

# The Marin Lawyer

An Official Publication of the Marin County Bar Association



## GENERAL MEMBERSHIP MEETING WHERE WILL YOU BUY YOUR ELECTRICITY NEXT YEAR?

### SUPERVISOR MCGLASHAN ANSWERS YOUR QUESTIONS ABOUT MARIN CLEAN ENERGY AT MAY 27 GENERAL MEMBERSHIP MEETING

PG&E may soon be facing competition from local Marin governments. How will this affect you, your clients, and your practice? Learn about Marin Clean Energy from Marin County Supervisor Charles McGlashan, one of the county’s leading proponents of environmental sustainability.

On **Wednesday, May 27, 2009**, beginning at 12:00 noon at **Jason’s Restaurant** (300 Drakes Landing Road, Greenbrae), Sup. McGlashan will explain the work of Marin Energy Authority (MEA). MEA, comprising the County and eight Marin cities, is building a program to buy renewable power directly from the market for county residents. The MEA, with its Marin Clean Energy initiative, expects to secure a clean energy supply, price stability, energy efficiencies, local economic benefits and a significant reduction of the county’s greenhouse gas emissions.

How will Marin Clean Energy locate and purchase energy, and how will the program be funded? What role will PG&E retain in the county? Will Marin residents have a choice of energy providers or type of energy purchased? Be among the first to find out.

*(Continued on page 13.)*

## Calendar of Events

**May 27th**  
General Membership Meeting  
Jason’s Restaurant, Greenbrae  
12 – 1:30 pm

**May 19th**  
Law Day  
7-9pm

**May 20th**  
ADR Section Meeting  
12 – 1:30 pm

**May 20th**  
Probate & Estate Planning Section  
Meeting  
12 – 1:30 pm

**May 21st**  
Real Property Section Meeting  
12 – 1:30 pm

Look for details each month in  
*The Marin Lawyer*

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Sara B. Allman was Guest Editor of this issue of *The Marin Lawyer*. Philip R. Diamond is Series Editor for 2009.

## NEW “LANDMARK” CALIFORNIA DISABILITY ACCESS LAW HAS UNCERTAIN FUTURE

By Sara B. Allman, Esq. \*  
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The California Legislature recently enacted bipartisan legislation designed to encourage compliance with disability access laws while minimizing business owners’ exposure to “shakedown” ADA lawsuits. The legislation (SB 1608), praised by some as “landmark,” was signed by Governor Schwarzenegger last October. Most provisions took effect January 1, 2009, with implementation of other provisions delayed to July 2009. The law adds new provisions (found in the Civil Code, Government



*(Continued on page 13.)*



**PRESIDENT'S MESSAGE**  
**MCBA'S "GREEN STAR OFFICE PROGRAM"**

*By Marlene P. Getchell*

To assist our members in becoming green businesses, MCBA has developed the "Green Star Office Program." We have established different levels of achievement, based on specific criteria. When a member

(or member's firm) satisfies the criteria of a particular level, MCBA will recognize each member or law firm for their accomplishment with a certificate, and will also acknowledge the achievement in the monthly newsletter.

Here is how it works:

When you have satisfied all of the criteria listed under a "Star" category below, let us know. That's all there is to it! You will be recognized for each Star category that you satisfy.

**★ One Star**

- Discourage printing emails and learn how to archive emails using Microsoft Outlook or some other program.
- Encourage emailing rather than faxing and mailing.
- Recycle discarded office paper.
- Recycle cardboard and newspapers.
- Recycle glass, plastic and aluminum bottles and containers.
- Recycle plastic bottles and containers.

**★★ Two Stars**

- When doing legal research, email or download the results to your computer as often as possible rather than printing the results.
- Use double-sided copying and printing at least for drafts and internal documents.
- Centralize acquisition and storage of forms and materials generally used by attorneys in the firm or building

(e.g., Federal Express, US Post Office boxes).

- Purchase office paper with at least 30% recycled content.

**★★★ Three Stars**

- Eliminate all plastic bottles from the workplace.
- Have toner cartridges refilled or recycled.
- Purchase recycled envelopes.
- When possible, scan documents and correspondence and store in your computer rather than printing or copying them.

**★★★★ Four Stars**

- Turn off all of the nonessential lights after working hours.
- Institute a formal policy that all nonessential electronic devices and lighting be turned off when not in use.
- Use the standby mode on equipment (e.g., energy saver buttons on copiers).
- Rearrange workspace to take advantage of areas with natural light.
- Set thermostat to 78 degrees F for cooling, 68 degrees F for heating; use the thermostat's night setback.

**★★★★★ Five Stars**

- Replace incandescent bulbs with more efficient compact fluorescents.
- Replace older T-12 fluorescent lighting with energy-efficient T-8 or T-5 fixtures with electronic ballasts.
- Clean lighting fixtures, diffusers and lamps so they are lighting as effectively as possible (dirt can reduce lighting efficiency by up to 50%).
- Use task lighting instead of lighting the entire area.

**★★★★★★ Six Stars**

- Become officially certified as a certified green business in Marin! Go to the Marin county website <http://tinyurl.com/greenmarin> for the official application.

While satisfying all of the criteria of our "Green Star Office Program" won't automatically qualify you as a green business by the County of Marin, it will give you a good head start on becoming a green business when you do decide to apply with Marin County.

**RESERVATION FORM**

General Membership Meeting **Speaker Supervisor Charles McGlashan**

Please make \_\_\_\_ reservations for me at Jason's Restaurant, 300 Drakes Landing Road, Greenbrae on **Wednesday May 27, 2009**, from 12-1:30 pm.

Please choose one: \_\_\_ Braised Short Ribs \_\_\_ Chicken Cesar \_\_\_ Salmon Cesar \_\_\_ Vegetarian Capellini Pomodoro

Name(s) or Firm Name: \_\_\_\_\_ Phone: \_\_\_\_\_

Enclosed check for \_\_\_\_\_ (\$40 members and \$50 non members)

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**Please, we must have RSVP's by May 21, 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.



