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Food from the Bar

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Santa Barbara County Bar Association

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On the Cover

Food from the Bar 2017

Renee Fairbanks presents the 2017 Court Staff of the Year Award. See page 8.

Medical Marijuana:

Questions and Answers regarding Reasonable Accommodation Requests by Residential Tenants

By Mike Brejle

Mike Brejle

Question: As a landlord, do I have a legal duty to accept a tenant's reasonable accommodation request for the tenant to possess, use or cultivate medical marijuana on my rental property?

Answer: The answer we believe the Court should accept, based upon applicable federal and California case law, in review of such a situation is, "No."

California is one of nearly twenty-five (25) states (e.g. Colorado) which have enacted laws that consider marijuana possession, use and cultivation to be legal when there is appropriate medical justification. California's Compassionate Use Act ("CUA") was approved by California voters as Proposition 215 in 1996 and is codified at Health and Safety Code section 11362.5

Many local jurisdictions in California have passed ordinances which specify circumstances under which such possession, use or cultivation will be allowed. Based on these statutes, commercial and residential tenants have regularly asserted that their landlord cannot control medical marijuana possession, use or cultivation beyond the restrictions established in state and local law.

Many local jurisdictions in California have passed ordinances which specify circumstances under which such possession, use or cultivation will be allowed.

With that said, *Gonzales v. Raich* (2005) 545 U.S. 1, published by the U.S. Supreme Court regarding a California case based on the legality of medical possession, use and cultivation of marijuana created a dilemma for California landlords. The *Gonzales* decision held that compliance with the CUA is ***not a defense*** to federal marijuana related crimes. Therefore, while medical marijuana possession, use and cultivation may be legal under California's state and local laws, federal laws do not contain an exception for medical purposes (see the Controlled Substances Act, 21 U.S.C. § 811). This conflict of laws has put landlords in an uncomfortable position.

The Supreme Court's decision in *Gonzalez* is controlling throughout the United States. Federal law enforcement agencies can clearly punish California residents under federal law for medical use or cultivation which would otherwise be legal under state or local law. However, media reports over the past five to ten years have indicated that federal agencies do not plan to pursue criminal prosecution of individuals for medical use of marijuana.

Most rental agreements in California generally prohibit illegal activity and specifically prohibit the use of drugs. However, landlords of residential and commercial properties are now frequently faced with the dilemma of disabled tenants who seek accommodations for their medical marijuana possession, use and cultivation.

Typically, an affected tenant may argue that medical marijuana possession, use and cultivation should be allowed as a disability accommodation because it is legal under California law. As a result, the landlord has to consider whether prohibiting such possession, use or cultivation on his property because it is not allowed under federal law might cause him to be sued for discrimination under state law.

In other words, would allowing such possession, use or cultivation be deemed to be a reasonable accommodation under the circumstances? According to a California Supreme Court case, *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, the CUA ***does not require*** an owner to allow the growing, smoking and/or possession of medical marijuana in residential rental property as a reasonable accommodation for a disabled person.

Based upon the foregoing, it is highly unlikely that a landlord would be expected to allow the violation of federal law on a rental property as a reasonable accommodation for a disabled tenant. As such, landlords have typically been advised to act reasonably, but absent a discriminatory motive, the landlord can either accept or reject the possession, use and cultivation of medical marijuana.

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Why it's Time to Ditch Work-Life Balance and Focus on Work-Life Blend

By Michelle P. Baca, PhD

Business Development & Marketing Manager, CIO Solutions

Michelle P. Baca, PhD

Our company sells a Cloud Desktop solution. We tout it as a solution for productivity, as a technology that means you can work anywhere that has an internet connection and anytime. The Cloud is fantastic for people who work remotely or who work flexible hours. The downside is that it contributes to the ubiquity of work in our daily lives. As we strive more and more for a balance between work and life, we have to wonder whether technology that makes it easier to work when we are not physically at work is actually making our lives better or worse. As we make advances in technology and as the workplace becomes increasingly looser the question of work-life balance becomes more urgent.

Most strategies for work-life balance prescribe clear delineations between work and not work. They advise leaving work at work and not letting it bleed into home or personal life. These strategies espouse not checking email over vacation or shutting off notifications after 5:00pm. As it turns out trying to balance work and life is actually more stressful than either actual work or actual life.

As it turns out trying to balance work and life is actually more stressful than either actual work or actual life.

In an article from August 2016 in *The Harvard Business Review* titled, "Research: Keeping Work and Life Separate is More Trouble than It's Worth," David Burkus explains,

> "It's true that for some time, the best advice on work-life balance was to create stiffer boundaries between both. But new research suggests that maintaining strict distinctions between work roles and home roles might actually be what is causing our feelings of stress to set in. Instead of leaving work at the office and home at the door, integrating both might be a better strategy for enhancements in well-being and performance."

The current best advice then tells us to abandon balancing in favor of blending. Do everything, take a work call at 7:30pm and check your email on vacation. This new thinking rooted in the realization that balance is next to impossible focuses on a strategy that blends tasks and emphasizes increasing resilience around task switching. Burkus utilizes the psychological idea of "cognitive role transition" to explain why switching tasks is so taxing. He says, "When you're actively engaged in one role, but experience thoughts or feelings related to a different role, you're experiencing a cognitive role transition. Often these transitions are easy and fleeting…but the more separate the roles in your life, the bigger the transition." So most of the stress of managing work and life lies in the drastic transition between work tasks and life tasks. This is why total separation and hard boundaries between work and home have been such a big part of the popular discourse. Basically, if cognitive role transition is difficult, then limit your amount of transitions.

