Santa Barbara Lawyer

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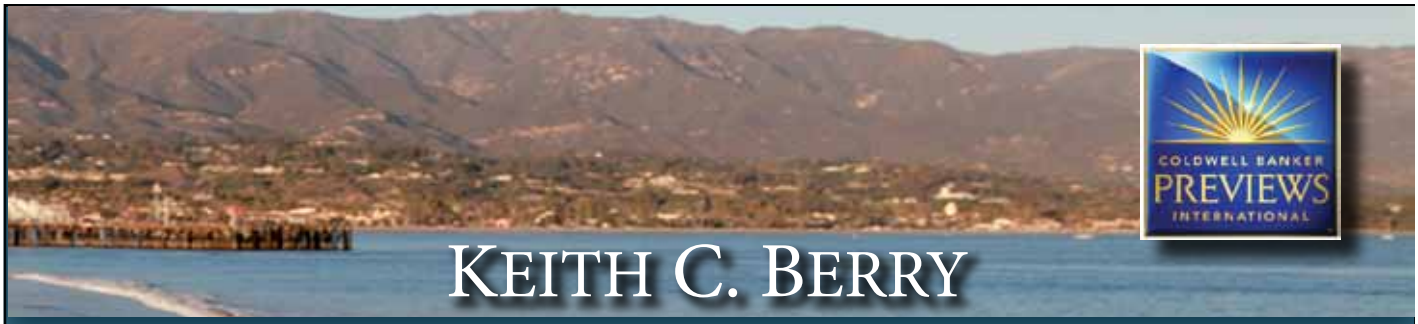

Keith C. Berry

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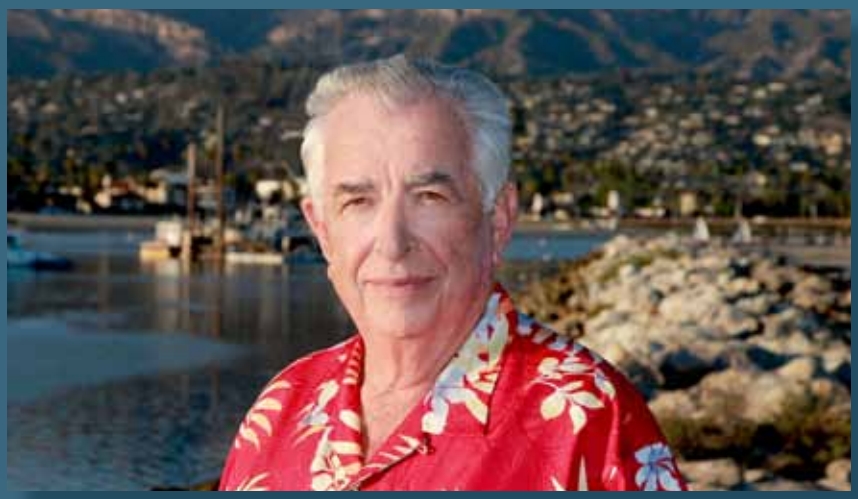

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Mission Statement

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

Sections

About the Cover

Happy Fourth of July from the Santa Barbara County Bar Association. Photo courtesy of Fritz Olenberger.

The State Bar of California is launching a voluntary survey of its members to help ensure that lawyers are meeting their ethical obligations when it comes to handling client funds.

http://bit.ly/ctasurvey2015

The anonymous online survey will increase awareness of client trust accounting rules and serve as an educational tool. In addition, staff will analyze the survey results to make decisions about future educational and regulatory efforts. Attorneys who hold money or property on behalf of clients must follow specific accounting rules and client trust accounting violations have long represented one of the primary areas of concern for the Office of Chief Trial Counsel, the bar's prosecution unit. The State Bar urges attorneys, particularly those who deal with client trust accounts, to respond to the survey. Participants will receive a coupon, valid through the end of the year, for a $10 discount on any item in the State Bar online CLE catalog. The survey will remain active through July 31 on the State Bar's home page and Ethics Information page.

The Santa Barbara & Ventura Colleges of Law Celebrates 45 Years of Accredited Legal Education for the Central Coast

By Lisa Williams

At events held on June 11th and June 18th, in Santa Barbara and Oxnard, respectively, The Santa Barbara & Ventura Colleges of Law (COL) celebrated its 45th anniversary with alumni, faculty, trustees, and friends. The anniversary events were co-chaired by Santa Barbara District Attorney Joyce Dudley, and retired Ventura County Superior Court Judge David Long. The law school has over 1800 graduates including judges, district attorneys, county and city elected officials, and leaders in legal practice, business, and nonprofit organizations who have made a powerful difference in the quality of justice and community well-being in Santa Barbara, Ventura, and San Luis Obispo counties.

"This has been a banner year for us to celebrate our 45th anniversary. We received a 5-year re-accreditation from the California State Bar Committee of Bar Examiners, and a 5-year initial accreditation from the Western Association of Schools and Colleges Senior College and University Commission. We are proud this year to have achieved these institutional accreditations that affirm the quality of the education we have been providing to students for 45 years," said COL President Dr. Charles McClintock.

With Juris Doctor (J.D.) and Master of Legal Studies (M.L.S.) programs that combine quality, convenience, affordability, and real-world practicality, the nonprofit COL has provided students a strong foundation in legal education since 1969. In 2010, COL joined TCS Education System (TCS Ed System), a nonprofit higher education consortium dedicated to creating educational experiences that change the way students learn, educating them to apply their skills to bring about lasting social change.

"We look forward to increase engagement with our alumni, many of whom have served as officers in our local bar associations and other community leadership roles. Without the Colleges of Law, we would be without a large group of local leaders who have contributed so much to the quality of life on the California central coast," said COL Dean Heather Georgakis, who has served the school as professor and dean for over a dozen years.

About The Santa Barbara & Ventura Colleges of Law

The Santa Barbara & Ventura Colleges of Law was founded in 1969 with a clear mission in mind—to prepare leaders, for law and law-related professions, through graduate-level legal education that emphasizes academic excellence and accessibility. With Juris Doctor (J.D.) and Master of Legal Studies (M.L.S.) programs that combine quality, convenience, affordability, and real-world practicality, graduates from the nonprofit Colleges of Law have found successful careers as judges, commissioners, or attorneys in both public and private practice, as well as community leaders in government, business and nonprofit organizations. In 2010, the law school became an affiliate partner of TCS Education System, a Chicago-based consortium of nonprofit higher education institutions devoted to graduating "change agents" in professional fields of psychology and behavioral sciences, education and human development, law and legal studies, nursing and health sciences, and organizational development.