## SEVEN PATENT CONCEPTS EVERY LAWYER SHOULD KNOW

By Steven A. Nielsen, Esq.\*  
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### 1. Only Attorneys Registered with the United States Patent & Trademark Office (USPTO or U.S. Patent Office)

**May Represent Clients in Submitting Patent Applications or Dealing with Patent Matters Before the U.S. Patent Office.**

Patent prosecution (the process of obtaining a patent) is the only area of law that requires a separate examination and qualifying criteria in addition to a law degree and state bar license. Only an attorney with a specified science degree from a qualifying university is eligible to apply to take the examination and become a member of the patent bar. An attorney who jumps over all the hurdles may register with the U.S. Patent Office and then be called a “registered patent attorney.”

If you are not a registered patent attorney, you may not retain any fees collected for work that you are not authorized to perform. Any patent-related documents that you submit to the U.S. Patent Office will be returned. As a consequence, your client may not obtain a filing date and could lose all rights to his or her invention.

### 2. The Inventor Has a One Year Period in which to File for Patent Protection Which Starts With a Public Disclosure of the Invention or a Public or Private Offer to Sell the Invention.

This strict one year rule is often called the “Bar on Sale Rule” and is intended to motivate inventors to diligently participate in the patent system. The rule makes intuitive sense.

Assume that your client observes an amazing product in a public demonstration at Costco. Your client has never heard of the patent process. She sells her home and fires up a business selling the amazing product down the mall at Target. After a year or so of hard work, your client’s efforts pay off and she moves her children into private schools, buys a string of polo ponies, and donates generously to Marin Legal Aid. After another year or so of hard

*(Continued on page 15.)*

You are cordially invited to attend  
the induction ceremony of

The Honorable Andrew E. Sweet  
Marin Superior Court

Thursday the fourteenth of May, 2009  
at six p.m.

Marin County Showcase Theater  
Avenue of the Flags  
San Rafael, California

Reception following the ceremony  
rsvp to [jsalas@30nsp.org](mailto:jsalas@30nsp.org)



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Therese Stewart  
Argues Before the  
California Supreme  
Court

**MARIN COUNTY BAR  
ASSOCIATION  
MEMBERS TREATED TO  
INFORMATIVE  
PRESENTATION ON  
GAY CIVIL RIGHTS AND  
SAME-SEX MARRIAGE  
ISSUES AT APRIL  
GENERAL  
MEMBERSHIP MEETING**

Those who attended the April 22, 2009, General Membership Meeting at Jason’s enjoyed a lively and informative presentation by San Francisco Chief Deputy City Attorney Therese Stewart on the history of gay civil rights in San Francisco and pending same-sex marriage issues. The attendees also received one unit of MCLE credit.

Ms. Stewart, who hails from Marin County and is a graduate of Terra Linda High School, has twice argued before the California Supreme Court on same-sex marriage issues. She was catapulted into the spotlight in 2004 when she took on the defense of San Francisco Mayor Gavin Newsom against a challenge to his decision to issue marriage certificates to same-sex couples. Close to 19,000 same-sex marriages have occurred since then.

On May 15, 2008, in a 4-3 decision written by Chief Justice Ronald George, the California Supreme Court reversed a 2-1 decision of the California Court of Appeal that would have allowed California to continue to bar same-sex marriages. The California Supreme Court held that the California Constitution guarantees that same-sex couples be treated with the same dignity and respect as heterosexual couples. Proposition 8, which would change the California Constitution to deem valid only marriages between a man and a woman, was then placed on the ballot as a voter initiative. It passed in the November 2008 election by the required majority of votes. On March 5, 2009, the California Supreme Court heard oral arguments, including that of Ms. Stewart, on the validity of Proposition 8. The Court is due to issue its opinion prior to June 5, 2009 (within 90 days of the hearing).

Ms. Stewart explained that the City challenged Proposition 8 with an argument that a law that so significantly

affects fundamental constitutional rights constitutes a revision rather than an amendment to the California Constitution and cannot be implemented by a simple voter initiative. The laws of the state are supposed to apply equally to all people, and the intent of the framers of the California Constitution was to protect the minority – not the majority. In addition, Ms. Stewart argued that important questions of civil rights should be decided by the judiciary, and not by a voter initiative. It has been argued by proponents of Proposition 8 that it took away only the label of marriage but left intact other laws that benefit same-sex couples. According to Ms. Stewart, same-sex couples should not be relegated to different terms, such as “domestic partnerships” and “civil unions,” that do not connote the same tradition, loyalty and fidelity as the term “marriage.”

The April General Membership meeting was very well attended, and MCBA Program Director Matt White deserves kudos for arranging Ms. Stewart’s presentation. The MCBA intends to continue to offer MCLE credit when appropriate for its future educational programs.



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## DAVID HELLMAN TO BE HONORED AT MAY GENERAL MEMBERSHIP MEETING

MCBA President Marlene Getchell will present San Rafael attorney David Hellman with the 2009 Marin County Bar Association's "Distinguished Service

Award" at the next general membership meeting on May 27, 2009. The Distinguished Service Award is presented to recognize outstanding achievement by an attorney living or practicing in Marin County who has made significant contributions to the community or to the Marin County Bar Association.

Mr. Hellman's law practice involves representation of individuals and business entities in tax matters, as well as estate planning, probate, real estate, business planning, and entertainment law. Since 1988, Mr. Hellman has generously volunteered his time free of charge to serve as tax advisor for the Bar and for the Lawyer Referral Service (LRS). Since 1992, he has also served as the Trustee for the Bar's retirement plan. In addition to preparing its annual tax returns, Mr. Hellman advises the Bar on how to treat items in the accounting records, what activities the Bar as a tax-exempt entity is permitted to undertake, and how best to report its activities to the IRS. As Trustee for the retirement plan, he handles all the administrative work for the plan, including tax preparation, asset investment, beneficiary reports and payments, and compliance with retirement plan laws and regulations.

