

Santa Barbara Lawyer

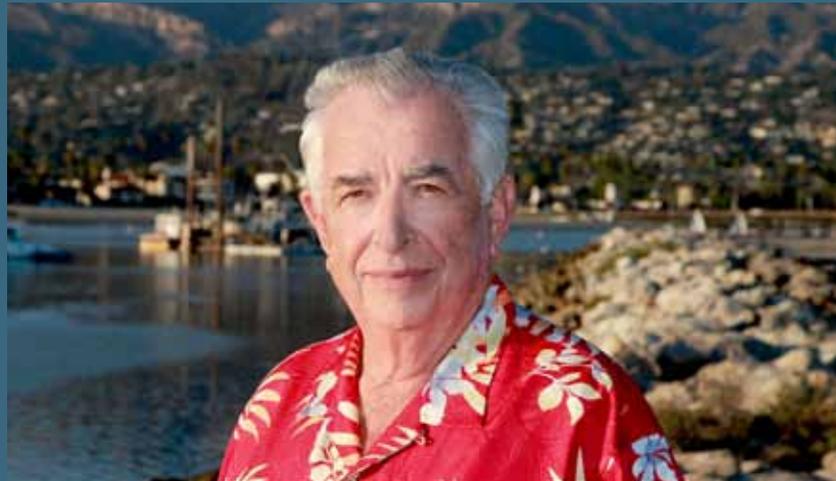
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August 2015 • Issue 515





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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.



Santa Barbara Lawyer

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About the Cover

August in Santa Barbara means it's time for Fiesta. Viva!
Photo © Fritz Olenberger.

The California Bar Foundation Invites Applications for Open Positions on its Board of Directors

Deadline 4:00 p.m., Thursday, October 15th

Board term begins on January 1, 2016. Ideal candidates will be attorneys, judges or members of the public with a demonstrated interest in and commitment to the purposes and goals of the California Bar Foundation. Applicants must have previous board, public or community service experience, and be knowledgeable about and comfortable with charitable fundraising. The California Bar Foundation actively seeks candidates from across California.

A complete application includes:

1. Applicant's Resume or CV; and,
2. Applicant's Statement of Interest and Qualifications.

Applications can be downloaded at <http://www.calbarfoundation.org/2015-board-application.html> and should be sent to the attention of:

Carlos Aguilar

California Bar Foundation

caguilar@calbarfoundation.org

MCLE Audit Time for MCLE Group 2

Audit letters were sent the week of July 7th to approximately 5,200 attorneys to ensure compliance with Minimum Continuing Legal Education (MCLE) requirements. The sample represents about 10 percent of attorneys in MCLE group 2 (last names beginning with the letters H through M). Attorneys will be asked to provide certificates of course completion or prove they are statutorily exempt by August 21.

The audit will include lawyers who had to make up missing hours as a result of being audited in 2012. In addition, it will include a higher proportion of those with other risk factors for doing poorly on the audit, such as a history of administrative actions or late filing of MCLE compliance. The remaining 2,000 or so will be chosen at random from attorneys whose last names begin with the letters H through M.

For more information about MCLE requirements and reporting, visit the State Bar's MCLE web page.

The Implications of Proposition 47 and SB 1310 on Immigration

BY ABBE KINGSTON

The crossroads of criminal defense and immigration law has become increasingly common and at the same time progressively complex. This intersection and the passage of Proposition 47 and SB 1310 provide potential for avoiding removal of non-citizens convicted of certain criminal offenses. At the same time, it requires criminal defense attorneys to carefully evaluate and consider immigration consequences when representing non-citizens charged with offenses.

Most defense attorneys are well-versed in the application of Proposition 47, SB 1310, and California Penal Code §18.5; however both immigration and criminal defense attorneys are struggling to understand the practical impacts of this new legislation. To provide adequate representation, criminal defense counsel must be aware of some of the basic fact patterns that can cause removal from the United States.

While a comprehensive review of all grounds for removal is beyond the scope of this article, a summary of the more common scenarios for non-citizens convicted of criminal offenses is summarized below.

Crime of Moral Turpitude

A non-citizen is subject to removal if convicted (i) of a crime of moral turpitude committed within five years after admission and (ii) of a crime for which a sentence of one year or longer may be imposed. INA 237(a)(2)(A). It should be noted that immigration law has its own definition of when an offense is a crime of moral turpitude, which may differ from interpretation by California courts.

Prior to Penal Code §18.5, many California misdemeanor offenses (including crimes that can be charged as either a felony or misdemeanor under Penal Code § 17b, known as “wobblers”) included a sentence of up to one year. Prior case authority held that a California misdemeanor crime of moral turpitude involving a potential sentence of up to one year would subject an individual to removal from the United States, where a non-citizen obtained status as a lawful permanent resident (green card) within five years of commission of the offense. SB 1310 limits misdemean-

ors to a sentence of up to 364 days as of January 1, 2015. Therefore, a single misdemeanor will no longer cause removability under INA 237(a)(2)(A).

Aggravated Felony

A non-citizen convicted of offenses defined by INA 101(a)(43) as an aggravated felony faces the most severe grounds of removal with very few (if any) options to avoid removal.

Certain offenses require a “term of imprisonment” of at least one year to be considered an aggravated felony. These offenses include crimes of violence (as defined by 18 U.S.C. § 16, but not including a purely political offense), theft, burglary, racketeering, gambling, commercial bribery, counterfeiting, forgery, obstruction of justice, perjury, and subordination of perjury. INA 101(a)(48)(b).

Prior to the enactment of Penal Code §18.5, certain misdemeanors could be considered aggravated felonies for immigration purposes if the actual sentence imposed (even if suspended) included a term of confinement of 365 days. The passage of SB 1310 and Penal Code §18.5 decreased the maximum possible sentence for misdemeanors to 364. Therefore, a misdemeanor conviction can no longer be an aggravated felony. Additionally, non-citizens convicted of certain felonies that have been reclassified as misdemeanors may petition to have those offenses designated as misdemeanors, eliminating aggravated felonies from their record.

Lastly, felony conviction is an enforcement priority. President Obama’s revamped enforcement plan will prioritize the deportation of a removable non-citizen who has any felony conviction.

