The Marin Lawyer

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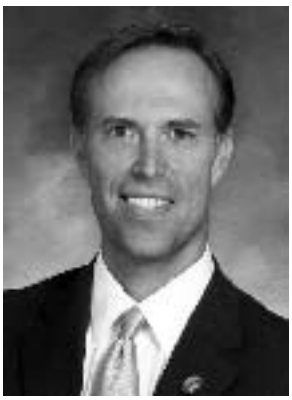

GENERAL MEMBERSHIP MEETING

LOCAL BOY MAKES GOOD: ASSEMBLYMEMBER JARED HUFFMAN TO SPEAK ON STATE BUDGET CRISIS AT FEBRUARY GENERAL MEMBERSHIP MEETING

The MCBA's own Jared Huffman, California State Assemblymember for Marin and southern Sonoma, will address the Marin County Bar Association at its monthly lunchtime membership meeting on **Friday**, **February 20, 2009**, at the Seafood Peddler in San Rafael. He will address the state's budget crisis, new environmental initiatives, and other matters of topical interest.

Huffman is a former member of the MCBA Board of Directors, 12-year member of the Marin Municipal Water District (three terms as President), and the first full-time professional environmentalist ever elected to the state legislature. As an attorney, he achieved numerous major environmental and civil rights victories. He was elected to the Assembly in 2006 and re-elected in 2008; this year, he is the chair of the Assembly Water, Parks, and Wildlife Committee.

Huffman lives in San Rafael with his wife, Susan, and their two children. Before graduating with honors from U.C. Santa Barbara and from Boston College Law School, he was a three-time NCAA All-American athlete and member of the World Champion United States Volleyball Team. As a lawyer, he has never lost a trial. As a politician, he has never lost an election. As a public speaker, he has never lost an audience. Please register for this exciting program by completing and returning the reservation form on page 2.

Calendar of Events

Feb. 20, 2009
General Membership Meeting
Jared Huffman
12-1:30pm

Feb. 18, 2009
ADR Section Meeting
12 – 1:30 pm

Feb. 18, 2009
Probate & Estate Planning Section Meeting
12 – 1:30 pm

Feb. 19, 2009
Real Property Section Meeting
12 – 1:30 pm

Feb. 23, 2009
Probate & Trusts Mentor Group
12 – 1:30 pm

Feb. 24, 2009
Barristers' Social
5:30 pm

Look for details each month in *The Marin Lawyer*

In This Issue

Eric Sternberger was Guest Editor of this issue of *The Marin Lawyer*. Philip R. Diamond is Series Editor for 2008.

THE TOP TEN THINGS THE GENERAL PRACTITIONER SHOULD KNOW ABOUT BUSINESS DIVORCES

*By Eric Sternberger, Esq.**

Regardless of your practice area, you are likely fielding new recession-related inquiries that may not be part of your daily practice. This article is intended to bring your attention to the "Top Ten" practical issues you should know about if confronted with a business divorce.

A business divorce refers to partners in a closely held business who decide to sever their relationship.

(Continued on page 13.)

PRESIDENT'S MESSAGE

Are You Wondering What Impact the Recession Will Have on You?

By Marlene P. Getchell

It is no surprise that we are in a recession. In fact, President Barack Obama has declared this recession to be the worst recession since World War II. What is not clear is whether being in a recession is a good thing or bad thing for your law practice. Most attorneys agree that if your specialty is in foreclosure law or bankruptcy, your caseload should increase. However, what about attorneys practicing in other areas of the law? Will there be a number of layoffs of attorneys from large law firms? Will business and tax attorneys have less work because of the decrease in acquisitions? Will there be more marital dissolutions because of the financial stress imposed on families, or will the lack of funds cause families that would otherwise wish to dissolve their union stay together? Will people decide to forego the expense of an estate plan believing that they aren't going to die before the recession ends, so they may as well save the expense of estate planning? Will the souring economy cause a spike in litigation and regulatory activity? Frankly, your guess is as good as mine.

It's hard to believe that all of the doom and gloom we hear about in the media isn't going to impact us as attorneys. A staggering 2.6 million jobs disappeared in 2008, which is the largest job loss since World War II. At least 11 million Americans were out of work in 2008 and searching for jobs. Many clients will definitely be negatively impacted by increased unemployment, the slide in stock prices, reduction in home values, and the inability to obtain financing.

Further, how long the recession will last is anyone's guess. According to the National Bureau of Economic Research, we have had at least 21 recessions since 1900. The average length of a recession is 14.4 months. The country's last recession began in July 1990 and lasted until March 1991. But the National Bureau of Economic Research did not officially declare the downturn over until December 1992. The longest recession was between August, 1929 and March, 1933, a total of 43 months. The shortest recession lasted only 8.4 months, from January through July, 1980.

In Marin County, we have seen a dramatic increase in the filing of unlawful detainers. According to Kim Turner, Executive Officer of the Marin County Superior Court, the number of unlawful detainer filings have increased from 527 in 2007 to 668 in 2008, representing an increase of more than 26%. Between 2007 and 2008, there has been no increase in Marin County in marital dissolution and legal separation filings.

The only advice I can give to attorneys during a recession is that they should be more vigilant about doing what they should have been doing all along. Whether you are employed by a firm or are a sole practitioner, you need to take seriously the fact that while you practice law, you need to treat your law practice as a business. First, reevaluate your practice area and see if you can answer the following questions in the affirmative: Are you practicing in an area that you enjoy? Is your area of expertise marketable? Are you providing clients with value for what you or your firm is charging? Can you expand your knowledge to include the busier practice areas that may arise during the recession? Have you positioned yourself to be able to receive work in your field?

Second, be careful with the type of case and client that you take on. Beware of taking a case only because of your concern that business has slowed down and you need the income. Ask yourself: Do you or your firm have the financial resources to continue to represent the client,

(Continued on page 14.)

RESERVATION FORM General Membership Meeting **Speaker: Jared Huffman**

Please make ____ reservations for me at the Seafood Peddler in San Rafael.

on **Friday, February 20, 2009**, from 12-1:30 pm.

Please choose one:____Chicken Breast Balsamic ____Sole Picatta ____Pasta Primavera

Name(s) or Firm Name:_____ Phone:_____

❑ Enclosed check for _____($27 members and $37 non members)

❑ Visa ❑ Mastercard _____ Exp _____

Please, we must have RSVP's by February 13, 2009.