In addition to being licensed as a Certified Public Accountant, Mr. Hellman is certified by the California State Bar Board of Legal Specialization as a specialist in Taxation Law and a specialist in Estate Planning, Trust and Probate Law. He is a 1972 graduate of Boalt Hall School of Law and served on the Marin County Bar Association Board of Directors from 1987 to 1993, including as Treasurer in both 1989 and 1990 and as President in 1992. He is the president and owner of Marin County Exchange Corporation, a business engaged in 1031 tax-deferred exchanges. He is a long-time resident of San Rafael and raised four children in Marin County. He is a publicly elected Trustee of the Marin County Board of Education and has been its president three times over the fourteen years he has served. He has held various positions in local civic and charitable organizations, including the Mis-

sion San Rafael Rotary Club, Marin Council Boy Scouts of America Executive Board, American Cancer Society Marin Unit, MARC (now Lifehouse), Marin Education Fund, San Rafael Chamber of Commerce, San Rafael High School Scholarship Foundation, Sunny Hills Services, and United Way of the Bay Area Marin Campaign.

Mr. Hellman's tireless work for the Marin County Bar Association and his significant contributions to our community are greatly appreciated.

**COME  
TOGETHER**

LEGAL AID OF MARIN  
51ST ANNIVERSARY CELEBRATION  
MILL VALLEY COMMUNITY CENTER  
FRIDAY, JUNE 5, 2009  
6 P.M. 'TIL 10 P.M.

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## THE RIGHT TO ATTACH ORDER IS AN EFFECTIVE LITIGATION TOOL WHEN A CONTRACTOR IS UNLICENSED

By Gregory R. Shaughnessy\*  
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A prejudgment writ of attachment under Code of Civil Procedure section 483.010 has been characterized by many seasoned California litigators as the most aggressive action that can be taken in civil litigation. The right to attach order, like a judgment, essentially gives the party who obtained the order the right to levy upon the bank accounts and property of the other party. But, if granted, the right to attach order on a prejudgment writ of attachment is typically issued very early in the case, long before a final determination on the merits has been made. It therefore can have a quick and devastating impact on the adverse party in a lawsuit.

In *Goldstein v. Barak Construction* (2008) 164 Cal. App.4th 845, the Court of Appeal held that the owner on a residential construction project was entitled to a right to attach order because the contractor he hired did not have a contractor's license at all times during the performance of the work that was the subject of the contract.

### Factual Background

In 2004, the owner entered into a contract with Barak Construction (Barak) for the construction of an addition to his residence in Los Angeles. The owner sued and alleged that he had paid Barak the sum of \$362,660.50 and that Barak abandoned the job before the work was completed. The owner was left with a home that was unfinished and riddled with construction defects.

The contract was signed on June 18, 2004 and Barak commenced working on the project. Barak did not obtain a contractor's license until September 17, 2004. After Barak filed its answer to the owner's complaint, the owner filed an application for a right to attach order and for issuance of a writ of attachment against Barak.

### Discussion

The *Goldstein* court explained that, under Code of Civil Procedure section 483.010, a prejudgment writ of attachment may issue only if the claim sued upon is (1) a claim for money based upon a contract, express or implied;

(2) of a fixed or readily ascertainable amount; (3) either unsecured or secured by personal property, not real property; and (4) commercial in nature. The plaintiff must also establish "the probable validity of the claim upon which the attachment is based." (C.C.P. section 484.090(a) (2).) "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (C.C.P. section 481.190.)

The *Goldstein* court observed that, at the hearing on an application for a right to attach order, the court shall consider the showing made by the parties and shall issue such order if it finds (1) the claim upon which the attachment is based is one upon which an attachment may be issued; (2) the plaintiff has established the probable validity of the claim upon which the attachment is based; (3) the attachment is not sought for a purpose other than recovery on the claim upon which the attachment is based; and (4) the amount to be secured by the attachment is greater than zero. (C.C.P. section 484.090(a).)

The primary argument advanced by Barak was that the grounds for the right to attach order, the absence of a contractor's license, was not based on a contract, either express or implied, but rather on a "punitive" statute, Business & Professions Code Section 7031. (Section 7031 essentially provides that a contractor is not entitled to recover for

(Continued on page 16.)

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# RESOLUTION

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# REMEDIES

Diane Levinson-Fass, President      Diane Story, Vice President

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## GOING GREEN

By Kate Rockas, MCBA Director

Is that cheeseburger you had for lunch causing global warming? The foods we consume are contributing to climate change. The production, packaging and transportation of food all consume energy. This results in carbon emissions which many believe contribute to raising average global surface temperatures.

The easiest way to reduce your food carbon footprint is to eat locally grown and produced products. In 2008, Bon Appetit Management Company, a national food service contractor that serves 80 million meals a year, committed to reducing its carbon emissions by 25 percent. The company did this by cutting their beef and cheese purchases by at least 25% (livestock production causes 18% of the world's greenhouse gasses) and by buying only meats raised in North America. It stopped purchasing all air freighted seafood and bought only local or frozen-at-sea fish. It also stopped serving tropical fruits.

Most of our foods have labels showing fat, protein, salt and sugar content, among other things. How about a "carbon footprint" label? Several British food companies are planning to add such labels showing the quantity of carbon-dioxide emissions associated with making and transporting foods and other goods. These labels will allow shoppers to choose products with the smallest carbon footprints and make it possible for them to compare locally produced with imported foods, as well as comparing conventionally farmed foods with organically grown foods.

Below are some tips for a low carbon diet:

- Minimize your food waste.
- Buy seasonal and regional foods.
- Cut back on meat and cheese consumption.
- Buy locally caught fish.
- Avoid processed and packaged foods.
- When selecting beer and wine, choose West Coast beverages.

To learn more about eating a low carbon diet and to calculate the carbon footprint of a recent meal, visit [www.eatlowcarbon.org](http://www.eatlowcarbon.org).

**SAVE THE DATE**  
May 28, 2009

Marin County Women Lawyers  
Presents:

"Elimination of Bias  
in the Legal Profession"  
with speaker Hina Shah

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[www.mcwlawyers.org](http://www.mcwlawyers.org)



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## **PARENTS, TEENS AND THE LAW: A FREE PUBLIC FORUM MARKING MCBA LAW DAY 2009**

### **THEME: Empowering Youth toward Responsible Citizenship**

*By Otis Bruce, Jr., Deputy District Attorney, Treasurer MCBA Board of Directors, and Chair of the Law Day/Public Education Committee*

2009 marks the bicentennial of the birth of Abraham Lincoln, regarded by many as our nation's greatest and most eloquent president. Lincoln, who devoted much of his adult life to the practice of law, was the quintessential American lawyer-president. His background in the law informed both his actions and his oratory.

