instance, the FTC can regulate the language on potato chip bags to prohibit misleading advertising, phony endorsements and testimonials and unfounded claims of qualifications of product to be provided. Why is it that, under the mantle of being a lawyer, people can make overblown representations about themselves, have manufactured endorsements and fictionalized testimonials, puff up their credential by claiming to be in the top x% of lawyers in their area of practice and give vulnerable people false hope that they will provide meaningful assistance?

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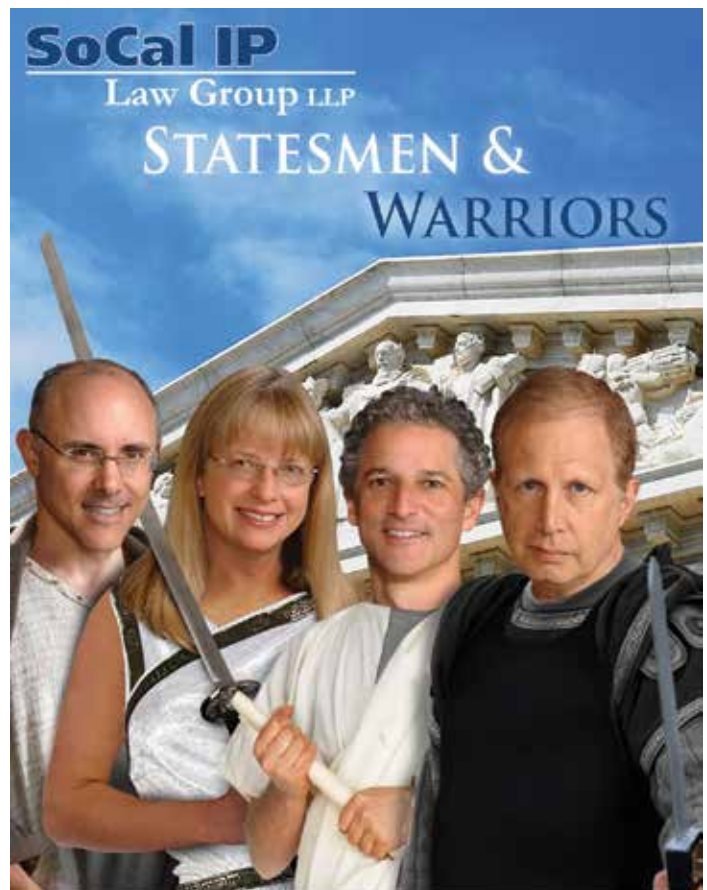
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- Fraud Investigation

Criminal Law

It would be nice to restore professionalism to the practice of law—or at least not allow unscrupulous mass marketers to detract from that professionalism. I have no illusions about the “good old days,” yet, moving forward, we need to emerge from this era of unrestricted commercial free speech with not only a firm commitment but clear mechanisms by which to ensure opportunity and diversity in the bar and to ensure that the profession makes itself and the law accessible to all aspects of the public as to the full range of legal services accessible to the public. ■

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).

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.



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You Are Invited!



Marilyn Metzner, Judicial Secretary to Judge Anderle and Judge Sterne, will be retiring as of December 31, 2022. Judge Anderle is hosting a Retirement Party in and around Department 3 at the Courthouse on Wednesday, December 14, from 4:00 p.m. until 7:00 p.m.

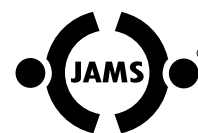
Non-alcoholic beverages and hors d'oeuvres will be served. It would be appreciated if persons who wish to attend would RSVP to Pamela Hiromerides, Judge Geck's secretary, at (805) 882-4590, by Monday, December 5.

Please come to wish Marilyn a happy retirement!



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Fast and Cost-Effective Take-Down Strategies for Online Scams, Frauds, and Infringement

The rise of e-commerce and crypto currencies has led to a cottage industry of scammers setting up fraudulent websites. Commonly, a scammer will pose as a legitimate internet retailer, take orders and collect payment from unsuspecting customers, and deliver nothing or counterfeit product in return. These websites frequently infringe the trademarks, trade dress, and copyrights of bona fide merchants and service providers or misuse the personal data of customers or users lured to the deceptive site. Scammers know it will take several months to remove a fake website from the internet via traditional federal litigation and injunctive relief. By the time a court orders a website removed or de-indexed, the swindlers have made off with thousands of dollars from fraudulent sales or valuable personal information and moved on to create another fake website.

