Santa Barbara Lawyer
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August 2016 • Issue 527

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Santa Barbara County Bar Association Annual Barbecue

Santa Barbara County Bar Association

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Santa Barbara County Bar Association

The mission of the Santa Barbara County Bar Association is to preserve the integrity of the legal profession and respect for the law, to advance the professional growth and education of its members, to encourage civility and collegiality among its members, to promote equal access to justice and protect the independence of the legal profession and the judiciary.

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About the Cover

Emily Allen, Elizabeth Diaz, Jill Monthei and Rusty Brace serve up the annual SBCBA barbecue. Coverage begins on page 7.

Unitrust Conversions and the Opportunities They Present for Win-Win Resolutions for Both Beneficiaries and Trustees

By Claude J. Dorais*

Being a trustee has never been an easy job. It involves keeping the big picture in focus and at the same time paying attention to the myriad details involved. Add to that the often competing interests of different beneficiaries and the need to manage funds over time, sometimes for many years, and the task becomes even more daunting.

How is a trustee to properly balance the desire to protect against erosion by inflation, the need for reasonable current income, the desire for long-term real growth and the importance of protecting principal – all at once? A trustee can try to reconcile all of this by looking at "total return," but how does that play out when one class of beneficiaries is entitled to income and another ultimately gets what is left? A trustee often has some discretion in classifying income and principal, but going that route usually requires ongoing decisions, with the discussion, potential criticism, downside risk, and stress that often comes from regularly revisiting what may be a touchy subject.

"How is a trustee to properly balance … when one class of beneficiaries is entitled to income and another ultimately gets what is left?"

The current investment climate brings some of the inherent tensions of the trustee's overall investment responsibilities into even sharper focus. Returns on the most conservative and liquid investments are very, very low. The best opportunities for true growth may well be longer term investments that generate little or no current income.

A unitrust is one of the tools that is often overlooked as a technique for reconciling tensions between current and remainder beneficiaries. A trust instrument can specifically discuss the unitrust approach, dictate whether it is allowed and, where allowed, can set parameters. However, it seems that most estate planning trust agreements, where at least the income beneficiaries are natural persons, are silent on the subject. If the document is silent, is the trustee stuck?

Not at all. California is one of many states that codify the ability to utilize the unitrust approach, even when the trust instrument is silent. Discussion of an actual recent matter illustrates the concept:

Claude J. Dorais

An elderly lady passed away leaving a substantial estate, the largest asset of which was a paid-for home in our area. Other assets included limited partnership and similar interests in other states, assets which were difficult to value, almost impossible to market, and which paid irregular income. The life beneficiary was the client's longtime companion, and the remainder beneficiary was a charity.

The trustee selected by the settlor faced several challenges. The largest single asset, by far, was the home and it was costly to maintain. Other assets generated income, but not enough to maintain the home and generate significant income for the immediate beneficiary, who had a life expectancy of approximately 30 years. The trustee reasonably concluded that there was little he could do to raise the income stream from the non-home assets. He was faced with the prospect of being unable to adequately address the short-term needs of the life beneficiary or with invading principal to generate reasonable present distributions for the life beneficiary, a strategy which would consume the non-home assets and was thus fatally flawed.

Counsel for the life beneficiary, John Parke of Allen & Kimbell, LLP, came up with what turned out to be the best solution for everyone – conversion into a unitrust. The proposed long-term payout rate of 4% was reasonable and was approved by the remainder beneficiary. Those pesky limited partnership assets were a small part of the overall estate and were simply carved out from the asset base to which the unitrust percentage was applied.

It was explained to the life beneficiary that the home she continued to occupy was not part of the unitrust asset base, but once it was sold the base would rise considerably and so would her unitrust payment.

As often occurs, there were important considerations outside of the legal aspects. The life beneficiary was griev-

ing and understandably found the process of moving on challenging. However, she grew excited about the prospect of a new home, in another state, which could be acquired at a fraction of the value of the current home in Santa Barbara. The trustee was accommodating, as the settlor would have wished him to be. The present home was sold and a portion of the proceeds was used to acquire a new home in the trust's name for the life beneficiary – a home worth a fraction of the old one and much easier and less expensive to maintain.

The end result, which was consented to by both the life and the remainder beneficiaries and did not require any Court proceedings, was that the trustee had far more funds to invest, the income to the life beneficiary was greatly increased, the need to consider invasions of principal was virtually eliminated, the trustee could invest for longer term total return, and the administrative costs of running the trust (not to mention legal expenses) were reduced. The life beneficiary ended up with greater income, and the charitable remainder beneficiary not only preserved the likely long-term value of the gift which would ultimately come to it, it increased the odds that the gift would grow over time.

The process was straightforward, simple, and efficient. In the end, everyone was better off.

The tools needed are all in the Probate Code. Most of them can be found in Sections 16336.4, *et seq.*[1]

In the right situation, the ability to convert to an unitrust, whether through a judicial process or by consent, can be a valuable and efficient tool. If circumstances change after a conversion, it is even possible to convert back out of a unitrust. ■

Mr. Dorais is with Dorais, Polinsky & Reese, Law Corp., in Santa Barbara. His practice encompasses estate planning and administration as well as insurance regulatory and business law. He is the former co-Chair of the Estate Planning Section of the Santa Barbara County Bar Association and has served on its Board of Directors.

ENDNOTES

1 Tax considerations are beyond the scope of this article. As a starting point, however, the reader may wish to consider that final regulations under IRC § 643 make clear that the IRS will permit a beneficiary entitled to "net income" to have that net income determined either through exercise of the power to adjust between principal and income or by a noncharitable unitrust with a payout percentage of not less than 3 percent and not more than 5 percent and will permit trusts to switch methods of determining net income without adverse tax consequences so long as a state statute authorizes these innovations. Treas. Reg. § 1.643(b)–1; TD 9102, 2004–1 Cum Bull 366.

Chef and attorney, Mack Staton

SBCBA Barbecue 2016

A multitude of thanks from the Santa Barbara County Bar Association to all who joined us for our Annual BBQ at Tucker's Grove. Special thanks to our exceptionally talented and enthusiastic volunteers (some of whom have tirelessly and generously contributed their considerable skills for decades!):

- Chefs Rusty Brace and Mack Staton for the delicious dinner entrees, along with their highly capable crew members: Tom Foley, Mike Denver, Paul Roberts, Paul Hayes, Marisa Beuoy, Sara Kuperberg, and longtime chef extraordinaire, Bill Duval;

- Expert Bartender Will Beall & his indispensable team of one: Eric Burkhardt; and

- Sommelier Joe Liebman who yet again donated the fine wine (as always, the compliments flowed as well!).

More gratitude goes to SBCBA Board Members, Elizabeth Diaz and Emily Allen, for lending their creativity and energy in ably organizing the BBQ, to SBCBA Events Chair Mike Brelje, to Casey Nelson and Jill Monthei for so willingly lending helping hands, and to our ace photographer, Michael Lyons for memorializing our event.

A huge thank you to our generous sponsor:

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(See pages 16-17 for more photos)

Trials of the Century

By Mark J. Phillips and Aryn Z. Phillips

Mark and Aryn Phillips

The following is a condensed excerpt from *Trials of the Century: a Decade-by-Decade Look at Ten of America's Most Sensational Crimes (Prometheus Books)* in bookstores as of July 2016, © Mark J. Phillips & Aryn Z. Phillips.