Prop 47 may help non-citizens by avoiding future felonies and re-categorizing prior felonies. Reduction of a felony to a misdemeanor under Penal Code § 17 also may help.

Relief from Removal for Individuals Present in the United States without Authorization (Cancellation of Removal)

INA 240A(b) provides an avenue of potential relief for non-citizens in removal proceedings who have been present in the United States without authorization for more than ten years, provided they can demonstrate extreme hardship to a U.S. citizen spouse, child, or parent. A conviction of a crime of moral turpitude with a potential sentence of one year or more precludes eligibility.¹ Prior to the enactment of Penal Code § 18.5, a conviction of most misdemeanor crimes of moral turpitude precluded this avenue of relief in removal proceedings. By limiting the sentence for misdemeanor offenses to 364 days, Penal Code § 18.5 extends

Continued on page 26

Local Lawyer Lore

BY L. LAWYER

As explained in the June issue of this publication, this is a monthly interactive column about local lawyers. We challenge you, our readers, to determine what common ground is shared by those featured in the group photo.

In the July “reveal”, you learned about our Gaucho Grid-iron Greats...the lawyer with the first/best correct answer to Contest #1 was John Nelson. John has received his prize, should be considered a “winner” and may even appear in a future column.

In the photo below are twelve experienced local attorneys- (left to right: Nelson, Clough, Monk, Fischer, Wiley, Sorensen, Bycel, Hughes, Fox, Seymour, Carozzo and Gough). What unique experience do these local attorneys have in common? (Note: Do not ask any of them for the answer; merely asking the question will disqualify you. Hint: They are not headliners in a local performance of Twelve Angry Men.)

Send your answer to LocalLawyerLore@gmail.com. The

winner will theoretically be the first with the correct answer, but our panel of judges reserves the right to consider not only the date of the earliest correct response, but also the amount of additional information provided about the individuals in the context of their common experience, humor, and the overall “quality” of the response.

Note that there will be many common facts about any featured group. Thus, the winning answer will be one identifying the unique experience that we have in mind. (It is also quite possible that we will have missed other local lawyers with the same experience/accomplishment; if so, our apologies.)

In the September issue of *Santa Barbara Lawyer*, our reveal will have the answer about our group of twelve below. Take a minute and send in your answer—this is a great opportunity to demonstrate the depth and breadth of your knowledge of local lawyer lore. ■



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Jackson Introduces Legislation Governing Aerial Drones and Equal Pay

BY NATHAN C. ROGERS

State Senator Hannah-Beth Jackson has recently introduced two notable pieces of legislation. The first, Senate Bill 142, would prohibit remotely operated aerial vehicles known as drones from trespassing on private property without permission. California law already prohibits someone from entering private property -- a home or backyard, for example -- without the owner's permission, and photographing or recording conversations. Senate Bill 142 would clarify that the rules pertaining to trespassing and the physical invasion of privacy also apply to drones. The bill would continue to allow drone use in public spaces, in areas where the owner has given permission, and on one's own property. Also, commercial drones could still operate in a zone 350-500 feet above ground. The stated objective of the legislation is to set reasonable limits that allow innovative uses of drone technology while protecting citizens' private property, privacy and security.

A second bill by Senator Jackson, the California Fair Pay Act (SB 358), would ensure that women are paid equally for work that is substantially similar to the work of their male colleagues, and that women would not face retaliation if they discuss or ask how much their male colleagues are paid. If signed into law, it would be the strongest equal pay law in the nation.

The bill has the support of dozens of organizations, including a broad spectrum of labor groups, women's and legal advocacy organizations, and local government. Al-

though they were initially opposed, the bill is also now being supported by the California Chamber of Commerce and is unopposed by the California business community.

The bill would go further than the federal Equal Pay Act in a number of ways:

- It would prohibit retaliation against employees who discuss or ask about pay at work.
- It would allow employees to challenge pay discrimination based on wages paid to other workers at different worksites of the same employer. For example, a female grocery store clerk who works at a store could challenge higher wages being made by male grocery store clerks at a store owned by the same employer just a few miles away. Employees could challenge pay discrimination based on wages paid to those doing substantially similar work. For example, a female housekeeper who cleans rooms in a hotel could challenge the higher wages being paid to a male janitor who cleans the lobby and banquet halls.
- It would require employers to show that differences in wages are due to factors other than gender, that the factor is job-related and reasonable, and that these factors -- rather than discrimination -- account for the difference in pay. For example, if a male chef is making more money than a female chef because he works weekend shifts, the employer would have to show that the weekend shifts are busier and require more work and account for the difference in wages. In addition, the employer would have to prove that the weekend shift position was open to all chefs, and that the employer hired the male chef because he was the most qualified or willing to work the shifts.



Nathan C. Rogers

According to the Equal Rights Advocates, co-sponsors of the bill, in 2013, a woman working in California full-time made a median 84 cents to every dollar a man earned. Senate Bill 358 passed out of the Assembly Judiciary Committee on July 7, 2015. ■

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Legal Drama

BY NICK CASPER

Television has had a long and storied fascination with the law. Perhaps the torchbearer of the courtroom drama was “Perry Mason,” a noir-inspired adaptation of the literary character who, against impossible odds, was always able to prove his client wrongly accused through sheer lawyerly guile, often with the real murderer confessing on the stand.

This formula continued in the 1980s with “Matlock,” when Andy Griffith played the country lawyer who repeatedly secured acquittals with dramatic trial moments, often exposing a key inconsistency in the star prosecution witness’s story or establishing an airtight alibi that somehow had slipped through the cracks.

The list of legal shows is extensive—from the madcap and zany “Night Court” and “Ally McBeal,” to the countless iterations of the “Law & Order” shows. Current shows such as “Damages” and “Suits” prove that TV’s love affair with the law is as strong and unwavering as ever.

Since the time I have been practicing, I have managed to avoid the legal dramas because I can’t muster the necessary suspension of disbelief to go along with the writers’ conceptions of how the law works. I know too much; I would be an insufferable TV viewing partner.

You can’t have a surprise witness without disclosing the individual in discovery! How did we just go from a preliminary hearing to a trial the following week?! There is no way that character evidence would ever be admitted!

