

Santa Barbara Lawyer

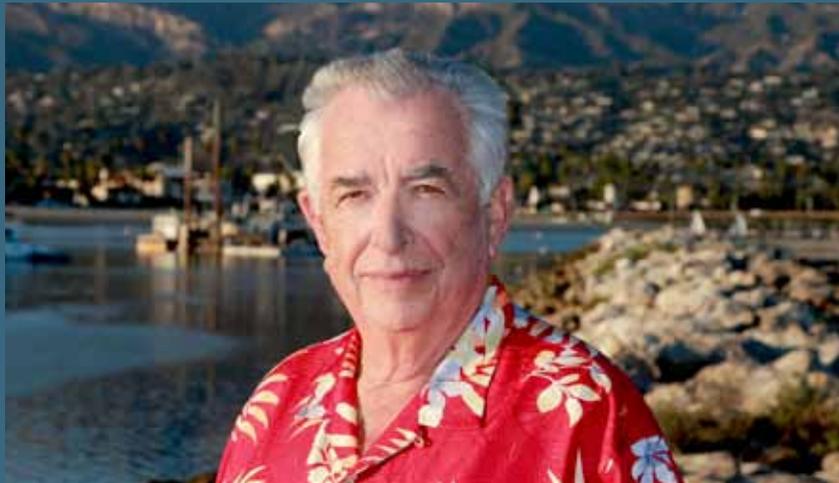
Official Publication of the Santa Barbara County Bar Association
December 2014 • Issue 507





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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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About the Cover

Does anyone recognize the actor in our cover photo of the beloved Mother Ginger character from *The Nutcracker*? In our own acclaimed local production, that role has been played each year for the last 24 years by former SBCBA President, Des O'Neill. Des will be giving his farewell performance in the 2014 production, which coincides with the 40th Anniversary of *The Nutcracker* at the Arlington. Photo courtesy of Fritz Olenberger (<http://olenberger.com/>). Used with the kind permission of the Santa Barbara Festival Ballet (<http://santabarbarafestivalballet.com>)



Tony Miratti as Mark Twain at the SBCBA Annual Dinner. For more photos see page 18.

From the President

BY SCOTT CAMPBELL

All of us should be proud of the SBCBA's performance in 2014, and thankful for all of the volunteers that made it happen.

Financially, the SBCBA is in great shape, possibly its best financial condition ever. This year we were able to fund an investment account from which we hope, in the future, to make charitable donations to SBCBA-supported organizations. We were also able to make a donation to the Legal Aid Foundation, in its year of dire need. This year's CFO, Katy Graham, and Fiscal Committee member, Nathan Rogers, did a great job.

One of SBCBA's most significant successes has been its Lawyer Referral Service (LRS). The LRS generates about half of our operating revenues. Special thanks to Lida Sideris for all her work, and to the LRS committee members, Donna Lewis, John Reyes, Lynn Goebel, Lauren Udden, Colleen Connors, and Phil Dracht.

Santa Barbara Lawyer magazine continues to be one of the crown jewels of the SBCBA operation. This year *SBL* was both profitable and popular. It continues to draw new advertisers, and helps us to encourage vendors and service providers to participate in our members benefit program. *SBL* takes a lot of work to put out each month. Many thanks to *SBL* Editor Claude Dorais and Assistant Editor Shelley Vail for all their efforts.

The SBCBA has put on at least 20 MCLE events this past year. All of our Section Heads have stepped to the plate to provide excellent content to our members. James Sweeney, who oversaw the MCLE mission, deserves the credit and our thanks for the successful MCLE year.

The tireless Emily Allen and Lauren Wideman were in charge of SBCBA Events in 2014. Those events included the Annual Barbecue, Lawrence Tribe at the Victoria Theater, the Past Presidents' Luncheon, the Golf and Tennis Tournament, and the Annual Dinner. Each event stayed in the black, and each went off without a hitch. SBCBA Events take a lot of work to put on, and Emily and Lauren's timely and flawless performance was spectacular.

Paula Waldman was our SBCBA Liaison to all other local

law-related organizations. Paula was able to connect us to a number of organizations we had not previously been connected to, and she revolutionized the reporting of significant events of other law organizations.

Along with Allan Morton, Paula was also tasked with SBCBA board development duties. Paula and Allan were able to identify and vet a number of willing Board volunteers so

that we can have every confidence that next year's board will be as productive and successful as this year's board was. Thanks to Paula and Allan for their hard work.

This year we have been preparing for next year's Bench & Bar Conference. The conference requires the coordination of a venue, food, debaters, keynote speakers, judges, sponsors, and subject presenters. We can all thank the unflappable Michael Denver and Nathan Rogers for their hard work in putting this all together. (And, do not miss January's Bench & Bar Conference featuring a debate about the constitutionality of electronic surveillance!)

Jim Griffith has been among the hardest working board members. Jim became head of the Bench & Bar Relations Committee at a time when the legislature drastically reduced court funding. So, in addition to chairing the committee (including Maureen Grattan (family law), and Mark Coffin (civil litigation), Sue McCollum (probate), Betty Jeppesen (SBWL), Lauren Joyce (Barristers), and Barbara Liss (SBPA)) that meets regularly with Judge Herman, Jim has been called upon to travel to Sacramento to lobby legislators directly on court funding issues. In addition to that, Jim has done a number of interviews that were published in the *SBL*, and he has been a member of the Legislative Liaison Committee. This coming year Jim moves to the SBCBA officer track as CFO.

2014 was the inaugural year of the SBCBA's Legislative Liaison Committee. The purpose of this committee is to establish and maintain communications with local legislators and supervisors. Angela Roach was given the job of organizing and chairing this committee. Through her leadership we established excellent, and we hope lasting, relationships with Senator Hannah Beth Jackson, Assemblymen Das Williams and Katcho Achadjian, along with Supervisors Janet Wolf, Doreen Farr, Steve Lavagnino, and



Scott Campbell

Salud Carbajal. Other members of the Legislative Liaison Committee are Jim Griffith, Emily Allen, and Sue McCollum. Congratulations to all of them for a great start to an important bar committee. In recognition of Angela's many years of devoted service to the SBCBA, she moves to the officer track by becoming next year's SBCBA Secretary.

Naomi Dewey will be the 2015 SBCBA President. With Naomi's calm and thoughtful approach to SBCBA issues and decisions we can be confident that we are in good hands.

All of us owe our profound thanks to Donna Lewis for her 10 years of service to the SBCBA. Donna has done much to improve the SBCBA over the years. She has been relentless in identifying duties to be performed (and putting them in writing), vetting of volunteers (including written vetting criteria), and analyzing revenues and costs of every

event put on by the SBCBA. Donna also came up with the idea for the Member Benefit Program which we expect will continue to grow in the coming years. Donna deserves the credit for making the SBCBA more relevant to all of us, efficient, and financially stable.

