What's NEW In The Law and How it Might Impact Trust Officers, CFPs and Attorneys?

Santa Barbara Estate Planning Council

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University Club

Presenter – Thomas P. Anderle[1]

1. <u>Who gets the pet when couples split?</u> Assembly Bill 2274; effective New Year's Day 2019. Not long ago I had a case that involved two dogs and divorcing spouses; I suggested that each party take one of the dogs. The couple was inconsolable. "NEVER. The dogs are inseparable." Indeed, both spouses said: "You have to decide" and each said: "I am the one who should get both." One testified "I took them to the vet;" the other said "I am the one who went to the pound to get them." There were no guidelines. Well, that has just recently changed. Former Governor Brown, owner of two dogs, Lucy and Cali, signed the bill. Incidentally, dogs were the most disputed family animal with 88% of the cases; cats were 5%; horses made up 1%; while the category of "other" registered 6%, and includes iguanas, pythons, an African grey parrot and a 130-pound turtle. The California law allows judges in divorces with pets to take into consideration:

Who feeds the pet?

Who adopted the pet?

Who purchases food, toys and other things for the pet?

Who walks the pet?

Who takes the pet to the vet?

Who protects the pet?

Who spends the most time with the pet?

Have there been allegations of domestic abuse or abuse of the pet?

Tip – There is hope for our best friends.

[1] I **apologize for any grammatical and typographical errors.**

2. The #MeToo Era

Ever since sexual misconduct allegations against entertainment mogul Harvey Weinstein broke into the news on October 7, 2017, sexual harassment in the workplace has taken an unprecedented spotlight in the public eye. That change appears to drive sweeping changes in how "companies" manage their workforces. Even though SB 3080 [banning mandatory arbitration of sexual harassment claims] was vetoed by Governor Brown, it appears that the use of mandatory arbitration in sexual harassment claims is less savory than ever; indeed it has become a dramatic wave crashing on our beaches. The question remaining for lawyers is how the tsunami impacts your law firm or individual practice.

We hear from the media that Google, Facebook and Uber have carved sexual harassment out of mandatory arbitration. The carve-out, of course, is business driven. That fact alone should send a shivering signal to all of us. Part of the answer is improving "training" and dramatically increasing "awareness" of the issue. The Equal Employment Opportunity Commission recently reported a 50% increase in sexual harassment lawsuits for fiscal year 2018. The cases' recoveries totaled just under $70 million, an increase of from $47 million in 2017. These impacts suggest that employer-lawyers keep an eye out for conduct that is unacceptable but may not be legally actionable. So, for example, in those instances where the actual allegation is not substantiated, it doesn't mean you should wash your hands and walk away; it means that something is wrong. Perhaps the most important point here is that this wave of reality is right and we should embrace it for the fact that is has been long in getting here. (Some of this material was gathered from a Daily Journal Article of 12/13/18.)

"Women law students boycott firms that require arbitration." Women's association from eight California law schools including UC Berkeley and Stanford, and additional schools throughout the country including Harvard, Yale and Chicago Law Schools "oppose the pernicious employment practice." (Article in the Daily Journal 12/15/19)

Tip - Times have changed!

3. <u>So you want to be "an expert" in court; a forensic on trusts and estates?</u> In 2016, the California Supreme Court in *People v Sanchez* (2016) 63 Cal.4th 665 triggered problems for both experts and lawyers; experts would no longer be able to relate to the trier of fact inadmissible hearsay that formed a basis for an opinion. *Sanchez* recognizes that if the information that is case specific, is not offered for its truth, then why should the court (jury) listen to it?

But with that said, forewarned is forearmed. Experts need to talk to the lawyer long in advance of when they are scheduled to give their testimony; we need the testimony to make good sense to the fact finder.

SB 435 has just been introduced; would exempt family law lawyers.

Keep in mind that in a criminal court the judge can simply decide that having analyzed the testimony of the expert under both the confrontation clause of the United States Constitution and California's hearsay rule, the Court can say there was no prejudicial error and affirm. (See, *People v Ochoa* (2017) 7 Cal App 5th 575.

Tip –talk to the lawyer before you testify.

4. <u>The Cell Phone Revolution. Instant Communication</u>.