Recently, this all changed for me with the debut season of “Better Call Saul.” My “gateway drug” into the show was “Breaking Bad,” one of the most gripping, tense and in my opinion, flawless, shows ever to grace the small screen. For those who are unfamiliar, “Better Call Saul” is the origin story of Jimmy McGill/Saul, a drifter turned-small-time-lawyer in Albuquerque.

Although the show is in its early stages, presumably

the show’s arc will track the transformation of Jimmy from an earnest, struggling attorney to the unscrupulous drug lawyer Saul Goodman featured in “Breaking Bad.” The show, like its “Breaking Bad” predecessor, is a testament to the storytelling prowess of creator Vince Gilligan, who is unrivaled in fleshing out complicated, flawed antiheroes that you can’t help but root for.

But even this smart show has led me down the path of obnoxious, insider disbelief. In recent episodes, Jimmy scribbled a demand letter on toilet paper and served it on a retirement home committing fraud, and in the next scene, powerful lawyers representing the facility descend to negotiate a settlement. Huh? And these same lawyers threaten Rule 11 sanctions if Jimmy does not drop the matter. Oh, really? Wouldn’t a lawsuit first need to be filed so that a court even has jurisdiction to entertain such a motion?

Nitpicking aside, “Better Call Saul” has made me realize why audiences continue to be enamored with the legal world—the stories are fundamentally about the search for truth, something that no other field is singularly focused on finding.

...the stories are fundamentally about the search for truth, something that no other field is singularly focused on finding.

The varied shows’ lack of fidelity to sound legal doctrine is beside the point—the shows are entertaining! And let’s be honest: If shows focused on the reality of the practice of law, with lawyers slogging through 100 special interrogatories and taking six-hour depositions, audiences would be bored to tears. Even the exciting moments of my practice, such as impeaching a trial witness with inconsistent deposition testimony, wouldn’t exactly translate to dynamite television.

Our practices, although more mundane, are constantly filled with twists and turns, of unexpected shifts in which side has the upper hand. If television wants to amplify the drama by taking liberties, so be it. At least with “Better Call Saul,” I am on board. ■

*As an associate with Casper, Meadows, Schwartz & Cook since 2007, **Nick Casper** represents injured individuals in cases involving catastrophic injury, wrongful death, medical malpractice, employment discrimination/harassment and civil rights violations. Nick has been lead counsel in five civil jury trials.*

This article was reprinted with permission from the Contra Costa County Bar Association (CCCBA). It was originally published in the May 2015 *Contra Costa Lawyer* magazine, a publication of the CCCBA. You can view the original online here: <http://cclawyer.cccba.org/2015/05/legal-drama/>.

Success at Trial is Enhanced by Control

By MATTHEW HAFFNER

Mediators or settlement referees frequently persuade litigants to settle to avoid leaving their case “in the hands of the jury,” likening jury trials to Las Vegas gambling, where the result is left to chance. A result at trial, however, can be greatly affected by utilizing all efforts to control the experience. The more control the litigant has over the trial process, the better able a party is to secure a favorable result. Preparation, anticipation and planning are the cornerstones of control at trial.

Control over the trial begins with motions *in limine*. Efforts before the trial even begins should be made to exclude or limit opposing counsel’s evidence. Experts may have testified in deposition to areas they are not qualified in, or anticipated evidence may lack the proper foundation for admission. Failure to properly disclose evidence in discovery may also support exclusionary motions. Careful motions *in limine* can shape the trial before evidence is even introduced and obviously, whatever evidence you are able to exclude will not even be considered by the jury.

Practicing your examinations with your witnesses, including performing cross-examinations of favorable witnesses, allows the trial lawyer to anticipate testimony and secure advance warning of potential problem areas. Prior

preparation of both direct and cross-examination outlines provide control of anticipated testimony. Since the trial lawyer should know the key areas of evidence, careful planning and review with witnesses helps reduce uncertainty.

Preparation of both the order of, and the manner in which evidence is admitted allows the trial lawyer to build the case, creating impact and energy for the jury. Use of multi-media emphasizes evidence and captures the jury’s attention, whether through Powerpoint, enlargements, models, demonstrative exhibits or other forms of evidentiary enhancement.

Emphasis on particular jury instructions, including seeking approval of special instructions, can outline the evidence and the interpretation of the law that applies to the case.

Finally, entertaining and captivating the jury with focused, carefully planned and concise opening statements and closing arguments frames the entire trial, emphasizing a certain point of view and enhancing the jury’s focus. As much control as may be asserted over the jury’s review and interpretation of evidence will greatly enhance obtaining a favorable result, quite different from leaving the jury’s result to chance. ■



Matthew Haffner

Matthew Haffner is a founding partner of Haffner Law Group, a Ventura litigation law firm created in 1997.

Santa Barbara County Bar Association (SBCBA) Call for Board of Director Nominations

SBCBA is calling for nominations for the 2016 Board of Directors. SBCBA is looking for hard-working, dedicated and enthusiastic members of the Bar in Santa Barbara County with proven volunteer experience.

If you or someone you know is interested in serving on the Board next year, please contact Angela Roach at angelaroch5@hotmail.com. Please be sure to describe your interest and include a current resume or CV listing any volunteer or non-profit experience. Please submit nominations by **August 15, 2015**.

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Get to Know...

Susan H. McCollum



Susan H. McCollum is a member of Hollister & Brace. She was awarded the Attorney of the Year award by Santa Barbara Women Lawyers (SBWL) in 1999 and has served as the president of the Santa Barbara County Bar. One of the founding members of SBWL, she served as the second president of that organization. She is active in the William L. Gordon Chapter of the American Inns of Court. She also is a long-time delegate from Santa Barbara to the California Conference of Delegates and works there to improve legislation in California.

1. What is your idea of perfect happiness?

When all of my children are perfectly happy—or when I am eating the chicken piccata at The Chase, with fettuccine.

2. What is your greatest fear?

Having to watch one of my children die.

3. Which living persons do you most admire?

Pope Francis, a courageous and loving leader; Elizabeth Warren, Senator and true champion of the students and working people; Ruth Bader Ginsburg, a courageous, tremendously intelligent feminist; and Meichelle Arnst (founder of Angels Foster Care of Santa Barbara) who sees children in trouble and moves heaven and earth to try to save them.