I became president with trepidation. Donna Lewis was a hard act to follow, and I was worried that I would screw up. As 2014 went on, however, I found that I enjoyed every aspect of my presidency, and as the year ends, I am pleased to report that the SBCBA is as relevant, useful and financially secure now, as it might ever have been in its past. I am grateful to have been a part of its continued evolution and positive direction. I will cherish my memories of 2014 for many years to come. Thank you for the honor. ■

Room at the Inn

2015 Membership in William L. Gordon Inn of Court

There is room at the Inns of Court for you. Since 1995, The William L. Gordon Inn of Court has been a Santa Barbara Chapter of the American Inns of Court. Its mission is to foster civility, professionalism, and excellence in the legal profession.

The monthly meetings are generally entertaining, educational, and a great way for the more experienced professionals to mentor the less experienced attorneys and students.

Benefits of membership in the Inn include all of the following:

1. Ten excellent dinners currently at the University Club (one each month November through October - excepting December and January);
2. At least nine hours of participatory MCLE credit (based on attendance - plus credit for being a presenter);
3. The opportunity to work as a team with local judges and other judicial officers and attorneys at all levels of experience to give one MCLE presentation during the year;
4. Social hour prior to dinner meetings to meet and become acquainted with the other members of the Inn and their guests; and,
5. Membership in the American Inns of Court and the bimonthly publication "The Bencher."

If you are interested in becoming a member of our Inn of Court, please contact Cheryl Johnson at 963-6711 or at cjohnson@hbsb.com.

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From the Editor

BY CLAUDE DORAIS

It has been a pleasure to serve as the 2014 Editor of this publication.

It is rare for a bar association of our size to produce a publication like *Santa Barbara Lawyer*, much less to do so once each month, year after year. If you sample similar efforts around the State, you will see that our publication is in a class of its own. I am not noting this so I can take any credit for it – on the contrary – I have been the beneficiary of a long tradition of hard work by my predecessors over many decades.

We passed the 500 issue mark in 2014 – that is 12 issues a year for over 40 years and good cause to note that maintaining quality is much less a challenge than creating it in the first place. Those of us involved this year benefitted from the hard work and creative commitment of those who served before us, those who reached the level we simply strive to continue.

Among the new features this year have been the Work/Life Balance and Dearly Departed features. The former has been an attempt to address an area we all have in common, even though our particular fields of practice may differ: that being the ongoing task of finding balance in our lives. The latter is a way of preserving the memories

of good people who are no longer among us, each of whom contributed to the collegiality and civility which are prevalent in our community and that we, in turn, seek to continue as part of the privilege of living and practicing here.

Along with these new features, there have been contributions on a wide variety of legal subjects, by both regular and one-time contributors.

With the exception of our Executive Director, layout professional, printer, and mailing house, everything that goes into each issue is provided on a volunteer basis. Each issue represents a collective effort amounting to many hours of devoted effort by our photographers, authors, and editors. It has been my pleasure to work with this group and if this publication has brought you enjoyment and knowledge during this past year, they are the ones who deserve your thanks. Their dedication is inspiring and we all benefit.

In no small measure, the excellence of *Santa Barbara Lawyer* is also a reflection of the strong support we receive from our loyal advertisers. It is their funding which allows this publication to fully meet its expenses and also contribute significantly to the SBCBA. Thank you to each and every one of them.

For 2015, Shelley Vail, 2014 Assistant Editor, and I are turning over the reins to Nathan Rogers, Editor, and Emily Allen, Assistant Editor. The publication is in good hands. ■



Claude J. Dorais



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Judge Iwasko Retires

BY SCOTT CAMPBELL & CLAUDE DORAIS

At age 70, Judge James Iwasko has decided it is time to retire from active status, although he will continue to serve on assignment.

Born in 1944 in Wisconsin, he was admitted to the bar in 1970, after graduation from Hastings College of the Law that same year. Prior to that he obtained a degree in business management from Woodbury College in 1967, an accomplishment he achieved while working full time.

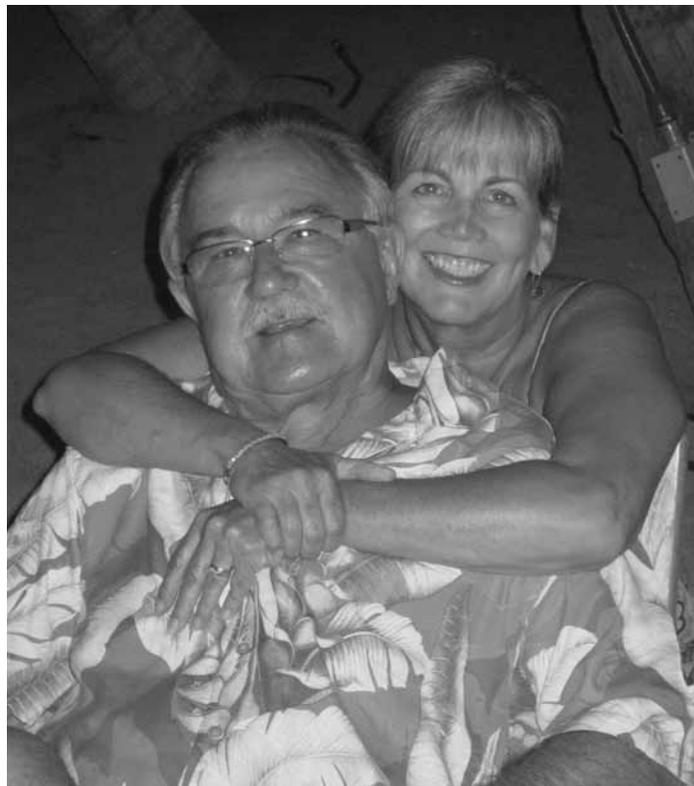
Starting in Riverside, and then quickly discovering the joys of living and working on the Central Coast, for 27 years Judge Iwasko enjoyed the general practice of law. For fourteen of those years he was associated with his friend, Judge Rodney Melville (Ret.), who spotted young James Iwasko and thought he would make a good partner. He was right.

As is typical in a smaller community, Judge Iwasko's practice was varied. It included personal injury cases, family law, business law, a small amount of criminal law, and general civil litigation, all of which experience stood him in good stead when he took the bench.

In 1997, Judge Iwasko accepted an appointment as a Superior Court Commissioner and in 2002 was elevated to Superior Court Judge by Gov. Gray Davis.

From the bench Judge Iwasko came to enjoy law from a new vantage point – as a neutral observer and decision maker, rather than as an advocate. He has particularly appreciated the opportunity to oversee criminal matters, which progress at a relatively quick pace and are often interesting. He has been impressed with the demeanor of many of the defendants who have faced him. Though they are in difficult personal circumstances, when treated with respect and courtesy almost all of them have reciprocated in kind.

It is no surprise that Judge Iwasko finds criminal defendants to be courteous, since people often respond in the same way as they are treated. Retired Judge Terrill Cox was once quoted about Judge Iwasko's demeanor: "I sat in on numerous hearings that Jim Iwasko conducted, and he was very patient. He had great judicial temperament, tried to explain to the litigants how he felt about the case and what he found, and he let them ask questions."