The French called it "The Crazy Years," for the extraordinary social, economic and artistic changes that occurred. The British called it "The Golden Age Twenties," for its years of economic boom. In America, it was the "The Roaring Twenties," and it was the decade in which the Twentieth Century came of age. The Twenties brought peace and prosperity to most, and a sense of social evolution. Charles Lindbergh piloted the Spirit of St. Louis from New York to Paris. Baseball was America's pastime and Babe Ruth its unquestioned king. Prohibition in 1925 did little to slow the party atmosphere of Jazz, Flappers and excess, which roared unabated until the stock market crash of October, 1929. And above all, America went to the movies.

In 1921, Roscoe "Fatty" Arbuckle was the highest paid film star in Hollywood. King of the two-reel comedies, he was beloved by millions for his pratfalls, his pie fights and his innocent, angelic smile. Studios churned his movies out by the score, and excited ticket buyers across the country stood in line to watch them.

But all that came to an end on September 5, 1921. Coming off a punishing year-long schedule of back-to-back filming, Arbuckle drove with friends to San Francisco for rest and relaxation over the Labor Day weekend. Prohibition was in full swing, but liquor was available to those who could afford it, and Arbuckle certainly could. That weekend, after a drunken revel in his suite at the St. Francis Hotel, Arbuckle was wrongfully charged in the rape and death of actress Virginia Rappe. Rumors swirled of his callousness, brutishness and sexual deviation, none of it true. Caught in a firestorm of ambitious politicians, rapacious studio owners, social reformers and newspaper publishers, Arbuckle was tried in both the courts and the press. Three trials later he was acquitted, but the damage was done. He was blacklisted, financially ruined and one of the most reviled men in America.

Born March 24, 1887, Arbuckle was one of five children in a poor farming family in Smith Center, Kansas. His father, William, presumed him to be the product of his wife's infidelity, and in revenge and derision named him Roscoe Conkling Arbuckle, after controversial New York senator Roscoe Conkling, a notorious womanizer and the power broker in the unconventional election of Rutherford B. Hayes in 1876.

On his own since age twelve, even then 185 pounds, Arbuckle was a talented performer, capable of broad slapstick physical humor, dancing and pratfalls. His humor and charm were popular with audiences. On stage he played parts of every ethnicity and age. Wherever he went he was known as "Fatty" and that nickname appeared everywhere; in articles, movie posters and product promotions. But it was only a screen name, and Arbuckle never used it himself nor did his friends use it in conversation with him. When anyone addressing him as "Fatty" in public, he responded "I have a name, you know."

By the summer of 1921, Arbuckle was at the height of his success and popularity, and Paramount signed him to an unprecedented three-year, three million dollar contract which made him the highest paid movie actor of his day. He entertained often, spent freely and saved nothing. He employed a butler and a chauffeur. He kept six cars, including a Rolls Royce and a custom built Pierce-Arrow touring car four times the size of an average car. Arbuckle told interviewers, "Of course my car is four times the size of anyone else's. I am four times as big as the average guy!" At $25,000, the car cost one hundred times the average American's annual salary.

These excesses of Hollywood stirred the passions of the national press and caught the attention of politicians. Newspapers, particularly the Hearst dailies, ran editorials critical of movie actors, and calls came from many directions for the industry to police itself. It was in this charged environment that Arbuckle announced an "open" party at the St. Francis Hotel, loaded his Pierce-Arrow with supplies, and headed north to San Francisco.

Monday, September 5, was the national holiday, and Arbuckle's suite began to fill with guests. Amongst them was a curious pair; Maude Delmont and Virginia Rappe, the former a petty criminal and the latter a twenty-five year old bit actress with a reputation as a likely prostitute. Arbuckle had never met either of them except in passing and there is some dispute about what they were doing in San Francisco that weekend, but according to witnesses Rappe was in San Francisco to have an abortion.

By midmorning the party in Arbuckle's suite was in full swing. There was food, bootleg liquor, music and dancing, and a stream of guests coming and going. Rappe became extremely drunk, then inexplicably erupted into hysterics and ran through the suite ripping at her clothes. Startled witnesses believed she had been accidently kneed in the abdomen by Arbuckle while dancing. When Arbuckle later attempted to use the bathroom in his room, he found Rappe vomiting into the toilet. She was crying with pain, and he carried her to his bedroom to lie down. She continued to tear at her clothes.

By midmorning the party in Arbuckle's suite was in full swing. There was food, bootleg liquor, music and dancing, and a stream of guests coming and going.

When Delmont entered the room she found Rappe on the bed disheveled and screaming, with Roscoe leaning over her. The clamor brought other guests, and Delmont ordered those present to fill the bathtub with cold water to cool Rappe's fever. Arbuckle located a vacant room down the hall and took her there to lie down, Delmont following to keep an eye on her. Arbuckle phoned the hotel manager and asked for the physician on call, who opined that she was simply suffering from too much to drink.

The party continued without Delmont or Rappe for the rest of the afternoon in high spirits, and with no other incidents.

The next day, Tuesday, September 6, Rappe was no better. Delmont summoned another doctor, Melville Rumwell, a physician associated with the local Wakefield sanitarium. This was an unusual selection but perhaps telling, as Dr. Rumwell was a specialist in maternity, and Wakefield an institution with a reputation for performing abortions.

That afternoon, Arbuckle checked out of the St. Francis, picking up everyone's tab for the weekend. He boarded the ferry *Harvard* for the trip south to Los Angeles. On Wednesday, September 7, Arbuckle returned to work.

Back in San Francisco, Rappe's condition continued to deteriorate. She was moved to the Wakefield sanitarium on Thursday afternoon. By then delirious with a high fever, she died of peritonitis and a ruptured bladder in the early afternoon of Friday, September 9. After Rappe's death, Maude Delmont contacted the San Francisco Police Department and swore out a complaint against Arbuckle, alleging that he had dragged Rappe in his bedroom and raped her, either personally or with a Coca-Cola bottle, and that her death was the result of his assault.

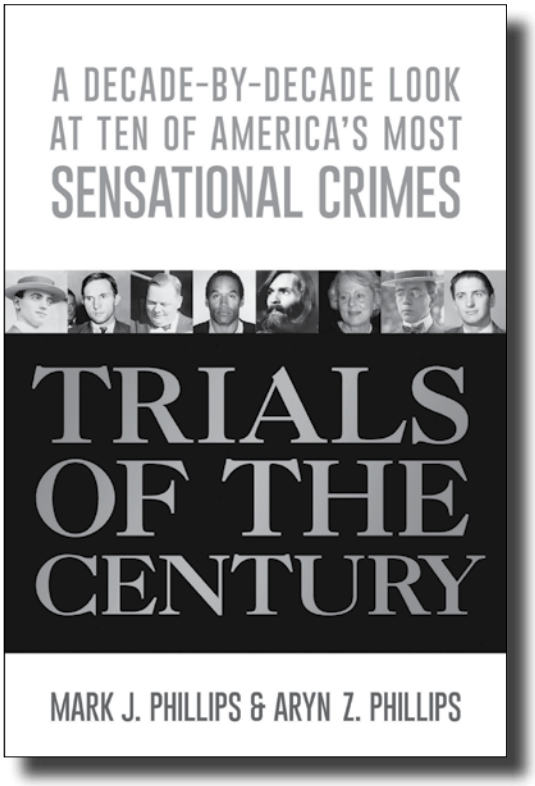
Arbuckle did not even know that Rappe had died until two officers from San Francisco knocked on his door in Los Angeles and summoned him to San Francisco for questioning. Early Saturday morning, Arbuckle returned to San Francisco with an attorney, Frank Dominguez, and reported to the Hall of Justice, where he was questioned for three hours. Dominguez believed the matter of Rappe's death would be dispensed with easily and in due course, but was concerned about the consequences of Arbuckle's possession of bootleg liquor. He advised Arbuckle to remain silent. His concerns were seriously misplaced and at about midnight that night, Saturday, September 10, Arbuckle was arrested and charged with first degree murder. He spent the next 18 days in jail, a celebrity even incarcerated, until bail was granted on September 28.