4. What is your greatest extravagance?

Travel.

5. What is your current state of mind?

Let's not waste our time. We only get so many trips around the Sun.

6. Which words or phrases do you most overuse?

Cool. Awesome. OK I'll do it.

7. What or who is the greatest love of your life?

My babies.

8. When and where were you happiest?

Five way tie, (1) 2001 Montreaux, Switzerland, (2) 2013 Grand Teton National Park, Wyoming (3) 2010 Requa Inn at Redwoods National Park (4) 2003 Wailea, Maui, Hawaii and (5) 2014 Vancouver, B.C., Canada.

9. Which talent would you most like to have?

Either the talent to pick stocks that will consistently increase in value and make me independently wealthy; or the ability to remember people's names. I have never been good at either one.

10. What do you consider your greatest achievement?

EITHER surviving a full time litigation practice while taking care of three children under 8 years old; OR surviving their teenage years.

11. Where would you most like to live?

In a beautiful, new, completely paid-for house in a community with a great water source.

12. What is your most treasured possession?

My dogs, Bruce, Ricky and Harry.

13. What is your most marked characteristic?

I speak my mind—probably more often and more loudly than is socially acceptable.

14. What do you most value in your friends?

Their ability to make me laugh and their ability to laugh with me.

Continued on page 34

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Santa Barbara Paralegal Association's 6th Annual Full-Day MCLE Conference

Sat., Sept. 26, 2015, 8:30 am – 5:00 pm
at the Historic Santa Barbara County Courthouse

- ◆ Up to 5 Hours of MCLE Credit, including Ethics & Elimination of Bias
- ◆ Continental Breakfast and Picnic Lunch

◆ Keynote Speakers:

Panda Kroll, JD, MFA of Benton, Orr, Duval & Buckingham on

“Political Correctness Bias v. Cultural Relativism Bias:

Why an R-Rated Mockumentary Teaches Us Everything We Need to Know About Bias”

[1 hour ETHICS / ELIMINATION OF BIAS MCLE]

John Sung Woo Park, JD, PhD, Assoc. Dir. UC Center for New Racial Studies, UCSB Prof. & Chair

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Santa Barbara County Bar Association Annual Barbecue

Many thanks from the Santa Barbara County Bar Association to all who joined us for our Annual BBQ at Tucker's Grove. And a multitude of gratitude to our exceptionally talented volunteers:

- Chefs Rusty Brace and Mack Staton for the delicious dinner entrees, along with their highly capable crew members: Tom Foley, Paul Roberts, Mike Denver, Kevin Nimmons, Lauren Joyce and longtime chef extraordinaire, Bill Duval;
- Expert Bartender Will Beall & his indispensable team of one: Eric Burkhardt; and
- Sommelier (so dubbed by Will Beall) Joe Liebman who again donated the fine wine (compliments, as always, were plentiful).

A special thank you to SBCBA Board Members Kelly Scott and Elizabeth Diaz for lending their considerable skill-set to organizing the BBQ, and to ace photographer, Michael Lyons. ■

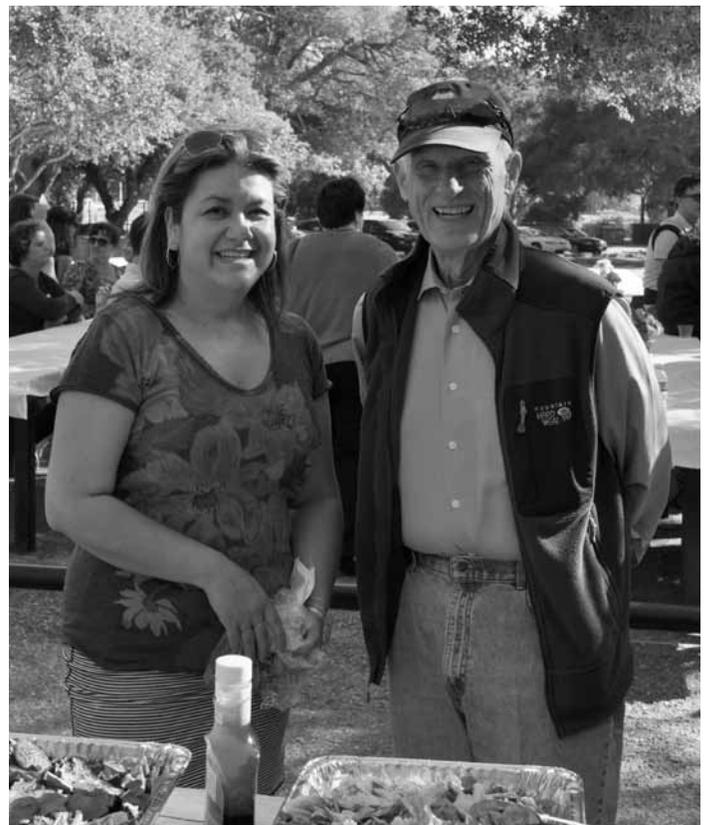
For more photos, see page 17-19.



Jessica Burns and Craig Granet



Sarah Sanger, Naomi Dewey, Catherin Swysen



Elizabeth Diaz and Judge Tom Anderle



Shannon DeNatalie-Boyd and Lauren Joyce



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Restorative Justice and the Conferencing Process—Part Two¹

BY ROBERT SANGER

In last month's *Criminal Justice* column, we talked about the fundamental applications of restorative justice and how restorative justice is referred to, but not defined, in California law. In this month's column we will talk about the statutory declaration of restorative justice in Vermont and Montana and see how those states, along with California, are positioned to implement the core concepts of the process.

Lessons of Restorative Justice from Other Jurisdictions

The concept of restorative justice has been applied in practice in a number of other states and, for that matter, other countries. In passing, we can note that England, Australia, New Zealand, and Canada make restorative justice a prominent part of their criminal and juvenile law processes. Versions, with considerable differences, are also seen in Malaysia, China, India and other locations. A review of the statutes in the United States shows that there are several places where restorative justice is authorized by name, if not embraced in spirit.