Judge Iwasko and Heidi Iwasko

Judge Iwasko is married. He and his wife, Heidi, live in Los Olivos, in a home they very much like, although they are in the process of moving to a smaller home. "It is time to downsize" says Judge Iwasko, "I don't want to spend my retirement taking care of my yard." The couple recently celebrated their 25th wedding anniversary while traveling through Spain and Portugal.

Judge Iwasko's son, Steve, serves on the Guadalupe Police Department. Daughter J.J. is a CPA in the Bay Area and was recently married in Santa Barbara. Guess who officiated?

The Judge has a few hobbies, among them fly fishing (he says he is lousy at it) and cooking at the BBQ (at which he admits he is a great deal better than at fishing). He BBQ's pretty much everything, even pizza. His cioppino is justly famous and has won prizes.

While Judge Iwasko has served long and well, he is not ready to leave his seat empty, with a growing backlog as a burden to his colleagues and his successor. He intends to sit on assignment until his replacement is appointed. As he does so, he will look for things to do after his retirement is complete. He knows he wants to stay busy.

When asked if there was one thing he wanted to be sure would be mentioned in article, his answer came easily: "I want everyone who works in the Courts to know how

Continued on page 26

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Terry Lammers

BY MATTHEW LONG

Terrence (“Terry”) L. Lammers passed away on October 6, 2014, at the age of 63 after practicing law in Santa Barbara for over 35 years. He was a fine lawyer, well-liked and respected in our legal community. Terry practiced family law without being overzealous and with the utmost civility. Whether in a meeting or in court, when



Terry was there the proceedings were usually punctuated with laughter and an ironic twinkle in Terry’s eyes.

Terry was the fourth child of what was to become a family of eight children. His father was a small town doctor in rural Ida, Michigan. For those of us who knew Terry, it is not surprising to learn that he was somewhat mischievous as a young boy. When painters were hired to paint the Lammers’ house, Terry was found on the other side of the house using the green paint for the shutters to paint the siding that had just been painted white. He was the one his siblings would go to for “forbidden candy,” knowing that he had the foresight to find numerous places to hide his private stash. When he was a little older, during the summer, Dr. Lammers would drive Terry and his brothers to a golf course near the hospital where he visited patients. He would drop them off in the morning, they would play golf until the afternoon, when he would pick them up on his way home. Thus began his love of golf. He won a national junior golf championship when he was 16.

Terry attended a Catholic military boarding elementary school, returning home on the weekends. He was an excellent student, athlete, and cadet. He attended an all boys Catholic high school. He played on the varsity teams as an underclassman and in his senior year he was quarterback of the football team, point guard on the basketball team, and Captain of the golf team.

Terry attended Stanford University on a golf scholarship in the fall of 1969. After two years, he returned to Michigan to get married, finishing his undergraduate studies at the University of Michigan in 1973. However, while he was a

student at Stanford he fell in love with Santa Barbara after traveling here with a roommate who had family in Santa Barbara.

Terry attended what was then the new law school at the University of Puget Sound in Tacoma, Washington (now Seattle University School of Law). Immediately after graduating and passing the California Bar in 1976, Terry moved to Santa Barbara. Although Terry began as a general practitioner, he gradually narrowed his practice to criminal and family law.

Terry had three children from his marriage with Marsha Manard: Joseph, Clark, and Lauren. He loved his children and was very proud of them. He was his sons’ best coach for basketball, football, and golf. Doug Rossi tells me that there was a time when their young families went on several vacations together in Northern California. They would joke about their differing parenting styles, with Terry acknowledging his “broader parameters” for child rearing. But it all seems to have turned out very well.

Terry was involved at various times with the Santa Barbara County Bar Association and the American Bar Association. He served as President of the “Children in the Middle” court mandated parent education provider and the Santa Barbara County Lawyer Referral Service. Terry taught Business Law courses at Santa Barbara City College and held a lifetime teaching credential with the California Community Colleges. Terry also sat as a Small Claims Judge Pro-Tem.

Many people have shared their experiences with golfing with Terry. Doug Rossi shared with me that “In golf, he always made his fellow players feel good. I could hit such a bad shot that laws of physics were called into question. His worst comment was ‘pretty good, Doug,’ which he said a lot. Meanwhile, I witnessed many great shots from him.”

Greg Lowe recounted that he attended a lawyer’s overnight golf tournament and remembers Terry joining Greg and some other buddies, talking and analyzing the mysteries of putting until late into the night. Greg says Terry was “geeky for golf.” Since Terry was much better than the rest of the group Greg was with, the group became known as “Lammers’ Patsies.” Terry had seven holes-in-one. Although Terry loved basketball and football, golf was his lifelong athletic passion.

Professionally, Terry dealt with many difficult cases, often with people at their worst. But he was always willing to take as much time as needed to explain things to clients in fully understandable terms. There were no pretenses to Terry. Disarming, warm, and an open book to all, he immediately made you feel comfortable talking to him, and made many feel like old friends after a few interactions. He had a casual yet effective way of handling cases and

clients. He remained calm amid chaos and always tried to “do the right thing.” Occasionally he took cases when others would not, but that is just the kind of guy he was. He helped people, plain and simple.

Terry was a very good listener, a good lateral thinker, and comfortable talking about any subject. He enjoyed taking an opposite viewpoint just to enliven a political discussion. This could have the amusing result of a heated discussion with people who did not know him well. Most of all, Terry had a truly great sense of humor. He had a real knack for finding an off-beat comedic aspect about any human condition or issue. He could poke fun at people, but never in a mean way. He related to a broad cross-section of humanity.

Terry was a searcher and an understated intellectual. He loved big ideas and learning about new things. In the middle of his life he developed a fascination with plants and trees. He knew about trees, plants, and different types of grasses and spent many weekend mornings at area nurseries. He told his son Clark at one point that if he could go back to college, he would study astronomy and physics. He loved watching PBS. NOVA, California Gold, and Frontline were some of his favorite television programs.

Terry was always upbeat, had a twinkle in his eye, and was more than a little devilish on the inside. Regardless of how difficult or contentious a case might be, he always practiced law with civility, humor, and professionalism. Terry was a caring person who adored his children and friends. He will be missed. ■

**With gratitude to Clark Lammers, Marsha Manard, Doug Rossi, and many others who forwarded their thoughts and warm memories.*

Robert McFarland (1942- 2014)

By CLAUDE DORAIS

The cut and dried facts about Bob McFarland are easy to recite: Born in Port Arthur, TX, on November 30, 1942; Eagle Scout; undergraduate school at the University of Idaho; law school at UCLA; admitted to the California Bar in 1967; in Santa Barbara also since 1967; married to Cathy; father to Elizabeth and Geoff.

I knew Bob, in typical Santa Barbara fashion, on several different levels: friend, law partner, neighbor to a member of my family, fellow cycling enthusiast, fellow car buff,



Cathy & Bob. married over 50 years.

and more. There was so much more to Bob than those facts. Far too much to cover here, so a few examples will have to suffice.

Around the office, we used to kid Bob that he had practiced in most every building in Santa Barbara, and that he had almost as many partners over the years as he had former office locations. His response was his characteristic laugh.

