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CITATIONS

NOVEMBER - TWO THOUSAND THIRTEEN

AN ACTIVE PUBLIC SERVANT: WIDDERS WINS NORDMAN AWARD

by J. Roger Myers

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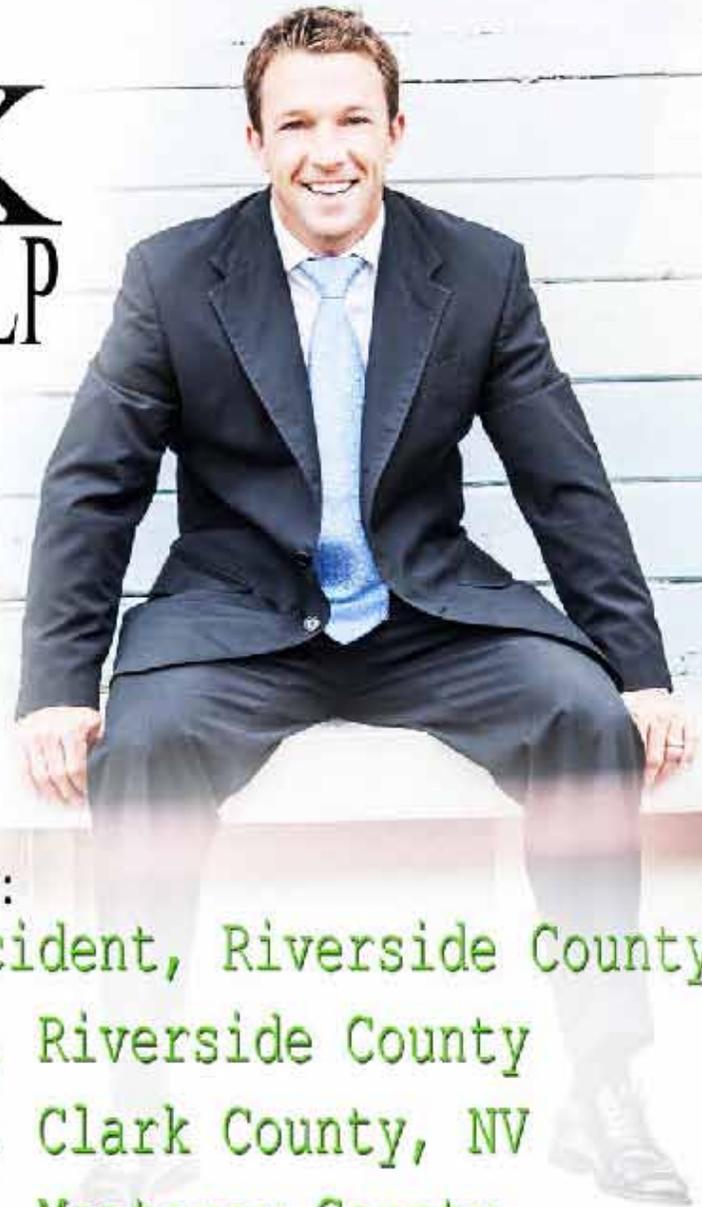
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PRESIDENT'S MESSAGE: DIALOGUE AND COMPROMISE

by Joel Mark

Wasn't it Ben Franklin's point in crafting a constitution for the emerging United States of America that the diversity of the people even then made it highly unlikely that there would be complete agreement on every point in the document? Rather, if I recall my history lessons, he advised dialogue and compromise were required if the framers were to create a document that would portend any chance of having their new nation survive beyond its birth.

Dialogue and compromise were required to set the rules of commerce among the states so that they might become far more economically viable standing together than going it alone. Among other things, this required individual states to give up their own taxing authority for the good of the nation's commerce.

The same was true of devising a mechanism for protecting the fledgling nation from foreign dangers. The lessons learned from the Revolution included that it took the might and cooperation of all thirteen colonies for their union to survive.

And, of course, the issue of slavery had to be addressed if the States in the North and in the South were to remain together as the country evolved from a confederation primarily concerned with gaining its freedom from England into a sovereign nation capable of setting its own direction once the Revolution had been won.

Now, I think I have been a good boy since I began crafting these President's Messages. I

have tried my best over the past ten months to be topical, and I have tried my best not to be divisive. But, I hope you will forgive me this one departure from the second objective. It is just that the lack of dialogue and compromise regarding two issues in our recent civic discourse have just made it too difficult not to use the "bully pulpit" you have given me to say something.

Hopefully, by the time this prints, one or more of these issues will be solved, but I fear that the best we can hope for by then is the cans simply being kicked down the road once again. So, for now I felt compelled.

Congress: What have they been thinking!?:

It seems that, with this Congress, dialogue and compromise have been thrown under the bus driven by ideology. The Affordable Health Care Act, or Obamacare depending on your political affiliation, has been the law for some time and has survived some forty-plus attempts to overturn it. Why did Congress attempt to shut down the entire government over a law that, by many measures, improves the health and welfare of so many citizens? I read an article in the LA Times a few days ago that pointed out how well that type of system works in the United Kingdom, while health care providers in the United States continue to charge outrageous amounts for even routine health care services. Sure the website has had some problems, but the food stamp website that has been up for over a decade also just crashed. Get over it.