The use of the term "restorative justice" does not mean that the core concepts of restorative justice are being adopted. For instance, as pointed out last month, restitution can be restorative in a general sense of the meaning of "restorative." However, standing alone, restitution is not what we are referring to as "restorative justice." Similarly, an alternative sentencing scheme standing alone can be restorative, in that general sense, to an offender. This is an important point because it is easy to divert the energy a community might want to put into restorative justice by using restorative language but advancing retributive principles. Restorative justice not only takes

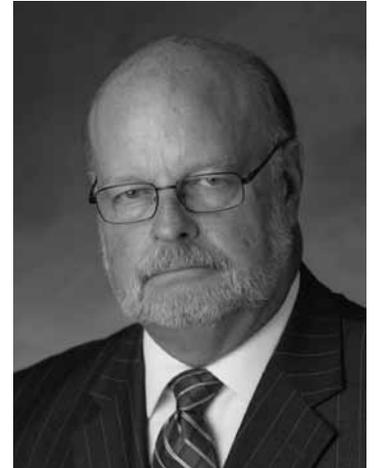
into account restitution to the victim and alternatives to punishment for the offender, but also takes into account the needs of the community.

If a restorative justice program is going to be put in place that will accomplish the goals discussed in the literature, it has to be an alternative to the Western linear version of retributive justice. It will not replace it because, at least in our current society, most criminal law will still be adversarial and rights-based. But, to work as an alternative, it has to provide a clear break from retributive justice. It will only work in the right cases; it will not work without a willing victim and a willing offender. However, there has to be a safe harbor so that victims and offenders feel that they have the alternative available.

If the language is co-opted, or politically compromised, to create a scheme advancing "victim's rights" or "alternative sentencing," it puts the interests of the victim or the offender above those of the community. These may be worthy goals but they really just perpetuate the rights-based approach. They also perpetuate the intervention of the state as the entity extracting punishment or the entity to be dealt with in avoiding punishment. It does not give anyone the safe harbor to, on the part of the victim, feel some level of comfort that she or he will avoid re-victimization, or, on the part of the offender, that he or she will avoid admissions that just lead to more certain and harsher punishment.

Vermont, for instance, has a statute that uses the term but places an emphasis on what seems more retributive than restorative. In fact, Vermont includes its restorative justice statute under Title 28 of the Vermont Statutes. That title concerns "Public Institutions and Corrections." This suggests that restorative justice in Vermont is seen as a remedial provision, something to be dealt with post-conviction only.

Nevertheless, Vermont is instructive in two ways. First,



Robert Sanger

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unlike California and a number of other states, the Vermont legislature at least attempted to explain what the policy behind restorative justice is. The implementing statute² says:

a) State policy. It is the policy of

this State that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses, and how the State responds to persons who are in

contempt of child support orders. The policy goal is a community response to a person's wrongdoing at its earliest onset, and a type and intensity of sanction tailored to each instance of wrongdoing. Policy objectives are to:

(1) Resolve conflicts and disputes by means of a nonadversarial community process.

(2) Repair damage caused by criminal acts to communities in which they occur, and to address wrongs inflicted on individual victims.

(3) Reduce the risk of an offender committing a more serious crime in the future, that would require a more intensive and more costly sanction, such as incarceration.

Second, as to the process, the statute goes on to say:

(b) Implementation. It is the intent of the General Assembly that law enforcement officials develop and employ restorative justice approaches whenever feasible and responsive to specific criminal acts, pursuant to 3 V.S.A. §§ 163 and 164, concerning Court Diversion, 13 V.S.A. chapter 221, concerning sentencing, and the provisions of this title, concerning persons in the custody of the Commissioner of Corrections. It is the further intent of the General Assembly that such restorative justice programs be designed to encourage participation by local community members, including victims, when they so choose, as well as public officials, in holding offenders accountable for damage caused to communities and victims, and in restoring offenders to the law-abiding community, through activities:

(1) Which require offenders to:

(A) acknowledge wrongdoing and apologize to victims;

(B) make restitution for damage to the victims, consistent with provisions of 13 V.S.A. chapter 221 and of this title;

(C) make reparation for damage to



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the community by fulfilling a community service; and

(D) when relevant, successfully complete treatment addressing the offense or other underlying problematic behavior, or undertake academic or vocational training or other self-improving activity.

(2) Which aid in the recovery of victims, recognizing that victims, particularly of violent crime, often suffer lifelong effects and, accordingly, must feel safe and involved in any program offered to assist them.

(3) Which help in identifying the causes of crime and ways community members and municipal and State government can reduce or prevent crime in the future.

To an extent, this statute, using terms like “nonadversarial” and “repair damage,” is an invitation to invoke restorative justice. In that sense, it has been accepted in various communities in Vermont where conferencing and circles have been instituted, but there is criticism that actual restorative justice principles are not taken seriously nor used as widely as they should be.³ Vermont is geographically close to Nova Scotia, one of the leading areas outside the United States where conferencing and circles are used extensively. It would seem a natural place to see restorative justice on a statewide basis.

However, in practice, restorative justice is not invoked evenly across the state of Vermont. Different prosecutors, police agencies, probation departments and judges apparently see it differently. However, since the statute is only an invitation, there is nothing to require its uniform application.⁴ The lack of a legally binding nature to the statute means also that restorative justice cases will not generate case law. In fact, a Westlaw search turns up no reported decisions in Vermont.

A weakness of the Vermont statute is that the concern for the offender

and for the community is almost lost in what seems like a more traditional emphasis on the victim and punitive provisions. The stated goal of “restoring offenders to the law-abiding community” is articulated but the

means set forth to accomplish this goal are more traditionally punitive. True restorative justice has a serious concern for the victim, but balances

Continued on page 26

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Nominee's Telephone (Day)	Your Telephone (Day)
Nominee's Telephone (Evening)	Your Telephone (Evening)

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PLEASE ATTACH ADDITIONAL PAGES DESCRIBING BASIS FOR NOMINATION, INCLUDING LETTERS OF RECOMMENDATION AND RESUME IF AVAILABLE.

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Sanger, *continued from page 23*

that concern with the desire to make things right and not just to force an offender to confess and provide restitution. No doubt, politics had a role in framing the law in such a fashion but, in the grand scheme of things, the use of the term restorative justice is inspiring but the actual statutory language is retributive.