"It is because men and women of every race, from every walk of life, continued to march for freedom long after Lincoln was laid to rest, that today we have the chance to face the challenges of this millennium together, as one people – as Americans."

*Barack Obama, February 2007*

For Law Day 2009, the American Bar Association is encouraging efforts nationwide to commemorate Lincoln by exploring this rich and resonate theme – A Legacy of Liberty.

The ABA encourages each Bar Association across the nation to create its own approach to celebrate this important event. The Marin County Bar Association is proud to join again with the Marin County Office of Education to present a free public forum entitled "Parents, Teens, and the Law: Rights, Responsibilities and Consequences" on **Tuesday, May 19, 2009**, at the Marin County Board of Supervisors' Chambers, Room 330, located at 3501 Civic Center Drive, San Rafael.

"Liberty" in this millennium, given our diverse communities and the rapid changes in our society, is even more connected to responsible citizenship. This year MCBA adopted the theme: Empowering Youth toward Responsible Citizenship. Many parents, on a daily basis, try to raise responsible, self-controlled children with the help of family, teachers, mentors and community support. Our teenage children are given many privileges: possession of a driver's license, possession and use of a car, cell phone, and access to the internet. The problem we face in our community is that many teens do not know or appreciate the laws and consequences connected to their abuse of these privileges when they engage in risky behavior.

As many of you are aware, communities across the country are experiencing a rise in teen parties where alcohol is served, teen drinking and driving, cyber bullying, teen victims from dating violence, sexual assaults, stalking, teen abuse of digital technologies and internet access privileges, and using text messaging service on cell phones for inappropriate communications, commonly referred to as sex + texting = *sexting*.

What can we do? It is our obligation to continue every effort to educate our youth that in order to maintain "liberty" they must understand and appreciate that civility, responsible citizenship and physical safety comes from knowing the potential criminal and civil consequences of risky behaviors.

The MCBA Law Day forum on May 19, 2009, will demystify and explain some of the important laws that affect parents and their teens. Our panel of speakers consists of several professionals who are committed to educating parents and teens about certain areas of the law that affect rights, responsibilities and consequences, when these laws are violated.

This year's MCBA Law Day panelists include: The Honorable Roy O. Chernus, Marin County Superior Court Commissioner who handles juvenile and drug court issues; Charlie D. Dresow, Esq., criminal defense attorney and member of the Richard M. Sangster Inn of Court; Juliana Weil, Esq., juvenile law, immigration law and criminal defense attorney; Tara Higgins, Esq., criminal defense and civil/personal injury attorney; Gary Najarian, Prevention Coordinator for Marin County Health & Human Services Division of Alcohol, Drug and Tobacco Programs; and David Vogelstein, Esq., criminal defense attorney and lead coach of the nationally ranked Tamalpais High School Mock Trial Team. Otis Bruce, Jr., Deputy District Attorney, will serve as the moderator for this year's Law Day Program.

This is a "must attend" event for all parents and their teenage children. This forum will attempt to demystify and explain some of the important laws that affect parents and teens. Topics to be covered are: Alcohol and Drugs, Sex and the Law, Teens and Cyber-Safety, Violence and Teens, including Cyber-Bullying, and Marin County's Social Host Ordinance – Civil and Criminal Consequences.

As Commissioner Chernus once said, "Clearly, educating our teens is not enough. Our kids need our help. We need to educate ourselves and our kids." Plan to attend this Law Day program and bring your teen with you to this important program that MCBA and the MCOE are offering to the community. Please R.S.V.P. to [jsalas@30nsp.org](mailto:jsalas@30nsp.org) or call Jan Salas or Robynn Gaspar at (415) 499-1314.



# Parents, Teens and the Law

*Empowering youth toward responsible citizenship*

*A free public forum for parents & teens to learn about their rights, responsibilities and consequences on issues directly relating to teens and their families.*

**Tuesday, May 19, 2009  
7:00 p.m. - 9:00 p.m.  
Board of Supervisors Chambers  
3501 Civic Center Dr. Room 330  
San Rafael, CA 94903**

## Topics to Include:

*Alcohol and Drugs*

*Sex & the Law*

*Teens & Cyber Safety*

*Violence and Teens – Cyber-Bullying*

*Marin County's Social Host Ordinance – Civil and  
Criminal Consequences*

**DISCUSSIONS WILL BE LED BY A DISTINGUISHED PANEL OF LEGAL EXPERTS  
WHO WILL SHARE VALUABLE INFORMATION  
AND ANSWER YOUR QUESTIONS.**

RSVP to [jsalas@30nsp.org](mailto:jsalas@30nsp.org) or call 415-499-1314  
Please provide your name and the number in your party.

**Sponsored by the Marin County Bar Association in collaboration with the Marin County  
Office of Education**



## MEET YOUR DIRECTORS SPOTLIGHT ON KATE ROCKAS

*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 Kate Rockas.

***The Marin Lawyer:*** What is your practice area?

***Kate Rockas:*** Family law.

***TML:*** Do you have a particular emphasis?

***KR:*** Not really. I handle all areas of family law – custody, support and property issues. I also write prenuptial agreements.

***TML:*** Why did you decide to become a lawyer?

***KR:*** I didn't want to go to medical school (too much blood) or business school (too boring) so that left law school. I like a challenge and I like helping people. Practicing family law is certainly challenging and it gives me an opportunity to help people during a difficult time in their lives.

***TML:*** Why do you live in Marin?

***KR:*** I grew up in the San Joaquin Valley. In my teen years, I thought that Fresno was pretty un-cool. I moved to Berkeley to go to school and never went back to Fresno. I landed in Marin County when I started law school in 1983. I love it here and hope to never leave.

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

***KR:*** I like to travel. I love to read. I have a sweet golden retriever named Halle; we love to go on hikes around Marin County.

***TML:*** Tell us about your family.

***KR:*** I have two wonderful girls. My daughter Demi is almost 21 years old and lives in San Francisco; she works as a barista and is working on her portfolio so that she can apply to an art program. My daughter Chloe is a senior at San Rafael High School and is getting ready to

start school at the University of Puget Sound in Tacoma, Washington.