Burkus, however, points out that "…blurring the boundaries and integrating work and life might better equip us to handle cognitive transitions while limiting the drain on our cognitive resources." These transitions are pretty much inescapable, and so it behooves the modern worker to view these transitions as the norm. By blurring the boundaries between work and life, one can build resilience around task transitioning and ultimately reduce stress. This new take on the subject isn't simply a reversal of old adages, rather it examines an old question in the context of a rapidly changing workplace.

The modern workplace is becoming more flexible. More companies are allowing employees to work remotely either part or full-time. More companies are allowing employees to work hours that reflect the natural flow of their individual productivity versus an arbitrary 9-5 day. These shifts in modern work require a shift in how we understand the relationship between work and life. Increased flexibility in working hours and location leads to deeper satisfaction and less stress for employees. In "How a Flex Time Program at

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2017 Court Staff of the Year Award

Given to Patti Nelson and Deanna Barnes of the Santa Barbara County Superior Court

By Renee Fairbanks

On Thursday, May 25, 2017, 76 members of the local legal community, including Presiding Judge Patricia Kelly and Commissioner Von Deroian, joined Judge Timothy J. Staffel , Family Law Executive Committee members Renee M. Fairbanks, CFLS, and Stephen Hamilton, CFLS, and immediate-past chair, Vanessa Kirker-Wright, CFLS, at the historic Santa Maria Inn, to honor Santa Barbara County Superior Court staffers Patti Nelson and Deanna Barnes and award them the 2017 Court Staff of the Year Award from the Family Law Executive Committee of the State Bar of California.

Patti Nelson has served as Judge Staffel's judicial secretary and courtroom clerk for almost 19 years. Prior to that, she was a district administrative assistant to Santa Barbara County Supervisor, Fourth District, for Supervisor Staffel. Ms. Nelson has been active in the Santa Maria Legal Professionals Association for more than 25 years and has served as an officer at the state and local levels. She has helped organize many continuing legal education events over the years for attorneys, paralegals, and legal secretaries, including the regular series of Brown Bag Family Law sessions in Department 1.

Deanna Barnes, Patti Nelson and Judge Timothy Staffel

Deanna Barnes has been a Santa Barbara Superior Court employee for more than ten years. She has been the courtroom clerk for Department 1 for the last three years. Prior to joining Department 1's courtroom staff, Ms. Barnes worked in the main clerk's office, so she understands each aspect of the court processes. Ms. Barnes works tirelessly to accommodate all those who appear before the court, many of whom increasingly are *pro per* litigants. From providing very practical "ready to place on the refrigerator door" calendars for parties to record their visitation schedules, to establishing a system for having family law mediation sessions set right from the courtroom in a user-friendly process, Ms. Barnes has set the standard for a courteous, customer-friendly clerk.

Judge Staffel, who nominated both Ms. Nelson and Ms. Barnes for this award, spoke of the challenges associated with staffing Department 1. He commented that Department 1 is a direct calendaring civil trial department, which includes a high-volume family law trial calendar. An increasingly large number of family law litigants are self-represented. Judge Staffel said that both Ms. Nelson and Ms. Barnes work as a team to ensure that family law matters are processed in an efficient, timely fashion that provides customer-friendly service to family law litigants, attorneys, and staff.

As Judge Staffel wrote in his nomination of Ms. Nelson and Ms. Barnes, "From seeking assistance in preparing, obtaining and providing detailed family law minute orders to assist in the preparation in family law judgments, to findings and orders after hearing to gaining access to the court through scheduling family law hearings, these dedicated professionals have served the Northern Santa Barbara County Family Law Bar and their clients well." He also said that both Ms. Nelson and Ms. Barnes "have demonstrated a dedication to the legal profession which has greatly assisted the administration of justice in the often tumultuous world of family law litigation and have done so with grace, dignity and professionalism."

It was wonderful to see so many people turn out to honor Ms. Nelson and Ms. Barnes for their achievement and to recognize them for their hard work. They have been a tremendous asset to our local legal community. A special thank you to the Northern Santa Barbara County Bar Association and Santa Maria Paralegals Association for putting this event together. ■

The legal community honors Superior Court staffers, Deanna Barnes and Patti Nelson.

Baca, *continued from page 7*

MIT Improved Productivity, Resilience, and Trust," from the *Harvard Business Review* in June 2016, author Peter Hirst examined how a part-time remote worker program increased overall work satisfaction in the MIT Sloan School of Management where he worked.

He notes that flex time was initially introduced as a perk. As hiring top talent becomes increasingly competitive most companies look to make the job seem fun by adding ping pong and happy hours. Hirst's department decided to add flexibility as a perk. By allowing employees to work remotely with unique hours, they immediately decreased the stress associated with a work commute. Additionally, employees were able to work regardless of the weather because they didn't have to worry about commuting through a winter storm, this increased productivity. The most important impact though was that this flexible schedule made the employees feel trusted and respected by their employers. Hirst writes,

> "We trust our people to be professionals and understand what needs to be done, regardless of where they work. It's easy to forget how traditional work practices like required office hours can often come off as a lack of trust for employees' ability to get the job done. When surveying our staff, 62% recorded an improved feeling of trust and respect. Based on this stat alone, it's clear to me that people who feel trusted will get their work done efficiently while improving overall morale and company culture."