Love or hate Obamacare, the shutdown itself threatens the health and welfare of all Americans. The Centers for Disease Control ceased to function. Air traffic has been in jeopardy. Firefighters have had to work for free. Thousands and thousands of American workers have received no paychecks.

What has Congress been thinking? Not enough about the citizens they were elected to serve, at least that is how I see things.

Gun Control: Haven't we had enough?

I was struck by the rhetoric that emerged out of the Navy Yard shooting incident. There was such a hue and cry about how we had missed so many signs that could have and should have alerted authorities to revoke the shooter's security clearance. Yet, many of the same people who were so ready to criticize on that issue also have been absolutely opposed to any kind of background checks for purchasers of guns without which otherwise can permit people who should not be entrusted with firearms to have them.

I do get it that the Second Amendment to the Constitution grants to the "people" the right to keep and bear arms. There seems to be no dispute that, despite the preamble to the amendment referring to the need to maintain armed militias, the context of the amendment refers to individual rights to keep and bear arms.

Indeed, it was not lost on the framers that, when Paul Revere rode out to warn that the British were coming, the specific thing they were coming for that night was to confiscate weapons and gunpowder that had been illegally imported to the Colonies (at least according to the British) in violation of British law.

But, I do not think that it ever was the framers' intent that, once written, the Constitution would be impervious to review based upon events that came after. I do think that the framers assumed that there always would be continuing dialogue and compromise as we adjusted our most important organic document to the changing needs of our times.

For instance, article I, section 2 of the original Constitution defined "all other Persons" than "free Persons" as three-fifths of a person for purposes of determining the number of Congressional representatives each locality would have, and was silent

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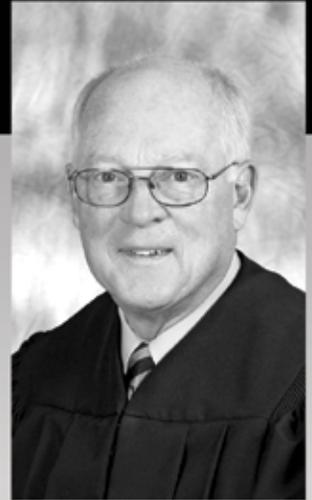
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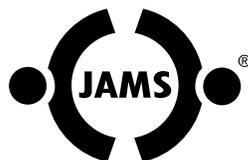
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PRESIDENT’S MESSAGE:

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on the issue of slavery. Because there was far too little dialogue and compromise on that watershed issue as time went on, the argument ultimately was settled by civil war with hundreds of thousands giving their lives to the debate.

The United States is not alone when it comes to gun violence, but it certainly is a world leader. I have heard it said that guns don’t kill people, only people kill people. But, as so many recent episodes have shown us, guns certainly make people much more efficient in the endeavor of killing. Isn’t it time we had some constructive dialogue on that issue as well?

I have worked with many successful businesses over the years as an attorney. The successful ones have it as a regular part of their culture that they sit down from time to time as a team and discuss how they can improve their products and services. The successful companies do not let ideology deter them from exploring constructively how they can do better as a business.

Our country is a business. Why won’t Congress start running it like one – and start improving the fortunes and welfare of all of its shareholders, us?

I know I have personal views on all these issues. But, my point is simply that it is time for our elected officials to return to constructive dialogue and compromise to improve all of our lives, and to spend less time espousing ideologies that work well for some, but not all, of our citizens.

Joel Mark is of counsel to Hathaway, Perrett, Webster, Powers, Chrisman & Gutierrez in Ventura. Despite this rant, Mr. Mark still expects to see each and every one of you at the VCBA Annual Installation Dinner on November 23 at the Spanish Hills Country Club. It’s not too late to sign up to sponsor or attend what is shaping up as a wonderful celebration.

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AN ACTIVE PUBLIC SERVANT: WIDDERS WINS NORDMAN AWARD

by J. Roger Myers



Monte L. Widders's selection as the recipient of the Ben E. Nordman 2013 Public Service Award follows more than four decades of legal practice and widespread involvement in Ventura County's legal world, and extensive contributions to the broader community we serve. He was admitted to the State Bar of California and the federal bar for the Central District of California in 1970. In 1975, he was admitted to the United States Supreme Court.

In 1966, Widders earned a Bachelor of Arts from UCLA, where he played second base on the freshman baseball team. Widders left UCLA for the Gould School of Law at USC, where he earned his Juris Doctorate in 1969. Widders stayed in Los Angeles after law school and began his career with a large firm there. In 1971, he opened his own practice in Santa Barbara and worked part-time with former VCBA president **J. Roger Myers** in 1972 and 1973 in Ventura. In 1974, he formed a law partnership with Myers. That partnership is known today as Myers, Widders, Gibson, Jones & Feingold, L.L.P., and has 17 attorneys.

Always sensitive about growing old, when Widders approached his fortieth birthday he fretted for half a year. Now, Mary Moros – Widders's secretary of 35 years – and Gloria Tovas – the firm's paralegal of 37 years – as well as Myers are always there to remind him when his Aug. 6 birthday approaches.