Moving Beyond the Reconciliation and Restitution

We have looked at the minimalist approach of California and the more expressive, but ultimately, more retributive approach of Vermont. The Montana Legislature has defined restorative justice for the purpose of grant programs⁵ (but the definition is incorporated into the substantive code sections⁶):

(2) . . . the term “restorative justice” means criminal justice practices that elevate the role of crime victims and community members in the criminal justice process, hold offenders directly accountable to the people and communities they have harmed, restore emotional and material losses, and provide a range of opportunities for victim, offender, and community dialogue, negotiation, and problem solving to bring about a greater sense of justice, repair harm, provide restitution, reduce incarceration and recidivism rates, and increase public safety.

(3) A restorative justice program eligible for grant funding pursuant to this section shall use evidence-based practices, which may include, but are not limited to, facilitated victim-offender meetings, family group conferencing, sentencing circles, victim impact panels, offender accountability letters, restitution programs, constructive community service, victim awareness education, victim empathy programs, school expulsion alternatives, peer mediation, diversion programs, and community panels.

This statute brings the community and the offender back into the restorative justice concept. It also makes more express reference to “facilitated victim-offender meetings,” “sentencing circles,” “constructive community service, victim awareness education, victim empathy programs, school expulsion alternatives, peer mediation, diversion programs, and community panels.” While mentioning these various recognized means of accomplishing restorative justice, it still does not provide a clear alternative procedure but it, at least, leaves the door open to such procedures.

Conclusion

If the reader will tolerate one more column on this important subject, we will return next month to compare these

statutory schemes to the reality of restorative justice as it functions in situations where it is successful. In a sense, California may have the wisest approach: Authorize restorative justice by name and do not define it. After all, definition is a tradition of linear Western legal thinking.

As we will see, when allowed to function, restorative justice does achieve positive results. In light of that, in California, we have an opportunity to be creative and shape programs that will have a true restorative justice effect. We will turn to how these programs actually work in schools, juvenile justice and post-conviction reconciliation, as well as their potential to work in the right kind of pre-plea adult cases. ■

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.

ENDNOTES

- 1 ©Robert M. Sanger. A version of this series of articles on restorative justice will form a part of an upcoming book on the subject.
- 2 28 V.S.A. Section 2a.
- 3 See, Jan Peter Dembinski, 39 (Winter) Vt. B.J. 20 (2014).
- 4 The Vermont statute is also post-conviction. It contemplates a guilty plea and victim-offender conferencing occurring only after the plea. Of course over 90% of all criminal cases are resolved with a guilty or no-contest plea anyway but the statute ignores the possibility of meaningful pre-plea conferencing.
- 5 Montana Code Annotated Section 2-15-2013.
- 6 ee, e.g., MCA 46-18-104.

Legal News

Kingston, *continued from page 6*

the benefit of an avenue of relief for individuals facing removal for being unlawfully present who are convicted of a misdemeanor crime of moral turpitude.

Deferred Action for Childhood Arrivals (DACA)

For most immigration purposes, designation as a felony or misdemeanor drug offense has little effect; however, under Deferred Action for Childhood Arrivals (DACA), individuals are ineligible if they have a conviction of any felony, a “significant misdemeanor,” or three non significant misdemeanors arising out of separate incidents. Significant

misdemeanors are defined as offenses that are punishable by imprisonment of one year or less and are offenses of domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, drug sales (distribution or trafficking), burglary, or driving under the influence of alcohol or drugs.

Proposition 47 amended the following three existing drug possession sections making each a misdemeanor: Health & Safety Code §11350 (possession of listed or cross-referenced drug, including heroin, which was previously a felony), Health & Safety Code § 11357 (possession of concentrated cannabis, which was previously a wobbler), and Health & Safety Code § 11377 (possession of a listed or cross-referenced drug, including methamphetamines, which was previously a wobbler). A misdemeanor conviction for simple possession is not a “significant misdemeanor” as long as a sentence of 90 days was not imposed. Therefore, a conviction for simple possession (as opposed to drug distribution or trafficking) is no longer a bar to eligibility.

The crimes of receipt of stolen property, passing bad checks, and forgery are wobblers. Under Proposition 47, if the amount taken was \$950 or less, the offense should be treated as a misdemeanor. Provided the sentence imposed is not 90 days or greater (and this does not constitute a third misdemeanor), this misdemeanor conviction is not a bar to eligibility for DACA.

Proposition 47 reduced theft of \$950 or less to a misdemeanor with a maximum sentence of six months (Penal Code § 490.2). Prior to Proposition 47, an individual could be charged with a felony if that individual had prior convictions for petty theft. Proposition 47 significantly narrowed the number of people who could be charged with wobblers in these situations, making such a charge possible only if the defendant had at least one prior petty or theft-related conviction and had been imprisoned as a result, and had a prior conviction for a serious or violent offense, for any registerable sex offense, or for embezzlement from a dependent adult or anyone over the age of 65. Therefore, two misdemeanor convictions of petty theft are not a bar to eligibility for DACA.

Petty Offense Exception

Under INA 212(a)(2)(A)(ii)(II) (the Petty Offense Exception), a non-citizen is automatically not inadmissible, on account of a conviction or admission of a crime involving moral turpitude, if the non-citizen: (1) has committed only one crime involving moral turpitude; and (2) “was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed)”; and (3) the offense of conviction

carries a maximum possible sentence of one year or less.

A non-citizen who is convicted of a misdemeanor first-offense crime of moral turpitude with a maximum of one year and a sentence imposed of six months or less is not inadmissible under the moral turpitude ground. If a non-citizen has committed a second crime of moral turpitude, he will no longer be eligible for the petty offense exception to inadmissibility. Commission of a second moral turpitude offense, even if the conviction was expunged, or charges were dismissed resulting in no second conviction, will disqualify the defendant from eligibility for the Petty Offense Exception. *See Matter of S.R.*, 7 I. & N. Dec. 495 (BIA 1957). On the other hand, previous convictions that do not involve moral turpitude, such as driving under the influence or simple assault do not disqualify the non-citizen from receiving the Petty Offense Exception. *See Matter of GarciaHernandez*, 23 I. & N. Dec. 590 (BIA May 8, 2003); *Reyes-Morales v. Gonzales*, 435 F.3d 937 (8th Cir. Jan. 31, 2006); *Cuadra v. Gonzales*, 417 F.3d 947, 949 (8th Cir. 2005).