It is ultimately reductive to wonder whether technology is making things better or worse. The fact of the matter is that technology is making things different. While smart phones and Cloud desktops make work more ubiquitous, they also make it more flexible. More flexibility all around is overwhelmingly positive. By developing resilience around cognitive role transition, we will be better equipped to reap the benefits of a new flexible work place. ■

Michelle P. Baca, PhD, works at CIO Solutions, a Managed Services IT Provider that has been in business on the Central Cost for over 30 years. She has explored all aspects of the business from Operations and Project Management to Business Development. She can be reached at mbaca@ciosolutions.com.

I Agreed to Arbitrate That???

Recent Developments in the Application of Arbitration Agreements

By Paul Dubow

Litigation stemming from Wells Fargo's improper opening of over 1,500,000 checking accounts and 560,000 credit card accounts has tested the limits of arbitration agreements and led to legislation to curb those agreements.[1]

In 2015, the Bureau of Consumer Financial Protection found that employees of Wells Fargo Bank had engaged in improper sales practices to satisfy sales goals under an incentive compensation program. This discovery resulted in several class action lawsuits, including *Jabbari v. Wells Fargo & Co.*,[2] in the Northern District of California. The lead plaintiffs in the *Jabbari* lawsuit had opened legitimate accounts with Wells Fargo. They alleged that Wells Fargo had used information from those accounts to open fraudulent accounts and had diverted funds from the legitimate accounts to pay fees generated by the fraudulent accounts.

The account agreements for the plaintiffs' legitimate accounts contained broad arbitration clauses that covered "any unresolved disputes" between them and provided that the arbitrator would determine arbitrability. Wells Fargo moved to compel arbitration. The district court determined that it could only deny the motion if Wells Fargo's claim that the dispute fell within the scope of the arbitration agreements was "wholly groundless".[3] The court then held that the argument was not wholly groundless because the allegations of misuse of information and funds "may 'relate' to the legitimate accounts".

After the *Jabbari* plaintiffs' claims were compelled to arbitration, bills were introduced in Congress and the California Legislature designed to cure the perceived problem. The federal Justice for Victims of Fraud Act, S.3491, would prohibit enforcement of predispute arbitration agreements with consumers in an action related to credit card or personal bank accounts unless the account at issue was opened in response to a request or application for that account. The California bill, SB33, prohibits "a financial institution" from seeking to "apply a written agreement to arbitrate, contained in a contract consented to by a consumer, to a purported contractual relationship with that consumer created fraudulently by the petitioner without the consumer's consent and by using the consumer' personal identifying information." [4]

Paul Dubow

However, legislative action may not be needed, because an argument can be made that the dispute in *Jabbari* is not arbitrable. The arbitration agreements cited by the court in *Jabbari* may not have applied to the dispute at issue. Arbitration contracts, whether broad or narrow, have limitations. They only pertain to the activities that are within the scope of or are significantly related to the contract. A situation similar to *Jabbari* arose in *Aiken v. World Finance Corp. of South Carolina.*[5] In that case, plaintiff had executed a broad arbitration agreement similar to the one used for Wells Fargo clients. He filed suit after he discovered that employees of the defendant bank had used the personal financial information and social security number that he had provided to defendant to obtain sham loans from other lenders and convert the proceeds for themselves. The rogue employees' failure to pay back the loans damaged plaintiff's creditworthiness. The South Carolina Supreme Court affirmed the denial of defendant's motion to compel arbitration, ruling that "in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct."

There have been similar results in other cases. In *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney,*[6] plaintiff purchased and financed an automobile, signing an arbitration agreement which covered *all* disputes arising from the "sale, lease, or financing of the vehicle". Later, plaintiff discovered that several of the dealer's employees had deliberately kept the car's title and used it to create phony titles for stolen vehicles. Plaintiff filed a lawsuit, alleging various tort claims. The Court denied defendant's motion to compel arbitration because the subject matter of the lawsuit was outside of the scope of the agreement. The Court determined that "no reasonable person would agree to submit to arbitration any claims concerning…a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles….actions

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Legal Community Celebrates Seventh Annual Drive to Feed Children

Santa Barbara Women Lawyers celebrated its seventh annual kick-off of its Food from the Bar Drive on June 6, 2017 at Patxis Pizza. Food from the Bar is a unique opportunity for legal organizations in Santa Barbara to come together to directly improve the lives of local children. During the month of July, the legal community is rallying to raise $20,000 to benefit the Foodbank's Picnic in the Park program, which feeds children in our County during the summer months. The Foodbank reports that a staggering 84% of children in our County who receive free or reduced lunches during the school year go without lunches during the summer. The Picnic in the Park program provides free nutritious meals to these children as part of the USDA Summer Food Service Program. Healthy meals will be served at various parks in the County from Monday through Friday for ten weeks. The cost per meal is approximately $3.50.