Born in Burbank, Monte was raised in San Diego. He now lives in Ojai with his wife, Cheryl. They have four sons, Evan, Blair, Drew and Reid. Monte barbecued before Evan, Blair and Drew's Nordhoff football home games. Every year, Monte and all four boys traveled to the Sierras for fishing trips. Until last year, they often skied together at Mammoth, based in a condo Widders owns with **Lee Gibson** and Myers.

Now, Evan is a professor at the University of West Virginia. Blair and Drew practice law at the same firm in Sacramento. Reid is a student at the University of West Virginia. The Widders' have six grandchildren and are expecting two more.

As a lawyer, Monte's community and public service is diverse and well-rounded. It includes:

- Rotary International – Membership and active participation for over 39 years. Past President of the Ventura-East Rotary Club and served as Lieutenant Governor for District 5240. Chairman of the Rotary Centennial Celebration Committee and served as Rotary Foundation Chairman for many years. In 1999, Widders was honored as the "Rotarian of the Year" for District 5240 and received the Citation for Meritorious Service from the Rotary Foundation.
- Ojai Valley Youth Foundation – Past Director and Chair of the Ojai Valley Golf Classic.
- Past President and Board Member, Monica Ros School, Ojai.
- Past Board Member, Ojai Presbyterian Session.

2013 RECIPIENTS OF VCBA/VLSP PRO BONO AWARD TO BE HONORED

by Rachel Coleman

Monte has also given generously to the legal profession. Some of the activities include:

- Community Associations Institute, Channel Islands Chapter – Co-founded the Chapter in 1979 and served as its Director. He served as President of the Association in 1983.
- Former Councilman, City of Carpinteria, 1974-1978.
- Mayor, City of Carpinteria, 1978.
- City Attorney, City of Ojai, 1980-2011.
- Assistant City Attorney, City of Fillmore, 1992-2012.
- Tri-Counties Local Government Attorneys' Association, Past President, Member.
- Member of the editorial board for the League of California Cities, Municipal Law Handbook Committee.
- Ventura County Bar Association, Member of the Board of Directors.
- Arbitrator of attorney fee's disputes in the Ventura County Bar Association Attorney/Client Relations program.
- Special counsel for numerous municipalities, counties and other public entities.

He has also provided legal assistance to a number of charitable organizations and affordable housing non-profit corporations including:

- Ojai Valley Youth Foundation.
- Ojai Education Foundation.
- Habitat for Humanity, Ventura County, Inc.
- Cabrillo Economic Development Corp.
- Better Business Bureau of the Tri-Counties.

J. Roger Meyers is a partner with Mr. Widders and a previous Nordman Award recipient in 2007.



Alfonso Martinez

This year, two local attorneys share in the prestigious honor as recipients of the **James D. Loeb** VCBA/VLSP, Inc. Pro Bono Award. **Alfonso Martinez** and **Kathleen Barrett** will be honored at the VCBA Annual Installations and Awards Dinner on November 23 at 6 p.m. at the Spanish Hills Country Club.

Recipient Kathleen Barrett runs her own firm, Law Office of Kathleen M. Barrett located in Simi Valley. Her solo practice primarily focuses on family law, wills and trusts. Kathleen retired as the Chief Administrative Officer in the Department of Neurology at UCLA when she made the decision to go to law school. Her primary motivation was to provide pro bono or low cost legal assistance to people who could otherwise not afford legal representation. During her second year of law school at Ventura College of Law, Kathleen interned at Grey Law of Ventura County, assisting on pro bono cases. After her internship ended, she stayed on to conduct legal clinics at senior centers in the area once or twice a month until a few months ago when she started a free legal clinic at the Free Clinic in Simi Valley. She was also appointed to the Board of Directors of Grey Law two years ago. She still sits on Grey Law's board today.

In Kathleen's third year of law school, she interned with **Debi Jurgensen**, who also handled many pro bono cases through VLSP. Through Jurgensen's mentorship, Kathleen says she was able to be involved



Kathleen Barrett

in a number of cases with Jurgensen and to continue taking cases on her own after being sworn in as an attorney.

Verna Kagan, who heads the VLSP program, gave Kathleen the good news about being a recipient of the VLSP Pro Bono Award. Kathleen expected Verna to give her another pro bono case, but Verna delivered the exciting news that Kathleen was to receive an award for her dedication to providing low or no cost representation to the residents of Ventura County.

Kathleen says that she is beyond thrilled to be honored with this award because it is tangible recognition that she is making progress toward accomplishing the goal she set for herself when she started law school, of providing legal representation to those who could otherwise not afford it.

The Co-recipient **Alfonso Martinez** works at Dion Law Group in Westlake Village, where he practices family and criminal law. Because Al is bilingual, he also handles other types of cases when he receives referrals from other attorneys with Spanish-speaking clients. Al reports that one day after being admitted to the Bar he began volunteering as a pro bono attorney for the Oxnard legal aid office of the California Rural Legal Assistance ("CRLA"). Former staff attorney **Alfred Vargas** suggested Al speak with Verna at VLSP to help take cases involving Spanish-speaking clients.

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RULING FOR COPYRIGHT OWNER TRUMPS CELEBRITY RIGHTS ACT, MARILYN MONROE ESTATE SETTLEMENT REJECTED

By Panda Kroll, Esq.