As a family lawyer, Bob was universally respected. He had the ability to litigate vigorously, yet always in a professional way, with a human dimension that made him friends with everyone, usually even the other side. As his partners, we benefitted from the respect in which he was held. More than one client has told me, in so many words, “I don’t know you, but you seem nice enough and if you are good enough for Bob, that works for me.”

For Bob’s part, he loved being part of our firm. It was his last partnership and we miss him.

While Bob worked hard, he also played hard. His idea of the ideal exercise was a bike ride – a long, long, bike ride – as much as 100 miles at a time. He owned several high-end bikes and every one of them was well-used.

He also loved cars and appreciated all their dimensions – the artistry of his 1930’s Packard, the utility of his 1960’s Ford pickup, the exuberance of his 1970’s Volvo E1800 two-seater sports car, the engineering excellence of his 1960’s Mercury convertible. His loved his cars and they were all for use, not just appearance.

Knowing Bob was the automotive equivalent of the proverbial friend with the swimming pool. My daughter, Hilary, was driven to her wedding at the Old Mission in Bob’s Packard. Bob was sick then, not working, but he found the energy to polish the Packard, get all dressed up, and deliver my daughter to the church in high style. She

will never forget it, nor will I. Another daughter, Alexis, had her belongings delivered to college in his van. When we donated surplus office furniture to a local high school, he and I delivered it in his restored 1960's Ford truck, which started life as a Forest Service vehicle. When our family was short of cars, I drove to and from work in his classic two-seater sports car.

Bob also loved to collect antiques. Despite his affection for cars, his garage at home did not hold any – that was saved for the antiques. He was very good at restoring and refinishing well-crafted pieces. Those who have been in the conference rooms in our office may have noticed a table over 200 years old and a desk which is close to 100. We refinished them together one weekend, just for the fun of it. He was a craftsman.

At all times and in all circumstances, Bob was as kind as he was capable.

Stewart Holden has this Bob McFarland story: "Around ten years ago, maybe an hour before sunset, Bob and I were standing on the southbound shoulder of Highway 101 at Gaviota Pass, fixing my flat bike tire with his last tube. We had started that morning in Pismo Beach with twenty riders. Somehow, that day I had managed to get three flats and to damage two tubes beyond patching. The others were all way in front of us; the fastest had probably already showered at home in Santa Barbara and were enjoying the sunset from their dining room windows. Though we were never close friends, Bob had taken it on himself to stick by my side despite my repeated assurances that I would be fine. He said that the last rider in the group should never have to straggle in alone without any prospect of aid from others in the group. We made it home together as the last bit of twilight faded from the sky. That is how I remember Bob McFarland."

Many of us have similar stories. No one who knew Bob will be in the least surprised that he made sure a fellow cyclist did not finish alone. He was that kind of guy.

Penny Mathison shares a remembrance: "Bob's hearty laugh is always the first thing I remember about Bob. He was a problem-solver. After a discussion he would offer, 'well, let's think about this' and proceed to recap and analyze what we had before us. Supreme professionalism."

Bob was diagnosed with multiple myeloma just a few weeks after he joined our firm in 2002. It was a surprise to everyone, most of all Bob, and it was advanced. At the time, he was given 50-50 odds of living two years, maybe as much as five years, at the outside and if he was really lucky. He beat those odds – he lasted over twelve years.

He made the most of those years. For some time he continued his practice. He walked his daughter, Elizabeth



Bob rafting down an Arizona river in June, 2014

(herself a prominent lawyer in Arizona), down the aisle for her wedding. He and Cathy reached the 50 year mark as husband and wife. Bob was always and forever deeply in love with his bride. He saw son Geoff and daughter-in-law Laura successful in business and established in a beautiful home – and, of course, imposed on them to store at least one classic car there at all times.

Cathy has long been deeply involved in a variety of charitable causes. Bob would often invite us to them and we would do our best to keep the number down – but for years we bought flats of flowers from the charity that sold them, attended this and that event, and otherwise supported a few of the many causes Cathy champions.

One memorable event saw another member of our firm, Andrew Polinsky, plus one of Bob's long-time friends and clients, Joe Antonucci, and myself off to Beverly Hills, taking a whole day off to attend a charity luncheon that was, of all things, a fashion show. I have never known anyone else who could talk the three of us into going to a fashion show and luncheon over a hundred miles away, but Bob had a trump card that was guaranteed to work and he used it. We all knew he would die of his illness one day and he asked each of us if we planned to attend his funeral. Of course, we all told him we would be there. His response was to say that he did not expect to have a funeral service and he preferred that we attend the fashion show instead!

What do you say to that? We went.

Just to make his victory complete, our tables for the lunch were right at the very edge of the catwalk. We were so close that people wondered if we were part of the show. Bob's

Continued on page 27

ACPERA and What Business Lawyers Need to Know Right Away in an Antitrust Investigation

BY ROBERT SANGER

Just about every practitioner advising businesses needs to be up-to-date on antitrust law. It is all too easy for a person involved in business to make casual comments or engage in what they think is legitimate activity only to find that they are the subject of a federal or state investigation for horizontal or vertical restraint of trade or price fixing, customer allocation, bid-rigging, or some other form of technically prohibited behavior. Blatant willful violations are, understandably, criminal but technical violations are a part of the trend of state and federal overcriminalization. Potential criminal prosecution for technical antitrust violations is a fact of life in business today.

Times have changed. When I first came to town as a lawyer in 1973, the County Bar sent all new lawyers a document called "Minimum Fee Schedule." It set forth what Santa Barbara lawyers, according to the County Bar, should charge as a minimum fee for divorces, unlawful detainers, wills, misdemeanors, and so on. To a then-recent law school graduate, it seemed a clear violation of the federal Sherman Anti-Trust Act. Shortly thereafter, there was a great deal of commentary on whether or not these fee schedules were, in fact, a violation.¹ There was an argument, without authority, that "learned professions" were exempt from antitrust laws. This was litigated gracefully in civil courts over years. It was eventually determined that lawyers were not exempt² but no lawyers were prosecuted in the meantime.

The first point of the story is that even lawyers -- who should know better, one would think -- were willing to blithely violate the antitrust laws without much reflection. So too, other well intentioned folks who have no legal training but are engaged in business may run afoul of the antitrust laws.

The second point of the story is that today just about everything, including technical violations of antitrust laws, can be and may be prosecuted as major federal felonies.

Those prosecutions may also involve government initiated civil enforcement actions or class-actions brought by plaintiff's lawyers who read press releases from the United States Attorneys' Office and troll for clients to represent a class.

In this *Criminal Justice* column, we will look at one particular aspect of antitrust litigation that can be extremely important to anyone who might be under investigation for an antitrust violation. It is a remedy that evokes moral and practical concerns. However, it is something that must be addressed immediately on behalf of the client or the benefits of it will be lost forever.



Robert Sanger

It is all too easy for a person involved in business to make casual comments or engage in what they think is legitimate activity only to find that they are the subject of a federal or state investigation....