About TCS Education System

TCS Education System (TCS Ed) was founded in 2009 as a nonprofit organization with a mission of preparing innovative, engaged, purposeful agents of change who serve our global community. TCS Ed features a community of specialized institutions, which are backed by a model of education that prepares socially responsible, culturally competent professionals in applied fields such as psychology and behavioral sciences, education and human development, law and legal studies, nursing and health care, and organizational development. For more information, visit www.tcsedsystem.edu. ■

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Local Lawyer Lore

By L. Lawyer

Below is last month's "mystery photo"...and below that is a photo with a clue...does that help?

The contest winner, whose answer will be the one considered to be the combination of most accurate/fastest/best, will be announced in a future issue.

Our group of four comprise our legal community's contribution to the list of Gaucho Gridiron Greats. Playing at UCSB from 1961 through 1969, each member of this group made his mark on and off the field.

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

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Played 1963-1967
Offensive (some say "very offensive") Guard

Played on 1965 Gaucho team with 10-1 record and post-season Camelia Bowl berth

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Doug Hayes

FRANK MICHAELSON

THEN
Played 1966-1969
Wide Receiver, Tight End

Claims to have caught the first touchdown pass in the history of Harder Stadium (the night *before* the first game)

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General Counsel
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Frank Michaelson

Doug Fell

DOUG FELL

THEN
Played 1961-1962
Wide Receiver, Defensive Back, Running Back

NOW
Founding Partner
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Real Property and Land Use

DENNIS REILLY

THEN
Played 1968-1969
Offensive Guard

Described in Gaucho program as "rugged and aggressive" player

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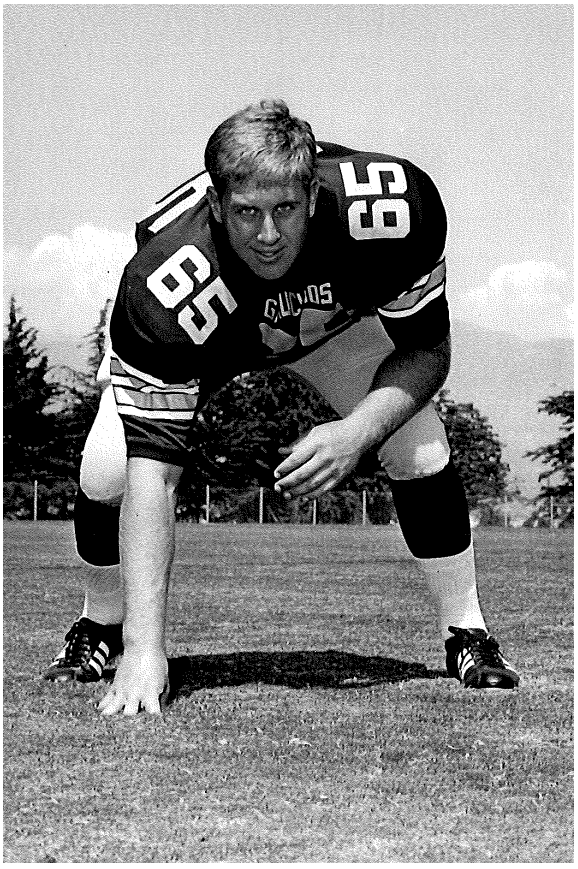

Dennis Reilly

Tax Planning for International Business: A Brief Discussion

By Stephen A. Malley

The U.S. Company looking to do foreign business will sooner or later recognize that tax planning to legally minimize U.S. income tax is not just wise, it may be necessary to survive. The United States has the highest corporate tax rate in the developed world, and it generally taxes individuals and corporations on worldwide income, possibly—but not always—with a credit for foreign income taxes paid on the same type of income. This, coupled with the incredible complexity of the Tax Code, puts U.S. businesses at a substantial disadvantage.

To highlight the complexity of the Tax Code, it is reported that United Technologies Corporation's tax return is 19,000 pages; General Electric's return is 24,000 pages. Much smaller companies engaged in international activity struggle with complex and confusing regulations and lengthy reporting requirements.

The United States taxes the earnings of foreign subsidiaries or "related" companies, absent legitimate tax planning, while some countries, like France, Belgium and The Netherlands, tax only income earned in their respective countries, on a "territorial" tax system. There is much discussion about changing the U.S. to a territorial tax system, but this writer doubts that will happen soon or ever; opponents argue such a system will, for example, encourage the outflow of capital, more deferral of foreign income, and lower wages.

There are, however, many planning opportunities for a U.S. business engaged in some area of international activity, and this article briefly highlights a few possible opportunities.

There are, however, many planning opportunities for a U.S. business engaged in some area of international activity. . . .

FOREIGN TAX CREDITS: U.S. Tax treaties generally allow income tax paid to a foreign country on the same income to be credited against U.S. tax. But, not all taxes paid overseas are income taxes, and are therefore not creditable. Complex regulations, recently revised by the *American Jobs Creation Act*, limited the "baskets" of income for tax crediting to ensure that the credits are applied to essentially the same types of business income.

Depending on the situation and business plan, the use of tax credits can be used to shelter income from high tax jurisdictions by using credits from low tax jurisdictions, perhaps by using hybrid entities, which are usually designed to be recognized as different taxable entities in the relevant countries. While this is a common and often highly beneficial form of planning, the use of hybrids is a subject of interest to both U.S. and European regulators and must be carefully designed.

INCOME DEFERRAL: The basic form of income tax deferral can be realized when a foreign subsidiary is manufacturing in the country where it is incorporated, or if such subsidiary contracts with a foreign manufacturer and meets all the requirements to avoid "subpart F" income; this Code section essentially requires the recognition of foreign income for U.S. tax purposes. Such planning to defer taxable income should be considered by a U.S. Company manufacturing outside the United States.