Marilyn Monroe once said:

"I knew I belonged to the public and to the world, not because I was talented or even beautiful, but because I had never belonged to anything or anyone else." Monroe is No. 3 in posthumous celebrity earnings, trailing only Michael Jackson and Elvis Presley. While Marilyn may have considered herself to be in the public domain, those asserting claims (whether by inheritance or copyright) to her name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms have fiercely competed over the privilege to exploit such rights. At issue in the long-pending California case of *Milton H. Greene Archives v. Marilyn Monroe LLC*, (9th Cir. 2012) 693 F.3d 983: Whether the iconic actress' publicity rights were passed to her psychiatrist and acting coach through her will, or rather, expired with her death in 1962, freeing her photographer from obligations as a licensee of such rights.

Apart from the probate questions raised by *Greene Archives* (addressed in *CITATIONS'* companion article on pg. 11), the case involves competing doctrines within the framework of our federal and state intellectual property laws. Copyright is based on Congress' explicit constitutional power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," copyright law is statutory and at least in principal, uniform across states. The right of publicity, in contrast, evolved from the individual's constitutional and common law right of privacy and is far from uniform.

While federal copyright grants the *creator* of an original work commercial rights over the work, statutory and common law rights of publicity (also called rights of personality), pursuant to state law, grant the person who was the *subject* of the work (whether a celebrity or a common person) the right to maintain control over his or her name or likeness for commercial purposes. California is one of many (about half) of U.S. states recognizing publicity rights by statute. About twenty states recognize a postmortem right of publicity. In particular, California's Celebrity Rights Act, aka the Astaire Celebrity Image Protection Act (1985), provides celebrities with publicity

rights for 70 years after their death. Civ. Code, §3344.1. The law, however, was enacted decades after Marilyn passed away.

Greene Archives is a dispute over the rights to a portfolio of thousands of photographs taken by Monroe's long-time friend, Milton Greene, valued by *Forbes* at \$27 million. In 2007, Judge Margaret Morrow of the Central District of California ruled at summary judgment that the estate couldn't control Monroe's posthumous image because she had died *prior* to the enactment of the Celebrity Rights Act. The ruling freed the owner of the copyright in Marilyn's images (Greene Archives – the photographer) to exploit the images as it desired, terminating any obligation to seek a license from the estate.

The California Legislature – in an unapologetic attempt to abrogate the district court's decision in favor of the photographer, with child-star turned California state senator Sheila Kuehl leading the charge – succeeded in amending the Celebrity Rights Act just six weeks after

the *Greene Archives* judgment had entered, extending its reach to those who died *before* its enactment. Civ. Code § 3344.1.10. This resulted in a new rush to the courthouse and request for reconsideration. In 2008, Judge Morrow agreed with the estate that as amended, the Act *would have* permitted the estate to survive summary judgment. *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, (C.D. Cal. 2008) 568 F.Supp.2d 1152. Nonetheless, the court once again granted summary judgment in favor of the photographer and entered an order of dismissal of the case in full, this time based on judicial estoppel (as explained in the article on page 11) : The court held that New York, and not California, law applied, because the estate was a bound by its prior election of that state as Marilyn's domicile at the time of death for tax purposes. New York did not provide for a posthumous right of publicity by law, and had expressly rejected a corollary rushed attempt to lobby its legislature to enact a law, based on potential Constitutional conflicts, as

Continued on page 15

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MARILYN MONROE'S ESTATE: A LESSON IN MULTI-STATE LAW?

by John M. Andersen

Marilyn Monroe executed her last Will in January 1961, while living in New York City. A few months later, she moved to Los Angeles, where she remained until her death in August, 1962. When she died, Monroe was living in a house in Brentwood, which she had purchased earlier that year. Monroe also maintained a fully furnished apartment in New York where many of her belongings were kept.

From an administration standpoint, Monroe's estate reflects a dilemma/opportunity that occurs when the decedent resided in more than one state: where to probate the estate? The decision typically comes down to which jurisdiction has the more favorable tax laws.

These days, for example, sunbirds from states like Washington (which has a state estate tax) with winter homes in states like California (that does not have a state estate tax) could benefit their heirs by dying while domiciled in the non-estate tax state. To bolster that position, a common planning strategy is to initiate primary probate proceedings in the non-estate tax state alleging that the decedent died a domiciliary of that state.

Given the California Inheritance Tax laws in effect in 1962, the executor of Monroe's will would have had a strong tax incentive to assert that Monroe died a domiciliary of New York. Not surprisingly, Monroe's will was submitted (and accepted) for probate in New York, rather than California. In addition, the executor completed an "Affidavit Concerning Residence," which was successful in convincing the California Inheritance Tax Appraiser that Monroe died a New York resident (and avoiding California Inheritance Taxes on the bulk of her estate).

The issue of domicile came up again 30 years later when, in 1992, Monroe's biological child, Nancy Miracle, sued the estate for a 50 percent share of the residue as a pretermitted heir. The claim was based on California law which, as of Monroe's death in 1962, allowed such claims by an omitted child, even if born before the execution of the will (whereas New York law limited such claims to after-born children). Accepting that Monroe died a domiciliary of New York, the court

determined that New York law applied and, therefore, dismissed Miracle's case for failure to state a claim.