ACPERA and Being the First On Board

The Antitrust Criminal Penalty Enforcement and Reform Act (ACPERA) was enacted by Congress in 2004 to increase incentives for people and businesses that were involved in antitrust violations to come forward, report their crimes and cooperate with any investigation of themselves and others as well as any subsequent civil litigation.³ They are able to enter the U.S. Department of Justice's

criminal leniency program and, in fact, receive amnesty from prosecution. On the civil side, they are able to avoid treble damages and joint and several liability.

In order to qualify, the ACPERA candidate must be the first on board. This is something we often hear in the criminal context in ordinary cases. A sweet deal is available to the first defendant who comes on board and agrees to testify against the co-defendants. The result could be immunity from prosecution but more often is an agreement to a plea and sentencing reflecting cooperation as a basis for departure or variance from the Sentencing Guidelines.

However, in the context of antitrust and ACPERA, the situation is more structured, the benefits are more clearly defined and are, for the most part, more substantial. In an antitrust action, a defendant, if convicted can face substan-

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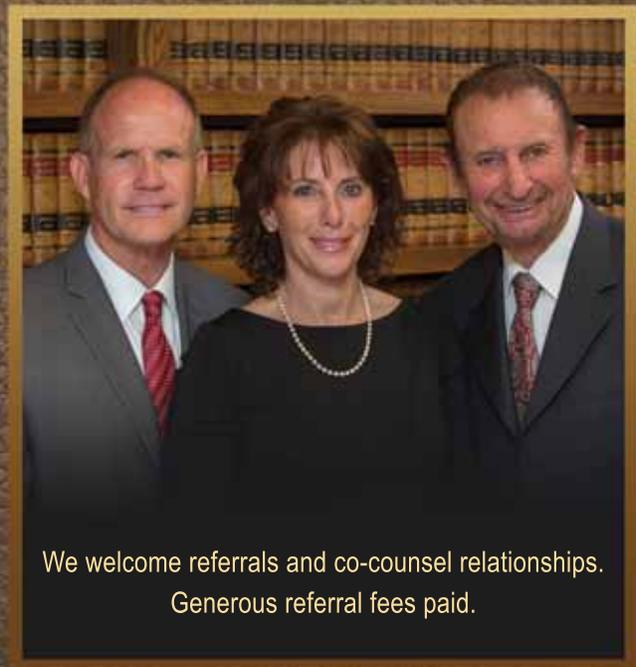
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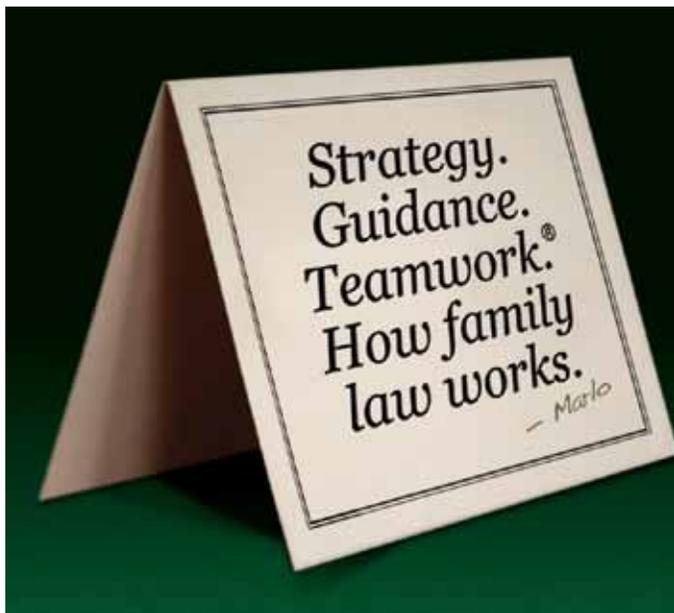
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Sanger, *continued from page 16*

tial time in custody. In addition, in the subsequent civil action, the damages can be monumental even before the invocation of treble damages. If the first on board obtains ACPERA status, that defendant will not be prosecuted at all while all other defendants may be prosecuted to the fullest. The first on board may still be sued, including in a class action, but will not be subject to treble damages nor to joint and several liability for the entire impact on the market.

The problem with this law – and other whistleblower laws – is that it is subject to abuse. Individuals and companies that are already subject to investigation can run in and claim a “King’s X” if they are the first through the door. This puts a premium on “snitching,” and is not necessarily based on the redemption of someone who comes forward to take responsibility because they had an epiphany that they had just broken the law. In other words, it puts a premium on throwing business colleagues and competitors under the bus to save one’s own skin.

Oddly, it can have a distinctly anticompetitive effect. The ACPERA qualified individual or business may well have derived significant benefit from antitrust activities. Yet, they can minimize their damages while subjecting their competitors to criminal prosecution and civil damages. The ACPERA defendant may be the one standing at the end of the day and be the benefit of a windfall in the form of a substantial increase of market share.

Nevertheless, business lawyers as well as civil and criminal litigators have to be aware of this opportunity whether or not it is philosophically pleasing. If it becomes known to corporate counsel or outside business counsel that a client has engaged in any form of antitrust activity – horizontal or vertical price fixing, customer allocation, bid-rigging or anything else that might come within the antitrust laws -- it is incumbent on the lawyer to make the ACPERA option known to the client. The client will have to wrestle with the practical and moral decisions involved in being the first on board. However, if that opportunity is lost, it is irretrievable.

Having said that, there will still be many issues with regard to whether or not an ACPERA applicant will be entitled to that status both in the criminal case and any subsequent civil litigation. The ACPERA applicant has to cooperate fully with the government in the prosecution of the other individuals and businesses. This may involve disclosing much more than the technical aspects of the antitrust violations. As a defendant in the subsequent civil litigation, the ACPERA defendant has to convince the judge that he or it has cooperated fully with the plaintiffs in their litigation against the remaining defendants. Failure to do so

can result in the judge denying the status and permitting treble damages and joint and several liability.

Conclusion

In one sense, ACPERA status is a regrettable consequence of the over-criminalization of business in the United States and the vast discretionary power of federal (and state) prosecutors in “white collar” cases. It is also a regrettable movement towards the policies of Big Brother (and those of some actual non-Orwellian regimes) where it is encouraged to denounce others to the state. Pure motives are often mixed with a sense of being deputized by the regime or may be overridden by corrupt motives of self-benefit.

Nevertheless, like all other areas of compliance, business lawyers have to be on top of all the nuances of antitrust. The best defense is a good offense. Keep the client educated and compliant. However, if any antitrust violation comes to the attention of counsel – in-house or outside – counsel has a duty to advise the client right away of the potential for seeking ACPERA status.

That does not mean that it is over for the applicant. Even though a potential criminal litigant or civil defendant has claimed ACPERA status, the remaining defendants can still fight back. ACPERA status can be revoked and, of course, the merits of the case are not established just because there is a “snitch” any more than they are in any other case. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 40 years. He is a partner in the firm of Sanger Swysen & Dunkle. Mr. Sanger is Immediate Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization. He is a Director of Death Penalty Focus. Mr. Sanger is a Member of the ABA Criminal Justice Sentencing Committee and the NACDL Death Penalty Committee. He is a Member of the American Association for the Advancement of Science (AAAS). Mr. Sanger was also accepted into the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS) earlier this year.

