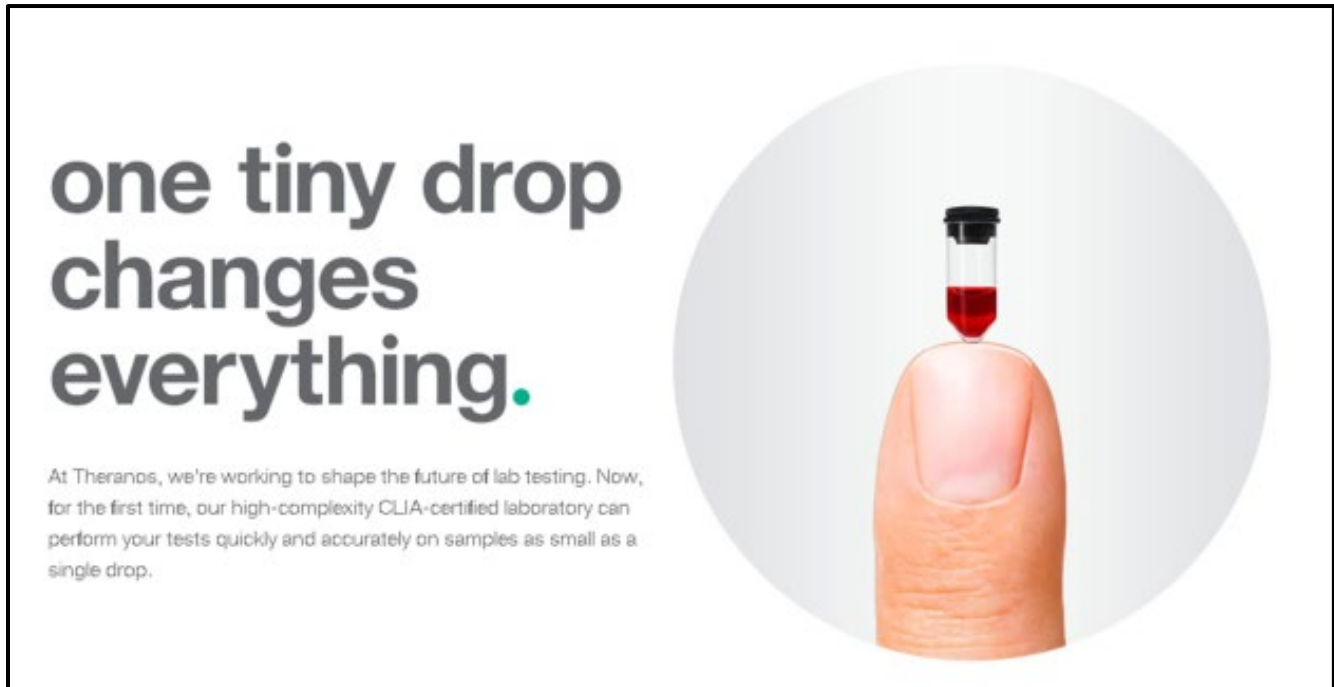


Team #2 – BAD BLOOD AND LABOR LAMENTATIONS

Maureen Houska * Samantha Koopman * Louis Kruezer
Panda Kroll * Michael Morrow * Tim Sottile * Al Vargas

This program is a mash-up of the story of the epic meltdown on a blood testing company, Theranos, and Dynamex v. Superior Court, a case that redefined who can be classified as an independent contractor. Theranos' rise and fall is depicted by Wall Street Journal reporter John Carreyrou's award-winning expose, Bad Blood: Secrets and Lies in a Silicon Valley Startup. The facts in our program tonight are loosely taken from the expose, and the labor issues based on Dynamex are completely fictional.



EMPLOYEE VS. INDEPENDENT CONTRACTOR

Overview of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (4 Cal.5th 903 (2018))

Two delivery truck drivers filed a lawsuit against former employer Dynamex, a package delivery company, claiming Dynamex misclassified its drivers as independent contractors. Dynamex argued that the standard for employment is the *Borello* standard. The delivery drivers argued that *Borello* was not the only applicable standard; they argued that, in the case at hand, the standards in *Martinez* were applicable.