Monroe's probate estate was closed in 2001, and all remaining assets were distributed to Marilyn Monroe, LLC; a partnership formed by the two residuary beneficiaries. In *Greene Archives*, it was the Monroe LLC (not the Monroe estate) asserting that Monroe had died a California domiciliary. In deciding whether the Monroe LLC should be judicially estopped from taking that position, the *Greene Archives* court had to consider whether the Monroe LLC was bound by the assertions previously advanced by the Monroe estate that Monroe died a

domiciliary of New York. In legal terms, was the Monroe LLC in *privity* with the Monroe estate? Citing various authorities, including the California case *Luckhardt v. Mooradian* (1949) 92 Cal.App.2d 501, the *Greene* court had no trouble concluding that Monroe LLC was the privy of the Monroe estate.



John Andersen is a partner at Ventura's Ferguson Case Orr Paterson and a Certified Specialist in Estate Planning, Probate and Trust Law by the State Bar of California, Board of Legal Specialization.



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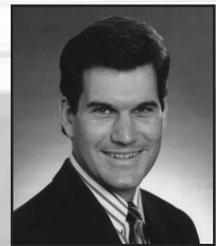
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Continued from page 9

Never one to turn down the much needed help, Verna contacted Al within 24 hours. She assigned him a family law case with a cross-over criminal element. With little time to prepare for a hearing the next day, Al won the hearing for the client on cross-examination of a witness. As a result, the District Attorney discharged the criminal complaint. Al's client was so thankful and happy to be reunited with his children that he cried as he hugged Al. "It felt good to make a difference in his life. I have been taking pro bono cases through VLSP ever since."

Al reports he found out about winning the Pro Bono Award by returning a phone call from Verna. Verna said she was calling for two reasons: the first was to ask if he was going to the Installations Banquet. To which Al replied, "You mean the Law Prom? Of course." Then Verna said "great, because you are getting an award." In case you had any doubt, the second reason for Verna's call was to assign Al a last minute child custody case with a Spanish-speaking VLSP client.

Both recipients have the same advice for attorneys as to why they should take pro bono cases: It's a great way to gain practical experience in dealing with clients, other attorneys and judges, especially for new attorneys. The gratitude of the client is often more meaningful than a check deposited into your bank account. Also through the VLSP, you can give someone a voice that would otherwise not have the opportunity to be heard.

If, after reading this article you are inspired to take on a pro bono case or two, please contact Verna Kagan at VLSP by calling (805)650-7599.



Rachel Coleman works at the Law Office of David Lehr and is a member of the CITATIONS Editorial Board.

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well as conflicts with the retroactively diminishing the rights of those who had previously relied on the absence of such rights in entering into contracts that would lawfully exploit certain images. On August 30, 2012, the Ninth Circuit affirmed Judge Morrow, upholding summary judgment in favor of the copyright owner and against the publicity rights owner in a “textbook case for applying judicial estoppel.” *Greene Archives, supra*, 692 F.3d at 986. The court noted that the decision fell on the 50th anniversary of Monroe’s death, and remarked on “plans to resurrect Monroe as a holographic ‘performer, spokesperson, cultural pundit and computer avatar’ ” as indicative of the expansive nature of Monroe’s posthumous publicity rights.

In a surprising twist, on September 11, 2013, Judge Morrow rejected the parties’ joint request to approve a settlement and dismissal, which the parties’ intended to prevent “collateral attacks or satellite litigation.” The court, however, ruled that having *already* ordered the case dismissed in full, and noting how many motions it took to obtain such resolution, it no longer retained jurisdiction to approve the parties’ settlement. To the extent the request reflected the parties’ displeasure with and sought vacation of the judgment entered by the court and affirmed by the Ninth Circuit in its published decision, the court denied that relief as well. One cannot but wonder if the court took umbrage at the estate’s nearly successful lobbying efforts to legislate around her earlier decision. The *Greene Archives* parties have not quite given up the ghost: On September 17, they asked Judge Morrow to reconsider her ruling.

Because the doctrine of judicial estoppel appears to have finally put the *Greene Archives* case to rest, whether federal copyright laws would have preempted posthumous state publicity rights was not reached by the court. Given the broad reach of the Celebrity Rights Act, and the high value of celebrities’ postmortem intellectual property applied retroactively, expect further challenges to the Act, including challenges to its constitutionality based on copyright-related preemption or even First Amendment-related fair use interests.



Panda Kroll, senior attorney at DK Law Group, is chair of VCBA’s Biotech Law Section and a member of the CITATIONS Editorial Board.

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REFLECTIONS ON A NASTYGRAM

by Leslie McAdam

I got a NASTYGRAM from a client the other day.

It started slowly. Over the weekend, I received an email on my phone with an attachment saying simply, "Please see attached." I had a bad feeling about the email even though I couldn't read the attachment from my now-ironically-antiquated smart phone. So I waited until I got to the office Monday morning.

I opened the attachment and there it was, in 18 point font. My client told me everything that I did wrong. How I did not represent the client's interests properly. How I screwed up the client's life forever. The letter was riddled with hyperbole and grammatical errors.