Believe it or not, there was a day in my life that there was a lull between what was happening and when I heard about it. Letters and land lines, secretaries and office doors, created real barricades. No more. When the client wants to talk about their matter, you get a text, an email or a cell phone call immediately.

As for your next email communication, consider pausing before you hit "send."

Also, believe it or not, there are professionals who have never actually sat down and talked to their client face to face; everything has been via text messages or email. Would your "recognize" your client when you see her?

Tip – can you turn off your cell phone?

5. <u>Scope of Representation.</u>

I have opined before that professionals of all disciplines have become "more civil" over the past 50 years that I have been in this business. On the other hand, I have opined there is a serious "lack of civility" with the civil

population. I don't know what drives that. This leads me the point I want to make.

<u>Your "retainer letter."</u>

Take a new look at it. What have you *agreed to do*, and what have you not *agreed to;* it can be critical. Here are some ideas you should use; some you might want to discard.

A. **Be cautious of using a form that you used with the last 10 clients. Professional practice of any kind, from what I see, is becoming very individualized and very personal.**
B. **Describe the work you will and will not do. I suggest that as a practical matter every retainer agreement may be a "limited scope of representation agreement." The explanation and description of the work is critical. It needs to clear, precise, practical. [Some folks think you are their trust officer, their banker, their estate planner and their lawyer.]**
C. **What the retainer is and when it will be paid; will you commence work if only a partial retainer is paid; how often you bill; are there others in the office who will be included in the billing and what the charge is for that work.**
D. **Will you tell them in the retainer agreement what you will do if not paid the retainer promptly? [Are you personally committed to following through?]**
E. **Will you require a commitment that you will be paid promptly each month upon the submission of the bill; if not paid, do you tell them what you will do?**
F. **When it comes to describing the factors that can affect fees, it is important to point out the major ones in the retainer letter. In every retainer letter think about what you will say in the fee arbitration proceeding or in the courtroom when you try to collect.**

Tip – this work needs to be practical and precise; keep it straightforward; do not oversimplify.

6. <u>Protecting Your Firm From The Next Data Breach</u>

The threat of the disclosure of personal data is ever-present in today's society as every week there is another report of a large company suffering a serious

data breach incident resulting in the exposure of personal information. The consequences of data breach can be very acute for lawyers and law firms given that clients trust their attorneys with not only personal identifying information but a host of other confidential information. Hackers are targeting law firms. The American Bar Association's 2017 Legal Technology Survey Report highlighted the serious risks faced by law firms. Data breaches are not limited to only the highly-publicized breaches that occur at large firms, but 22% of the survey respondents reported that their firm had experienced a data breach which was up from 14% the previous year. In firms with 10 to 49 attorneys, over one-third of firms reported a breaching incident. The key is to identify confidential information and guard it effectively. Even when firms have protections, sometimes a third-party vendor does not. It appears that you must have technical expertise in-house or engage cyber professionals specializing in responses to data breaches to assist your firm. [See the American Bar 2017 Legal Technology Survey Report.]

Tip – better be alert.

7. <u>Mediation if your are in litigation</u>. Believe it or not, I once said (in 1980) that lawyers don't need mediators, they settle cases by themselves. I was never so wrong. Mediation has long ago swept the landscape and it is now an institution of its own. This is not "new" but I suggest that *the steps to get ready for mediation are new to some professionals.* We have an unusually robust and effective settlement program in place in this courthouse that takes place every Friday. But mediation, wherever it is done, will be effective only when:

(1) Both sides are fully [and really] prepared.

(2) Both sides know the facts and the applicable law.

(3) Both sides have established good rapport with their lawyer.

(4) Both sides have a recognition of what a jury or their bench officer is likely to do with their case.

Tip – be thoroughly prepared.

8. <u>The New California Trust Decanting Act.</u> Most wine aficionados are familiar with the term "decanting." In wine parlance the term refers to the process of transferring the contents of a bottle of wine to a decanter before

pouring a glass of wine from the decanter. The purpose is to separate the wine from the sediment and residue in the bottle.

The concept is similar in estate planning. An irrevocable trust is decanted by distributing the assets from one trust with non-preferable and likely outdated terms to another trust or trusts with new, improved, and preferable terms. Like wine decanting, the trust distribution process allows the trustee to leave the unwanted trust terms behind.