ENDNOTES

- 1 See, e.g., Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 Duke L.J., 1164 (1974) and citations therein, Id. at 1165 fn. 3.
- 2 *Goldfarb v. Virginia State Bar* 421 U.S. 773 (1975). Although professional organizations are subject to the “rule of reason” rather than “per se” analysis. *California Dental Association v. Federal Trade Commission*, 526 U.S. 7856 (1999).
- 3 Pub. L. No. 108-237, tit. II, 118 Stat. 661, 665; it has been extended in effect now through 2020, Pub. L. No. 111-190, 124 Stat. 1275. ACPERA was previously extended for 1 year in 2009. Pub. L. No. 111-30, 123 Stat. 1775 (2009).

Perfection in Progress

BY DANIELLE DESMETH

I love being told, “You look so calm,” “so happy,” or, “Your posture is so good.” Obviously it is nice to hear a compliment, but what tickles me is that I am as I appear: calm, happy, and grounded.

This was not always the case. In recent years I have felt stressed, lacking, and short of breath. I was forced to confront these issues after scar tissue crept across my windpipe,



suffocating me. I had been having difficulty breathing since 2008. Misdiagnosed as asthma and allergies, a doctor discovered the airway obstruction in Fall 2011. I underwent six surgeries from September 2011 to October 2013. Top specialists projected no end in sight to the frequent surgeries. It is the only way Western medicine currently treats my idiopathic (unexplained) condition. This made no sense and I decided there must be a better way. As soon as I made that decision, I found an answer: Eastern medicine. The compliments I now receive inevitably follow a yoga class or acupuncture session, validating my efforts to take my emotional, physical, and spiritual health into my own hands. It has been a year since my last surgery and I do not intend to have another. I share my journey in the hope it may help you.

In my effort to stay collected in our chaotic world, I was bottling things up, holding myself too tight. To prevent errant movement in court, I stood tall like a statue, channeling nervous energy down to my concealed wriggling toes. I used to hail this as a victory. My acupuncturist, Dr. Gayatri Chopra Heesen, helped me realize I was suffocating myself. Since starting acupuncture in February, I have watched decades-old bruises disappear. Acupuncture opens blocked channels, allowing my body to process and move what sits stagnant, including the scar tissue in my throat.

Yoga taught me that breath moves the body. Ever notice a deep sigh (of exasperation or something else)? That is the body commanding the air we refuse it. A deep breath into the belly after a stressful work call saturates my body with the oxygen it needs to tackle the task at hand. In court I



now stand tall, shoulders back and down, relaxed into my rooted feet.

If you believe yoga is for hippies, you are wrong. Take it from ex pro-wrestler Jake the Snake Roberts, who fell into a pit so deep he removed all of the mirrors from his home. It was not until his protégé, Diamond Dallas Page, introduced him to yoga, that Roberts can now extend his fingers and accept his life-long struggles. “Progress, not perfection,” says Diamond Dallas Page (DDP). With his thriving yoga business, DDP helps regular “dudes” address all kinds of ailments.

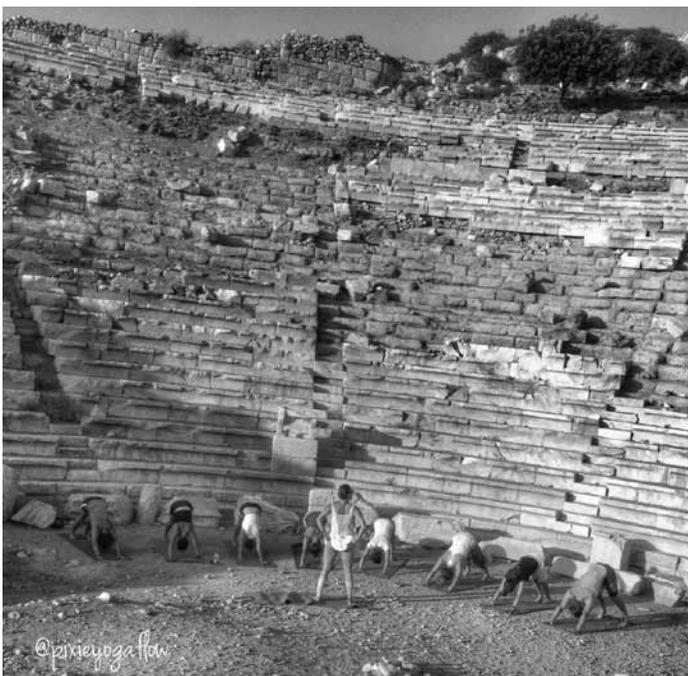
Yoga is for everyone, unique to everyone. As you feel your breath expand your ribs, you are doing yoga. Literally the yoking of mind, body, and spirit, you can take it wherever you like. I hear people say, “I can’t do yoga because [fill in your reason].” That is because people imagine it to be something. In practice, yoga is whatever you do with each breath. You remain in the moment and, when you do, you cannot fail. As DDP intends it, when we strive for this unattainable thing we call perfection we are rejecting the present moment. We are rejecting what is.

When I honestly asked myself what I lacked, I imagined things that were expected of me. Of course that expectation was in my head but it did not make it any less compelling. Constantly comparing my “imagined me” to me was preventing me from being me. As a reformed perfectionist, I see how criticizing my best efforts and rejecting what is, crippled my health. I now reject my fear of failing to live up to those expectations. Failure is manufactured and exists only in my mind. Everything is a work in progress.



Until I sailed Greece and Turkey in September, I had not taken a legitimate vacation since my post bar exam trip in 2008. In a group of 10, led by yoga instructor Pixie Kastrup, we practiced yoga twice a day while playing in the pristine waters of the Dodecanese Islands and Turkey’s turquoise coast. In a small bay called Panormitis on the island of Symi, I felt an openness in my core. Suddenly I had a louder voice, deeper breath, and freer movement than I have ever known.

I returned resolved to maintain my vacation bliss, knowing we are all calm, happy, and grounded if we so choose. When I feel that tightness in my throat, I take a deep breath and smile, in awe of our ability to be as we think and feel. I hope, dear readers, you know what relaxes and releases you. If not, go find out. ■



Remembering Our Colleagues

BY PETE UMOFF

Once again *Santa Barbara Lawyer* wishes to remember two of our Dearly Departed. This is the fifth installment in the “Remembering Our Colleagues” series, and will be the last during Claude Dorais’ tenure at the helm of *Santa Barbara Lawyer*. Congratulations to Claude on a great year and all credit to him for bringing this series to print. In this edition we would like to remember two pioneers in the Santa Barbara legal community.

Paul Fritz

I first met Paul many years ago when he was still a partner and an outstanding trial lawyer at Archbald & Spray. In 1986, after 12 years with that firm, Paul virtually invented the “lawyer as mediator” when he founded Creative Dispute Resolution. Many local lawyers have followed Paul’s footsteps into the world of mediation over the years since, but none have done it better or taken it more seriously. As a pioneer in the field, Paul left the practice of law because, as a veteran of many trials, he believed there had to be a better way for him to bring his skills to bear to help people resolve disputes. Paul was perfectly suited for the role. He was intelligent, an experienced trial lawyer, a former command officer, and a compassionate human being. His combination of experience, intelligence, and quick witted personableness enabled him to calm the waters in the most turbulent of cases and find resolution where it often appeared there could be none. He did that in multiple cases in which I was involved, each time to my surprise. His easygoing manner and quick smile were disarming and virtually impossible to resist. You simply could not maintain a stubbornly piggish posture in the face of Paul’s good natured chiding and insight.