- *Borello* test – In determining whether a person providing service to another is an employee or an independent contract, all factors set forth in prior California cases - including the nature of the work, the overall arrangement between the parties, the right to control the manner and means of the work, and other factors – may be considered.
- *Martinez* test – To “employ” means to (1) exercise control over the hours, wages, or working conditions, (2) to suffer or permit to work, OR (3) to engage, thereby creating a common law employment relationship.

What standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors for the purposes of California wage orders?

The ABC Test

A worker is *presumed to be an employee* unless the hiring business can meet *all three* of the following conditions:

- A. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- B. The worker performs work that is outside the usual course of the hiring entity’s business; AND
- C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

If all three conditions are met, the worker may be classified as an independent contractor.

The Court determined that the *Borello* test was applicable but was too wide-ranging and flexible. The Court also determined that the suffer-or-permit-to-work portion of the *Martinez* test was applicable as well, but the suffer-or-permit-to-work term could not be interpreted literally. Therefore, the court adopted a “simpler, more structured test” – the ABC test – to minimize the disadvantages of the *Borello* and *Martinez* tests.

California Assembly Bill 5

Effective January 1, 2020, AB5 limits the use of classifying workers as independent contractors rather than employee by codifying the *Dynamex* ABC test in section 2750.3 of the California Labor Code. Some professions are exempt from AB5, including insurance agents, physicians, lawyers, architects, engineers, and accountants.



On September 18, 2019, Governor Newsom signed California Assembly Bill 5 (AB 5) into law – codifying and expanding the California Supreme Court’s decision in the *Dynamex* case and the "ABC test" for determining if a worker may be classified as an independent contractor, instead of an employee. AB 5 also creates exemptions and establishes new methods of enforcement.

However, AB 5 does not extend the ABC test to tort claims or claims under the California Government Code (Fair Employment and Housing Act), which protects employees against harassment and discrimination.

CONFIDENTIALITY

California Business and Professions Code §6068(e)

- (1) [It is the duty of an attorney] to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

California Rules of Professional Conduct – Rule 1.6 Confidential Information of a Client

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c).
- (c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable under the circumstances:
 - (1) Make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
 - (2) Inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

California Rules of Professional Conduct – Rule 1.13 Organization as Client

- (b) If a lawyer representing an organization knows that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code section 6068, subdivision (e).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and is likely to result in substantial* injury to the organization, the lawyer shall continue to proceed as is reasonably* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rule 1.16.

California Rules of Professional Conduct – Rule 1.16 Declining or Terminating Representation

- (b) Except as stated in paragraph (c), a lawyer may withdraw from the representing a client if:
 - (2) The client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime of fraud.
-

WHISTLEBLOWER LAWS

Some federal whistleblower laws:

- False Claims Act (31 U.S.C. §§3729-3733)
 - one of America's first whistleblower laws
- Sarbanes-Oxley Act of 2002
 - protects corporate fraud whistleblowers
- Tax Relief and Healthcare Act (2006)
 - IRS Whistleblower Office officially opened in 2007
- Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)
 - increased regulation of the financial industry
 - resulted in the creation of the SEC's Office of the Whistleblower



"I have nothing against whistleblowers per se; I'd prefer you just call me coach."

California whistleblower statutes:

- Government Code §8547 et seq (CA Whistleblower Protection Act)
 - protects CA public officers and employees; also applies to government contractors
 - authorizes complaints alleging retaliation against whistleblowers
 - Prescribes penalties; Specifies B of Proof; Created exception to the exhaustion of administrative remedies rule;
- Government Code §12650 et seq (California False Claims Act)
 - modeled after and relies on cases interpreting the federal False Claims Act
 - permits Attorney General to bring a civil law enforcement action against any person who knowingly makes or uses a false statement of document to obtain money or property from the state or avoid paying money or property to the state
 - qui tam provision allows a whistleblower to bring an action under the Act
 - whistleblower may be eligible to receive a share of any recovery
- Health & Safety Code §1278.5
 - prohibits retaliation by health facilities against employees complaining of quality of care or services provided
- Labor Code §98.6 – whistleblower protection for wage and hour violations
- Labor Code §1102.5 – general whistleblower protection
 - prohibits employers from retaliating against an employee for:
 - disclosing information reasonably believed to be a violation or noncompliance with a law or regulation
 - providing information or testifying before a public body investigating a possible violation or noncompliance with a law or regulation
- Labor Code §6310
 - prohibits whistleblower retaliation by employers against employee making complaints to Cal/OSHA