Proposition 47 reduced the maximum sentence for theft of \$950 or less to six months (as opposed to grand theft which is a wobbler). Penal Code § 490.2. Proposition 47 also removed some conduct from commercial burglary, creating a new six-month misdemeanor for “shoplifting” which is defined as entering a store when it is open for business with the intent to steal \$950 or less worth of goods. *See Penal Code § 459.5*. A non-citizen convicted of one of any of these crimes would be eligible for the Petty Offense Exception, provided the non-citizen had committed no other crimes of moral turpitude.

Conclusion

Proposition 47 applies retroactively to previous felony convictions. With some exceptions (such as previous convictions for sex offenses, murder, attempted murder, solicitation to commit murder, assault with a machine gun on an officer; or any serious or violent crime punishable by a life sentence or death) a person serving a felony sentence for an offense that would have been a misdemeanor under Proposition 47 may now petition a court and receive resentencing as a misdemeanor. Where the sentence has been completed, Penal Code § 1170.18 provides that a petition can be filed to reclassify a felony offense as a misdemeanor. ■

Abbe Kingston is a certified specialist in immigration law at Kingston, Martinez & Hogan, LLP.

ENDNOTES

- 1 A conviction of moral turpitude with a potential sentence of one year or more is only one amongst many disqualifying criteria.

Classifieds

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Criminal Law Section of the Santa Barbara County Bar Association

Don't Say “No Comment”: How To Ethically and Effectively Talk to Reporters

This hour long presentation will first review the relevant California Rules of Professional Conduct and explain how they apply to trial publicity and to the constantly evolving forms of social media. It will then provide some practical tips for attorneys on how best to interact with reporters. For many, talking to reporters is a stressful experience they'd rather avoid, but doing so effectively can help advance your clients' interests and promote your practice.

When

September 16, 2015

Time

Noon to 1:30 p.m.

Place

Santa Barbara College of Law
Lunch will be provided

MCLE

1 Ethics unit

Speaker

Matthew Preusch practices in Keller Rohrback L.L.P.'s nationally recognized Complex Litigation Group, in the firm's growing Santa Barbara office. Prior to his legal career, he spent ten years as a journalist in the Pacific Northwest, covering regional and national news for The Oregonian, The New York Times, and other publications.

Cost

\$30 SBCBA members/\$35 non-members

R.S.V.P.

Mail your check payable to the SBCBA by September 11, 2015 to:

Catherine J. Swysen (cswysen@sangerswysen.com)
Sanger Swysen & Dunkle
125 E. De La Guerra Ste 102
Santa Barbara, CA 93101

*The Santa Barbara County Bar
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*A Reception with the
Appellate Justices of Division
Six*

*Please join us on
Wednesday, October 21, 2015
6:00 pm - 8:00pm
The Santa Barbara Club - 1105 Chapala Street
Santa Barbara*

*1 MCLE Credit
SBCBA Members: \$50 (After October 1st, \$60)
Non-Members: \$60 (After October 1st, \$70)
Students/Paralegals: \$20*

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The Santa Barbara Courthouse Legacy Foundation

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2nd Annual Miniature Golf Tournament September 18, 2015

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Don't miss this "roaring" event on Friday, September 18th at the Santa Barbara County Courthouse. Our fun and challenging minigolf tournament will be played on the courthouse lawn along Anacapa Street. In honor of the Courthouse's 1925 reconstruction, we'll feature a "Roaring 20's" theme — 1920's golf attire is encouraged! Tournament check-in begins at 3:00pm with a shotgun start at 4:00pm. After the tournament, join us for awards, cocktails and refreshments in the Courthouse's Sunken Gardens.

On Saturday, September 19th from 10:00am-2:00pm we'll open the course to the public for our Community Day, a unique opportunity for family-friendly fun at the Santa Barbara County Courthouse!

All proceeds benefit the Santa Barbara Courthouse Legacy Foundation, a 501(c)3 organization established to fund conservation and restoration of the Santa Barbara County Courthouse. Federal Tax ID #20-1174366. Event will take place weather permitting.

