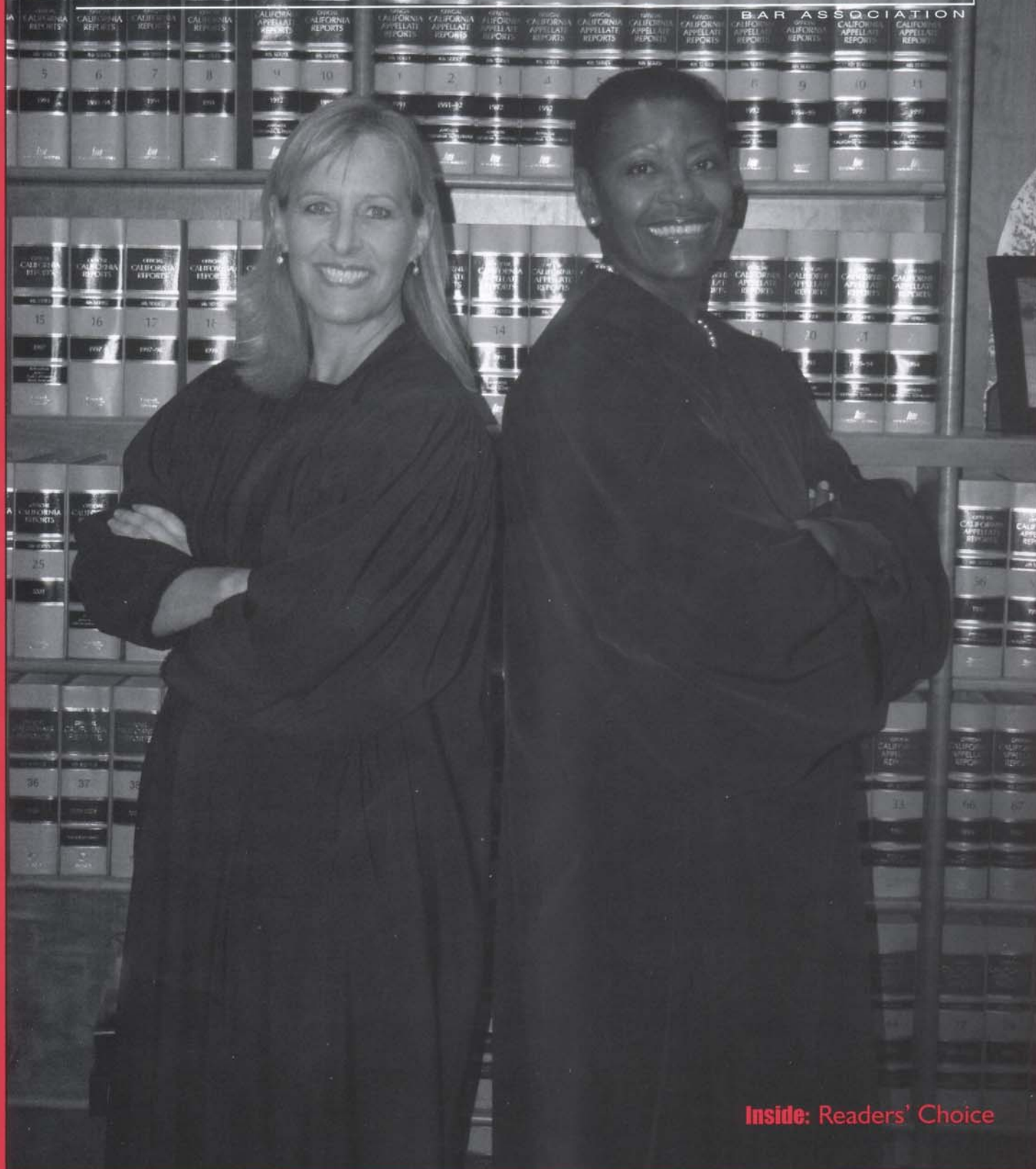


# Contra Costa Lawyer

Volume 21, Number 12 • December 2008

The official publication of the Contra Costa County



Inside: Readers' Choice

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# Contra Costa Lawyer

Volume 21, Number 12 • December 2008

Contra Costa County

BAR ASSOCIATION

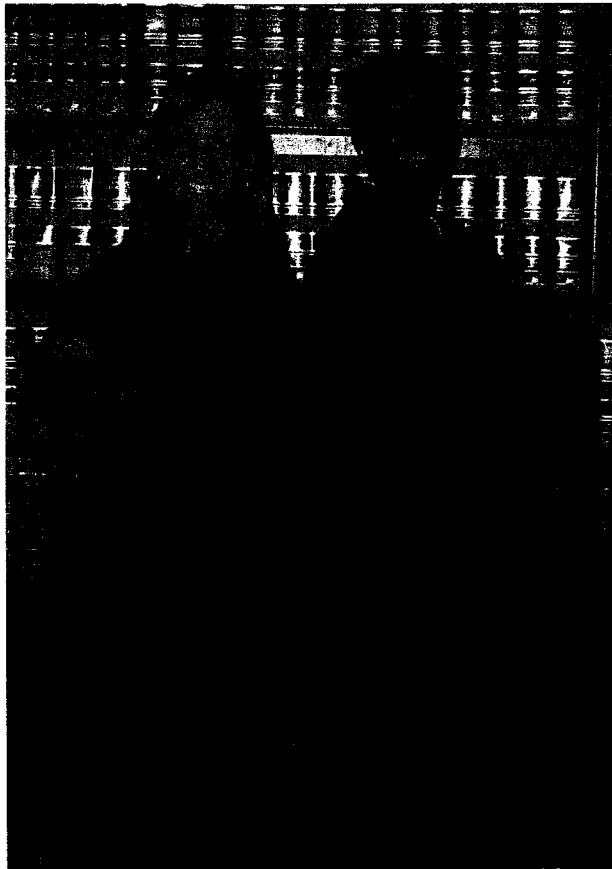
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About the cover . . .

From left: The county's first-ever women  
Presiding and Assistant Presiding Judges,  
Mary Ann O'Malley and Diana Becton Smith.

Photo courtesy of Young Design's Ryan Young

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The *Lawyer* welcomes and encourages articles and letters from readers. Please send them to Nancy J. Young, Associate Editor, *Contra Costa Lawyer*, P.O. Box 1867, Benicia, CA 94510.

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*president's message*



*by Robin Pearson*

As my presidency draws to a close, I look back with some satisfaction at a very productive and rewarding year. I am honored by the trust and confidence that was placed in me to serve as president of this fantastic organization. When I first moved to this county, I never imagined that I would hold this esteemed position, let alone be the first person of color and only the fifth woman to do so. As I stated at my induction ceremony last January, my primary platform this year has been to promote diversity. As a consequence, I worked to turn the bar association into a more inclusive organization that honors the differences of our members. I believe our community is better served by having lawyers with wide-ranging backgrounds and training who can serve a multi-cultural community.

As I reflect upon the events of the past year, I am proud to report that the bar association has been very prolific. Our goals for 2008 were to (1) increase public trust and confidence in our judicial system; (2) promote diversity in our governance, membership, and the bench; (3) make the bar association more relevant to its members; and (4) have the infrastructure, resources, and staff necessary to fulfill our vision. Based on the accomplishments set forth below, I think we succeeded in meeting our goals by:

- establishing a Judicial Mentoring Program to guide attorneys who are contemplating a career on the bench. Our special thanks go to those who worked hard to make this program possible, including Judges Barbara Zuniga, Diana Smith, Barry Goode, Steve Austin, Lewis Davis, and Susanne Fenstermacher;
- forming a Diversity Section (with the assistance of Judges Zuniga and Smith) to provide support and guidance to attorneys from diverse backgrounds. (On a related note, the Diversity Committee continued its hard work by updating its Power Point presentation

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and offering it to our members, working to establish a Law Academy at Deer Valley High School in Antioch, and providing a special diversity Power Point presentation to our judicial officers);

- recruiting members of the legal profession to serve as mentors for children whose parents are incarcerated;
- reinstituting the Get to Know Your Local Judges events;
- revising the By-Laws of the bar association to address its growth and changing needs;
- completing the assessment of the surveys for large firms, small firms, and solo practitioners;
- dedicating a bench to the memory of long-time bar association supporters, John and Fosca Zandonella (see page 11);
- hosting a Law Day for Lawyers program that provided members with practical help and affordable MCLE credit;
- working with the bench to fund scholarships (through the Court Scholarship Fund) for individuals with past criminal convictions who are making positive changes in their lives;
- assisting with Appellate Oral Arguments at Acalanes High School and hosting a reception for the participants and appellate justices;
- maintaining strong bench-bar relations to improve the administration of the courts;
- increasing diversity on the bar's board of directors;
- commencing plans to update the bar association's website; and
- maintaining the bar association's existing programs and continuing to provide support to the various bar sections.