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

***KR:*** If I had been blessed with any sort of musical talent, I would love to have a career as a musician. It would be nice to have a career where my work brought pleasure to others. As a family law attorney, I don't often get to do that.

***TML:*** Why did you join MCBA?

***KR:*** I believe that community is important. As a member of MCBA, I am able to support our local legal community.

***TML:*** Why did you become a Director?

***KR:*** When my younger daughter got her driver's license and a car last year, I was finally able to end my career as a chauffeur and begin doing other things. I have wanted to get more involved with MCBA and becoming a Director seemed like a good way to do that.

***TML:*** What was the best, worst, or strangest experience in your career?

***KR:*** The strangest experience was a nine day trial on the issue of the validity of a prenuptial agreement. My client kept attempting to put on his own evidence; he would take photographs and documents up to the witness stand and ask the judge to consider them whenever he had the opportunity. My client also responded to questions from opposing counsel by stating that he would answer after he explained something else. He would then testify as to whatever he thought was relevant. I had to constantly fight the urge to object to my own client's testimony. My client also threatened the life of a percipient witness in the middle of the trial. Needless to say, the judge found against my client; he found that the wife had signed the prenuptial agreement under duress.

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## ADA CONSULTANT AND QUADRIPLÉGIC, KIM BLACKSETH, EARNS PILOT'S LICENSE



*Kim Blackseth celebrates new pilot's license with instructor and family*

Kim Blackseth is a consultant to employers, business owners, architects, municipalities and the legal community. He provides advice on disability access requirements under state and federal law. He is also disabled. He uses an electric wheelchair for day-to-day ambulation. He recently earned his pilot's license.

Kim has always enjoyed motor sports. He was a nationally ranked professional motocross racer in the late 1970's. As a result of a serious crash in a race in 1979, he is a C-5 quadriplegic. He became a wheelchair user, but continued to race cars in SCCA Pro Rally for a few years. In the late 1990's, he raced 2.6-meter sailboats in an attempt to qualify for the Para-Olympics.

In early 2003, Kim investigated flying a helicopter. But he quickly realized that it would not be possible. He thought alternatively that he might be able to handle fixed wing aircraft. He was motivated to become a pilot by the challenge of acquiring a highly technical mental and physical skill set and the hope the utility of the plane would permit him to travel on business to areas not served by commercial air.

The FAA of course has very strict medical requirements, so Kim first had to convince the FAA that his medical history did not preclude him from flying safely. This was a long and expensive process, but in the end the FAA was understanding and cooperative. As a C-5 quadriplegic, Kim is paralyzed from below the arms down, so the obvious physical limitation on strength and lack of any "grip" were issues that had to be evaluated against the physical requirements necessary to operate the plane's controls and radios.



*Kim Blackseth about to take off*

which he used for training purposes and "proof of concept" design work. The Ercoupe is a very unusual plane,

Unlike others, he could not rent a plane to test it out, since the plane first had to be modified to meet his needs. Kim bought a 1947 Ercoupe

but its design convinced Kim that he could fly. The plane was very much ahead of its time. It was designed to not have pedal-operated rudders. The ailerons and rudders are interconnected. By just turning or pulling the yoke, Kim thus could operate all the flight controls. The plane has a panel-mounted throttle and a hand brake. For a guy with no lower limb use and limited upper extremity capacity, it was a perfect match. Because it is too small to carry his wheelchair, however, its usefulness for Kim has been limited to education and training.

Kim now owns two planes, the Ercoupe and a 2008 Jabiru J230. He intends to use the new Jabiru for the long term. As his flying skills improve, he is transitioning into the Jabiru, which is a very complex plane. The Jabiru has rudder pedals, a computer (glass) panel with complex GPS, autopilot, transponders, and radios. It also has a huge cargo area for his wheelchair and other equipment. The hand controls on the plane were designed and built collaboratively by a group of engineers and Kim's friends. The controls are still being modified. Once modifications are built, Kim flies to test them out. They are then refined and rebuilt (with Kim's input as a guide) as is necessary. The modification process is being closely monitored by the FAA.

Kim describes his favorite flying experience so far as a breathtaking summer night flight in warm still air with the sun setting in the West and darkness in the East. Another highlight of Kim's flying experience was flying solo for 150 miles and landing at three different airports. This was a requirement to obtain his pilot's license and was extremely challenging. A YouTube video of this flight can be seen at <http://www.youtube.com/watch?v=syxxM487vzQ>.

Kim's wife, Tammy, has been very supportive of his passion for flying. After he passed the private pilot's test, she demanded that she be his first "passenger." Kim's 30-year-old daughter, Emily, has also shown some interest in flying and has been taking lessons to see if it is something she too wants to pursue. The photograph above shows Kim's wife, Tammy, daughter Emily, and the FAA Flight Examiner, Rob David, on January 20, 2009 – just after Kim passed his flight test.

When he is not working too much, Kim now enjoys taking off on flying excursions.

*Kim Blackseth is a California certified disability access specialist and has been a licensed general building contractor since 1978. He was appointed by Governor Schwarzenegger and served as a Commissioner on the California Building Standards Commission in 2006-2007. He presently is a member of the California Board for Professional Engineer and Land Surveyors. He also served on the Marin County Planning Commission for 10 years, 4 of those years as Chairman. He can be reached at: Kim R. Blackseth Interests, Inc.; 310 17th St; Oakland, CA 94612; (510) 839-1760; (510) 839-2085 (fax); kimblackseth@mac.com.*



## MARIN ATTORNEY RECEIVES HIGHEST AWARDS FOR OUTSTANDING PUBLIC SERVICE

Marin solo practitioner Jennifer Ani recently received highest awards for Outstanding Public Service from both The Legal Aid Association of California and the San Francisco Bar Association.

On February 25, 2009, Ms. Ani received the Legal Aid Association of California's 2009 Family Law Award. LAAC is California's statewide organization consisting of approximately 80 organizations and 40 individual members who work to provide critical legal assistance to low-income Californians and to ensure equal access to justice. The award was presented to Ms. Ani at LAAC's annual conference in San Francisco last month.