Make checks payable to MCBA and mail to: MCBA, 30 North San Pedro Road, Ste. 140, San Rafael 94903.

Reservations are non-refundable unless the individual provides at least 24 hours cancellation notice to MCBA.

A SELLER'S SPECIFIC PERFORMANCE REMEDY IN A RESIDENTIAL REAL ESTATE TRANSACTION

*By Barrett R.P. Schaefer**

An increasing number of disputes involve a buyer and seller of real estate who disagree as to whether they are obligated to close escrow. Nowadays, it seems sellers want reluctant buyers to specifically perform more than ever. With the right facts, the law permits a seller to obtain specific performance and even damages against a buyer who refuses to close escrow. This article discusses some of the more important law and facts that are important for such a seller. (This article is limited in scope to residential real estate transactions in which the parties have used the industry standard California Association of Realtors (CAR) Residential Purchase Agreement and Joint Escrow Instructions (hereinafter the "Agreement")).

Contrary to popular belief, it is not just the buyer who can force escrow to close. The law provides that both sides to a real estate purchase agreement have the right to specific performance. (Civil Code Sec. 1680; see also *BD Inns v. Pooley* (1990) 218 Cal. App. 3d 289 [seller granted specific performance].)

Before a seller may obtain specific performance, certain key facts must exist. For one, the seller must have fully performed all of his or her contractual obligations. (Civ. Code Sec. 3392.) This includes making the property available for all inspections, providing all required disclosures, and placing all required seller documentation into escrow (such as a seller carryback note). (See Agreement ¶¶ 5, 7, 9, and 14.)

Second, the buyer must have removed all contingencies. If this has not occurred, the buyer may properly cancel. (*Id.* at ¶¶ 7.D. and 14.B.) By contrast, upon removing all contingencies the buyer "shall conclusively be deemed to have elected … to proceed with the transaction." (*Id.* at ¶14.D.)

Ideally, the buyer also has signed and returned all required disclosures, as required in Agreement ¶ 5.A.2. This will help to avoid disputes about whether the buyer intended to waive this requirement. The purchase price must also have been reasonable. (Civ. Code Sec. 3391.)

Interestingly, a seller can obtain the equitable remedy of specific performance notwithstanding a liquidated damages provision. (Civ. Code Sec. 3389 [entitled, "Liquidation of damages not a bar to specific performance"]; *see also* Civ. Code Sec. 1680 and its corresponding Legislative intent that, "the right of the seller to obtain specific performance of a contract for the purchase of real property is not affected by the inclusion in the contract of a provision liquidating the damages to the seller…." (1977 Law Rev. Comm. Comments to Sec. 1680.) See also Civ. Code Sec. 3387 and 2003 Law Rev. Comm. Comments to Civ. Code Sec. 1675.) Case law elucidates that a liquidated damages provision pertains only to a seller's legal, and not equitable, remedy. (See, e.g., *Glock v. Howard & Wilson Colony Co.* (1898) 123 Cal. 1, 8-9).

In addition to obtaining specific performance, the seller can recover costs incurred as a result of the buyer's failure to perform. These costs are treated as "equitable damages," and thus the legal remedy limitation of a liquidated damages provision does not prevent their recovery. (See, *Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1221.)

Lastly, the Agreement cannot include an option to purchase that has not been exercised, as a buyer's unexercised option will defeat a specific performance claim. (See, *Auslen v. Johnson* (1953) 118 Cal.App.2d 319, 321-322.) To be a valid option, the option itself must have been founded on sufficient and valuable consideration. (See, *Torlai v. Lee* (1969) 270 Cal.App.2d 854, 858.) In and of itself, the CAR purchase agreement should not easily be construed as an option since the required additional consideration does not exist, among other reasons. That notwithstanding, the California Supreme Court recently granted review of *Steiner v. Thexton* (2008) 163 Cal. App.4th 359, a case involving an alleged option in a non-CAR purchase agreement. Depending upon the scope of the high court's opinion, some believe that case could give a buyer an argument that CAR purchase agreements are option agreements. The Supreme Court's eventual opinion could affect the analysis above, in which case CAR could be expected to then update its form contract accordingly.

**Barrett Schaefer is a real estate and business attorney at DeMartini & Walker LLP in San Rafael. He has a B.A. from UCLA and a law degree and MBA from Santa Clara University. In his spare time, he can be found hiking Mt. Tam, volunteering at one of a number of local organizations, or spending time with his family. He may be contacted at (415) 472-7880 or by email at barrettschaefer@sbcglobal.net.*

A GOOD START…

MCBA Installation Dinner a Rousing Success

By Eric Sternberger

"A Good Start:" That's what you call an evening of good wine, good food, SHORT speeches, and comedian Josh Kornbluth. The MCBA Installation Dinner, held January 24, 2009, at the Spinnaker Restaurant in Sausalito, began with an outstanding silent auction benefiting Legal Aid of Marin and the Marin Justice Center, and smooth jazz featuring our own Sara Allman (vocals) and Phil Diamond (flute).

Hon. Lynn Duryee Swears In the New Board and Officers

Our new MCBA president, Marlene P. Getchell, was installed by the "always funny" Honorable M. Lynn Duryee. Also installed were Beth S. Jordan (President-Elect), Jessica Karner (Secretary), Otis Bruce, Jr. (Treasurer), and Mary K. McLain (5-Year Past President), and Directors Andrew S. McCullough, Sara B. Allman, Kate Rockas, Louis Franecke, Phil Diamond, and Eric Sternberger. The only shameless moment of the evening was Judge Duryee's "not so subtle pitch" for appointment to the United States Supreme Court by reading not one but two oaths perfectly, and which oaths were at least three times longer than the oath flubbed by Chief Justice Roberts.

L. to r. - Jeffrey Schoppert, Wendy Wise, Matt White, Nicole Caballette, Jessica Karner, Damon Connolly & Rob Harris

Next, outgoing MCBA President, Ed Berberian, thanked the MCBA staff and Board for their support, and presented Marlene with the honorary gavel of the MCBA. Ed made reference that he wasn't going to disclose where he kept our sacred gavel over that past year term. He later confided to me where he kept it, but you'll never get the answer out of me. After all, he is our prosecutor – better to have as a friend than as a foe, don't you think?