That Arbuckle came to find himself in this fight for his life was the result of several colliding forces. First, Delmont's inexplicable fabrication of the assault on Rappe, given in the form of a sworn affidavit, could not be easily explained away or ignored by the authorities. Second, the new district attorney in San Francisco, forty-six year old Matthew Brady, a politically connected and ambitious lawyer now in his second year as prosecutor, saw the prosecution of Arbuckle as a stepping stone to higher office. Finally, and importantly, the immediate focus of both the local and national Hearst papers was overwhelming and uniformly biased against Arbuckle.

The coverage was all-pervasive. Beginning Monday, September 12, the Hearst dailies ran sensational front page

headlines every day, including "Fatty Faces Coroner's Jury", "Orgy Girl Offered Bribe to Keep Mum" and "Movieland Liquor Probe Started – 40 Quarts Killed At Fatty's Big Party." So did papers all over the United States. Coverage in *The New York Tribune,* founded by Horace Greeley in 1841, was nearly continuous. While some reporting was relatively balanced, this was the age of yellow journalism and much of the content pilloried Arbuckle.

Trial commenced before Superior Court judge Harold Louderback on Monday, November 14. Arbuckle was now represented by attorney Gavin McNab, well known for representing Hollywood celebrities, and a team of four other respected attorneys. After five days of questioning, a jury of seven men and five women was empanelled.



Prosecutor Matthew Brady was working with weakening evidence and recalcitrant witnesses. Those present at the Labor Day party had been interviewed by the police immediately after Rappe's death and had initially backed Delmont's story, but several had recanted and refused to sign statements. Brady threatened them with perjury and confined them in protective custody to prevent the defense from interviewing them.

But Brady's most difficult challenge was Maude Delmont. The charges were based largely on her claims, but not only was she a lifelong criminal, she had changed her story so many times that by the time trial commenced both sides knew that she was a liar as well. To make sure her earlier testimony at the inquest would not be contradicted at trial, Brady had her jailed on bigamy charges and refused to release her to testify. Defense requests to call her to the stand were turned down by the court.

Prosecution witnesses included guests at the party, a studio security guard who testified to Arbuckle's having met Rappe two years before in 1919, a hotel chambermaid who testified to the rowdy nature of the celebration, and a criminologist who testified that Arbuckle's fingerprints on the inside of his bedroom door obscured those of Rappe, suggesting that Rappe had struggled to open the door and that Arbuckle had forced it closed.

Defense experts were called to demonstrate that Rappe's death could have been the result of disease. Other witnesses included those who testified that they had witnessed Rappe on prior occasions drink to excess and run about tearing at her clothes, even running naked in the streets. The guest who invited Rappe testified that he witnessed nothing that could have caused her injuries or death.

Arbuckle was the final witness in his defense. His testimony was described as calm, lasting four hours. He recounted the events of the party and how he found Rappe on the floor of his bathroom in front of the toilet, carried her into his room and put her on the bed. He described her distress, the screaming and the tearing at her garments. On cross-examination the prosecutor retraced Arbuckle's testimony but was unable to find chinks in his defense. It was clear that if a crime had been committed, no one had seen it and there was no physical evidence that pointed to Arbuckle.

Maude Delmont, with her black past and her shifting story, was never called as a witness.

Both sides made closing arguments, the defense portraying Arbuckle as a kind man who had sweetened the lives of millions of little children, now needlessly suffering when no crime had been committed, and the prosecution calling him a moral leper with whom no woman in America was safe.

The jury retired for deliberation. After forty-one hours they returned on December 4, unable to reach a verdict at 10-2 for acquittal.

A second trial commenced on January 11, 1922, before a new jury, again featuring Brady for the prosecution and McNab for the defense. Many of the same witnesses testified, and buoyed by his near success in the first trial McNab chose not to have Arbuckle testify, focusing instead on a parade of witnesses who trashed Rappe's reputation. The strategy backfired, with nearly disastrous results. After two days of deliberation, the jury returned deadlocked again, but this time 10-2 for conviction.

The third and final trial commenced on March 6, 1922. After the near scare of the second jury, this time McNab left

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Getting To Know The Santa Barbara Barristers

By Jeffrey Soderborg, Barristers President, and Joseph Billings, Barristers Representative to the SBCBA

The Santa Barbara Barristers (SBB) is a nonprofit organization with a mission to advance education, collegiality and professionalism among members of the local Bar by providing educational and social opportunities for the Santa Barbara County legal community to participate in. SBB also aims to promote and participate in activities benefiting other non-profit organizations and our local community as a whole.

Through exciting (and low cost) MCLE luncheons, SBB ventures to broaden the perspectives of the local legal community, while providing productive and informal forums for interaction. Our MCLE programs cover topics that are both useful for local practitioners and relevant to current issues in the legal profession. Some recent programs included a presentation with Judge James Herman on e-filing in Santa Barbara County, a presentation by Judges Thomas Anderle and Peter Carroll on the differences between practicing in State vs. Federal Court, and a presentation on privacy law in conjunction with the local UC Hastings Alumni Association.

SBB also holds social engagements throughout the year to provide an opportunity for new attorneys, law students, seasoned practitioners, judicial officers and all other legal professionals to network, as well as to stimulate a worthy professional spirit amongst the legal community. As its latest endeavor, SBB will be collaborating with the Santa Barbara Young Professionals Club (SBYPC) as a means of providing an opportunity for Santa Barbara County lawyers to network with other professionals in the Santa Barbara community. To this end, SBB anticipates sponsoring a SBYPC event in the fall of this year.

Additionally, SBB proudly produces and publishes the bi-annual Santa Barbara County Attorney Directory to provide a concise, comprehensive and helpful resource for locating attorneys, judicial officers, government agencies, and other legal resources and services throughout Santa Barbara County.

SBB has historically provided significant support in the form of monetary grants to various law based service providers and non-profit organizations. In that vein, SBB is proud to be hosting a 2016 Pro-Bono Bowl for the benefit of the Legal Aid Foundation of Santa Barbara County. SBB last hosted the Pro-Bono Bowl in 2014, which was attended by many lawyers, judges and paralegals. Proceeds from the event were donated to Legal Aid.

For more information about future MCLE programs and social events, please visit our website at www.sbbarristers.com. There you will find links to become a member of SBB, and to sign up to receive further information. ■

Santa Barbara Barristers Board (From Left to Right): Shannon DeNatale-Boyd, Jeffrey Soderborg, Paul Schonauer, Joe Billings, Virginia Fuentes, Lauren Wideman, Connor Cote and Alison Bernal (Not pictured, Jameson Acos and Andrew Alire)

Phillips and Phillips, *continued from page 10*

no stone unturned, carefully detailing both Rappe's sordid past and calling Arbuckle to testify in his own defense. After five weeks and only six witnesses called by an exhausted prosecution, the jury retired to deliberate on April 12.

It returned in less than five minutes. Not only did it vote unanimously for an acquittal, it took the few minutes behind closed doors to craft a written apology to Arbuckle which it handed to the court. The jurors wrote:

> "Acquittal is not enough for Roscoe Arbuckle. We feel that a great injustice has been done him.… We wish him success, and hope that the American people will take the judgment of fourteen men and women who have sat listening for thirty-one days to evidence, that Roscoe Arbuckle is entirely innocent and free from all blame."