While litigation is expensive, time consuming, and less than effective in addressing ongoing online scams and infringement, takedown notifications offer a much faster and more cost-effective means of eliminating counterfeit websites. Join us to learn about various federal, state, and foreign statutes and specific procedures that can be used to get a fraudulent website offline.

Speaker:

Brian S. Tamsut

Brian Tamsut is an attorney with SoCal IP Law Group in the firm's Westlake Village office. His practice focuses on patent and trademark prosecution, intellectual property litigation in federal courts, and alternative strategies for addressing online fraud, scams, and infringement. Brian attended UC Irvine School of Law as an Erwin Chemerinsky Merit Scholar. During law school he worked pro bono for the UC Irvine Intellectual Property, Arts, and Technology Law Clinic, where he represented copyright holders before a federal rulemaking agency and testified about the Digital Millennium Copyright Act (DMCA) before the United States Copyright Office.



Brian Tamsut

Date and Time:

Thursday, November 17
12 noon – 1:15 PM

Location:

Virtual Presentation Via Zoom

Reservations:

To receive the meeting link via email, please respond by Friday, November 11, to Chris Kopitzke at ckopitzke@socalip.com AND to Marietta Jablonka at sblawdirector@gmail.com

Cost and Payment:

\$10 SBCBA Members/\$15 Non-members
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THE OTHER BAR NOTICE

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

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.

The Santa Barbara County Bar Association congratulates Judge Patricia L. Kelly in her recent election as incoming Assistant Presiding Judge for the term January 1, 2023 and concluding December 31, 2024. She will lead with Judge Pauline Maxwell who will act as Presiding Judge with Judge Kelly at the turn of the year.

Gustavo E. Lavayen
Presiding Judge



Darrel E. Parker
Court Executive Officer

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA
1100 ANACAPA STREET, SANTA BARBARA, CA 93101

Contact: Darrel E. Parker
Telephone: 805-614-6594
Email: dparker@sbcourts.org
Website: www.sbcourts.org

FOR IMMEDIATE RELEASE
September 22, 2022

SUPERIOR COURT JUDGES ELECT PATRICIA L. KELLY AS ASSISTANT PRESIDING JUDGE

Santa Barbara, California, September 22, 2022 – The Judges of the Superior Court of California, County of Santa Barbara elected Judge Patricia L. Kelly as their incoming Assistant Presiding Judge for the term beginning January 1, 2023 and concluding December 31, 2024. The election took place at a Countywide Judges meeting conducted on Friday September 9, 2022.

Current Presiding Judge Gustavo E. Lavayen said, *“Congratulations to Judge Kelly. She has experience serving in this role in the past, which has prepared her to tackle the leadership challenges she will face in the coming years.”*

Judge Kelly was appointed to the bench by Governor Schwarzenegger in 2010. She currently presides over a criminal trial court in the North County Santa Maria Division. Judge Kelly previously served as Assistant Presiding Judge from 2015-2016 and as Presiding Judge from 2017-2018.

Judge Pauline Maxwell, currently serving as Assistant Presiding Judge, will begin her term as Presiding Judge on January 1, 2023 when Judge Kelly undertakes the position as Assistant Presiding Judge. Upon announcing Judge Kelly’s election, Judge Maxwell remarked, *“I look forward to leading the Court in partnership with Judge Kelly as we emerge from the challenges presented by the pandemic.”*



YOU ARE CORDIALLY INVITED TO ATTEND
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SANTA BARBARA COUNTY BAR ASSOCIATION'S

ANNUAL DINNER

**Thursday, December 1st at
El Paseo Restaurant
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Reception begins at 6:00 PM

Dinner to follow at 6:30 PM

Awards Presentation Honoring:

The Honorable Von Deroian

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Verdicts & Decisions

Joshua Cheek and Jessica Cheek v. William Chiles

ORANGE COUNTY SUPERIOR COURT

CASE NUMBER: NO. 30-2019-01081483-CU-PA-CJC
FILED: JULY 5, 2019
SETTLEMENT: \$1,051,250
DATE OF SETTLEMENT: MARCH 7, 2022
JUDGE: HON. JOHN GASTELUM
PLAINTIFF'S ATTORNEY: MARTIN E. PULVERMAN & RAYMOND J. PULVERMAN
PULVERMAN & PULVERMAN, LLP
DEFENDANT'S ATTORNEY: ROBERT T. MACKEY, GREG B. SELARZ, ADAM E. WAYNE and SERENA
L. NERVEZ
VEATCH CARLSON, LLP
PLAINTIFFS' EXPERTS: Thomas Zweber, M.D. - physical medicine/life care plan
David King, P.E. - accident reconstruction
Anthony Paton, Pharm.D.- pharmacology
Paula J. Pearlman, M.D. - emergency room medicine
David Frecker, M.D. - neurology
John Nordstrand, M.D. - economics
Erin Farrelly, M.D. - orthopedics
DEFENDANT'S EXPERTS: Stephen Mikulak, M.D. - orthopedics
Kenneth Solomon, Ph.D. - engineering/human factors/biomechanics
Mary Jesko, M.S., Ed.D. - life care plan
Edwin Amos, M.D. - neurology
Jeffrey Bounds, M.D. - neurology
MEDIATOR: Wendy Kramer, Esq.
INSURER: USAA