Premier sponsors of the event include the Santa Barbara Women Lawyers & Foundation; Santa Barbara County Bar Association; and Brownstein Hyatt Farber Schreck. Gold sponsors include Ambrecht & Associates; Amberger & Chamberlain; White, Zuckerman, Warsavsky, Luna & Hunt; Law Office of Janean Acevedo Daniels; Sanger Swysen & Dunkle; Reicker, Pfau, Pyle & McRoy; Bamieh & Erickson; and Greben & Associates. Silver sponsors include Lytel & Lytel; Price, Postel & Parma; Santa Barbara Barristers; Herring Law Group; Molora Vadnais; Law Office of Gregory McMurray; and Kathleen Weinheimer.

The Food from the Bar Drive will run during the entire month of July. For more information, please contact Tara Messing at tcmessing@gmail.com. To make a contribution to the Drive, please go to: https://donate.foodbanksbc.org/campaign/food-from-the-bar-2017/c122377. ■

Food from the Bar - Members of the legal community join together to support the Food from the Bar Drive.

Mens Rea and Making False Statements

By Robert Sanger[1]

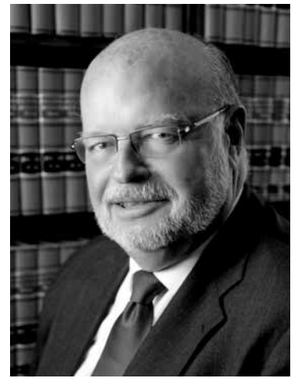
On April 24, 2017, the United States Supreme Court denied certiorari in case number 16-888, *Farha, et al. v. United States*. Denial of certiorari is, of course, not a decision on the merits, however, this was a case that framed two important issues for review that affect businesses and people involved in businesses. In this month's *Criminal Justice* column, we will look at those two issues: 1) what mental state is required to violate complicated federal criminal laws regulating businesses; and 2) what does it mean for employees to make false statements to officials in the middle of a raid related to such complicated issues.

The Issues

Basically, at stake is the ability of corporate officers and employees to do business without undue fear of being prosecuted for something that they did not know was illegal or fear of being prosecuted for making statements to investigators in the course of a raid that are later deemed false. This has become a serious problem in the business world and for lawyers who are attempting to advise corporate clients.

The Eleventh Circuit opinion that was on petition for writ of certiorari before the United States Supreme Court[2] was *United States v. Clay, Farha, Behrens, and Kale.*[3] There is no case currently pending review before the Supreme Court squarely raising these issues. It is worth saying that not only is a denial of certiorari not of legal significance to other cases, but there can be any number of reasons that the Court has decided not to grant certiorari. In addition to just not generating interest among the law clerks and Justices, it may be that the Court did not think the particular case was the best vehicle by which to render an opinion on the issues.

In this particular case, it may also be that the Court may have felt that the Justice Department would take a different approach both in enforcement of the federal statutes in general and with regard to the merits of any similar case that later comes before the Court. While Attorney General Sessions has rescinded the Holder Memo[4] and has indicated it will be "tough on crime," the kind of crime it is focused on are drugs and street crime. It has long been a concern of the conservative policy groups, like the CATO Institute,[5] the Heritage Foundation[6] and the Federalist Society,[7] that prosecution of business crime should be largely restricted. The issue of the lack of a clear mens rea requirement in many federal statutes has been a particular focus not only of conservative but progressive proponents.[8] As a result, the Court may have reason to believe that judicial interference may not be necessary under the present Administration.



Robert Sanger

In any event, the issues remain unresolved for now by the United States Supreme Court. The Eleventh Circuit, in *United States v. Clay*,[9] framed the issues in a very complex and very long decision. In fact, the length is symptomatic of the complexity which, in turn, supports the claim that the law at issue is so convoluted as to be unintelligible to the public who are required to comply with it. Further, the public, including those who are representing or employed by corporations doing business, is required to comply under penalty of criminal prosecution. That prosecution extends, in *Clay*, to those who were responsible for policy, but also those who were present and questioned by federal officers during a raid.

The short version is that WellCare Health Plans, Inc., and WellCare of Florida , Inc., doing business as Staywell and HealthEase, operated under contracts with the state of Florida through the Florida Agency for Health Care Administration ("AHCA") to cover medical and behavioral health care services for Medicaid enrollees. Various individuals were prosecuted under the relatively new federal Health Care fraud statute, 18 U.S.C. § 1347 and under the more venerable statute making it a crime to make false statements to a federal official, 18 U.S.C. § 1001. After a three month jury trial, the jury came back with arguably inconsistent, but demonstrably fragmented, verdicts convicting some individuals on some counts, acquitting them on others and hanging on yet others.

The charges on the health care fraud counts had to do with reporting the transactions of the businesses to AHCA in different calendar years and under different circumstanc-

es. Basically, the reporting required complicated calculations regarding the expense and refund figures and patient encounter data. While there was apparently testimony about statements, gestures and reactions of employees, the AHCA guidelines were extremely complicated, difficult to follow and subject to interpretation.