But the verdict of a single San Francisco jury, even one motivated to the extraordinary gesture of penning a written apology to the defendant, was not enough to save Arbuckle's career. Within a week of the death of Virginia Rappe, exhibitors in every city in America had withdrawn Arbuckle's films, and those that had been completed and ready for distribution were never released. His record-setting three-year $3,000,000 contract was canceled, and without the ability to work Arbuckle was financially ruined.

Fueled by newspaper coverage, the groundswell of negative publicity continued to build. Amid a Hollywood lifestyle considered by most Americans to be out of control, Arbuckle was only the most visible example. In early 1922, other scandals set the newspaper presses running, including the murder of Paramount director William Desmond Taylor and the death of movie heartthrob Wallace Reid. These scandals, along with the Arbuckle trials, led to the creation of the Motion Picture Producers and Distributors of America, known as the Hays Office, under the dictatorial sway of Presbyterian elder and former Postmaster General, Will Hays. Just as major league baseball hired Judge Kenesaw Mountain Landis as Commissioner in 1921 following the 1919 Black Sox Scandal, so the movie industry the next year formed the Hays Office to deal with public backlash against a trail of broken lives and disgraces that threatened the young industry. Formed in January of 1922, one of Hays' first moves was to blacklist Arbuckle, prohibiting him from working in films.

In 1925, Arbuckle's wife, Minta, from whom he had been separated nine years, divorced him. He married twice more, in 1925 to actress Doris Deane, who he met for the first time on the fateful ferry ride home from San Francisco on September 6, 1921, and again in 1933 to young actress Addie McPhail. After a high-spirited dinner on June 29, 1933, to celebrate a just received offer to appear in a feature length film for Warner Brothers, Arbuckle and Addie returned to the Central Park Hotel in Manhattan and went to bed. Arbuckle died in his sleep. He was forty-six.

His films now largely unwatched, America has forgotten Arbuckle, once its darling. A century of innovation, from silent to sound, short to feature length, black and white to color, faltering nitrate to sophisticated computer graphics, has relegated Arbuckle and his contributions to the back drawer of history. Scholars and critics may know him, but few Americans today recognize his name, and those who do remember only vaguely the rape and rumored coke bottle; the legacy, obituary really, written for Arbuckle in the newspapers in the fall of 1921 when he was still a household name. Few in America have fallen so far or so fast. And few profited from that fall, except perhaps William Randolph Hearst, who once boasted that the Arbuckle trial sold more of his newspapers than the sinking of the Lusitania. ■

City of Petaluma v. Superior Court:

Upholding Attorney-Client Privilege and Work Product Protections When Attorneys Conduct Workplace Investigations

By Robin Oaks, J.D.

In June 8, 2016, the Court of Appeal, First Appellate District, Division Three, ruled in *City of Petaluma v. Superior Court* that an investigation report and related investigation conducted by an independent outside attorney investigator hired by the City was protected by the attorney-client privilege and work product doctrine. *City of Petaluma v. Superior Court* (Cal.App. 1st Dist., June 8, 2016) (No. A145437). Recent court rulings have evaluated when the attorney-client privilege (Evidence Code § 954) and work product doctrine (Code of Civil Procedure § 2018.030) protect attorney-directed interviews, attorney-written opinion letters containing factual information, and documentation when attorneys are conducting fact-finding.[1]

The Court ruled that although the attorney investigator expressly stated that legal advice would not be provided, and the client (City) had asserted an "avoidable consequence" defense, the investigation report is protected from disclosure by the attorney-client privilege and work product doctrine. The *Petaluma* decision represents a significant step forward in recognizing that attorneys who conduct fact-finding investigations are providing "legal services."

The initial focus of the inquiry is on the "dominant purpose of the relationship between attorney and client," *i.e.*, whether an attorney-client relationship is created. Based on the express actions of the parties, the Court was convinced that the attorney investigator was retained for her legal expertise and experience conducting investigations, and an attorney-client relationship was created. The Court's decision highlights the importance of including a thorough definition of services in retention agreements when investigations are conducted or attorneys provide other limited task-based "unbundled"[2] legal services. Additional measures should be instituted before and during the investigation that will ensure any applicable privileges are preserved.

City of Petaluma Case Background

In *Waters v. City of Petaluma*, Andrea Waters, a City firefighter, sued the City of Petaluma claiming hostile work environment and discrimination based on gender, retaliation, and failure to prevent the harassment. The City then hired an outside attorney who was specifically retained to conduct a fact-finding investigation of the Plaintiff's allegations based on the EEOC charges filed. The attorney conducting the investigation expressly stated in the retention agreement that she would not provide legal advice to the City. Instead, the City Attorney was solely responsible for providing legal advice to the City relating to the matter.[3]

Robin Oaks

Waters subsequently filed a complaint and the City denied the allegations, asserting several affirmative defenses. The defenses included that the Plaintiff 1) failed to take advantage of any preventative and corrective opportunities or to otherwise avoid harm, and 2) failed to take reasonable and necessary steps to avoid the harms and consequences. These defenses constitute the "avoidable consequence doctrine."

The Plaintiff requested in discovery all investigation documents and related communications. The City objected, citing the attorney-client privilege and work product doctrine. The Plaintiff moved to compel the production of documents claiming that the investigation was not privileged because 1) the attorney hired to provide fact-finding was not providing any legal advice, and 2) in the alternative, the City waived any privilege that might exist when the "avoidable consequence defense" was asserted and the investigation was thereby placed at issue.

The trial court granted the motion to compel relying on the Plaintiff's argument that the investigator was not providing legal "advice" as an attorney, only a fact-finding investigation. Further, the City had asserted the avoidable consequence defense, which, according to the trial court, by necessity, placed the investigation at issue. The Supreme Court granted the City's petition for writ of review and then transferred it to the Court of Appeal with direction to issue an order to show cause as to why the relief requested by the City should not be granted. Amicus briefs were filed on behalf of and in support of the City by the Association of Workplace Investigators, Inc., The League of California

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Marisol Alarcon, Jeff Soderborg, Joe Billings

Jana Young and Judge Tom Anderle

Judge Donna Geck & Judge Jean Dandona

Seana Thomas, Danielle De Smeth, Mike Lyons

Sara Kuperberg, Christina Cila, Nick Behrman

Emily Allen, Jennifer Smith, Nicole Champion, Erica Hoover, Danielle De Smeth

2016 SBCBA Barbecue

Mike Brelje, Bruce Hogan, Jim Griffith, Bill Clinkenbeard

SBCBA President Jim Griffith

Joe Liebman, Will Beall, Eric Burkhardt

Ben Feld, Elizabeth Diaz, Emily Allen,Cameron Van Tassel

Virginia and Tobacco

By Robert Sanger[1]

Robert Sanger

Having lived in Virginia, it did not surprise me that the Governor of Virginia would have gotten in trouble trying to market tobacco. It is a big crop and factored in the Continental debates over the form of our national government. With all the current restrictions on tobacco consumption and advertisements to stop smoking, you would think that tobacco would be on the Virginia Governor's mind. Of course, the recent Supreme Court case of *McDonnell v. United States* (June 27, 2016), concerned the Virginia Governor's dealings with the manufacturer of Anatabloc, a nutritional supplement. Oh yes – it was made from anatabine, a compound found in tobacco!

The *McDonnell* case got a tremendous amount of publicity, heralding it as anything from legalizing influence peddling[2] to a barrier to public corruption cases[3] to an indication that the Supreme Court is headed in a different direction.[4] This month's *Criminal Justice* column will examine the *McDonnell* case from the perspective of what it really does and does not mean to elected officials, the business community and those who might otherwise get caught in the white collar prosecution web.