Marlene Getchell Installed as President by Hon. Lynn Duryee

Marlene then introduced her signature MCBA project, which is educating and encouraging MCBA members to become green certified businesses. She did so with a startling admission relating to the discarding of half-empty mayonnaise bottles in the regular trash instead of washing them out for recycling (does this raise ethical concerns to anyone?), but finished off strongly with an account of her own efforts to become green certified. Going "green" no doubt will be a theme revisited this year, and one that I hope garners some momentum.

Following Marlene's SHORT speech (is our President-Elect listening for next year?), Josh Kornbluth read a rousing excerpt from his 2001 movie *Haiku Tunnel*, which chronicles his experience as a temporary legal secretary with an offer to go "perm." Mr. Kornbluth was an excellent choice for a keynote, providing humor and a tie-in to the legal profession.

Well done by all.

Sara Allman Sings with Jazz Trio

THE PERMIT STREAMLINING ACT: ALL BARK AND NO BITE?

*By Riley F. Hurd III, Esq.**

Anyone who has submitted a development application for review by a public agency in California has likely experienced some type of processing delay at one point or another. Given the state of the national economy and the resulting budget shortfalls at local levels, an increase in processing delays attributable simply to insufficient resources are a possibility in the very near future. Often times, an applicant faced with what feels like an unreasonable delay will seek a tool for moving things along and will undoubtedly come across the Permit Streamlining Act (PSA), *Government Code §65920 et seq.*

The PSA was the California Legislature's attempt at expediting decisions on development applications and applies to any state agency, county, city, regional agency, public district, redevelopment agency, or other political subdivision (§§ 65921 and 65932.) To accomplish its goal, the Legislature set timelines for different phases of a project's consideration and attempted to provide repercussions for failing to comply with the mandated timelines.

The PSA is triggered by the submittal of a development application. After the submittal, an agency has 30 days in which to deem the application complete or incomplete (§65943). If the agency fails to make this determination, the application is automatically deemed complete and moves to the next step in the process. If it is incomplete, the applicant must be told why, and a new 30-day period is triggered upon re-submittal of an updated application.

After the completeness determination, the timing elements of the PSA then become inextricably intertwined with the analyses required by the California Environmental Quality Act (CEQA). This interplay with CEQA is one of the first loopholes in the protections intended to be afforded by the PSA. Once an application is deemed complete, the PSA essentially switches off and the public agency undertakes its environmental review. It is not until the CEQA review is complete that the PSA turns back on and a new timeline is activated. Specifically, if a project is deemed exempt from CEQA or if a Negative Declaration ("Neg Dec") is prepared, an agency then has 60 days from the date of exemption or the date of adoption of the Neg Dec in which to make a final decision on an application (§65950). In the case of projects requiring an Environmental Impact Report (EIR), an agency has 180 days in which to decide on an application after completion of the EIR (§65950). The inapplicability of the PSA during the CEQA review period undermines the PSA's purpose due to the fact that the timing components required by CEQA for a Neg Dec or an EIR, 180 days and one year respectively, are routinely exceeded by public agencies seemingly without consequence.

Often an agency or an applicant may desire to extend the time limits mandated by the PSA. Applicants were permitted to unilaterally waive the PSA time limits indefinitely up until 1998, when the legislature responded to *Bickel v. City of Piedmont* (1997) 16 Cal. 4th 1040, 1049, which upheld the right to waive PSA timelines, by amending the PSA to allow for only a one-time 90-day consensual extension of a PSA decision deadline (§65957).

The big question that remains is: What happens if the agency doesn't make a decision on an application within the time limits mandated by the PSA? According to §65956(b), "the failure to act shall be deemed approval of the permit application for the development project." At first blush, this seems like a very appealing result for an applicant, and it would be if Section 65956(b) did not go on to state that the permit shall be deemed approved, "only if the public

(Continued on page 15.)

GOING GREEN

By Kate Rockas

Are you still faxing documents to opposing counsel and then mailing a hard copy too? Do you still mail your clients copies of all correspondence and copies of all court pleading documents? In the course of one year, an office worker can use 10,000 sheets of paper.

It doesn't take much effort to reduce your paper footprint. One easy way to significantly cut your use of paper is to switch to electronic communications. Buy a small desk top scanner such as the Fujitsu ScanSnap (I like this one so much that I bought one for my assistant to have on her desk). Scan all documents that you would normally send by snail mail and email them instead. By eliminating the snail mail versions of your documents, you will also save on postage! If you have to fax a document, don't send a hard copy too. And, with those documents that require a signature, ask your client to print and fax only the signature page.

Here are some additional ideas: Print all documents double-sided to reduce the number of pages each print job takes. Purchase 100 percent recycled paper. Narrow your word processor margins to save hundreds of pieces of paper each year. Sign a petition (changethemargins.com) to encourage Microsoft to decrease the standard margins in Word from 1.25 inches to 0.75 inches. Recycle all paper brought into your home or office.

Another way to reduce your paper footprint is to end the flow of unwanted mail. Exercise your right to opt out of receiving unsolicited junk mail. Opting out is simple, usually free and does not take much time. You can opt out yourself or you can use professional services for a fee. While it is virtually impossible to opt out from all unsolicited offers, with diligence, you can dramatically reduce the amount of unsolicited offers you receive.

Another big paper saver is electronic billing and online bill payments. Thirty-five billion paper statements, bills and payments are mailed each year in the United States. Opting for online banking, bill payments and statements saves not only paper, but it also saves gas and money. Consider this - if five percent of U.S. households switched to electronic billing, 452,819 trees would be saved each year.

THE TOP TEN THINGS A GENERAL PRACTICIONER SHOULD KNOW ABOUT THE REGULATION OF HOME IMPROVEMENT CONTRACTORS

*By David F. Feingold, Esq.**

Regardless of your practice area most, if not all, of your clients or their representatives are homeowners. Most also have hired or in the future will hire a contractor to work on their home. They might have the foresight to educate themselves about the legal issues involved when embarking on a home improvement project. They may even ask you to look at the contract.

For any project involving large dollar amounts or potentially dangerous work, the proposal or draft agreement should be reviewed by counsel. That page of small print on the back of the proposal for services typically includes a number of booby traps, such as hold harmless and indemnity clauses heavily favoring the contractor, limitations of liability, and other exculpatory language. The standard form AIA contracts also should be reviewed and modified as necessary to protect your client. But I digress – the purpose of this article is not to analyze all of the various issues raised in a construction contract. The purpose is to acquaint you, the general practitioner, with the "Top Ten" laws and regulations I think you should know about when dealing with home improvement contractors.