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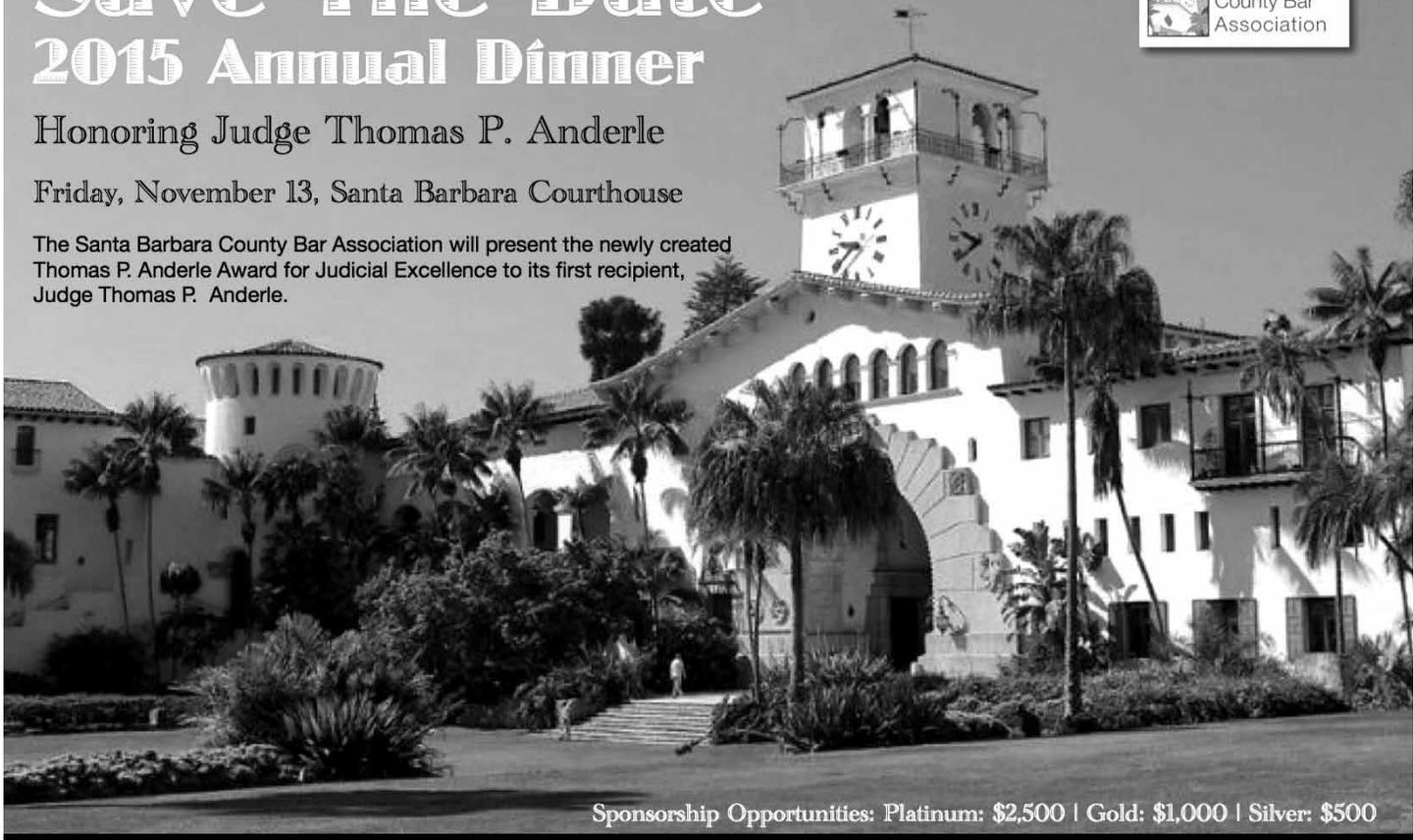
Save The Date 2015 Annual Dinner



Honoring Judge Thomas P. Anderle

Friday, November 13, Santa Barbara Courthouse

The Santa Barbara County Bar Association will present the newly created
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Motions



Rogers, Sheffield & Campbell, LLP is pleased to announce that **Braden R. Leck** and **Daniel C. David** have become partners of the firm, and **Bradley C. Hollister** has become an associate attorney at the firm.

Leck earned his law degree from the University of California at Los Angeles School of Law after graduating with Honors from UC Santa Barbara.

Prior to joining the firm last year, Leck was a partner of the Santa Barbara firm of Seed Mackall LLP. He began his legal career in Los Angeles at the international firm of Latham & Watkins. Leck's legal practice is focused on real estate and business transactions, estate planning and trust administration.

David earned his law degree from the University of California at Berkeley School of Law (Boalt Hall) after graduating with High Honors, and receiving an M.S. in environmental science from the University of Virginia. David was previously Of Counsel with the Santa Barbara firm of Price, Postel & Parma LLP. He began his legal career in Los Angeles at the international firm of Loeb and Loeb. His legal practice is focused on advanced estate and gift tax planning, wealth preservation, trust and estate administration, business formations, business succession planning and business transactions.

Hollister recently earned his law degree from the Santa Barbara College of the Law while working as a full-time paralegal at the firm. Hollister graduated from Kaplan University after serving in the U.S. Marine Corps infantry, earning the Navy Achievement Medal with "V" for Combat Valor during Operation Iraqi Freedom. His legal practice is focused on business, real estate, estate planning and general legal matters.

Cappello & Noël LLP donated \$5,000 each to The Boys & Girls Club of Santa Barbara and the United Boys & Girls Clubs of Santa Barbara County. The donations were made June 5, 2015, at the Boys & Girls Club on West Anapamu Street with Cappello & Noël partners Barry Cappello and Leila Noël presenting checks to representatives from both

clubs. Representing the Boys & Girls Club of Santa Barbara were Carolyn Brown and Board President Jim Turner. Representing the United Boys & Girls Clubs of Santa Barbara County were Michael Baker, Chief Executive Officer, and Board President Jim Crook.

"We are so incredibly pleased that Cappello & Noël has reached out to both of the Boys & Girls Clubs that serve Santa Barbara," said Carolyn Brown, Executive Director of The Boys & Girls Club of Santa Barbara. "Donations like this are absolutely invaluable to help us to continue to provide much-needed community-based facilities where kids can become involved in educational, sports, recreational, and character-building activities. I am overjoyed by their generous donation, and it will truly be put to good use for the over 2,000 kids both our clubs serve."

"Our organization is relentless when it comes to reaching those youth who need our services the most and eliminating any financial barrier that causes that to not happen," said Baker. "It takes great corporate citizens like Cappello & Noël to help us reach these kids. Their donation will help our club transport youth from a troubled neighborhood to and from our facilities each day for free."

"Our community's kids are its future," said Barry Cappello. "It's important that they have access to quality after school programs where they can learn, grow, and be encouraged to succeed."

If you have news to report - e.g. a new practice, a new hire or promotion, an appointment, upcoming projects/initiatives by local associations, an upcoming event, engagement, marriage, a birth in the family, etc... - The Santa Barbara Lawyer editorial board invites you to "Make a Motion!". Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com. If you submit an accompanying photograph, please ensure that the JPEG or TIFF file has a minimum resolution of 300 dpi. Please note that the Santa Barbara Lawyer editorial board retains discretion to publish or not publish any submission as well as to edit submissions for content, length, and/or clarity.

2015 SBCBA SECTION HEADS

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Legal Community

McCollum, *continued from page 12*

15. Who are your favorite writers?

The writers of *The Colbert Report* particularly the writers of "The Word." Barbara Park. Agnes Sligh Turnbull. John Steinbeck. James A. Michener.

16. Who is your hero of fiction?

Atticus Finch

17. Which historical figure do you most identify with?

Benjamin Franklin.

18. Who are your heroes in real life?

My mother and my father. Simply good, hard-working, pleasant, loving people.

19. What is it that you most dislike?

Raisins and people that waste my time.

20. What is your motto?

When you look for the good in everything, you will find it.

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