What McDonnell Does Mean

First of all, the *McDonnell* decision was unanimous and the opinion was written by Chief Justice Roberts. That is significant in that it is an opinion concerned with the over-criminalization of America. We have pointed out before in this column that this is actually an issue in which the Cato Institute and the Federalist Society on the one hand, and the ACLU and the National Association of Criminal Defense lawyers on the other, have come together. Too much government regulation has been exacerbated by too many criminal sanctions. As a corollary, prosecutors also have too much discretion to decide who will be prosecuted under the laws that authorize prosecution. In the federal system, mail fraud, wire fraud and public corruption under the Hobbs Act are popular, and vague, statutes under which federal prosecutors have exercised this broad filing discretion.

In this case, Governor McDonnell of Virginia was indicted for one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and two counts of making a false statement. Wire fraud was the basis for the fraud under 18 U. S. C. § 1343 in conjunction with honest services fraud under Section 1349. Public corruption extortion was brought under Section 1951(a) (the Hobbs Act) and, finally, a charge of false statement was appended under Section 1014. The theory of the government was that the Governor accepted something of value from the manufacturer of Anatabloc, Star Scientific, in exchange for being influenced in the performance of an official act as defined in 18 U.S.C. § 201(b)(2).

The problem for the government (and the reason they never should have brought the case in the first place) is that the Governor never agreed to do, nor did he do, an official act. The allegation was that: he arranged meetings for the manufacturer with public officials; he hosted and attended events at the Governor's Mansion to encourage Virginia university researchers to do studies; he contacted government officials to encourage these studies; allowed the manufacturer to invite others to Governor Mansion functions; and recommended to senior government officials to meet with the manufacturer's executives to discuss ways that the product would lower health care costs.

Besides firing a warning shot over the prosecutors' bow and, perhaps, reminding the Legislature about the unfairness of overbroad criminal statutes, the Court also ruled on this particular case. But, while the message may at least reinforce the Court's concerns about over-criminalization, the case itself does not really make any new law. The law as interpreted is really uncontroversial and, except that these prosecutions caused severe damage to the lives of the governor and his wife, the opinion is not that important. In fact, the district court judge had modified a pattern instruction creating the problem and this is more a matter of correction of an error than a matter of jurisprudence.

What McDonnell Does Not Mean

McDonnell was a governor who met with his constitu-

ents and promoted commerce. The Supreme Court held that, "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act'." That is just common sense and is consistent with the Court's precedents. The fact that this decision was unanimous and was authored by the Chief Justice is just a reflection of the fact that the decision was not controversial. So, this case does not mean that the definition of "official act" is contracted.

It also does not mean that criminal politicians are getting away with something. Elected officials are expected to listen to their constituents and to make sure that their concerns are being heard. Nor does it mean that the Court is moving to the left or is more likely to go easy on corporate executives or condemn any working relationship between labor and commerce. The law remains unchanged after *McDonnell.* The prosecution still has to prove that there was an official act that was agreed to be done or that was, in fact, done.

Cognitive Bias and the Court Decision

Why then did this case evoke such a reaction? Is it the same reason that the district court judge modified pattern jury instructions to make prosecution easier? Is it the same reason that the prosecutor pursued the case to indictment even though the facts were not there? Is it that tobacco, or politicians in general, are regarded with disdain? If so, it may be that cognitive bias played a role in selection of the case, indictment and prosecution and may have had a role in the trial judge's decisions while presiding over the trial.

First, this was a high profile case. In high profile cases, none of the lawyers or judges think like they do when they are handling ordinary cases. There is a tendency to think large. Nothing is simple or routine. Everything done is done with an eye on how it will play in the press. This is true of indictment decisions, choice of legal theories, evidence produced, legal arguments made and just about all else. When lawyers and judges are looking over their shoulder at the national or international press, every decision and the announcement of every decision become larger than life. We have seen time and again that larger than life decisions can lead to wrongful convictions.

Second, there is the public perception of the case. Here it is not hard to imagine the pressure that public opinion put on the players. This can involve pressure on judges and jurors, but can also impact the prosecutors. Here there is a governor accused of corruption involving the tobacco industry. That in and of itself would be enough to engender larger than life thinking. That kind of thinking results in unusual decisions that would not be made in the same fashion if the sensational aspect of the case were not present.

Third, money. The fact that a defendant can afford to pay for a defense is significant. When defendants or their families or supporters have money, lawyers converge on the client and his entourage to become involved in the case. This entourage – the, often inaccurate, view of the defense as a "dream team" – evokes a response from prosecutors to fight even harder to win – sometimes to win at all costs.

Conclusion

And all of these factors, including overbroad charging discretion, the real or apparent cognitive biases associated with cases that evoke emotion, and the high publicity of the case, come together synergistically to do injustice. What *McDonnell* means, more than its relatively insignificant addition to jurisprudence, is that there are times when prosecutors, judges and defense lawyers evaluate and handle cases, not strictly on their legal merits, but are influenced by other intangible biases. Having said that, one has to wonder why this case was taken by the Supreme Court over so many others that presented actual unresolved legal issues.

Perhaps the case stands as another reminder that the legislative efforts to reform federal criminal law need to be taken seriously. People in politics and business have a right to know what is criminal conduct and what is not. Criminal statutes should define a clear line between criminal and non-criminal behavior. The focus should not be on whether something affects interstate commerce or whether there was the use of the mails or the internet. The focus should be on whether someone willfully violated a clearly written statute that proscribes specific criminal behavior. ■

Robert Sanger is a Certified Criminal Law Specialist and has been practicing as a criminal defense lawyer in Santa Barbara for over 40 years. He is a partner in the firm of Sanger Swysen & Dunkle. Mr. Sanger is Past President of California Attorneys for Criminal Justice (CACJ), the statewide criminal defense lawyers' organization. He is a Director of Death Penalty Focus. Mr. Sanger is a Member of the ABA Criminal Justice Sentencing Committee and the NACDL Death Penalty Committee.

ENDNOTES

1 ©Robert M. Sanger.

2 Rob Hager, *Supreme Court Legalizes Influence Peddling,* Counterpunch (June 30, 2016) http://www.counterpunch.org/2016/06/30/supreme-court-legalizes-influence-peddling-mcdonnell-v-united-states/

3 Lyle Denniston, *New Barrier to Public corruption Cases,* SCOTUSblog (June 27, 2016) http://www.scotusblog.com/2016/06/opinion-analysis-new-barrier-to-public-corruption-cases/

4 Theodore Ruger and Nan Hunter, *Is the Supreme Court Headed in New Directions?*, ValueWalk (July 4, 2016) http://www.valuewalk.com/2016/07/supreme-court-abortion/

Oaks, *continued from page 14*

Cities, California State Association of Counties, California Association of Joint Powers Authorities, and California Special Districts Association.

Attorneys Conducting Fact-Finding Investigations Are Providing Legal Services

The Court of Appeal decided that neither the attorney-client privilege nor work product protection was waived. The matter was remanded to the trial court to determine the specific items that are or are not protected from disclosure, in light of the decision.

Relying on *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, the court concluded that undisputed evidence was provided that the attorney investigator was retained to use her legal expertise in order to conduct an impartial investigation that would be the basis for the City Attorney to provide legal advice to the City. To determine whether a communication is privileged, the initial focus is on the "dominant purpose" of the relationship between the attorney and client and not on the purpose served by the individual communication. *Costco*, 47 Cal.4th at 739-740. The dominant purpose must be to secure or render either legal *services or* advice. Evid. Code § 951. The court determined that communications were made in the context of an attorney-client relationship between the attorney investigator and the City. Consequently, the communications, which may include any reports of factual material, are privileged, even though the factual material might be discoverable by other means.