Of course, these accomplishments would not have been possible without the collaborative effort put forth by many people. The bar association's success is due in large part to the dedication of the board of directors. ►

## The Contra Costa Lawyer thanks you!

Earlier this year, we emailed you — our faithful readers — asking for article ideas. Some articles are printed in this issue, while some will be printed in future issues. Thank you, once again, to all who submitted an article or idea for this very popular (now annual) Readers' Choice issue:

Christine Callahan  
Michael Carbone  
Mike Durkee  
Scott Honegger  
David Lederman  
John T. MacMillan  
Martha G. McQuarrie  
Robert R. Pohls  
David Roth  
Christopher J. Schweickert  
Ferne Spector  
Gary Watt

**Thanks also to Andi O'Toole for doing a fabulous job guest editing this issue!**



## 2009 MEMBERSHIP RENEWAL DRIVE IN PROGRESS NOW!

It is fast and easy to RENEW ONLINE at [www.cccba.org](http://www.cccba.org)

The first 250 online renewals will be entered into a drawing for the winner's choice of a refund of his or her 2009 CCCBA membership dues\* and three practice area listings; or a one-third page ad in an upcoming issue of the Contra Costa Lawyer. The winner will be drawn at the January installation luncheon.\*\*

To renew online:

1. Open "Member Resources" and follow the "to renew click here" link. Use your CCCBA ID # to log-on to your personalized application. Forget your ID #? Call us at (925) 686-6900 x 2 for help.
2. Review your current membership information and make any changes then update your dues, sections and practice areas. Payment: If you are paying by credit card, fill-in the secure payment section - or - Checkmark the "I'm mailing in a check" box.
3. Checkmark the "Yes, I agree" box validating your Membership agreement.
4. Click "Print Form" to make a copy for your file and/or your accounting department.
5. Click "Submit Form." Paid by credit card? Your membership renewal is complete. Mailing a check? Your membership renewal will be processed upon receipt of payment.

Some firms have their accounting department collect all the membership applications and bundle them for submission to CCCBA with one check. If your firm does this, you may still make the necessary changes to your on-line membership application and then before you click "Submit Form" print a copy to give your accounting department for processing. As always, your continued membership is appreciated.

**Not tech savvy? The printed Membership Renewal Statement will be mailed the first week in December.**

\*Does not include Section Dues or LRIS Dues. \*\*You do not have to be present to win.



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I have had the honor of working with an extraordinary group of hard working and passionate individuals, and I want to thank them for their commitment to our bar. Presiding Judge Terence Bruiniers gave me much of his valuable time and support throughout the year, and I appreciated it immensely. I want to thank my colleagues at Miller Starr Regalia for their stalwart support and enthusiasm for my presidency and my diversity platform. I am fortunate to be working with a group of people who are dedicated to making the practice of law a pleasure on a personal and professional basis. I owe a debt of gratitude to the director of the bar association, Lisa Reep, and her staff. Nothing at the bar would ever be accomplished without Lisa's hard work and knowledge. And finally, I want to thank my husband Ted for his love, encouragement, and support.

My travels around the state as president this year convinced me that we are one of the most organized and effective bar associations in California. I know that my successor, Larry Cook, and his board of directors will continue to guide the bar association through the challenges that lie ahead while helping it to flourish. In my induction speech, I touched upon the momentous changes that have been taking place toward diversity in our society. At that time, we knew history would likely be made because the Democratic nominee for President of the United States would either be a woman or an African American. History was made yet again because both presidential tickets reflected the demographics of this country. Although my term expires at the end of this month, I will continue to actively promote diversity within the legal profession in addition to supporting the bar association's other activities. I want to thank you all for your support and for sharing this wonderful journey with me, and I hope you continue to show your active support as well. ♦

— Robin Pearson is Senior Counsel with Miller Starr Regalia in Walnut Creek. She practices civil litigation with an emphasis in real estate matters. She can be reached at [rmp@msrlegal.com](mailto:rmp@msrlegal.com).

# Annual CCCBA Officer Installation

*featuring*

## Justice Ignazio Ruvolo

*First District Court of Appeal*

**Friday, January 16, 2009**

**Contra Costa Country Club**

**801 Golf Club Road ■ Pleasant Hill**

**Social 11:30am ■ Lunch and program 12:00 – 1:30pm**

*CCCBA Membership Directory photos may be taken from 11:00am to noon ~and~ 1:30 to 2:30pm*

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### **PICTORIAL MEMBERSHIP DIRECTORY PHOTOS**

Photo sessions for the directory are free. No appointment is necessary; simply show up during one of the following scheduled photo shoots:

**Friday, January 16, 11am–noon; 1:30–2:30pm:** (in conjunction with the annual Installation Luncheon above)

Contra Costa Country Club, 801 Golf Club Road, Pleasant Hill

**Tuesday, January 20, 8am–5pm:** Morgan Miller Blair, 1331 N. California Blvd., 2<sup>nd</sup> floor, Walnut Creek (925.937-3600)

**Thursday, January 22, 8am–2pm:** Contra Costa County Bar Association, 704 Main Street, Martinez (925.686-6900)

Alternatively, you may forward a camera-ready photo for inclusion in the directory (head and shoulders, plain background) to CCCBA, 704 Main Street, Martinez, CA 94553 or e-mail a photo (**minimum of 300dpi**) to Nancy Young at [young-design@prodigy.net](mailto:young-design@prodigy.net) no later than February 13, 2009.

**REMINDER:** You must be a current member by March 1, 2009 to be included in the annual CCCBA Membership Directory.

### **RESTRICTED ACCESS COURT SECURITY CARDS**

**How to obtain a card for the FIRST time (or for those wishing to have their photo retaken):** The Contra Costa County Superior Court provides restricted access court security cards to CCCBA members for a \$10 fee. These photo ID cards are valid for two years and allow our members to bypass the court's perimeter security system, which is particularly beneficial to attorneys who make frequent court appearances. Purchase of a restricted access court security card is entirely optional. If you would like to obtain one, you will be required to sign a contract, which you can obtain from Jenny Comages at 925.370-2543 or via e-mail at [jcomages@cccba.org](mailto:jcomages@cccba.org). You must present a form of picture identification and your State Bar card at the time your photo is taken. Current membership in the CCCBA will be verified by the Court's Executive Office. Interested members may drop in to have their photo taken by Lisa Frades at Superior Court's Executive Offices, located at 649 Main Street, Room #103, in Martinez. Although walk-ins are welcome, we recommend that you notify Lisa in advance of your intention to drop in. She can be reached directly at 925.957-5600. Payment will be accepted by cash or check.

Note: Cards obtained in 2009 and 2010 will be valid until December 31, 2010.

# Attorney Fees in Trust Litigation

by Loren Barr

*Most settlors of living trusts name a child or spouse as their successor trustee. As a result, trust litigation often involves disputes between a beneficiary, on the one hand, and a trustee who is also a beneficiary (the "trustee-beneficiary") on the other. These cases often unfairly favor the trustee-beneficiary because the trustee usually has access to a war chest of trust funds to spend on the litigation while the beneficiary must pay his own litigation fees. Few beneficiaries have the resources to fund this long and expensive litigation, and they become particularly frustrated when their adversary, often a sibling or step-parent, is paying their attorneys with what the beneficiary views as his inheritance. ■ Under these circumstances, it is not surprising that the first battle in trust litigation often involves a determination of whether a trustee-beneficiary can spend trust funds in litigation against a beneficiary. Whittlesey v. Aiello [104 Cal. App. 4<sup>th</sup> 1221 (2002) (McAdams)] provides a tool to deny a trustee-beneficiary access to trust funds for use in litigation. This article explains Whittlesey and offers suggestions for how it can be used by practitioners.*

In *Whittlesey*, husband and wife created a revocable trust and named niece as the trustee and primary beneficiary. Wife died and husband remarried, and amended the trust to name (you'll never guess...) new wife and her son as the primary beneficiaries. Husband died and niece contested the amendment on the basis of undue influence. New wife, as trustee, hired an attorney to defend the contest. Three months later, new wife died, and the same lawyer continued the defense of the contest on behalf of the successor trustee. At trial, the court found the amendment void as a result of the undue influence of new wife and her son.

The Court of Appeals affirmed the trial court's denial of litigation fees and costs. Unfortunately, the decision is based on three lines of reasoning — one sound, and

two somewhat questionable. First, the court reasoned that a trustee should remain neutral in disputes between beneficiaries, and should refrain from using trust funds to litigate on behalf of one beneficiary against another. While it is true that a trustee has a duty to "defend the trust" (Probate Code § 16011), its duty extends only so far as to prevent a default against the trust; after that, it should pull back and allow the beneficiaries to litigate at their own expense. If the trustee chooses to enter the fray by participating in the litigation on behalf of a beneficiary, it does so at considerable risk. Citing *Estate of Hite* (which involved a will and probate estate rather than a trust), the court found "if an executor voluntarily assume[s] the burden of a contest which properly belongs to the [beneficiaries], he must look to

them, and not to the estate for reimbursement." (Although not discussed in the decision, a trustee-beneficiary may generally litigate against another beneficiary at its own expense with separate counsel.)