The following page is a sample posting from the California Labor Commissioner's Office intended to meet the requirements of California Labor Code 1102.8(a).

The Division of Labor Standards Enforcement believes that the sample posting below meets the requirements of Labor Code Section 1102.8(a). This document must be printed to 8.5 x 14 inch paper with margins no larger than one-half inch in order to conform to the statutory requirement that the lettering be larger than size 14 point type.

WHISTLEBLOWERS ARE PROTECTED

It is the public policy of the State of California to encourage employees to notify an appropriate government or law enforcement agency, person with authority over the employee, or another employee with authority to investigate, discover, or correct the violation or noncompliance, and to provide information to and testify before a public body conducting an investigation, hearing or inquiry, when they have reason to believe their employer is violating a state or federal statute, or violating or not complying with a local, state or federal rule or regulation.

Who is protected?

Pursuant to [California Labor Code Section 1102.5](#), employees are the protected class of individuals. "Employee" means any person employed by an employer, private or public, including, but not limited to, individuals employed by the state or any subdivision thereof, any county, city, city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California. [[California Labor Code Section 1106](#)]

What is a whistleblower?

A "whistleblower" is an employee who discloses information to a government or law enforcement agency, person with authority over the employee, or to another employee with authority to investigate, discover, or correct the violation or noncompliance, or who provides information to or testifies before a public body conducting an investigation, hearing or inquiry, where the employee has reasonable cause to believe that the information discloses:

1. A violation of a state or federal statute,
2. A violation or noncompliance with a local, state or federal rule or regulation, or
3. With reference to employee safety or health, unsafe working conditions or work practices in the employee's employment or place of employment.

A whistleblower can also be an employee who refuses to participate in an activity that would result in a violation of a state or federal statute, or a violation of or noncompliance with a local, state or federal rule or regulation.

What protections are afforded to whistleblowers?

1. An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from being a whistleblower.
2. An employer may not retaliate against an employee who is a whistleblower.
3. An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
4. An employer may not retaliate against an employee for having exercised his or her rights as a whistleblower in any former employment.

Under [California Labor Code Section 1102.5](#), if an employer retaliates against a whistleblower, the employer may be required to reinstate the employee's employment and work benefits, pay lost wages, and take other steps necessary to comply with the law.

How to report improper acts

If you have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors, or employees, **call the California State Attorney General's Whistleblower Hotline at 1-800-952-5225**. The Attorney General will refer your call to the appropriate government authority for review and possible investigation.

From the *LA Times*:

Defense Attorney's Decision Touches a Nerve

BY STEVE CHAWKINS
DEC. 30, 1998 12 AM PT

Chuck Samonsky doesn't look forward to playing back his voice mail messages these days.

"Disgusting!" callers hiss. "Unethical!"

They ask how he can live with himself. They demand his immediate disbarment. A few have threatened his life. A woman said she was praying that one of his family members be killed. Of more than 50 furious callers, only one has left a valid return number.

Samonsky, a well-known criminal defense lawyer, has emerged as the villain of the day. The letters' pages quiver with condemnation; for many, Samonsky has become a persuasive symbol of all that is wrong with the justice system—the arrogant, selfish, clever, hyper-technical attorney who twists the law to his own purpose and the public be damned.

But before he is hanged, Chuck Samonsky deserves a fair hearing.

We don't know yet the full story of 14-year-old Kali Manley's brutal end, or whether Samonsky's client in fact killed her, or all the details that Samonsky knew when he tried to strike a now-infamous deal with the district attorney.