Attorneys Retained to Conduct Impartial Investigations are Utilizing Their Legal Expertise and Experience to Conduct Fact-Finding Investigations

The evidence confirmed that the City established a prima facie claim of privilege by presenting undisputed evidence that the investigator was retained to use her legal expertise in order to conduct an impartial investigation that would be the basis for the City Attorney to provide legal advice to the City. The retention agreement specifically stated that the investigator would make findings based upon her professional evaluation of the evidence and experience in employment law and conducting investigations.

The Court recognized that attorneys retained to conduct investigations, regardless of whether they provide legal advice, utilize their legal knowledge and expertise in the process of evaluating evidence and assessing credibility, conducting interviews, and sifting through the factual background with an "eye to the legally relevant." *Upjohn Co. v. United States* (1981) 449 U.S. 383.

Further, although not directly cited in the opinion, when an outside attorney conducts an investigation, she must do so in compliance with the Private Investigator Act, which requires that an attorney be "performing his or her duties as an attorney at law."[4] The ethical responsibility to obtain informed consent from a client when providing limited task-based legal services in the form of impartial investigative services requires an attorney investigator to clarify those legal services that both will and will not be provided.

Although the City could have chosen to have City staff conduct the investigation, the City Attorney contended that the decision to hire an outside attorney investigator was made with the intent to ensure the investigation would be subject to the attorney-client privilege and work product doctrine.

Asserting the Avoidable Consequence Defense Did Not Constitute a Waiver of Privileges

The appellate court also ruled that the City did not waive any privileges by asserting the avoidable consequence defense. The Plaintiff left employment with the City days after the City first received notice of her EEOC charges. "Here, the City does not seek to rely on the *post-employment* investigation itself as a defense, nor could it." *Petaluma,* No. A145437 at 12. The Court's decision did not address whether the assertion of the avoidable consequence doctrine in situations when an employee remains in employment would waive any privileges; however, pleading an affirmative defense in an answer does not require that a defendant pursue that defense, nor mandate what specific evidence the defendant might decide will later be relied upon to prove it.[5]

Suggested Safeguards For Preserving Privileges

The Court's analysis serves as a roadmap for attorneys to follow that will ensure privileges will be upheld when investigations are conducted by attorneys, and also when other task-based unbundled legal services are offered. The following are important actions cited by the Court as relevant to the holding:

1. The scope of services was clearly defined. Not providing legal advice did not preclude a conclusion that the attorney provided legal services.
2. The retention agreement stated that an attorney-client relationship was created between the City and the attorney investigator.
3. The retention agreement specified that the investigation would be subject to the attorney-client privilege unless

the City waived the privilege or a court determined that some or all of the investigation was not subject to the privilege.

4. The retention agreement stated that the attorney would use her employment law and investigation expertise in conducting an impartial fact-finding investigation for the City.
5. Every page of the report contained an indication of confidentiality and attorney-client privilege.
6. Communications between the investigator and the City Attorney were kept confidential, with no documentation disclosed to anyone outside of the attorney-client relationship.
7. The employer made the decision to hire the attorney to ensure the investigation report was protected by applicable privileges, as needed.

Other measures that would be prudent to take include: 1) clarifying that the investigator is a licensed attorney, 2) providing notification to witnesses that the attorney investigator is hired by the employer to conduct an impartial investigation, 3) notifying witnesses that the investigator does not represent any witness specifically, 4) creating a written account of all confidentiality measures that are intended and have been taken, and 5) marking all relevant investigation communications and documentation with language stating: Confidential: Protected by Attorney-Client Privilege and Work Product Doctrine.

The *City of Petaluma* decision stands as sound guidance for counsel who want to preserve privileges when investigations are conducted by attorneys. The Court's reasoning upholding the applicable privileges could equally extend to situations when attorneys provide task-based unbundled legal services. Further, the *Petaluma* decision recognizes by its holding that fundamentally an employer's decision-making is important regarding whether and by whom investigations will be conducted when responding to harassment complaints filed by employees in both private and public sector employment settings. ■

Robin Oaks has been an attorney for over thirty years, and for over twenty years has focused her legal practice exclusively on providing investigative and conflict resolution services for public and private sector clients. She has conducted hundreds of independent personnel investigations, including complaints of discrimination, racial and sexual harassment, multi-million dollar embezzlement and fraud, retaliation, and employee performance or misconduct. With her background as a mediator, teacher, and empowerment coach, she offers conflict resolution consultations, supervisor training, work environment climate assessments, and stress-reduction coaching services, including witness preparation support. Contact her at: Robin@RobinOaks.com *or 805-685-6773.*

Endnotes

1 *Coito v. Superior Court* (2012) 54 Cal.4th 480 (witness statements obtained through an attorney- directed interview are entitled to work product protection); *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 (attorney's written opinion letter with witness statements contained within is protected); *T.E. v. South Berwyn School Dist.* 600 F.3d 612. *See also, In re Kellogg Brown & Root, Inc.* No. 14-5319, slip op.; *In re Kellogg Brown & Root, Inc.* (D.C. Cir. 2014) 756 F.3d 754.

2 Unbundling is a method of legal service delivery in which lawyers break down the tasks associated with a client's legal matter and provide representation pertaining only to a clearly defined portion of the client's legal needs. There is an ever expanding market need for accessible unbundled legal services. Frequently, unbundled legal services include advising on court procedures and courtroom behavior, collaborative lawyering, document review, negotiating, organizing discovery materials, providing legal guidance, fact-finding investigations, coaching on strategy, witness preparation and role playing.

3 Cal. Bus. & Prof. Code §§ 7512-7573. California's Private Investigator Act requires that only persons licensed as a private investigator may conduct workplace investigations *unless* a person qualifies under one of the exemptions set forth in the Act. Sections 7520, *et seq.*, of California's Private Investigator Act control who can conduct an investigation in California. The exemption under the Act allowing attorneys to conduct workplace investigations reads: " (e) An attorney at law in performing his or her duties as an attorney at law." *See* also Lindsay E. Harris and Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, 25 Cal. Lab & Emp. L. Rev., No. 4, 2011.

4 *See supra*, endnote ii.

5 It is often the case, however, that an employer *will* decide that the investigation conducted is the best evidence of preventive measures and response actions taken, and will waive the privileges for investigation reports when defending against a claim of harassment. Other situations in the public sector that may require disclosure of investigation reports involve discipline proceedings of a public employee. *See, Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

The Santa Barbara & Ventura Colleges of Law Names New Dean

Jackie Gardina Tapped as Chief Academic Officer for one of California's Leading Regional Law Schools

The Santa Barbara & Ventura Colleges of Law (COL) announces the appointment of Jackie Gardina as its new Dean and Chief Academic Officer. Gardina was selected after an extensive national search and assumed her post on July 1. She succeeds Heather Georgakis, who served COL for three decades, including 15 years as Dean.

Gardina's extensive experience in higher education includes both academic and administrative positions. She arrives at COL after 13 years of service at Vermont Law School, where as chief academic officer she oversaw graduate and professional programs of over 600 students across six degrees, while also teaching courses such as Civil Procedure and Administrative Law & Bankruptcy. Gardina has been a visiting professor of law for Santa Clara University School of Law, University of Denver Sturm College of Law, and University of Oregon School of Law.