My first working experience with Paul was in an easement dispute between neighboring property owners. As is the case with most disputes between neighboring property owners, this was an emotionally charged situation where lines had been drawn, names had been called, and locked gates had been installed. As is also the case with most dis-

putes of that type, opposing counsel and I knew that our clients’ best interests would be served by finding a way to resolve their differences by agreement. We knew we needed help to do that, so we called in Paul. It was a long and hard road, but by the end of the day Paul had defused the situation, created an agreement that both sides could live with, and laid the groundwork for these two neighbors to co-exist peacefully for many years to come. I entered that mediation session strongly doubting that it would be successful. I left it impressed by Paul’s ability, through accurate analysis and assessment, personal presence and compassion, and sheer determination, to find a way to dispel the emotional load and identify the needs of both parties and a way to address those needs. The parties did not leave friends, but they left with a resolution that has lasted for over 30 years. I left knowing that we collectively had done a good job and served our clients well.

Over the years I had similar experiences with Paul, and without fail, Paul was a credit to our profession in the way in which he conducted himself, the respect he paid to the parties and the process, and the results he assisted the lawyers and the parties to obtain.

On a personal level, I liked Paul very much. He was good natured, quick to smile, and always had a good word to say. I never saw him in a bad mood, and I never heard him speak disrespectfully to anyone. I was stunned when I heard of his passing. I can still see that smile and hear his voice, rich with goodwill and warm California sunlight.

Joe Nida

Those of you who are litigators may not have known Joe, unless you had the opportunity to litigate on behalf of one of his many clients, in which case you probably knew him very well indeed. Personality wise, Joe Nida was very different from Paul Fritz, but professionally he was every bit as experienced and capable, and was a pioneer in his own right. Joe was at the forefront of the start-up world in Santa Barbara. He was the founder and Chairman of the California Coast Venture Forum, created by Joe to mentor, advise, and promote start-up and growing companies, primarily in Santa Barbara’s burgeoning high tech community. He was instrumental in the success of many fledgling companies, as well as being on the boards of publicly traded companies. He was tireless, nay relentless, in the cause of his clients. He was a major partner in several of the premier law firms in town, including Schramm & Raddue, Seed, Mackall; Nida & Cole; and Nida & Maloney, which he merged with LA

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Legal News

Campbell & Dorais, *continued from page 10*
much I have appreciated their diligence, their concern, and their caring. I wish the public could fully appreciate how good a job the staff does and how critical their day-to-day excellence and high level of effort is to the administration of the Court system. I have made true friendships with many of the staff, and those friendships will continue to be joys in my life."

As so often happens in Santa Barbara County, the lives of those participating in our legal system intersect at various stages. Judge James Herman remembers that he took his very first deposition in a case where Judge Iwasko, then still in private practice, was on the other side. As a young lawyer at the time, still shy on experience, Judge Herman wanted to be sure he left no stone unturned and asked a few – well, quite a few - too many questions. By his own admission, a one-hour deposition was at the three-hour mark when, during a break, he was introduced to Judge Iwasko's well-known sense of humor: "Well, Mr. Herman, my clients prefer to pay by the hour instead of by the word." Judge Herman cheerfully recalls it as a lesson well learned.

Judge Iwasko also enjoys being on the receiving end of humor. In an article in *Santa Barbara Lawyer* in March 2003, reporting on his elevation to Judge, Judge Iwasko's friend, Bill Duval, was quoted as suggesting that prior to his appointment and while on a trip to London, Judge Iwasko purchased a wig of the type worn by British Judges, just to have it handy if and when there is occasion to wear it.

The people of Santa Barbara County have been well-served by Judge Iwasko and the members of the Santa Barbara County Bar Association wish him well as he embarks on a new path. ■

Scott Campbell is the 2014 President of the Santa Barbara County Bar Association. Claude Dorais is a Director of the Association and the 2014 Editor of Santa Barbara Lawyer. Both are in private practice in Santa Barbara.

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IS PLEASED TO ANNOUNCE THAT **GREGORY B. WILBUR** HAS JOINED THE FIRM. MR. WILBUR, A GRADUATE OF GEORGETOWN UNIVERSITY AND NEW YORK UNIVERSITY SCHOOL OF LAW, WILL CONTINUE TO FOCUS ON EMPLOYMENT LAW.

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In Memoriam

Dorais, *continued from page 15*

sense of humor was in full evidence that day and he relished every minute of our discomfort, knowing that positioned as we were we could not leave early. He was such a great guy, we did not even resent it.

Bob lived his life committed to excellence, in his relationships, in his work, and in his life. He was generous to a fault and kind to all he knew. He brought to mind the saying: "His kind shall not soon pass this way again." While that is true, it turns out the genesis of that sentiment is an old Quaker quote, often attributed to the missionary Stephen Grellet, which expresses how Bob lived:

"I expect to pass through this world but once; any good thing therefore that I can do, or any kindness that I can show to any fellow creature, let me do it now; let me not defer or neglect it, for I shall not pass this way again."

Knowing Bob McFarland, being his friend and his partner, was a privilege. ■

**Claude Dorais was Bob's friend and partner at Dorais, McFarland, Grattan & Polinsky, Law Corp.*

Dearly Departed

Umoff, *continued from page 24*

powerhouse Sheppard Mullen Richter & Hampton.

As a lawyer, Joe was a true rainmaker (along with Harris Seed, probably the best Santa Barbara has ever seen), but not just a rainmaker. He worked tirelessly; he was usually the first to arrive and the last to leave. His clients loved him because he was always available and quick to respond to whatever their need might be. He could be tough to work for or with because he demanded as much from those around him as he himself was prepared to give, which was a lot. The needs of the client always came first. Yet, he loved a party and was at his best when he was the host.

Despite Joe's hard-driving style, and the not uncommon perception of him as a hard-nosed lawyer and business person, Joe was at heart an optimistic and compassionate man. Through his own debilitating illness he never lost his positive outlook. He never lost his positive, can-do attitude, his passion for helping the underdog, or his compassion for those who had suffered misfortune. He was a man of uncommon courage and dogged determination. He was what my wife calls a "pinwheel," after the cookies of the same name, crusty on the outside and marshmallow on the inside.

There are not many like Joe Nida. ■

Motions



Mark Coffin has relocated his practice as the **Law Office of Mark T. Coffin**, 21 E. Carrillo Street, Suite 240, Santa Barbara, CA 93101. Mr. Coffin is a 20-year attorney, formerly with Christman, Kelley & Clarke and Hardin & Coffin in Santa Barbara. He is an experienced civil litigator practicing in the areas of business, construction, real estate, and personal injury. Mr. Coffin

earned his J.D. from the McGeorge School of Law, University of the Pacific, and a graduate business degree from Thunderbird School of Global Management in Phoenix, AZ. He is active on the boards of several local nonprofit organizations, most recently the Montecito YMCA and American Institute of Architects, Santa Barbara Chapter.