We know only that Kali is dead, and a community plunged into grief has focused its white-hot anger on a lawyer who contends he was just trying to do his job.

Here are a few of the sad facts, as they have emerged publicly:

An Oak View girl named Kali Manley disappeared after last being seen with David Alvarez, 22, a man with a short temper and a long record. Several hundred volunteers scoured the hills around Ojai looking for her.

In jail on an unrelated charge, Alvarez was questioned about Kali. He told his attorney, Samonsky, that he wanted to lead police to Kali's body. But Samonsky urged him not to. Maybe the district attorney will agree not to file any potential death-penalty charge in exchange for your help, he told his client.

That wasn't to be. After on-and-off discussions that stretched over three days, Dist. Atty. Michael Bradbury wouldn't bargain. Accompanied by Samonsky, Alvarez eventually took officers to a roadside drainpipe in the back country. Kali's body was stuffed inside.

Charges against Alvarez are expected soon.

Awhile back, I saw a bumper sticker on a car no doubt driven by a lawyer. It said: "Have you hugged your criminal defense attorney today?"

It was an apt joke. Defense attorneys expect no hugs. In many quarters, they are seen as worse than the criminals they defend—scum with post-graduate degrees. That is why it's hardly surprising that a community heavy with anguish should lash out at the lawyer whose quest to save his client's skin only prolonged its pain.

Of course, Samonsky could have allowed Alvarez to help the officers immediately. By doing so, he would have eased the Manleys' agony, ended the community's uncertainty and called off the frustrating search.

But for better or for worse, he wouldn't have been much of a lawyer.

“He acted completely ethically and properly,” said Erwin Chemerinsky, a specialist in legal ethics at the USC law school. “A lawyer has a duty to zealously represent his client within the bounds of the law. This was quite clearly in his client’s interest.”

Veteran defense attorney James Farley agreed. “I probably would have done exactly the same thing,” he said.

And yet.

The Manley family agonized. The searchers tramped through the brush. Parents feared for their children’s safety.

Samonsky, meanwhile, went through his own dark night of the soul. While the Ojai Valley hoped Kali was still alive, he knew she was dead and he knew how—though not where—her body could be found. Conferring with lawyers he respected, he was told the same thing over and over: Don’t let your client do it. Don’t expose him to that kind of risk.

“You have to understand that my obligation is to my client,” he told me. “I have to protect them against all possible scenarios.”

For three nights Samonsky didn’t sleep. He would run the problem relentlessly through his mind: “Can I allow an unsophisticated 22-year-old to make that kind of decision and walk himself into a buzz saw? What if the worst turned out? Assume he wasn’t responsible for the crime but was charged for it and convicted and sent to death row: What do I tell the family then? ‘Sorry?’”

Bradbury received Samonsky’s offer a week ago Tuesday and was immediately discouraging. Still, according to Samonsky, the district attorney needed to consult his top prosecutors—who had already scattered for the holidays. He gave his final decision—a resounding no—on Thursday night.

“If it hadn’t been Christmas, it would have taken hours instead of days,” Samonsky said.

On Christmas Day, Samonsky spent hours more grappling with the questions. He made sure his client understood the risks of leading police to the body. The next morning, he arranged the fateful trip to the back country.

Did Samonsky really expect Bradbury—who is not known as an enthusiastic bargainer—to deal away the death penalty in the high-profile slaying of a young girl just down the highway from Bradbury’s ranch? After all, Samonsky had for nine years worked as a prosecutor in Bradbury’s office and knew him well.

Samonsky said he had “legitimate hope” that Bradbury would go for the deal. He would not elaborate but said he respects Bradbury’s decision.