"Transfer pricing" rules govern sales between a U.S. parent and its foreign subsidiary, and pricing arrangements must be observed and documented. These rules are designed to prevent unreasonable payments to a related foreign entity to increase foreign deferred income. Many countries have their own rules.

The use of "hybrids" or the election by the U.S. parent to "check the box" to disregard one foreign subsidiary but not another, can, in the right circumstances, produce substantial tax benefits. A so-called hybrid entity is one that is, for example, recognized as a corporation in one jurisdiction, but disregarded for tax purposes in another. The various forms and uses of hybrid entities is a complex subject. Possible benefits are, for example, a deduction for interest paid by a high tax subsidiary to a low tax subsidiary. Both the U.S. and certainly many countries in Europe are taking a hard look at the use of hybrid entities, and careful planning is necessary.

CORPORATE INVERSIONS: This term describes the process when a U.S. corporation merges with a foreign corporation in a lower tax rate jurisdiction, and then treats the foreign corporation as the "parent" and the U.S. corporation as the "subsidiary." This can result in overseas profits

being out of the U.S. tax system, and taxed a lower rate. Such low taxed profits may eventually be repatriated and taxed in the U.S. The amount of money kept overseas is a popular press topic and it has been targeted as "unpatriotic." The Obama Administration and the IRS have recently tried to at least curb this technique by interpreting existing law to prevent the U.S. Corporation from borrowing from its foreign "parent." Nevertheless, for both large and smaller companies, this technique is still viable, especially if there is a strong business purpose. The risk of future legislation to further curb this activity has to be considered, but there remain many legislators who insist there should be no such legislation without tax reform.

INTELLECTUAL PROPERTY: The transfer of intellectual property to a foreign subsidiary or related company is regulated by the Tax Code and Regulations. The IRS is alert to ensure that transfers of intellectual property to a foreign related company will not take all the royalty or licensing income out of the United States. The basic rule is that the transfer is treated as an "exchange" for payments to the U.S. company of the "arms-length" value of the intellectual property, and recognized over a period of time as taxable income. Valuation of intellectual property which is transferred or "sold" is the subject of much IRS litigation. This planning may nevertheless be appropriate and tax-wise in the right situation, such as when royalty or licensing income is expected from foreign sources.

TAX HAVEN COUNTRIES: There is rarely if ever a tax benefit for simply incorporating in a very low or zero tax country. The United States allows no tax deferral to a "CFC" or controlled foreign corporation, absent, for example, the manufacturing exceptions discussed above. As in most foreign arrangements, the CFC must report all its income.

Nevertheless, in some circumstances the use of a so-called tax haven may be justified. Just for example, the U.S. Virgin Islands offers a program by which a qualifying company's income is essentially tax free (taxed on only 10% of its income, which might subsequently be repatriated to the U.S. shareholders as a qualifying dividend taxed as low as 15%.

The Organisation for Economic Co-operation and Development (OECD) continues to try to make the use of such jurisdictions as unattractive as possible. It is interesting to note that the U.S. is often criticized for its lack of transparency. For example, it is still possible to incorporate in some states without a public record of ownership. However, full disclosure of beneficial ownership will be required by financial institutions both here and by most other countries. This Article does not discuss the Foreign Account Tax Compliance Act (FATCA) and the surge in cooperative tax reporting by one country to another.

TAX REPORTING: A U.S. person and corporation must determine which IRS reports are required relating to foreign ownership and foreign transactions. The list of IRS reporting forms is formidable, and it may be assumed that IRS reporting will be required for any foreign activity. Failure to timely file the required forms carries severe penalties.

CAPTIVE INSURANCE: There are many insurance companies which specialize in insuring various risks arising from overseas business activity. If the desired insurance is either not available or too expensive, the U.S. Company can consider forming a Captive Insurance Company to essentially "self-insure," or benefit from a pool of insurance. The statutory type of Captive (831(b), for example) is typically owned by the principals of a company, who can pay deductible premiums of up to $1.2 million a year to the Captive for such casualty insurance. A Captive must meet certain statutory and regulatory requirements, but it can be both a beneficial business and tax planning opportunity.

SUMMATION: Tax planning for the business that is engaged in foreign activity, or that is planning to do so, can provide business and tax advantages which can make the business more competitive, and it may be the difference between financial success and the failure of the overseas effort. The current legislative climate in both the United States and other countries should be considered. ■

Stephen A. Malley is an attorney with an emphasis on United States and international tax planning, international business structuring, estate, tax and asset protection planning for United States and foreign nationals and companies, international licensing of intellectual property, and international financial transactions generally.

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Don't Walk Away

By Vicoria Lindenauer

Don't walk away when I'm talkin' to you
This ain't no time for your bad attitude
Don't gimme
That face
When you know I'm really down for the chase
'cause my heart's already in it
And I'm never gonna quit it
When you finally gonna get it
Don't walk away

–Miley Cyrus

There can be a quick blip of time from perceived intransigence to settlement– sometimes hours or even minutes. Help your mediator get you there by trusting him or her to kick around ideas with you confidentially, and to do the same with the other side.

Case in point: Just recently I was conducting a contested liability mediation when, after a couple of hours, the parties proclaimed themselves "too far apart" with plaintiff at about $90,000 and defendant at about $20,000. Not yet time for a mediator's proposal (please see *http://tinyurl.com/mhpbna2* for basics on the mediator's proposal), but based upon my gut instinct, not time to quit either.

After getting both sides' commitments to stick around a little longer, I asked each privately whether hypothetically they would be interested in continuing if we were talking about "something in the mid-five figures." Somewhat to my surprise, both said yes. I then asked each to define for me what "mid-five figures" meant to them. Defense answer: $30,000 - $50,000. Plaintiff answer: $40,000 - $65,000. Now we're getting somewhere! The case settled shortly thereafter.

I suspect both sides came into the mediation with the ultimate settlement number within the range of what they had been willing to do. Yet, no one wanted to be the first to approach it because it's anathema to the training we've all had regarding negotiation "anchoring," which is the tendency to attach a greater significance to the first offer in a negotiation. We all want the other guy to move before we do.