FACTS: On January 27, 2018 plaintiffs exited the 55 freeway onto Newport Boulevard in Costa Mesa when they were rear-ended by the defendant driver in a 2008 Range Rover SUV. The defendant then rolled 5 or 6 times and landed 460 feet from the point of impact. The plaintiffs' sedan was demolished. The trunk was crushed into the rear seat. The rear seat passenger was 21 years old and the force of impact caused his femur to fracture at the hip. The front seat plaintiff, also in her twenties, was lacerated by flying glass.

PLAINTIFF'S CONTENTIONS: Plaintiffs contend the defendant was drug impaired and driving at an excessive speed. The defendant admitted that he took antidepressant medication which made him complacent. His medical records in the months preceding the crash also indicated that he was asking his doctors for prescription pain killers including oxycodone for back pain. He was given a prescription pain killer which he denied taking. An eyewitness saw an ice chest

with bottles of beer lying in the street within ten feet from where the defendant's car came to rest after tumbling down Newport Boulevard. An eyewitness estimated the defendant was driving at least 80 miles per hour at the moment of the collision. Plaintiffs' accident reconstruction expert estimated the defendant's speed at over 100 mph. Plaintiffs alleged the defendant was negligent based on excessive speed and drug impairment. Plaintiffs included a claim for punitive damages.

DEFENDANT'S CONTENTIONS: The defendant refused to take responsibility for the rear-end collision. The Defendant contended that he suffered a sudden unanticipated loss of consciousness and/or seizure. In the emergency room he was diagnosed with a small lesion on his penial gland. He underwent brain surgery a year later and was diagnosed with a brain tumor presumably from exposure to Agent Orange. The defendant was subsequently diagnosed with epilepsy and treated for epileptic seizures.

The Defendant denied that he ever experienced a seizure prior to the crash, despite medical records to the contrary. The defendant published an autobiography entitled *God-Link* in 1997 about his life and experiences as a combat marine in the Viet Nam war. In his autobiography he described having a seizure and not knowing when it would occur again. When presented with this passage from his autobiography, the defendant claimed that his book was stolen, altered, printed and distributed with inaccurate and false statements.

The Defendant brought a motion for summary adjudication of issues on the claim for punitive damages. The court denied defendant's motion. The case settled at a mediation after the hearing on the motion for summary adjudication of issues.

PLAINTIFFS' INJURIES: The primary injury involved a fractured femur at the hip requiring surgery with metal hardware. Defendant's orthopedic expert contended that the plaintiff only needed to remove the hardware. Plaintiff's physiatrist disagreed and recommended that the plaintiff would eventually necessitate hip replacement surgery. Plaintiff's paid and owed bills were \$90,138.

The primary injury to the second plaintiff involved lacerations to the shoulder leaving scars. Plaintiff's paid medical bills were \$14,644.

SETTLEMENT DISCUSSIONS: Plaintiffs made a C.C.P. §998 settlement offer of \$1,249,999 for the plaintiff with a fractured femur. The defendant made a C.C.P. §998 settlement offer of \$400,000.

Plaintiff made a C.C.P. §998 settlement offer of \$117,999 for the plaintiff with a shoulder scar. The defendant made a C.C.P. §998 settlement offer of \$50,000.

RESULT: The case settled for \$962,500 for the hip injury and \$88,750 for the shoulder scar.