My first reaction was one of bemusement. I had actually obtained a phenomenal result for this client, who had gotten into hot water and needed legal assistance to get bailed out. I got the client out of the problem, and charged perhaps 10 of the actual 12 hours it took to do so. The client could have had WAY worse problems without my help. Anyone could see that the result in the matter was actually a victory for this client. The client simply did not want to pay the bill.

But my next reaction was one of pain and self-blame. I do care about my clients, deeply. I don't want them to be upset with my services. This hurt.

In the letter, the client had proposed paying for about two of the six or seven hours remaining on the bill. Although I figured I would go along with it, I decided to think about it for a few days.

In talking with others, I realized that getting a NASTYGRAM is incredibly common. A good friend of mine said, when I told her: "Look girlfriend, let us be clear that I..... ME.....I in CAPS.....am the reason lawyers have a bad name. YOU cannot home in on my designation.....I've worked really hard for that glory and I ain't sharin'." And then she proceeded to tell me that this insult was what a client had told her last week when she told her client

that she could not provide a payment check because she had not received it yet.

Of course, I have received NASTYGRAMS before—thankfully infrequent—but this one hurt more, perhaps because I felt like it was especially undeserved.

I realized that it was still bothering me when I found myself thinking about it days later, early morning on the weekend away from the office. Then I realized that it was not the NASTYGRAM that was the problem, it was me. I was allowing this client into my brain and into my home and allowing this client to be an excuse for my suffering.

So the first thing I did was to tell this fake client-in-my-head to eff off.

After all, the issue was the client's, not mine. This was a client's problem, not mine. I had done an outstanding job. The client was just one of those people who does not value legal work.

But the next step was to take a look around me and realize where I was. I was sitting

upstairs in my drafty old farmhouse, looking at the early morning sunshine on the Topa Topa mountains. The orange trees and avocado trees looked spectacular on an especially clear fall day and I could see from Fillmore to Santa Paula. Then I looked around my comfortably mismatched room. My most vociferous ranch cat was asleep on my fuzzy blanket in my room, apparently oblivious to the NASTYGRAM I had received. I could hear my children downstairs rotting their brains watching Cartoon Network. All actually was well and beautiful in my world.

So I started there. Noticing the good that was around me in the room I was in.

Next, I thought of all of the good things I had received from clients this year. Indeed, nine out of ten clients had given me hugs, cookies, flowers, compliments, referrals, or simply paid the bill without complaint. I had a lot to be thankful for and focusing on the one negative client did me no good.

And then I thought about what to do in the future. No matter how good you are

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at client communication, you can always be better at explaining why your services have value and how you are helping the client. Although in this matter I had done this in writing several times, there are always opportunities for more and better communication.

Have I homed in on my friend's designation of being The Reason why lawyers have bad names?

No. But she is not that reason either.



Leslie McAdam is a partner at Ferguson Case Orr Paterson in Ventura. Her practice focuses on employment litigation and counseling, business litigation, real estate and land use.

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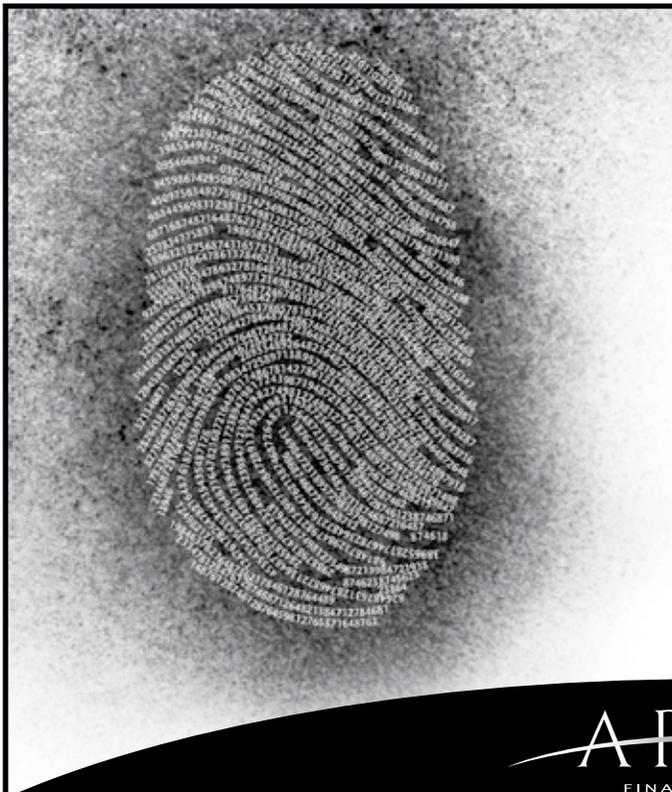
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LIES HAVE CONSEQUENCES: WHY DO FEWER JUDGES SEEM TO CARE?

by Kate Neiswender

I was in court, first day of trial, arguing motions in limine. The other side was arguing that my expert was not qualified, and suddenly the other lawyer blurted out that my expert was “indicted for criminal wrongdoing.” I was shocked and piped up that this was false, and that there was no evidence to that effect. Which there wasn’t. In fact, during the expert’s deposition, the expert was asked about an investigation at the time he was employed at State Parks, and there was a lengthy discussion of that matter. This wasn’t an error – it was just a lie.