It would have been good for the court to stop there. Instead, the court seemed to also base its decision on a second line of reasoning — that a trustee may use trust funds to defend a contest that challenges the very existence of the trust, but not one that challenges an amendment to the trust. In fact, the court's statement of its holding recites this purported rule: "We conclude that, because this was a dispute between competing trust beneficiaries and not a challenge to the trust itself, the trial court properly denied litigation expenses."

This rule makes little sense. Imagine a father named Adam with two sons, Cain



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and Abel. Adam creates and funds a trust, leaving his estate in equal shares to his two sons. On his deathbed, Adam executes an amendment to the trust, leaving his entire trust estate to Cain and naming Cain as trustee. Abel contests the amendment on the grounds of undue influence and incapacity. In this example, following the "challenge to the trust itself" rule, Cain may not use trust funds to defend against Abel's contest because Abel has challenged an amendment rather than the validity of the trust itself.

Now imagine that Adam has a simple will leaving his estate in equal shares to his two sons. On his deathbed, he executes a living trust and an assignment transferring his entire estate to the trust. Abel contests the trust on the same grounds. In this case, because — and only because — the alleged misdeed was accomplished by means of an original trust instrument rather than an amendment to a previously created trust, Cain may use trust funds in defense of the contest. This result, resting entirely on which piece of paper is in dispute, cannot be what the court intended.

As a third line of reasoning, *Whittlesey* states that "The underlying principle...in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust." This rule amounts to nothing more than this: If a trustee-beneficiary uses trust funds to *successfully* defend against a contest, then he benefited the trust and the trust will pay his attorneys' fees; if he uses trust funds to *unsuccessfully* defend against a contest, then the trust will not pay his attorneys' fees and he must pay them personally. The difficulty here is that whether a litigating trustee is successful can only be determined after trial. Hence, application of this rule will not sever a trustee-beneficiary's access to trust funds until after trial, allowing a trustee-beneficiary to use trust funds to lean on the beneficiary throughout the litigation; it provides courts and beneficiaries with no way of preventing a trustee from litigating on behalf of one beneficiary against another.<sup>1</sup> ►



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## Holiday Party

Thursday, December 18, 2008

4:30 – 6:30pm • 704 Main Street, Martinez



CCCBA members and Contra Costa Superior Court judges, clerks and administrative staff are invited to join us for fun, food and holiday cheer.

To gain admittance to the party, simply bring a non-perishable food item(s) for donation to the Contra Costa Food Bank and/or toy(s) for donation to the 16<sup>th</sup> Annual Toy Drive for homeless children, sponsored by the Juvenile Section of the CCCBA.

**Please RSVP to Michele Vasta at 925.370-2548 by December 11**  
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The proper rule, notwithstanding its varied articulation in *Whittlesey*, seems to be that a beneficiary deserves an independent trustee. It need not be a professional or corporate trustee — a family member and even a trustee-beneficiary will suffice — so long as the trustee does not take sides in the litigation. As such, *Whittlesey* invites several responses from courts and practitioners.

First, practitioners can use *Whittlesey* to prevent trustees from using trust funds to litigate for their own benefit. Second, practitioners representing trustees engaged in litigation should consider a clause in their fee agreement informing the trustee that it may have to pay its own attorneys' fees if the court denies it the use of funds in litigation. Third, trustee-beneficiaries engaged in litigation against beneficiaries should consider hiring separate counsel (i.e., not the same attorney representing them in their capacity as trustee) using personal funds. Fourth, counsel representing a trustee-beneficiary might request a court order authorizing the use of trust funds in litigation.

Finally, some practitioners have suggested the inclusion of various clauses in their trusts to authorize the trustee's use of trust funds in litigation against beneficiaries. Common clauses ("The trustee is authorized to use trust funds to defend against any contest or attack on the trust...") would seem insufficient to prevent the application of *Whittlesey*. Stronger language, authorizing a trustee-beneficiary to use trust funds even to protect its own interests, would seem inadvisable.

Future decisions may clarify the *Whittlesey* rule, or rules. Until then, practitioners must make do with a useful, but often confusing, decision. ♦

—Loren Barr is a Certified Specialist in Estate Planning, Trust and Probate Law, specializing in estate and trust litigation.

Finally, in what some consider dicta, the court stated "litigation seeking to remove or surcharge a trustee for mismanagement of trust assets would not warrant the trustee to hire counsel at the expense of the trust. Such litigation would be for the benefit of the trustee, not the trust." The accuracy and wisdom of this statement — whatever it is — is beyond the scope of this article.

# John and Fosca Zandonella Memorial Bench Dedication

September 23, 2008

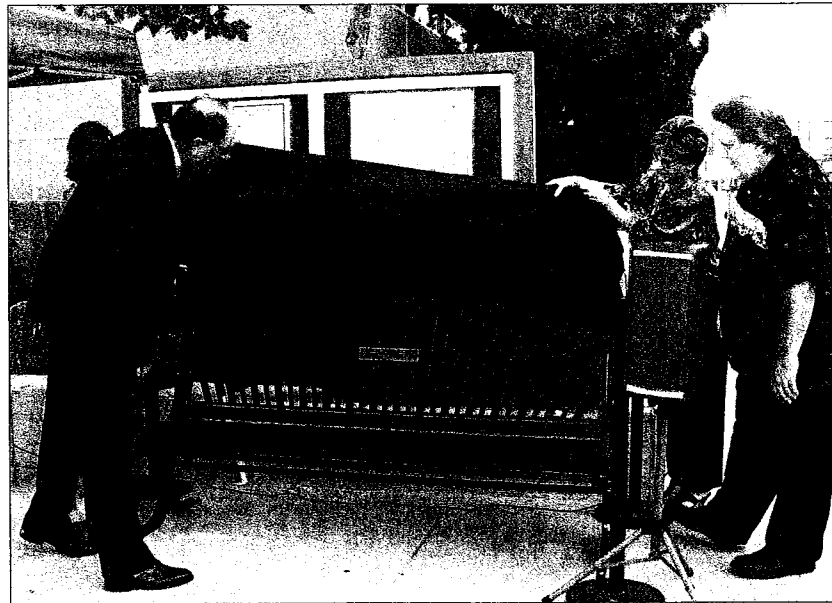
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In Grateful Appreciation and Fond Memory of  
John Zandonella (1929-2008) and Fosca Zandonella (1930-2007)  
True Friends of the Legal Community  
Contra Costa County Bar Association (2008)



Bill Gagen fondly reminisces about John and Fosca Zandonella while Presiding Judge Elect Mary Ann O'Malley and CCCBA President Robin Pearson look on.

John and Fosca's children unveil their parents' memorial bench. From left: Anna Bob, Mike Zandonella, Patty Garaventa, Louie Zandonella.



*by Gary Guillian*

## Am I Drinking too Much *is a Rhetorical Question!*

*Alcohol use is an integral part of our culture as lawyers. Having been a trial lawyer for well over 40 years, I certainly have had an opportunity to observe alcohol use in our profession. And, of course, I have participated in it.*



If you look at the history of our profession, dating to the common law in England, we can understand that alcohol use among barristers, counselors and lawyers goes way back. There is a great bar in London called the "Wig and Pen," which is primarily populated by English lawyers. Barristers, counselors, and lawyers all head for the pub at days end to enjoy a few drinks (or more). There is a great television series about an English barrister called "Rumpole of the Bailey," which was quite popular in the '80s and '90s. Good old Rumpole loved his claret and indulged regularly at night and often times at lunch. This was typical of our English colleagues.

The same is true of American lawyers. Generally we are social people and enjoy social events from bar luncheons to conventions. Alcohol is always a part of these get-togethers and many lawyers are connoisseurs of good wine.

Most trial lawyers are especially fond of alcohol. Having been involved in board meetings, conventions, and numerous social events over the years, I have my own perspective. Most trial lawyers of my generation were hard drinkers. It was part of who we were as courtroom lawyers. Tough, macho and manly (there were very few women lawyers in those early years).

Times have changed a bit. But there is still a lot of drinking and not just among trial lawyers. Any lawyer can get caught up in this habit.

Lawyers have among the highest rates of alcoholism, depression, and suicide of any other profession. Between 50 and 80 percent of all lawyers who have discipline problems have substance abuse problems. There is no clear answer why this is the case. Perhaps it is due to the tough conflictual nature of our profession. Maybe it's part of our social nature. It certainly is a reaction to stress.