Rodriguez v City of Santa Maria

SANTA BARBARA COUNTY SUPERIOR COURT (COOK DIVISION, SANTA MARIA)

CASE NUMBER:	19CV04142
TYPE OF CASE:	Personal Injury. Vision loss and TBI
TYPE OF PROCEEDING:	Jury
JUDGE:	Hon Timothy Staffel
LENGTH OF TRIAL:	8 days
LENGTH OF DELIBERATIONS:	2.5 days
DATE OF VERDICT:	October 8, 2022
PLAINTIFF:	Juan and Sandra Rodriguez
PLAINTIFF'S COUNSEL:	Nigel Whitehead and Taylor Ernst
DEFENDANT:	City of Santa Maria
DEFENDANT'S COUNSEL:	Dan Carobini
INSURANCE CARRIER, IF ANY:	Self-Insured

EXPERTS PLAINTIFF:	Neurology	Fernando Miranda, MD
	Neuropsychology	Edgar Angelone, Ph.D
	Neuro-optometry	Doug Major, OD
	Occupational Evaluation:	Jeff Bruno
	Economics:	Laura Ines
EXPERTS DEFENDANT:	Sewer Operations	John Shaw
	Neurology	Phillip Delio, MD
	Neuropsychology	Ari Kalechstein, Ph.D
	Radiology	Kumar, MD
	Neuro-ophthalmologist	Howard Krauss, MD
	Defendant designated, but after depositions, withdrew:	
	Economics	Jenny McNulty
	Sewer Operations	Ed Fitzgerald
Occupational Evaluation	Karen Luckett	

OVERVIEW OF CASE: Juan Rodriguez was hit in the eye with a high-pressure sewer cleaning jetter that City of Santa Maria (“City”) negligently allowed to escape from a manhole onto the public street.

CLAIMED INJURIES: Plaintiff claimed a vision loss in left eye and a traumatic brain injury.

SPECIAL DAMAGES: Plaintiff claimed \$897,000 in future loss of earnings. Plaintiffs waived past and future medical expenses.

FACTS AND CONTENTIONS: Plaintiffs claimed that the City was negligent in the sewer operation by allowing a high-pressure sewer jetter (2,500 psi) to exit the enclosed sewer pipe and enter the manhole chamber. Once in the chamber the force of the rear-jets on the nozzle propelled the nozzle forward with sufficient force to flip a 175 lb manhole cover over and onto the street. Once the nozzle escaped Plaintiff contend that the spray hit Juan Rodriguez in the face. Juan Rodriguez had no memory of the event.

Defendants claimed the water never hit Juan. They further claimed that even if the water did hit him, it was a minor spray and not sufficient to cause injury.

Defendants’ medical experts all claimed that Juan’s test results, which showed impairment, were false due to lack of effort by Juan.

Plaintiff’s initial claim was permanent blindness in left eye; defendant disputed the claim and at trial plaintiff’s expert stated vision was restored to 80% of normal. TBI was not raised until two years after the incident; Defendant argued any such injury was not caused by the incident.

SUMMARY OF CLAIMED DAMAGES: \$879,000 future loss of earnings. Plaintiff requested \$7 to \$10 million dollars in non-economic damages.

SUMMARY OF SETTLEMENT DISCUSSIONS: Plaintiff CCP 998 in November 2020 for 2.5 million. Defendant’s Offer - ZERO

RESULT: Negligence was admitted on the first day of trial.

CAUSATION: YES. 12/0

Juan Rodriguez	\$900,000 Economic damages (12/0)
Juan Rodriguez	\$1,600,000 Past non-economic loss (9-3)
Juan Rodriguez	\$3,000,000 Past non-economic loss (9-3)
Sandra Rodriguez	\$150,000 Loss of Consortium
Interest on Juan Rodriguez’s verdict accrues at \$550,000 a year or \$1,506.85 a day.	

Motions

G. Michael Brelje, a civil litigation trial attorney who specializes in complex business, real estate and construction business litigation, has joined the Santa Barbara law firm **Cappello & Noël LLP**. Brelje's practice includes all forms of civil procedure, discovery and motion practice, as well as trial and appellate appearances.



Michael Brelje

Before joining Cappello & Noël, Brelje was a senior attorney at Rogers, Sheffield & Campbell, LLP and Grokenberger & Smith, where he represented clients involved in real estate transactions and disputes, construction, landlord/tenant and trust administration and estate-related issues.

"All of us who have gone up against Mike in litigation matters could see his talent and commitment. His joining our firm is a great asset to our clients and our team," says A. Barry Cappello, managing partner at Cappello & Noël.

Brelje has worked on and tried numerous complex civil and appellate cases, including arguing cases in the California Court of Appeal.

Brelje is active in the Santa Barbara legal community. He previously served on the Board of Directors of the Santa Barbara County Bar Association and is a current member. He was the former president of the Santa Barbara Barristers. As a frequent contributor to the Santa Barbara Rental Property Association, he has lectured on and authored numerous articles related to real property law, civil litigation, landlord/tenant relations and other legal issues.