There were no consequences to this obvious ethical breach. The judge just waved it off, as if lying in court on a matter of some importance was not a problem.

It seems to me that this is happening more and more frequently. In another case, opposing counsel informed the court that she had personally spoken with the claims manager for her client, and that there were only three claims against a product that had blown up and sent my client to the hospital. In fact, there were six, all of which sent the users to the hospital with third degree burns. We found the others through months more of discovery, and it became clear that the lawyer had lied. She hadn’t checked with the claims manager. When called on this lie, she said we had asked the question wrong. Really? Isn’t that something we were supposed to stop doing in grade school? Blaming the cookie jar when you get caught with your hand in it is childish, yet here we are.

In one insurance defense firm, young lawyers are told that they must be prepared to do anything to win, and if they aren’t, then they should find another firm. This promotes a culture of lying. One of my colleagues, in a medical malpractice defense firm, was told that his doctor should lie in deposition; when my colleague objected, he was literally laughed at, and was told he was naive.

This one should sound familiar. In a case over interpretation of a long term lease, we asked some fairly straightforward questions and received pages of objections, without

any substantive responses. Thus, asking 25 questions, we received 53 pages of objections. When called into court on that one, the other attorney waved the half-inch thick document at the court and claimed, “we gave them 53 pages of responses, your Honor!” Seriously, aren’t they ashamed to make such silly arguments?

I haven’t tried this, but one colleague has gotten so fed up with this type of behavior and has filed CCP §128.6 motions. Each time, over and over again, the motions have been denied. He can quote from the transcript in court, he can show that the lawyer is responsible for lying to the court and then trying to cover it up. Each time, the court finds this kind of behavior part of “normal” adversarial tactics and denies the motion, even if the prevarication has cost the parties tens of thousands of dollars in fees.

To the judges who think this way, no, this is not normal. Lying to the court may be common, but it isn’t normal. There should be consequences. One judge (now retired) who last presided in Simi Valley always gave sanctions in discovery motions. He said the code required him to, even if the behavior had justification. In his courtroom, litigants took discovery abuses seriously and I found it easier to get good information more quickly, and with less of a fight. I also responded to discovery much more carefully when he was the judge. I would posit that sanctioning bad behavior would tend to stop its spread, but I see few judges willing to take that step.

I asked a couple judges about it. The first reaction was to wave it off, just like the judge in the first paragraph of this article. It happened; move on, counsel. But why, I pressed, lawyers should know there are consequences to bad behavior. The response from both judges was the same: we are here in a courtroom setting. We don’t know what happens outside the courtroom. And we don’t want to get tangled in a petty argument, but would rather move the courtroom towards a more civil and professional standard.

I don’t think that will work anymore. If a lawyer thinks he can claim someone whose credibility is an issue was “indicted,” say it without any evidence to that effect, that lawyer won’t be civil in the courtroom or out of it. His lies have no consequences. So he will provide objection-only responses and claim he complied with discovery. He will withhold evidence. He will lie about the most critical aspects of his case, and if caught – there are no consequences. So why not lie?

I was told very early in my career never to say the other side “lied.” They may have misrepresented something, or are mistaken, or some other less offensive word than “lie.” Twenty years later, I think the most offensive thing is not using the word “lie,” it’s the fact that lying happens on a daily basis and is getting more pervasive. I can’t even begin to talk about prosecutorial misconduct, which I understand is in the same category as the abuses I have described. The difference, of course, is that someone’s freedom is at stake, not just damages in a civil case.

I would urge everyone to write into *CITATIONS* and tell me if I am just getting old and grouchy (a distinct possibility) or if you too have seen this sort of problem blossom in the past few years. Let us know what you think.



Kate Neiswender practices in Ventura, focusing on litigation, civil and constitutional rights, environmental and regulatory agency law.

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Self-Help Night

On September 11, the Barristers provided a self-help night at the RAIN Transitional Living Center in Camarillo. **Andrew Ellison, Rachel Coleman, Rennee Dehesa, Josh Hopstone** and **Brier Miron** assisted several individuals with completing legal forms and documents and educated them on the court's policies and procedure. The Barristers welcome all attorneys to participate in Self-Help night. For more information contact Andrew Ellison at andrew@palaylaw.com

Upcoming Events

Come test your knowledge on Tuesday, November 12 at the Barristers' Trivia Night. This event will begin at 7 p.m. at Garman's Pub in Santa Paula. The Barristers encourage all members of the legal community to join in this battle of wits.

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Exec's Dot...Dot...Dot... *by Steve Henderson, Executive Director, M.A., CAE*



Do us all a tremendous favor and attend the bar's Annual Installation and Awards Dinner scheduled for Saturday evening, November 23, beginning at 6:00 p.m. inside the Spanish Hills Country Club. We will be honoring **Monte Widders** as the recipient of the **Ben E. Nordman** Public Service Award in addition to recognizing **Kathleen Barrett** and **Alfonso Martinez** with the James Loebel Pro Bono Award. Monte was nominated by **Jill Friedman**, a partner. There is also the opportunity to thank the out-going VCBA Board members who served the last two years and those new board members who have signed-on for the next two years. There will also be the Silent Auction with proceeds benefitting the VLSP, Inc. and donations may still be made by contacting Chair **Don Hurley** at 659.4695 or don_hurley@yahoo.com. Invitations were mailed October 19, but if you'd like to call the bar to register directly, ask for Nadia at 650.7599 or bar@vcba.org.