There is nothing wrong with the reasonable use of alcohol. Although there are some of us who should not drink at all because of our propensity to alcoholism, that is not true of the great majority of our profession. So the question we need to ask: Where do we draw the line? This is a personal question that each of us needs to answer for ourselves.

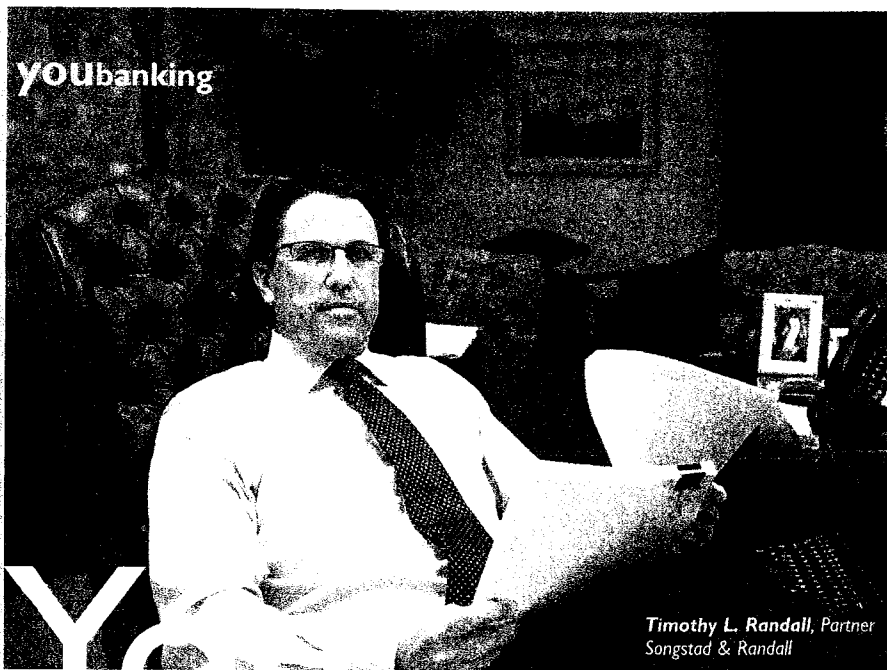
So why is the title of this article, "Am I Drinking too Much is a Rhetorical Question?" The answer is quite simple. If you look in the mirror and wonder whether you are drinking too much, then you probably are. Perhaps it happens after a hangover or perhaps you begin to catch yourself increasing your use of alcohol.

For whatever reason, you become concerned. So you ask yourself, "Am I drinking too much?" That question raises a red flag and probably answers itself. Maybe you should begin to reduce your intake. Or, perhaps you should talk to someone about it. But once you ask yourself that question, you need to do something about it.

Many of us who have had serious alcohol problems are known as "functioning alcoholics." There are many people in our profession who can be heavy drinkers and yet are still be able to perform as relatively good lawyers. In my case, I was an evening drinker. I did alright during the day, but drank very heavily when I got home from work, through dinner and after dinner, until bedtime. This is not uncommon. But it usually is a serious sign of impending problems with alcohol.

When do we cross the line from being a social drinker to having a problem? In my opinion, it is when we quit drinking for social reasons and begin to drink for stress. We are in a difficult and conflictual ►

**Take the quiz at the end of this article  
(see page 15) to obtain one hour of the  
hard-to-get substance abuse MCLE credit!**



*Timothy L. Randall, Partner  
Songstad & Randall*

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WEALTH MANAGEMENT

profession and most lawyers have a high degree of stress. Alcohol seems like a quick and easy way to reduce the stress. We have a couple of drinks — we enjoy ourselves — we begin to numb out. Alcohol becomes an anesthetic for the pain we feel due to the stress, anxiety and overwork that is an integral part of our legal profession. So this is the key. Are you drinking to reduce stress as opposed to just having alcohol at social occasions? Are you drinking every day? Do you feel the need to have a drink after a tough day at work? These are all signs that alcohol is turning from a fun part of your life to what can be a very serious problem.

So what can we do about it? Some of us are able to pull back and simply take control of the use of our alcohol. However, it is not that simple. Alcohol is an addicting substance and it is easy to fall into that addiction. Fortunately our profession has become much more sensitive to this problem and we now have support and help for this problem. There are a number of groups as part of our Bar Association that give advice and help for substance abuse. The one that I prefer: The Other Bar. This is a confidential organization that will help and/or assist lawyers who may have an alcohol or substance abuse problem. I strongly urge you to call them and get a confidential consultation if you, your friends, colleagues or partners need help. This organization is not just for serious alcoholics and down-and-out drunks. It is for anyone who questions their drinking and wants some advice. The Other Bar members are made up of the top people in our profession and they are ready to talk to you about the problem and help you answer the question: Am I drinking too much?

You can reach The Other Bar at 800-222-9767 ([www.otherbar.org](http://www.otherbar.org)). ♦

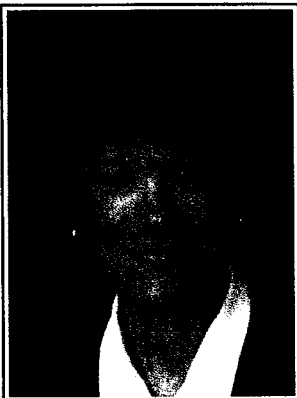
— Gary Gwilliam recently wrote a book about his experience with alcohol and his struggle with losses, relationships and all the issues that surround trial lawyers. He can be reached at 510.832-5411.

# AT YOUR SERVICE

- Newly retired as a complex litigation judge from Alameda County.

- Named "Trial Judge of the Year" by the Alameda Contra Costa Trial Lawyers Association in 2000.

- During her 20 years on the Bench, Judge Sabraw presided over hundreds of settlement conferences in all categories of civil litigation.



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Bonnie Sabraw  
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Contra Costa County

BAR ASSOCIATION

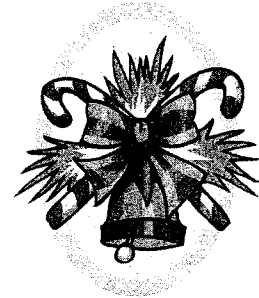
# CALENDAR

*Please note  
new location!*

## Barristers Section Holiday Party

Thursday, December 4, 2008  
6:30 p.m. - whenever

Spin Ultra Lounge  
1411 Locust Street, Walnut Creek



Who's invited? Everyone from the CCCBA!

Tickets: \$5 per person/\$10 at the door (which includes 2 drink tickets, good for two drinks)  
Live DJ spinning all night long!

RSVP (& send checks, payable to CCCBA) to Michele Vasta,  
CCCBA, 704 Main Street, Martinez 94553.

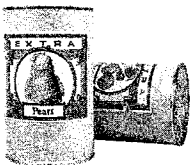
For further information, please contact Robin Chang, [lrchang@archernorris.com](mailto:lrchang@archernorris.com).

## CCCBA's Annual Holiday Party

Thursday, December 18, 2008  
4:30 - 6:30pm  
704 Main Street, Martinez

CCCBA members and Contra Costa Superior Court judges,  
clerks and administrative staff  
are invited to join us for fun, food and holiday cheer.

To gain admittance to the party, simply bring a non-perishable  
food item(s) for donation to the Contra Costa Food Bank and/or  
toy(s) for donation to the 16<sup>th</sup> Annual Toy Drive for homeless  
children, sponsored by the Juvenile Section of the CCCBA.



**Please RSVP to Michele Vasta at 925.370-2548 by December 11  
(although drop-ins are welcome).**



California Certified Public  
Society Accountants  
East Bay Chapter

# TAX ISSUES IN DIVORCE

## MINI-CONFERENCE

**Presented by the East Bay Chapter Litigation Committee  
and the Contra Costa County Bar Association**

<b>11:30-1:00</b>	Registration & Optional Lunch (box lunch can be ordered or bring your own)	<b>2:30-3:30</b>	<b>What's New with Stock Options</b> – Don Read, Certified Tax Specialist
<b>12:15-12:45</b>	<b>Tax Consequences of the Mortgage Crisis</b> (no credit) – Scott Haislet, Lafayette Exchange Corporation	<b>3:30-3:45</b>	Break
<b>12:45-1:00</b>	Break	<b>3:45-4:15</b>	<b>Current Tax Cases and Issues</b> – Leslie Dawson, Glenn & Dawson LLP
<b>1:00-2:30</b>	<b>Tax Issues Related to the Business in Divorce</b> – Jeff Stegner, Armanino McKenna LLP; Mark Ericsson, Youngman, Ericsson & Low, LLP	<b>4:15-5:15</b>	<b>Pension and QDRO Issues</b> – Ann Fallon, Whiting Fallon Ross & Abel, LLP; Mary Kay Foss, Greenstein Rogoff Olsen & Co.