Anchoring does work: An analysis of several anchoring studies by Dean Chris Guthrie of Vanderbilt Law School and attorney Dan Orr concluded that anchoring has a powerful influence on outcomes with a correlation of 0.497 between the initial anchor and the outcome.* This means every one dollar increase in the opening number is associated with an approximate fifty cent increase in the final sale price. Mediators tell you that the key to making the anchoring strategy work is to make your first offer as aggressive as possible without being so unrealistic that the other side walks away. That strategy should give you room to move and define the zone of potential agreement. (*Guthrie, Chris and Orr, Dan, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*. Ohio State Journal on Dispute Resolution, 2006; Vanderbilt Law and Economics Research Paper No. 06-12)

However, anchoring isn't supposed to translate into being perpetually stuck in the mud. So, how do you stimulate activity when you don't want to be the one to move? This is where your mediator can come in handy, provided there is sufficient trust between the two of you and he or she nudges the negotiation along in a way that preserves each side's negotiating integrity and potential concerns about appearing vulnerable.

Before asking my hypothetical question about "something in the mid-five figures," I told each side I didn't know whether those kinds of numbers would fly with the other side, and that the suggestion was entirely my own. This is important, because numerous studies have demonstrated that people often devalue a proposal received from someone perceived as an adversary, even if the identical offer would have been acceptable when suggested by a neutral or an ally.

This phenomenon is called "reactive devaluation." In an initial experiment conducted in 1991, Constance Stillinger and co-authors asked pedestrians whether they would support a drastic bilateral nuclear arms reduction program. If they were told the proposal came from President Ronald Reagan, 90 percent said it would be favorable or even-handed to the United States; if they were told the proposal came from a group of unspecified policy analysts, 80 percent thought it was favorable or even; but, if respondents were told it came from Mikhail Gorbachev only 44 percent thought it was favorable or neutral to the United States. Ross, Lee; Constance Stillinger (1991). *Barriers to conflict resolution.* Negotiation Journal 8: 389–404.

Having a hypothetical suggestion come from the media-

Continued on page 22

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Who Deserves Recognition?

A Call for Nominations

Are you, or someone you know, a selfless contributor to our community and our local court system? The Santa Barbara County Bar Association calls for nominations for 2015 awards in the following four categories. Please do not allow us to overlook worthy candidates.

Award	Recipient Type	Criteria to be Honored
Pro Bono Award	Attorney	Has donated at least 50 hours of direct legal services to low income persons without expectation of remuneration during the previous calendar year.
John T. Rickard Judicial Service Award	Judge	Outstanding contributions to the judiciary and/or the local court system
Richard Abbe Humanitarian Award	Attorney or judge	Life, leadership and conduct that exemplify humanitarian principles
Frank Crandall Community Service Award	Law firm	Facilitating pro bono services to community non-profit organizations). Factors to consider: • services benefiting low-income persons; • community projects' leadership; • nature and quality of work and hours per attorney; • percent of firm attorneys involved in pro bono work; • existence of a policy encouraging pro bono activity.

Submit your nominations to scott@rogersheffield.com by July 31, 2015.
Please include specific facts that support each criterion

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Get to Know... Your Very Own Editor, Nathan Rogers

1. What is your idea of perfect happiness?
Living without regret, envy, or fear.

2. What is the trait you most deplore in others?
Dishonesty.

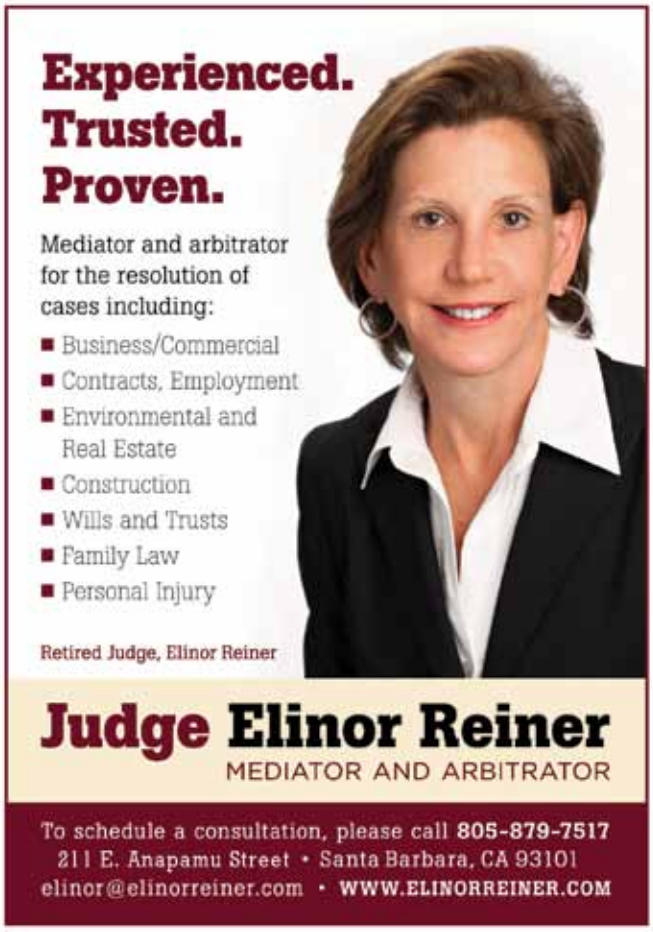
3. What is your greatest extravagance?
Musical instruments and equipment.

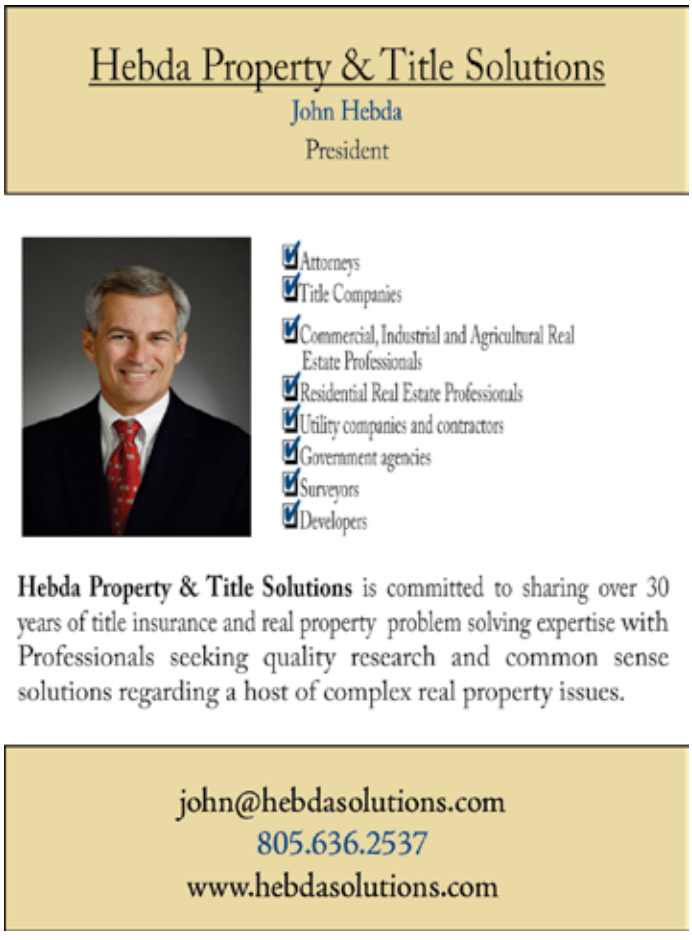
4. What is your current state of mind?
Contemplative.