1. License Required: Any contractor who does home improvement work must be licensed by the California Contractor's License Board (Bus. & Prof. Code §7159(b)). (There is an exception for what is considered "minor work" which is work that does not involve more than $500 in labor and materials.) "Home improvement work" is defined broadly and basically includes "the repairing, remodeling, altering, converting, or modernizing of, or adding to, residential property" (Bus. & Prof. Code §7151). Almost everything, from landscaping to windows to HVAC systems to carpeting, falls under the "home improvement" definition.

2. Put It In Writing: If the total cost of a home improvement project exceeds $500, the contract must be in writing (Bus. & Prof. Code §7159).

(Continued on page 15.)

THE MARIN COUNTY BAR ASSOCIATION
SAYS "THANK YOU" TO

LAW OFFICES OF ROWLAND & CHAMBERS
OFFICES OF LAWRENCE A. BASKIN, ATTORNEY & MEDIATOR AT LAW
and
RACHEL CASTREJON, ATTORNEY AT LAW

FOR THEIR SPONSORSHIP OF THE MCBA HOLIDAY PARTY ON DECEMBER 12, 2008

A GREAT TIME WAS HAD BY ALL!

MARIN COUNTY JURY VERDICTS

By Steven Perl

The Marin Lawyer will periodically report on jury verdicts from the Marin County Superior Court. We welcome reports from trial attorneys involved in Marin County verdicts; please contact Steven Perl (SPerl@co.marin.ca.us) with your information.

City of Larkspur v. Jacobs Engineering

Complete Title of Plaintiff: City of Larkspur

Complete Title of Defendant: Jacobs Engineering Group

Case Number: CV 06-1094

Plaintiff Attorney: Geoffrey Spellberg/Reichi Lee, Meyers, Nave, San Francisco

Defendant Attorney: Morrow Otis/Steven Inki, Otis, Canli, & Iriki, San Francisco

Plaintiff Experts: Hamid Shamsapour – public works & traffic costs; Dr. Abolhasssan Astaneh – thermal expansion; Nader Tamannaie – construction costs

Defendant Experts: None

Judge: Hon. Terrence Boren

Type of Action: Alleged fraud & fraudulent concealment

Facts of Case: Defendant's predecessor, engineering firm Sverdrup Civil, Inc., contracted with plaintiff City in 1994 for earthquake retrofit and other services on Bon Air Bridge. The project was completed in 1995.

Plaintiff's Contentions as to Liability: Plaintiff alleged negligent work, fraudulent misrepresentations and concealments of key information by defendant's predecessor regarding seismic retrofit and bridge widening work. Claim for negligent design was withdrawn.

Defendant's Contentions as to Liability: Defendant denied liability.

Length of Jury Trial: 5 weeks

Plaintiff Attorney asked the Jury to Award: Approximately $20 million

Defendant Attorney asked the Jury to Award: Not stated

Settlement Talks:

Demand: Approximately $3 million

Offer: $0

Result: $8.3 million verdict for plaintiff. According to defendant's attorney, the jury found no fraud, but did find that defendant's predecessor intentionally concealed or made a false promise with intent to deceive about an important fact, upon which plaintiff City relied, for which defendant was liable as successor in interest. Defendant plans post-trial motions and appeal.

Poll Result: 12-0

Verdict Date: 9/18/08

Goodlund v. Home Depot

Complete Title of Plaintiff: Jeffrey Goodlund

Complete Title of Defendant: Home Depot U.S.A., Inc.

Case Number: CIV 06-0067 **Insurance Carrier(s):** Not Provided

Plaintiff Attorneys: John Hill, Michael Guta, Law Offices of John E. Hill, Oakland, 510-588-1000

Defendant Attorneys: Paul D. Caleo, Derek Lim, Burnham, Brown, Oakland, 510-444-6800

Plaintiff Doctors: Claude S. Munday, Ph.D., neuropsychology, Oakland; Joseph Izzo. M.D., neurosurgery, Oakdale

Defendant Doctors: Alan D Shonkoff, Ph.D., neuropsychology, Berkeley; Peter B. Slabaugh, M.D, orthopedic surgery, Oakland.

Plaintiff Experts: Phillip H Allman, Ph. D., economics, San Francisco; Michael Graham, Ed.D., vocational rehabilitation, San Ramon

Defendant Experts: Lawrence J. Deneen, Ph D , vocational rehabilitation, Oakland

Judge: Hon. James R. Ritchie

Type of Action: Personal Injury

Location of Accident/Incident: Home Depot store, San Rafael

(Continued on page 9.)

(Jury Verdicts, continued from page 8.)

Plaintiff: Age: 49 at time of incident **Occupation:**Home repairman, musician

Facts of Case: While plaintiff was shopping, an employee knocked a box of hole saws off a shelf onto plaintiff's head. The store employee claimed the shelf was 2 ½ feet above plaintiff's head and the box weighed 7.6 pounds; plaintiff claimed that the shelf was 10 feet above his head and the box weighed 10 to 15 pounds.

Length of Jury Trial: 12 days

Jury Deliberated: 1 ½ days

Plaintiff Attorney asked the Jury to Award: $3,000,000

Defendant Attorney asked the Jury to Award: A few thousand dollars

Injuries/Damages:

Plaintiff claimed neck, back and brain injuries. According to plaintiff's attorney, none of plaintiff's treaters could come up with a physical or anatomical explanation for his pain, which plaintiff described as so debilitating that it required him to lie down a few times during the day and prevented him from pursuing his business of home repairs.

Plaintiff Doctors/Experts Stated:

Dr. Munday testified that testing showed that the plaintiff was exceptionally intelligent both before and after the injury, but that now he had only average short-term memory, whereas he had exceptional short term memory before the injury.

Dr. Izzo testified that one can have chronic neck and back pain without "objective signs," such as a herniated disc or a fracture, and plaintiff probably had soft tissue damage (ligament injuries) or facet joint syndrome that would not show up on a film. Dr. Izzo concluded that the cause of his persistent pain was facet joint syndrome and ligament damage in his spine. He also testified that the brain is damaged by a traumatic impact, primarily as a result of axon shear.

Based on the medical doctors' and psychologists' opinions, Dr. Graham testified that there were several other jobs that plaintiff could do, since he was now incapable of doing home repair and home renovation, but each would take some retraining. Based on Dr Graham's testimony, Dr. Allman testified that the economic losses were $205,255.00, in the past and $200,049.00, in the future.