On September 14, 2018, Governor Brown signed into law Senate Bill 909, the California Uniform Trust Decanting Act ("Decanting Act"). The Decanting Act is effective January 1, 2019, and is located in Probate Code sections 19501 et seq. The Decanting Act is based on the Uniform Trust Decanting Act, which was drafted and approved by the National Conference of Commissioners on Uniform State Laws to create a uniform decanting procedure.

The Decanting Act is an important development in California probate law. It is quite long and complex, adding 28 new sections to the Probate Code. Planners and litigators alike should become familiar with the new law because clients will have more planning options, and a new body of litigation may develop in the coming years.

One of the first questions that comes to mind is, what is the difference between decanting and modifying a trust? While the result is the same or similar, different processes must be followed to achieve the desired result. Modification is permitted under California statutory law if all the beneficiaries of an irrevocable trust agree to modify the trust. If the settlor does not also join in the modification, the court must approve the modification through a petition. [See California Trusts and Estates Quarterly; article by lawyers, Jenny Bratt and Catherine Swafford.]

Tip: The Decanting Act is an interesting development in our Probate Code. While all the nuances of the Act could fill an entire issue of the Quarterly, this article provides practitioners with a starting point for new approaches they can offer to California trustees to address problematic trust administrations and to accomplish the settlor's broader intent not fully realized in the trust instrument as originally drafted.

9. <u>The Gig Economy</u>. What is a Gig Economy? In a gig economy, temporary, flexible jobs are commonplace and companies tend toward hiring independent

contractors and freelancers instead of full-time employees. A gig economy undermines the traditional economy of full-time workers who rarely change positions and instead focus on a lifetime career. 57 million U.S. workers are part of the Gig Economy.

The gig economy is built on a structure that for the most part, is temporary. Essentially, employees who participate in gig economies can come and go at will from their employment. The same is true for employers within gig economies, who can hire then terminate employees at will.

Firms need to show a sense of permanence and solidity. This is because clients come to a firm with issues and problems that are affecting their lives. The notion of having a gig attorney who can come and go at will, while taking care of a client's long-term scenarios, will more than likely cause the client unease. Long-term, or shall we say, full-time employees can ensure client reciprocity. In short, the client will return to a firm with more work because they have confidence in that firm from the last time they worked with this particular employee. Gig economies do not foster such relationships.

Is there any type of situation where gig economics might work?

As gig economics have done within the service and retail sectors, leaving workers to transition from one job to the next, one can't say that the same has not crept into the all professions. The gig economy is the new short-term solution for firms looking to hire temporary employees for specific projects. As far as your staff is concerned, that type of work will always be part and parcel to gig economics only because it again has very little to do with long-standing employer-client relationships in which an established history is integral. A few clients or "gigs" of this nature, can keep an independent quite busy as well as successful.
Tip – if it works for you, use it.

10. <u>Catfishing and Swatting</u>.

<u>Catfishing</u> is a type of deceptive activity where a person creates a sock puppet social networking presence, or fake identity on a social network account, usually targeting a specific victim for deception. Catfishing is often employed for romance scams on dating websites. Catfishing may be used for financial gain, to compromise a victim in some way, or simply as a form of trolling or wish fulfillment.

<u>Swatting</u> - Swatting is the harassment tactic of deceiving an emergency service (via such means as hoaxing an emergency services dispatcher) into sending a police and emergency service response team to another person's address. This is triggered by false reporting of a serious law enforcement emergency, such as a bomb threat, murder, hostage situation, or other alleged incident.

Don't you just hate it when someone takes a bunch of photos of you from your social media account and then uses them to attract lovers online? And then some of those heartbroken people track down the real you and are pretty mad about it? Well, if the person who jacked your photos lives in Oklahoma, you would have legal recourse. A law called the Catfishing Liability Act of 2016, allows people to obtain an injunction against people who are using their names, images, or voice to "create a false identity" on social media. It was hailed as the first of its kind in the US; though there are laws in other states against impersonation, most don't apply if the photos are used to create an entirely new, fictional persona, and most don't help the person whose photos are being used. And convincing the police to go after someone simply for using your photos to build online relationships with other people (or most things on social media, for that matter) isn't exactly easy.

Tip: I think it's a problem that's recurring more and more. It disproportionately impacts millennials.