5. Which words or phrases do you most overuse?
It is what it is.

6. What or who is the greatest love of your life?
My children. Do people actually answer this question with a "what" instead of a "who"?

7. When and where were you happiest?
Huntington Lake, California, attending summer camp as a child.





8. Which talent would you most like to have?
The ability to write popular songs, but to do it twenty-five years ago when the songs I'm likely to write would actually be popular.

9. If you could change one thing about yourself, what would it be?
My wife could answer this question better, but it would probably be hard for her to choose just one thing.

10. Where would you most like to live?
I would split my time four ways between Santa Barbara, San Francisco, somewhere in the Sierras, and a big parcel of pine tree-filled land in Georgia.

11. What is your most marked characteristic?
Stoicism.

12. What do you most value in your friends?
Consistency.

13. Who are your favorite writers?
I'm a big fan of autobiographies, so it depends on whose book I'm currently reading.

14. What is your greatest regret?
Not having traveled more when I was younger with fewer responsibilities.

15. How would you like to die?
If not peacefully in my sleep at a ripe old age, then doing something heroic. ■

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Restorative Justice and the Conferencing Process—Part One[1]

By Robert Sanger

Restorative Justice is part of the law of some 37 states, including California, and is in place in Santa Barbara in a juvenile justice program as well as in the public schools. The statutes and Rules of Court in California which reference restorative justice do not do more than state its availability. There are no express procedures set forth, although procedures are implemented when the process is invoked.

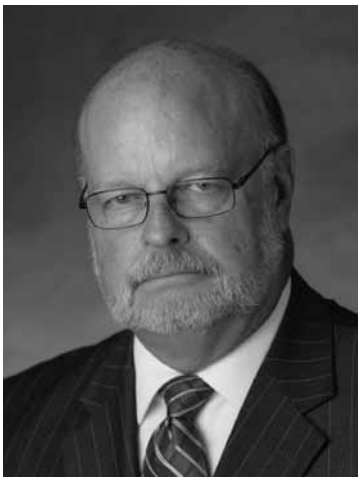
There is a certain core process that is common to most restorative justice applications throughout the world. Restorative justice is, of course, a communitarian process and does not lend itself well to rigid rules. Nevertheless, in order to implement these programs, in traditional Western fashion, legal procedures (or legal recognition of traditional procedures) will be developed over time.

One of the features of most restorative justice efforts is the conference or the "circle." It is something that lawyers, probation officers, correctional officers and judges are implementing and—as foreign to some readers as it may seem—circles are part of the legal process now here and throughout the country. They also work.

In this *Criminal Justice* column, Part 1, we will do a quick overview of restorative justice and look at the statutory references under the California statutes. In Part 2, we will look at the statutory schemes in other states. In Part 3, we will conclude by reviewing the actual facilitation of restorative justice through the conferencing or circle process.

Restorative Justice

The kind of restorative justice that we are concerned with in this article is the kind that involves the victim, the offender and the community. It is the kind where there is conferencing that involves the victim and the offender, and that conferencing often involves a circle. It is not a unilaterally imposed form of restitution or punishment (although both may be involved in the final resolution); it is the kind of restorative justice which attempts to restore the victim, the community and the offender. As we have discussed in a prior *Criminal Justice* column, this kind of restorative justice is not for everyone.



Robert Sanger

First, we would not use the terms victim and offender prior to a determination of guilt. The complaining witness is a witness. The accused is presumed innocent. Any reference to the charged crime is preceded by the word "alleged." However, when we invoke restorative justice, we are talking about a situation in which the accused has made a conscious decision to concede guilt and is willing to agree that he or she is an offender and that his or her conduct has caused harm to the victim and the community as a whole.

Second, restorative justice is not for everyone because, for conferencing to work, the participants have to be willing. There are some juvenile and minor offenses where the offender can be compelled into the process. However, in all cases, the victims still have to be willing. In major crimes, including homicides, all parties—victims and offenders—have to agree to participate. In fact, in major cases, both victims and offenders have to prepare with a counselor or facilitator before the actual conference or circle.

There are two general types of restorative justice that concern us here:

Reconciliation: Restorative justice can be used in post-sentencing circumstances where it facilitates an understanding of usually violent crime by the victims and the offenders. The idea of reconciliation is an aspiration of the process but not required. Remorse and even forgiveness may be a product but, again, are not required. What is required is that the victim and the offender must be willing to sit down at a conference, ideally a circle, and talk. It might be a one-time meeting or the dialogue might go on for several meetings or for life.

Pre-sentence: Restorative justice can also be used pre-sentence or even pre-adjudication of guilt. It is not, in its pure form as restorative justice, a negotiating tool. The offender is never to ask for leniency. However, in these circumstances, there is no question in anyone's mind that the victims will be asked by the prosecution for their views on sentencing. This type of restorative justice is often used in juvenile offenses and minor property crimes but it has also been used in serious cases like vehicular manslaughter, white collar offenses and even murder.

According to a recent survey, as earlier noted, 37 states make reference to restorative justice in their statutes and codes.[2] Many of the references are vague or conclusory, just making reference to "restorative justice" without explanation. However, there are some states which have instituted statutory processes for the implementation of restorative justice. Even where there is no statutory reference or only a vague one, restorative justice conferences have been, and can be, invoked.