Jennifer Ani with California Supreme Court Chief Justice Ronald George.

On March 26, 2009, Ms. Ani was awarded the San Francisco Bar Association's highest honor in Family Law, the prestigious James P. Prevolos Award for Outstanding Public Service. In 2008 alone, Ms. Ani represented more than twelve clients through the Family Law Project, devoting over 400 hours of pro bono services. California Supreme Court Chief Justice Ronald George and San Francisco Family Law Judge Patrick Mahoney presented this award to Ms. Ani at a ceremony held in the Green Room at the San Francisco War Memorial and Performing Arts Center.

Ms. Ani is a 1992 graduate of McGeorge Law School who began her career in the private sector working locally for Headlands Mortgage Company. After taking time off to start a family, in 2006 Ms. Ani began a one-year internship with The Family & Children's Law Center in San Rafael where she learned the specialized practice of Juvenile Law. In 2007, Ms. Ani started a private practice that includes Juvenile Dependency and Family Law litigation. Ms. Ani continues to donate her time to the non-profit organizations that gave her experience and training. She also provides pro bono services through the Family Law Project of The Bar Association of San Francisco and has received their "Outstanding Contribution to Public Service" awards in both 2007 and 2008.

Ms. Ani appears regularly in San Francisco, Sonoma, San Mateo and Lake Counties in Family Law and Juvenile Dependency matters. She can be reached at: 4040 Civic Center Drive, Suite 200; San Rafael CA 94903; (415) 259-6630; (415) 259-6631 (fax); [j.ani@comcast.net](mailto:j.ani@comcast.net)

## MARIN COUNTY LEGAL PROFESSIONALS ASSOCIATION

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### NEXT MEETING:

Thursday, May 14th,  
6 pm, Café Arrivederci  
11 G Street, San Rafael

### TOPIC:

Installation of 2009-2010 Officers with  
LSI Treasurer Mary Beaudrow, CCLS

### RSVP/INFO:

Kristi L. Edwards, CCLS, 491-5000,  
[kledwards@justice.com](mailto:kledwards@justice.com)

### TIP OF THE MONTH:

MCLPA members qualify for discounts on Continuing Legal Education from CEB and Bay Area Legal Secretaries Forum! Did you just pay full price for your legal assistant to attend the BALSF Annual workshop?

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*(General Membership, continued from page 1.)*

Sup. McGlashan is in his second term as a member of the Marin County Board of Supervisors. His work is focused on sustainability in all facets of public policy: energy efficiency and renewable power, water conservation, affordable housing, local non-car transportation systems, bicycle and pedestrian improvements, smart community design, zero waste, green building, justice, public health, and habitat protection. In addition to serving as chair of the Marin Energy Authority, Sup. McGlashan chairs the Sonoma Marin Area Rail Transit Authority (SMART), chairs the Richardson's Bay Regional Agency, and serves on many other intergovernmental and environmental agencies. He holds a B.A. from Yale and an MBA from Stanford, both awarded with honors.

Seating is limited; early reservations are recommended. Please register for this exciting program by completing and returning the reservation form on page 2, or by calling or e-mailing Robynn Gaspar at (415) 499-1314 or [rgaspar@30nsp.org](mailto:rgaspar@30nsp.org).

*(Disability, continued from page 1.)*

Code, Health & Safety Code, and Business & Professions Code) to existing state disability access laws.

The new law establishes a 19 member California Commission on Disability Access – a committee intended to monitor disability access compliance, act as an information center, make recommendations to the Legislature on changes to disability access laws, develop a checklist for inspectors to use in determining disability access compliance, and study and report to the Legislature on whether the state's programs are meeting the needs of the disability and business communities. (Government Code § 8299.01.) Many of the new provisions added to the Civil Code become operative only upon issuance of a notice by the Director of Finance declaring that the California Commission on Disability Access has been funded (a meager \$80,000 has been appropriated from the General Fund for this purpose) and has commenced operations. The funding and operation of the Committee could be a big "if," given the state's present economic woes.

Among other things, the new law provides that owners and tenants of public accommodations may obtain (at their own expense) an inspection by a certified access specialist (CASp). (Civil Code § 55.53.) The CASp is required to notify the business owner of the right to a written report of the inspection. The CASp may then issue either 1) a certificate of full compliance or 2) a report that identifies required corrective measures and a timetable for completion of the remediation. The business owner may post a CASp certificate of compliance in the window of its business to signal compliance with access laws and thereby (it is hoped) discourage the filing of a lawsuit.

With respect to any complaint filed on or after January 1, 2009, any business that has obtained a CASp certificate or report may apply to the court to obtain a stay of the action for 90 days and an early evaluation conference to attempt to resolve the case short of protracted litigation. (The stay would apply only to the accessibility claim, not to other causes of action pled in the complaint. The stay provisions also would be inapplicable where the plaintiff has obtained temporary injunctive relief in connection with an accessibility claim.) After an early evaluation conference is set by the court, the defendant must file and provide the plaintiff with a copy of the CASp report. Following that, the plaintiff must provide the defendant with a list of claimed violations, damages and attorney's fees. The Legislature has directed that the Judicial Council prepare and post on its website forms and instructions to help the parties implement the law. (Civil Code § 55.54.)

Under the new law, attorneys who demand money directly from a business to resolve disability access claims must also provide the business an advisory statement (on a form to be developed by the Judicial Council) regarding their legal rights, including an explanation of the right to a stay and early evaluation, as well as their legal obligations to comply with state and federal disability access laws. (Civil Code § 55.3.)

The legislation also clarifies that statutory damages under the Civil Code may be awarded only for the occasion(s) on which the plaintiff personally encountered a barrier to, or denial of, access. Damages are not awardable for each technical violation of a construction standard. (Civil Code § 55.6.) A court may also consider prior written settlement offers made or rejected by a party in determining the propriety of an award of attorney's fees in a disability access case. (Civil Code § 55.55.)

The new provisions attempt to ensure that California architects and building officials become more knowledgeable regarding disability access requirements. Architects will now be required to complete coursework as a condition of renewal of their state license. (Business and Professions Code § 5600.) Building officials will also be subject to continuing disability access education requirements. (Health & Safety Code § 18949.29.) Every local building department will be required to employ or retain a CASp. (Civil Code § 55.53.) Furthermore, the State Architect is required under the new law to develop access standards equal to or greater than those specified in federal guidelines. (Government Code § 4450.)