Meanwhile, in 2007, over 200 federal investigators raided WellCare's corporate headquarters and executed a search warrant of the premises. FBI agents and agents of the U.S. Department of Health and Human Services interviewed employees while the raid was going on. In particular, one of the employees of the WellCare, Peter Clay, was interviewed in his office by these federal agents for an hour and a half. In the course of the interviews, Clay was asked general questions as to whether costs were inflated in the annual reports to AHCA, and whether he had attended meetings in which it was discussed or suggested that costs should be inflated. Clay stated that he was not aware of any intentional inflation of costs.

Issues to be Resolved

The first issue is that the Eleventh Circuit upheld a modified pattern instruction on the mens rea required for the health care fraud convictions. Arguably, 18 U.S.C. § 1347 contains an express requirement of express knowledge which is further arguably required by case law holding that a person must be "blameworthy in mind" to permit conviction.[10] Instead the District Court arguably watered down that mens rea requirement by allowing knowledge to be proven by "deliberate indifference." There is, of course, authority for "willful blindness" but that requires a more stringent showing that a person believe that there is "a high probability that a fact exists" and then take "deliberate actions to avoid leaning that fact."[11] So, as it stands, the Eleventh Circuit would allow a standard of knowledge that is less than the wording of the statute and less than is otherwise required by the Supreme Court to establish knowledge.

The second issue might be even more troubling than the first. The conviction of Clay for a violation of 18 U.S.C. § 1001 occurred in the context of a raid on the facilities where the subject was confronted in his office with what appeared to be fairly broad accusations of wrongdoing of company officials. While the "exculpatory 'no'" doctrine has been abrogated with regard to 18 U.S.C. § 1001 prosecutions,[12] the statute still requires proof that defendant knowingly and willfully made a statement with knowledge that statement was false or fictitious and fraudulent. Context matters. Here, it appears that Clay was not even employed in the company during the time that most of the annual reports were made or discussion was had about the manner in which they would be compiled. Therefore, Clay's direct knowledge of the facts was questionable.[13] Moreover, he is confronted by an army of federal agents in a full-blown raid and is held responsible for making disclosures that will be measured by the results of a full investigation after the fact.

For lawyers advising clients who may face a similar situation, the obvious advice is to remain silent. When confronted by federal agents, a person has a Fifth Amendment right not to answer questions which will thereby render the provisions of 18 U.S.C. § 1001 inapplicable.[14] An employee under federal siege may feel she or he is doing the right thing to deny that the company has done anything wrong, even if the employee does not have all of the facts or may not have been with the company at the time of the alleged wrongdoing. The fact is that it is in the best interests of the employee and the company for the employee to have time to reflect on the questions with the advice of counsel.

Conclusion

We are practicing law in interesting times. It seems likely that the federal criminal law for street crimes will be enforced more harshly, both in terms of charging decisions and sentencing, if Attorney General Sessions' commands are followed. However, crimes in the board room, according to the conservative organizations that provide intellectual support for politicians like the Attorney General, are likely to be reined in considerably. The question though is whether or not there will be a consistent doctrinal basis for these two directions. Specifically, with regard to the issues discussed in this article, will there be a uniform interpretation of mens rea regarding white collar crimes? Time will tell. ■

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 and Professor of Law and Forensic Science at the Santa Barbara and Ventura Colleges of Law. 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 and a Member of the American Association for the Advancement of Science (AAAS). Mr. Sanger is also a Member of the Jurisprudence Section of the American Academy of Forensic Sciences (AAFS).

ENDNOTES

1 ©Robert M. Sanger.

2 *Sub nom., Farha v. United States, cert. den.,* April 24, 2017, (2017 WL 131980 (Mem)).

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Dubow, *continued from page 12*

of which (he) was presumably totally unaware at the time of the execution of the documents in question, including the arbitration agreement."

In *Clay v. New Mexico Title Loans, Inc.* [7], plaintiff took out a loan from defendant and put up his truck as collateral. The loan agreement provided for the arbitration of any claim or controversy "relating to this agreement or the motor vehicle securing this agreement". Further, the arbitration agreement specifically included tort claims. Plaintiff fell behind in his payments and defendant sent out agents to repossess the truck. An argument ensued and one of defendant's agents shot the plaintiff, permanently paralyzing him. Plaintiff filed a lawsuit against defendant, alleging various tort claims and defendant's motion to compel arbitration was denied because the subject matter of the lawsuit was outside of the scope of the arbitration agreement. The court noted that "(e)ven if (plaintiff) intended to submit to arbitration disputes related to the collateral or default clauses, it is not reasonable to conclude that he intended to give up his right to a jury trial if he was shot during the repossession."