Brelje was selected to the Super Lawyers' Rising Stars list

for Southern California in 2020-2021. He received his B.A. with honors in Communication and Sport Management from the University of California, Santa Barbara and his J.D. from the Santa Barbara College of Law.

* * *

Price, Postel & Parma is pleased to welcome **Jeremy Frankel** to the firm's litigation practice group. As a member of the group, Frankel will provide counsel and representation in the wide range of civil litigation matters handled by the firm.



Jeremy Frankel

Frankel recently returned to his hometown of Santa Barbara. He is a new admittee with the State Bar of California. Before joining Price Postel & Parma, Mr. Frankel served for two years as a judicial law clerk for the Honorable Ted C. Tow III at the Colorado Court of Appeals. He then served an additional one-year term for the Honorable M. Terry Fox. As an appellate law clerk, Mr. Frankel drafted over sixty full length opinions resolving civil, criminal, and administrative appeals. In the civil context, he frequently addressed issues involving state permitting decisions, real estate and land use, commercial contract disputes, corporate liability, and federal and state constitutional claims.

Frankel received his B.A. in Environmental Studies and International Relations from Gonzaga University in Spokane, Washington, in 2014 and obtained his J.D. from the University of Denver, Sturm College of Law in 2019.

* * *

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.

EDUCATION LAW ATTORNEY

Griffith & Thornburgh LLP is a well-respected mid-size firm in downtown Santa Barbara with an active and growing education law practice. We represent public school districts, a community college, and a local county education office on the Central Coast and seek an attorney to join our thriving and collegial practice. Our team of education law attorneys is committed to working collaboratively and in a supportive environment to provide the best quality representation. Qualified candidates will have three to five years of experience, including the below qualifications:

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- Admission to the California State Bar.

Send resume and cover letter to Felicita Torres at torres@gtlaw.com. Visit us online for more information www.gtlaw.com.

BUYNAK LAW FIRM SEEKS ASSOCIATE ATTORNEY

Buynak Law Firm has the opportunity to associate an attorney for this coming year into our established transactional practice in the business, real estate and tax/estate planning areas, with offices in Santa Barbara and Solvang. We function as general counsel to business and families for their local and U.S. operations. A successful candidate must have experience and a sincere interest in our core practice areas in serving clients and in client development, with a proactive work ethic and ability to blend physically with our team and systems at our Brinkerhoff office. Send your proposal to dhall@buynaklaw.com for our consideration.

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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.

Month-to-month, or 1st month free with 1-year lease, \$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

- **BUSINESS & REAL ESTATE ASSOCIATE 0-5 YEARS:** Join our business and real estate group. Our transactional practice includes real estate acquisition, development, financing, syndication, and leasing, land use, business and nonprofit formation and operation, business acquisitions, and general corporate and contract matters.
- **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.
- **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. 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 at Recruit@mullenlaw.com (re BD, LE or EP position). Visit us online for more information: www.mullenlaw.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.

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.

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



2022 SBCBA SECTION HEADS

Alternative Dispute Resolution

Matthew Moore (805) 697-5141
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

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renee@reneemfairbanks.com
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In House Counsel/Corporate Law

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Christine Kopitzke (805) 845-3434
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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

November

2022



Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2	3	4 National Candy Day	5
6	7	8 Election Day	9	10 SBCBA Employment Law MCLE : "Understanding the Nuts & Bolts of EPLI"	11 Veteran's Day	12
13	14	15	16	17 SBCBA IP/In-House MCLE : "Fast & Cost-Effective Take-Down Strategies for Online Scams, Frauds, & Infringement"	18	19
20	21	22	23	24 Thanksgiving	25 Shop til You Drop	26
27	28 Cyber Monday	29	30			

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

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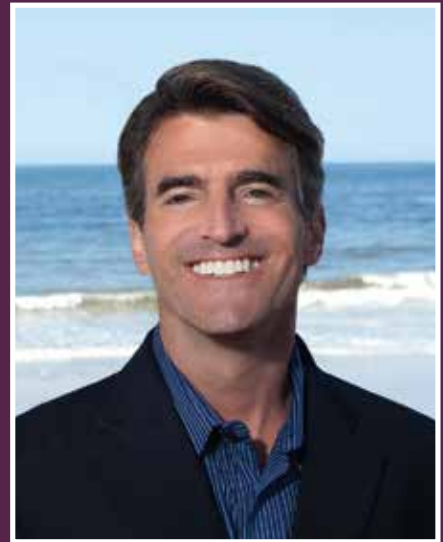
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