Defendant Doctors/Experts Stated:

Dr. Shonkoff testified that plaintiff was only "dinged" and was just fine hours or days later, and that his pre- and post-accident memory are the same.

Dr. Slabaugh testified that plaintiff suffered no more than a neck strain (and no back injury) that resolved within days–or weeks at most.

Specials/Damages: Past medicals were $71,944.85 (Kaiser $13, 730.85; Physical therapy $46,664.00; Massage $7,170.00; Acupuncture $4,380.00)

Settlement Talks:

Demand: $900,000

Offer: $102,000 (CCP 998)

Result:

Past economic loss

Lost earnings:	$1,100
Medical expenses	$50,000

Future economic loss

Lost earnings	$0
Medical expenses	$20,000

Past noneconomic loss, including physical pain/mental suffering etc.: $90,000.00

Future noneconomic loss, including physical pain/mental suffering etc: $100,000.00

Total Verdict: $261,000.00

Total judgment of $278,719.32, including costs of $17,719.32, was paid.

Poll Result: Not supplied.

Verdict Date: 10/14/08

NOTE: The information in the report for Goodlund v. Home Depot, above, was provided solely by plaintiff's attorney; defendant's attorney did not respond to MCBA's request for information.

MEET YOUR DIRECTORS
SPOTLIGHT ON SARA ALLMAN

The Marin Lawyer decided that it would be a good idea to let the MCBA membership get to know a little more about the MCBA Directors whom they elected, and who give so much to make the MCBA a great, vibrant, organization. To that end, *The Marin Lawyer* will run a series of articles, each focusing on a different MCBA Director or Officer. This month, our spotlight is on Board Member Sara Allman.

The Marin Lawyer: What is your practice area?

Sara Allman: Civil litigation, mediation, and appeals.

TML: Do you have a particular emphasis?

SA: My focus is representing commercial landlords and tenants in defense of ADA (Americans with Disabilities Act) claims in federal court. I also defend private clients and insureds in a variety of disputes, involving HOAs, employment discrimination, fair housing, the San Francisco Rent Ordinance, habitability, real estate transactions, professional liability, construction injury, and large loss auto.

TML: Why did you decide to become a lawyer?

SA: I majored in French and quickly ran out of options. I could have had a career as a tour guide or a translator. My sister was already a lawyer and I looked up to her. When I was a teenager, I sat in on her Criminal Law class at NYU and became fascinated with law. After graduating from college, I played my guitar on the streets of San Francisco for six months. That was enough to convince me to go to law school.

TML: Why do you live in Marin?

SA: It's the best place to live, of course. I appreciate the outdoors. We have a direct view of Mt. Tamalpais and are steps away from the hiking trails. The beaches are beautiful here, and there are so many great activities available for the kids.

TML: What do you love to do when you're not busy practicing law?

SA: Playing music with friends or baking cupcakes.

TML: Tell us about your family.

SA: I am married to Steve Nielsen, who is a patent lawyer and the Chair of the Intellectual Property section of the MCBA. He is very entertaining and easy going. We have twin daughters, Amy and Rachel, who will turn 8 this month. They attend the Dunham Academy in San Rafael. They are studying ballet at Marin Ballet and looking forward to performing in the Nutcracker this year.

TML: If you could pursue any other career besides law, what would it be and why?

SA: It would be singing, because it is so fun and uplifting.

TML: Why did you join MCBA?

SA: I moved my office to Marin in 2003 and thought that it would be a good way to meet new people and network.

TML: Why did you become a Director?

SA: I wanted to become more involved in the legal community and work on getting a better website for the court.

TML: If you had to pick a single highlight of your career, what would it be?

SA: My cross-examination of basketball great Nate Thurmond in a legal malpractice case that led to a defense verdict for my client.

TML: What was the best/worst/strangest experience in your career?

SA: The worst and strangest experience is when I monitored a negotiated move-out of a residential tenant in a building on Leavenworth Street in San Francisco. When I arrived, I discovered that the tenant's brother and a dozen "friends" had come in and occupied the unit after the tenant vacated. They were doing drugs in the apartment. I was standing in a stinky hallway with a worthless settlement agreement in my hand. There were cockroaches everywhere. The occupants would not leave and I had to call the police. The police came and, with weapons drawn, pounded on the door and called for back up. They then arrested and hauled away everybody inside. As I watched the drug addicts being loaded into the police cars, I seriously questioned why I was doing the work I did.

One of the best experiences was pro bono. I negotiated a simple accommodation for a disabled client that made her life a lot easier—she was elated.

SECONDHAND SMOKE IN COMMON AREAS MAY CONSTITUTE A PUBLIC NUISANCE

By Scott Rogers, Esq. © 2009

In a recent California appellate court case, *Birke v. Oakwood Worldwide*, 09 C.D.O.S. 409 (2009), the court sustained a public nuisance cause of action arising out of an apartment owner's failure to limit secondhand smoke in outdoor common areas. The court reversed the trial court's ruling sustaining the apartment owner's demurrer to the resident's First Amended Complaint. Without commenting on the merits of the allegations or the potential difficulties in proof, the court found the facts as pled by the resident were sufficient to withstand a demurrer and state a valid cause of action.

The Facts

Oakwood owns and operates an apartment complex in which Birke (a five-year- old girl) and her parents reside. Oakwood prohibits smoking in all indoor apartment units and indoor common areas but allows smoking in the barbeque areas, pool areas, playground areas and other outdoor common areas where it provides ashtrays and permits its employees to smoke. Oakwood is also alleged to have made a business decision to not restrict smoking so as to aid in the marketing of the apartment to international tenants. Further, Oakwood declined Birke's repeated requests that smoking be banned from the outdoor common areas. Birke, an asthma patient, suffered allergic reactions and three bouts of pneumonia as a result of her exposure to the secondhand smoke.

The Nuisance Allegations

The court in its distillation of applicable statutes and case law opined that in order to adequately plead a cause of action for public nuisance based upon secondhand smoke in an apartment's common areas it is necessary to allege the following: (i) the apartment was operated and managed in a way that, by act or omission, created a condition harmful to health, or obstructed the free use of the common areas, so as to impede the comfortable enjoyment of life or property, (ii) the condition impacted a substantial number of people concurrently, (iii) an ordinary person would be reasonably annoyed or disturbed by the condition, (iv) the seriousness of the harm outweighs the social utility of the conduct, (v) the condition was non-consensual, (vi) the harm suffered was different from the type of harm suffered by the general public, and (vii) the objectionable conduct was a substantial factor in causing the alleged harm.