**Objectives:** Update family law practitioners on the latest issues affecting their clients and practice.

**Designed for:** CPAs, attorneys, judges, other professionals and staff who require current knowledge of family law cases and issues.

**Date:** Tuesday, Jan. 13

**Location:** Crowne Plaza Concord; 45 John Glenn Drive; Concord

**Cost:** \$90 Conference only; \$110 conference and box lunch (turkey sandwich, vegetarian); \$25 additional after Jan. 7

**CPE:** 5 hours; **MCLE:** 4 hours; **LS:** 4 hours (Taxation and Family Law)

### CalCPA EB Chapter Mini-Divorce Conference

**Tuesday, Jan. 13**

**RSVP online** at [www.calcpa.org/EB](http://www.calcpa.org/EB) or **mail this form** with your check to:

**Soco Davenport; CalCPA; 1235 Radio Road; Redwood City, CA 94065-1217** or fax to: **(650) 802-2665**.

Or; reserve by phone at **(925) 926-0189** or [soco.davenport@calcpa.org](mailto:soco.davenport@calcpa.org).

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\_\_\_\_\_ Member ID No.: \_\_\_\_\_ CPA License No.: \_\_\_\_\_ ☐ Nonmember

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☐ Check (Payable to CalCPA) Member ID No. (if different from above) \_\_\_\_\_ ☐ Nonmember

☐ MC ☐ Visa ☐ AMEX: \_\_\_\_\_ Exp. Date: \_\_\_\_\_ Cardholder Name: \_\_\_\_\_

No. of Participants: \_\_\_\_\_ X Cost per Person: \_\_\_\_\_ = Total Amount: \_\_\_\_\_

Meal Choice: ☐ Turkey Sandwich ☐ Vegetarian

All cancellations must be made 48 hours in advance. This is due to a contractual number guarantee which must be confirmed with the hotel, club or restaurant.

# Annual CCCBA Officer Installation

featuring

## Justice Ignazio Ruvolo

*First District Court of Appeal*

**Friday, January 16, 2009**

**Contra Costa Country Club**

**801 Golf Club Road ■ Pleasant Hill**

**Social 11:30am ■ Lunch and program 12:00 – 1:30pm**

*CCCBA Membership Directory photos may be taken from 11:00am to noon ~and~ 1:30 to 2:30pm*

**\$40 CCCBA members ■ \$50 non members**

**1 hour MCLE Credit**

**Menu Choices:** Grilled, Herb Marinated Chicken Breast served over Roasted Mushrooms and Sweet Garlic Herb Jus  
~or~ Poached Salmon Filet with Kettle One and Green Olive Beurre Blanc (*vegetarian option available*)

**To register:** Phone in your credit card (925.370-2548) or send check, payable to CCCBA to Michele Vasta, c/o CCCBA, 704 Main Street, Martinez 94553. *Please indicate your menu selection.* Call Michele, 925.370-2548, for further information.



### PICTORIAL MEMBERSHIP DIRECTORY PHOTOS

Photo sessions for the directory are free. No appointment is necessary; simply show up during one of the following scheduled photo shoots:

**Friday, January 16, 11am–noon; 1:30–2:30pm:** (in conjunction with the annual Installation Luncheon above)  
Contra Costa Country Club, 801 Golf Club Road, Pleasant Hill

**Tuesday, January 20, 8am–5pm:** Morgan Miller Blair, 1331 N. California Blvd., 2<sup>nd</sup> floor, Walnut Creek (925.937-3600)

**Thursday, January 22, 8am–2pm:** Contra Costa County Bar Association, 704 Main Street, Martinez (925.686-6900)

Alternatively, you may forward a camera-ready photo for inclusion in the directory (head and shoulders, plain background) to CCCBA, 704 Main Street, Martinez, CA 94553 or e-mail a photo (**minimum of 300dpi**) to Nancy Young at [young-design@prodigy.net](mailto:young-design@prodigy.net) no later than February 13, 2009.

**REMINDER:** You must be a current member by March 1, 2009 to be included in the annual CCCBA Membership Directory.

### RESTRICTED ACCESS COURT SECURITY CARDS

**How to obtain a card for the FIRST time (or for those wishing to have their photo retaken):** The Contra Costa County Superior Court provides restricted access court security cards to CCCBA members for a \$10 fee. These photo ID cards are valid for two years and allow our members to bypass the court's perimeter security system, which is particularly beneficial to attorneys who make frequent court appearances. Purchase of a restricted access court security card is entirely optional. If you would like to obtain one, you will be required to sign a contract, which you can obtain from Jenny Comages at 925.370-2543 or via e-mail at [jcomages@cccba.org](mailto:jcomages@cccba.org). You must present a form of picture identification and your State Bar card at the time your photo is taken. Current membership in the CCCBA will be verified by the Court's Executive Office. Interested members may drop in to have their photo taken by Lisa Frades at Superior Court's Executive Offices, located at 649 Main Street, Room #103, in Martinez. Although walk-ins are welcome, we recommend that you notify Lisa in advance of your intention to drop in. She can be reached directly at 925.957-5600. Payment will be accepted by cash or check.

Note: Cards obtained in 2009 and 2010 will be valid until December 31, 2010.

## Business Law & Corporate Counsel Section

**JANUARY 29, 2009**

### PROGRAM

Unauthorized Practice of Law for the  
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Free to section members / \$45 CCCBA members

### SPEAKERS

Carol Langford Esq.  
Robert Hawley Esq.

To register: Phone in your credit card (925.370-2548)  
or send check, payable to CCCBA, to Michele Vasta,  
CCCBA, 704 Main Street, Martinez 94553

For additional information, call Michele Vasta at 925.370-2548.

1 hour MCLE Credit\*



# 2009 MEMBERSHIP RENEWAL DRIVE IN PROGRESS NOW!

It is fast and easy to RENEW ONLINE at [www.cccba.org](http://www.cccba.org)

The first 250 online renewals will be entered into a drawing for the winner's choice of a refund of his or her 2009 CCCBA membership dues\* and three practice area listings; or a one-third page ad in an upcoming issue of the Contra Costa Lawyer. The winner will be drawn at the January installation luncheon.\*\*

### To renew online:

1. Open "Member Resources" and follow the "to renew click here" link. Use your CCCBA ID # to log-on to your personalized application.  
*Forget your ID #? Call us at (925) 686-6900 x 2 for help.*
2. Review your current membership information and make any changes, then update your dues, sections and practice areas.  
*Payment: If you are paying by credit card, fill-in the secure payment section - or - Checkmark the "I'm mailing in a check" box.*
3. Checkmark the "Yes, I agree" box validating your Membership agreement.
4. Click "Print Form" to make a copy for your file and/or your accounting department.
5. Click "Submit Form." Paid by credit card? Your membership renewal is complete. Mailing a check? Your membership renewal will be processed upon receipt of payment.

Some firms have their accounting department collect all the membership applications and bundle them for submission to CCCBA with one check. If your firm does this, you may still make the necessary changes to your on-line membership application and then before you click "Submit Form" print a copy to give your accounting department for processing.

*As always, your continued membership is appreciated.*

Not tech savvy? The printed Membership Renewal Statement will be mailed the first week in December.

\*Does not include Section Dues or LRIS Dues. \*\*You do not have to be present to win.

*\*The Contra Costa County Bar Association certifies that this activity has been approved for MCLE credit by the State Bar of California (Provider #393).*



## MCLE SELF-STUDY

1. Alcohol use is an integral part of our culture as lawyers. **T or F**
2. If you look at the history of our profession, dating to the common law in England, we can understand that alcohol use among barristers, counselors and lawyers was basically non-existent. **T or F**
3. According to the author, there is a bar in London called "Cheers," which is primarily populated by English lawyers. **T or F**
4. There is a great television series about an English barrister, called "Rumpole of the Bailey," who loved his gin. **T or F**
5. As opposed to the English way of life, alcohol is not usually a part of American lawyers' get-togethers. **T or F**
6. Many lawyers are connoisseurs of good wine. **T or F**
7. Most trial lawyers of the author's generation were not hard drinkers. **T or F**
8. Only trial lawyers tend to be alcoholics. **T or F**
9. Lawyers have among the highest rates of alcoholism, depression, and suicide of any other profession. **T or F**
10. Between 30 and 60 percent of all lawyers who have discipline problems have substance abuse problems. **T or F**
11. Alcoholism can be a reaction to stress. **T or F**
12. Even reasonable use of alcohol is a problem. **T or F**
13. Although there are some attorneys who should not drink at all because of their propensity to alcoholism, that is not true of the great majority of attorneys. **T or F**
14. If you are aware enough to look in the mirror and wonder whether you are drinking too much, then you probably are not. **T or F**
15. If you are a heavy drinker and can still perform as a relatively good lawyer, then you are known as a "functioning alcoholic." **T or F**
16. According to the author, you have crossed the line into alcoholism when you become violent. **T or F**
17. Alcohol is an addicting substance and it is easy to fall into that addiction. **T or F**
18. Unfortunately, our profession is still unaware of this wide-spread problem and attorneys have no where to turn for support. **T or F**
19. The Other Bar is a confidential organization that will help and/or assist attorneys who may have an alcohol or substance abuse problem. **T or F**
20. The Other Bar members are made up of the top people in our profession and are ready to talk to you about your problem. **T or F**