Shelley Vail, attorney and assistant editor of *Santa Barbara Lawyer*, together with her husband, **Chris Vail**, environmental engineer, are pleased to announce the birth of **Carter Thomas Vail**. Carter was born on July 2, 2014 at Santa Barbara Cottage Hospital at 3:35 PM. Carter is a happy baby and joins his 3 year old sister, **Scarlett Annslee Vail** in robbing their parents of sleep, sanity, and any remaining youthfulness; while also bringing more joy to their lives than they could have ever imagined.



If you have news to report, 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.

THE OTHER BAR:

Meets every Tuesday at noon 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/> Link: Santa Barbara in 'Meetings' menu.

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SAVE THE DATE 2015 High School Mock Trial Competition Call for Scorers

Volunteer scorers are needed to help make this an effective competition and a rewarding experience for our local high school students. Interested attorneys, paralegals and legal professionals are invited to apply to serve as scorers. The participating schools this year are Cabrillo, Carpinteria, Dos Pueblos, Laguna Blanca, Pioneer Valley, San Marcos, Santa Barbara, Santa Maria and Santa Ynez Valley Union.

It is sponsored by The Constitutional Rights Foundation, the Santa Barbara County Education Office and the Santa Barbara County Superior Court.

When: Preliminary Rounds: Saturday, February 21
Semi-Finals and Finals: Saturday, February 28
Both days feature a morning and afternoon session.

Where: 1100 Anacapa Street (Courthouse), Santa Barbara

There will be a free one hour MCLE training in mid-February. Training is required to score.

Law Library Wants to Hear from You!

The Board of Trustees of the Santa Barbara County Law Library is asking the legal community for input to ensure that the collections in both Santa Barbara and Santa Maria remain "attorney friendly."

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Verdicts and Decisions

Morris vs. Rofeh

SANTA BARBARA COUNTY SUPERIOR COURT, ANACAPA DIVISION

CASE NUMBER: 1416229
TYPE OF CASE: Complaint for breach of contract and conversion; cross-complaint for breach of contract
TYPE OF PROCEEDING: Court trial
JUDGE: Hon. James E. Herman
LENGTH OF TRIAL: 4 days
DATE OF VERDICT OR DECISION: July 17, 2014
PLAINTIFF AND CROSS-DEFENDANT: Robert M. Morris
PLAINTIFF'S COUNSEL: Bruce W. Hogan of Kingston, Martinez & Hogan, LLP
DEFENDANT AND CROSS-COMPLAINANT: Mansour Rofeh aka Mark Rofeh
DEFENDANT'S COUNSEL: David W. Affeld of Affeld, Grivakes & Zucker, LLP

OVERVIEW OF CASE: Plaintiff sued for collection of a \$450,000 secured promissory note and damages for conversion of the collateral. Defendant claimed Plaintiff had forged a modification to the promissory note and that Defendant had already paid more than was due on the note.

FACTS AND CONTENTIONS: Plaintiff and Defendant, who owned a Beverly Hills antique store called Amphora Antiques, are both in their 70s. They were close friends for 40 years and often bought and sold collectible items to each other. Plaintiff made several loans to Defendant over the years, culminating in a \$600,000 promissory note signed in 2000 secured by three vintage Indy style race cars and the inventory of Amphora Antiques. The parties met for lunch in Los Angeles nearly every month for the next 11 years, and each time Defendant made an interest only payment on the loan.

In 2006, at Defendant's request, the parties met in Santa Barbara and modified the promissory note, eliminating the Amphora Antiques inventory from the collateral, acknowledging a principal reduction of \$150,000 to a new balance of \$450,000, and reducing the interest payments from \$4,000 per month to \$2,500 per month. Defendant continued to make \$2,500 monthly payment for five more years, until the end of 2011, when he told Plaintiff he was financially unable to continue.

In 2012, Plaintiff requested that Defendant turn over the racecars to be sold and applied toward the \$450,000 note balance, but Defendant refused. Plaintiff had neglected to file a UCC-1 and Defendant previously had sold two of the racecars in a private sale without informing Plaintiff. When Plaintiff sued Defendant in 2013, Defendant cooperated in the auction sale of the third racecar. The net proceeds of \$166,500 were turned over to Plaintiff, but the parties were unable to come to terms for payment of the remaining balance. Formal discovery followed.

After a limited response to Plaintiff's initial document request, Defendant, at Plaintiff's deposition, confronted Plaintiff with several new cancelled checks which appeared to reflect payments in excess of the amounts due on the note. At the same time, and for the first time, he accused Plaintiff of forging the 2006 modifications to the promissory note. Plaintiff denied forging the modifications.

After the deposition, Plaintiff located personal financial records including Morgan Stanley account statements which re-



flected that he had lent an additional \$200,000 to Defendant in 2000, three months after the \$600,000 note was signed. The additional \$200,000 loan was not documented on the promissory note, but when that amount was included in the note calculations, it generally matched up with the payments shown by Defendant's cancelled checks and resulted in a balance of approximately \$450,000 on the combined loans in 2006, when the note was modified to reflect that amount as the remaining principal balance. Defendant denied that he had received the additional \$200,000, maintained his claim that Plaintiff had forged the note modifications, and filed a cross-complaint which asserted that he was due over \$315,000 for overpayments he had mistakenly made on the note.

Both parties had handwriting experts and forensic accountants to support their positions at trial.

SUMMARY OF CLAIMED DAMAGES: Plaintiff requested damages of \$371,400 based on the note balance, including interest and after credit for the \$166,500 already received from the sale of the third racecar. Plaintiff also requested punitive damages for conversion of the collateral. Defendant's cross-complaint requested damages of over \$315,000 based upon his claim of overpayment.

RESULT: Judgment for Plaintiff for \$371,400. Defendant's cross-complaint was denied. Plaintiff's motion for attorneys' fees is pending. ■



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Speaker

Matthew Haffner of HAFFNER LAW GROUP
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Date and Time

Thursday, January 15th, 12 noon to 1:30 pm

Location

Santa Barbara College of Law, Room 1, 20 East Victoria Street, Santa Barbara

Reservations

Reserve via email to Mark Coffin,
Chair of Litigation Section, by Thursday, January 8th,
mtc@markcoffinlaw.com

Cost and Payment

\$40/members \$45/non-members – includes lunch
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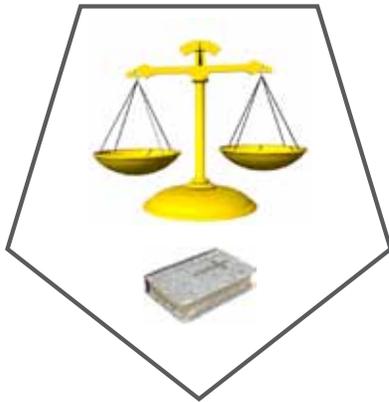
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