Attending the Animal Law Section luncheon October 16 inside the bar offices was **Deborah Parker**. Her personal plate on the Benz was ANML♥VR...Anthony Graves spent 18 years in prison, including 12 on death row, for a gruesome multiple murder he didn't commit. Thanks to Nicole Casarez, a Houston attorney and journalism professor who spent eight years clearing his name, Graves was exonerated and awarded \$1.45 million by the Texas Legislature in 2011. Graves wanted to do something for Casarez, but as he told *Texas Monthly*, "I knew she never accept money from me." After consulting with her husband, Rueben, Graves came up with a generous honor for his "defender, friend, sister and angel" – a scholarship in law studies to the University of Texas, endowed in her name. Graves surprised her with the certificate for the scholarship among a gathering of her friends and family,

a certificate significantly emblazoned with the quote, "Never underestimate the power of dedicated people working for good."... **Susan McCarthy**, VCTLA President and a Director on the VCBA Board, managed a 2:36:34 in the SF Nike Women's Half Marathon despite breaking her big toe about the time she started training. CITATIONS Managing Editor **Wendy Lascher** turned in a respectable 2:42:04...

Israel or Jordan? **David Shain** at 659.6800 or dshain@fcoplav.com...A burglar who was sentenced to nearly 39 years in prison as a habitual offender is asking a federal appeals court to reverse his conviction due to the conduct of a California lawyer who served as foreman of the jury that convicted him. Defendant Donald McNeely initially filed the habeas corpus pro se, contending, among other claims, that the foreman violated his constitutional rights by failing to identify himself as a practicing lawyer during voir dire and blogging about the case, both before and after it was decided. A report by a federal magistrate recaps posts by the unidentified attorney, who writes at one point: "Nowhere do I recall the jury instructions mandating that I can't post comments in my blog about the trial." While the attorney apparently told the truth about where he worked when questioned during voir dire, he didn't volunteer information that likely would have resulted in his being struck by defense counsel. For example, the foreman was still winding down his private law practice, and had worked as a lawyer representing the technology company at which he was then employed...**Patrick Loughman**, nominated by his staff, won the Ventura County Legal Professionals' Boss of the Year Award presented October 16. The Secretary of the Year was Cindy Frazier, nominated by **Susan Witting**...

If you are looking for **John Howard**, effective December 2, he may be reached at Lowthorp Richards.....Our very own Associate Executive Director, Sandra Rubio, designed the new VLSP, Inc. Champions logo. It was approved by the board in September and will debut in **Tony Strauss's** article in January 2014...

Departed Oxnard attorney **Jorge Alvarado** has been selected as New Mexico's Public Defender. He had been the managing

attorney for a legal aid office in Albuquerque. Jorge was appointed unanimously by an eleven-member commission. New Mexico's Public Defender Department has a budget of nearly \$42 million and a staff of nearly 400...A lawyer for a Utah man convicted of lewdness for showing children his Elmo diaper says the conduct may have been odd, but it doesn't support a conviction for felony lewdness. Lawyer Joanna Landau sought to overturn her client's lewdness conviction in oral arguments earlier in October before the Utah Supreme Court. "It was not sexual, it was just strange," Landau said. Landau's client, Barton Bagness, 36, was accused of pulling down his pants to show two 8-year-old children his diaper in May 2009. At the time, Bagness was sucking a candy pacifier and throwing paper airplanes onto lawns. A lawyer for the state, Ryan Tenny, said, "This is why you have mothers pulling their kids away from Victoria's Secret at the mall."... **Anne Pierce's** fifteen-year run as a Research Attorney for the VC Superior Court ended September 30...

Mike O'Brien was inducted October 20 into the 2013 Hall of Fame of Santa Clara High School. Class of 1965. Long overdue!...A contractor who found historical documents chronicling the life of a pioneering African American lawyer is now threatening to torch many of the papers because Harvard's offer to buy them was too low. The contractor, Rufus McDonald, said he will "roast and burn" the documents because of an insulting \$7,500 offer from Harvard University. McDonald found the documents inside a steamer trunk in an attic of an abandoned home slated for demolition. He took the documents to a rare book dealer and learned the papers once belonged to Richard T. Greener, who was the first African American to graduate from Harvard in 1870...**David Ossentjuk** and **Aaron Botti** have joined forces and may now be reached at 805.557.8081 in Westlake Village...

Steve Henderson has been the executive director and chief executive of the bar association and their affiliated organizations since November 1990. He will be celebrating his 10th year on the job November 16 and any kind of suds may be delivered to his office or a donation to the vcba/vlsp, inc. is tax deductible. He may be reached at steve@vcba.org, FB, Twitter at stevehendo1, LinkedIn, or better yet, 650.7599.

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Wifey the day before
Baby Victoria!



Joey celebrating his new baby sister's Arrival with some cake!



Baby #9 – Victoria Kathryn Joy Lehr arrived early on May 6 at 8:15 pm! She weighed in at 6 pounds, 3 ounces. After a brief stay in the NICU, Mom and Baby are at home!

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