Restorative Justice in California

There are a half dozen references to restorative justice in the California codes. It seems that some of the references are not to the kind of restorative justice referred to here. But it is unclear exactly what is contemplated because none of the statutes refer to the process itself in any detail, and the few that hint at it seem to be referring to something else.

Restorative justice for adults, which might include the type of restorative justice we are addressing, was added to the statutes for consideration as a community based punishment alternative. On April 4, 2011, the Governor of California approved the "2011 Realignment Legislation Addressing Public Safety" (Stats.2011, ch. 15, § 1). In addition to all the other provisions of the Realignment Act, such as "County Jail prison" sentences under the portion adding Penal Code Section 1170(h), the Act added an express reference to "restorative justice" as a non-custodial remedy under Penal Code Sections 17.5 and 3450. The subsection adding restorative justice to a list of community based punishment alternatives is identical in both sections and reads in its entirety: "(E) Restorative justice programs such as mandatory victim restitution and victim-offender reconciliation."[3] There is no definition or guide offered as to what restorative justice would entail.

This language seems to conflate "mandatory victim restitution" with "victim-offender reconciliation." These are two completely different projects. The first project, "mandatory victim restitution" is not a restorative justice program since it implies unilateral imposition of an order for restitution. Restitution, of course, can be a part of restorative justice, but only as it results from the restorative justice process involving the victim, the offender and the community.

The second project referred to, "victim-offender reconciliation" has more significance to restorative justice, but certainly does not define it. Not all restorative justice efforts result in reconciliation. In addition, one would assume that the term "mandatory" only applies to the restitution project and not victim-offender reconciliation. Restorative justice cannot mandate reconciliation and, in more serious crimes, participation in the restorative justice process must be voluntary on the part of the victim and the offender.

Cryptic though it may be, the one reference in the California Codes to what might be real restorative justice is found in Education Code Section 48900.5, which provides for suspension of a student or for other means of correction including, "[p]articipation in a restorative justice program." This is not necessarily related to criminal behavior and is not expressly an alternative to juvenile proceedings. The process is not spelled out, but the context and lack of qualifiers suggests that the school and the offending student can agree to engage in a restorative justice program. In fact, there is a program in operation in Santa Barbara public schools.

The term "restorative justice" appears two more times in the Penal Code and California Rules of Court, both relating to hate crimes. Penal Code Section 422.86, enacted in 2004, and Rule 4.427, adopted January 2007, provide for "[r]estorative justice for the immediate victims of the hate crimes and for the classes of persons terrorized by the hate crimes." However, these references are not to the kind of restorative justice discussed here. It seems to be a shorthand reference for allowing the court to unilaterally order some sort of restitution or assistance. It does not seem to contemplate involvement of the offender or the community.

Conclusion

Space in this magazine does not permit us to go further at the moment. Next month we will take up the question of how other states have implemented restorative justice through statutory schemes. We will then go on to discuss how the conferencing or circle process works. ■

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 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 is also a member of the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS).

ENDNOTES

1 ©Robert M. Sanger. This is the first of a series of three articles. A version of this series of articles on restorative justice will form a chapter in an upcoming book on the subject.

2 Molly Rowan Leach and Dr. Sandra Pavelka, *The Political Rise of Restorative Justice,* HuffPost *Crime*, May 26, 2014; http://www.

Continued on page 22

The Santa Barbara Chapter of the UC Hastings Alumni Association Presents:

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Jill Monthei, Esq.

With more than ten years of experience in the entertainment industry at Foothill Entertainment before becoming an attorney, Jill Monthei has extensive knowledge in the executive production and distribution of film and television properties. Jill's practice encompasses a full range of legal services for the entertainment community. She earned her law degree at the Santa Barbara College of Law and her Bachelor of Arts degree from the University of Connecticut.

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Jill Monthei

Lindenauer, *continued from page 12*

tor may also make it more attractive to your opponent for a second reason—because a concession that is actually offered is valued less than a concession that is withheld, and a compromise is rated less highly after it has been put on the table than beforehand. Mnookin, Peppet and Tulumello (2000). *Beyond Winning*, citing Ross, *supra*.

Powerful stuff: a hypothetical settlement coming from a mediator may be more attractive than an actual offer in *the same amount* coming from one's opponent. So, don't walk away. ■

Victoria Lindenauer is a full-time mediator in central and southern California. She may be reached at lindenauer_mediation@cox.net and www.lindenauermediation.com.

Sanger, *continued from page 20*

huffingtonpost.com/molly-rowan-leach/the-political-rise-of-res_b_5029413.html (last visited May 31, 2015).

3 This language is identical to language in Penal Code Section 8052 of the *Community Based Punishment Act of 1994* codified in Penal Code Sections 8050, *et seq*. However, implementation of the Act was contingent on the availability of funding by the Legislature. *The Realignment Act,* however, was funded including money for community based punishment.

Closing Argument: How a Trial Lawyer Writes a Book

By Walter Walker

Walter Walker

So, how's your book coming?

Seriously, you are writing a book, aren't you? Aren't all lawyers? All trial lawyers, at least.

And why shouldn't we? After all, we have wonderful stories to tell. Rip-roaring stories. Exciting, unbelievable, tragic, funny, peculiar stories about people in crisis, pain, despair, and ultimately (one hopes) exhilaration. Who wouldn't want to read about how we (or our clients) overcame all odds to attain, achieve, or formulate justice— snatch it from the fires of hell to which it otherwise would have been condemned for all eternity?

Besides, we (and you in particular) are good with words. That is how we got to become lawyers in the first place, isn't it? The reason we are successful lawyers, winning lawyers, is because we are better with words than our opponents—which means our opponents' books will not be nearly as good as ours.

Because they are writing, too. Or they are going to write as soon as they are done with their briefs, motions, oppositions, pleadings, memos—not to mention their parenting, exercising, coaching, bicycling, skiing, golfing, socializing, traveling, and of course watching "Mad Men" and "Game of Thrones."

I know this because with remarkable regularity I am asked by trial lawyers from both sides of the aisle one or more of the following questions:

- How did you get published?
- Can you help me get published?
- How did you get an agent?
- Can you help me get an agent?
- Will you read my manuscript?