### Substance Abuse MCLE Test

December 2008 *Contra Costa Lawyer*

Name \_\_\_\_\_

Law Firm \_\_\_\_\_

Address \_\_\_\_\_

City & Zip \_\_\_\_\_

Telephone \_\_\_\_\_

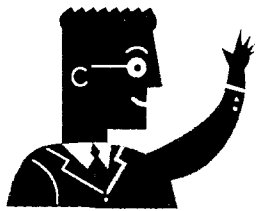
State Bar # \_\_\_\_\_

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|-----|-------------------------------|--------------------------------|
| 1.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
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| 18. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |

Mail this completed form and the \$20 testing fee (**checks made payable to CCCBA**) to: Michele Vasta, CCCBA, 704 Main Street, Martinez, CA 94553.

*The Contra Costa County Bar Association certifies that this activity has been approved for one hour of Substance Abuse MCLE credit by the State Bar of California (Provider #393).*





## How will 2008 affect you in 2009?

2009 will reinforce that my decision to retire in 2008 was the right one. It has been enjoyable, even though I have taken up a new vocation as the Foreperson of the San Francisco 2008-2009 Civil Grand Jury, which is keeping me very active.

*Leonard A. Kully*

Former CCCBA President ('73)



It seems clear that 2009 will undoubtedly be a banner year for dynamic and unprecedented change. Unfortunately, it is the grim reality that "change" is all I am likely to have remaining in my pockets.

*James R. Morgan*

Solo, Walnut Creek



The presidential election will affect me in 2009 and all of us for decades to come. President Barack Obama will soon nominate two or three Supreme Court justices who will sail through



Senate approval. The judges will be the most extremist left justices we have ever seen — certainly to the left of the Warren court. Remember, Obama himself is on the record as stating that the Warren court was not radical enough, in that it did not find that "equal protection under the laws" meant an equal share of the wealth for each person. In addition, the justices are likely to be in their early to mid 30s, so that they will be with us for 40 to 50 years each. In ways that we have not yet begun to imagine, this election will affect us all. And our children. And their children. And *their* children.

*Kurtiss Jacobs*

Solo, Concord



Huh? Well, I guess it will keep 2009 from sliding back into 2007....

*John E. Manoogian*

Law Offices of John E. Manoogian

I have no clue. I'm still trying to figure out how 2007 has been affected by 2008. All I know is that I have resurrected my old retirement plan of dropping dead at my desk.

*Dan G. Ryan*

Holmes, Moore & Sparks



Are you kidding? Let me put it mathematically: < 2008 stock market = < 401k = > years in the saddle = more than ever to do in 2009!

*Richard A. Eggerth*

Law Offices of Morales Fierro & Reeves

No more Bush!!

*David L. Roth*

Real Estate Law Offices of David L. Roth



I'll be another year younger, and deeper in debt, so St. Peter don't you call me.

*Tom Cain*

Solo, Walnut Creek



2008 was the year we opened our new law firm. By all accounts, it is making for a fantastic 2009.

*Richard C. Vasquez*

Vasquez Benisek & Lindgren LLP

It will screw up my writing dates for the first two months.

*Merritt Weisinger*

Walnut Creek Family Law Center



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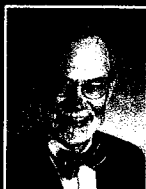
**Tax Lawyers.**

# SEASON'S GREETINGS & THANK YOU

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# SANCTIONS one and all



by Thomas H. Smith

## IN RE MARRIAGE OF FELDMAN

(2007) 153 Cal.App.4<sup>th</sup> 1470 is a wake-up call to anyone who has not yet taken seriously the Family Code's financial disclosure requirements (and its resulting sanctions when those requirements are not met). A party to a dissolution proceeding who attempts to avoid full financial disclosure invites specific Family Code ("FC") sanctions and attorney fees awards. The FC's disclosure requirements, sanctions and fee awards complements the FC §271 sanctions and FC §2030 need-based fee awards. They are separate, and potentially far more powerful, than those set forth in the *Code of Civil Procedure's* ("CCP's") discovery statutes.

*Feldman* focuses on the FC's duty of disclosure during dissolution proceedings and confirms the consequences of breaching those duties. The trial court found that the husband (the "husband") established a "pattern" of financial non-disclosures and issued sanctions against him. These sanctions were set in an amount the court deemed sufficient to deter future non-compliance with the disclosure requirements of FC §§721, 2100, 2120, and 1100(e), as well as *Corporations Code* §§16403(c)(1) & (2). The trial court also awarded the wife ("wife") attorney fees incurred in pursuing husband's compliance with the statutes, including bringing and defending the motion.

The fiduciary obligations of spouses are set forth in FC §721, and are made specifically applicable during dissolution proceedings by FC §1100(e). It provides:

*Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary*

*relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request.*

Consistent with these fiduciary obligations, FC §2100(c), in part, provides that "...a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as community or separate, together with a disclosure of all income and expenses of the parties." This disclosure duty is ongoing, as FC §2100(c) further provides that "...each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have a full and complete knowledge of the relevant underlying facts." (Italics added.)

Similarly, FC §2102(a) provides: From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities

that affect the assets and liabilities of the other party, including, but not limited to...(1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, *including an immediate, full, and accurate update or augmentation* to the extent there have been any material changes. (Italics added.)

FC §2107(c) now *requires* the trial court to impose monetary sanctions, including an award of reasonable attorney fees if a party fails to comply with any portion of the FC chapter dealing with a spouse's fiduciary duty of disclosure during dissolution proceedings, *i.e.*, §§2100 to 2113. The sanctions "shall be in an amount sufficient to deter repetition of the conduct or comparable conduct ... unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Notably, unlike FC §271, FC §2107 does not require the court to consider the parties' incomes, assets, and liabilities. It merely *requires* sanctions in an amount sufficient to deter repetition of the failure to disclose. Public policy favors cooperation of the litigants and the promotion of settling litigation [*Feldman* at 1480]. As such, neither statute requires the moving party to show damages or demonstrate financial need. The FC further directs that, "Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, *shall include*, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty

plus attorney's fees and court costs." [See FC §1101(g). (Italics added.)]

*Feldman* affirmed these non-disclosure sanctions. A little over a year after filing her petition for dissolution, wife applied for an order (1) imposing monetary sanctions against husband for violating his fiduciary duty to make financial disclosures to her during the dissolution proceedings (the "sanctions motion"), and (2) requiring husband to pay her attorney fees [*Feldman* at 1474]. The sanctions motion was based on sections 1101(g), 2107(c), and 271(a) of the FC [Id.]. Wife's declaration in support of the sanctions motion alleged that husband repeatedly failed to disclose several different financial transactions, including the purchase of a personal residence through one of his companies, the purchase of a \$1 million bond, the existence of a 401(k) account, and the existence of several business entities [Id. at 1475].

Following full briefings and a hearing, the trial court ruled that husband repeatedly breached his fiduciary duty to disclose financial information to wife, and concluded the numerous deficiencies in disclosure showed "a clear pattern" and that husband had no intention of complying with the disclosure statutes [Id.]. Husband's "failure to disclose [was] intentional" and "trying to circumvent the process," and the court ordered husband to pay sanctions in the amount of \$250,000 and attorney fees of \$140,000 [Id.]. The Court of Appeal of the Fourth District upheld the ruling.

In summary, in addition to the well established FC §2030 need-based attorney fees awards and FC §271 sanctions (and in addition to the fee awards associated with the CCP's discovery statutes), *Feldman* stands for the proposition that a court may sanction a party to a dissolution proceeding, and award the other party his or her attorney fees, to deter future violations of the party's fiduciary obligation; and, all this without a court's finding of need or even a party's ability to pay. ♦

— *Thomas H. Smith is an attorney with the Law Offices of David M. Lederman, with offices in Antioch and Walnut Creek.*

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# The Secret

by Justice James J. Marchiano

*In past accounts, Judge Carlton presided over a problematic three strikes case and a mental health case.*

*Now he confronts legal ethics...*

*It clung to him and obsessed him during quiet moments, interrupted his thoughts while he struggled to write a motion, and awakened him in a sweat at night. The secret consumed his being.*

John Derickson, a successful, 56-year-old Walnut Creek criminal defense lawyer, skilled from defending countless persons accused of crimes against the People of the State of California, reread Evidence Code section 954 which governs confidential communications between a lawyer and client. He was duty bound to claim the privilege unless disclosure was necessary to prevent a criminal act likely to result in death or substantial bodily harm. It was the cornerstone of the profession to which he had dedicated his life, twice divorced but never separated from his love of the law. He recalled from his ethics course at Hastings Law School that he must faithfully adhere to Business and Professions Code section 6068 to maintain inviolate the confidence and at every peril to himself preserve the secrets of his client. "Inviolable," free from violation, never transgressed, never broken — yet now a secret confidence harbored an injustice and tore at the core of his conscience.