The court found that each of the required elements of the cause of action had been adequately pled. In particular, the court held that the aggravation of Birke's allergies and chronic asthma was different in type from the harm to the general public of increased risk of developing heart and lung cancer. The court also suggested that where the injury is a private nuisance as well as a public nuisance the special injury requirement is inapplicable. The court further found that Oakwood's alleged conduct in permitting the smoking in the common areas, providing ashtrays and refusing Birke's request to ban smoking was sufficient to support the nuisance claim.

The Potential Impact

As a result of the court's decision, the case now goes back to the trial court for a determination on its merits. The cost of prosecuting and defending the action will be substantial as the various factual and medical issues will be complex and contested.

The opinion provides a roadmap to other potential plaintiffs and their counsel as to how to successfully plead the public nuisance cause of action so as to survive demurrer. It can be anticipated that numerous actions will be filed against apartment owners and managers based upon similar allegations. Apartment owners and managers, however, are not the only likely targets of this new wave of litigation. The same allegations can be made with respect to office buildings, shopping centers, resort property and virtually any other real property occupied for extended periods or on a regular basis.

Owners of all property types are advised to carefully consider the nature and scope of their smoking/secondhand smoke regulations and policies so as to minimize the risk of potential secondhand smoke claims and the resultant litigation.

**Scott Rogers is a senior partner in the Real Estate, Development, Land Use and Finance Group of Holme Roberts & Owen LLP. Resident in the firm's San Francisco office, his practice focuses on the representation of institutional and private real estate investors in all aspects of real estate equity and finance transactions. Mr. Rogers obtained his BA in Economics from U.C. Irvine and his J.D. and M.B.A. from UCLA. He is the chair of the Executive Committee of the Real Property Section of the State Bar of California. He may be contacted at Scott.Rogers@hro.com.*

2009 ESTATE TAX ALERT

JANUARY 1ST BRINGS HISTORIC CHANGES THAT CAN AFFECT YOU

*By Michelle C. Lerman**

We are living in historic times and not just for the reasons you think – the housing crisis, stock market meltdown, and the inauguration of President Obama. For the first time ever, on January 1, 2009, the exclusion (the amount one can leave free of Federal estate and GST tax) increased to $3.5 million. Although scheduled to be eliminated in 2010 and re-instated at $1 million in 2011, we believe that legislation later this year will eliminate the repeal of estate tax and that the Federal estate and GST tax exclusion will remain in the range of $3.5 million. The amount of the exclusion that can be left during life (called the Federal Gift Tax Exclusion) remains at $1 million, and we do not anticipate that will change. With the increase in the annual exclusion for tax-free gifts increasing from $12,000 per donee to $13,000, a married couple can now annually gift $26,000, called Annual Exclusion Gifts.

Now's the time for estate planning, for the following reasons: First, with asset values low, the Federal Gift Tax Exclusion can go a lot farther. So now is the time to use tax savings vehicles, some of which allow assets to grow in the estate of the beneficiaries, while the parents maintain some use of the assets for a period of time. Second, with the increase of Annual Exclusion Gifts to $13,000, now is the time to gift to children and grandchildren to reduce your estate and you don't even need to file a gift tax return! Third, with the increased exclusion, current plans, especially those that give the exclusion amount to one beneficiary and the remainder to others, must be reviewed. For example, if the exclusion amount is to be distributed to children, with the spouse getting the remainder of the estate, the high exclusion will distort the distribution likely giving the children much more than desired. And lastly, for married couples, the trust formula which was used to eliminate any Federal estate tax at the death of the first spouse, may no longer be needed. If the old formula would increase income tax but no longer save estate tax, then the formula needs to be reviewed and either revised or eliminated.

As the New Year begins, we pray for peace in the world and good health to you and your family, and we encourage all of you to examine how the historic changes in estate tax laws affect your estate plan.

**Attorney Michelle C. Lerman, a partner at LERMAN LAW PARTNERS, LLP, specializes in custom legacy planning for the unique needs of individuals and families. Certified by the California Board of Legal Specialization of the State Bar of California as a Legal Specialist in Estate Planning, Trust and Probate Law, Ms. Lerman has been practicing law for over 20 years, has published numerous articles on a wide range of estate planning topics, and is a much sought-after professional speaker. Committed to giving back to the community through mentoring other attorneys, Ms. Lerman chairs the Marin County Bar Association Mentor Group, which she co- founded in 1997, co-chaired the Marin County Bar Association Estate Planning Section for several years, and currently sits on the Federation Estate Planning Subcommittee and the Marin Estate Planning Council. She may be contacted at (415) 454-0455 or by email at michelle@lermanlaw.com.*

(Business Divorce, continued from page 1.)

When undertaking these matters, it can be imperative that you balance your role as a zealous advocate with that of a business counselor to help your client navigate through the separation.

1. It's Not Business, It's Personal: Business partners have a familial relationship. At the inception of their venture, the partners chose to trust one another with their financial security. Entrepreneurs tend to see their individual contribution as the primary reason for success, creating a sense of entitlement. This, coupled with their disappointment/anger in having voluntarily entered into this now-failed relationship, causes a significant hurdle requiring early attention if an informal resolution is to be reached. To overcome this, try to recognize and acknowledge each partner's perception of his or her contribution in an attempt to avoid litigation.

2. Reconciliation Options: Reconciliations are hard to come by, and are generally viable only if the partners seek representation early in their dispute. Most often, by the time one party seeks legal advice it is after months of frustration and retention of counsel is considered the point of no return. Here, it is important for you to thoroughly explore reconciliation at the outset. Restructuring compensation can be an equitable method of reforming the relationship. Recognize the parties' contributions and attempt to devise an equitable method for compensating them for their respective efforts.

3. Fiduciary Obligations: Regardless of the form of business entity, certain positions create a fiduciary duty of loyalty and care. It is important to advise your client of his responsibilities. Also, consider whether it would be beneficial to relinquish some control by resigning from his position (e.g. Officer, Director, Manager, etc.) to attempt to eliminate his fiduciary obligations. Care must be taken to balance the need for control versus the end goal of a separation.

4. Dissolution: Where negotiations are stalled or non-existent, dissolution may be the only viable option to sever the failed business relationship. In the corporate context, 50% or more of the shareholders may elect to voluntarily dissolve the corporation. However, if merely 50% elect to voluntarily dissolve, the remaining 50% may seek court intervention to stay the dissolution so they can negotiate a buy-out. (See, Corporations Code, §§ 1901 and 2000.)