And, of course, most ubiquitous of all:

- How do you find the time?

Ah, the time. Well, it helps to have a patient and understanding spouse. It helps to have at least some control of your practice (with patient and understanding partners, bosses, associates). And it helps not to sleep, or at least not to sleep as much as other people. And, oh yes, forget improving your golf game. For that matter, forget "Mad Men" and "Game of Thrones."

When I am done providing discouraging responses to the questions set out above, I am often asked what I think about self-publishing. With developments in printing and graphics and crowdfunding, I tell my interrogators, it is possible to put out a great looking product on your own. The issue is, who is going to read it? Your friends and family, sure. Maybe your staff members who want to keep their jobs and your associates who want to be made partner. But do not expect to place it in Barnes & Noble or airport kiosks.

Not all the questions I get are about procedure. Some are about the writing process itself, such as the one from a trial lawyer whose telephone call I took because I mistakenly thought he was referring me a case: "Skip," he said, "how do you write a book?"

Well, my friend, first you get an idea.

For those of you who have gotten this far, it is time to raise your hands, speak up, remind me that you are lawyers and that, therefore, of course you have an idea, you have lots of them. Which brings me to part two of the process. Once you have the idea you have to ask yourself, who cares? Or, a little more optimistically, who will care? Or, more realistically, why should anyone care?

Over the course of my legal and writing careers I have on various occasions been called upon to lecture on the topic of writing as a professional. Last summer, at an event called ThrillerFest, which is held annually in New York City, I looked out at the hundreds of middle-age and post-middle age people who had come to pick up tips on writing and getting published and wondered why so many were doing this. What rewards did these people expect to receive that would be worth putting themselves through the agony, turmoil, and frustration of writing a book? Was it to make money? Few are those who can support themselves just by writing fiction. Was it in hopes of becoming famous? Those who achieve name-recognition are fewer even than those who make money. Or was it simply a desire to create a legacy, something that says the author was here and left something behind to prove it?

Continued on page 26

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Walker, *continued from page 23*

Most writers will tell you that writing is just something they have to do; that the process itself makes them fulfilled. Fair enough, but it is not likely that the folks who attended ThrillerFest would be content just to sit in a room loading up their computers or shelves with electronic or printed pages that are going to be read by nobody but themselves. In this regard, I am reminded of a 1976 article in *The New Yorker* by the great John McPhee in which he describes going up to an isolated cabin in the Alaska wilderness to seek shelter as night was approaching. He knew the cabin owner, knew he lived alone, and was just about to knock on the cabin's door when he heard the man's voice coming from inside. He recognized the cadence and hesitated. And then he heard the speaker break into raucous laughter and realized the man had just told himself a joke. McPhee left without going through with his knock.

But let us get back to you, the trial lawyer. You are not going to be telling yourself jokes when you write your book. After all, you really do have something to say.

Don't you?

Sure. Because as a trial lawyer you deal with people in stress, people who have encountered the strange, the untoward, the unexpected, and sometimes the very darkest corners of life. You have read stirring lines of dialogue in depositions; experienced remarkable moments in court; known the joy and travails of living life on the edge, when every word, every exhibit, every ruling counts.

How could you not have something to say? Plenty of other trial lawyers have done it. Look at Scott Turow. Or John Grisham, who does it every six months (or so it seems). Locals, or former locals, who have done it include Richard North Patterson, John Martel, Stephen Murphy, Sheldon Siegel, Lia Matera, and John Lescroat (who was a paralegal rather than a lawyer - - but still).

What do they know that you don't? Well, maybe nothing, but just in case, here are a few reminders. In fiction, the point does not have to be made, indeed should not be made, directly, with supporting authority and to a standard of more-likely-than-not. Rather, the reader needs to be swept along, not bogged down; the reader needs to feel what the author is saying, not be lectured about it. (The reader who wants to be lectured can always turn to Ayn Rand).

The adage with which most of us are familiar is "write what you know." That does not mean, however, that everyone will be impressed with *all* that you know. Not every bit of legal minutiae or arcane procedure will be as fascinating to non-lawyers as it might be to you. Move the story along. That's what Grisham does. That is what they used to do to the extreme in "LA Law"—and, hey, that show was loved by millions.

But what about my story, you want to know, the one I gleaned from real life or a real case? Real cases can make real stories, certainly, but fiction is not factual reporting. Consider *All the King's Men* or the movie "Chinatown" or Shakespeare's "Richard III." As the authors did in those fictionalized versions of real events, think about taking what you have seen or read or heard and asking, simply, "What if?" At the very least that will enable you to employ that other power possessed by successful trial attorneys everywhere, the power of imagination.

People read fiction to be entertained, to be informed, to understand. Bear that in mind when approaching that troublesome triad of questions about who cares, who will care, who should care. We trial lawyers are in a unique position to entertain, inform and enlighten. We are in the public eye, if not individually then at least collectively. We are doing something important, something of significance to others, something of which everyone is aware and about which most people want to know more - - provided, of course, that we do not get pedantic.

You have the story, you have the talent, and you won't be pedantic, will you? We'll leave that to the defense lawyers. ■

Skip Walker, managing partner of Walker, Hamilton & Koenig, LLP, has tried over 50 cases and is the author of six novels, including Crime of Privilege, published by Ballantine in 2013 and a finalist last year for the Harper Lee Award, given annually to the novel that best depicts a lawyer's role in society.

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Verdicts & Decisions

Knight v. Ramsey Asphalt Construction Corporation, et al.

SANTA BARBARA SUPERIOR COURT, ANACAPA DIVISION

CASE NUMBER:	1438227
TYPE OF CASE:	Automobile negligence
TYPE OF PROCEEDING:	Jury trial
JUDGE:	Hon. Thomas P. Anderle
LENGTH OF TRIAL:	11 days
LENGTH OF DELIBERATIONS:	2 days
DATE OF VERDICT OR DECISION:	April 21, 2015
PLAINTIFF:	Maryanne Knight
PLAINTIFF'S COUNSEL:	Jeffrey S. Young and Raymond J. Pulverman of Pulverman & Pulverman, LLP
DEFENDANTS:	Ramsey Asphalt Construction Corporation, Estate of Melvin E. Dworak, III
DEFENDANTS' COUNSEL:	John V. Hager and Amber N. Hurley of Hager & Dowling

FACTS AND CONTENTIONS: Maryanne Knight sued Ramsey Asphalt Construction Corporation and Melvin E. Dworak for injuries sustained in an automobile collision that occurred on October 4, 2011. Plaintiff was traveling southbound on U.S. Highway 101, just south of the La Cumbre overcrossing, when her 2003 Toyota was struck by a 2008 Ford F-550 being driven by defendant Melvin E. Dworak, III, who died of unrelated causes before trial. Dworak was employed by Ramsey Asphalt.