Derickson's secret sprung from conversations with a client and his review of court transcripts. The obsessive secret fatefully began some years before in a Latino area of Concord and involved two Mexican cousins and a good luck medallion.

Juan Jesus Mejia, a five-foot-seven, quiet 27-year-old from a village in Zacatecas, Mexico, worked as a gardener for any landscaper who would give him work. Each February, for six years, he had slipped across the border near Mexicali into California, made his way to Concord where other Zacatecans lived and then returned to his village in late November in time to celebrate the December fiesta honoring Our Lady of Guadalupe. During slow times he waited patiently in the parking lot of Home Depot hoping that some Lamorinda patrón in his silver SUV would need his

strong back and rough hands for renovating a backyard. Twenty-five dollars of each hundred dollars he earned was Western Unioned back home to his mother and five brothers and sisters. He lived in a one bedroom apartment in the Monument corridor of Concord with four other itinerant rent sharers who slept in beds, on the floor, and on two old couches. The neighborhood had become a barrio with its tiendas, comidas de Mexico shops, Latino music blaring from car radios and young Latinas sashaying their baby strollers down the sidewalk, looking to make friends with other young mothers who spoke their language and understood their dreams and fears.

Jose Miguel Moreles was Juan Mejia's 29-year-old cousin and roommate. His nickname was "Lobo" because he seemed to be a lone wolf, nervously on the prowl for some action, usually dressed in black with his longish hair protruding from a black baseball hat. His upper left arm displayed the tattoo of a menacing wolf with exaggerated teeth ready to devour anything that came near. His right arm bore a seven-inch long serpentine scar etched from a vicious knife fight several months earlier. His good luck gold medallion with the Mexican symbol of the eagle eating the serpent hung on a gold chain around his neck, hidden under his shirt. The Aztec gods directed the building of Tenochtitlan/Mexico City on land in the middle of Lake Texcoco where an eagle on a cactus was seen devouring a serpent. It was a place of good luck, now memorialized in gold medallions. Only Jose Moreles knew about this 18-karat last refuge — his good luck charm in case he ever ran out of money.

Moreles drank more than he should have and learned firsthand about the American delicacy of methamphetamine that heightened his senses and electrified his reflexes. He was a muscular five foot eight, 175 pound figure, bitter about his dead-end existence in Norte America. Tecate beer and meth helped him forget his

plight. He was jealous of Mejia, who found work readily and made friends easily.

On the last week of November, Juan Mejia alone in the apartment eagerly planned his return to Mexico. Lobo had not paid his share of the rent for six weeks. Work was slow for everyone and other newly arrived Zacatecans arrived with enough money to pay a share of the rent. Lobo was looking at eviction to the streets where homeless shelters did not exist for people like him. After fortifying himself with some meth he won from a bet, he put on Mejia's black hooded sweatshirt and walked the two miles to Park and Shop Shopping Center with its elongated neon light seductively beckoning shoppers. It was 9:00 p.m. when most of the stores were closing and the parking lots were practically empty. Lobo would make his own luck. He hid in the shadows of the employee back parking lot where one car was parked off by itself.

At 9:15 pm Janet Bronson, a sales clerk at the discount clothes boutique, walked quickly to the car, her mind occupied on picking up her three-year-old from her babysitting aunt. As she opened the car door, a pair of strong arms suddenly grabbed her from behind, one hand muffled her mouth and the other pushed a sharp gardener's knife against her throat. In an accented voice the assailant told her to keep quiet and shoved her into the back seat as Ms. Bronson fought against him. She momentarily glimpsed at his face under his black hood and in the struggle grabbed at his gold necklace. She saw a large tattoo on the assailant's arm. A terrified scream became her only defense as her fingernails dug into Lobo's arm and drew blood. Lobo panicked, viciously slashed his victim on the face with the knife, grabbed her purse and her cell phone, fled down a back alley, and ran until safely back to the apartment. This was his lucky night. The wallet in the purse contained \$141.24, enough money to buy time for his rent, to buy speed, to buy whatever. He buried the cell phone that had a spot of his blood by the apartment.

Hearing the screams from around the corner of the parking lot, a passerby called 911. The Concord police tried to comfort an hysterical Ms. Bronson, obtained some information, and took her to Mt. Diablo Hospital for medical treatment. She told a female officer and the surgeon about the knife and the necklace. A few days later a police artist drew a composite sketch of the suspect with the medallion dangling outside a black sweatshirt. Copies of the drawing were distributed to patrol officers and to the press. In the meantime, criminalists checked the Bronson car for fingerprints and for hair and fiber evidence. A few hairs that might have come from the hooded sweatshirt were retrieved and carefully placed in a plastic evidence bag.

Two days later, Lobo did not know why he happened to see the *Contra Costa Times* on a fast food counter, opened to page 3 with the drawing of a Latino suspect with a gold medallion staring at him. It was like looking into a slightly distorted mirror. He hurried back to the apartment where some new renters were unloading their belongings. Desperate for money and a way out, he decided to part with his last refuge. He took Juan Mejia outside and offered to sell the prized gold medallion. Mejia planned to leave for Mexico the next day. Mejia had never seen such finely crafted, golden figures and bargained to \$225. The deal was struck. Lobo moved out that day and headed to East Oakland where he could lose himself in the Latino community.

That night, Juan Mejia celebrated his imminent return home with a few friends at a local cantina. He proudly wore the distinctive medallion against a black shirt and reveled in the compliments he received. His good luck was short-lived. As he walked down Monument Boulevard with the medallion glistening under the street lights, a Concord police patrol car passed by, slowed, and the officer fixed his eyes on the necklace and medallion. The consensual stop turned into a detention, and then an arrest. At the police ►

station he struggled to explain in poor English how he obtained the necklace. The interrogating officer noted a small tattoo on the suspect's arm and arranged for a photo lineup. Ms. Bronson picked out Mejia's photo from photos of five Latin looking men and was "pretty sure" that Mejia was the one who attacked her. And she would never forget that haunting gold medallion. Officers served a search warrant for items in the apartment and found a black hoodie and a gardener's knife. A microscopic examination of a hair strand found on the night of the assault matched a strand of Mejia's hair taken at the station. Mejia's cousin was nowhere to be found.

The trial was swift and unremarkable, lasting only three days in Department 37 of the Bray Building. A scared defendant Mejia testified and tried to explain why he was innocent. He was alone at the apartment at the time of the attack. No one provided an alibi. Eyewitness identification, forensic hair evidence, a similar knife, and the medallion doomed the defendant. The public defender's investigator was unable to find anyone at the apartment who knew where Lobo was. At sentencing, the penal code sections meant little to Mejia, but he did understand Judge Raymond Carlton intoning the aggregate term of 12 years in state prison for assault, robbery, personal infliction of great bodily injury, and use of a deadly weapon.

Moreles learned about the sentence, was relieved and was pleased that the cousin whom he disliked was his proxy at Soledad State Prison. He eagerly turned to his

new venture in the East Bay, distributing marijuana and methamphetamine smuggled from Mexico. Two years later, a joint DOJ and DEA enforcement team stopped Lobo's van and uncovered enough illegal substances to warrant a 25-year federal prison sentence. Fate befell John Derickson. Because of a conflict of interest among the defendants charged in federal court, John Derickson, who spoke some Spanish, was appointed to represent Moreles. Derickson knew the ambitious U.S. Attorney and recognized the favorable publicity fallout that this huge drug bust could provide. He helped transform Lobo into a valuable, voluble source of information, naming names, routes, and safe houses. For services rendered, Lobo would receive a reduced five-year sentence to a protected section of a prison and then ICE would return him to Mexico after he served his time.

Most clients found John Derickson easy to talk to. In a prison conference room, Lobo and Derickson shared strategy, information, and discussed Lobo's future. That's when Lobo with a smirk on his face unleashed a torrent of Mexican obscenities about Mejia and blurted out: "*5 years was less than 12 years.*" Then he told Derickson about his attack on some woman in Concord, how he escaped, and how his cousin was mistaken for him and convicted of his crime. He laughed as he described what he thought Mejia's daily life in prison was like. Derickson could not believe what he was hearing. Lobo went into detail how he committed the crime, described the car, the woman, his knife, her struggle, and his fortuitous sale of the medallion

to Mejia. The disclosure was a mock confession to his priest, and this priest could not reveal what he learned. It was their inviolate secret.