5. Shareholder Redemption in Corporate Context: A typical resolution is a redemption agreement, which calls for the corporation (or LLC) to purchase/redeem the interests of the departing owner. Care should be given to the drafting and negotiation of these agreements to ensure they truly sever the relationship and not just postpone litigation. The most common reasons for post-redemption litigation are: (a) failure to timely pay seller; (b) indemnification provisions that leave seller open to defense and indemnification demands; (c) competition; and (d) disparagement. In addition, the redemption agreement should contain appropriate release language. While the parties may each desire a "quickie divorce," you need to resist shortcutting the redemption agreement and explain the risks to your client. Most clients, upon realizing the potential for future liabilities, will agree to a more formal and complete agreement.

6. Buy-Sell Agreements: Review any existing shareholder buy-sell agreements, which, in addition to a traditional first right of refusal, may limit the rights of the divesting owner. For example, some agreements require an owner to sell his interest under an undesirable valuation methodology upon his resignation or termination of employment. In some agreements, an owner may have the right to demand a buy-out via a "put option." Alternatively, an owner may have a "call option" and demand that the other owner(s) sell their interest for a price set by the buyer. This option, however, is generally coupled with a call option for the offeree(s), whereby the offeree(s) my instead call the offeror's shares on the same terms as the offer. These cross-call options put the onus on the offeror to make a fair offer; otherwise the offeree(s) can turn the tables on the offeror.

7. Organizational Documents: Similar to the shareholder buy-sell agreement, make sure to review any LLC operating or partnership agreement for similar concepts, and to review the corporation's bylaws and articles for other limitations in dealing with shareholder divestment.

8. Continuing Liability: As discussed above, dealing with continuing liabilities is important to avoid future entanglements in third-party claims. The risk can be mitigated where there is insurance coverage. In addition to potential customer claims, there are many other risks that should be considered, including labor claims and long/short

(Continued on page 14.)

(Business Divorce, continued from page 13.)

term liabilities. Careful planning and drafting is critical for the parties to have reasonable expectations regarding their potential liabilities and to preserve the value of any buy-out figure.

9. Asset/Customer Division: In certain businesses a division of clients may be appropriate, especially where particular owners have stronger relationships with particular clients. Additionally, since clients are generally free to move to whatever service provider they desire, where a partner is going to end up with certain clients anyway, why not be realistic now and save potentially tens of thousands of dollars in unrecoverable legal fees.

10. Moving Forward: Whether a business partnership ends with an informal resolution or in litigation, take care to reach a resolution that will put your client in the best available position for the next step in his or her career. While California has a strong public policy against restraining competition, there are exceptions when selling all the interest and good will of a business, and in the context of partnership and LLC dissolutions and sales. (See, Business & Professions Code, §§ 16600-16602.5.) Because of these exemptions, it is important to ensure that an informal resolution does not limit your client's ability to compete in the future, or that adequate consideration is paid for your client's agreement to same.

**Eric Sternberger is a partner at Ragghianti Freitas LLP, a business lawyer on the mediation panel of Resolution Remedies, the former Chair for the Partnerships and Limited Liability Companies Committee for the Business Law Section of the State Bar of California, a member of the State Bar-CEB Business and Intellectual Property Law Advisory Committee, and a Director of the Marin County Bar Association. He can be contacted at eric@rflawllp.com.*

(President's Message, continued from page 2.)

regardless of the outcome? Do you have the requisite legal expertise to represent the client? Are you compatible with the client?

Third, keep close track of your receivables. Beware of clients with the economic means to pay for your legal fees who become slow to pay, or nonpaying clients, and deal with the situation right away. Don't let receivables run away from you. If your client can't afford to pay your legal fees, either cut the client loose or be aware that you have intentionally made the commitment to continue to represent your client with the economic arrangement that you are now facing.

Fourth, watch your overhead expenses. Evaluate credit card debt, and avoid incurring unnecessary travel and operational expenses. Make sure that you are in control of the practice, and that the practice isn't running you!

Fifth, network! Get to know the members of your legal community. Attend MCBA events, including our monthly general membership meetings, and meet other attorneys in your community. Some of my best referrals have come from other attorneys that I know in Marin. Your local contacts may make the difference between thriving and barely surviving during times of economic turmoil.

(The Permit, continued from page 5.)

notice required by law has occurred." This one little caveat regarding notice is enough to undo just about any hopes of automatic approval.

An applicant can either elect to give the appropriate notice himself, or to go to court seeking an order forcing an agency to give the required notice. The self-notice process, however, requires adequate publication and agency notification of the project details 60 days *prior* to the expiration of the PSA decision deadline, thereby requiring an almost psychic ability of an applicant in predicting an agency's future action (§65956). Assuming an applicant opts for filing a mandate petition to force the agency to give notice or act, which is certainly a less daunting option than the incredibly onerous self-notice provisions, even a victorious applicant simply ends up forcing a hearing on his application before the now-scorned agency – not an optimal decision-making audience!

A description of the intricacies of the PSA and its interplay with other laws could be the subject of an entire book. However, it is safe to simply state that the true intent of the PSA is not being realized due to the timing loopholes and hurdles to enforcement described above.

**Riley F. Hurd III is a partner at Ragghianti Freitas LLP in San Rafael and serves as Deputy City/Town Attorney for the municipalities of Belvedere and San Anselmo while also handling private land use matters throughout Marin. He can be contacted at rhurd@rflawllp.com.*

(Home Improvement, continued from page 6.)

3. Spell It Out: Among other things, the contract must contain specific provisions, including when the work will start and end, a description of the work, how payments will be made, and cancellation rights (Bus. & Prof. Code §7159).

4. Get A License Number: Every contractor must include his or her license number on all contracts and all forms of advertising (Bus. & Prof. Code §7030.5).

5. Limitation on Deposits: It is unlawful for a home improvement contractor to require an advance payment of more than $1000 or 10% of the contract price, whichever is less (Bus. & Prof. Code §7159 (d)).

6. Honor the Contract Price: Failure to complete the job for the contract price constitutes a ground for disciplinary action against the contractor (Bus. & Prof. Code §7113).

7. Beware The Lien: An unpaid licensed contractor can use a "mechanics lien" to secure his or her interest in the property. The contractor can foreclose on the property, but must file a lawsuit to do so (Civil Code §3110). There are special rules that apply to mechanic's liens in condominium projects (Civil Code §1369).