Ms. Knight alleged that Dworak made an unsafe lane change, struck her car, and forced her off the freeway, through the guardrail and into a tree. She claimed she sustained personal injuries and losses as a result of the accident, including a fractured pelvis, sacrum, femur, tibia and fibula. Plaintiff underwent an open reduction internal fixation of the tibial fractures with plates and screws, and an intramedullary rodding of her femur. Plaintiff contended she will need future surgeries on her knee and ankle.

Ramsey Asphalt and Dworak alleged that Plaintiff was driving too fast for wet road conditions and made an unsafe lane change. Ramsey Asphalt admitted it was liable for any negligence of its employee, Dworak, but contended that Dworak was not negligent in the collision and, if he was, that both drivers were negligent. Ramsey Asphalt admitted Plaintiff sustained serious injuries but disputed the claim she needed future knee and ankle replacement surgery.

SUMMARY OF CLAIMED DAMAGES: Plaintiff sought $238,526 for past medicals, $90,194 for past lost earnings, $450,568 for future medicals, and $1,774 for future lost earnings. Plaintiff also sought past non-economic losses of $2,000,000 and future non-economic losses of $3,000,000.

Defendants disputed the future economic losses (medical and loss of earnings) and suggested, only if the defendant was found negligent, past non-economic losses of $100,000 to $200,000 and future non-economic losses of $50,000.

RESULT: The jury awarded Plaintiff $2,000,000 in damages. The jury vote was 11-1 on negligence, 12-0 on causation and 10-2 on damages. The award included past economic losses of $328,720, future economic losses of $452,342, past non-economic losses of $609,469, and future non-economic losses of $609,469. The parties reached an agreement regarding costs and prejudgment interest without the need for post-trial motions.

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Motions

Brooke Cleary McDermott, JD, LLM has been named a partner at the prestigious boutique law firm of **Ambrecht & Associates** in Montecito. Ms. McDermott has been with the firm since 2008.

Ms. McDermott works with individuals and families to achieve their financial, family and charitable goals by guiding them step-by-step through the estate planning process. She also advises individuals, families, beneficiaries, trustees and executors with regard to probate, estate, and trust administration matters, including preparation of estate tax returns, IRS audits and allocation and distribution of bequests to beneficiaries.

Ms. McDermott completed her LLM (Masters of Law) in Estate Planning at the University of Miami School of Law in Coral Gables, Florida. She earned her JD at Suffolk University Law School in Boston, Massachusetts, and a BA summa cum laude, at the University of Connecticut, Storrs, Connecticut in 2003 where she was the commencement speaker.

A member of the Santa Barbara Bar Association, Ms. McDermott has chaired the Probate Section from 2012 to the present and lectures frequently. She is currently licensed to practice law in both California and Florida. Additionally, she is the author of an article published in the Santa Barbara Independent (January 28, 2014) "Protect Your Pets – How to Successfully Include Animals in Your Will or Trust".

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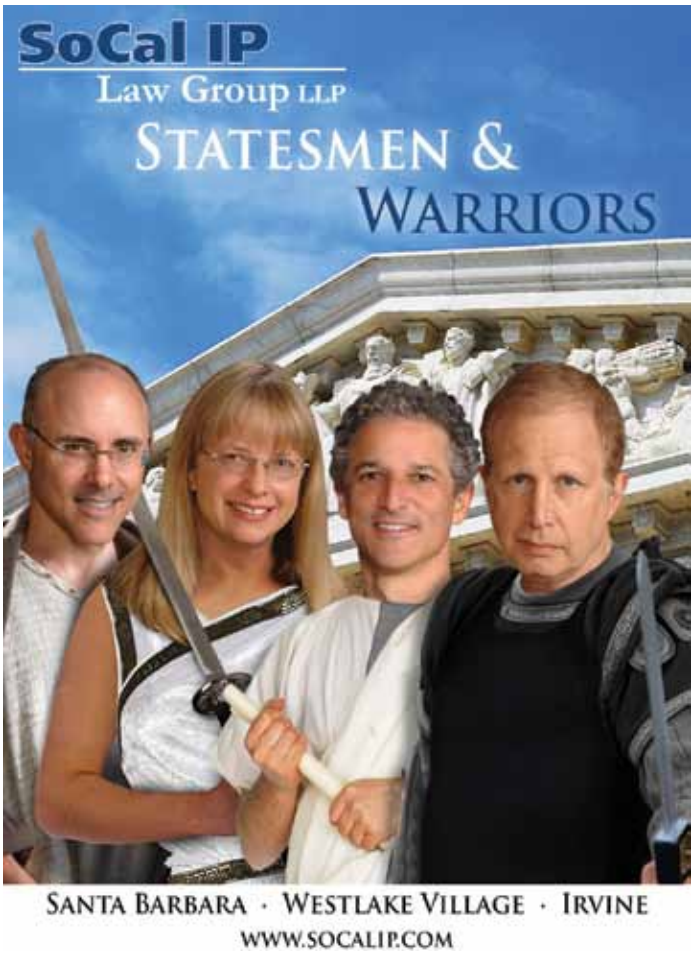

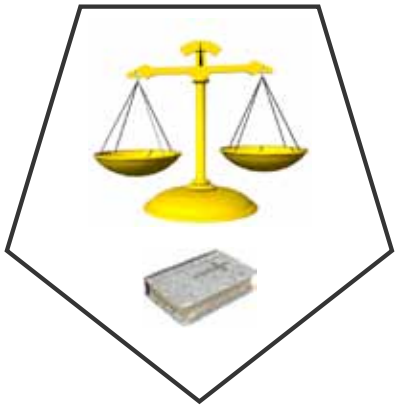

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