John Derickson asked a clerk at the First District Court of Appeal to retrieve *People v. Juan Jesus Mejia* from the court's storage. As he read the reporter's transcript, he found every detail described by Lobo in the stark pages. Lobo had described the car, the back parking lot, his attack on Bronson and slashing her face, just how the victim recounted to the jury what happened to her — but about the wrong defendant. Derickson went to the Monument Boulevard apartment and in a side yard found Bronson's cell phone buried by an old almond tree exactly where Moreles said he had disposed of it. So now like the piercing needles of a Sonoran cactus, the secret clung to him.

Lobo went to federal prison, where a La Eme gang member befriended him. Derickson met with Moreles twice in prison and urged him to reveal his role in the robbery. Moreles listened, smiled, and said he would think about it tomorrow. Tomorrow faded into the next mañana.

Meanwhile, Mejia's appeals failed. He felt trapped in a cave, never to be found and gave up hope in Soledad; *Soledad*, Spanish for loneliness, that had turned into despair. And the secret continued to hound and torment Derickson.

Months later, Judge Raymond Carlton greeted John Derickson in Department 37's chambers at 5:00 p.m. after the court staff went home. Judge Carlton, close to retirement, had presided over several of

## APPEALS

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Derickson's trials and was regarded as a legal scholar. They respected each other like one accomplished artist might admire the work of another. Derickson knew that he could not disclose his secret but needed someone to talk to, needed advice from someone he could trust, from the judge who sentenced Mejia.


Derickson described in general terms his ethical problem to Judge Carlton, who listened intently. What can a lawyer do if he has attorney/client information that an innocent defendant was wrongly convicted? How could State Bar discipline be avoided? Judge Carlton saw the tortured look in Derickson's face and felt the turmoil in his mind. Like problem solvers searching for a solution to a complex theorem, they discussed exceptions, lawful ways around the rule that prevents a lawyer from revealing a client's confidential communications. Derickson listened and knew none were applicable to his secret. Judge Carlton adjusted his bow tie and advised that The Restatement of Law, "The Law Governing Lawyers," states that a lawyer must maintain and assert the privilege at all times even after the client has died. The secret would survive Moreles' death, like an indestructible monster from a horror movie. Judge Carlton, however, also recalled Thomas Aquinas' teaching on the primacy of conscience and tried to explain that guiding principle to Derickson. In determining what is morally right to do, one may act in accordance with what a well-informed conscience tells him to do, even if it is contrary to written law. The often blurred line between what one *can do* and *ought to do* is seen through a glass darkly. He gave Derickson the names of several professors of ethics with whom he might consult. A disconsolate Derickson left Judge Carlton's chambers. During the night as he tried to sleep, he felt like his soul was tumbling down into the depths of darkness.

But fate was not finished. Lobo's luck ended abruptly. His La Eme amigo learned that Moreles earned the right to special treatment at the prison as a government informant. The Mexican prison gang convened. Jose Miguel Moreles, aka El

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Issue	Theme	Deadline
January	Annual Bar Issue	November 20, 2008
February	Financial Distress	December 19, 2008
March	Family Law	January 19, 2009
April	Corporate/Business	February 20, 2009
May	Elder Law	March 20, 2009
June	Real Estate	April 20, 2009
July	International	May 20, 2009
August	Education	June 22, 2009
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October	Bench/Bar	August 20, 2009
November	Tax	September 21, 2009
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Lobo, was found dead in a remote corner of the recreation yard, a bloody, cell-made shiv protruding from his upper chest. Derickson arranged for his client's burial.

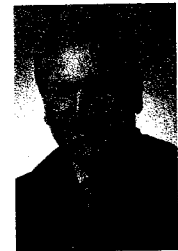
A few days later, John Derickson, after a turbulent, sleepless night, tore up his State Bar membership card and drove to Soledad Prison to meet with Juan Mejia.

A month later, Judge Carlton's clerk handed him a Petition for a Writ of Habeas Corpus requesting a hearing for the illegal imprisonment of Petitioner Juan Jesus Mejia, CDC #199982, Soledad State Prison. The Petition, filed by assistant public defender Joyce Sawyer, was supported by the meticulous declaration of John Derickson, detailing what he had learned from Moreles. Derickson included a photograph of the cell phone in the exposed hole. Now understanding what was behind his recent conference with Derickson and seeing how justice works in mysterious ways, Judge Carlton dis-

qualified himself. The case was reassigned to Judge Laura Estrada, who ordered a hearing. A roommate of Mejia testified about Lobo's selling the necklace to Mejia. Ms. Bronson agreed a photograph of Moreles looked more like her assailant than Mejia did. A DNA test on the spot of blood on the cell phone matched Jose Moreles'. Derickson testified. Judge Estrada took the matter under submission.

That night was unlike past nights. John Derickson thought about the medalion, Judge Carlton's remarks about conscience, fell asleep unburdened, and slept through the darkness. ♦

—Hon. James Marchiano  
presided in Martinez from  
1988 to 1998. From 1998  
to present, he serves as  
Presiding Justice of Division One, First District  
Court of Appeal.



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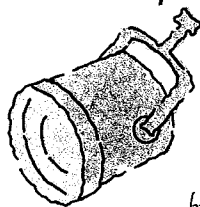
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# Pro Bono Spotlight



by Craig Nerwin

## McNamara, Dodge, Ney, Beatty, Slattery, Pfalzer, Borges & Brothers

The Contra Costa Bar Association and The Law Center would like to acknowledge the outstanding work of McNamara, Dodge, Ney, Beatty, Slattery, Pfalzer, Borges & Brothers.

In 2007, McNamara partner Michael J. Ney was Chairman of The Bar Fund. As many of you know, the Bar Fund was established in 1998 to provide a permanent and growing source of income for grants and monetary support in furtherance of the following goals:

1. Promote and support Pro Bono legal advice, counsel and representation to the County's poor and needy;
2. Maintain equal access to justice;
3. Support and improve administration of justice;
4. Contribute to wider understanding of the law and legal reform;
5. Preserve American heritage of rule by law; and,
6. Encourage elevated standards of legal education and performance.

The Bar Fund's activities include the awarding of annual grants to non-profit organizations that provide free or reduced-fee legal services to low-income Contra Costa County residents. In 2007 alone, grant recipients and their awards were: Bay Area Legal Aid – \$40,000; JFKU Elder Law Clinic – \$7,500; The Law Center – \$5,000; Contra Costa Senior Legal Services – \$9,000; Court Appointed Special Advocates – \$5,000; The Hawkins Center for Law & the Disabled – \$8,500; Housing and Economic Rights Advocates – \$5,000; and, Equal Justice Works Fellowship – \$65,000 (total, for a multi-year grant). Other past grant recipients:

the public television legal program *For The Record* and Contra Costa Superior Court's *Youth Against Drinking & Driving* video competition. The grants awarded to date by The Bar Fund total \$318,900! To learn more about The Bar Fund and its work, visit the CCCBA website ([www.cccba.org](http://www.cccba.org)).

In addition to Mike Ney's work aimed at increasing access to justice and promoting pro bono legal work, recently, McNamara partner Gary R. Johnson was elected Vice-President of The Law Center. The Law Center responds to the needs of our local community by matching pro bono attorneys with clients who do not qualify for assistance through existing service providers and who cannot afford paid representation. In practice, The Law Center attempts to level the playing field for countless poor and very low income residents who otherwise would be at an extreme disadvantage in their encounters with the legal system. Help for these individuals takes on many forms, from telephone coaching, preventive education and referral to existing agencies on one end, to full representation at the other. Currently, approximately 100 attorneys are "panel members" who periodically receive Notice of Pro Bono Opportunities. The Law Center is thrilled to have Gary as its Vice-President.

We would like to take this opportunity to acknowledge and thank McNamara, Dodge, Ney, Beatty, Slattery, Pfalzer, Borges & Brothers. This particular law firm has greatly increased its involvement in pro bono work and efforts to increase Access to Justice in a manner that we should all follow. ♦



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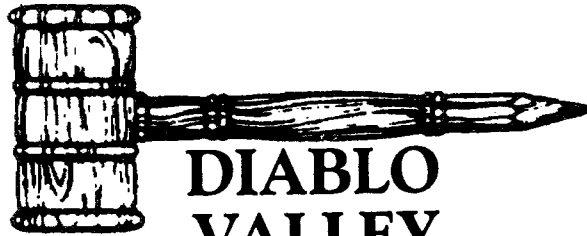
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