The disputes in *Aiken, Clay* and *Blakeney* were significantly unrelated to the business relationship contemplated by the contract that contained the arbitration clause and were not arbitrable. The events that gave rise to the dispute in *Jabbari* were not contemplated by the contracts that contained the arbitration agreements and they, too, should not have been arbitrable.[8] ■

Paul Dubow is a full time arbitrator and mediator located in San Francisco, specializing in commercial, employment, insurance, and securities matters. He is a member and past president of the California Dispute Resolution Council; former co-chair of the Arbitration Committees of the ABA Dispute Resolution Section, ABA Litigation Section, State Bar Litigation Section, and Contra Costa County Bar Association; member of the board of directors of the College of Commercial Arbitrators; and a co-founder and past president of the Mediation Society of San Francisco. Mr. Dubow served as a member of the Judicial Council working group that promulgated the rules for mediators in court annexed mediations, and the working group that created the initial draft of the Employment Rules of the American Arbitration Association, and served as chair and vice chair of the State Bar Task Force on Complex Litigation. He is the author of the ADR section of the annual update of California law for the State Bar Business Law Section and serves on the editorial boards of California Litigation Journal *and The Securities Arbitration Commentator.*

ENDNOTES

1 In 2015, the federal Consumer Financial Protection Bureau found that employees of Wells Fargo Bank had engaged in improper sales practices to satisfy sales goals under an incentive compensation program devised by Wells Fargo management that included the opening of over 1,500,000 checking accounts and 560,000 credit card accounts. In 2016, the Bureau fined Wells Fargo $100 Million for this practice. https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/

2 *Jabbari v. Wells Fargo & Co.,* United States District Court for the Northern District of California, Case No. 15-cv-02159

3 See *Qualcomm, Inc. v . Nokia Corp.,* (Fed. Cir. 2006) 466 F. 3d 1366, 1371; *Zenalaj v. Handybook, Inc.,* (N.D. Cal. 2015) 82 F. Supp. 3d 968, 975.

4 As of June 15, SB 33 had been passed in the Senate. It is expected to be passed by the Assembly.

5 644 S.E. 2d 707 (S.C. 2007)

6 950 So. 2d 170 (Miss. 2007)

7 288 P.3d 888 (N.M. 2012)

8 The case docket in *Jabbari* reflects that the parties have filed a motion for preliminary approval of a class action settlement. Hence, the court's ruling on the motion to compel arbitration may never have any real precedential effect.

Brejle, *continued from page 6*

Based on the statutory language of the CUA and the current case law on point, it appears that landlords are not under any legal duty to accommodate the use, possession or cultivation of even small amounts of marijuana by a tenant who has a doctor's approval to do so.

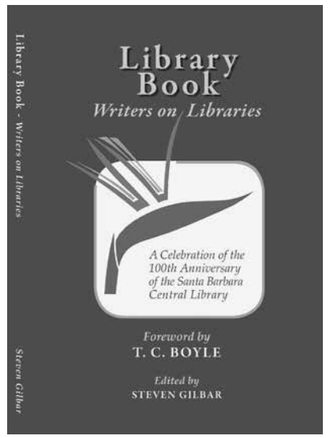
Therefore, it is up to the landlord to allow the possession, use and cultivation of a tenant in either a residential or commercial rental, but the landlord is not legally required to do so. Having said that, landlords with tenants or applicants who wish to possess, use or cultivate medical marijuana on either commercial or residential premises ***should consult with counsel*** on how best to proceed regarding their specific set of facts. ■

Mr. Brelje graduated from the University of California at Santa Barbara with honors, and received his Juris Doctor from the Santa Barbara College of Law. He is a Senior Associate Attorney at GROKENBERGER & SMITH, a civil litigation firm in Santa Barbara. Mr. Brelje focuses his practice in the areas of general and complex civil litigation, Real Estate law, Homeowners Association law, Construction and Landlord/Tenant law. He is also a member of the Board of Directors of the Santa Barbara County Bar Association, and is the former President of the Santa Barbara Barristers.

Motions

Anticouni & Associates are pleased to announce that **Jessica Anticouni** has joined the firm as an Associate Attorney. She graduated with High Honors as the Saludatorian from the Santa Barbara College of Law in January 2017 and was admitted to the California State Bar in June 2017. Ms. Anticouni will represent both employers and employees in all phases of employment litigation.

Anticouni & Associates' practice is limited to workplace law and related litigation with an emphasis on wage and hour class actions. The firm filed the first California wage and hour class action over 30 years ago.



In celebration of the 100th anniversary of Santa Barbara's Central Library, the Friends of the Library has published *Library Book: Writers on Libraries*, an anthology of prose and poetry about the glory of libraries. Over 80 writers are represented, including Ray Bradbury, Fannie Flagg, Sue Grafton and a host of local writers including SBCBA Executive Director, **Lida Sideris**. The 250-page volume is edited by local anthologist and lawyer **Steven Gilbar**. The book may be checked out at the public library and is available for purchase from our local bookstores. The proceeds benefit the Santa Barbara Central Library.

The Santa Barbara Lawyer *editorial board invites you to "Make a Motion!" Send one to two paragraphs for consideration by the editorial deadline to our Motions editor, Mike Pasternak at pasterna@gmail.com.*