"To have someone of Jackie's caliber and breadth of experience join the Colleges of Law is a testament to our standing in the legal community," said Dr. Matthew Nehmer, COL's Executive Director. "We had candidates from across the country seek the opportunity to serve as our next Dean. In the end it was Jackie's passion for providing people from all backgrounds access to an outstanding legal education that made her stand out. Since our founding in 1969, COL has worked diligently to build a reputation for excellence; with Jackie's leadership we stand poised to build on this foundation toward an even more successful future."

Gardina is a member and former co-president (2012-2014) of the Society of American Law Teachers (SALT) and a former governing board member of Service Members Legal Defense Network (LDN). More recently, Gardina founded and chaired the Association of American Law Schools Section for Associate Deans for Academics and Research and chaired the Associate Dean Conference Committee for the American Bar Association's Section on Legal Education.

"I am excited to join an institution that is dedicated to providing access to an excellent, affordable legal education and a pathway to the legal profession for adults from all backgrounds," said Gardina about her appointment. "I was drawn to the school because of this mission and look forward to working with the Colleges of Law team to take it even further."

Jackie Gardina

Gardina's higher education journey began at the University of Iowa where she completed a B.A. in Political Science before earning a Master in Social Work (M.S.W.) from Boston University. Gardina worked as an outpatient clinical social worker prior to enrolling at Boston College Law School, where she graduated magna cum laude. She clerked for Chief Judge William Young of the United States District Court for the District of Massachusetts, as well as for the Honorable Levin H. Campbell of the First Circuit Court of Appeals. In addition, she was an associate at the Boston firm Choate, Hall and Stewart.

The COL community gathered for alumni/student Midsummer Celebrations on July 15 in Santa Barbara and July 22 in Ventura to say farewell to Dean Georgakis as she begins a third career in legal education consulting. "I am delighted to pass the baton to Dean Gardina, because under her academic leadership I feel certain that our students' best interests will remain the law school's primary focus."

About The Santa Barbara & Ventura Colleges of Law

Established in 1969, The Santa Barbara & Ventura Colleges of Law (COL) was founded to expand opportunities and broaden access to legal education. COL is dedicated to a student-centered approach that affords students of diverse backgrounds the opportunity to pursue careers in law or legal-related fields. The Colleges' faculty advances a real-world perspective and practicality on the application of law and includes practicing attorneys, judges, public servants, and leaders in business and non-profit organizations. An accredited nonprofit institution, COL offers a Juris Doctor (J.D.) and a Master of Legal Studies (M.L.S.) program. COL is regionally accredited by the Western Association of

Continued on page 31

Short Story Contest

Congratulations to Clark Stirling, back-to-back winner of both the May and now June 2016 short story contests! He collects another $50 credit against the price of a future SBCBA event. Clark's story is published below. The Editors look forward to a deeper pool of entries in coming months, but will be glad to recognize any quality submission.

The *Santa Barbara Lawyer* short story contest remains open to all *SBL* readers. The rules are 1) each person may enter only once per month, 2) entries must be between 35 and 350 words, and 3) all August entries must begin with this sentence:

"He insisted that, despite appearances to the contrary, Truth is not a matter of imagination."

The top few entries will be published in the next issue, and we plan to renew the contest each month. In addition to publication, **the August winner will also receive a $50 discount off the price of an SBCBA event**. The discount can be used for the Golf & Tennis Tournament, an MCLE program, the Annual Dinner, next January's Bench & Bar Conference – you decide! Winners will be determined by the *SBL* editorial staff in our sole, arbitrary and capricious discretion. Submit your entry to jsweeney@aklaw.net by September 1st. Enjoy!

By Clark Stirling

With one last look at the letter, the woman raised her eyes to the man seated across the table and stated the obvious – "We definitely need a lawyer."

His reply was a flicked hand of disgust. "I vote we ignore it."

"Good thing you don't get a vote," she trilled, eyes returning to the letter, an unsettled feeling in her stomach, knowing things were worse than he imagined. "If we don't get a great attorney, we could lose everything."

"Everything we've stolen," he smirked, eyebrows bobbing.

She patted her dress, a touch of pink coloring her cheeks, her eyes finding the crumbs on the table suddenly appealing. She then looked closely at Thomas, his calm in light of the accusations admirable, a trait she found so attractive. "Fine, what we've stolen. I just don't want to go to jail."

"So who's trying to blackmail us?"

"Peggy-Ann, the little tramp. Give me one minute with her and I'll – "

"Now Grace," Thomas interrupted, "let's stay focused. Must be some way to get her to back off."

More she thought about it, more frighten she became, now only half listening as she pictured herself behind bars, knowing the claims so nastily recited in the letter were indeed true, that there wasn't another couple in town, heck the entire county, with a comparable record of larceny. Knew they should've been more discreet. "I'm scared."

Thomas reached a hand across the table, intertwined his fingers with hers, told her he'd take the blame, would face the consequences alone.

"But it takes two," Grace whined. "They'll know you didn't do it alone."

"You make a good point."

Grace was almost shaking now, couldn't delay the call for another second. After getting her attorney on the line, Grace summarized the whole sordid affair, all the accusations in the letter, admitting they didn't have a defense. "What are we facing here?"

The attorney just laughed. "I don't condone theft, but stealing kisses during yoga class or glances at work? My advice, keep doing it. I mean really, you've been married six months now." ■

Verdicts & Decisions

Krajcir v. Dish Network

SANTA BARBARA SUPERIOR COURT, ANACAPA DIVISION

CASE NUMBER:	1467590
TYPE OF CASE:	Negligence
TYPE OF PROCEEDING:	Jury Trial
JUDGE:	Hon. Colleen K. Sterne
LENGTH OF TRIAL:	8 days
LENGTH OF DELIBERATIONS:	1 day
DATE OF VERDICT OR DECISION:	March 2, 2016
PLAINTIFF:	Stephanie Krajcir
PLAINTIFF'S COUNSEL:	Raymond Pulverman of Pulverman & Pulverman LLP and Jeffrey Young of The Law Offices of Jeffrey Young
DEFENDANTS:	Ricky Flores, DISH Network
DEFENDANTS' COUNSEL:	William J. Mall and Fred Heiser of Selman Breitman LLP

OVERVIEW OF CASE: Plaintiff fell down a hallway floor hatch that was opened during the installation of DISH Network equipment. She alleged that it was negligent for Flores, the DISH installer, to have left the hatch open when he walked away from the hole.

FACTS AND CONTENTIONS: The Krajcirs were moving into a house, and, on their first day in that house, a DISH network installer, Mr. Flores, arrived to install a DISH system. The installer opened a floor hatch inside the hallway, just outside the kitchen, and went down to the mechanical basement to look around. Plaintiff's husband, Mark Krajcir, showed the installer the location of the hatch. Mr. Krajcir knew his wife was home, likely in the kitchen on the other side of a closed door. Mr. Flores also knew Mrs. Krajcir was on the premises.

While Mr. Flores was in the basement, Mr. Krajcir walked away from the hatch, either to the living room area or outside, to find a suitable location for the satellite dish. Mr. Flores climbed out of the hatch, saw that Mr. Krajcir was not there, and went to look for him. Mr. Flores left the hatch open, and did not warn Mrs. Krajcir that he was leaving the hatch open and unguarded.

Mrs. Krajcir was in the kitchen unpacking boxes and did not know there was an access hole in the hallway. She picked up two boxes that she claimed blocked her view of the floor in front of her as she walked, opened the kitchen door, and fell down the open hatchway approximately 6-8 feet onto the concrete floor.

Plaintiff claimed that Mr. Flores and DISH were the only negligent parties, and that it was negligent to walk away from the uncovered hatch and unguarded hole for any reason. Plaintiff also claimed that Mr. Flores should have warned her that he left the hatch open. Earlier that day the Cox Cable installer also performed work at the home. He covered the open hatch with the cover each time he left the hallway.