The significance of this legislation is uncertain. The law does not give businesses a safe harbor or notice and opportunity to correct access deficiencies before a lawsuit is filed. Assuming the California Commission on Disability Access is funded and becomes operational, commercial

*(Continued on page 14.)*

(Disability, continued from page 13.)

property owners and tenants (who can afford it) may be motivated to hire a CASp so that they can address access issues, post a compliance certificate, and hopefully avoid a lawsuit or mitigate its impact. As a result, greater access may be achieved for the disabled community. The provisions of the law which require certification and greater continuing education for architects and building officials could also have a positive effect on disability access. The clarification on recoverable damages and attorney fees determinations might assist California businesses who are sued in disability access actions and who typically are not covered by the average CGL insurance policy.

Conceptually, the stay and early evaluation provisions of the law should decrease attorney's fee exposure for businesses sued in state court. But, as it stands now (and in the experience of the author) most ADA lawsuits are brought in federal court under federal law with state law damages claims tacked on. The procedural aspects of state law cannot be imposed on the federal court. Moreover, the Northern District has already implemented a stay and early evaluation program for its disability access cases. The true impact of this complicated legislation on ADA litigation thus remains to be seen.

*\*Sara B. Allman practices general civil litigation with an emphasis on defense of commercial property owners and tenants in disability access cases in state and federal court. She is a principal of Allman & Nielsen, P.C., in Larkspur and can be reached at (415) 461-2700 or at allniel@comcast.net.*

## Superior Court of California County of Marin

### Notice

#### Revision of the Uniform Local Rules of Court (California Rule of Court 10.613)

The Judges of the Marin County Superior Court have approved a draft set of proposed Local Court Rules. As authorized under CRC 10.613, they are posted on the internet at the following web page address of the Court:

<http://www.marincourt.org/data/PDFs/ULRD.pdf>

Should an individual or organization not have access to the internet, a printed copy of the local rules of court may be obtained at no charge by writing the Court at:

Marin County Superior Court  
Court Executive Officer  
Attn: Local Rules of Court  
P.O. Box 4988  
San Rafael, CA 94913-4988

Written comments or proposed changes should be submitted to the above address no later than May 8, 2009 by 4:00 p.m. Should you need additional information regarding the revision of these local rules, please call the Office of the Court Executive at (415) 473-6244.

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(Patent, continued from page 3.)

work, your client receives a cease and desist letter from the inventor of the amazing product. If the inventor failed to file a patent application within one year of the first public demonstration, your client's new life may continue uninterrupted. This result makes equitable sense, since your client has spent over a year of her life devoted to developing and marketing the amazing product.

But, if the inventor wisely filed a timely patent application within one year of the first public demonstration or public or private offer to sell the invention, your client is in deep trouble and will soon learn the phrase "Patent Punishment." Since there is no patent prison (yet), your client will be out and about with plenty of time on her hands and motivation to blame others for her setback. Your client may ask you, her long-time lawyer, why you did not advise her of this result when you first learned of her new business based upon the amazing product that she did not invent. This predicament can be avoided by the simple suggestion of a patent search to determine if there already is a patent or a published application for the product.

### **3. Do Not Express an Opinion on the Patentability of a Product or the Potential Commercial Success of a Product.**

Imagine in the year 1900 two bicycle mechanics tell their business lawyer about their plans to make a wing-warping mechanism and other components to create the first powered aircraft. Had the lawyer pointed out that the greatest and most educated engineers of the world were already working on powered flight inventions and dissuaded his clients, Orville and Wilbur, from participating in the patent process, today we might be taking slow boats to Hawaii. Every lawyer should know that the sanity of an inventor is often a close call and that registered patent attorneys and the U.S. Patent Office do not discriminate against the "reality challenged." Do not undertake the job of trying to figure out if your client's invention will succeed. Who could guess that the *Chuck It Tennis Ball Thrower* would be granted patent protection and turn out to be as ubiquitous as the dog collar? Send your client to a registered patent attorney and get back to your billable day.

### **4. The U.S. Patent Office Gladly Accepts Patent Applications from Inventors who Are Insane, in Prison, Incapacitated, Under-Age, or Even Dead.**

The U.S. Patent Office anticipates that many great minds may be considered legally insane, and it provides simple mechanisms to allow such people access to the patent process. A guardian or other legal representative

may sign patent documents on behalf of an insane or unavailable inventor. Unlike a trusts and estates lawyer who drafts a will for a client, the patent lawyer who prepares a patent application need not take the client's mental state into consideration.

### **5. The U.S. Patent System Is Instrumental in Rewarding and Promoting Innovation.**

The Framers of the U.S. Constitution were interested in promoting scientific inquiry and the development of technology. Our Constitution gives Congress the authority to grant inventors exclusive rights to their inventions. In exchange for a government-granted monopoly, inventors are required to make a full disclosure of their invention within their patent application. The contents of a published patent application or a patent describe the invention in sufficient detail so as to allow one reasonably skilled in the art to make the invention. With such disclosures, other inventors have a greater knowledge base upon which to develop new technology – consistent with the intent of our founding fathers.

### **6. Invention Promotion Companies Are to be Avoided at all Costs.**

Invention promotion is a huge industry that takes advantage of the public's perception that a mere idea will lead to untold riches. In late night TV ads or infomercials, invention promotion companies promise inventors access to willing manufactures, marketing companies, worldwide markets and anything else that might be alluring to a potential customer. For an affordable fee of \$300 and up, these companies initially offer the unwitting inventor mechanical drawings and other simple services. Upon completion of the drawings or simple service, the promotion company will extol the commercial potential of the item and entice the inventor into paying an additional \$5,000 to \$20,000 for additional "development" or for submitting the idea to a list of manufactures and various companies. The invention promotion companies will continue asking for money until the inventor stops paying for worthless goods and services.

### **7. While only registered patent attorneys may represent clients before the U.S. Patent Office, any attorney may represent clients in patent lawsuits, which are conducted in federal court.**

Patents are valid for 20 years after the filing date. Patents are not self-enforcing. A patent holder may need to file

(Continued on page 16.)