Sanger, *continued from page 18*

3 *United States v. Clay,* 832 F.3d 1259 (11th Cir. 2016).
4 Jeffrey Sessions, Office of the Attorney General, "*Memorandum for all Federal Prosecutors, Department Charging and Sentencing Policy,"* (May 10, 2017), at https://assets.documentcloud.org/documents/3719247/Jeff-Sessions-s-criminal-charging-policy.pdf.
5 Tim Lynch, *"Over-Criminalization of Conduct/Over-Federalization of Criminal Law,"* CATO Institute (July 2009), at: https://www.cato.org/publications/congressional-testimony/overcriminalization-conductoverfederalization-criminal-law.
6 Dick Thornburgh, *"Overcriminalization: Sacrificing the Rule of Law in Pursuit of 'Justice',"* The Heritage Foundation, Crime and Justice Report, (March, 2011), at: http://www.heritage.org/crime-and-justice/report/overcriminalization-sacrificing-the-rule-law-pursuit-justice. Former Attorney General Thornburgh starts by saying, "Those who commit real crimes should be prosecuted and appropriately punished." He then distinguishes business crimes from these "real crimes."
7 John S. Baker, Jr., William J. Haun, *"The 'Mens Rea' Component Within the Issue of the Over-Federalization of Crime,"* The Federalist Society, 14 Engage, Issue 2 (July 2013) at: http://www.fed-soc.org/publications/detail/the-mens-rea-component-within-the-issue-of-the-over-federalization-of-crime.
8 Bryan Walsh, Tiffany Josyln, *"Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law,"* The Heritage Foundation and the National Association of Criminal Defense Lawyers (2010), containing the remarkable joint Forward by Edwin Meese III and Norman Rainer.
9 *United States v. Clay,* 832 F.3d 1259 (11th Cir. 2016), *cert. den., sub nom., Farha v. United States,* (April 24, 2017).
10 *Morissette v. United States,* 342 U.S. 246 (1952).
11 *Global-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754 (2011).
12 *Brogan v. United States,* 522 U.S. 398 (1998).
13 *See,* Reply Brief for Defendant-Appellant Peter E. Clay, *United States v. Clay,* 2015 WL 1803392 (C.A.11, April 17, 2015).
14 Justice Scalia makes this point explicitly in *Brogan v. United States,* 522 U.S. 398 (1998).

THE OTHER BAR NOTICE

Meets at noon on the first and third Tuesdays of the month at 330 E. Carrillo St. We are a statewide 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.

2017 AWARDS

SANTA BARBARA COUNTY BAR ASSOCIATION

The Santa Barbara County Bar Association calls for nominations for 2017 awards for recognition of outstanding attorneys, law firms, and judges in our community.

Richard Abbe Humanitarian Award

This special award, which is not given every year, honors a judge or attorney who evinces exceptional qualifications reflecting the highest humanitarian principles as exemplified by the late Justice Richard Abbe.

John T. Rickard Judicial Service Award

This award honors one of our judges for excellence on the bench and outstanding contributions to the judiciary and/or the local court system.

Pro Bono Award

This award recognizes an individual attorney who has donated at least 50 hours of direct legal services to low income persons during the previous calendar year.

Frank Crandall Community Service Award

This award honors a local law firm's best efforts in providing pro bono services to community non-profit organizations. Factors considered in bestowing the award include:

- Existence of a firm policy encouraging pro bono services;
- Percentage of firm attorneys performing pro bono work;
- Nature and quality of pro bono work and hours per attorney;
- Leadership of community projects; and
- Services benefiting low income persons.

Please submit your nominations to JDuffy@fmam.com by July 1, 2017. Include specific facts to support the award's criteria for each nomination.

THE **SANTA BARBARA COUNTY BAR ASSOCIATION** INVITES
MEMBERS AND GUESTS TO OUR

2017 GOLF & TENNIS TOURNAMENT

FRIDAY, SEPTEMBER 22, 2017

Sandpiper

DINNER / RECEPTION

So as to provide opportunity for the victors to boast of their athletic conquests, a post golf and tennis reception will begin at 5:00 at the Sandpiper Grill, to be followed by dinner starting at 5:30 pm.
Dinner is $50 per SBCBA Member/$55 per non-SBCBA Member *(after September 8th: $60/$65)*

GOLF

Meet at the Sandpiper Golf Course at 11:30 a.m. Shotgun starts at 12:00 pm. Team prizes for 1st & 2nd places. Individual prizes for Longest Drive and Closest to Pin! Players must give some estimate of his/her handicap. You will be contacted regarding team assignments.
$105 to Play per SBCBA Members/$110 per Non-SBCBA Members – Includes green fees & cart.
(Fee after September 8th: $110/$115)
$150 for BOTH Golf & Dinner per SBCBA Members/ Non-SBCBA Members $155
($165/$160 after September 8th)

TENNIS

Meet at the tennis courts at the Santa Barbara Tennis Club at 1:30 pm for warm-up with round robin play starting just after 2:00 pm. 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!
$30 to Play per SBCBA Members/$35 for Non-SBCBA Members – Includes court fees & balls.
(Fee after August 12: $35/$40)
$75 for BOTH Tennis & Dinner per SBCBA Members/Non-SBCBA Members $80
($80/$85 after September 8th)

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 Sponsorships: Tee sign on course with your company name ($100)

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

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

SBB SANTA BARBARA BARRISTERS

2017-2018 DIRECTORY RELEASE

THE 2017-2018 SANTA BARBARA ATTORNEY DIRECTORY HAS BEEN PUBLISHED AND IS AVAILABLE FOR PURCHASE

The SB Barristers have published their 2017 attorney directory, and it is ready for purchase and distribution. There are a few options in this regard as follows

- Barristers Members who renewed their membership after May 1, 2016 are entitled to a 2017 directory with their membership;
- If an attorney does not fall in the above category, membership with the Barristers can be renewed for $45, which comes with a 2017 directory;
- If one simply wants to purchase a directory (without membership) the cost is $50.