8. Ninety Days to Sue: To enforce a mechanic's lien, the contractor must file a lawsuit to foreclose on the property within 90 days of the date the lien was recorded (Civil Code §3144).

9. No License – No Hope: An unlicensed contractor cannot sue to recover money for work requiring a license (Bus. & Prof. Code §7031(a)). An unlicensed contractor may also be required to disgorge any money he or she received from the owner. Let me repeat that: An unlicensed contractor can be sued and required to give back all the money he or she has been paid. (Bus. & Prof. Code §7031(b)). The license requirement is strictly construed and can have draconian results, as illustrated in *Great West Contractors, Inc. vs. WSS Construction, Inc.* (2008) 162 Cal. App. 4th 581. In *Great West,* the subcontractor that signed the contract was a recently formed corporation. The subcontractor's president, as an individual, held a valid contractor's license at all times. However, the corporate entity was not licensed at the time it submitted its bid proposal and performed some preliminary tasks – but it obtained its corporate contractor's license shortly thereafter. Because the corporate entity was not licensed prior to beginning performance, it could not recover compensation because it

(Continued on page 16.)

(Home Improvement, continued from page 15.)

was not licensed *at all times*. As if not being able to sue and being required to disgorge funds received was not enough pain, an unlicensed contractor causing injury or damage may be liable for three times the amount of damages (to a maximum of $10,000), plus costs and attorneys' fees (Code of Civil Procedure §1029.8). You can – and always should – check the status of a contractor's license by contacting the Contractors State License Board (CSLB). The easiest way is on the web at http://www.cslb.ca.gov.

10. Prove the License: If you represent a contractor in a suit, you must prove license status by producing a verified certificate of licensure from the Contractors' State License Board showing that the contractor held all necessary licenses during performance of the work (Bus. & Prof. Code §7031, subd. (d)). If you are representing an owner or other contracting party, have your motion for nonsuit ready when the contractor misses this crucial step.

**David F. Feingold, Esq., is a partner with the San Rafael law firm of Ragghianti Freitas LLP. His practice is focused on representing community associations, homeowners, and contractors in real estate and construction matters. He can be reached at dfeingold@rflawllp.com.*

ABA OFFERS LEGAL OPPORTUNITY SCHOLARSHIPS TO LAW STUDENTS FOR 2009 – 2010

The American Bar Association has available a scholarship fund intended to encourage racial and ethnic minority students to apply to law school. Each scholarship recipient attending an ABA-accredited law school may receive $5,000 of financial assistance annually, up to a total of $15,000 over 3 years. Completed scholarship applications must be received by the ABA no later than March 2, 2009. The application can be downloaded from the ABA website, http://www.abanet.org/fje. Contact Robin L. Rone, Director, Presidential Advisory Council on Diversity in the Profession and Legal Opportunity Scholarship at (312) 988-5137 for more information.

DETAILS FOR CALENDAR

Feb. 18, 2009

ADR Section Meeting

Speaker: On Wednesday, February 18, 2009 at 12:00 p.m., noted San Francisco attorney Ron Rouda, former President of National ABOTA, will speak, at the Sea Peddler Restaurant in San Rafael. The topic will be "MEDIATION DISASTERS". Lunch will be served. $25.00 per person.

The luncheon provides attendees with an interesting presentation involving alternative dispute resolution topics, as well as one (1) hour of MCLE credit.

If you are a member of the MCBA, but not a member of the ADR Section, you may still attend these presentations for a nominal additional fee.

If you would like your email address added to the ADR Section Announcements list, please contact The Law Office of Robert B. Ingram at (415) 499-0800 or hannahleigh@ingramlawoffices.com.

12 – 1:3- pm

Feb. 18, 2009

Probate & Estate Planning Section Meeting

Speaker: David Gaw

Topic: Trust Administration

The Rafael Corporate Center, 750 Lindaro,

San Rafael

12 – 1:3- pm

Feb. 19, 2009

Real Property Section Meeting

12 – 1:3- pm

For more information and to sign up, please contact section co-chair Derek Weller at derek@derekwellerlaw.com or call (415) 453-1375.

Location: Seafood Peddler

Feb. 23, 2009

Probate & Trusts Mentor Group

An informal forum to further discuss issues addressed at the monthly estate planning section meetings or any other issues. Bring your lunch and interesting estate planning/trust administration/probate issues to discuss, and snacks will be provided.

Location: The Lerman Law Building,

802 B Street, San Rafael

Parking is available in the City of San Rafael parking lot on B Street south of 4th Street.

Feb. 24, 2009

Barristers' Social

Mayflower Pub on 4th Street, San Rafael

5:30 pm

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We need attorneys
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Contact: Jan at (415) 499-1813
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THE MARKETPLACE

Anyone wishing to advertise in the Marketplace should send their text ad to MCBA, 30 N. San Pedro Rd, Ste. 140, San Rafael, CA 94903 with payment of $25 per month, or you may email to: rgaspar@30nsp.org ***. The ad should be no longer than 25 words and paid in advance.***

LEGAL SECRETARY - Need help with motions, complaints, discovery? I am conscientious, responsible and reliable with 20 years experience. Barbara Plaut - 515-2400, email: browneyedbarbara@gmail.com. Available for temporary - sick leave - or long-term assignment.

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ONE OFFICE AVAILABLE at Drake's Landing Road with an estate planning law firm. Close to Hwy 101. Walk to Larkspur ferry and Bon Air shopping and restaurants. Secretary and paralegal services also available. Call Cynthia at 464-8855 x402.

LITIGATION-CORPORATE LEGAL ASSISTANT Word Processing – 82 wpm Editing & Summarizing Litigation-E-filing, Discovery, Trial Prep, Corporate Transactions General dictation, billing Le-Gals 299-0562.

Deadline for submission of articles, ads, inserts, and announcements is the 15th of each month. Thank you.

MISSION STATEMENT OF THE MARIN COUNTY BAR ASSOCIATION

To involve, encourage, and support bar association members, to serve as a liaison to the Marin County courts, and to educate the community and enhance access to legal services.

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MCBA encourages submission of articles that may interest the legal community. Letters to the Editor are also welcome and may be published if space permits. Submissions will not be returned. The Editor reserves the right to publish, decline to publish, edit or otherwise modify any submission. Editorial material should be sent to the Marin County Bar Association at the above address.

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