DISH and Mr. Flores claimed that the open hatch was an open and obvious condition. Plaintiff admitted that if she had not been carrying boxes, she would have seen the hole, as the hall light and the basement light were on at the time. DISH argued that, since it was moving day, it was incumbent on Plaintiff to be able to see where she was going. DISH also claimed that Mr. Krajcir knew that Mr. Flores was in the house, knew that the hatch was open, knew that his wife

was in the house, and knew that she was likely in the kitchen, immediately adjacent to the hatch, but didn't tell his wife Mr. Flores was there, didn't tell Mr. Flores his wife was there, instead assuming it was Mr. Flores' responsibility.

A former DISH employee, who was a convicted felon for embezzlement, testified that he completed the installation a few days later. The former employee testified that Mr. Krajcir told him the accident was Mr. Krajcir's fault, and asked if they should sue DISH. The former employee also testified that Mr. Krajcir asked him if he could get free TV service.

Summary of Claimed Damages: Plaintiff claimed she fractured the tips of the transverse processes at L1 and L2, and had significant soft tissue complaints, including neck, back, knees, ankles, and left shoulder. She claimed that she has frozen shoulder, and needed additional care for that condition. She also claimed she was no longer able to pursue an active lifestyle. Plaintiff incurred $27,759 in past medical expenses, and claimed $5,500 in future medical expenses.

Defendants argued that Mrs. Krajcir did not have a frozen shoulder, that $20,000 of her medical expenses were incurred in the emergency room, and that she was discharged from the ER after three hours.

Plaintiff asked the jury for $495,000, and claimed that neither she nor her husband bore any liability for the incident. Defendants suggested a $50,000 award, and argued that liability should be evenly split between Mr. Flores, Mrs. Krajcir, and Mr. Krajcir.

Result: The jury awarded gross damages in the amount of $42,508.99 (past medical specials $27,758.99, future medical specials $1,250.00, past pain and suffering $10,000 and future pain and suffering $2,500). The damages vote was 10-2.

The jury allocated liability Flores/DISH: 30%, Stephanie Krajcir: 30%; Mark Krajcir 40%. The liability allocation vote was 11-1. ■

The Litigation Section of the Santa Barbara County Bar Association presents:

YOUR LAW FIRM'S WEB PRESENCE

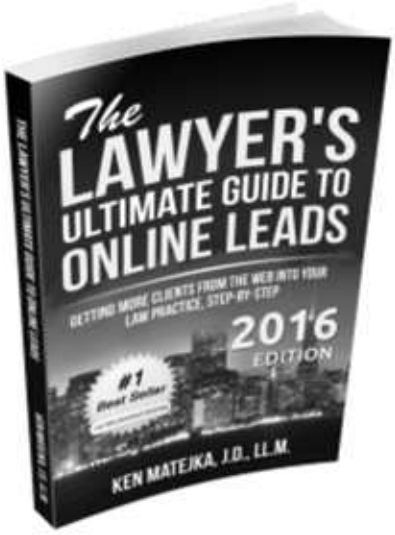
Online Content Creation, and Related Ethical Issues

Every day, lawyers compete for fewer clients as more self-help legal services come online. Your firm's online presence is no longer an optional afterthought of your business plan. However, communication of legal information through your website, email, and social media carries both liability risks and restrictions under the Rules of Professional Conduct.

Join us as California attorney and #1 best-selling author Ken Matejka discusses the elements of a successful law firm website. Learn how to improve your site, make it more visible in Google, and keep all your online properties in compliance with CA Rules of Professional Conduct and related case law.

Speaker: Ken Matejka, JD, LLM, of Matejka Marketing.

Mr. Matejka is a California attorney and former member of the ABA's Standing Committee on Lawyer Referral and Information Services. His company, Matejka Marketing, Inc., is dedicated exclusively to helping lawyers and bar associations get more clients through their web presence.



He is the author of the #1 bestseller, "*The Lawyer's Ultimate Guide to Online Leads*." All attendees will receive a complimentary copy.

Date and Time
Thursday, September 22, 2016, 12 noon to 2:00 pm.
(*PLEASE NOTE: This is a 2-hour presentation.*)

Location
Santa Barbara College of Law, Room #1, 20 E. Victoria Street, Santa Barbara

Reservations
Reserve via email to Mark Coffin,
Chair of Litigation Section, by Thursday, Sept 15th, at:
mtc@markcoffinlaw.com

Cost and Payment
Members $35, Nonmembers $40.00 includes lunch.
Please mail checks by Thursday, Sept 15th, payable to:

Santa Barbara County Bar Association,
c/o LAW OFFICE OF MARK T. COFFIN,
21 E. Carrillo Street, Suite 240
Santa Barbara, CA 93101

MCLE Credit
Two hours: 1 hour ethics credit, 1 hour general credit applied for.

RECEPTION & DINNER

Reception (No Host Bar): 5:00pm at the Frog Bar & Grill at Glen Annie Golf Club
Dinner: 5:30pm at the Frog Bar & Grill at Glen Annie Golf Club,
$40 per SBCBA Member/$45 per Non-SBCBA Member *(after September 15: $45/$50)*

GOLF

Meet at Glen Annie Golf Club (405 Glen Annie Rd, Goleta) 1/2 hour before tee time. Shotgun starts at 12pm. Team prizes for 1st & 2nd places. Individual prizes for Longest Drive and Closest to the Pin! Players must give some estimate of his/her handicap. You will be contacted regarding team assignments.
$95 to Play per SBCBA Member/$100 per Non-SBCBA Member **–** Includes green fees & cart.
(Fee after September 15: $100/$105)
$130 per SBCBA Members/$135 for Non-SBCBA Members
for BOTH Golf and Dinner *($135/$140 after September 15)*

TENNIS

Meet at the tennis courts at the Santa Barbara Tennis Club (2375 Foothill Road, Santa Barbara) at 3:00pm for warm-up with round robin play starting just after 3:30pm. A committee will form teams, reserving the right to make equitable adjustments in all levels. Men and women will participate in the tournament in all levels. Prizes to tournament winners!
$25 to Play per SBCBA Members/$30 for Non-SBCBA Members **–** Includes court fees and balls.
(Fee after September 15: $30/$35)
$60 for BOTH Tennis and Dinner per SBCBA Members/Non-SBCBA Member $65
($65/$70 after September 15)

To register, please fill out bottom portion of this flyer and mail, with check, to:
SBCBA 15 West Carrillo Street, Ste. 106, Santa Barbara, CA 93101
Please clearly specify GOLF HANDICAP or TENNIS RATING.
Questions? Call the SBCBA at (805) 569-5511

Limited Number of Tee Sponsorship: Tee sign on course with your company name ($100)

Name & Phone Number	Handicap/Rating	Tourney Fees	Dinner	Vegetarian?	Total

Amount Enclosed: $_____ (all fees are non-refundable)

2016 SBCBA SECTION HEADS

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For information on upcoming MCLE events, visit SBCBA at http://www.sblaw.org//

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a state-wide network of recovering lawyers and judges dedicated to assisting others within the profession who have problems with alcohol or substance abuse. We protect anonymity. To contact a local member go to http://www.otherbar.org and choose Santa Barbara in "Meetings" menu.

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Colleges of Law, *continued from page 24*

Schools and Colleges Senior College and University Commission (WSCUC), and the Juris Doctor program is accredited by the Committee of Bar Examiners (CBE) of the State Bar of California. For more information, visit www.collegesoflaw.edu.

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