*(Patent, continued from page 15.)*

a lawsuit in federal court to stop an infringer and recover damages. By act of Congress, our federal court system has exclusive jurisdiction over cases involving patents. Our federal judges are familiar with patent disputes, but, due to the complexities of patent litigation, most federal district courts have local patent rules that dictate timelines and hearings peculiar to patent litigation such as claim interpretation hearings or client tutorials. A claim interpretation hearing or “Markham hearing” is a separate bench trial to adjudicate disputes over the meaning of words within the claims of the subject patent. A client tutorial is where an inventor or expert hired by one of the parties explains the subject technology to the court.

When a patent suit is filed by a patent holder, a defendant may allege that the subject patent is invalid for a number of reasons. Arguments of invalidity often revolve around the earlier procurement of the patent before the U.S. Patent Office. Often trial counsel will hire a registered patent attorney to review the prosecution history of the relevant patent application. The set of documents maintained by the USPTO for each patent application is called a “file wrapper.” Patent litigation is a very lucrative field and is available to all attorneys who have a penchant for technology and a tolerance for a byzantine set of rules found only in patent disputes.

*\*Steven A. Nielsen is a registered patent attorney and a principal of Allman & Nielsen, P.C. Mr. Nielsen is the current Chairperson of the Intellectual Property Section of the MCBA and may be reached at [www.NielsenPatents.com](http://www.NielsenPatents.com).*

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*(Attach Order, continued from page 6.)*

work performed under a construction contract unless the contractor can prove that it was properly licensed *at all times* during the performance of the work. In addition, an owner can require the unlicensed contractor to disgorge all sums it has already been paid.)

The court rejected Barak’s argument, finding that a claim brought under the California Contractors State License Law “may appropriately form the basis for a right to attach order since an agreement for the performance of services lies at the heart of such a claim.”

The court also rejected Barak’s argument that it should be entitled to recover for the value of the work performed after it became licensed. The court held that the fact that Barak became licensed sometime during the performance of the work was immaterial, citing *Great West Contractors, Inc. v. WSS Industrial Construction, Inc.* (2008) 162 Cal. App. 4<sup>th</sup> 581.

The court also held that Barak was not entitled to recover the value of extra work performed pursuant to separate oral agreements, stating that the fact that there was no formal agreement regarding the extras did not render the extras separate from the contract, citing *M.W. Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal. 4<sup>th</sup> 412, 428.

### **Comment**

The decision in *Goldstein* is potentially very significant. It is a common occurrence in construction litigation to find that a contractor or a subcontractor was not licensed at all times during the performance of a contract or subcontract, either because the license was obtained after the work commenced or because the license was not timely renewed and lapsed for a period of time during performance. And frequently the contractor or subcontractor does not hold the right kind of license, such as an “A” license for general engineering work (Bus. & Prof. Code section 7056), a “B” license for general building work (Bus. & Prof. Code section 7057), or a “C” license for specialty work (Bus. & Prof. Code section 7058). In fact, there are over forty different classes of specialty licenses. Case law has held that, even if a contractor has a contractor’s license, when it undertakes work outside the scope of its license it is deemed to be unlicensed.

The lack of a proper contractor’s license comes up with great frequency in construction litigation. Under *Goldstein*, whenever a party has a good case against a contractor for lack of a proper license at all times during the performance of the work, it would appear to be appropriate to seek a prejudgment writ of attachment. The right to attach order effectively allows a party to seize and freeze the assets of the party against whom the order is issued, up to the amount specified in the right to attach order. This could put a party out of business, as it is hard to do business if all the party’s bank accounts are frozen.

Obviously the party with a right to attach order obtains a great deal of leverage in any settlement negotiations held after the right to attach order is issued. The right to attach order is indeed a powerful litigation tool.

*\*Gregory R. Shaughnessy specializes in construction and real estate litigation. He regularly advises owners, general contractors and subcontractors on their legal rights and remedies. For more information about the issues discussed in this article, Mr. Shaughnessy can be reached at (415) 435-2409; email: [grs@grs-law.com](mailto:grs@grs-law.com); website: [www.grs-law.com](http://www.grs-law.com)*

## DETAILS FOR CALENDAR

### May 19th

Law Day  
Board of Supervisors Chambers  
Room 330  
3501 Civic Center Drive, San Rafael  
7 – 9 pm

### May 20th

ADR Section Meeting  
Topic: A continuation of our March 2009 meeting that covered “What Now?” scenarios from a Mediator’s perspective.  
One (1) hour of MCLE credit.  
Location: Seafood Peddler  
12 – 1:30 pm

### May 20th

Probate & Estate Planning Section Meeting  
Speaker: Christopher Arledge of Turner Green Afrasiabi & Arledge LLP  
Topic: “Why Superman and Copyright Matter to You – Copyright for Trust and Estate Lawyers.”  
Location: The Rafael Corporate Center,  
750 Lindero, San Rafael  
12 – 1:30 pm

### May 21st

Real Property Section Meeting  
Speaker: Jim McKenney of Professional Publishing  
Topic: “Provisions in pre-printed contract forms that cause disputes -- a comparison of the language in CAR and Professional Publishing forms”  
Location: Seafood Peddler  
12 – 1:30 pm  
RSVP to Section Co-Chair Paul Smith attn Debbie Burger 456-4000 or dburger@marinlaw.com

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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.

**Marin County Bar Association**  
30 North San Pedro Road, Ste. 140  
San Rafael, CA 94903


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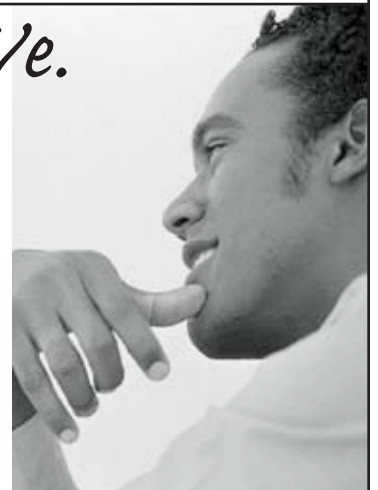
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