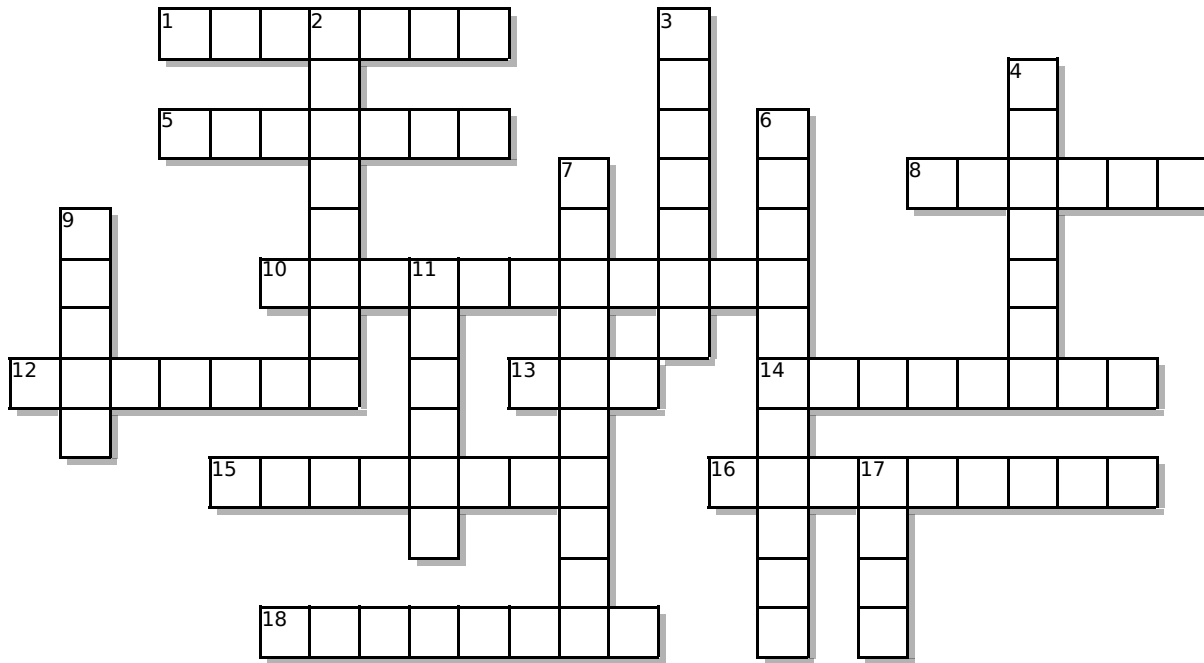
What bothers him more are those hate-filled messages on his machine. A former prosecutor, he is accustomed to threats; he got his share after putting hard-core bikers behind bars, and two decades later, he is still kept up to date on when those jailhouse doors will spring open.

But he can’t understand people vilifying a defense attorney for behaving like one.

“My God, what are you going to do—allow the Star Chamber back?” he asked. “I’m doing nothing more than what I’m sworn to do and bound to do.”

Bad Blood and Labor Lamentations

Test Your Knowledge!



ACROSS

- 1 One of the conditions for classification as an independent contractor is that the worker is free from _____ and direction of the hiring business.
- 5 The test that employer, Dynamex, argued was the only applicable standard for determining employment.
- 8 Elizabeth _____, Theranos founder
- 10 Make sure your workers aren't improperly classified as _____ contractors!
- 12 Under the Borello test, all _____ set forth in prior CA cases may be considered when determining whether a worker is an employee.
- 13 The _____ economy is highly affected by the employment classification standards.
- 14 The delivery drivers in the Dynamex case argued that the test in this case was applicable in addition to the Borello test
- 15 Classification of a worker who is not an independent contractor
- 16 Whistleblowers are _____.
- 18 Under the ABC Test, a worker is _____ to be an employee unless certain conditions are met.

DOWN

- 2 A once-promising biotech start-up that falsely claimed to have created revolutionary blood testing technology
- 3 The case that redefined who can be classified as an independent contractor
- 4 The valley where Theranos was located
- 6 One of the conditions for classification as an independent contractor is that the worker is _____ engaged in an independently established trade or business of the same nature as that involved in the work product.
- 7 It is the duty of an attorney to maintain inviolate the _____ of his or her client.
- 9 One of the conditions for classification as an independent contractor is that the worker performs work that is outside the _____ course of business.
- 11 The Martinez test defined what it meant to _____ a worker.
- 17 AB5 does not extend the ABC test to _____ claims.