Membership and directory purchases can be accomplished via our website or by emailing the Barristers at sbbarristers@gmail.com. Purchases through the website will require PayPal. If a purchase is preferred by check please fill out an order form and send a check to:

Santa Barbara Barristers
P.O. Box 21323
Santa Barbara, CA 93121

Directories can be picked up from the current Barristers president Virginia Fuentes. Please contact Virginia at Virginia@virginiafuentes.org to arrange pick-up.

MCLE Presented by the SB Barristers

2017 MID-YEAR EMPLOYMENT LAW UPDATES

When: Wednesday, July 19, 2017

Time: 12:15 PM - 01:15 PM (please arrive to register at 12:00)

Location: Santa Barbara College of Law
20 East Victoria Street,
Santa Barbara, CA 93101

Employment law developments in 2017 have been fast and furious. Join the **Santa Barbara Barristers** for a look at workplace issues to be aware of to best protect your firm and clients against employment related liability. Presented by Jeff Dinkin of the Stradling Law Firm. This program qualifies for 1.0 General CLE Credit. Lunch will be provided.

Stradling Attorneys at Law

Price: $15 SB Barristers Members / $20 Non-Members. Cash or Check made out to Santa Barbara Barristers. RSVP to Lorraine Pereverziev via email (lwpctc@gmail.com)

Associate Attorney Sought

Santa Barbara civil litigation law firm, Hager & Dowling, seeks associate attorney with experience in civil litigation and insurance law.

Candidate must have excellent verbal and writing skills and enjoy litigation. Competitive benefits offered. Qualified applicants should submit their resume and writing sample to Kristin Callahan via email : kcallahan@hdlaw.com

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CALL FOR NOMINATIONS TO
THE SANTA BARBARA COUNTY BAR ASSOCIATION BOARD OF DIRECTORS

The Santa Barbara County Bar Association is seeking applications and nominations for its 2018 Board of Directors. Prospective Directors should be enthusiastic and reliable, with previous volunteer and board experience and sufficient time to devote to our Board for at least a one-year term. If you or someone you know is interested in being nominated to the Board, please contact Jennifer Duffy at JDuffy@fmam.com. Briefly describe your interest in serving on the Board or why your nominee would be an asset to the Board and provide a current CV, including volunteer and non-profit experience.

Applications and nominations should be received by July 15, 2017.

MULLEN & HENZELL L.L.P.
RECRUITING TWO ASSOCIATES

Mullen & Henzell L.L.P., an AV-rated, 20+ attorney firm located in downtown Santa Barbara is recruiting for two attorney positions:

Litigation Associate:
Seeking an attorney (0-5 years' experience) for sophisticated and dynamic Civil Litigation practice with an emphasis on real estate, business, employment and estate/trust litigation. Candidates must have strong credentials, outstanding analytical skills, excellent oral and written communication skills, and be interested in performing high quality legal work in a collegial work environment.

Employment Law Associate:
Seeking an attorney (0-5 years' experience) for its Employment and Labor Defense Group. Candidates must have strong credentials, outstanding analytical skills, excellent oral and written communication skills, and be interested in performing high quality legal work in a collegial work environment.

Compensation: Our firm offers an excellent benefits package that includes medical, dental, life insurance, 401k & profit sharing plan. Associate salaries, bonuses and benefits are competitive with other leading firms in the area.

Please send cover letter and resume today. ***Reference "LIT position" or "EMP position" - thank you!**

Susan A. Subject
Mullen & Henzell L.L.P.
112 E. Victoria Street
Santa Barbara, CA 93101
Website: www.mullenlaw.com
Email: Recruit@mullenlaw.com

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2017 SBCBA SECTION HEADS

Alternative Dispute Resolution
David C. Peterson 441-5884
davidcpeterson@charter.net

Bench & Bar Relations:
Stephen Dunkle 962-4887
sdunkle@sangerswysen.com

Civil Litigation
Mark Coffin 248-7118
mtc@markcoffinlaw.com

Criminal
Catherine Swysen 962-4887
cswysen@sangerswysen.com

Debtor/Creditor
Carissa Horowitz 708-6653
cnhorowitz@yahoo.com

Employment Law
Alex Craigie 845-1752
alex@craigielawfirm.com

Estate Planning/Probate
Connor Cote 966-1204
connor@jfcotelaw.com

Family Law
Matthew Long 254-4878
matthewjlong@santabarbaradivorcelaw.com

In House Counsel/Corporate Law
Betty L. Jeppesen 963-9958
jeppesenlaw@gmail.com

Intellectual Property
Christine Kopitzke 845-3434
ckopitzke@socalip.com

Mandatory Fee Arbitration
Eric Berg 708-0748
eric@berglawgroup.com
Michael Brelje 965-7746
gmb@grokenberger.com
Naomi Dewey 966-7422
ndewey@BFASlaw.com

Real Property/Land Use
Josh Rabinowitz 963-0755
jrabinowitz@fmam.com
Bret Stone 898-9700
bstone@paladinlaw.com

Taxation
Peter Muzinich 966-2440
pmuzinich@rppmh.com
Cindy Brittain 695-7315
Cdb11@ntrs.com

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

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The Santa Barbara County Bar Association
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